

APPENDIX
" A "

MIDDLE DISTRICT OF FLORIDA
DENIAL OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN DAVID WILSON, JR.,

Petitioner,

v.

Case No. 8:20-cv-1064-T-33TGW

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER

This cause is before the Court on Petitioner John David Wilson, Jr.'s petition for writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 1), motion to appoint counsel (Doc. 12), and motion for summary judgment (Doc. 13). Upon consideration, the Court **ORDERS** as follows:

BACKGROUND

A person in custody under a state court conviction may challenge his conviction under § 2254 on the basis that he is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Wilson challenges his convictions entered in state court case Nos. 99-18481 and 00-12480, which he states were consolidated in state court proceedings. In case No. 99-18481, Wilson pleaded guilty to aggravated stalking. In case No. 00-12480, Wilson was convicted of attempted first degree murder and aggravated battery. Wilson was ultimately sentenced to concurrent terms of five years in prison in case No. 99-18481 and life in prison in case No. 00-12480.

DISCUSSION

I. State Case No. 00-12480

Wilson previously challenged the validity of the conviction entered in case No. 00-12480 in *Wilson v. Sec'y, Dep't of Corr.*, No. 8:07-cv-2185-T-33MAP. The Court denied the petition, and the Eleventh Circuit Court of Appeals denied Wilson's motion for a certificate of appealability. (Docs. 30 and 38 in No. 8:07-cv-2185-T-33MAP).

Accordingly, the instant petition is second or successive as to Case No. 00-12480. See *Magwood v. Patterson*, 561 U.S. 320, 338-39 (2010) (stating that a § 2254 petition attacking the same state court judgment that was challenged in an earlier § 2254 petition is successive). "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

This Court lacks jurisdiction to review Wilson's challenge to case No. 00-12480 unless and until the Eleventh Circuit Court of Appeals grants him permission to file a second or successive petition. See *Burton v. Stewart*, 549 U.S. 147, 157 (2007) ("Burton neither sought nor received authorization from the Court of Appeals before filing his 2002 petition, a 'second or successive' petition challenging his custody, and so the District Court was without jurisdiction to entertain it."); *Hubbard v. Campbell*, 379 F.3d 1245, 1246-47 (11th Cir. 2004) (recognizing that a district court is without jurisdiction to review a second or successive petition if a petitioner has not obtained authorization from the circuit court as required under § 2244(b)(3)(A)).

Wilson contends within his motion for appointment of counsel that “on or about Dec. 1, 2019 [he] receive[d] permission to file a successive habeas, from the Eleventh Circuit.” (Doc. 12 at 3). However, as addressed *infra*, the order to which Wilson refers only concerned Wilson’s other state conviction and has no impact on the Court’s conclusion as to jurisdiction over the instant petition. Wilson has not demonstrated that he has received authorization from the Eleventh Circuit to file a second or successive § 2254 petition challenging the conviction entered in case No. 00-12480.

Finally, the Court notes that Wilson’s petition alleges newly discovered evidence. A claim based on new facts is a basis for pursuing a second or successive petition. See 28 U.S.C. § 2244(b)(2)(B) (“A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” As discussed above, however, Wilson must persuade the Eleventh Circuit, not this Court, that he is entitled to file a second or successive petition.

II. State Case No. 99-18481

Wilson was sentenced in state case No. 99-18481 to five years’ imprisonment, to run concurrently with the life sentence he received in his other case. Wilson previously challenged this conviction in *Wilson v. Sec’y, Dep’t of Corr.*, 8:15-cv-2084-T-33AAS. On appeal, the Eleventh Circuit determined that Wilson’s challenge to case No. 99-18481

was subject to dismissal because Wilson failed to satisfy the “in custody” requirement.

The Eleventh Circuit explained:

District courts have jurisdiction over petitions for habeas relief only when the habeas petitioner – at the time his petition is filed – is “in custody” under the conviction or sentence he seeks to challenge. Maleng v. Cook, 490 U.S. 488, 491-92, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (interpreting the language in 28 U.S.C. § 2241(c)(3)). Once the sentence for a conviction has fully expired, the petitioner is no longer “in custody” for purposes of challenging that conviction. Id. at 491, 109 S.Ct. 1923.

Here, Wilson began serving his 60-month sentence in case No. 99-18481 in October 2001. When Wilson filed his construed section 2254 petition in 2015, his 60-month sentence had long since expired. Thus, Wilson was no longer “in custody” for purposes of challenging his conviction for aggravated stalking. See id.

Wilson v. Sec’y, Dep’t of Corr., 717 F. App’x 891, 893 (11th Cir. 2017).

Accordingly, to the extent Wilson seeks to challenge the conviction entered in case No. 99-18481, he cannot meet the in custody requirement.

