No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

MARK A. CIAVARELLA, JR. – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

_____

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner was denied effective assistance of counsel as a result of the deprivation of a viable statute of limitations defense with respect to the honest services mail fraud counts?

II. Whether Petitioner established cause and actual prejudice to overcome procedural default as to the claim that the trial court's jury instructions were inconsistent with this Court's decision in *McDonnell v. United States*, and further established that the jury instructions were erroneous and prejudicial?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

1. *United States v. Mark A. Ciavarella, Jr.*, 3-09-cr-00272-002 (Middle District of Pennsylvania); judgment entered on August 11, 2011.

2. *United States v. Ciavarella*, 716 F.3d 705 (3d Cir. 2013); direct appeal opinion entered on May 24, 2013.

3. *United States v. Ciavarella*, No. 11-3277 (3d Cir. 2013); order denying rehearing entered on July 24, 2013.

4. *Ciavarella v. United States*, 134 S. Ct. 1491 (2014); order denying petition for writ of certiorari entered on March 3, 2014.

5. *United States v. Mark A. Ciavarella, Jr.*, 2018 U.S. Dist. LEXIS 2785 (M.D. Pa. Jan. 8, 2018); opinion granting in part and denying in part 28 U.S.C. § 2255 petition.

6. *United States v. Mark A. Ciavarella, Jr.*, Nos. 18-1489 & 18-1499, 765 Fed. Appx. 855, 2019 U.S. App. LEXIS 9421 (3d Cir. March 29, 2019); opinion affirming district court opinion.

7. *United States v. Mark A. Ciavarella, Jr.*, Nos. 18-1489 & 18-1499 (3d Cir. 2019); order denying rehearing entered on May 7, 2019.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below from the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The not precedential opinion of the United States Court of Appeals for the Third Circuit appears in Appendix A to this petition, and is reported at *United States v. Mark A. Ciavarella, Jr.*, Nos. 18-1489 & 18-1499, 765 Fed. Appx. 855, 2019 U.S. App. LEXIS 9421 (3d Cir. March 29, 2019).

The order denying Ciavarella's petition for rehearing by the United States Court of Appeals for the Third Circuit appears in Appendix B to this petition, and is dated May 7, 2019.

The memorandum opinion of the United States District Court for the Middle District of Pennsylvania appears in Appendix C to this petition, and is reported at 2018 U.S. Dist. LEXIS 2785 (M.D. Pa. Jan. 8, 2018).

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit issued the opinion in this case was March 29, 2019, and the date on which the United States Court of Appeals for the Third Circuit denied Ciavarella's Petition for Rehearing was May 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Procedural Background

Ciavarella was charged by superseding indictment on September 29, 2010, with 39 counts, including Count 1, Racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c); Count 2, Racketeering Conspiracy in violation of 18 U.S.C. § 1962(d); Counts 3 through 6, Honest Services Wire Fraud in violation of 18 U.S.C. §§ 3, 1343, and 1346; Counts 7 through 10, Honest Services Mail Fraud in violation of 18 U.S.C. §§ 2, 1341, and 1346; Counts 11 through 20, Corrupt Receipt of Bribe of Reward in violation of 18 U.S.C. § 666(a)(1)(B); Count 21, Conspiracy to Launder Money in violation of 18 U.S.C. § 1956(h); Counts 22 through 26, Money Laundering in violation of 18 U.S.C. § 1956(h); Counts 27 through 34, Extortion in violation of the Hobbs Act, 18 U.S.C. § 1951; Count 35, Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371; Counts 36 through 39, Filing a Materially False Tax Return in violation of 26 U.S.C. § 7206(1).

At the conclusion of a jury trial in February, 2011, Ciavarella was convicted of Counts 1, 2, 7 through 10, 21, 35, and 36 through 39, and acquitted of all other counts. On August 11, 2011, the trial court (Kosik, J.) sentenced Ciavarella to 336 months' imprisonment.

Ciavarella appealed his conviction and sentence, and the United States Court of Appeals for the Third Circuit vacated the conviction on Count 7 because the count was time barred, but otherwise affirmed. *See United States v. Ciavarella*, 716 F.3d 705 (3d Cir. 2013). The Third Circuit denied Ciavarella's request for en banc and panel rehearing on July 24, 2013. *United States v. Ciavarella*, No. 11-3277(3d Cir. July 24, 2013). This Court denied Ciavarella's petition for *certiorari* on March 3, 2014. *Ciavarella v. United States*, 134 S. Ct. 1491 (2014).

Ciavarella timely filed a motion to vacate pursuant to 28 U.S.C. § 2255, and then later filed a motion to amend to assert an additional ground for relief in light of this Court's decision in *United States v. McDonnell*, __ U.S. __, 136 S Ct. 2355 (2016). On January 8, 2018, the District Court (Conner, C.J.) filed a Memorandum Opinion and Order, granting Ciavarella's motion to amend to include a *McDonnell* claim, granting the Section 2255 motion to the extent that the District Court determined that Ciavarella was denied effective assistance of counsel as to Counts 1, 2, and 21, and denying the Section 2255 motion in all other respects. (District Court opinion attached to this Petition in Appendix C.)

Ciavarella timely filed a notice of appeal on March 7, 2018, and the District Court granted Ciavarella's motion for certificate of appealability. The United States filed a cross appeal on March 8, 2018. On March 29, 2019, the United States Court of Appeals for the Third Circuit filed a not precedential opinion affirming the District Court opinion. *United States v. Mark A. Ciavarella, Jr.,* Nos. 18-1489 & 18-1499, 765 Fed. Appx. 855, 2019 U.S. App. LEXIS 9421 (3d Cir. March 29, 2019) (Circuit Court opinion attached to this Petition in Appendix A). Ciavarella filed a petition for hearing on April 10, 2019, and the United States Court of Appeals for the Third Circuit denied the petition on May 7, 2019. (Circuit Court order attached to this Petition as Exhibit B.)

B. Factual Background

Ciavarella is a former judge of the Court of Common Pleas of Luzerne County, Pennsylvania. In February, 2011, a jury found Ciavarella guilty of racketeering, racketeering conspiracy, honest services mail fraud, money laundering conspiracy, conspiracy to defraud the United States and subscribing and filing materially false tax returns, in connection with receiving and concealing payments in exchange for his role in the construction of a private juvenile detention center in Pennsylvania.

The superseding indictment alleged acts that fall outside and inside the five-year period of limitation. Specifically, predicate acts 1(a), 1(d), 1(e), 1(f), and 1(g) for Count 1 (RICO), Count 3, Count 7, Counts 11 to 13, Counts 22 to 25, and Counts 27 to 29 are all outside the period of limitations. The conspiracy charges (Counts 2 and 21) are alleged to have spanned a time period outside the period of limitations (from December, 2001, until September 9, 2004), and within the period of limitations (from September 10, 2004, until September 29, 2010).

Ciavarella was represented by Attorneys William Ruzzo and Albert J. Flora, Jr. during the trial and direct appeal (hereafter referred to collectively as "trial counsel"). At the conclusion of the jury trial, the jury found Ciavarella guilty of receiving three illegal payments in January, 2003, but not guilty of receiving any illegal payments in the years 2004, 2005, or 2006.

Trial counsel did not present a statute of limitations defense at trial, and did not request any form of jury instruction on the statute of limitations. The trial court did not give any jury instruction on the applicable statute of limitations.

Ciavarella contends in this Section 2255 proceeding that trial counsel were constitutionally ineffective for failing to pursue and preserve a viable statute of limitations

defense under *Strickland v. Washington*, 466 U.S. 668 (1984). Ciavarella also contends that he is entitled to relief under Section 2255, because there was instructional error based on this Court's decision in *McDonnell*.

C. District Court Opinion (Appendix C)

The District Court concluded that the first prong of the *Strickland* test was satisfied because trial counsel's performance in connection with the statute of limitations defense fell below prevailing professional norms, and deprived Ciavarella of a viable defense. With respect to the prejudice prong of the *Strickland* test, the District Court held that the jury's verdict compelled the conclusion that an appropriate statute of limitations instruction may have altered the outcome of the proceedings with respect to Counts 1, 2, and 21 (the "conspiracy counts"), but not with respect to Counts 8, 9, and 10 (the "honest services mail fraud counts"). As a result, the District Court vacated the conviction and sentence with respect to Counts 1, 2, and 21 only.

The District Court denied relief on the claim of instructional error based on the *McDonnell* decision, because it concluded that there was no justification for Ciavarella's failure to challenge the jury instruction at trial, and accordingly he did not establish cause for his procedural default. The District Court explained that, even assuming that Ciavarella had established cause to excuse his procedural default, he failed to demonstrate prejudice. The District Court concluded that the jury instructions provided by the trial judge were "arguably overbroad" and inconsistent with the holding of *McDonnell*. Nonetheless, the District Court concluded that, based on the trial record, Ciavarella would not have benefitted from more restrictive instructions.

D. The Third Circuit Opinion (Appendix A)

Ciavarella's appeal challenged the District Court's holding denying *habeas* relief on the claim of ineffective assistance of counsel in relation to the honest services mail fraud convictions, and the claim based on the court's jury instruction regarding official acts in connection with the honest services mail fraud counts under *McDonnell*. The Government's cross appeal challenged the District Court's holding granting *habeas* relief on the claim of ineffective assistance of counsel in relation to the racketeering and money-laundering conspiracy convictions.

The Third Circuit determined that there was a reasonable probability that the statute-of-limitations defense would have resulted in acquittal on the conspiracy charges, but not on the honest services mail fraud charges. This was the same conclusion reached by the District Court, and the Third Circuit therefore affirmed the District Court. (Appendix A at pp. 4-5.)

The Third Circuit determined that Ciavarella was not entitled to *habeas* relief on his claim of instructional error under *McDonnell* for two reasons. First, the Third Circuit determined that Ciavarella's trial counsel failed to preserve the claim by challenging the jury instruction on the meaning of "official act" at trial. Second, the Third Circuit concluded that Ciavarella's "bribery-related" actions still satisfy a post-*McDonnell* definition of "official act." (Appendix A at p. 6.) As a result, the Third Circuit affirmed the District Court on this issue as well.

REASONS FOR GRANTING THE PETITION

Ciavarella asks this Court to grant his petition for writ of *certiorari* because the Circuit Court decision in this *habeas* matter resolved important legal issues based on facts that are not part of the record and without consideration of legal arguments based on this Court's precedent. The Circuit Court addressed this case based on the media label of "Kids For Cash," rather than based on the arguments presented by the parties and the facts of record. In the first sentence in a six-page, non-precedential opinion, the Circuit Court characterized the case as follows: "This is a *habeas* appeal in the infamous 'kids-for-cash' scandal." (Appendix A at p. 2.) Ciavarella was denied meaningful appellate review of the important legal issues raised in this *habeas* matter because of the notoriety of the case. He asks this Court to grant review in order to rectify this error.

Specifically, Ciavarella was denied effective assistance of counsel because his trial counsel failed to raise the statute of limitations as an affirmative defense. The District Court and the Circuit Court correctly concluded that trial counsel's deficient performance caused prejudice to Ciavarella with respect to the RICO, RICO Conspiracy, and Money Laundering Conspiracy charges. However, the lower courts wrongly concluded that trial counsel's deficient performance did not prejudice Ciavarella with respect to the honest services mail fraud charges. The lower courts failed to recognize the considerable ambiguity in the jury's verdict, and failed to account for the fact that honest services mail fraud is not a continuing offense. In addition, the lower courts incorrectly held that Ciavarella failed to establish cause and actual prejudice to overcome procedural default and enable him to challenge the jury instruction in this case that fails to comport with this Court's holding in the *McDonnell* case.

I.

