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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 26, 2017

No. 14-3863

UNITED STATES OF AMERICA

v.

NICHOLAS ALBANESE
a/k/a Stoney Oaks

NICHOLAS ALBANESE,
Appellant

(E.D. Pa. No. 2-97-cr-00359-003)

Present: FISHER and SHWARTZ, Circuit Judges

1. Motion by Appellant to Recall Mandate and Reinstate the Appeal

Respectfully,
Clerk/cjg

ORDER

The foregoing motion by Appellant to recall mandate and reinstate the appeal is denied.

By the Court,

s/ Patty Shwartz
Circuit Judge

Dated: October 27, 2017

sb/cc: David E. Fritchey, Esq.

Nicholas Albanese

Appendix A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

December 7, 2017

No. 14-3863

UNITED STATES OF AMERICA

v.

NICHOLAS ALBANESE,
a/k/a Stoney Oaks

NICHOLAS ALBANESE,
Appellant

(E.D. Pa. No. 2-97-cr-00359-003)

Present: FISHER and SHWARTZ, Circuit Judges

ORDER
Motion by Appellant Nicholas Albanese for Reconsideration of the Court's
Order dated 10/27/17.

Respectfully,
Clerk/clw

ORDER

The foregoing motion by Appellant Nicholas Albanese for reconsideration of the Court's
Order dated 10/27/17 is denied.

By the Court,

s/ Patty Shwartz
Circuit Judge

Dated: December 8, 2017

sb/cc: Nicholas Albanese

David E. Fritchey, Esq.

Appendix B

DLD-119

February 26, 2015

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 14-3863

UNITED STATES OF AMERICA

VS.

NICHOLAS ALBANESE, a/k/a Stoney Oaks, Appellant

(E.D. Pa. Crim. No. 2-97-cr-00359-003)

Present: FISHER, SHWARTZ and SLOVITER, Circuit Judges

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1),

in the above-captioned case.

Respectfully,

Clerk

MMW/CWS/clw

ORDER

Appellant's request for a certificate of appealability is denied, for reasonable jurists would debate neither the District Court's dismissal of appellant's 28 U.S.C. § 2255 motion as time-barred, nor the court's denial of his motion for reconsideration. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). In neither his Rule 59(e) motion nor his papers filed with us has appellant made a substantial showing that equitable tolling was warranted. See id.

By the Court,

s/ D. Michael Fisher

Circuit Judge

Dated: March 3, 2015

CLW/cc: David E. Fritchey, Esq.

Mr. Nicholas Albanese



A True Copy

Marcia M. Waldron

Marcia M. Waldron, Clerk

Certified order issued in lieu of mandate.

Appendix C

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :

v.

: CRIMINAL NO. 97-359-03

NICHOLAS ALBANESE :

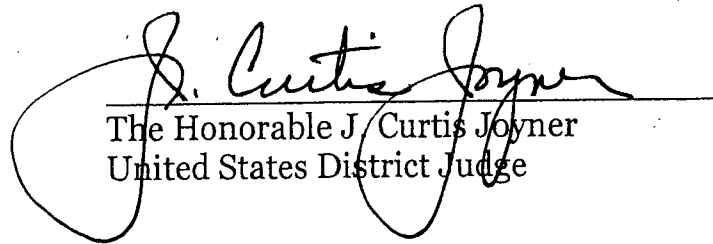
ORDER

AND NOW, this ^{8th} day of July, 2014 upon consideration of the government's motion to dismiss the defendant's motion under 28 U.S.C. § 2255 as untimely, it is hereby

ORDERED

that the motion is GRANTED. The motion was filed over 12 years and 9 months after the deadline set forth in 28 U.S.C. § 2255 expired, and the defendant is not entitled to equitable tolling, as he faced no impediment in researching or presenting a claim, and also did not exercise reasonable diligence.

