CASE NO. 21-5511
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MAY 27, 2011 ORDER
Res One

Defendant,

And

IN RE: MAY 22, 2012 JUDGMENT
Res Two

Defendant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

APPELLANT'S PETITION FOR PANEL REHEARING

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Exhibit B

Table of Contents

Table of Authorities

Page(s)

Cases

Exhibit B

Exhibit B

Exhibit B

Rules

Exhibit B

INTRODUCTION

There is an eerie similarity between the instant appeal and Judge Benham's *Res One*. The result (outcome) of the instant appeal is and the result (outcome) of *Res One* are both controlled by Williams v. Pennsylvania, 579 U.S. 1 (2016) ("*Williams*").

In *Williams*, the United States Supreme Court decided nothing except whether Chief Justice Castille's conduct in adjudicating violated Fourteenth Amendment Due Process.

The case below and this appeal are about nothing except whether Judge Benham's conduct in adjudicating *Res One* violated the Fourteenth Amendment Due Process.

Neither *Williams* nor the opinion of the Court nor the opinion by the district court below involved at all the merits of what either what Chief Justice Castille or the merits of what Judge Benham adjudicated.

Though briefed extensively, neither the opinion of the Court nor the opinion by the district court below even acknowledge the existence of *Williams*.

Just as *Williams* controls the instant case, *Crews v. Overbey*, 645 S.W. 2d 388 (Tenn. 1983) ("*Crews*") controlled *Res One*.

Though *Williams* was briefed extensively, just as neither the opinion of the Court nor the opinion by the district court below even acknowledge the existence of

Exhibit B

Williams, *Res One* does not even acknowledge the existence of *Crews*.

The opinion of the Court and the opinion by the district court below asserted *Rooker-Feldman* as a reason to bypass *Williams*.

Though *Crews* was briefed was extensively, Judge Benham used *res judicata* as a reason to bypass *Crews*.

PETITION

COMES NOW, claimant, Judy Morrow Wright ("Petitioner/Claimant"), pursuant to Federal Rules of Appellate Procedure, Rule 40, and petitions the Court to rehear and, upon rehearing, to reverse the opinion ("Opinion") rendered on December 1, 2021 (copy attached), available as In re May 2011 Ord., 2021 WL 5701419 (6th Cir. Dec. 1, 2021).

In place of the Opinion, Petitioner/Claimant petitions the Court to enter an order remanding the case to district court with a mandate to enter a judgment adjudging that the status of *Res One* is *coram non judice* for having been adjudicated by a judge who adjudicated *Res One* burdened by an unconstitutional appearance of undermined neutrality and that, because *Res One* was adjudicated by a judge who was burdened by an unconstitutional appearance of undermined neutrality, *Res Two*, per se, is *coram non judice*.

Exhibit B

MEMORANDUM IN SUPPORT

Collateral Matter

On November 9, 2021, a Petition For Certiorari was filed and remains pending in the United States Supreme Court in Wright/Morrow v. Buyer, No. 21-714 (U.S. Sup. Ct, Nov. 9, 2021) ("Wright/Morrow Cert.").[1]

In the Wright/Morrow Cert., the instant appeal is described in the required "Statement of Related Proceedings" because appellant, Petitioner/Claimant, is one of the petitioners in the Wright/Morrow Cert. and the dispute at issue in the Wright/Morrow Cert. is the subject matter of the dispute as in this appeal, except that the judge whose conduct is the subject in the Wright/Morrow Cert. is the judge who followed the judge whose conduct is the subject in this appeal, after the judge whose conduct is the subject in this appeal retired.

In both the instant appeal and the Wright/Morrow Cert., the question is whether the judges adjudicated burdened by an unconstitutional appearance of undermined neutrality and, therefore, were disqualified as adjudicators of the different parts of the same dispute at issue in the instant appeal and the Wright/Morrow Cert.

[1] The Wright/Morrow Cert. is available on the United States Supreme Court website.

Exhibit B

Issues Summary
(Standing)

The claims in the Rule 60 *In Rem* Complaint (RE 1, Page ID # 59 - 60) are justiciable. The Opinion misjudged that the claims are non-justiciable erroneously using *in personam* standards. *In personam* justiciability standards are materially different from *in rem* justiciability standards.

Even though Petitioner/Claimant's standing is compliant with *in personam* justiciability standards, there is no need to discuss *in personam* justiciability standards because those have no application in this case. Rather, because this case is 100% *in rem*, in every aspect, and the Opinion cites no *in rem* justiciability standards and authorities are explicated below.