CIAVARELLA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF THE DEPRIVATION OF A VIABLE STATUTE OF LIMITATIONS DEFENSE WITH RESPECT TO THE HONEST SERVICES MAIL FRAUD COUNTS

The lower courts correctly concluded that there was a viable statute of limitations defense available to Ciavarella. His trial attorneys did not research the law, and were not aware that the statute of limitations is an affirmative defense in the Third Circuit, and must be raised at trial in order to be preserved. Ciavarella's trial counsel made a mistake about this important procedural rule of law rather than a strategic decision to raise a viable defense. It is undisputed in this case that trial counsel did not present a statute of limitations defense at trial, and did not request any form of jury instruction on the statute of limitations. (APP.74-75.) It is also undisputed that the trial court did not give any jury instruction on the applicable statute of limitations. (*See* APP.970-1032.) The jury's verdict demonstrates the prejudice to Ciavarella. For the reasons explained in this Argument, there is a reasonable probability that the jury would have acquitted Ciavarella on the honest services mail fraud counts, if properly instructed on the statute of limitations.

A. The Lower Courts Correctly Concluded That Trial Counsel's Failure to Pursue and Preserve a Viable Statute of Limitations Defense Was Prejudicial with Respect to the Conspiracy Counts.

The lower courts held that trial counsel's ineffective assistance in depriving Ciavarella of a viable defense was prejudicial with respect to the conspiracy counts. (*See generally* Appendices A and C.) Specifically, the District Court found that the "jury plainly did not believe Ciavarella accepted additional kickbacks or bribes after January 2003, but whether it

believed the conspiracies continued beyond that date is simply unclear." (Appendix C at p. 18.) The District Court noted that "[i]f the jury resolved that the conspiracies concluded before September 9, 2004, it would be required to acquit Ciavarella on Counts 1, 2, and 21." And then, the District Court concluded that "[t]he jury's verdict constrains us to find that an appropriate limitations instruction *may* have altered the outcome of these proceedings." (*Id*.)

Similarly, the Circuit Court found that the "jury convicted Ciavarella of receiving kickbacks in 2003 (outside the limitations period) but acquitted him of charges relating to kickbacks from 2004 and later (within the limitations period.) (Appendix A at p. 4.) The Circuit Court held: "We cannot say for certain whether the jury believed that the racketeering and money-laundering conspiracies ended before September 2004. But such a belief seems "reasonably probable" in light of the jury's acquittal on all kickbacks after 2003." (*Id*.) As a result, the Circuit Court affirmed.

B. The Third Circuit's Denial of Relief With Respect to the Honest Services Mail Fraud Convictions Relied on Facts That Are Not of Record and Ignores Crucial Legal Arguments.

As detailed in the following sections of this Petition, the Third Circuit relied on facts that are not of record and construed facts to reach a conclusion that is not supported by the record. And, the Third Circuit ignored a critical legal argument, based on this Court's precedent, that honest services mail fraud is not a continuing offense.

1. The Third Circuit Relied on Facts That Are Not of Record.

First, the Third Circuit stated that Ciavarella accepted nearly $3 million in kickbacks. (Appendix A at p. 2.) That statement is false. In fact, the jury found Ciavarella guilty of receiving three illegal payments in January, 2003, which totaled $997,600, but not guilty of

receiving any illegal payments in the years 2004, 2005, or 2006. (*See* APP. 217-229 (Verdict Form).) If Ciavarella had been convicted of all counts in the indictment, the amounts at issue would have totaled $2,819,500 – not $3 million. (*See* APP. 230-231 (Special Verdict Form).) But, in reality, he was acquitted of all payment-related counts other than the $997,600 in payments that he received in 2003.

Second, the Third Circuit stated: "In exchange [for the kickbacks], he [Ciavarella] sentenced children to long stays in juvenile detention for minor offenses" and Ciavarella sentenced "hundreds of juveniles to excessive terms of incarceration . . . ." (Appendix A at pp. 2, 6.) In stating these "facts" that were often repeated in the media coverage of this case, the Third Circuit does not cite to any brief or the record on appeal. Ciavarella is not aware of any evidence presented at trial in this case demonstrating that he placed any juvenile to a longer placement than was warranted by the facts of the juvenile's case as a result of receiving the $997,600 kickback at issue in this case, or for any other reason. The record simply does not include these facts.

In the Third Circuit's short opinion, which does not include much factual background, these facts are prominent. And there is no basis for these facts in the record on appeal.

2. The Third Circuit Reached An Important Conclusion That is Not Supported by the Record.

In its description of the background of this case, the Third Circuit stated:

> Based on the jury's verdict, the following facts were proven beyond a reasonable doubt. Ciavarella received kickbacks in the form of three wire transfers in 2003. *To conceal these payments*, he lied about his income in annual filings to the Administrative Office of Pennsylvania Courts in April 2004 and each April thereafter through 2007.

(Appendix A at p. 2; emphasis added.) The factual conclusion that the false filings that were made in 2004 through 2007 were intended to conceal the 2003 payments is the critical factual basis for the Third Circuit's denial of relief on the honest services mail fraud counts. (Appendix A at p. 5.) The Third Circuit's factual conclusion is not supported by the record on appeal, as demonstrated in the following paragraphs.

The Government alleged in the indictment with respect to the honest services mail fraud counts that Ciavarella devised a scheme to defraud through "bribery, kickbacks, and the concealment of material information." (APP. 184 at ¶ 87.) The Government alleged that the scheme to defraud was executed by mailing "materially false" annual statements of financial interest on certain dates in 2004, 2005, 2006, and 2007. (APP. 184-186 at ¶ 88.) The indictment does not specify which payments were concealed in each mailing. (*Id*.) Accordingly, the Third Circuit's conclusion that the falsity of the 2004 through 2007 annual filings was intended to conceal the 2003 kickbacks is not based on how the charges were described in the indictment.

The trial court instructed the jury in this case that the government must prove that a defendant "knowingly devised a scheme to defraud the public of its right to the honest services of the defendant through bribery or kickbacks and by materially false or fraudulent pretenses,

representations, or promises willfully participated in such a scheme with knowledge of its fraudulent nature." Specifically, the Government must prove that "a bribe or a kickback was paid in connection with the alleged wire fraud and mail fraud counts." (APP. 980-992.)

It is clear from the trial court's jury instructions in this case that it was not sufficient for the jury to determine that the information contained in each annual statement of financial interest was false. That conclusion alone cannot, as a matter of law, serve as the basis for an honest services mail fraud conviction. *See Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (holding that the honest services mail fraud statute criminalizes only bribe and kickback schemes); *United States v. Wright*, 665 F.3d 560, 567-68 (3d Cir. 2012) (bribery and kickback honest services fraud requires a *quid pro quo*). The jury also had to conclude that Ciavarella made a false statement in each annual statement in connection with a bribe or kickback and in furtherance of scheme to defraud. *Skilling*, 561 U.S. at 408-09, 412 (stating that "no other misconduct" other than bribes or kickbacks falls within the honest services mail fraud statute).

Because of the jury's verdict, which clearly found the only kickback at issue to be the 2003 payment of $997,600, combined with the jury instruction that incorporates the *Skilling* holding limiting honest services mail fraud to bribery or kickback schemes, there could not be any valid conviction for honest services mail fraud in this case without the 2003 kickback. The Third Circuit has concluded that the jury must have found beyond a reasonable doubt that the 2004 to 2007 financial statements must have been intended to conceal the 2003 kickback.

But, the Third Circuit's conclusion that the jury must have found that the later mailings of financial statements must have been acts in furtherance of the fraudulent scheme to conceal the only kickback at issue in this case ignores the complete absence of any statute of limitations

instruction and affirmative defense in this case. When the jury actually rendered a verdict, the jury had not received any instruction on the statute of limitations. The statute of limitations instruction would include the five-year statute of limitation for bribery and kickbacks, as well as the five-year statute of limitation for conspiracy. *See, e.g., United States v. Silver*, 864 F.3d 102, 112 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 738 (Jan. 16, 2018); *United States v. Jake*, 281 F.3d 123, 129 (3d Cir. 2002).

There is a reasonable probability that a jury properly instructed on the statute of limitations for bribes and kickbacks as well as conspiracy, would have concluded that the scheme to defraud in connection with a bribery or kickback ended no later than September, 2004 – outside the period of limitation. To answer the question of when the statute of limitations period began to run for each of the honest services mail fraud counts, the jury would be required to determine if the 2004 mailing of the annual statement ended the 2003 bribe or kickback scheme to defraud, or if the scheme to defraud continued to include the 2005, 2006, and 2007 mailings. But this jury had no reason to consider when the scheme ended, because there was no instruction on the statute of limitations in this case at all.

If the jury had been properly instructed on the applicable statute of limitations, there is a reasonable probability that the jury would have found the defendant not guilty on these counts because the jury clearly found that all of the payments that took place within the period of limitations were not bribes or kickbacks. *See United States v. Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011) (vacating conviction because counsel's failure to raise statute of limitations defense and request instruction created reasonable probability that properly instructed jury would have found defendant not guilty); *see also United States v. Span*, 75 F.3d 1383, 1390-1391 (9th Cir.

1996) (finding prejudice and vacating convictions because it was "highly likely" that a properly instructed jury would have found the defendants not guilty).

The District Court actually recognized the fact that the jury in this case may have convicted Ciavarella of honest services mail fraud based on his failure to report lawfully obtained income. The District Court stated: "An alternative view of the verdict form is that the jury concluded that Ciavarella's financial crimes ended with the final January 2003 wire transfer, that all payments received thereafter were lawful, and that Ciavarella was liable for honest services fraud and filing false tax returns solely because he failed to report his financial interests and income lawfully developed and obtained." (Appendix C at p. 19.)

The District Court's observation is correct. In fact, the Government did not specify the "materially false" content in each annual statement mailed to the AOPC. (*See* APP. 184-186 at ¶¶ 86-88.) Rather, the Government alleged generally that from "in or about January, 2001, the exact date being unknown to the grand jury, to on or about the date of the filing of this Indictment," Ciavarella devised a scheme to defraud the citizens of Luzerne County and to deprive those citizens of their right to the honest and faithful services of himself as a judge of the Court of Common Pleas of Luzerne County "through bribery, kickbacks, and the concealment of material information" and for that purpose mailed each of the annual statements on the dates specified in counts 7 through 10. (*Id.*) The Government never alleged what the Third Circuit said the jury must have concluded – which is that the 2005, 2006, and 2007 mailings were intended to conceal the 2003 kickback.

Was there evidence from which the jury could have reached this conclusion? Absolutely. That has already been determined by the Third Circuit in its opinion addressing sufficiency of

the evidence in the direct appeal. *Ciavarella*, 716 F.3d at 731-732. But, the general verdict issued by the jury on the honest services mail fraud counts does not reveal that this is, in fact, what the jury concluded. (APP. 224.) And, it does not answer the question raised in this 2255 matter – which is whether there is a reasonable probability that a jury properly instructed on the statute of limitations could have concluded that the scheme to defraud based on the 2003 kickback ended outside the statute of limitations. Because there was no statute of limitations defense raised due to the ineffective assistance of trial counsel, and because the jury was not instructed on the impact of the statute of limitations to any extent, it is pure speculation to reach the conclusion that the jury must have found beyond a reasonable doubt that the 2004 to 2007 financial statements were intended to conceal the 2003 payments. *See McDonnell*, 136 S. Ct. at 2375; *Silver*, 864 F.3d at 115-122; *United States v. Murphy*, 323 F.3d 102, 110, 118 (3d Cir. 2003); *Coutentos*, 651 F.3d at 818; *Span*, 75 F.3d at 1390-1391.

In fact, the jury never had any reason to consider whether the scheme to defraud ended with the 2003 kickback and concealment of that payment, or whether the scheme continued with the subsequent mailings that failed to report lawful income. The jury never had reason to ponder this question because of the ineffective assistance of counsel. The prejudice is, therefore, exactly the same with respect to the honest services mail fraud counts as it is with respect to the conspiracy counts – the jury was allowed to reach a verdict on charges involving an allegedly ongoing scheme/conspiracy absent the affirmative defense of statute of limitations and absent any instruction on the statute of limitations. Because trial counsel did not argue and the jury was never instructed to consider the statute of limitations, there was no reason for the jury to consider whether the annual reports that were filed in 2005, 2006, and 2007, were acts in furtherance of

the original scheme to defraud or whether that scheme to defraud concluded with the concealment of the 2003 payments. For this reason, there cannot be any confidence in the jury's verdict on the Honest Services Mail Fraud counts.