BY THE COURT:


The Honorable J. Curtis Joyner
United States District Judge

Appendix D

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
NO. 97-CR-359-3

VS. :

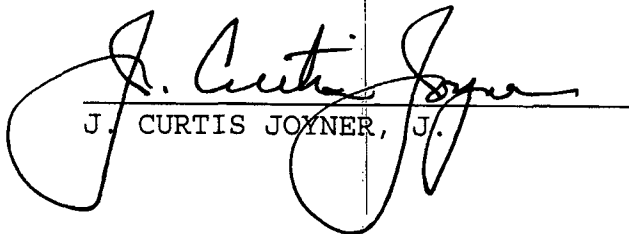
NICHOLAS ALBANESE : CIVIL ACTION
NO. 14-CV-3815

ORDER

AND NOW, this 23rd day of September, 2014, upon consideration of the Defendant's Motion for Reconsideration of the Court's Order granting the Government's Motion to Dismiss Petitioner's Motion under 28 U.S.C. §2255, pursuant to Fed.R.Civ.P. 59(e) (Document 575), this Court again determines that the Defendant's motion pursuant to 28 U.S.C. §2255 is untimely and the Government's Motion to Dismiss was properly granted. Defendant's motion was filed well after the deadline set forth in 28 U.S.C. §2255 and he has failed to show he is entitled to any equitable tolling.¹

We further find that there is no probable cause to issue a certificate of appealability.²

BY THE COURT:


J. CURTIS JOYNER, J.

Appendix D

1. Although this Court granted the Government's motion to dismiss before a response from the Defendant, it is apparent that even considering Defendant's response, the motion was properly granted. See United States v. Swinton, 333 F.3d 481 (3d Cir. 2003); United States v. Reynes, ___ F.3d ___, 2014 WL 2747216 (3d Cir. June 18, 2014).

2. A certificate of appealability should not be granted when a Section 2255 motion is procedurally defective unless Petitioner demonstrates that jurists of reason would find debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the district court was correct in its procedural ruling. Slack v. McDaniels, 529 U.S. 473, 484 (2000); 28 U.S.C. §2253(c). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Slack, 529 U.S. at 484. In view of the Petitioner's untimely motion, a reasonable jurist would conclude that the Court would be correct in denying the Section 2255 motion as untimely. Accordingly, a certificate of appealability should not issue.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NICHOLAS ALBANESE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

*

Appeal No. 14-3863

*

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania, at
Philadelphia

*

(USDC No. 2:14-CV-03815-JCJ)

*

*

APPELLANT ALBANESE'S
MOTION TO RECALL THE MANDATE
AND REINSTATE THE APPEAL

COMES NOW, Appellant, NICHOLAS ALBANESE, ("Albanese"), in proper person,^{1/} and hereby respectfully moves the Court to recall the mandate from the denial of his application for a certificate of appealability ("COA"), and reinstate the appeal, because correction of the Court's prior judgment is compelled by the U.S. Supreme Court's subsequent decision in BUCK v. DAVIS, No. 15-8049, 137 S.Ct. 759, 773 (2017) ("When a court of 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.")

As explained herein, recall of the mandate is necessary to prevent a manifest injustice. Contrary to BUCK, this Court's previous denial of Albanese's application for a COA was predicated upon an actual merits determination that he had not made a substantial showing that equitable tolling was warranted — while the actual issue was that the District Court never afforded him the opportunity.

^{1/} Albanese, proceeding pro se, requests that the Court construe his pleadings liberally so as to achieve substantial justice. HAINES v. KERNER, 404 U.S. 519, 520 (1972); UNITED STATES v. MILLER, 197 F.3d 644, 648 (3d Cir. 1999).

Albanese had argued only and specifically that the binding applicable precedents established that jurists of reason would find debatable or wrong the District Court's dismissal of his 28 U.S.C. §2255 motion on timeliness grounds without any opportunity afforded to reply to the Government's affirmative defense that the District Court sustained. This was also the same issue presented to the District Court in Albanese's Motion for Reconsideration, pursuant to Fed.R.Civ.P. 59(e). SEE: EXHIBIT B (Mot. For. Reconsid., at p. 1-3). Here, the basis of the denial of Albanese's COA — that he did not prove an entitlement to equitable tolling — constituted an adjudication of the merits of the appeal that would have ensued had the COA been granted.

