

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS ALBANESE — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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INCARCERATED
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QUESTION(S) PRESENTED

- I. WHETHER BUCK v. DAVIS, 137 S. CT. 759 (2017) COMPELS A COURT TO REDRESS A PRIOR DENIAL OF A PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY THAT WAS BASED ON AN ACTUAL MERITS DETERMINATION WITHOUT JURISDICTION?
- II. WHETHER A DEFENDANT'S DUE PROCESS RIGHTS ARE VIOLATED WHEN THERE IS SUBSTANTIAL EVIDENCE THAT HIS MOTION WAS SO NASTILY DENIED THAT THE POSSIBILITY OF HAVING RECEIVED ANY MEANINGFUL REVIEW IS IMPLAUSIBLE?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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- Appendix B. ORDER DENYING MOTION FOR RECONSIDERATION, (construed as
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14-3863 (3d Cir., December 7, 2017) (CF. Appendix F, hereto)
- Appendix C. ORDER DENYING CERTIFICATE OF APPEALABILITY,
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U.S. District Court, No. 2:14-CV-03815 (E.D. Pa., July 8, 2014)
(CF. Crim. Case No. 2:97-CR-00359 (E.D. Pa.))
- Appendix E. MOTION TO RECALL THE MANDATE,
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TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

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NIXON v. BEARD, 361 Fed. Appx. 304 (3d Cir. 2010)
DAY v. McDONOUGH, 547 U.S. 198 (2006)
UNITED STATES v. BENDOLPH, 409 F.3d 155 (3d Cir. 2005)
BUXTON v. PENNSYLVANIA, 398 Fed. Appx. 704 (3d Cir. 2010)
MILLER v. NEW JERSEY STATE DEPT OF CORR., 145 F.3d 616 (3d Cir. 1998)

STATUTES AND RULES

28 U.S.C. § 2253 (c)

28 U.S.C. § 2255

OTHER

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.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A, B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 26, 2017, Appendix A (Order).

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 7, 2017, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the U.S. Constitution

28 U.S.C. § 2253(c)(1)-(2)

STATEMENT OF THE CASE

RE: Question I.

This case involves a claim that the Third Circuit Court of Appeals has denied a motion seeking redress of a prior denial of an application for a certificate of appealability ("COA"), 28 U.S.C. § 2253(c)(2), that was based on an impermissible merits determination at the COA stage. This Court's subsequent decision in Buck v. Davis, 137 S.Ct. 759 (2017) makes clear that such a denial was manifestly incorrect since the Court of Appeals lacked jurisdiction to adjudicate the merits at the COA stage. Petitioner urges that he has been denied due process by the Third Circuit's unwillingness to redress a manifestly incorrect judgment, particularly where the Third Circuit lacked jurisdiction to make the merits determination at the COA stage. Petitioner's Petition for Panel Rehearing, following the denial of the COA, raised the nearly identical points that have now been affirmed to be correct in Buck.

This issue originated from the U.S. District Court for the Eastern District of Pennsylvania, when that Court denied Petitioner's 28 U.S.C. § 2255 motion on untimeliness grounds. SEE: NICHOLAS ALBANESE V. UNITED STATES OF AMERICA, 2:14-CV-03815 (E.D. Pa. 2014). Petitioner then filed a Motion for Reconsideration, pursuant to Fed. R. Civ. P. 59(e), arguing that the District Court had allowed the Government to respond setting forth an affirmative defense of untimeliness — and then signed the Government's proposed order of dismissal without ever affording Petitioner any opportunity to respond on the issue of timeliness, including equitable tolling. The District Court denied the Rule 59(e) motion, reasserting its earlier conclusion that the Section 2255 motion was untimely and that the Petitioner had not made any demonstration for equitable tolling. In fact, the District Court concluded that equitable tolling was not warranted without giving Petitioner the opportunity to reply at all.

Appendix D.

Petitioner then filed a timely Notice of Appeal and an application for a certificate of appealability ("COA") to the Third Circuit Court of Appeals. Appeal No. 14-3863. Petitioner argued, inter alia, that a COA was warranted because the District Court sustained the Government's response setting forth an affirmative defense of untimeliness without ever affording Petitioner any opportunity to reply, nor notice, prior to the dismissal. Petitioner specifically argued that it was wrong for the District Court to determine that he was not entitled to equitable tolling — without ever giving him an opportunity to reply, prior to dismissal, demonstrating that equitable tolling would be warranted. Cf. Appendix E (Mot. to Recall the Mandate).