3. The Third Circuit Affords Undue Significance to the Opinion on Direct Appeal.

The Third Circuit relied upon the assertion that the opinion affirming Ciavarella's judgment on direct appeal had already determined that the 2003 kickbacks were enough to support convictions for mail fraud in 2005 to 2007. *Citing Ciavarella*, 716 F.3d at 730. (Appendix A at p. 5.) The Third Circuit afforded the opinion on direct appeal far too much weight.

In fact, the opinion in the direct appeal held that there was sufficient evidence to allow a reasonable jury to convict Ciavarella on each count of honest services mail fraud, because the jury found that the 2003 payment constituted a bribe or kickback, and "there was sufficient evidence for a reasonable jury to conclude that Ciavarella's nondisclosure of that payment in his Statements of Financial Interests constituted honest services mail fraud." *Ciavarella*, 716 F.3d at 731-732. It is clear that the Third Circuit made a ruling regarding the sufficiency of the evidence on direct appeal. And, it is also clear that the jury did not have the benefit of any statute of limitations instructions. A jury properly instructed on the applicable statutes of limitations may have concluded that the honest services mail fraud scheme ended with the mailing of the financial disclosure statement in 2004, which statement failed to disclose the payments obtained by means of a kickback in 2003.

The jury convicted Ciavarella on the honest services mail fraud counts without ever deciding whether the scheme to defraud based on the 2003 bribe or kickback continued into the

limitation periods, because they were never instructed on the period of limitations and had no reason to concern themselves with that issue. That means that the jury may have actually based their convictions in Counts 8, 9, and 10 on the concealment of lawfully obtained monies (a possibility noted by the District Corut). If the jury had been properly instructed on the applicable statute of limitations, then the jury would have been required to determine whether there was a bribe or kickback within the period of limitations with the resulting payments not being reported on the annual disclosure form, or whether there was an ongoing scheme to defraud based upon the 2003 kickback that continued into the limitations period. But, without a statute of limitations instruction, the jury would not have had any reason to determine when the scheme to defraud ended. The jury likewise would not have had any reason to determine whether the unreported income in the annual statements that were mailed in 2005, 2006, and 2007 was derived from the scheme to defraud based on the 2003 bribe or kickback.

If the verdicts are allowed to stand, then a bribe or kickback completed in 2003, outside the period of limitations, may have been used to sustain honest services mail fraud convictions in years in which the jury found that no illegal payments were received. There is no reason to believe that the Third Circuit intended that result in its opinion on direct appeal.

4. The Third Circuit Ignored the Crucial Legal Argument that Honest Services Mail Fraud Is Not a Continuing Offense.

The superceding indictment in this case charged Ciavarella at Counts 7 through 10 with devising a scheme to defraud the citizens of Luzerne County of their right to his honest and faithful services through bribery, kickbacks, and concealment of material information from January, 2001, until the date of the indictment. (APP.184.) The Government alleged that as part of this scheme, Ciavarella committed four acts of honest services mail fraud by mailing

materially false annual statement of financial interests to the Administrative Office of the Pennsylvania Courts. (APP.184-185.) These four mailings are charged as Counts 7 through 10 in the superceding Indictment, in violation of 18 U.S.C. §§ 2, 1341, and 1346. (APP.184-186.)

The Government has characterized this as a continuing honest services mail fraud scheme, and the lower courts have accepted this characterization for purposes of this *habeas* matter. As a result, the Government and the lower courts appear to assume that the limitations period only commenced after the completion of the last act in furtherance of the scheme.

But is honest services mail fraud a continuing offense? This Court established a two-part test in *Toussie v. United States*, to determine whether an offense is continuing for statute of limitations purposes. 397 U.S. 112 (1970), *superseded by statute for other reasons*. This Court held that an offense should be deemed continuing only if (1) "the explicit language of the substantive criminal statute compels such a conclusion," or (2) "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115.

As defined by Congress, the explicit language defining the offense of mail fraud in 18 U.S.C. § 1341, including the scheme to deprive another of the intangible right of honest services in 18 U.S.C. § 1346, does not compel the conclusion that it is a continuing offense. In fact, the Third Circuit has held that mail and wire fraud (in violation of 18 U.S.C. §§ 1341 and 1343) are not continuing offenses but, rather, are crimes that are complete upon the execution of each mailing or wiring. *See United States v. Siddons*, 660 F.3d 699, 705 (3d Cir. 2011); *United States v. Seligsohn*, 981 F.2d 1418, 1425 (3d Cir. 1992), *superseded by statute for other reasons as stated in United States v. Corrado*, 53 F.3d 620, 624 (3d Cir. 1995). Other circuits have likewise

held that mail and wire fraud are not continuing offenses. *See United States v. Howard*, 350 F.3d 125, 127-128 (D.C. Cir. 2003); *United States v. Barger*, 178 F.3d 844, 847 (7th Cir. 1999); *United States v. Miro*, 29 F.3d 194, 198 (5th Cir. 1994); *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991); and *United States v. Calvert*, 523 F.2d 895, 914 (8th Cir. 1975); *see also* Jeffrey R. Boles, *Easing the Tension Between Statute of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL'Y, 219, 247-249 (2012) (discussing numerous cases holding that mail and wire fraud are not continuing offenses).

The Government charged Ciavarella in the superseding indictment in paragraphs 86 to 88 in a manner that creates the appearance of a continuing offense by characterizing it as a "scheme to defraud" extending from January, 2001, to September 9, 2009. But the language in the charging instrument is not determinative of whether a charge is a continuing offense. That is because the "charged conduct" approach is inconsistent with the test established by this Court in *Toussie* to determine whether a particular offense is "continuing" for statute of limitations purposes. *See, e.g., United States v. Yashar*, 166 F.3d 873, 877-79 (7th Cir. 1999); *United States v. Sunia*, 643 F. Supp. 2d 51, 72-75 (D.D.C. 2009); *see also* Jeffrey R. Boles, *Easing the Tension Between Statute of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL'Y, 219, 238-252 (2012) (explaining why the "charged conduct" approach is inconsistent with *Toussie* and should be rejected).

In this case, although the Government alleges a "scheme to defraud," there is no conspiracy to commit honest services mail fraud charged in this case.[1] Instead, there are four counts of honest services mail fraud. Conspiracy, of course, is a discrete offense, separate and apart from the execution of a mail fraud offense. And that offense was not charged with mail fraud as the object of a conspiracy in this case.

Finally, the Third Circuit implicitly put this issue to rest in the opinion on direct appeal in this case. The Third Circuit held that there was sufficient evidence to support the honest services mail fraud convictions based on the following rationale: "Because the jury found that the 2003 payment constituted a bribe or kickback to support Racketeering Act One, there was sufficient evidence for a reasonable jury to conclude that Ciavarella's nondisclosure of that payment in his Statements of Financial Interest constituted honest services mail fraud." *Ciavarella*, 716 F.3d at 732. The Third Circuit went on to hold that the honest services mail fraud Count 7 was time barred because the statement at issue was mailed in April, 2004, which was outside the period of limitation. *Id*. at 733-734. If the Third Circuit viewed these honest services mail fraud counts as part of a scheme to defraud that constitutes a "continuing offense," then it would make no sense to vacate Count 7, since the statute of limitations would not commence until after the last mailing. But that is not what the Third Circuit held. Therefore, by vacating Count 7, the Third Circuit implicitly rejected the argument that these counts can be construed as a "continuing offense."

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[1]This is distinct from the money laundering and tax fraud charges in this case. In Count 21, the Government charged the defendant with money laundering conspiracy, and then in Counts 22 through 26 with separate money laundering counts. In Count 35, the Government charged the defendant with a conspiracy to defraud the United States by means of tax fraud, and then in Counts 36 through 39 with separate tax fraud counts. (APP.143-216.)

II.

CIAVARELLA ESTABLISHED CAUSE AND PREJUDICE TO OVERCOME PROCEDURAL DEFAULT AS TO THE CLAIM THAT THE TRIAL COURT'S JURY INSTRUCTIONS WERE INCONSISTENT WITH THE SUPREME COURT'S DECISION IN *MCDONNELL V. UNITED STATES*, AND FURTHER ESTABLISHED THAT THE JURY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

On June 27, 2016, this Court issued a decision in *United States v. McDonnell*, announcing a new rule of substantive law that placed particular conduct outside the scope of the "official acts" that are illegal in public corruption cases. The trial in this case was in February, 2011, over five years prior to the issuance of the *McDonnell* decision. In this case, the request for a proper jury instruction on the definition of "official act" was not reasonably available to counsel at the time of the trial in 2011, because the *McDonnell* case was not decided until 2016. The overly broad jury instruction given by the trial court in this case caused actual prejudice to Ciavarella, because there is a reasonable probability that the jury convicted him of honest services mail fraud based on lawful conduct.

A. Ciavarella Established "Cause" to Excuse the Failure to Challenge the Jury Instruction on "Official Act".

Ciavarella was convicted in 2011 and his direct appeal was decided in 2013. The *McDonnell* decision was not issued until June of 2016. Ciavarella had no opportunity to challenge the jury instruction on "official act" (based on *McDonnell*) prior to filing his motion to amend in 2016. There is no dispute in this case that the *McDonnell* decision established a new rule of substantive law that is retroactively applicable to cases on collateral review. Nonetheless, the lower courts denied Ciavarella relief on the claim of instructional error based on the *McDonnell* decision, because they concluded that there was no justification for Ciavarella's failure to challenge the jury instruction at trial.

In order to establish "cause" in the procedural default analysis, a defendant must show that "some objective factor external to the defense impeded counsel's efforts to raise the claim." *United States v. Pelullo*, 399 F.3d 197, 223 (3d Cir. 2005). Examples of "external impediments" include, among others, "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Id*. The "external impediment" cited by Ciavarella is the fact that the request for a proper jury instruction on the definition of "official act" was not reasonably available to counsel at the time of the trial and direct appeal in 2011 and 2013, because this Court did not announce the correct definition and jury instruction until the *McDonnell* decision was issued in 2016.

Other courts have found that the Supreme Court in *McDonnell* announced a new rule of substantive law, placing particular conduct outside the scope of the statute, which is a "major change in the legal landscape." *See United States v. Vederman*, 225 F. Supp. 3d 308, 311 (E.D. Pa. Dec. 21, 2016); *Cordaro v. United States*, 2017 U.S. Dist. LEXIS 143347, 2017 WL 3839916 at **26-28 (M.D. Pa. Sept. 1, 2017). Moreover, the United States Court of Appeal for the Second Circuit observed that the definition of "official act" given by the trial court at the trial of Sheldon Silver – which is materially similar to the definition given by the trial court in this case – was consistent with precedent at the time, and there was no fault in failing to anticipate the problem with the definition prior to the *McDonnell* decision. *Silver*, 864 F.3d at 119.

The jury instruction given by the trial court in this case on the definition of "official act" was the standard pattern jury instruction in the Third Circuit at the time of the trial. It is unclear how Ciavarella was expected to object to the trial court's instruction on the definition of "official act" in 2011, when that instruction was consistent with then-existing precedent and the pattern

jury instructions in this Circuit. *See Reed v. Ross*, 468 U.S. 1, 15-16 (1984) (holding that non-strategic failure to raise a novel constitutional claim established cause for procedural default because trial counsel is not required to argue every conceivable constitutional claim, no matter how far-fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law).

Instead, this Court should find "cause" to excuse a procedural default when the law in the Circuit was firmly established, and a request for a jury instruction that is contrary to firmly established Circuit precedent would be futile. Punishing a defendant for his lawyer's failure to request a charge that was contrary to established Circuit precedent when that precedent is subsequently found to be unconstitutional should not be the purpose of the procedural default rule. Moreover, a defendant should not be denied the protections of a new Supreme Court ruling when the law at the time of the defendant's trial would have made it futile to request a jury instruction, but the law now would mandate such an instruction.

B. Ciavarella Has Established "Actual Prejudice" from the Erroneous Jury Instruction on "Official Act."

In order to obtain review on the merits, Ciavarella must also establish "actual prejudice" resulting from the jury instruction given. *See Pelullo*, 399 F.3d at 220-21. On this issue, the District Court agreed with Ciavarella's argument that the trial court's instructions on the meaning of "official act" in this case are "arguably overbroad" and "align closely" with the overly broad language held to be over-inclusive by the Supreme Court in *McDonnell*. (Appendix C at p. 28.) The Third Circuit did not disagree with the District Court.