This Court has the "inherent power" to recall its mandate, in "extraordinary circumstances." CALDERON v. THOMPSON, 523 U.S. 538, 549-50 (1998); AMERICAN IRON & STEEL INSTITUTE v. E.P.A., 560 F.2d 589, 594 (3d Cir. 1977). Albanese urges that because the Supreme Court's decision in BUCK calls into serious question the correctness of the Court's prior judgment, the circumstance is sufficiently exceptional so as to compel a recall of the prior mandate and reinstatement of the appeal. An injustice will result from the Court's decision to leave the prior judgment undisturbed. In support, Mr. Albanese respectfully submits:

I. Salient summary of relevant background facts.

28 U.S.C. §2255 Motion

In June 2014, Albanese filed his initial 28 U.S.C. §2255 motion. Case No. 2:14-CV-03815-JCJ (E.D. Pa.). After permitting the Government to respond, the District Court summarily dismissed the §2255 motion based on the Government's affirmative defense of untimeliness — signing the Government's proposed Order of dismissal the very same day it was proffered. SEE: EXHIBIT A (Order dismissing §2255, July 8, 2014). Significantly, Albanese was not afforded any notice or

opportunity to reply to the Government's affirmative defense prior to the dismissal.

Motion For Reconsideration, Fed.R.Civ.P. 59(e)

Mr. Albanese filed a Motion for Reconsideration, (SEE: EXHIBIT B), arguing inter alia, that the District Court's dismissal on timeliness grounds without any opportunity for Petitioner to reply contravened both the U.S. Supreme Court and Third Circuit precedents to the contrary. Albanese urged that he should have been given an opportunity to reply to the Government's affirmative defense of untimeliness that formed the basis of the Court's Order of dismissal. SEE: EXHIBIT B (Mot. for Recon., at p. 1-3). Albanese also contended that an evidentiary hearing was essential to timeliness considerations because certain pertinent facts, including those related to ineffective assistance of counsel, were outside the trial record and not before the Court. SEE: EXHIBIT B (Mot. for Recon., at p. 7-9). Albanese emphasized that he had been given no opportunity to come forward with evidence that might justify application of equitable tolling or otherwise establish that his claims were not time-barred. The District Court, apparently assuming that Albanese could not make such a showing, subsequently denied the Motion for Reconsideration by reaffirming that the Government's motion to dismiss was properly granted since Defendant's motion was untimely and he failed to show he is entitled to any equitable tolling. SEE: EXHIBIT C (Order denying Mot. for Recon., September 23, 2014).

Application for a COA to the Court of Appeals

Mr. Albanese filed an application for a COA to the Third Circuit Court of Appeals. Appeal No. 14-3863. Albanese submitted, inter alia,^{2/} that jurists of

^{2/} The underlying claims of Albanese's §2255 motion was that his sentence exceeded the statutory maximum based on a jury verdict of undetermined drug quantity — and that his trial/appellate counsel was ineffective in failing to convey the specific terms of the Government's proffered plea agreement that he would have otherwise accepted, and that when APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000) was decided during Albanese's direct appeal counsel failed to bring the decision to the attention of the Third Circuit.

reason would find debatable or wrong the District Court's dismissal of his \$2255 motion on timeliness grounds because the Court permitted the Government to file its response asserting the affirmative defense of untimeliness, sustained the proposed Order of dismissal the same day it was filed — and did not provide notice or an opportunity to file a reply to demonstrate either the timeliness of the motion or that equitable tolling was appropriate. SEE: COA, at p. 14-17. Albanese also argued that the District Court's dismissal was debatable since any demonstration of equitable tolling required an evidentiary hearing because the facts of Albanese's ineffective assistance of counsel claims and tolling considerations were outside of the trial record. SEE: COA, at p. 17-22.

On March 3, 2015, the Third Circuit denied Albanese's request for a COA. SEE: EXHIBIT D (Order denying COA). In pertinent part, the Court based its decision on the fact that Albanese had not "made a substantial showing that equitable tolling was warranted." *Id.*

Petition For Panel Rehearing

Albanese then filed a petition for Panel Rehearing, pursuant to Fed.R.App.P. Rule 40, urging the Court that it had decided a fundamentally different consideration than that presented. Albanese pointed out that a reconsideration was necessary because the Court had 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 he was improperly denied any opportunity by the District Court to have done so. SEE: EXHIBIT E (Pet. for Panel Rehear., at p. 2-4). The Court summarily denied Albanese's Petition for Panel Rehearing on March 31, 2015. SEE: EXHIBIT F (Order denying Pet. for Panel Rehear.).

The instant Motion to Recall the Mandate and Reinstate the Appeal now follows in light of the U.S. Supreme Court's decision in BUCK v. DAVIS, No. 15-8049, 137 S.Ct. 759 (2017).