Discussion Issues
(Standing)

The Opinion's adjudication of standing is erroneous because the analysis is exclusively referring to *in personam* cases, and in *personam* cases have no bearing on standing to be a claimant in an *in rem* case. The Rule 60 *In Rem* Complaint (RE 1, Page ID # 59 - 60) includes the following unrefuted and irrefutable facts (RE 1, Page ID # 59 – 60, Page 3):

8. First Claimant is an heir-at-law of Helen B. Goza.

9. Helen B. Goza died May 15, 2001.

Exhibit B

10. First Claimant is an heir-at-law of John J. Goza.

11. John J. Goza died September 27, 2007.

The remainder of the Rule 60 *In Rem* Complaint (RE 1, Page ID # 59 - 60) clarifies that, if the status of *Res One* and *Res Two* is *coram non judice*, as Petitioner/Claimant pleads, she is entitled to her inheritable share of the Goza Estate. Respectfully, Petitioner/Claimant contends that it is hard to imagine a more colorable claim of interest. *Restor-A-Dent-Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874-75 (2d Cir. 1984); *Humes v. Alaska Transportation Co.*, 180 F.2d 534, 536-37 (9th Cir. 1950); *J.T. Shannon Lumber Company, Inc. v. Gilco Lumber, Incorporated,*, 2008 WL 4553048 *1-*2 (N.D. Miss. 2008); *United States v. $7,206,157,717 On Deposit at JP Morgan Chase Bank, N.A.*, 274 F.D.R. 125, 127 (S.D.N.Y. 2011); *Compagnie Noga D'Importation Et D'Exportation S.A., v. The Russian Federation*, 2005 WL 1690537 *4-*5 (S.D.N.Y. 2005).

Petitioner/Claimant's claims of interest in *Res One* and *Res Two* are claims of entitlement to Petitioner/Claimant's inheritance.

This case being a diversity case, it is important to note that beyond question Tennessee precedent requires a suitor to have standing to make a claim that attaches

Exhibit B

the subject matter jurisdiction of a Tennessee court.[2] From 1835 through 2016, the Tennessee Supreme Court precedent has used "colorable" to describe what a claim must be to be a justiciable a claim essential to a claimant's right to be heard."[3]

A colorable claim prerequisite, per federal case law incorporated as Tennessee precedent, means that to state a claim in relation to a *res* in an *in rem* proceeding, direct ownership or possessory interest in the *res* must be colorable.[4] Because the *in*

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[2] *Howe v. Haslam*, 2014 WL 5698877 (Tenn. Ct. App. 2014); *UT Medical Group, Inc. v. Vogt*, 2007 WL 2350088 (Tenn. 2007); *Mayhew v. Wilder*, 46 S.W.3d 760, (Tenn. Ct. App. 2001); *Citizens for Collierville, Inc. v. Town of Collierville*, 977 S.W.2d 321 (Tenn. Ct. App. 1998); *Oldham v. American Civil Liberties Union Foundation of Tennessee, Inc.*, 910 S.W.2d 431, (Tenn. Ct. App. 1995).

[3] *In re Carrington H. et al.*, 483 S.W.3d 507, 530 (Tenn. 2016); *Floyd v. Goodwin*, 16 Tenn. 484, 486, 490-91, 495 (1835); *Keller v. Estate of McRedmond*, S.W.3d (Tenn. 2016); *Shields v. Clifton Hill Land Co.*, 26 L.R.A 509 (Tenn. 1894); *First Community Bank, N.A. v. First Tennessee Bank N.A.*, 489 S.W.3d 369, 404-07, (Tenn. 2015).