However, both lower courts held that Ciavarella could not establish prejudice because he did not establish that he would have benefitted from more restrictive instructions based on the

trial record. (Appendix A at p. 6; Appendix C at p. 28.) The Third Circuit held Ciavarella's "bribery-related actions still satisfy even a post-*McDonnell* understanding of 'official act.' If sentencing hundreds of juvenile offenders to excessive terms of incarceration is not an 'official act,' then nothing is." (Appendix A at p. 6.)

The lower courts were wrong to conclude that a correct jury instruction on the definition of "official act" would have made no difference in this case. The "official act" cited by the Third Circuit was not part of the record in this case (even though it was often repeated by the media as part of the coverage of this case). The District Court erred because it considered conduct that the jury plainly discredited in acquitting Ciavarella on multiple counts, and including actions taken by the co-defendant despite the fact that the honest services mail fraud counts were not charged as a conspiracy.

Reviewing the trial record without consideration of acquitted conduct and limited to the evidence of actions taken by Ciavarella, it is clear that the crux of the evidence relative to the 2003 kickback was that Ciavarella arranged the contact between the principals that led to the construction of the initial juvenile detention facility. This action taken by Ciavarella does not meet the definition of an "official act" under *McDonnell*. To the extent that there was also evidence presented by the Government that arguably may constitute an "official act" by Ciavarella, it is impossible to know whether this jury – employing the overly broad definition of "official act" instructed by the trial court – convicted Ciavarella of honest services mail fraud based on lawful or unlawful conduct. This same problem existed in the Sheldon Silver case, and the Second Circuit granted a new trial because there was a reasonable likelihood that the jury may have convicted the defendant based on lawful conduct. *See Silver*, 864 F.3d at 120-124; *see*

also United States v. Jefferson, 2017 U.S. Dist. LEXIS 165824 at *41-43 (E.D. Va. Oct. 4, 2017).

In this case, just as in the *Silver* case, the Government presented evidence of acts that remain official under *McDonnell*, but also evidence of acts that are not unlawful. *See Silver*, 864 F.3d at 119-124. There is, therefore, at least a reasonable likelihood that the jury in this case may have convicted the defendant for conduct that is not unlawful under the *McDonnell* definition of "official acts."

Specifically, there was a great deal of testimony presented by the Government at trial regarding Ciavarella's acts in arranging the meeting between Robert Mericle and Robert Powell that led to the construction of the initial juvenile detention facility (PA Child Care in Luzerne County) and that led to the 2003 payments from Robert Mericle to the defendant. For example:

- Robert Mericle testified that in May, 2000, he received a phone call from Ciavarella asking if he would take a phone call from a gentleman named Bob Powell who was interested in building a project. (APP.257-258.)
- Robert Mericle testified that Ciavarella told him that the existing juvenile detention facility in Luzerne County was in bad shape, and he was interested in getting a new facility for the county. (APP.258.)
- Robert Mericle testified that he met Bob Powell through Ciavarella. (*Id*.)
- The phone call between Mericle and Powell led to a meeting regarding the construction of a juvenile detention facility (eventually called PA Child Care). (APP.260.)
- Mericle testified that he was paying the initial "finder's fee" to Ciavarella because he was "given the opportunity" to complete the construction "because Mark [Ciavarella] introduced [Mericle] to PA Child Care." (APP.275, 314.)
- Mericle testified on cross examination that Ciavarella was his friend, and the referral to Powell was made in the context of their friendship. (APP.307.)
- Robert Powell testified that Ciavarella suggested to him that he and his partner, Greg Zappala, could help the county figure out how to build a new juvenile

facility to replace the deplorable existing facility. (APP.365.)

- Robert Powell testified that Ciavarella introduced him to his good friend Rob Mericle to start the process. (APP.366.)

- Robert Powell testified that Ciavarella also arranged for several members of the juvenile probation staff to attend a few meetings relative to the construction of the new detention facility. (APP.367.)

The Government then argued in closing:

> Judge Ciavarella was the juvenile court judge. In his capacity as the juvenile court judge, he took steps to have a new juvenile detention center built. If he couldn't get the county to build it, then he was going to use his authority and his position and his discretion as a judge to have it built privately but for public use. In his capacity as a judge, he got Robert Powell to put together a team and to commit to get funds to go build it. In his capacity as a judge, he brought Robert Mericle to the table to build the facility. Mericle had made millions by building the PA Child Care facility, and he testified that he gave Judge Ciavarella $997,600 as a reward for bringing him to the table, which again led Mericle to making more millions. This is a reward. It's a bribe. It is a kickback, and it's illegal.

(APP.923, lines 9-21.)

Ciavarella's actions arranging the contact between Mericle and Powell fit squarely within the category of conduct that the *McDonnell* court held to be not unlawful. That is exactly the conduct that the Government relied upon in closing argument. However, "[s]etting up a meeting, hosting an event, or calling an official (or agreeing to do so) . . . does not qualify as a decision or action on the pending question . . . ." *McDonnell*, 136 S. Ct. at 2371; *see also Silver*, 864 F.3d at 123 (finding that meeting to discuss legislation, without more, does not qualify as a "decision" or "action" under *McDonnell*).

Ciavarella's actions in arranging the contact does not constitute an "official act" because it is not a decision or action on a "question, matter, cause, suit, proceeding or controversy" involving a formal exercise of governmental power. The introduction of Powell and Mericle

also did not involve something "specific and focused" that was "pending" before the defendant, or may be brought before him. *McDonnell,* 136 S. Ct. at 2372. In sum, the act of connecting Powell and Mericle for the purpose of discussing the construction of a private juvenile placement facility did not fit within the *McDonnell* definition of an "official act." *See, e.g., Silver*, 864 F.3d at 122-123 (finding that rational jury with proper instruction on "official act" could have found that Silver's letter offering general assistance with an event occurring in his district – absent any actual exertion of pressure on other officials regarding a particular matter under their consideration – did not satisfy the *McDonnell* standard); *Jefferson*, 2017 U.S. Dist. LEXIS 165824 at *41-43 (finding that defendant attending certain meetings did not meet the definition of "official act" under *McDonnell*).

The jury was not required in this case to identify the "question" or "matter" under the confined *McDonnell* standard. Given the proper instruction, the jury may have concluded that the defendant's interest in helping private parties build a privately owned and operated juvenile detention facility was not a "question" or "matter" that required a formal exercise of governmental power for purposes of finding an "official act." *See, e.g., Jefferson*, 2017 U.S. Dist. LEXIS 165824 (finding that a privately funded trade delegation does not meet the standard of being a "question" or "matter" that involves a formal exercise of governmental power under *McDonnell*).

In this case, just as in *Silver*, some of the actions at issue are no longer "official" under *McDonnell*. *Silver*, 864 F.3d at 119-124. A properly instructed jury would, therefore, not have considered Ciavarella's actions in arranging the meeting between Mericle and Powell since that was not an " official action." It is very probable that a properly instructed jury would not have convicted Ciavarella of the honest services mail fraud counts because it would have found that he did not perform any "official action" in exchange for the 2003 payments.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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July 31, 2019

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-1498 & 18-1499

UNITED STATES OF AMERICA

Appellee/Cross-Appellant

v.

MARK A. CIAVARELLA, JR.,

Appellant/Cross-Appellee

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 3-09-cr-00272-002)
District Judge: Honorable Christopher C. Conner

Submitted Under Third Circuit L.A.R. 34.1(a)
March 7, 2019

Before: AMBRO, RESTREPO, and GREENBERG, Circuit Judges

(Opinion filed March 29, 2019)

OPINION*

AMBRO, Circuit Judge

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

This is a *habeas* appeal in the infamous "kids-for-cash" scandal. A former Pennsylvania judge argues that his trial counsel was ineffective by failing to raise a statute-of-limitations defense, and the appeal centers on the prejudice wrought by the deficient lawyering: Would a proper timeliness defense have resulted in the judge's acquittal on charges of racketeering, money-laundering conspiracy, and mail fraud? Because we determine the answer is "yes" as to racketeering and money-laundering and "no" as to mail fraud, we affirm the District Court in full.

Background

Mark Ciavarella, a judge of the Pennsylvania Court of Common Pleas, accepted nearly $3 million in kickbacks from the owner and builder of two private prisons that housed juvenile inmates. In exchange, he sentenced children to long stays in juvenile detention for minor offenses. He was convicted of racketeering, money-laundering, mail fraud, tax fraud, and conspiracy to defraud the United States.

We focus on the failure by Ciavarella's trial counsel to raise a statute-of-limitations defense. Both parties agree that his counsel was ineffective. But was that prejudicial? That, in turn, depends on whether any of Ciavarella's convictions punished conduct that should have been off-limits by the statute of limitations — in this case, crimes committed before September 2004.

Based on the jury's verdict, the following facts were proven beyond a reasonable doubt. Ciavarella received kickbacks in the form of three wire transfers in 2003. To conceal these payments, he lied about his income in annual filings to the Administrative Office of Pennsylvania Courts in April 2004 and each April thereafter through 2007. In

addition, the jury convicted Ciavarella of racketeering and money-laundering conspiracies that, as charged, straddled the limitations period by running from 2001 to 2009.

On direct appeal, we affirmed all but one conviction. Unlike their faulty approach to most other counts, Ciavarella's trial lawyers had raised a timeliness challenge to the conviction for the April 2004 financial filing. Because that filing occurred before the limitations window of September 2004, we vacated the conviction. *See United States v. Ciavarella*, 716 F.3d 705, 734 (3d Cir. 2013).

Seeking collateral relief, Ciavarella brought a motion to vacate other convictions under 28 U.S.C. § 2255. The District Court did so for racketeering and money-laundering on the ground that Ciavarella's counsel was ineffective, denied the motion to vacate as to the counts for mail fraud, and denied Ciavarella's claim that the jury instructions were faulty in light of the Supreme Court's subsequent decision in *United States v. McDonnell*, 136 S. Ct. 2355 (2016). Both Ciavarella and the Government have appealed.

Analysis

We deal with three discrete issues. Each devolves to whether an error by trial counsel was prejudicial. To meet his burden as to prejudice, Ciavarella must show a "reasonable probability" that, absent his counsel's error, the outcome of his trial would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A. Racketeering and Money-Laundering Conspiracies

The jury convicted Ciavarella of receiving kickbacks in 2003 (outside the limitations period) but acquitted him of charges relating to kickbacks from 2004 and later (within the limitations period). As noted, it also convicted him of racketeering and money-laundering conspiracies that were alleged to have run from 2001 to 2009.

Targeting those conspiracy convictions, Ciavarella argues that competent trial counsel would have excluded the 2003 kickbacks on limitations grounds. As a result, he maintains that the jury would have had nothing on which to base its convictions for racketeering and money-laundering. In response, the Government points out that Ciavarella was also convicted of submitting fraudulent financial filings in 2005, 2006, and 2007 — in other words, well into the limitations period. The Government maintains that the filings furthered the conspiracies by concealing the kickbacks.

Thus the *habeas* petition presents whether the jury based its conspiracy convictions on the 2003 kickbacks alone (in which case the conspiracy charges should have been time-barred) or on the subsequent financial filings (if so, the charges were timely). Because it concluded there was a "reasonable probability" of the former scenario, the District Court vacated Ciavarella's conspiracy convictions.

We agree and thus affirm. We cannot say for certain whether the jury believed that the racketeering and money-laundering conspiracies ended before September 2004. But such a belief seems "reasonably probable" in light of the jury's acquittal on all kickbacks after 2003.

B. Mail Fraud

Ciavarella was convicted of mail fraud for filing financial statements in 2005, 2006, and 2007 (within the limitations period) that concealed his kickback income earned in 2003 (before the limitations period). He argues that an adequate statute-of-limitations defense by his trial counsel would have resulted in an acquittal on the charges of mail fraud.

Here we disagree. Although the underlying conduct that supported the fraud occurred before 2004, the financial statements were not submitted — and the crime of mail fraud was therefore not completed — until after 2004. Indeed, our Court on direct appeal already explained that the 2003 kickbacks were enough to support convictions for mail fraud in 2005–07. *See Ciavarella*, 716 F.3d at 730. As a result, we affirm the District Court's denial of *habeas* relief on these convictions.

