No. _____

IN THE
Supreme Court of the United States

TREMANE WOOD,
Petitioner,

vs.

CHRISTE QUICK, WARDEN, OKLAHOMA STATE PENITENTIARY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
FEDERAL PUBLIC DEFENDER
District of Arizona

AMANDA C. BASS
Counsel of Record
KEITH J. HILZENDEGER
ALISON Y. ROSE
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 382-2800 facsimile
Amanda_Bass@fd.org
Keith_Hilzendeger@fd.org
Alison_Rose@fd.org

Counsel for Petitioner

****CAPITAL CASE****

QUESTION PRESENTED

Tremane Wood was convicted of felony murder for participating in a robbery in which his older brother, Zjaiton Wood, killed one of the robbery's victims and confessed to that fact. In separate trials, Mr. Wood was sentenced to death while Zjaiton was sentenced to life without parole. That disparity comes down to resources. Whereas Zjaiton was zealously represented by three experienced capital defense attorneys with Oklahoma's Indigent Defense System, the trial court appointed private conflict counsel to represent Mr. Wood who was paid just $10,000, did no work on Mr. Wood's case other than show up for court, and was impaired by an addiction to alcohol, cocaine, and prescription pills.

In his federal habeas petition, Mr. Wood raised a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), based on conflict counsel's penalty-phase ineffectiveness. When the district court adjudicated that claim, however, it failed to review the last reasoned state court decision adjudicating the claim's merits—a fact which Respondent did not dispute in the proceedings below—as required by this Court's decisions in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), in *Wilson v. Sellers*, 584 U.S. 122 (2018), and by 28 U.S.C. § 2254(d). Based on that fundamental defect in the district court's adjudication of his *Strickland* claim, along with new and various extraordinary circumstances, Mr. Wood moved the district court to reopen the judgment in his habeas proceeding under Federal Rule of Civil Procedure 60(b)(6). Without reaching the Rule 60(b)(6) motion's merits, the district court decided that it was "not a true Rule 60(b) motion," rather it was an unauthorized second-or-successive habeas petition, and transferred it to the Tenth Circuit under 28 U.S.C § 1631 for authorization under 28 U.S.C. § 2244(b). Mr. Wood timely appealed.

Following the court of appeals' sua sponte request for briefing on whether it has appellate jurisdiction to review the district court's decision, the court of appeals held that it "lacks jurisdiction to review, via this appeal, the district court's conclusion that Wood's Rule 60 motion was an unauthorized second or successive § 2254 petition," and dismissed Mr. Wood's appeal.

This petition presents the following question:

> Does 28 U.S.C. § 1291 give a federal court of appeals jurisdiction to review a district court's decision that a habeas petitioner's motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not a true Rule 60(b) motion if, in the same order, the district court also transfers to the court of appeals under 28 U.S.C. § 1631 what it construes as a second-or-successive habeas petition?

PARTIES TO THE PROCEEDING

In the proceedings below, Tremane Wood was the plaintiff/petitioner and Christe Quick was the defendant/respondent.

RELATED PROCEEDINGS

Oklahoma Court of Criminal Appeals:

Wood v. State, 158 P.3d 467 (Okla. Crim. App. Apr. 30, 2007) (No. D-2005-171) (order denying relief on direct appeal)

Wood v. State, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010) (unreported) (denying initial postconviction application)

Wood v. State, No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011) (unreported) (denying second postconviction application)

Wood v. State, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017) (unreported) (denying third postconviction application)

Wood v. State, No. PCD-2022-550 (Okla. Crim. App. Aug. 18, 2022) (unreported) (denying fourth postconviction application)

U.S. District Court for the Western District of Oklahoma:

Wood v. Trammell, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Oct. 30, 2015) (order denying federal habeas petition)

Wood v. Quick, No. CIV-10-0829-HE (W.D. Okla. Sept. 13, 2023) (order determining that Rule 60(b)(6) motion is "not a true" Rule 60(b) motion, and transferring to Tenth Circuit for second-or-successive authorization)

U.S. Court of Appeals for the Tenth Circuit:

Wood v. Carpenter, 899 F.3d 867, *opinion modified and superseded on denial of rehearing*, 907 F.3d 1279 (10th Cir. Aug. 9, 2018) (No. 16-6001) (opinion affirming denial of federal habeas petition)