On March 3, 2015, the Third Circuit denied Petitioner's application for a COA. In pertinent part, the Court's Order indicates that its denial was based on a failure to show that equitable tolling was warranted. Petitioner immediately filed a

Petition for Panel Rehearing, pursuant to Fed. R. App. P. 40, urging that the Court had decided a fundamentally different consideration than that presented. Petitioner explained that while the Court had made a determination that he did not prove any entitlement to equitable tolling — the actual point of debatability at the COA stage was whether Petitioner was improperly denied any opportunity by the District Court to have done so prior to dismissal. Petitioner explained that he had not even endeavored to make an equitable tolling demonstration at the COA stage since the very issue he sought to raise in an appeal was whether he was denied the very opportunity to make an equitable tolling demonstration at all. Whether he was entitled to equitable tolling was properly the merits of an appeal. The Third Circuit denied

the Petition for Panel Rehearing without any further analysis or opinion, on March 31, 2015.

Finally, following the Supreme Court's decision in BUCK v. DAVIS, 137 S.Ct. 759 (2017), Petitioner filed a Motion to Recall the Mandate and Reinstate the Appeal. SEE: Appendix A. Therein, Petitioner had argued that BUCK compelled the Court to recall its mandate because the denial of his COA was improperly based on an actual adjudication of the merits — the determination that equitable tolling was not warranted. Petitioner explained that a showing of an entitlement to equitable tolling had not been the point of debatability presented in the COA, but rather that he was never given any opportunity to

make that showing — or any timeliness showing — prior to dismissal. Denying the COA based on a lack of a showing that equitable tolling was warranted constituted a merits determination. Petitioner relied upon BUCK to argue that the Court of Appeals lacked jurisdiction to make that merits assessment — particularly when that was not the issue. Whether Petitioner could or could not make an equitable tolling showing was different than whether he was ever allowed any opportunity to fairly do so. Petitioner asked the Third Circuit to recall its mandate in light of BUCK, and permit him an opportunity to make an equitable tolling showing — or reconsider the actual point of debatability anew. The Motion to Recall the Mandate

was denied on October 26, 2017. see: Appendix A (Order).

RE: Question II.

This case additionally involves a related, yet separate question, of whether Petitioner's due process rights were violated based on substantial evidence that the Third Circuit's denial of his Motion to Recall the Mandate had occurred under circumstances that made it implausible that any meaningful review had been provided. Specifically, as detailed in Petitioner's Motion for a Definite Statement of the Court — construed by the Court of Appeals as a Motion for Reconsideration — there was no adequate time to have meaningfully considered the issues, exhibits, and briefing from the prior COA. These reasons are discussed *infra* under Question I. CF. Appendix F (Motion

for a Definite Statement of the Court). Without any further analysis or opinion the Third Circuit denied the motion. see: Appendix B (Order).

This timely petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

The Court's discretionary review is appropriate and necessary in this instance because the due process concerns at issue in Petitioner's case are shared by many other criminal defendants throughout the country. Following this Court's decision in BUCK v. DAVIS, 137 S.Ct. 759 (2017) (holding that a court lacks jurisdiction to deny a certificate of appealability, "COA", based on its adjudication of the actual merits), there is an emergence of criminal defendants, like Petitioner, who have previously been denied COA's based upon an impermissible adjudication of the merit(s). Given the importance of the COA stage for a habeas (28 U.S.C. § 2255) petitioner — providing perhaps the final opportunity to obtain judicial review or correction — a significant federal due process question arises as to whether BUCK compels a court to provision redress in cases where the court lacked jurisdiction to deny a petitioner's COA based on an actual merit(s) determination. This Court's guidance is necessary to insure the equal application of this Court's precedents amongst the lower courts. This Court's clarification of an appropriate remedial mechanism for courts who have previously denied COA's contrary to BUCK will insure the observance and protections of a petitioner's due process rights, including meaningful review.

QUESTION ONE

WHETHER BUCK v. DAVIS, 137 S.Ct. 759 (2017)
COMPELS A COURT TO REDRESS A PRIOR DENIAL
OF A PETITIONER'S APPLICATION FOR A
CERTIFICATE OF APPEALABILITY THAT WAS
BASED ON AN ACTUAL MERITS DETERMINATION
WITHOUT JURISDICTION?