[4] *The Cartona*, 297 F. 827 (2d. Cir. 1924); *The Idaho*, 12 F. Cas. 1345, 1356 (E.D.N.Y. 1870); *Succession of Bibbins*, 152 So. 592, 594 (La. App. 1934); *Scott v. Larkin*, 79 Pa. D. & C. 140, 142 (Allegheny County 1951); *U.S. v. Thirty-Eight Thousand Dollars ($38,000) in U.S. Currency*, 1987 WL 10192 *2 (E.D. La. 1987); *U.S. v. Premises Known as 281 Syosset Woodbury Road, Woodbury, N.Y.*, 791 F.Supp. 61, 63 (E.D.N.Y. 1992); *U.S. v. Real Property Located at Incline Village*, 976 F.Supp. 1321, 1325 (D. Nev. 1997); *DnB Holdings, Ltd. V. M/V Hermitage*, 1995 WL 529853 *1 (E.D. La. 1995); *Broad Bridge Media, L.C. v. Hyper CD.com*, 2000 WL 680255 *1 (S.D.N.Y. 2000); *Ryer v. Harrisburg Kohl Bros., Inc.*, 315 F.Supp. 7, 9 (M.D. Pa. 1970); *Zann v. King County*, 2006 WL 2590091 *2 (Ct. App. Wash. 1 2006); *Graham & Buffet, Ltd. v. www.vilcabamba.com*, 2006 WL 851253 *3 (W.D. Wash 2006); *U.S. v. $343,069 in U.S. Currency*, 2011 WL 1299347 at *2 (N.D. Okl. 2011); *U.S. v. One 2003 M/V Edgewater Vessel (Hull No. DMA03540L2032008)*, 2015 WL 998168 *2 (D. Puerto Rico. 2015); *Regency Highland Associates v. Regency Highland Condominium Ass'n, Inc.*, 405 So.2d 788, 789 (Fla. 4th DCA 1981); *Thomton, Sperry & Jensen, Ltd. v. Anderson*, 352 N.W.2d 467, 469 (Minn. App. 1984); *U.S. v. 40 Acres of Real Property, More or Less*, 629

Exhibit B

rem proceeding *sub judice* arises in the context of Rule 60 and the federal cases on point arise in the context of the mirror-image federal rule, the federal law incorporated as Tennessee precedent is tailor-made for incorporation.

The right to an inheritance is personal property in the form of a chose-in-action awaiting conversion into a chose-in-possession.

Eerie Similarity

Arguably, there is an eerie similarity between the Court's opinion in the instant appeal/district court opinion and Judge Benham's *Res One* in that both are result-oriented adjudications to avoid feared precedential results that might occur, outside the boundaries of the instant case/appeal if *Williams* and *Crews* were allowed to control results (outcome).

Williams was designed to control how every judge in the United States and the United States territories, in every case, makes personal *sua sponte* decisions about whether the judge must withdraw/recuse from adjudicating a particular case. *Williams* was designed to ensure that judges' decisionmaking, about whether judges must withdraw/recuse, to conform to Fourteenth Amendment Due Process standards. Using Chief Justice Castille's misstep as an example of non-compliant

F.Supp.2d 1264, 1274-75 (S.D.Ala. 2009); *U.S. v. $148,840.00 in U.S. Currency*, 521 F.3d 1268, 1273, 1275 (10th Cir. 2008); *U.S. v. $8,440,190.00 in U.S. Currency*, 719 F.3d 49, 54-5, 57, 60, 62, 65-6 (1st Cir. 2013).

Exhibit B

decisionmaking potentially changes the status quo with respect to the current withdrawal/recusal decisionmaking of some judges. Changing status quo inevitably draws resistance.

Crews set precedent in Tennessee opting Tennessee out of the trend in many states toward changing centuries-old trust law that made revocable living trusts able to estate planning devices to control post-death estate distribution.

Despite *Crews*, after 1983, as before, Judge Benham and other trust and estate lawyers in Tennessee used revocable living trusts to plan estates devices to control post-death estate distribution.

Arguably, *Res One* is a result-oriented adjudication to avoid the feared potential effect if *Crews* was reaffirmed as the binding precedent it was and had been since decided by the Tennessee Supreme Court in 1983.

Here, it is argued that *Williams*, effectually, reaffirms the never-changed rule of law that outlaws all result-oriented adjudication by all courts in the United States and the United States territories.

Williams found the fault of Chief Justice Castille to be that Chief Justice Castille was burdened with a state of mind (RE 1, Page ID # 59 – 60, page 20, paragraph 90) or, more particularly, an appearance of a state of mind, that might cause it to appear to a reasonable audience (not Chief Justice Castille) that Chief Justice Castille was adjudicating with an undermined neutrality.

Exhibit B

The standard by which to measure Judge Benham's conduct (refusing to withdraw from adjudicating) in the instant appeal is what the United States Supreme Court, in *Williams*, found to be conduct of Chief Justice Castille equaling a structural (not merely a personal) violation of Fourteenth Amendment Due Process. Petitioner/Claimant contends that, by comparison, on an egregiousness scale, the conduct of Chief Justice Castille was but a small fraction of the Opinion's (2021 WL 5701419, at *1) understated summarization of the conduct of the Judge Benham: "because he had drafted trust documents and advised trust-estate clients in private practice." This combines with district court's words (2020 WL 6532850*4): "bias rest ... on Judge ... knowledge of ... probate law. ... [b]ecause Judge ... law practice included the drafting of trust instruments like the one in dispute, ..."