Wood v. Quick, No. 23-6134 (10th Cir. Nov. 6, 2023) (dismissing appeal of district court's Sept. 13, 2023 Rule 60(b)(6) decision for lack of jurisdiction)

In re: Tremane Wood, No. 23-6129 (10th Cir. Feb. 9, 2024) (denying petition for rehearing and request for en banc consideration of denial of motion for remand)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
RELATED PROCEEDINGS iii
TABLE OF CONTENTS iv
APPENDIX TABLE OF CONTENTS v
TABLE OF AUTHORITIES vi
PETITION FOR A WRIT OF CERTIORARI 1
INTRODUCTION 1
OPINIONS BELOW 5
JURISDICTION 5
CONSTITUTIONAL AND STATURORY PROVISIONS 6
STATEMENT OF THE CASE 7
REASONS FOR GRANTING THE PETITION 9
I. The court of appeals has jurisdiction under 28 U.S.C. § 1291 to review the district court's decision that Mr. Wood's Rule 60(b) Motion was not a "true" Rule 60(b) motion. 9
A. The district court's decision that Mr. Wood did not bring a "true Rule 60(b) motion" is final and appealable under 28 U.S.C. § 1291. 9
B. AEDPA left intact the familiar rule that district court decisions on Rule 60(b) motions are reviewable on appeal. 17
CONCLUSION 21

APPENDIX TABLE OF CONTENTS

Appendix A: Order, *Wood v. Quick*, No. 23-6134 (10th Cir. Nov. 6, 2023) 001a

Appendix B: Order, *Wood v. Quick*, No. CIV-10-0829-HE (W.D. Okla. Sept. 13, 2023) 003a

Appendix C: Jurisdictional Memorandum Brief, *Wood v. Quick*, No. 23-6134 (10th Cir. Oct. 03, 2023) 010a

Appendix D: Reply Brief, *Wood v. Quick*, No. 23-6134 (10th Cir. Oct. 19, 2023) 032a

Appendix E: Motion for Remand, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 13, 2023) 043a

Appendix F: Order, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Jan. 8, 2024) 067a

Appendix G: Petition for Rehearing, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Jan. 19, 2024) 079a

Appendix H: Order, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Feb. 09, 2024) 112a

Appendix I: Response, *Wood v. Quick*, No. 23-6134 (10th Cir. Oct. 16, 2023) 113a

TABLE OF AUTHORITIES

Federal Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 20

Browder v. Director, Dept. of Corr. of Illinois, 434 U.S. 257 (1978) 17, 20

Castro v. United States, 540 U.S. 375 (2003).....18, 19, 21

Catlin v. United States, 324 U.S. 229 (1945).....2, 9, 14, 17

Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991).....2

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 9

FDIC v. McGlamery, 74 F.3d 218 (10th Cir. 1996) 14, 15, 16, 17

Gonzalez v. Crosby, 545 U.S. 524 (2005).....2, 4, 5, 17, 19

Griffin v. Illinois, 351 U.S. 12 (1956).....20

Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997).....10

Marmolejos v. United States, 789 F.3d 66 (2d Cir. 2015) 14, 16, 17

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 10, 11, 12, 13, 14

Ross v. Moffitt, 417 U.S. 600 (1974).....20

Spitznas v. Boone, 464 F.3d 1213 (10th Cir. 2006) 3

Tremane Wood, In re, No. 23-6129 (10th Cir.) 2, 3, 4, 7, 8, 18, 19

Wilson v. Sellers, 584 U.S. 122 (2018) 2

Wood v. Quick, No. 23-6134 (10th Cir. Nov. 6, 2023) 1, 8

Wood v. Quick, No. 23-6234 (10th Cir. Sept. 19, 2023).....8

Wood v. Quick, No. 23A689 (U.S. Jan. 25, 2024) 5, 8

Wood v. Quick, No. CIV-10-0829-HE (W.D. Okla. Apr. 19, 2023), ECF No. 127 7

Ylst v. Nunnemaker, 501 U.S. 797 (1991).....2

Federal Statutes

28 U.S.C. § 1254 5

28 U.S.C. § 1291 ..... 1, 2, 4, 6, 9, 10, 14, 16, 19

28 U.S.C. § 2241 17

28 U.S.C. § 2244 ..... 2, 4, 17, 18, 19

28 U.S.C. § 2253 17

Rules

Fed. R. App. P. 4(a) 17, 20

Fed. R. Civ. P. 60(b) 1, 2, 3, 4, 5, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20

Sup. Ct. R. 10(a) 5

Constitutional Provisions

U.S. Const. amend. VI 6

PETITION FOR A WRIT OF CERTIORARI

Tremane Wood is on Oklahoma's death row and respectfully petitions this Court for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals dismissing for lack of appellate jurisdiction under 28 U.S.C. § 1291[1] his appeal of the district court's decision that his Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) was not a "true" Rule 60(b) motion, rather was an unauthorized second-or-successive habeas petition.

