

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Emerson Davis — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

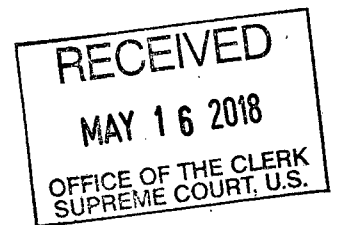
PETITION FOR WRIT OF CERTIORARI

Emerson Davis
(Your Name)

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(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

PREFACE Petitioner sought a Certificate of Appealability (COA) from denial of relief under Rule 60(b)(6). On March 29, 2018 the United States Court of Appeals for the Eleventh Circuit denied a Certificate.

On February 25, 2003 this Court decided *Miller-El v. Cockrell* 123 S.Ct. 1029 (2003) which expressly clarified the criteria for issuance of a COA. This Court also recently decided *Buck v. Davis*, 137 S.Ct. 759 (2017), which also expressly clarified the criteria for issuance of a COA. The issues identified in the request for the COA were directly supported by rulings of this Court and several federal appellate courts.

Petitioner Presents These Questions:

Whether this Court should grant certiorari and remand for reconsideration in light of this Court's decision in *Miller-El v. Cockrell*, and *Buck v. Davis*.

OR

Whether a COA should have been granted to consider the following issues:

1. Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the

greatest penalty.

2. Whether the district Court failed to Adjudicate the Sua Sponte Ineffective Assistance of Counsel claim raise by the Magistrate Judge on Appellate Counsel, For failure to raise a Edwards claim on Direct Appeal, a violation of Gonzalez v. Crosby.
3. Whether Ineffective Assistance of Appellate counsel, by failure to raise a Edwards claim on Direct Appeal.

LIST OF PARTIES

- [x] 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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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 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 B 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 March 29, 2018.

☐ 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: May 3, 2018, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

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STATEMENT OF THE CASE

Original Criminal Proceeding

Emerson Davis was indicted, convicted, and sentenced under a single count for a multi-drug conspiracy:

...to distribute controlled substances, that is cocaine, cocaine base (commonly know as "crack cocaine") and marijuana in violation of Title 21 of the United States Code §841(a)(1) and (b)(1)(A)(iii).

Emerson Davis was sentenced to life based upon the controlled substance (crack cocaine) with the highest penalty instead of the controlled substance with the least penalty (marijuana). Marlin Davis, Emerson's brother and sole-codefendant at trial, was sentenced to 360 months on the basis of crack cocaine.

At sentencing, court appointed trial counsel did not object to the court's sentencing or to the quantity and quality of the drugs involved notwithstanding Emerson Davis' personal on-record request for "how much cocaine, crack cocaine and marijuana I'm charged for." On direct appeal, government counsel argued that the court appointed trial defense counsel did not properly object to the judge's finding on drug quantity at the sentencing hearing.

On the direct appeal, the court-appointed appellate counsel failed to raise an Edwards claim. The Eleventh Circuit affirmed without an opinion under Rule 36.1.

28 U.S.C. §2255 Proceeding

Emerson Davis' §2255 motion for relief asserted numerous grounds that includ the issues subsequently requested in the

COA. The magistrate directed the government to respond. Davis filed an objection to the magistrate's report and also filed additional memorandum and briefs before the district court. The district court denied all relief based upon the magistrate's order, but the court failed to address or adjudicate the additional claim of ineffective assistance of counsel raised by the magistrate judge sua sponte. The Magistrate Judge Sua Sponte raised a IAC claim on appellate counsel for failing to raised an Edwards claim during Davis direct appeal eventhought Edwards was decided before Davis initial brief was filed. The magistrate then rule neither trial or appellate counsel was ineffective because the issue was without merits. (Doc. 1507). The district court did not adjudicate this claim raised by the magistrate.

The district court granted Davis' request to file supplemental authority from the Eleventh Circuit, *United States v. Allen*, 302 F.3d 1260 (11th Cir. 2002). Allen ruled that an indictment and conviction for a multi-drug conspiracy involving cocaine and marijuana was ambiguous under the record and required the sentence be based upon the substance with the least penalty.

The district court in a written opinion ruled the conviction of Emerson Davis and Marlin Davis (Emerson's brother and sole co-defendant) for conspiracy to distribute controlled substances involving cocaine, crack cocaine, and marijuana was not ambiguous. The court determined that the jury necessarily had found with reference to all three objects of the conspiracy and not just to one, or a combination of one or more controlled substance. As the

court acknowledged, special interrogatories had not been submitted to the jury. The jury was not instructed that to be guilty of the conspiracy to distribute controlled substances they must find guilt for all three substances.