C. McDonnell Instruction

After Ciavarella's trial, the Supreme Court clarified the meaning of "official act" for purposes of bribery. *See McDonnell*, 136 S. Ct. at 2361. In light of this decision, Ciavarella argues that he deserves a new trial with different jury instructions on the meaning of "official act."

For two reasons, we disagree. First, Ciavarella's counsel failed to preserve this claim by challenging the jury instructions at trial, and Ciavarella cannot provide any reason to excuse this procedural default. In particular, it is no excuse that he was convicted before *McDonnell* was decided. Although "subsequent legal developments have made counsel's task easier," a *McDonnell*-style challenge was "available" at the

time of Ciavarella's conviction. *See Smith v. Murray*, 477 U.S. 527, 537 (1986) (noting that "various forms of the claim [the petitioner] now advances had been percolating in the lower courts for years at the time of his original appeal").

Second, Ciavarella's bribery-related actions still satisfy even a post-*McDonnell* understanding of "official act." If sentencing hundreds of juvenile offenders to excessive terms of incarceration is not an "official act," then nothing is. *See* 18 U.S.C. § 201(a)(3) (defining "official act" in part as "any decision or action on any question, matter, cause, suit, proceeding or controversy . . . which may by law be brought before any public official, in such official's official capacity"); *see also McDonnell*, 136 S. Ct. at 2371–72.

In this context, we affirm the District Court in full.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-1498 & 19-1499

UNITED STATES OF AMERICA

v.

MARK A. CIAVARELLA, JR.,

Appellant/Cross-Appellee

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 3-09-cr-00272-002)
District Judge: Honorable Christopher C. Conner

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, and GREENBERG*, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant/Cross-Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no

* Senior Judge Greenberg's Vote is limited to Panel Rehearing Only.

judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc,* is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: May 7, 2019
Lmr/cc: Michael A. Consiglio
William S. Houser
Carlo D. Marchioli
Jennifer P. Wilson

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 3:09-CR-272**
	:	
v.	:	**(Chief Judge Conner)**
	:	
MARK A. CIAVARELLA, JR.,	:	
	:	
Defendant	:	

MEMORANDUM

Defendant Mark A. Ciavarella, Jr. ("Ciavarella"), is a former judge of the Court of Common Pleas of Luzerne County, Pennsylvania. In February of 2011, a jury found Ciavarella guilty of racketeering, racketeering conspiracy, honest services mail fraud, money laundering conspiracy, conspiracy to defraud the United States, and subscribing and filing a materially false tax return. (Doc. 216). The court sentenced Ciavarella to 336 months' imprisonment and 3 years of supervised release. (Doc. 272). The court also ordered Ciavarella to pay restitution in the amount of $1,173,791.94 and to forfeit $997,600. (Id.)

Ciavarella now moves to vacate, set aside, and correct his conviction and sentence under 28 U.S.C. § 2255. Ciavarella also moves to supplement his original Section 2255 motion to include a claim pursuant to McDonnell v. United States, 579 U.S. __, 136 S. Ct. 2355 (2016).

I. Factual Background & Procedural History[1]

Ciavarella served as judge on the Luzerne County Court of Common Pleas from 1996 through January of 2009. United States v. Ciavarella, 716 F.3d 705, 713 (3d Cir. 2013). During his tenure, Ciavarella served primarily on the Juvenile Court. Id. Ciavarella was appointed President Judge in January of 2007, succeeding his former colleague and codefendant, Michael T. Conahan ("Conahan"). Id. at 713-14. In late 2008, Ciavarella and Conahan were accused of receiving nearly $3 million in exchange for their respective roles in facilitating construction and ensuring continued operation of two private juvenile detention centers in the Commonwealth of Pennsylvania. Id. at 713. Two other key players—commercial builder Robert Mericle ("Mericle") and local attorney and businessman Robert Powell ("Powell")—were also criminally charged. See id.

Prosecution of Ciavarella and Conahan began with the filing of a felony information on January 26, 2009. United States v. Ciavarella, No. 3:09-CR-28, Doc. 1 (M.D. Pa. Jan. 26, 2009). The information charged one count of honest services wire fraud and one count of conspiracy to defraud the United States against both defendants. Id. Ciavarella and Conahan entered Rule 11(c)(1)(C) plea agreements wherein all parties jointly agreed to a binding sentencing recommendation of 87 months' imprisonment. See id., Docs. 3, 5. The plea agreements contained express

[1] The above narrative summarizes the factual and procedural background of this case as derived from the record. Citations to the record include the transcript of the Section 2255 evidentiary hearing convened on September 14, 2017 ("Hr'g Tr."), the transcript of trial proceedings ("[Date] Trial Tr."), and the Third Circuit Court of Appeals' precedential opinion on direct review of Ciavarella's convictions and sentence, see United States v. Ciavarella, 716 F.3d 705 (3d Cir. 2013).

waivers of several defenses, including the statute of limitations. Id., Doc. 3 at 3; Doc. 5 at 3. Following receipt and review of the defendants' presentence reports, Judge Edwin M. Kosik rejected the Rule 11(c)(1)(C) agreements, observing that the proposed sentences fell "well below" the Guidelines for the offenses charged. United States v. Ciavarella, No. 3:09-CR-28, 2009 WL 6032443, at *2-3 (M.D. Pa. July 31, 2009). Ciavarella and Conahan withdrew their guilty pleas.

On September 9, 2009, a grand jury returned a 48-count indictment against both defendants. (Doc. 1). Albert J. Flora, Jr., Esquire ("Attorney Flora") and William Ruzzo, Esquire ("Attorney Ruzzo") entered appearances on Ciavarella's behalf. (Docs. 10-11). Defendants answered the indictment with a bevy of pretrial motions—44 in all. (Docs. 34-78). Shortly after the motions were filed, Conahan agreed to plead guilty to racketeering conspiracy. (See Doc. 106). Judge Kosik accepted Conahan's guilty plea on July 23, 2010. (Doc. 122).

The grand jury returned a 39-count superseding indictment on September 29, 2010 charging Ciavarella as follows:

- Count 1: racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), between approximately June of 2000 and January 1, 2007;

- Count 2: racketeering conspiracy in violation of 18 U.S.C. § 1962(d), from on or about December of 2001 to on or about the date of the superseding indictment;

- Counts 3 through 6: honest services wire fraud in violation of 18 U.S.C. §§ 2, 1343, and 1346, for a scheme executed through wire transmissions on July 12, 2004; September 23, 2004; July 15, 2005; and February 3, 2006, respectively;

- Counts 7 through 10: honest services mail fraud in violation of 18 U.S.C. §§ 2, 1341, and 1346, for a scheme executed through the mailing of materially false annual statements of financial interests to the Administrative Office of the Pennsylvania Courts in April 2004; March 2005; April 2006; and March 2007, respectively;

- Counts 11 through 20: corrupt receipt of a bribe or reward in exchange for official action in violation of 18 U.S.C. § 666(a)(1)(B) for payments received between February 15 and February 24, 2004; on April 30, 2004; on July 12, 2004; on September 23, 2004; on July 15, 2005; on February 3, 2006; on August 16, 2006; on November 1, 2006; on November 20, 2006; and on December 18, 2006, respectively;

- Count 21: conspiracy to launder money in violation of 18 U.S.C. § 1956(h), from on or about January 1, 2001 to on or about the date of the superseding indictment;

- Counts 22 through 26: money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), on or about January 20, 2004; February 24, 2004; May 3, 2004; July 12, 2004; and September 23, 2004;

- Counts 27 through 34: extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, for payments between February 15 and February 24, 2004; on April 30, 2004; on July 12, 2004; on September 23, 2004; on August 16, 2006; on November 1, 2006; on November 20, 2006; and on December 18, 2006, respectively;

- Count 35: conspiracy to defraud the United States in violation of 18 U.S.C. § 371, between on or about January 1, 2002 and May 21, 2007; and

- Counts 36 through 39: subscribing and filing a materially false tax return in violation of 26 U.S.C. § 7206(1), on or about April 15, 2004; April 15, 2005; April 15, 2006; and April 15, 2007, respectively.

(Doc. 134). Count 1 alleged 13 separate acts of racketeering activity in support of the substantive RICO charge. (Id. at 12-28). The superseding indictment also included forfeiture allegations. (Id. at 71-74).

Ciavarella renewed his earlier pretrial motions, (see Doc. 148), and filed several additional motions to dismiss. Of particular relevance herein, Ciavarella sought to dismiss Counts 3 through 5, 7 through 9, 11 through 14, 22 through 25, and 27 through 30 on statute of limitations grounds, and all honest services-related counts based upon the Supreme Court's then-recent decision in Skilling v. United States, 561 U.S. 358 (2010). (See Docs. 149, 151). Judge Kosik denied Ciavarella's motions in a memorandum and order (Doc. 164) dated December 15, 2010. Notably, therein, Judge Kosik found that Ciavarella waived the limitations defense in his earlier plea agreement. (Id. at 2). Judge Kosik also determined that the government's *allegata* survived scrutiny under Skilling. (Id. at 1-2).

Ciavarella's trial commenced with jury selection on February 7, 2011. Evidence at trial established that Ciavarella introduced two local businessmen, Powell and Mericle, with the goal of constructing a private juvenile detention center in Luzerne County to replace a dilapidated county-run facility. See Ciavarella, 716 F.3d at 714. Powell and a business associate created Pennsylvania Child Care, LLC ("PACC") to develop the center and hired Mericle's construction company to build it. Id. As part of a successful effort to thwart the county's plan to build and operate its own facility, Ciavarella and Conahan executed a placement agreement between the county and PACC, guaranteeing placement of the county's juvenile offenders at PACC at a contract price of $1.314 million per year. Id. At the end of January

of 2003, as construction neared completion, Mericle transferred a referral fee of $997,600 in three separate payments to Ciavarella and Conahan in a series of wire transfers between various conduits. Id. In January of 2004, the defendants and their wives formed Pinnacle Group of Jupiter, LLC ("Pinnacle"), a corporation they used for channeling funds associated with PACC. Id.

The jury heard evidence that Ciavarella, in his capacity as judge on the Juvenile Court, "leveraged" his position "to place juvenile offenders with PACC" to ensure the facility's continued success. Id. at 715. According to trial testimony, the judges believed they were entitled to join in that success. See id. The judges directed Powell to transfer their perceived "share" of the profits to Pinnacle. Id. From January through September of 2004, Powell made payments to the judges totaling $590,000. Id. He disguised the payments by labeling them as "rent" for an uninhabitable condominium purchased by Pinnacle in Jupiter, Florida. Id.

When Mericle and Powell decided to build a second juvenile detention center, Western PA Child Care ("WPACC"), and to expand PACC, Ciavarella and Conahan received additional referral fees: $1 million in July of 2005 for WPACC's construction and $150,000 in February of 2006 for expansion of PACC. Id. at 714. Powell distributed additional proceeds to the judges totaling $143,500 from August through December of 2006 by delivering "boxes filled with cash" to Conahan and his judicial assistant. Id. at 715. Ciavarella admitted at trial that he falsified tax returns to conceal this income from the Internal Revenue Service and failed to report financial interests in PACC and WPACC to the Administrative Office of the Pennsylvania Courts. (See 2/15/11 Trial Tr. 58:18-59:19, 69:7-72:2); see also

Ciavarella, 716 F.3d at 714-15. He denied that any payments were bribes, kickbacks, or the product of extortion, and denied knowledge of the rent payments and the deliveries of cash. (See, e.g., 2/8/11 Trial Tr. 27:16-28:8, 31:25-45:21; 2/15/11 Trial Tr. 25:18-26:13, 67:17-19; 2/16/11 Trial Tr. 52:2-25).