INTRODUCTION

Mr. Wood seeks review of the Tenth Circuit's Order in *Wood v. Quick*, No. 23-6134 (10th Cir. Nov. 6, 2023) (Pet. App. 001a–002a) dismissing for lack of appellate jurisdiction under § 1291 Mr. Wood's timely appeal of the district court's decision that his Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) (hereafter "Rule 60(b)" Motion) was not a "true" Rule 60(b) motion, but rather was an unauthorized second-or-successive habeas petition. (Pet. App. 003a–009a.)

Mr. Wood argued below (Pet. App. 010a–031a; Pet. App. 032a–042a) that the court of appeals has appellate jurisdiction under § 1291 to review the district court's Rule 60(b) decision in his case (Pet. App. 008a–009a), because that decision terminated the litigation on the merits of his Rule 60(b) Motion in the district court, rendering it final and appealable under a straightforward reading of § 1291 and this

[1] Unless otherwise noted, unadorned statutory citations are to Title 28 of the United States Code.

Court's precedent. *See* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States[] . . . "); *Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

The court of appeals disagreed, concluding that because the district court decided in the same order, first, that Mr. Wood's Rule 60(b) Motion was "not a true Rule 60(b) motion" (Pet. App 008a–009a), and then, on that basis, transferred it to the court of appeals under § 1631 for adjudication as a second-or-successive petition under § 2244(b)[2], it lacked appellate jurisdiction over the district court's Rule 60(b) decision (Pet. App. 001a–002a (court of appeals concluding that "this court lacks

[2] That transferred case is captioned *In re: Tremane Wood*, No. 23-6129 (10th Cir.). There, Mr. Wood argued in a Motion for Remand that the district court erred when it construed his Rule 60(b) Motion as "not a true Rule 60(b) motion" under this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and he asked the Tenth Circuit to remand his case to the district court for adjudication of his Rule 60(b) Motion's merits. (Pet. App. 043a–066a.)

On January 8, 2024, the court of appeals denied Mr. Wood's Motion for Remand in an order that conflicts with this Court's decisions in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), *Wilson v. Sellers*, 584 U.S. 122 (2018), and *Gonzalez*; with the court of appeals' own precedent in *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991); and with the decisions of every court of appeals interpreting and applying *Ylst*. (Pet. App. 067a–078a; 079a–111a; 112a.) Mr. Wood will be seeking this Court's certiorari review of that decision as well, including whether this Court has jurisdiction under § 2244(b)(3)(E) to review by way of a writ of certiorari the court of appeals' denial of a Motion for Remand transferred pursuant to § 1631. Because this Court's answer to that anticipated question is related to the question presented here, *see* Section I(B) *infra*, Mr. Wood will be asking the Court to consider the questions presented by both petitions together.

jurisdiction to review, via this appeal, the district court's conclusion that Wood's Rule 60 motion was an unauthorized second or successive § 2254 petition").) It then dismissed Mr. Wood's appeal.

The § 1631 transfer procedure that the court of appeals has adopted for district courts adjudicating Rule 60(b) motions in federal habeas cases not only renders the Tenth Circuit an outlier among the lower federal courts tasked with adjudicating Rule 60(b) motions in habeas cases, *see Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006) (directing that where, in a habeas case, a "district court concludes that the [Rule 60(b)] motion is actually a second or successive petition, it should refer the matter to this court for authorization under § 2244(b)(3)[]" (citing. § 1631)); but that outlier procedure also jeopardizes habeas petitioners' right to appellate review—by the en banc court of appeals, and by this Court—of a district court's Rule 60(b) decision in federal habeas cases arising out of the Tenth Circuit.