Wilson sought permission from the Eleventh Circuit to file a second or successive § 2254 petition with respect to his five-year sentence imposed in 2001 in case No. 99-18481. (See Doc. 1-2 at 3). As addressed above, the earlier § 2254 petition challenging this conviction was dismissed for lack of jurisdiction. Since that petition was not addressed on the merits, the Eleventh Circuit determined that a future § 2254 petition would not be “second or successive” and thus denied, as unnecessary, Wilson’s application for leave to file a second or successive petition. (See *id.*).

Accordingly, while the instant § 2254 petition is not “second or successive” to the extent it challenges the conviction entered in case No. 99-18481, the petition is nevertheless subject to summary dismissal for lack of jurisdiction on the basis that Wilson


was not "in custody" under this conviction at the time he filed the petition. The Eleventh Circuit's order does not allow Wilson to avoid the "in custody" requirement.

III. CONCLUSION

For the reasons stated above, the Court lacks jurisdiction to consider Wilson's petition. Wilson's motion for appointment of counsel (Doc. 12) and motion for summary judgment (Doc. 13) are therefore moot. Accordingly, the Court **ORDERS**:

1. The petition (Doc. 1) is **DISMISSED** for lack of jurisdiction.
2. The motion for appointment of counsel (Doc. 12) and motion for summary judgment (Doc. 13) are **DENIED AS MOOT**.
3. The **CLERK** is directed to **CLOSE** this case.
4. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, Wilson is hereby **DENIED** a certificate of appealability because he cannot show "that jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Wilson is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on September 4, 2020.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

John David Wilson, Jr.

APPENDIX

B //

MIDDLE DISTRICT OF FLORIDA

DENIAL OF MOTION FOR REHEARING

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN DAVID WILSON, JR.,

Petitioner,

v.

Case No. 8:20-cv-1064-T-33TGW

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER

This cause is before the Court on Petitioner John David Wilson, Jr.'s motion for rehearing. (Doc. 16) Upon consideration, the Court **ORDERS** that the motion is **DENIED**:

Wilson initiated this action by filing a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1) The Court dismissed the petition for lack of jurisdiction. (Doc. 15) Wilson challenged his state court convictions in case Nos. 00-12480 and 99-18481. As to case No. 00-12480, the Court concluded that Wilson's petition was an unauthorized second or successive petition. With respect to case No. 99-18481, the Court concluded that Wilson did not meet the "in custody" requirement of § 2254 because his five-year sentence had fully expired before he filed the petition.

The Court construes this motion as having been filed under Rule 60(b), Federal Rules of Civil Procedure. Relief from a final judgment, order, or proceeding may be obtained under Rule 60(b) to correct mistakes of law as well as mistakes of fact. *Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir. 1992). Rule 60(b)(1) permits relief for "mistake, inadvertence, surprise, or excusable neglect[.]" Rule 60(b)(6) permits relief for "any other

reason that justifies relief." However, "relief under [Rule 60(b)(6)] is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984).

Wilson contends that the Court erred in finding that it lacked jurisdiction to consider his petition as to case No. 99-18481. Wilson concedes that the sentence imposed in that case has expired. However, he now contends that he meets an exception to the "in custody" requirement because the conviction in case No. 99-18481 was used to enhance the sentence in case No. 00-12480, which he still serves. Generally, when a sentence for a conviction has fully expired, a petitioner is no longer "in custody" and therefore cannot challenge the conviction. *Maleng v. Cook*, 490 U.S. 488, 491 (1989). In *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394 (2001), the Supreme Court barred § 2254 review of a prior state conviction used to enhance the sentence imposed for a new state conviction. However, a petitioner may challenge a prior conviction if it was obtained in violation of the right to counsel as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See *id.* at 404; *Daniels v. United States*, 532 U.S. 374, 382 (2001).


These decisions provide no avenue for Wilson to challenge the conviction in case No. 99-18481. Initially, it is not apparent from the record before the Court whether the conviction in case No. 99-18481 was in fact used to enhance the sentence imposed in case No. 00-12480. Even if the prior conviction was used for enhancement purposes, however, Wilson fails to demonstrate that the conviction was obtained without counsel in violation of *Gideon*. Thus, because Wilson is not "in custody" under the conviction in case No. 99-18481, the Court lacks jurisdiction to hear his § 2254 challenge to that conviction.

In his motion for rehearing, Wilson also re-argues the merits of the underlying

habeas claims attacking the validity of his convictions. These arguments do not provide any basis for the Court to reconsider its decision. Wilson fails to show that rehearing is warranted.