After seven days of evidence and two and a half days of deliberation, the jury convicted Ciavarella on 12 of 39 counts: racketeering (Count 1), racketeering conspiracy (Count 2), all four counts of honest services mail fraud (Counts 7-10), money laundering conspiracy (Count 21), conspiracy to defraud the United States (Count 35), and all four counts of subscribing and filing a materially false tax return (Counts 36-39). (Doc. 216). On the verdict form, the jury identified two acts of racketeering activity in support of its RICO verdict on Count 1, to wit: Racketeering Act One, charging honest services wire fraud for $997,600 in wire transfers on January 21, January 24, and January 28, 2003, and Racketeering Act Thirteen, charging money laundering conspiracy. (Id. at 1, 2, 7).

Ciavarella filed several post-trial motions, one of which is pertinent *sub judice*: a motion for acquittal, contending that Counts 1, 2, and 21 are time-barred by the applicable five-year statute of limitations and that the proof at Counts 7 through 10 fails to establish the requisite bribe or kickback under Skilling. (Doc. 237). Judge Kosik denied the motion on both grounds by memorandum and order (Doc. 257) on May 26, 2011. Judge Kosik found that counsel's failure to challenge Counts 1, 2, or 21 on statute of limitations grounds by pretrial motion or by requesting a jury instruction on the subject waived the defense. (Id. at 5). He further held that the jury's verdict on the honest services mail fraud counts was

consistent with the Supreme Court's holding in Skilling. (See id. at 4). On August 11, 2011, the court sentenced Ciavarella to 336 months' imprisonment and three years of supervised release and ordered him to pay $1,173,791.94 in restitution. (Doc. 272). The court ordered Ciavarella to forfeit $997,600. (Id.)

Ciavarella appealed his conviction and sentence to the United States Court of Appeals for the Third Circuit. (Doc. 274). On appeal, Ciavarella raised a mélange of issues including, *inter alia*, the sufficiency of the evidence supporting Counts 1, 2, 7 through 10, and 21, and the timeliness of his prosecution on Counts 1, 2, 7, and 21. Ciavarella, 716 F.3d at 730-34. The panel examined the sufficiency of the evidence first. The court resolved that the government adduced ample evidence supporting the jury's determination that the January 2003 payment was a bribe, sustaining the RICO, RICO conspiracy, and money laundering conspiracy convictions, and further held that Ciavarella's failure to disclose the 2003 payment on his financial disclosure statements in 2004, 2005, 2006, and 2007 supported the honest services mail fraud convictions. Id. at 730-32.

The Third Circuit then turned to the statute of limitations issue. The court of appeals held that trial counsel waived a timeliness defense to Counts 1, 2, and 21—RICO, RICO conspiracy, and money laundering conspiracy—by failing to raise it before or during trial. Id. at 733 (quoting United States v. Karlin, 785 F.2d 90, 92-93 (3d Cir. 1986)). The panel agreed with Ciavarella that he "would have been entitled to an instruction on the applicable statute of limitations," but held that trial counsel's failure to preserve the issue for appeal barred the court from considering the defense. Id.

As to the honest services mail fraud charge at Count 7, however, the panel found the limitations defense to be both properly preserved and valid. The court of appeals observed that the original indictment was filed more than five years after the April 2004 mailing that supported Count 7, and thus concluded that Count 7 was "clearly time-barred absent any waiver by Ciavarella." Id. The court of appeals further held that withdrawal of the initial Rule 11(c)(1)(C) plea agreement rescinded that document's statute of limitations waiver. Id. Accordingly, the court vacated the conviction at Count 7. Id. at 734. Because *vacatur* did not impact the Guidelines sentencing range, the Third Circuit did not order resentencing *de novo*, but directed the district court to reduce the $100 special assessment on Count 7. Id. at 734-35. The Third Circuit denied Ciavarella's request for *en banc* and panel rehearing on July 24, 2013. United States v. Ciavarella, No. 11-3277 (3d Cir. July 24, 2013). The Supreme Court denied Ciavarella's petition for *certiorari* on March 3, 2014. Ciavarella v. United States, 134 S. Ct. 1491 (2014).

Ciavarella timely filed his instant Section 2255 motion together with supporting brief and exhibits, as well as a motion for leave to proceed *in forma pauperis* and for appointment of counsel. (Docs. 322-25). Following the Supreme Court's McDonnell decision in June of 2016, Ciavarella moved for leave to amend his underlying Section 2255 motion to include an additional ground for relief. (Doc. 337). This case was thereafter transferred to the undersigned. On July 21, 2017, we issued an order appointing counsel and scheduling a hearing on Ciavarella's Section 2255 motion. (Doc. 346). We convened an evidentiary hearing on September 14, 2017 and heard testimony from Attorneys Ruzzo and Flora.

Following supplemental briefing by both parties, (see Docs. 356, 357, 359, 360), Ciavarella's motions are fully briefed and ripe for review.

II. Standard of Review

Under 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set aside, or correct the prisoner's sentence. 28 U.S.C. § 2255. Courts may afford relief under Section 2255 on a number of grounds including, *inter alia*, "that the sentence was imposed in violation of the Constitution or the laws of the United States." 28 U.S.C. § 2255(a); see also 28 U.S.C. § 2255 Rule 1(a). The statute provides that, as a remedy for an unlawfully-imposed sentence, "the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). The court accepts the truth of the defendant's allegations when reviewing a Section 2255 motion unless those allegations are "clearly frivolous based on the existing record." United States v. Booth, 432 F.3d 542, 545 (3d Cir. 2005). A court must hold an evidentiary hearing when the motion "allege[s] any facts warranting § 2255 relief that are not clearly resolved by the record." United States v. Tolliver, 800 F.3d 138, 141 (3d Cir. 2015) (quoting Booth, 432 F.3d at 546).

III. Discussion

Ciavarella contends that trial counsel were constitutionally ineffective for failing to pursue and preserve a statute of limitations defense to Counts 1, 2, 8, 9, 10, and 21 of the superseding indictment.[2] Ciavarella also seeks leave to amend his Section 2255 motion to assert a claim based on the Supreme Court's decision in McDonnell v. United States, 579 U.S. __, 136 S. Ct. 2355 (2016).

A. Ineffective Assistance of Counsel

A collateral attack based on the Sixth Amendment's guarantee of effective assistance of counsel is governed by the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on this claim, a defendant must demonstrate, *first*, that trial counsel's representation fell below an objective level of reasonableness based on prevailing professional norms and, *second*, that the deficient representation prejudiced the defendant. See id. at 687-88. Courts refer to Strickland's elements as the "performance" and "prejudice" prongs, respectively. Bey v. Superintendent Greene SCI, 856 F.3d 230, 238 (3d Cir. 2017). A defendant must establish both elements to obtain relief. See United States v. Washington, 869 F.3d 193, 204 (3d Cir. 2017) (quoting United States v. Travillion, 759 F.3d 281, 289-90 (3d Cir. 2014)).

Ciavarella claims his trial counsel were ineffective by depriving him of a viable statute of limitations defense. (See Doc. 356 at 4-14). Specifically, he asserts

[2] Ciavarella initially asserted a second claim, alleging that the government violated its disclosure obligations under the Jencks Act, 18 U.S.C. § 3500, and Brady v. Maryland, 373 U.S. 83 (1963), (see Doc. 322 ¶¶ 41-56), but he withdrew this claim during the evidentiary hearing on September 14, 2017. (Hr'g Tr. 6:8-23).

that Attorneys Ruzzo and Flora were ineffective in failing to know or to research the applicable law concerning when a statute of limitations defense must be raised in a federal criminal case, resulting in counsel's failure to request a jury instruction on the limitations period applicable to Counts 1, 2, 8, 9, 10, and 21. (See id.) Each of these counts is governed by a five year statute of limitations. 18 U.S.C. § 3282(a); Ciavarella, 716 F.3d at 732 n.18. The parties agree that counsel did not present a statute of limitations defense at trial and that counsel did not request a statute of limitations jury instruction. With this as background, we address the Strickland prongs *seriatim*.

1. *Ineffective Assistance – Performance*

In determining whether counsel has satisfied the objective standard of reasonableness under the first prong, courts must be highly deferential toward counsel's conduct. Strickland, 466 U.S. at 689. The Strickland test is exacting, and there is a strong presumption that counsel exercised reasonable professional judgment in making significant decisions. Burt v. Titlow, 571 U.S. __, 134 S. Ct. 10, 17 (2013) (quoting Strickland, 466 U.S. at 690). Overcoming this deference requires a showing that "the suggested strategy (even if sound) was not in fact motivating counsel," or that "the actions could never be considered part of a sound strategy." Thomas v. Varner, 428 F.3d 491, 499 (3d Cir. 2005). Even if a defendant identifies an error, Strickland still requires the defendant to establish that the error was so egregious as to fall outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. The test tasks the court to assess counsel's performance

"on the facts of the particular case, viewed as of the time of counsel's conduct." Jacobs v. Horn, 395 F.3d 92, 102 (3d Cir. 2005).

Trial counsel testified that failing to raise a statute of limitations defense during Ciavarella's trial was not a deliberate or informed choice. Attorney Ruzzo testified that there was no "strategic decision" made not to raise the defense. (Hr'g Tr. 12:3-6, 12:25-13:5, 43:3-23). He also testified that the defense never denied that Ciavarella accepted payments in January of 2003, only whether those payments were in fact bribes or kickbacks. (Id. at 13:6-14:17). Thus, a limitations defense would not have conflicted with the defense strategy. (Id.) When asked whether he believed he erred in handling the limitations issue in this case, Attorney Ruzzo replied, "Absolutely." (Id. at 23:22-24). Attorney Flora confirmed that the defense team did not purposefully forgo the limitations defense. (Id. at 46:22-47:5, 52:7-10). To the contrary, he agreed that a limitations instruction would have been entirely consistent with the defense strategy. (Id. at 48:4-18). Attorney Flora revealed that the team had erroneously assumed the limitations defense could only be raised post-verdict because the RICO, conspiracy, and honest services mail fraud counts each alleged some conduct within the five-year statutory period. (Id. at 48:19-50:11).

We must determine whether trial counsel's failure to present a statute of limitations defense falls outside the wide range of reasonable professional assistance. Third Circuit precedent squarely resolves this inquiry. "It is well settled that a criminal defendant is entitled to an instruction on the applicable statute of limitations." United States v. Jake, 281 F.3d 123, 129 (3d Cir. 2002) (citing Grunewald v. United States, 353 U.S. 391, 396-97 (1957)). Indeed, the Third Circuit

on direct appeal in this case has already held that Ciavarella "*would have been entitled*" to a limitations instruction had counsel requested one. Ciavarella, 716 F.3d at 733 (emphasis added). As a general rule, failure to suggest a favorable instruction will be deemed "constitutionally deficient" performance unless the failure was a "strategic choice." Bey, 856 F.3d at 238 (quoting Everett v. Beard, 290 F.3d 500, 514 (3d Cir. 2002)). On the record before the court, there can be no dispute that counsel's failure to raise and preserve a limitations defense was not strategic.[3]

Compounding this threshold error is counsel's failure to conduct research on the preclusive effect of forgoing a limitations defense. Both counsel conceded that they did not research the issue of *when* a limitations defense must be raised until after trial. (Hr'g Tr. at 11:21-12:1, 50:12-19). Attorneys Ruzzo and Flora each testified that they *assumed*, but never confirmed, that the defense was jurisdictional and, as such, could be raised post-verdict. (See id. at 11:14-12:2, 43:5-2, 49:25-50:19). Cursory research would have disabused counsel of this notion. The Third Circuit announced nearly a quarter century before Ciavarella's trial that "the statute of limitations does *not* go to the jurisdiction of the court but is an affirmative defense that will be considered waived if not raised in the district court before or at trial."

[3] We recognize that the trial court's disposition of certain pretrial motions—resolving that both Ciavarella and Conahan had waived the statute of limitations in their rescinded Rule 11(c)(1)(C) plea agreements—suggests that the trial court may have rejected a request for a statute of limitations instruction. (See, e.g., Doc. 164 at 2). We also note that the Third Circuit squarely rejected the trial court's waiver analysis. See Ciavarella, 716 F.3d at 733-34. We conclude that speculation over the trial court's handling of the matter is unnecessary, as objecting to the court's declination to provide a specific limitations instruction would have adequately preserved the issue for appellate review. See Jones v. United States, 527 U.S. 373, 387-88 (1999); Jake, 281 F.3d at 130.