II. Recall of the mandate is compelled by the U.S. Supreme Court's decision in BUCK because the Court's denial of Albanese's application for a COA is predicated upon an impermissible adjudication of the actual merits of an equitable tolling showing at the COA stage since the only point of debatability was whether he was denied the opportunity to make such a showing — not that he would ultimately prevail.

Mr. Albanese respectfully urges that the Court's denial of his application for a COA constituted an actual adjudication of the merits of equitable tolling — a showing he did not need to make for the issuance of a COA at that point — and, in doing so, contravened the U.S. Supreme Court's subsequent decision in BUCK v. DAVIS, 137 S.Ct. 759 (2017). In BUCK, the Supreme Court reaffirmed its prior decisions setting forth the correct standards for consideration of a COA request, emphasizing that "[t]he COA inquiry ... is not coextensive with a merits analysis." BUCK, 137 S.Ct. at 773. The Supreme Court explained that, "When a court of 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 Albanese's case, the District Court never afforded him the very opportunity to file a reply on the issue of timeliness and equitable tolling — and the Third Circuit's denial of the COA was based upon its own conclusion that Albanese did not show that equitable tolling was warranted (that he would have ultimately prevailed).

Mr. Albanese's claim in his COA was specifically that the District Court did not afford him any opportunity to reply to the Government's affirmative defense of untimeliness prior to the dismissal of his Section 2255 motion. SEE: COA, at p. 14-17. In support of the COA, Albanese cited to binding U.S. Supreme Court and Third Circuit precedents demonstrating that the circumstances of the District Court's dismissal would be found to be debatable or wrong by jurists of reason. SEE: COA, at p. 15-16. Albanese submitted that, although the District

Court possesses the authority to raise AEDPA's statute of limitations, even sua sponte, "a habeas petitioner must first be afforded fair notice and an opportunity to be heard on the issues of timeliness and equitable tolling."

NIXON v. BEARD, 361 Fed. Appx. 304, 305-06 (3d Cir. 2010)(citing DAY v. MCDONOUGH, 547 U.S. 198, 209-10 (2006)); UNITED STATES v. BENDOLPH, 409 F.3d 155, 168 (3d Cir. 2005); BUXTON v. PENNSYLVANIA, 398 Fed. Appx. 704, 708 (Remanding, stating, "The District Court should address the statute of limitations issue... after affording [petitioner] an opportunity to respond."). 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]."); 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).

Subsequently, the Third Circuit panel denied Albanese's COA, (SEE: EXHIBIT D), not on the debatability of whether he was to have been afforded an opportunity to reply to the Government's affirmative defense of untimeliness prior to dismissal in accord with the binding precedents — but on an actual merits determination that Albanese had not made a substantial showing that equitable tolling was warranted. In pertinent part, the panel's COA denial states:

"IN neither his Rule 59(e) motion nor his papers filed with us has appellant made a substantial showing that equitable tolling was warranted." 3/

SEE: EXHIBIT D (Order denying COA, March 3, 2015).

Here, while the issue presented for purposes of obtaining a COA was specifically that Albanese was never afforded an opportunity to file a reply

3/ The issue in Albanese's Rule 59(e) Motion for Reconsideration to the District Court, (SEE: EXHIBIT B), was the same as presented in his request for a COA to the Third Circuit — that binding precedents required affording an opportunity to reply before dismissal on timeliness grounds — not that he made the showing but that he was wrongly denied the very chance to have done so.

in demonstration of timeliness prior to dismissal, in accord with precedent, the panel made an actual merits determination of the equitable tolling considerations. The panel's denial reflects that Albanese needed to prove before the issuance of a COA that he should prevail on the issue of equitable tolling when the only point of debatability for purposes of the COA was that he was wrongly denied the very opportunity to have done so. The panel's denial is a merits determination because, had the issuance of a COA occurred, it was in the appeal that Albanese would have been required to make an equitable tolling showing to prevail.

Mr. Albanese filed a Petition for Panel Rehearing, (SEE: EXHIBIT E), in which he pointed out that the panel had decided a fundamentally different consideration than that presented. Relative to the COA, he explained, the issue was not whether jurists of reason would have debated that Albanese demonstrated that equitable tolling was warranted — but whether reasonable jurists would have found debatable or wrong the District Court's having denied Albanese any full and fair opportunity to have made such a showing. SEE: EXHIBIT E (Pet. for Panel Rehear., at p. 2-5). The petition for Panel Rehearing was summarily denied. SEE: EXHIBIT F (Order denying Pet. for Panel Rehear.).