Davis filed a notice of appeal and requested the COA. The district judge denied the COA and the Eleventh Circuit denied the request to issue the COA on the merits.

Rule (60)(b)(6) Proceeding

Davis filed a Rule (60)(b)(6) motion with the district court asking the court to reopen his §2255 proceedings because the court failed to adjudicate or address the Sua Sponte ineffective assistance of counsel claim raised by the Magistrate Judge during his §2255 proceedings. Davis relies on the recent Supreme Court decision in *Buck v. Davis*, 137 S.Ct. 759 (2017). The court denied Davis 60(b) and a COA. The Eleventh Circuit remanded the 60(b) back to the district court to rule on a COA on Davis timely filed Rule 59(e) motion. The district court again denied a COA. On March 29, 2018, the Eleventh Circuit denied Davis a COA. The very fact that the Magistrate Judge Sua Sponte raised a ineffective assistance of counsel claim on appellate counsel for failing to raise an Edwards claim on direct appeal and the clear fact that the district court failed to adjudicate this issue after accepting the Magistrate Judge's finding as to the (IAC) claim on trial counsel, but fail to adjudicate the same claim as to appellate counsel show that the court did not adjudicate this claim, and the claim is debatable.

REASONS FOR GRANTING THE PETITION

I. EMERSON DAVIS' COA SHOULD BE GRANTED UNDER MILLER-EL V. COCKRELL

There are several compelling reasons of substantial public importance why certiorari should be granted. As this Court recognized in Miller-El v. Cockrell, the criteria for granting COAs affects constitutional right of thousands of persons. In particular, the constitutional right of effective assistance of counsel can best, and generally only, be protected under §2255 relief.

The COA sentencing issue for multi-object conspiracy involves confusion and conflict among the circuits concerning general verdicts without specific jury findings. Depending upon the circuit, substantial numbers of persons are granted relief and substantial numbers are denied relief predicated on subjective judicial determination of what the jury's general verdict really meant and may not have meant.

Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), focuses upon whether the constitutional issues are "debatable," and not upon whether there is a reasonable probability of success or failure if the COA would be allowed.

Petitioner will discuss the application of Miller-El v. Cockrell to the constitutional principles in support of the specific issues requested for the COA under one principal section; (a) sentencing.

II. EMERSON DAVIS SHOULD HAVE BEEN SENTENCED
FOR THE CONTROLLED SUBSTANCE WITH THE
LEAST PENALTY NOT THE HIGHEST

COA issues on sentencing can be stated thus:

Whether under a single count indictment and conviction for a drug "conspiracy" to distribute "cocaine, cocaine base (crack), and marijuana" a defendant should be sentenced for the substance with the least penalty in the absence of special verdicts or instructions requiring the jury to find guilt on all three substances or acquit.

Emerson Davis was indicted, convicted and sentenced to life under a single count indictment:

[T]o distribute controlled substances, that is cocaine, cocaine base (commonly known as "crack cocaine"), and marijuana, in violation of Title 21 United States Code, Section 841(a)(1), and (b)(1)(A) (iii).

This Court in *Edwards v. United States*, 523 U.S. 511 (1988) addressed the sentencing question for a conviction of drug crimes involving "cocaine and cocaine base". The instruction had used the disjunctive "or". This Court expressly observed, "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." *Edwards*, 523 U.S. at 515. In *Edwards*, this Court denied relief because the sentence did not exceed the penalty for the quantity of drugs for the substance with the least penalty.

The district court's denial of § 2255 relief was predicated on the indictment being in the conjunctive (use of "and" to link the controlled substances) and not in the disjunctive (use of "or"). Based upon a general verdict to a multi-drug indictment

using "and", the Second Circuit in *United States v. Zillgitt*, 286 F.3d 128, 131 (2002), held:¹

...Zillgitt argues that his sentence is unconstitutional under *United States v. Barnes*, ..in which we held that where a jury returns a general guilty verdict on a single count of conspiracy involving multiple controlled substances, the district court must sentence the defendant as if convicted of a conspiracy involving only the substance that carries the lowest statutory sentencing range... We agree that Zillgitt's sentence was unconstitutional under *Barnes* and the cases upon which *Barnes* relied.

Because Zillgitt did not raise these argument either at trial or at sentencing, we review his claims for plain error....Applying plain error review, we hold that the district court committed error, that the error was plain, that the error affected Zillgitt's substantial rights, and that the error seriously affected the fairness and the public reputation of the judicial proceedings.

The issues raised by Davis concerning sentencing constitute plain error. The constitutional sentencing issue has been raised properly by Emerson Davis in his §2255 proceeding because the court appointed trial counsel failed to object at the time of sentencing. See also *United States v. Dale*, 178 F.3d 429.