Karlin, 785 F.2d at 92-93 (emphasis added). Counsel's ignorance of and failure to conduct "basic research" on a point of law fundamental to their client's case is "a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. __, 134 S. Ct. 1081, 1089 (2014) (citations omitted).

This confluence of errors mandates the conclusion that trial counsel's performance fell below prevailing professional norms. We underscore that this holding is not the result of counsel's personal beliefs as pertains their respective performances, which both attorneys supplied quite candidly on the witness stand. Rather, our finding that trial counsel's performance was ineffective is based on the familiar "objective standard of reasonableness," Strickland, 466 U.S. at 687-88, and our examination of counsel's performance based on the trial record and binding precedent. Counsel operated exclusively and unjustifiably on an erroneous assumption concerning a crucial point of law. As we explain *infra*, that error deprived Ciavarella of a viable defense. Ciavarella satisfies the first Strickland prong.

2. *Ineffective Assistance – Prejudice*

To satisfy the prejudice prong, the petitioner must establish a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. See Strickland, 466 U.S. at 694. A reasonable probability is one that "undermine[s] confidence in the outcome." Id. The Third Circuit has rejected a preponderance of the evidence standard under Strickland, to wit: a defendant "need not show that counsel's deficient performance more likely than not altered the outcome of the case—rather, he must show only a probability sufficient

to undermine confidence" in the proceedings. Jacobs, 395 F.3d at 105 (internal quotation marks omitted) (quoting Strickland, 466 U.S. at 693-94). This threshold has been described as "relatively low." Boyd v. Waymart, 579 F.3d 330, 354 (3d Cir. 2009).

The jury supported its RICO verdict at Count 1 by finding that Ciavarella committed two predicate acts: wire fraud involving $997,600 in a series of payments on January 21, 2003, January 24, 2003, and January 28, 2003, and the undated predicate act of money laundering conspiracy. (Doc. 216 at 1-2, 7). The jury also found Ciavarella guilty of Counts 2 and 21, which charged undated RICO and money laundering conspiracies, (id. at 7, 10), as well as Counts 7 through 10, charging four counts of honest services mail fraud dated April 2004, March 2005, April 2006, and March 2007, respectively. (Id. at 8). The jury found Ciavarella not guilty of all dated RICO predicate acts and all financial crimes following the final January 28, 2003 wire transfer. (Id. at 1-13).

Ciavarella claims it is reasonably probable that, had the jury been instructed on the applicable statute of limitations, the verdict on Counts 1, 2, 8, 9, 10, and 21 would have been different. At the outset, we reject the argument that Ciavarella would have achieved acquittal on Counts 8, 9, and 10. These counts expressly include conduct occurring after September 9, 2004, the date on which the limitations period expired. The verdict form itself cites the date of the charged conduct in question: Count 8 concerns failure to disclose financial interests anent

the 2003 payments[4] on a March 2005 financial disclosure statement; Count 9 concerns nondisclosure on an April 2006 statement; and Count 10 concerns nondisclosure on a March 2007 statement. (Doc. 216 at 8).

Mailing is a requisite element of the offense for each of these counts. See United States v. Riley, 621 F.3d 312, 325 (3d Cir. 2010); see also Ciavarella, 716 F.3d at 731-32. There is no dispute that the mailing of the financial disclosure statements subject to Counts 8, 9, and 10 occurred well within the limitations period. (See Hr'g Tr. 30:19-32:13; see also Doc. 216 at 8). For comparison, in vacating Ciavarella's conviction on Count 7, the Third Circuit focused exclusively on the fact that the count was "based on a mailing in April 2004," five months beyond the limitations period. See Ciavarella, 716 F.3d at 734. The jury's verdict necessarily establishes that a central element of Counts 8, 9, and 10 occurred within the five-year statute of limitations. Hence, the result for these counts would not have been different had counsel requested an instruction on the limitations period.

Analysis of Counts 1, 2, and 21 is more complex. It is clear that the first predicate act supporting the jury's RICO verdict—three instances of wire fraud in January of 2003—is time-barred. The government concedes this point. (Doc. 357 at 42). But the second RICO predicate, money laundering conspiracy, is undated on

[4] Ciavarella suggests that the jury could not rely on a 2003 payment for Counts 8, 9, and 10, but instead must have determined that a payment during the year preceding each subject mailing—2004, 2005, and 2006, respectively—formed the basis of the count. (See Doc. 356 at 14-15, 21-22). On direct appeal, however, the Third Circuit determined that the 2003 bribe provided sufficient evidence to support the jury's honest services mail fraud verdicts for nondisclosure in 2005, 2006, and 2007. Ciavarella, 716 F.3d at 731-32.

the verdict form, as are both of the conspiracy charges at Counts 2 and 21. (Doc. 216 at 7, 10). The jury plainly did not believe Ciavarella accepted additional kickbacks or bribes after January 2003, but whether it believed the conspiracies continued beyond that date is simply unclear. (See generally Doc. 216). Accordingly, we must determine whether the jury's consideration of the conspiracy predicate of Count 1 and the conspiracy charges at Counts 2 and 21 may have been impacted by an instruction on the limitations period.

To find Ciavarella guilty of RICO, RICO conspiracy, and money laundering conspiracy in the face of an appropriate statute of limitations instruction, the jury would have to find that the respective conspiracies continued into the limitations period. See Jake, 281 F.3d at 123 n.6. In other words, the government would need to establish beyond a reasonable doubt that its September 9, 2009 indictment was "brought within five years of the last overt act" in furtherance of the conspiracies. See id. If the jury resolved that the conspiracies concluded before September 9, 2004, it would be required to acquit Ciavarella on Counts 1, 2, and 21. See id.

The jury's verdict constrains us to find that an appropriate limitations instruction *may* have altered the outcome of these proceedings. See Strickland, 466 U.S. at 694. The government asseverates that the jury could have considered Ciavarella's mailing of false statements of financial interest in 2005, 2006, and 2007, (Doc. 357 at 42-47), or falsification of tax returns in the same years, (Doc. 329 at 14-16), to be overt acts in furtherance of the respective conspiracies. It emphasizes that the jury convicted Ciavarella of both honest services mail fraud and filing a

materially false tax return in connection with this conduct. (See Doc. 357 at 42-47; see also Doc. 329 at 14-16).

We do not disagree with the government's postulation. However, it is equally likely that the jury believed the money laundering and RICO conspiracies terminated much earlier. An alternative view of the verdict form is that the jury concluded that Ciavarella's financial crimes ended with the final January 2003 wire transfer, that all payments received thereafter were lawful, and that Ciavarella was liable for honest services fraud and filing false tax returns solely because he failed to report his financial interests and income lawfully developed and obtained. The jury's verdict on Counts 8 through 10 and Counts 35 through 39 suggests that Ciavarella did engage in efforts to cover up his own financial relationships within the limitations period; but it does not *ipso facto* signal that the jury believed he engaged in *conspiratorial* acts of concealment during that time.

Resolution of this pivotal issue—when the RICO and money laundering conspiracies terminated, and whether they terminated within the five-year statute of limitations period—must wait for retrial. Given the jury's unequivocal finding that Ciavarella's financial crimes ended with the final January 2003 wire transfer, it is reasonably probable that a proper instruction on the statute of limitations would have altered the result on Counts 1, 2, and 21. See Strickland, 466 U.S. at 694. As a consequence, failing to present a limitations instruction did not create a mere "possibility of prejudice." Bey, 856 F.3d at 242 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). It worked to Ciavarella's "*actual* and substantial disadvantage" by entirely foreclosing a defense. See id. We are compelled to grant

Ciavarella's motion and vacate his conviction and sentence on Counts 1, 2, and 21 of the superseding indictment.

B. Proposed McDonnell Claim

Ciavarella also moves to amend his Section 2255 motion to add a claim of instructional error based on the United States Supreme Court's 2016 decision in McDonnell. (Doc. 337). The Federal Rules of Civil Procedure govern motions to amend habeas petitions. See Riley v. Taylor, 62 F.3d 86, 89-90 (3d Cir. 1995). Courts must "freely give leave when justice so requires," FED. R. CIV. P. 15(a)(2), and generally will grant leave to amend unless the opposing party demonstrates undue delay, bad faith, prejudice, or futility. See Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006); see also Foman v. Davis, 371 U.S. 178, 182 (1962). Rule 15 aims to offer the "maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." United States v. Thomas, 221 F.3d 430, 435 (3d Cir. 2000) (citations omitted). We will grant the motion to amend and consider Ciavarella's McDonnell claim as part of his Section 2255 motion.[5]

Ciavarella asserts that McDonnell narrowed the range of conduct which qualifies as honest services mail fraud. He maintains that it is possible that the jury convicted him of conduct which the law no longer criminalizes. (See Doc. 356 at 32-44). The government asks the court to deny Ciavarella's claim for three reasons:

[5] The government bases its opposition to Ciavarella's motion exclusively on futility grounds. (See Doc. 360 at 1). A court measuring futility should deny leave to amend if the proposed alteration "is frivolous or advances a claim or defense that is legally insufficient on its face." Massarsky v. Gen. Motors Corp., 706 F.2d 111, 125 (3d Cir.), *cert.* denied, 464 U.S. 937 (1983). Although we ultimately conclude that Ciavarella has procedurally defaulted his McDonnell claim, we cannot find that the claim is frivolous.

first, Ciavarella cannot show cause to overcome his procedural default; *second*, the jury instructions at trial were consistent with McDonnell; and *third*, assuming instructional error, the evidence at trial would nonetheless support a guilty verdict under McDonnell.[6] (Doc. 360 at 1-21).

Our analysis begins and ends with the issue of procedural default. When a defendant fails to raise a claim on direct appeal, he "procedurally defaults" the claim for purposes of collateral review. See Bousley v. United States, 523 U.S. 614, 622 (1998). A defendant may overcome default in two ways: by demonstrating "that he is 'actually innocent,'" or by showing "cause" and "actual 'prejudice'" should the default be given preclusive effect. Id. Ciavarella argues cause and prejudice alone. (Doc. 356 at 28-44). Only if both elements are met may we consider his defaulted claim. See United States v. Jenkins, 333 F.3d 151, 155 (3d Cir. 2003) (citing Frady, 456 U.S. at 167; Bousley, 523 U.S. at 622).

1. *Procedural Default – Cause*

Ciavarella asserts that the argument for a proper jury instruction on the definition of "official act" was not reasonably available to his trial counsel because McDonnell was not decided until 2016, more than five years after his trial. (Doc. 356 at 29). To support this argument, Ciavarella relies exclusively on a report and recommendation issued in Cordaro v. United States, No. 3:17-CV-215, Doc. 34 (M.D.

[6] The government does not dispute that Ciavarella's proposed claim is timely under 28 U.S.C. § 2255(f)(3) or that McDonnell is retroactively applicable to cases on collateral review. (Doc. 342 at 5 n.1). Because we hold that Ciavarella cannot overcome his procedural default, we do not address these issues further.

Pa. Sept. 1, 2017), adopted without objection by 2017 WL 6311696, *6 (M.D. Pa. Dec. 11, 2017). Cordaro is legally distinguishable.

Cordaro concerned a petition brought pursuant to Section 2241, which carries a unique gatekeeping standard distinct from the procedural default paradigm under Section 2255. See Cordaro, 2017 WL 6311696, at *6. The defendant in Cordaro had been convicted for various actions taken in his capacity as county commissioner and sought to invoke McDonnell to invalidate a number of those convictions. See Cordaro, No. 3:17-CV-215, Doc. 34 at 1. The magistrate judge acknowledged that the Third Circuit allows an "extremely narrow" category of Section 2241 petitions to proceed when the petitioner claims actual innocence and "has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision issued." Id. at 17-19 (quoting Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017)). The magistrate judge opined that, because Cordaro had no prior opportunity to challenge his convictions after McDonnell issued, Section 2241 was available as a means to seek relief. Id. at 21.