Mr. Albanese respectfully urges that the Court should recall the mandate and reinstate the appeal in light of BUCK to allow for a proper determination of the debatability of the District Court's dismissal without any opportunity to reply on the issue of timeliness. Since the point of debatability was whether Albanese was to be afforded an opportunity to reply on the issue of timeliness prior to dismissal — not whether he had failed to make such a showing — the panel's merits determination that no showing warranting equitable tolling was made is an improper consideration at the COA stage. The required showing of timeliness or equitable tolling was the proper subject of an appeal if the COA was granted. Both the panel and the District Court essentially concluded that Albanese could not

make the requisite showing by denying him any opportunity to do so. Under the circumstances of Albanese's case, in combination with the reaffirmation of the U.S. Supreme Court's standards for consideration of a COA in BUCK, it was not necessary for Albanese to "prove before the issuance of a COA that some jurists would [have] grant[ed] the petition[,]" or that "he will ultimately succeed on appeal[.]" MILLER-EL v. COCKRELL, 537 U.S. 322, 336-37 (2003); PABON v. MAHANOY, 654 F.3d 385, 393 (3d Cir. 2011). Accordingly, the Court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." MILLER-EL, 537 U.S. at 337(emphasis added). Further, "[i]t is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.*

Mr. Albanese submits that the ends of justice would best be served, under the circumstances, by recalling the mandate to allow for a de novo consideration of whether jurists of reason would find debatable or wrong the District Court's dismissal of Albanese's §2255 motion on timeliness grounds (sustaining the Government's affirmative defense) without affording any opportunity for him to file a reply. The applicable binding precedents dictate that, for purposes of a COA, it is at least debatable that Albanese should be given one full, fair, and genuine opportunity to reply in demonstration of timeliness and equitable tolling. An injustice will result from the Court's decision to leave the prior judgment undisturbed.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Mr. Albanese respectfully prays this Court grants his Motion to Recall the Mandate and Reinstate the Appeal in light of the U.S. Supreme Court's decision in BUCK. Mr. Albanese asks the Court to grant his COA so that he may make a showing that equitable tolling is warranted in an appeal.

I, NICHOLAS ALBANESE, declare under the penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is both true and correct.

Dated this 21st day of October, 2017.

Respectfully Submitted,


Nicholas Albanese, **pro se**
Reg. No. 51151-066
Federal Correctional Complex
U.S. Penitentiary - Coleman II
P.O. Box 1034
Coleman, FL 33521-1034

CERTIFICATE OF SERVICE

I, NICHOLAS ALBANESE, hereby certify that I have this day and date, OCTOBER 21, 2017, sent a true and correct copy of the foregoing, APPELLANT ALBANESE'S MOTION TO RECALL THE MANDATE AND REINSTATE THE APPEAL, via first-class U.S. Postal Mail, with prepaid postage affixed thereon, and properly addressed, to:

Clerk Of The Court
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

United States Attorney's Office
Eastern District of Pennsylvania
ATTN: David E. Fritchey, AUSA
615 Chestnut Street, Ste. 1250
Philadelphia, PA 19106

Dated this 21st day of October, 2017.


Nicholas Albanese, **pro se**
Reg. No. 51151-066

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-vs-

NICHOLAS ALBANESE,

Appellant.

* Appeal No. 14-3863

* On Appeal from the United States
* District Court for the Eastern
* District of Pennsylvania, at
* Philadelphia
* (USDC No. 2:97-CR-359-3 E.D. Pa.)

APPELLANT ALBANESE'S
MOTION FOR A DEFINITE STATEMENT OF THE COURT

COMES NOW, Appellant, NICHOLAS ALBANESE, ("Albanese"), in proper person, and hereby respectfully moves the Court to provide a definite statement with regard to the concern that his previously submitted MOTION TO RECALL THE MANDATE AND REINSTATE THE APPEAL is believed to have actually been denied without any meaningful consideration. Albanese bases his concern upon the following facts:

1. On October 23, 2017, Albanese affirms that his MOTION TO RECALL THE MANDATE AND REINSTATE THE APPEAL was processed through the U.S. Postal Mail. SEE: Certified Mail Tracking No. 7012 1010 0003 1410 7943 A print-out of the delivery and tracking record is appended hereto.
2. The Certified Mail Tracking record indicates that the motion was delivered to the Court at 11:57 am on October 26, 2017.
3. This Court's Order denying Albanese's motion is dated this very same day, October 26, 2017.

