APPENDIX A

- Copy of Order denying Rule 60(b) Motion and Certificate of Appealability by the U.S. District Court for the District of Hawaii, dated March 27, 2018.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff-Respondent, vs. UIKI TEAUPA, Defendant-Petitioner.	Cr. No. 12-01128 JMS Civ. No. 16-00385 JMS-KSC ORDER DENYING CERTIFICATE OF APPEALABILITY PURSUANT TO LIMITED REMAND (9th Cir. No. 18-15194)

ORDER DENYING CERTIFICATE OF APPEALABILITY PURSUANT TO LIMITED REMAND

I. INTRODUCTION

On December 12, 2016, this court denied pro se Defendant-Petitioner Uiki Teaupa's ("Teaupa") motion under 28 U.S.C. § 2255 for writ of habeas corpus (the " § 2255 Motion") and denied a certificate of appealability (the "Order Denying § 2255 Motion"). ECF No. 152.[1] The Ninth Circuit also denied Teaupa's request for a certificate of appealability, and it denied Teaupa's motion for reconsideration and rehearing en banc. ECF Nos. 158, 159.

On December 15, 2017, Teaupa filed a Rule 60(b) motion for relief from judgment (the "Rule 60(b) Motion"). ECF No. 160. On December 21, 2017,

[1] All "ECF No." references are to Cr. No. 12-01128 JMS.

the court construed the Rule 60(b) Motion as an application for leave to file a second or successive § 2255 petition and referred the application to the Ninth Circuit (the "December 21 Order").[2] ECF No. 161.[3] Teaupa then filed a motion for reconsideration of the December 21 Order, ECF No. 162, which this court denied on January 17, 2018 (the "January 17 Order"), ECF No. 163.

On February 5, 2018, Teaupa appealed the December 21 and January 17 Orders. ECF No. 164. On February 13, 2018, the Ninth Circuit determined that "[t]o the extent the district court's orders denied [Teaupa's Rule 60(b) motion], . . . a certificate of appealability may be required" for his appeal. ECF No. 166. Thus, the Ninth Circuit remanded the case to this court "for the limited purpose of granting or denying a certificate of appealability." *Id.* For the reasons discussed below, the court DENIES a certificate of appealability.

II. BACKGROUND

In his § 2255 Motion, Teaupa claimed that he was provided constitutionally ineffective assistance when his trial counsel failed: (1) to move pretrial to dismiss the Superseding Indictment; (2) to object to the amount of

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[2] *See* 28 U.S.C. § 2255(h); Rule Governing Section 2255 Proceedings 9 ("Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion[.]").

[3] The referred application is pending in the Ninth Circuit as No. 17-73410. *See* ECF No. 166.

methamphetamine attributed to Teaupa at sentencing; (3) to seek a two-level reduction for acceptance of responsibility at sentencing; and (4) to appeal the government's failure to file a motion at sentencing for a downward departure based on substantial assistance. In denying the § 2255 Motion, this court determined that the issues could be decided on the existing record and elected not to hold an evidentiary hearing. Order Denying § 2255 Motion at 7.

In his Rule 60(b) Motion, Teaupa claimed that this court failed to afford him the opportunity to conduct discovery and that the court erred in not holding an evidentiary hearing on his § 2255 Motion. Rule 60(b) Motion at 2.

The December 21 Order set forth the standard for determining whether a Rule 60(b) motion is a second or successive § 2255 petition or a properly-brought Rule 60(b) motion — the court must "examine the substance of the motion to see if it sets forth a 'claim' (such that it must be construed as a § 2255 petition) or raises a defect in the integrity of the § 2255 proceeding (such that it is a proper Rule 60(b) motion)." December 21 Order at 4 (citing *Gonzalez v. Crosby* 545 U.S. 524, 531-33 (2005) and *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011)). And in the Ninth Circuit, "a Rule 60(b) motion asserting that the district court declined to hold an evidentiary hearing is considered a 'claim' on the merits of the § 2255 petition." *Id.* at 4-5; *see United States v. Washington*, 653 F.3d 1057, 1064 (9th Cir. 2011) (determining that a defendant's

arguments that the district court failed to develop the record and declined to conduct an evidentiary hearing on actual innocence claim "are precisely the sort of attack on 'the federal court's previous resolution of a claim on the merits,'. . . which is outside the scope of Rule 60(b)." (quoting *Gonzalez*, 545 U.S. at 532)).

Applying that standard, the court first determined that because the record conclusively showed that Teaupa was not entitled to relief under § 2255, the decision not to hold an evidentiary hearing "was a merits-based decision." December 21 Order at 5. And because "there could be no error in denying an evidentiary hearing unless the district court made an incorrect merits determination," *In re Lindsey*, 582 F.3d 1173, 1176 (10th Cir. 2009), the court then determined that Teaupa's "§ 2255 Motion raise[d] a 'claim' on the merits and [must be] construed as a second and successive petition." December 21 Order at 6.