The district court's ruling is directly contrary to the Fourth Circuit decision in *United States v. Rhynes*, 206 F.3d 349, 380 (4th Cir. 1999), and the Second Circuit's holding in *United States v. Zilliget*, 286 F.3d 128 (2002). Although decisions of the Second and Fourth Circuit are not controlling in the Eleventh Circuit, these decision does prove the COA is debatable under *Miller-El v. Covkrell*.

Emerson Davis was found guilty of "a drug conspiracy"

¹. *Newman v. United States*, 817 F.2d 635 (10CA.1987) (same)

involving "a controlled substance." The individual jurors all could have found "a drug conspiracy" with each juror finding a different controlled substance or a different combination of controlled substances. For the district court to hold that the Davis jury could not have done so violates due process under the Sixth Amendment. U.S. CONST.Amend. VI.

Under Miller-El, and Buck v. Davis the COA should have been granted.

III. FAILURE TO ADJUDICATE-INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The COA involving debatable constitutional questions of failure to adjudicate claims Sua Sponte raised by a Magistrate Judge, and Ineffective Assistance of Appellate counsel for failure to raise a Edwards claim on Direct Appeal.

Whether the district Court failed to Adjudicate the Sua Sponte Ineffective Assistance of Counsel claim raise by the Magistrate Judge on Appellate Counsel, For failure to raise a Edwards claim on Direct Appeal a violation of Gonzalez v. Crosby.

Whether Ineffective Assistance of Appellate counsel, by failure to raise a Edward claim on Direct Appeal.

The denial of the COA does not cure the district court failure to adjudicate the Magistrate Sua Sponte raising of a ineffective assistance of appellate counsel claim.

The magistrate judge Sua Sponte raised a claim of ineffective

assistance of counsel on appellate counsel but rule neither trial or appellate counsel was ineffective because the issue was without merits. (Doc. 1507). The trial court adjudicated the ineffective assistance of counsel claim on Davis trial counsel but fail to adjudicate the ineffective assistance of counsel claim which was Sua Sponte raise by the Magistrate Judge. This is a clear violation of this Court ruling in *Gonzalez v. Crosby*, 545 U.S. 524 (2003).

In *United States v. Manigault*, 37 Fed. Appx. 68 (4th Cir. 2002), the Fourth Circuit Court of Appeals held that the inmate's trial counsel was not ineffective during trial and sentencing for failing to anticipate a new rule of law. However, his appellate counsel did not raise any argument pertaining to the special verdict form even though one of the appellate decisions relating to the issue had been issued over a year prior to disposition of the inmate's direct appeal. In Davis case, The Edwards decision was handed down before Davis direct appeal was filed and appellate counsel omission of the Edwards claim in his initial brief on direct appeal failed Sixth Amendment musted.. See *Ballard v. U.S.* 400 F.3d 404.

In *Black v. United States*, 373 F.3d 1140 (2004), the Eleventh Circuit Court of Appeals held appellate counsel could not be held ineffective because the Edwards claim was dicta.

There is no doubt that if Davis was sentence in the Fourth or 6th Circuit he would had been granted a COA on his ineffective assistance of appellate counsel claim. See also *Ballard v. United States*, 400 F.3d 404 (6th Cir. 2004) (Same).

The Eleventh Circuit ruling is directly contrary to the Fourth Circuit's holding in *United States v. Manigault*, 37 Fed. Appx. (4th Cir. 2002). The COA sentencing issue for multi-object conspiracy involves confusion and conflict among the circuits concerning general verdicts without specific jury findings. Depending upon the circuit, substantial numbers of persons are granted relief and substantial numbers are denied relief predicated on subjective judicial determination of what the jury's general verdict really meant and may not have meant.

B.

The district court failed to address and adjudicate the ineffective assistance of appellate counsel claim sua sponte raised by the Magistrate Judge during Davis §2255 proceedings.

This Court held in *Gonzalez v. Crosby*, 545 U.S. 524 (2005):

[A] Rule 60(b)(6) motion... is not to be treated as a successive habeas petition if it does not assert, or re-assert, claims of error in the movant[] conviction. A motion, like movant's challenging only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals.

This issue relates back to the original §2255 petition and is not a successive habeas petition, and the Court erred in not granting a COA on this issue.

WHEREFORE, Under *Miller-El v. Cockrell*, Emerson Davis has demonstrated the threshold question that the constitutional issues, properly raised, are debatable among reasoned jurists. The COA should have been granted. This Court should grant Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Emerson v. Davis

Date: 5/7/18