Accordingly, it is **ORDERED** that Wilson's motion for rehearing (Doc. 16) is **DENIED**. The Court previously declined to issue a certificate of appealability. (Doc. 15, p. 5) Wilson has not made a substantial showing of the denial of a constitutional right. Nor has he shown that reasonable jurists would debate whether the Court's procedural ruling was correct. Accordingly, a certificate of appealability is **DENIED**. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Wilson is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on October 6, 2020.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

John David Wilson, Jr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN DAVID WILSON, JR.,

Petitioner,

v.

Case No. 8:20-cv-1064-T-33TGW

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER

This cause is before the Court on Petitioner John David Wilson, Jr.'s motion (Doc. 21) in which he asks that the Court "stay the mandate" so that he can request a certificate of appealability. Upon consideration, the Court **ORDERS** as follows:


Wilson initiated this action by filing a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1). The Court dismissed the petition for lack of jurisdiction. (Doc. 15). Wilson challenged his state court convictions in case Nos. 00-12480 and 99-18481. As to case No. 00-12480, the Court concluded that Wilson's petition was an unauthorized second or successive petition. With respect to case No. 99-18481, the Court concluded that Wilson did not meet the "in custody" requirement of § 2254 because his five-year sentence had fully expired before he filed the petition. The Court denied Wilson's motion for rehearing. (Docs. 16, 18). Wilson then filed a notice of appeal. (Doc. 19).

In the instant motion, Wilson asks that the Court "stay" the mandate so that he may seek a certificate of appealability from the Court. He appears to contend that he needs additional time to perform legal research in moving for a certificate of appealability.

This Court did not issue a mandate in this case. Further, the Court already denied Wilson a certificate of appealability when it dismissed Wilson's petition and when it denied his motion for rehearing. (Doc. 15 at 5; Doc. 18 at 3). Wilson has not established that a certificate of appealability is warranted. Wilson is advised that he may seek a certificate of appealability from the Eleventh Circuit Court of Appeals pursuant to Rule 22(b), Federal Rules of Appellate Procedure.

The Court therefore **ORDERS** that Wilson's motion (Doc. 21) is **DENIED**.

ORDERED in Tampa, Florida, on October 28, 2020.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

John David Wilson, Jr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN DAVID WILSON, JR.,

Petitioner,

v.

Case No. 8:20-cv-1064-T-33TGW

SECRETARY, DEPARTMENT
OF CORRECTIONS,

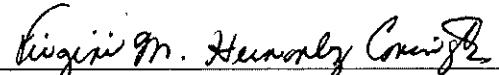
Respondent.

ORDER

This cause is before the Court on Petitioner John David Wilson, Jr.'s motion for issuance of a certificate of appealability. (Doc. 25). Wilson initiated this action by filing a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1). The Court dismissed the petition for lack of jurisdiction. (Doc. 15). The Court denied Wilson's motion for rehearing (Docs. 16, 18), as well as Wilson's motion to stay (Docs. 21, 22) and Wilson's motion for leave to appeal *in forma pauperis* (Docs. 23, 24). The Court declined to issue a certificate of appealability when the petition was dismissed (Doc. 15) and when Wilson's motion for rehearing was denied. (Doc. 18). Wilson's latest motion does not establish any reason why a certificate of appealability should issue.

Accordingly, it is **ORDERED** that Wilson's motion for issuance of a certificate of appealability (Doc. 25) is **DENIED**.

ORDERED in Tampa, Florida, on January 7, 2021.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

John David Wilson, Jr.

APPENDIX

C

ELEVENTH CIRCUIT
DENIAL OF APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13960-A

JOHN DAVID WILSON, JR.,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

John Wilson, Jr., a Florida prisoner serving a total life sentence for attempted first-degree murder and aggravated battery, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the dismissal of his *pro se* 28 U.S.C. § 2254 habeas corpus petition and the denial of his motion for rehearing, which the district court construed as a Federal Rule of Civil Procedure 60(b) motion. He has also filed a "Motion to Alter or Amend Judgment," as well as a motion to re-file a notice of appeal and a motion for a COA, which is construed from his "Judicial Notice."

Because the district court dismissed Wilson's § 2254 petition for lack of jurisdiction, Wilson does not require a COA to proceed on appeal. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (concluding that a COA is not required to appeal the dismissal of a § 2254

petition for lack of jurisdiction as a second or successive habeas petition); *see also Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1264 (11th Cir. 2004) (*en banc*) (stating that “[t]here is no reason to treat orders denying habeas relief and subsequent orders denying motions to reopen those earlier orders differently for purposes of the certificate of appealability requirement, and there is every reason to treat them the same”). Nevertheless, because Wilson seeks leave to proceed IFP from this Court, his appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B). An action is frivolous if it is without arguable merit in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