Prior to the filing of any appeal from the
denial of a 28 U.S.C. §2255 motion, a petitioner
must first obtain permission from either the
District Court or Court of Appeals by filing an
application for a certificate of Appealability ("COA").
28 U.S.C. §2253(c)(1)-(2).

Following the denial of his 28 U.S.C.
§2255 motion, Petitioner filed a timely Notice
of Appeal. UNITED STATES v. NICHOLAS ALBANESE, Case

No. 2:14-cv-03815-JCT (E.D. Pa.). Petitioner then filed an application for a certificate of appealability ("COA") to the Third Circuit Court of Appeals. Appeal No. 14-3863. Pertinent to the instant consideration, Petitioner argued that a COA was warranted because jurists of reason would find the District Court's dismissal of his initial Section 2255 motion to be debatable or wrong since the Court had allowed the Government to file a response asserting an affirmative defense of untimeliness, and summarily dismissed Petitioner's §2255 motion without permitting him any notice or

opportunity to file a reply or otherwise demonstrate the timeliness of the motion. The District Court's dismissal order, as well as a subsequent order denying Petitioner's Fed. R. Civ. P. 59(e) Motion for Reconsideration,^{1/} concluded that Petitioner's Section 2255 motion was untimely and that he was not entitled to equitable tolling. Petitioner explained that the District Court's resolution of the §2255 was debatable or wrong in light of both Supreme Court and Third Circuit precedents. The point of debatability for purposes of the COA was solely that Petitioner was

^{1/} SEE: APPENDIX D

not provided notice nor opportunity to demonstrate timeliness of the §2255 motion, including demonstration that equitable tolling was appropriate.

The Third Circuit ultimately denied the COA, stating in pertinent part, that Petitioner had not "made a substantial showing that equitable tolling was warranted." Appeal No. 14-3863 (Order denying COA).^{2/} Petitioner then filed a Petition for Panel Rehearing, pursuant to Fed.R.App.P. 40, urging that the Court had erred by deciding a fundamentally different consideration than that presented in the COA. Petitioner explained that the

^{2/} SEE: APPENDIX C

Court made a determination that he did not prove any entitlement to equitable tolling — when the actual point of debatability at the COA stage was whether Petitioner was improperly denied any opportunity by the District Court to have done so. On March 31, 2015, the Third Circuit Court of Appeals denied Petitioner's Petition for Panel Rehearing.^{3/4/} CF. Appendix E (detailing procedural history).

BUCK v. DAVIS, 137 S.Ct. 759 (2017)

On February 22, 2017, the U.S. Supreme Court subsequently decided BUCK v. DAVIS, No. 15-8049, 137 S.Ct. 759 (2017), holding that, "When a court of

^{3/} Notably, a careful review of Petitioner's Petition for Panel Rehearing of the Third Circuit's denial of the COA made the precise points that would eventually be affirmed in the BUCK decision.

^{4/} Petitioner's petition for a writ of certiorari to the U.S. Supreme Court raised the same points affirmed in BUCK, but was denied prior to BUCK.
see: NICHOLAS ALBANESE v. UNITED STATES, No. 14-10104 (U.S. Oct. 5, 2015).

appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, It is in essence deciding an appeal without jurisdiction." BUCK, 137 S.Ct. at 773.

In reliance upon BUCK, Petitioner filed a Motion to Recall the Mandate and Reinstate the Appeal to the Third Circuit Court of Appeals.

SEE: Appendix E (Appeal No. 14-3863)

Petitioner explained therein that recall of the mandate was necessary because the Court's prior judgment denying his COA was manifestly incorrect in light

of BUCK. Specifically, the Court's denial of Petitioner's COA was predicated upon an actual adjudication of the merits of equitable tolling. The Third Circuit had denied the COA by concluding that the Petitioner had not "made a substantial showing that equitable tolling was warranted." This is unequivocally an adjudication of the equitable tolling merits or timeliness merits that would have properly been the subject of an appeal had the COA been granted. This is so because the

only issue related to timeliness or equitable tolling in the COA was the issue that prisms of reason would have found it debatable or wrong that Petitioner was never given any opportunity to file a reply or make these showings. The issue in the COA was strictly that Petitioner was improperly denied any opportunity to even make an equitable tolling demonstration — not that he had, could have, or did. In fact, in the COA Petitioner had

never even endeavored to make any equitable tolling demonstration because that was not the point of debatability on the COA at all. Petitioner explained that a COA should have issued so that he would be able to present the equitable tolling and timeliness showing in an appeal.

