

Appendix-A

**Order Denying Petitioner's COA,
March 29, 2018**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12871-K

EMERSON DAVIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Emerson Davis seeks a certificate of appealability ("COA"), in order to appeal the denials of motions seeking relief from the denial of his underlying 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Davis must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Davis has not made such a showing, and his motion for COA is DENIED. Accordingly, his motions for leave to proceed *in forma pauperis* and appointment of counsel are DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix-B

**Order Denying Petitioner's Rule
(60)(b)(6) Motion, May 12, 2017**

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs.

Case Nos.: 4:92cr4013/WS/CAS

EMERSON DAVIS

ORDER

Defendant Emerson Davis has filed a “Motion in Support for Relief Pursuant to Rule (60)(b)(6) on Behalf of Emerson O. Davis.” (ECF No. 2171). In his motion, Davis asks this court to reopen his § 2255 proceedings, contending that this court incorrectly denied him a certificate of appealability after denying his motion. Davis relies on the recent Supreme Court decision in *Buck v. Davis*, 137 S.Ct. 759 (2017) in support of his claim.

Rule 60 of the Federal Rules of Civil Procedure provides an avenue to obtain relief from a judgment or court order in certain circumstances. Rule 60(b) provides that the court may relieve a party from a final judgment, order or proceeding for a specific list of reasons. Davis relies herein on the catchall provision of Rule 60(b)(6) which allows relief for “any other reason that justifies relief.”

In *Buck v. Davis*, the Supreme Court reiterated that in order to obtain a certificate of appealability, a litigant must demonstrate that “jurists of reason could

disagree with the district court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The COA inquiry "is not coextensive with a merits analysis." *Buck*, 137 S. Ct. at 773. The holding in *Buck*, however, is neither novel nor inconsistent with the analysis employed in this case.

In denying Davis's request for a certificate of appealability in this case, this court stated that in order to obtain a certificate of appealability, Davis needed to make a substantial showing of the denial of a constitutional right, which "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (ECF No. 1607, quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). This court concluded that for the reasons set forth in the second report and recommendation as adopted by the court (ECF Nos. 1507, 1572), Davis was not entitled to a certificate of appealability as he had not made the requisite showing. (ECF No. 1607 at 2).

The only issue Davis now identifies as warranting a certificate of appealability is Ground Twelve of his motion, in which he claimed that the jury's general verdict was ambiguous, and that the court should have sentenced him based upon the

“lowest possible statutory penalty.” (ECF No. 2171 at 6). The magistrate judge recommended that this ground be denied without prejudice as premature, and that the remainder of the motion be denied with prejudice. (ECF No. 1507 at 28). The court stayed the proceedings to allow defense counsel the opportunity to conduct additional investigation. Having heard nothing further, the court adopted and incorporated the report and recommendation fifteen months after it was prepared, but denied the entire § 2255 motion with prejudice. (ECF No. 1572).

Clearly, if Davis believed the incorrect standard had been applied to his request for a certificate of appealability, he could have raised this issue at any time after the request was denied. Davis has not shown that the Supreme Court’s decision in *Buck*, reiterating the standard applicable to motions for certificates of appealability, is a “reason that justifies relief” from the court’s order denying his request for the certificate in 2003. (ECF No. 1607).

Certificate of Appealability

An appeal of the denial of a Rule 60(b) motion requires a certificate of appealability. *Williams v. Chatman*, 510 F.3d 1290, 1294 (11th Cir. 2007); *Gonzalez v. Sec’y for Dept. of Corrections*, 366 F.3d 1253, 1263 (11th Cir. 2004). A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253 (c)(2). The

certificate of appealability is a threshold requirement that filters from the appellate process cases in which the possibility of reversal is "too unlikely to justify the cost for the system of a full appellate examination." *Gonzalez*, 366 F.3d at 1264. Thus, a certificate of appealability should not issue in the appeal from the denial of a Rule 60(b) motion unless Davis shows, at a minimum, that it is debatable among jurists of reason whether the district court abused its discretion in denying the motion. *See Mobley v. Head*, 306 F.3d 1096, 1097 (11th Cir. 2002). In this case, issuance of a certificate of appealability is not warranted, and his request will be denied. Davis is advised that he may seek a certificate of appealability from the Eleventh Circuit Court of Appeals, pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure.

Accordingly it is **ORDERED**:

1. Davis' Motion in Support for Relief Pursuant to Rule (60)(b)(6) on Behalf of Emerson O. Davis" (ECF No. 2171) is **DENIED**.
2. No certificate of appealability shall issue.

DONE AND ORDERED this 12th day of May, 2017.

/s/ William Stafford

WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix-C

**Order Denying Petitioner's Reconsideration
Motion, May 3, 2018**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12871-B

EMERSON DAVIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Emerson Davis has filed a “Petition 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 March 29, 2018, order, denying a certificate of appealability, leave to proceed *in forma pauperis*, and appointment of counsel in his underlying motion to vacate, 28 U.S.C. § 2255. Upon review, Davis’s motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.