Wilson cannot raise an issue of arguable merit as to the district court’s dismissal of his § 2254 petition. *See id.* As to Wilson’s claims relating to his attempted-murder and aggravated-battery convictions in case number 00-CF-012480, the district court lacked jurisdiction to review those claims because Wilson previously had filed a § 2254 petition on the grounds that those convictions were invalid, and his attempt to raise similar claims in the instant § 2254 petition amounted to an unauthorized second or successive habeas petition. *See* 28 U.S.C. § 2244(b)(3)(A). As to Wilson’s claims challenging his aggravated-stalking conviction in case number 99-CF-018481, the district court lacked jurisdiction to review those claims because Wilson’s 60-month sentence had fully expired, and he was no longer “in custody” for purposes of § 2254(a). *See Maleng v. Cook*, 490 U.S. 488, 490-92 (1989) (stating a petitioner must be “in custody” under the conviction or sentence he seeks to attack at the time his habeas petition is filed and that a petitioner whose sentence has fully expired is generally not “in custody”).

Wilson also cannot raise an issue of arguable merit as to the district court’s denial of his construed Rule 60(b) motion, as he failed to demonstrate that any of the limited circumstances warranting relief under Rule 60(b) were present. *See Napier*, 314 F.3d at 531;

Fed. R. Civ. P. 60(b)(1)-(6). Wilson's assertion that he satisfied the exception to the "in custody" requirement because he was denied the assistance of counsel required under *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Fourteenth Amendment requires a defendant in state criminal proceedings to enjoy the right to assistance of counsel), lacks merit, as he did not show that counsel was absent during any of the proceedings, and, thus, did not establish that he was denied the assistance of counsel in violation of his Fourteenth Amendment rights. See *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 403-04 (2001) (articulating an exception to the "in custody" requirement, where a defendant may "challenge an enhanced sentence on the basis that the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon*").

In light of the above, Wilson's motion for a COA is DENIED AS UNNECESSARY, and his motion for leave to proceed on appeal IFP is DENIED. Wilson's motion to alter or amend judgment is DENIED. Finally, Wilson's motion to re-file a NOA and a motion for a COA, construed from his "Judicial Notice," is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX

" D "

ELEVENTH CIRCUIT

DENIAL OF REHEARING

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.call.uscourts.gov

June 22, 2021

John David Wilson Jr.
Martin CI - Inmate Legal Mail
1150 SW ALLAPATTAH RD
INDIANTOWN, FL 34956

Appeal Number: 20-13960-A
Case Style: John Wilson, Jr. v. Secretary, Department of Corr., et al
District Court Docket No: 8:20-cv-01064-VMC-TGW

****CORRECTED LETTER****

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.call.uscourts.gov.

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless you pay to the DISTRICT COURT clerk the docketing and filing fees, with notice to this office.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Team-1/abm
Phone #: (404) 335-6135

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13960-A

JOHN DAVID WILSON, JR.,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

John Wilson, Jr. has filed a “motion for rehearing,” which is construed as a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court’s May 6, 2021, order denying a certificate of appealability (“COA”) as unnecessary and denying Wilson’s motions for leave to proceed *in forma pauperis*, to alter or amend judgment, and to re-file a notice of appeal and COA motion. Upon review, Wilson’s motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX
"E"

DD-214

ANY ALTERATIONS IN SHADED
AREAS RENDER FORM VOID

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)Page 2964

CAUTION: NOT TO BE USED FOR
IDENTIFICATION PURPOSES

ANY ALTERATIONS IN SHADED AREAS
RENDER FORM VOID

1. NAME (Last, first, middle) WILSON, JOHN "D" JR		2. DEPARTMENT, COMPONENT AND BRANCH NAVY - USN		3. SOCIAL SECURITY NO. (Also, Service Number if applicable)	
4. MAILING ADDRESS (Include ZIP Code) 13901 N FLORIDA AVENUE #196, TAMPA FL 33613				264	75 0896
5. ORIGINAL DD FORM 214 IS CORRECTED AS INDICATED BELOW					
ITEM NO.	CORRECTED TO READ				
12d	SEPARATION DATE ON DD FORM 214 BEING CORRECTED - 94 MAR 22				
12e	04-00-00				
16	00-11-10				
	NONE				
	NO FURTHER ENTRIES				
BY DIRECTION OF THE CHIEF OF NAVAL PERSONNEL					
6. DATE PERS 324/01 02 JUN 94		7. TYPED NAME, GRADE, TITLE AND SIGNATURE OF OFFICIAL AUTHORIZED TO SIGN BY BENTON (GS-11) HEAD, RESPONSE SECTION MILITARY CORRESPONDENCE BRANCH			

DD FORM 215
1 JUL 79
5/N 0102-LF-000-2150

PREVIOUS EDITIONS
OF THIS FORM ARE
OBSOLETE.

**CORRECTION TO DD FORM 214, CERTIFICATE OF RELEASE OR
DISCHARGE FROM ACTIVE DUTY**

MEMBER - 1

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