Indeed, a careful comparison of the Fed. R. Civ. P. 59(e) Motion for Reconsideration^{5/} in the District Court following the §2255 motion denial, with the Third Circuit's order denying Petitioner's COA^{6/}, reveals that both Court's adjudicated the actual merits

^{5/} SEE: APPENDIX D

^{6/} SEE: APPENDIX C

of timeliness and equitable tolling without ever having provided Petitioner with any opportunity to make such showings. The District Court made its merits determinations without giving Petitioner any chance to reply to the Government's affirmative defense of timeliness — and, the Third Circuit similarly made a merits determination of timeliness and that equitable tolling was not warranted without giving Petitioner any opportunity to make such showings because a review of the COA establishes that making a showing of equitable tolling was not even the

subject for consideration in the COA, but rather the debatability of whether the District Court had denied Petitioner the very opportunity to do so. Here, the Third Circuit clearly sidestepped the proper analysis at the COA stage and supported its denial of a COA by determining the merit of whether the Petitioner had made a substantial showing that equitable tolling was warranted. On October 26, 2017, the Third Circuit nevertheless denied Petitioner's Motion to Recall the Mandate. SEE: Appendix A (Order).

The Third Circuit also denied an ensuing Motion for Reconsideration. SEE: Appendix B (Order) (filed as a Motion for a Definite Statement but construed as reconsideration. CF. APPENDIX F).

Since the point of debatability on the COA was whether Petitioner should have been afforded an opportunity to reply on the issues of timeliness and equitable tolling prior to dismissal of his Section 2255 by the District Court — and not whether he failed to make such a showing — the Third Circuit's denial of the COA was a merits determination that no showing warranting equitable tolling was made is an improper analysis and consideration at the COA stage.^{7/} The required showing of timeliness or equitable tolling was the proper subject of an appeal if the COA was granted. Both the District Court and the Third Circuit essentially concluded that Petitioner could not or did

^{7/} CF. APPENDIX C and APPENDIX E.

not make the requisite showing by denying him any opportunity to do so.

Respectfully, Petitioner urges that this Court should vacate the judgment of the Third Circuit's denial of his COA and subsequent Motion to Recall the Mandate. The Third Circuit's improper merits determination at the COA stage contravenes important due process interests of Petitioner in the habeas process, and the court lacks jurisdiction to decide the merits of an appeal at that juncture. Buck, 137 S.Ct. at 773. Petitioner beseeches the Court to conclude that its decision in Buck compels the Third Circuit to provision redress of the denial of his COA based upon an improper merits determination. An

injustice will result in some cases, like Petitioner's, if there is no affirmative guidance from this Court that BUCK compels redress of a prior COA based upon an improper merits determination.

Petitioner's prayer, particular to him, is that this Court would vacate the prior judgment and remand this matter for further consideration, or remand this matter with instructions for the Third Circuit to grant Petitioner's prior COA to the extent that he is given a full and fair opportunity to demonstrate timeliness and an entitlement to equitable tolling in an appeal. "[A] habeas petitioner must first be afforded fair notice and an opportunity to be heard on the issues of timeliness and equitable tolling [prior to dismissal]." NIXON v.

BEARD, 361 Fed. Appx. 304, 305-06 (3d. Cir. 2010) (citing DAY v. McDONOUGH, 547 U.S. 198, 209-10 (2006)) (emphasis added); UNITED STATES v. BENDOLPH, 409 F.3d 155, 168 (3d. Cir. 2005); BUXTON v. PENNSYLVANIA, 398 Fed. Appx. 704, 708 (3d. Cir. 2010) (remanding, stating, "The District Court should address the statute of limitations issue... after affording [petitioner] an opportunity to respond.") (emphasis added). SEE ALSO: DAY, 547 U.S. at 206-07 (The "parties must be afforded fair notice and an opportunity to present their positions [on the issue of timeliness].") (emphasis added); MILLER v. NEW JERSEY STATE DEP'T OF CORR., 145 F.3d 616, 618-19 (3d Cir. 1998) (granting COA to afford opportunity to make equitable tolling showing).