These words, Petitioner/Claimant contends, leave out the qualitative and quantitative magnitude of what Judge Benham did relative to what Chief Justice Castille did.

Respectfully, Petitioner/Claimant contends that this is the most important teaching from *Williams*. Likely, some persons believe that the *Williams* standard is too restrictive, but this feeling is immaterial; only the feeling of the United States Supreme Court, expressed in *Williams*, is of any legal significance.

If a judge, on self-examination, decides, measured by Chief Justice Castille's state of mind, the judge has a pre-case state of mind (RE 1, Page ID # 59 – 60, page

Exhibit B

20, paragraph 90) that might cause a reasonable third person to question whether the judge's neutrality might be undermined, the judge must withdraw from the adjudication.

Therefore, respectfully, it is incumbent on every judge in the United States to become acutely aware of the characteristics of Chief Justice Castille's state of mind that rendered Chief Justice Castille disqualified.

The sole determinative question as to whether Chief Justice Castille should have granted the recusal motion and avoided violation of Mr. Williams' structural Fourteenth Amendment right.

Williams was not about the merits of Mr. Williams' case. However, because Chief Justice Castille's violation was a structural violation, whether the decision was correct or not was an irrelevancy. The Pennsylvania Supreme Court's presumably correct decision on the merits was *coram non judice.*

The circumstance that Mr. Williams alleged required Chief Justice Castille's recusal, **in 2012**, was Chief Justice Castille's **state of mind,** evidenced by a page and a half routine memorandum which, **28 years earlier,** while serving as District Attorney, he signed giving an assistant the authority to seek the death penalty in Mr. Williams' case. In the intervening 28 years, Chief Justice Castille had long since ceased being the District Attorney and was in a long tenure as a Supreme Court Justice.

Exhibit B

So, of what probative significance is the state of mind of Chief Justice Castille 28 years earlier, in his role as a District Attorney, when he signed the routine memorandum, in determining Chief Justice Castille's state of mind, 28 years later in his role as the Chief Justice?

Williams held the probative significance was sufficient to deem Chief Justice Castille's refusal to recuse a structural Fourteenth Amendment Due Process

Williams added four other circumstances to bolster the 28-year-old routine memorandum.

There were 19-year-old newspaper articles reporting rank hearsay that, while Chief Justice Castille was campaigning for office to be a justice, he was in favor of the death penalty and tough on crime.

To this was added statements his Chief Justice Castille's concurring opinion in Mr. Williams' case chastising the lower court for its decision staying Mr. Williams' execution.

To this was added rank speculation that Chief Justice Castille might have been influenced by the fact that, in 2012, the assistant district attorney, 28 years earlier, violated the Brady Rule, and this might have influenced Chief Justice Castille to absolve the assistant.

Exhibit B

The weight (or lack of weight) of the circumstances (barely "evidence") *Williams* found to constitute Chief Justice Castille's structual violation is the strongest teaching from *Williams*.

Post-*Williams,* the burden on every judge in the United States is heavy to searchingly self-examine for any appearance which a neutral third person, correctly or incorrectly, might interpret as undermined neutrality of the quantity and quality of Chief Justice Castille's disqualifying appearance.

The United States Supreme Court, in *Williams,* signaled that it was about as serious as it could be about neutrality, actual or perceived, on the part of all judges, state and federal. Justice Barrett, in a recent speaking engagement, according to a Washington Post article on September 14, 2021, described as "hypervigilant" the duty of the Justices to make certain the Justices' personal biases do not creep into their opinions.[5]

Respectfully stated, the egregiousness of the state of mind of Chief Justice Castille, in comparison with the egregiousness of the state of mind of Judge Benham (RE 1, Page ID #59 paragraph 147, Pages 36-37; Paragraph 153, pages 39-41; paragraph 154, Pages 41-51; paragraph 155, Pages 52-56) of the is the comparison of a peashooter to a Sherman Tank.

[5] September 12, 2021 public speaking engagement at the Mitch McConnell Center in Louisville, Kentucky.