Mr. Albanese respectfully submits that it appears that a mistake may have been made in the denial of his motion. It simply defies belief that within only

a matter of a few hours left in the day that his motion was delivered that it received a meaningful consideration. The Clerk only received it at noon. By the time the Clerk processed the motion, this means that both judges on the Court's Order stopped everything they were doing and immediately considered Mr. Albanese's motion. It seems inconceivable that the Court could have had time to consider the facts contained in Albanese's motion, in conjunction with the COA briefing from three years previous. Then, even assuming that the Court did work this quickly, the decision still had to be given to the Clerk with enough time to have processed the denial Order. This all had to have happened within a couple of hours at best — and assuming that the judges dropped everything they were doing to address Albanese's motion.

Mr. Albanese believes that a mistake has been made since this scenario is not very plausible. Additionally, Albanese would respectfully urge that his experience during each of his filings (the record will confirm) is that he is not being given any meaningful opportunity to litigate. Indeed, the very issue on his COA was that he was never given any notice or opportunity to reply at all to the Government's response to his Section 2255 motion prior to dismissal. This Court then denied his COA, affirming the District Court's dismissal on timeliness grounds and saying Albanese had not shown that equitable tolling was warranted — when the entire issue was the very point that he was never given that opportunity.

Mr. Albanese, prior to sending this matter to the U.S. Supreme Court, asks the Court to please issue a definite statement confirming that the October 26, 2017 Order denying his MOTION TO RECALL THE MANDATE AND REINSTATE THE APPEAL is not attributable to any mistake and that the motion truly received a meaningful consideration. Recall of the Court's mandate was appropriate since the denial of Albanese's COA was premised on a merits determination of equitable tolling (that he had not made a showing) when the point of debatability for purposes of the COA

was that he was never given any opportunity to have made the showing prior to dismissal by the District Court. This Court's merits determination at the COA stage contravenes the U.S. Supreme Court's subsequent decision in BUCK v. DAVIS, 137 S.Ct. 759, 773 (2017) ("When a court of 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.") In Albanese's case, whether he could make a showing that equitable tolling was warranted was actually what would have been the merits of an appeal had the COA been granted. The COA issue was only the debatability of the District Court's having allowed the Government to assert an affirmative defense of timeliness and not allowing Albanese any opportunity to reply.

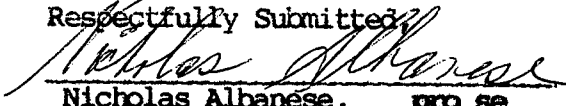
CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Mr. Albanese respectfully asks the Court to issue a definite statement confirming that the denial of his Motion to Recall the Mandate and Reinstate the Appeal was not attributable to any mistake, but is a meaningfully considered decision by the Court — despite the expeditious review/denial.

I, NICHOLAS ALBANESE, declare under the penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is both true and correct.

Dated this 24th day of November, 2017.

Respectfully Submitted,


Nicholas Albanese, **pro se**
Reg. No. 51151-066
Federal Correctional Complex
U.S. Penitentiary - Coleman II
P.O. Box 1034
Coleman, FL 33521-1034

CERTIFICATE OF SERVICE

I, NICHOLAS ALBANESE, hereby certify that I have this day and date, ~~NOVEMBER~~ 24, 2017, sent a true and correct copy of the foregoing, APPELLANT ALBANESE'S MOTION FOR A DEFINITE STATEMENT OF THE COURT, via first-class U.S. Postal Mail, with prepaid postage affixed thereon, and properly addressed, to:

Clerk Of The Court
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

United States Attorney's Office
Eastern District of Pennsylvania
ATTN: David E. Fritchey, AUSA
615 Chestnut Street, Ste. 1250
Philadelphia, PA 19106

Dated this 24th day of November, 2017.


Nicholas Albanese, pro se
Reg. No. 51151-066