QUESTION TWO

WHETHER A DEFENDANT'S DUE PROCESS RIGHTS ARE VIOLATED WHEN THERE IS SUBSTANTIAL EVIDENCE THAT HIS MOTION WAS SO HASTILY DENIED THAT THE POSSIBILITY OF HAVING RECEIVED ANY MEANINGFUL REVIEW IS IMPLAUSIBLE?

Petitioner submits that the Third Circuit Court of Appeals's denial of his Motion to Recall the Mandate denying his COA, occurred under circumstances that violates his rights of due process because there is substantial evidence that the Court could not have had opportunity to conduct a meaningful and informed review. SEE: APPENDIX F.

Following the denial of Petitioner's Motion to Recall the Mandate, CF. Appendix A, E, Petitioner filed an Immediate Motion for a Definite Statement of the Court expressing his concern that it appeared the denial may have been a mistake since it was evident that there could not have been any meaningful consideration given to his motion under the circumstances. Specifically, as explained in Petitioner's Motion for a Definite Statement, Appendix F, the certified mail tracking number history indicates that the Motion to Recall the Mandate was delivered to the Third Circuit Clerk at 11:57 a.m. on October 26, 2017. The Court's Order denying the motion is dated the very same day. See; Appendix B (Order). The Order says the denial was a decision of two

judges. Petitioner expressed his troubling concern at the apparentness of the hastily rendered denial. With all due respect, it defies belief that within only a couple of hours left in the day that his motion could have possibly received a meaningful and informed consideration. see: APPENDIX F.

Here, the Clerk only received Petitioner's Motion to Recall the Mandate at noon. By the time the Clerk processed the motion, this means that both judges on the Court's Order would have had to have immediately stopped everything they were doing so that they could consider Petitioner's motion. It appears inconceivable that the judges could have truly had time to consider the substance of Petitioner's motion - which involved many

attached exhibits of briefing history, and would have required consideration of the COA briefing from three years prior and would have had to have been obtained and consulted. Then, even assuming the Court could work this quickly, and placed such a high priority on Petitioner's unanticipated motion arriving, the decision still would've had to have been given to the Clerk with enough time to have processed the dental Order. This all had to happen within a couple of hours at best — and assuming that the two separate judges on the Order dropped everything they were doing to address Petitioner's motion.

Petitioner's Motion for a Definite Statement of the Court, Appendix F, conveyed to the Court

that the scenario seemed so implausible so as to appear to have surely been a mistake. It wasn't.

On December 7, 2017, to Petitioner's utter dismay and disbelief, the Third Circuit construed his motion as a Motion for Reconsideration and denied the motion. See:

Appendix B (Order). No comment as to a confirmation that a meaningful review was provided appeared. Notably, Petitioner's Motion for a Definite Statement had additionally explained that the Court's hasty denial was troubling because the entire history of his litigation in the District Court, and on the COA, consists of an apparent unwillingness to permit Petitioner from obtaining a full and fair opportunity

to meaningfully litigate. In the District Court, Petitioner's §2255 motion was dismissed based on the Government's affirmative defense of untimeliness — without any opportunity for him to reply at all. Then, on the COA, the Third Circuit denied the application (contrary to Supreme Court and Third Circuit precedent) by making an actual adjudication of the merits by determining that Petitioner had not made a showing that equitable tolling was warranted — when the only point of debatability was that he was improperly denied the very opportunity to do so. Finally, when this Court's decision in Buck called into question the correctness of the Third Circuit's denial of Petitioner's COA

based on the improper merits determination, the circumstances under which his Motion to Recall the Mandate was hastily denied occasions a substantial concern that the possibility of a meaningful review having occurred is implausible.

Petitioner submits that, for the foregoing reasons, there exists sufficient evidence to create a grave doubt that his rights of due process were afforded when the Third Circuit's denial of the Motion to Recall the Mandate occurred under circumstances that rendered any meaningful review implausible. Certiorari review is necessary in this case so that lower courts will be required to provide a meaningful basis for its decision when there exists substantial evidence that a meaningful review was implausible, so as to insure due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nicholas Albanese

Date: January 26, 2018 → Remailed March 12, 2018

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(per Court order to
correct appendix)