Exhibit B

Considering the rule (all pled facts taken as true etcetera) of law in a motion for a judgment on the pleadings (RE 6, Page ID # 248-253; RE 7, Page ID # 254-274), a reasonable summarization of the Rule 60 *In Rem* Complaint (RE 1, Page ID # 59 - 60) is as follows.

Factors determinative of Judge Benham's disqualification include but not exclusively the following: **(1)** Judge Benham routinely used the revocable living trust, as an estate planning device for hundreds, if not thousands, of former clients; **(2)** Judge Benham was an early advocate of the use of the revocable living trust before it was commonly in use; **(3)** Judge Benham, for decades, had taught others in CLE courses and law school students and had mentored lawyers in the use of the revocable living trust; **(4)** use of the revocable living trust as a post-death estate planning device creates for client a legal document on which the client and the client's heirs rely on for generations; so, revocable living trust as a post-death estate planning device which Judge Benham prepared for clients before he became a judge, if lawful, remain in force and in use long after Judge Benham became a judge; **(5)** Judge Benham was participating as a presenter at continuing legal education seminars teaching that revocable living trusts are lawful estate planning devices; **(6)** the trust and estate planning bar in Memphis is a relatively small fraternity-like group in which Judge Benham, for years, was a prominent senior member; **(7)** in that role, Judge Benham was an outspoken advocate of use of revocable living trusts as lawful

Exhibit B

estate planning devices; **(8)** the lawyer who drafted the revocable living trust at issue in the Goza case was/is a friend and fellow long term member of the Memphis bar trust and estate lawyers; **(9)** the Goza revocable living trust at issue was the same as the revocable living trusts Judge Benham had used for hundreds, if not thousands, of clients who, while Judge Benham served as a judge, have continued to rely on the efficacy of the revocable living trusts Judge Benham prepared for his clients.

Res One is Judge Benham's judgment in the Goza case. The case-dispositive issue for Judge Benham to decide was exceedingly simple. Is it unlawful, in Tennessee, to use the revocable living trust as a post-death estate planning device?

Judge Benham, before, in and after 2011, had spent decades and continued to answer that question NO in every public forum and attorney-client relationship imaginable.

The one and only outcome, if this Court decided that Judge Benham was disqualified, is that the merits would be submitted to probate court again for adjudication by a judge not disqualified by an appearance of undermined neutrality.

What legitimate reason could cause Judge Benham not to withdraw?

One fallout from *Williams* is that a result-oriented adjudication (as described in the dissent in Gohl v. Livonia Pub. Sch. Sch. Dist., 836 F.3d 672, 698 (6th Cir. 2016), is a per se structural (not merely a personal) violation Fourteenth Amendment

Exhibit B

Due Process Clause. The mere appearance of undermined neutrality is a fire-on-ice antidote to result-oriented adjudication.

It is impossible for Judge Benham to maintain an appearance of neutrality and, at the same time, adjudicate to avoid what Judge Benham saw as a catastrophic result which so closely touched Judge Benham in a unique and personal way.

The fact that no other person knew of Judge Benham's predisposition is immaterial because the view of the third party presumes that the third party knows everything Judge Benham knows about Judge Benham.

Respectfully, Petitioner/Claimant contends that, if what Judge Benham did is not checked, *Williams*' precedent is as if overturned because it is unimaginable that any judge, more than Judge Benham in this case, could more flagrantly transgress the qualitative and quantitive standards *Williams* established to be equal to or surpassing what Chief Justice Castille did, i.e., denied a recusal motion even though he was burdened by an appearance of undermined neutrality.

Chief Justice Castille's structural violation of Mr. Williams' Fourteenth Amendment Due Process rights may have been a mistaken misapprehension but mistaken or not was irrelevant. In light of and since *Williams*, misapprehension should not occur.

Exhibit B

Conclusion

For the foregoing reasons, Petitioner/Claimant urges the Court to grant the instant Petition To Rehear and adjudicate the relief for which the Petition prays.

Respectfully Submitted,

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Exhibit B

CERTIFICATE OF SERVICE AND CONFORMITY

I certify that on December 10, 2021, a copy of Petitioner/Claimant/Appellant, Judy Morrow Wright's Petition To Rehear, which was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

This brief complies with the 3,900 type-volume limitation of Fed. R. App. P. 40 as this Petition, excluding the words excluded by Fed. R. App. P. 32(a)(f), contains 3,375 words in proportionally spaced font, Times New Roman.

PARRISH LAWYERS, P.C.

By: /s Larry E. Parrish
Larry E. Parrish

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