In addition, the court explained that under Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts, a judge may authorize discovery upon a showing of good cause by the petitioner. *Id.* at 7. But because Teaupa never requested any discovery, "there was simply no reason for the court to grant Teaupa the right to conduct discovery." *Id.* Thus, the court determined that this argument was also "a claim on the merits, and not one asserting a defect in the integrity of the § 2255 proceeding," and therefore must be "construed as a second or successive § 2255 petition." *Id.*

Teaupa sought reconsideration based on his "disagree[ment] with the Court's characterization of his Rule 60(b) Motion." Mot. at 2, ECF No. 162. In denying Teaupa's request, this court stated that "[m]ere disagreement with a previous order is an insufficient basis for reconsideration." January 17 Order (quoting *Haw. Stevedores, Inc. v. HT&T Co.*, 363 F. Supp. 2d 1253, 1269 (D. Haw. 2005)). The court further stated that Teaupa failed to meet his burden of showing (1) newly discovered evidence, (2) that the court committed clear error or that the initial decision was manifestly unjust, (3) an intervening change in controlling law, or (4) other, highly unusual circumstances warranting reconsideration. *Id.*

III. ANALYSIS

A certificate of appealability should only be granted for an appeal arising from the denial of the Rule 60(b) motion in a § 2255 proceeding if "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015). Unless both prongs are met, a certificate of appealability should not issue. *Id.* at 1144.

As set forth above, Teaupa's Rule 60(b) motion argued that he is entitled to relief from judgment on the denial of his § 2255 Motion for two reasons

— because this court (1) declined to hold an evidentiary hearing, and (2) failed to afford him the opportunity to conduct discovery. Rule 60(b) Motion at 2.

The argument that a court declined to hold an evidentiary hearing is deemed to raise a claim on the merits of the § 2255 petition, and thus is not properly raised in a Rule 60(b) motion. *See Washington*, 653 F.3d at 1064 (explaining that such argument constitutes an "attack on 'the federal court's previous resolution of a claim on the merits'") (citing *Gonzalez*, 545 U.S. at 532); *In re Lindsey*, 582 F.3d at 1175 (finding that challenging the failure to hold an evidentiary hearing is a claim on the merits); *McCurdy v. United States*, 2016 WL 1170970 (D. Maine Mar. 24, 2016); *Robles-Garcia v. United States*, 2014 WL 3534016 (N.D. Iowa July 16, 2014); *Blackwell v. United States*, 2009 WL 3334895 (E.D. Mo. Oct. 14, 2009).

And because Teaupa never requested any discovery, there was no reason for the court to grant him the right to conduct discovery. *See* December 21 Order at 7. That is, absent a request, there simply can be no assertion of a "defect in the integrity of the § 2255 proceeding" regarding discovery that could be raised in a proper Rule 60(b) motion. *See Gonzalez*, 545 U.S. at 532-33 (explaining that a proper Rule 60(b) motion that attacks a "defect in the integrity of the federal habeas proceedings," rather than the merits of a prior resolution of a habeas claim, need not be construed as a habeas corpus petition). And to the extent Teaupa could

be arguing that without an opportunity to conduct discovery, he was prevented from presenting new evidence, such an argument is considered a claim on the merits, and not an attack on the integrity of the § 2255 proceedings. *See id.* at 531-33 (recognizing that a Rule 60(b)(2) motion for leave to present "newly discovered evidence" in support of a previously denied habeas claim attacks the court's resolution of the claim on the merits).

Thus, based on settled law, this court determined that Teaupa's claims are outside the scope of a proper Rule 60(b) motion, but rather, must be construed as a second or successive § 2255 petition. *See* December 21 Order at 6, 7. Reasonable jurists would not find this debatable.

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IV. CONCLUSION

Based on the foregoing, the court determines that reasonable jurists would not find that its rulings in the December 21 and January 17 Orders are debatable. Therefore, the court DENIES a certificate of appealability. The Clerk of Court is directed to send a copy of this order to the Ninth Circuit.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, February 16, 2018.

/s/ J. Michael Seabright
J. Michael Seabright
Chief United States District Judge

APPENDIX B

- Copy of Order denying Certificate of Appealability by the Ninth Circuit Court of Appeals, dated April 20, 2018.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. UIKI TEAUPA, Defendant-Appellant.	No. 18-15194 D.C. Nos. 1:16-cv-00385-JMS-KSC 1:12-cr-01128-JMS-1 District of Hawaii, Honolulu ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

APPENDIX C

- Copy of Order denying Petition for Panel Rehearing and En Banc Hearing by the Ninth Circuit Court of Appeals, dated June 25, 2018.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. UIKI TEAUPA, Defendant-Appellant.	No. 18-15194 D.C. Nos. 1:16-cv-00385-JMS-KSC 1:12-cr-01128-JMS-1 District of Hawaii, Honolulu ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.