The standard for procedural default of Section 2255 claims is different. To show cause adequate to overcome procedural default, a defendant must establish that an "objective factor external to the defense" prevented him from advancing the claim at a procedurally appropriate time. United States v. Pelullo, 399 F.3d 197, 223 (3d Cir. 2005) (quoting McCleskey v. Zant, 499 U.S. 467, 493 (1991)). Factors sufficient to excuse default include, *inter alia*, "a showing that the factual or legal basis for a claim was not reasonably available to counsel" at the relevant time. Id. (quoting Wise v. Fulcomer, 958 F.2d 30, 34 n.9 (3d Cir. 1992)). It is of no moment

that "subsequent legal developments have made counsel's task easier." Smith v. Murray, 477 U.S. 527, 537 (1986). We consider only whether, at the time of the default, "the claim was 'available' at all." Id.

Ciavarella fails to demonstrate that the legal basis for his instant claim was not reasonably available to him at trial. Despite ample opportunity to brief the issue of default, Ciavarella has not identified a single, objective impediment—legal or factual—to asserting a claim of instructional error at trial. (See Doc. 356 at 29-32). He argues only that he could not have been expected to raise an argument akin to McDonnell until the Supreme Court issued its decision in June of 2016.

The law is clear that a claim is not futile simply because it may have been "unacceptable to a particular court at that particular time." Bousley, 523 U.S. at 623 (internal quotation marks omitted). Other defendants raised the argument prior to McDonnell being decided. See, e.g., United States v. Jefferson, No. 1:07-CR-209, 2017 WL 4423258, at *10-11 (E.D. Va. Oct. 4, 2017) (finding McDonnell claim was not procedurally defaulted because defendant objected to instruction as being overbroad at trial). And McDonnell itself is grounded, in part, in the Court's prior jurisprudence. See McDonnell, 136 S. Ct. at 2367-68, 2370 (quoting United States v. Sun-Diamond Growers of Cali., 526 U.S. 398 (1999)). Even Cordaro, the decision invoked by Ciavarella himself, recognizes that the claim of instructional error "may have been viable under circuit and Supreme Court precedent as it existed" prior to McDonnell. See Cordaro, No. 3:16-CV-215, Doc. 34 at 21.

This is not a case where the Supreme Court overruled its precedent, overturned a unanimous body of lower court authority, or rebuked a practice

arguably sanctioned by its prior decisions, placing an earlier claim outside of the defendant's reach at trial. Cf. Reed v. Ross, 468 U.S. 1, 17 (1984); see also Parkin v. United States, 565 F. App'x 149, 151-52 (3d Cir. 2014) (nonprecedential). The Supreme Court simply sought to, and did, "clarify the meaning of 'official act.'" McDonnell, 136 S. Ct. at 2361. There is no justification for Ciavarella's failure to challenge the breadth of the instructions at trial. Accordingly, Ciavarella has not established cause for his procedural default.

2. *Procedural Default – Prejudice*

Assuming *arguendo* that Ciavarella could establish cause, he nonetheless fails to demonstrate prejudice. Ciavarella contends that, in view of McDonnell, he may now be incarcerated for lawful conduct. (Doc. 356 at 33-44). The government rejoins that the trial court's instructions were consistent with McDonnell and that, assuming error, Ciavarella cannot show actual prejudice. (See Doc. 360 at 5-21).

McDonnell involved a public corruption prosecution against former Virginia Governor Robert McDonnell ("McDonnell"). See McDonnell, 136 S. Ct. 2355. Over a three year period, McDonnell accepted more than $175,000 in payments, gifts, and loans from a Virginia businessman in exchange for McDonnell's efforts in hosting various events and coordinating meetings with other state officials. See id. at 2361-64. At trial, several charges required the jury to find that McDonnell had accepted these payments in exchange for an "official act" under the federal bribery statute, 18 U.S.C. § 201. See id. at 2361, 2365-66. The trial court first provided the statutory definition of "official act": "The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any

time be pending, or which may by law be brought before any public official, in such public official's official capacity." United States v. McDonnell, 792 F.3d 478, 505 (4th Cir. 2015) (quoting 18 U.S.C. § 201(a)(3)). The court further instructed:

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

Id. at 505-06.

The district court denied McDonnell's request for more restrictive instructions, *viz.*, that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts,' even if they are settled practices of the official," or that an official act "must intend to or 'in fact influence a specific official decision the government actually makes—such as awarding a contract, hiring a government employee, issuing a license, passing a law, or implementing a regulation.'" McDonnell, 136 S. Ct. at 2366. The jury convicted McDonnell of honest services fraud, extortion, and other offenses, and the Fourth Circuit Court of Appeals upheld the conviction. See McDonnell, 792 F.3d 478.

The Supreme Court granted *certiorari* and reversed. See McDonnell, 136 S. Ct. 2355. The Court held that official action comprises two components: *first*, a particularized "question, matter, cause, suit, proceeding or controversy" which "may at any time be pending" or "may by law be brought" before a public official, and *second*, a decision or action "on" that question, matter, cause, suit, proceeding or controversy, or an agreement by the official to do so. Id. at 2368. Regarding each of these requirements, the Court elucidated:

> [A]n "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. 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. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act."

Id. at 2371-72.

After clarifying the definition of "official act," the Court determined the trial judge's instructions to be "significantly overinclusive" and lacking "important qualifications." Id. at 2373-74. The Court took issue specifically with the district court's statement, *inter alia*, that official acts "may include acts that a public official customarily performs," including acts taken "in furtherance of longer-term goals"

or "in a series of steps to exercise influence or achieve an end." Id. at 2373. The Court also noted that the trial court failed to adequately explain how to identify the question, matter, cause, suit, proceeding or controversy at issue; that same must be specific and focused and not merely a broad policy objective; and that the public official must decide or act "*on*" the particular question, matter, cause, suit, proceeding or controversy. Id. at 2374. Absent such clarifications, the Court found that the jury may have erroneously convicted McDonnell solely for arranging calls or meetings, without finding that he agreed to make a decision or take an action on a properly defined issue. Id. at 2374-75. The Court vacated McDonnell's convictions and remanded for further proceedings.

With McDonnell's clarifications in mind, we examine the instructions provided to the jury in this case. The court specifically instructed the jury as follows:

> . . . The term official act includes any act within the range of the official's duty of a public official and any decision, recommendation or actions on any question, matter, cause, proceeding or controversy which at any time may be pending or which may by law be brought before any public official in such public official's capacity.
>
> Official acts include decisions or actions generally expected of the public official. In addition, official action includes the exercise of both formal official influence such as a judge's performance and duties in court proceedings and informal official influence such as the judge's behind-the-scenes influence on the other judges or employees of the judiciary.
>
> Official action also includes a public official's altering his or her official acts, changing the position which he or she would otherwise have taken or taking action in his or her

> official capacity that he or she would not have taken but for the scheme. . . .

(2/16/11 Trial Tr. 77:5-22).

The instructions provided by Judge Kosik are arguably overbroad. The instructions expand the definition of "official act" to include not only actions or decisions on a question, matter, cause, suit, proceeding or controversy, McDonnell, 136 S. Ct. at 2371-72, but also "*any act within the range* of the official's duty [as] a public official." (2/16/11 Trial Tr. 77:5-10 (emphasis added)). Combined with the unqualified statement that official acts "include decisions or actions generally expected of the public official," (id. at 77:11-12), the jury instructions in this case align closely with similarly broad language—that official acts "include acts that a public official customarily performs"—held to be overinclusive by the Supreme Court. McDonnell, 136 S. Ct. at 2373-74.

The parallels between this case and McDonnell end there. To establish prejudice and overcome procedural default, Ciavarella must demonstrate that the instructional error "so infected the entire trial that the resulting conviction violates due process." Frady, 456 U.S. at 169. Based on the trial record, we cannot find that Ciavarella would have benefitted from more restrictive instructions.

Ciavarella asserts that the act of connecting two private businessmen to discuss constructing a private juvenile placement facility cannot qualify as an official act under McDonnell. (See Doc. 356 at 41-42). Were facilitation of this business relationship the sole basis of Ciavarella's honest services mail fraud convictions, we would be inclined to agree. But Ciavarella's actions were not so

innocuous as merely bringing two private parties together to discuss private business. In charging documents and in evidence at trial, the government identified manifold acts which remain unlawful in McDonnell's wake.

The evidence showed that Ciavarella and Conahan shared a common objective with the businessmen and worked steadfastly to facilitate that objective. For example, the record reflects that defendants worked with Powell and Mericle to create a placement agreement between PACC and Luzerne County to secure financing for the new detention facility, which lease obligated the county to house juvenile offenders at PACC. (See 2/9/11 Trial Tr. 118:4-121:23, 123:17-125:1, 154:8-18; 2/10/11 Trial Tr. 81:13-84:10); see also Ciavarella, 716 F.3d at 714. Testimony at trial generally established that Ciavarella worked to shutter the county's existing juvenile detention center, thwarted efforts to build a new county center, and moved the county's best juvenile detention employees to PACC. (See 2/9/11 Trial Tr. 124:4-125:1); see also Ciavarella, 716 F.3d at 731. The record also showed that Ciavarella "leveraged" his appointment to the Juvenile Court to place hundreds of juveniles at PACC and ensure success of the business venture, and that he expected a share of its profits in return. (See 2/9/11 Trial Tr. 142:5-143:21); Ciavarella, 716 F.3d at 714.

McDonnell is distinguishable on this central point. The full extent of the government's case against McDonnell were its allegations that the former governor had arranged meetings, hosted events, and made calls in exchange for payments, gifts, and loans. See McDonnell, 136 F.3d at 2365-66. In this case, *per contra*, the government has never argued or suggested that Ciavarella's introduction of Powell and Mericle itself constituted a criminally cognizable "official act." Compare (Doc.

134 at 3-4, 35-38, 42-43; 2/16/11 Trial Tr. 7:1-36:6) with McDonnell, 136 S. Ct. at 2365-66. The government's position *sub judice* has always been Ciavarella forced the county-run juvenile detention center to close, forestalled efforts to construct a new county center, facilitated construction of a private detention center, and placed the county's juvenile offenders there in exchange for money. (See generally Doc. 134; 2/16/11 Trial Tr. 7:1-36:6); see also Ciavarella, 716 F.3d at 713-15. The jury's verdict reflects its finding that the government proved this theory with respect to the January 2003 payments. (See Doc. 216 at 1-2).

We have little difficulty concluding that Ciavarella's conduct falls squarely within the category of "official acts" as clarified by McDonnell. The Third Circuit recently resolved that "facilitation of the award of [municipal] contracts is an 'official act'" as defined by the Supreme Court. United States v. Repak, 852 F.3d 230, 254 (3d Cir. 2017). Ciavarella's efforts to facilitate an agreement between the county and PACC, one which he profited from considerably, constitutes an "official act" both before and after McDonnell. The government also established that, after facilitating the agreement, Ciavarella ordered countless children to be detained at PACC, ensuring continued financial success of the facility. See Ciavarella, 716 F.3d at 714. This conduct is not merely "similar in nature to" a case pending before a court—it *is* action by the court. See McDonnell, 136 S. Ct. at 2371-72. We find that a jury provided with a more nuanced post-McDonnell instruction would convict Ciavarella all the same. Ciavarella cannot overcome his procedural default.

IV. Conclusion

For the reasons stated herein, the court will grant in part and deny in part Ciavarella's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. In light of clear Third Circuit precedent, we are compelled to vacate Ciavarella's convictions on Counts 1, 2, and 21 of the superseding indictment and to convene a new trial wherein a proper statute of limitations instruction will be given. The court will deny Ciavarella's Section 2255 motion to the extent he seeks a new trial on Counts 8, 9, and 10 of the superseding indictment.

The court will schedule a new trial forthwith during which a jury will test the defendant's guilt or innocence on Counts 1, 2, and 21 of the superseding indictment. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: January 8, 2018

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Mark A. Ciavarella, Jr. — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

PROOF OF SERVICE

I, Jennifer P. Wilson, do swear or declare that on this date, July 31, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Stephen R. Cerutti, II, Esq., Office of U.S. Attorney, 228 Walnut St., PO Box 117544, Harrisburg, PA 17108

Solicitor General of the U.S., Dep't of Justice, 950 Pennsylvania Ave., N.W., Rm. 5616, Washington, D.C. 20530

Mark A. Ciavarella, Jr., FCI Ashland, Reg. No. 15008-067, PO Box 6001, Ashland, KY 41105

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 31, 2019

_____
(Signature)