The decision below jeopardizes that right in Mr. Wood's case in the following way: The court of appeals concluded in the separate *In re: Tremane Wood* case transferred to it from the district court that Mr. Wood's Rule 60(b) Motion is an unauthorized second-or-successive habeas petition that fails to meet § 2244(b)(2)'s requirements (Pet. App. 071a), and denied Mr. Wood's Motion for Remand on that basis (Pet. App. 067a–078a). The court of appeals also denied Mr. Wood's petition for rehearing and request for en banc consideration without addressing whether that denial was predicated on the court of appeals' lack of jurisdiction to entertain such a

petition under § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or a writ of certiorari"), or on Mr. Wood's failure to meet the court of appeals' substantive criteria for obtaining rehearing and en banc consideration. (Pet. App. 112a.)

As noted *supra*, note 2, Mr. Wood intends to seek this Court's certiorari review of the court of appeals' *In re: Tremane Wood* denial where the related questions presented will include whether this Court has jurisdiction under § 2244(b)(3)(E) to review the court of appeals' decision by way of certiorari. If the answer to that question is "no," then unless this Court's answer to the question presented here is "yes"—i.e., that the court of appeals has jurisdiction under § 1291 to review the district court's Rule 60(b) determination by way of appeal—then a habeas petitioner like Mr. Wood may be forever barred from obtaining rehearing, en banc, and certiorari review of a district court's decision on a Rule 60(b) motion whenever that motion is erroneously construed as second-or-successive and subject to the court of appeals' outlier § 1631 transfer procedure. That result would implicitly engraft onto the habeas statute a jurisdictional bar on appellate review of Rule 60(b) motions in habeas cases that cannot be squared with the text of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), with Congress's intent, or with this Court's decision in *Gonzalez* where it held that "AEDPA did not expressly circumscribe the operation of Rule 60(b)" where "[b]y contrast, AEDPA directly amended other provisions of the

Federal Rules." 545 U.S. at 529.

This Court—in the exercise of its supervisory power and defense of its appellate jurisdiction over federal district courts' Rule 60(b) decisions in habeas cases—should summarily reverse the decision below and remand with instructions to accept jurisdiction over Mr. Wood's appeal. Sup. Ct. R. 10(a).

OPINIONS BELOW

The Tenth Circuit's order dismissing Mr. Wood's appeal of the district court's Rule 60(b) decision for lack of jurisdiction is unreported. (Pet. App. 001a–002a.) The United States District Court for the Western District of Oklahoma's decision that Mr. Wood's Rule 60(b) Motion was not a "true" Rule 60(b) motion, but rather was an unauthorized second-or-successive habeas petition, is also unreported. (Pet. App. 003a–009a.)

JURISDICTION

The Tenth Circuit dismissed Mr. Wood's appeal for lack of jurisdiction on November 6, 2023. On January 25, 2024, the Honorable Brett M. Kavanaugh[3] extended the time to file the instant petition up to and including March 21, 2024. *Wood v. Quick*, No. 23A689 (U.S. Jan. 25, 2024). Mr. Wood now timely petitions for a writ of certiorari over which this Court has jurisdiction under 28 U.S.C. § 1254.

[3] The Honorable Neil M. Gorsuch, Circuit Justice for the Tenth Circuit, is recused from the instant matter.

CONSTITUTIONAL AND STATURORY PROVISIONS

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

28 U.S.C. § 1291:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . .

STATEMENT OF THE CASE

On April 19, 2023, Mr. Wood moved the United States District Court for the Western District of Oklahoma for relief from the final judgment in his habeas proceeding under Federal Rule of Civil Procedure 60(b)(6). Motion for Relief, *Wood v. Quick*, No. CIV-10-0829-HE (W.D. Okla. Apr. 19, 2023), ECF No. 127. Following full briefing (Response, *Wood v. Quick*, No. CIV-10-0829-HE (W.D. Okla. May 8, 2023), ECF No. 129; Reply, *Wood v. Quick*, No. CIV-10-0829-HE (W.D. Okla. Apr. 8, 2023), ECF No. 130), the district court decided that Mr. Wood's Rule 60(b) Motion was "not a true Rule 60(b) motion" and declined to consider its merits (Pet. App. 003a–009a). The district court instead construed Mr. Wood's motion as a second-or-successive petition that amounted to a new habeas action, and transferred that action to the court of appeals for authorization under § 2244(b). (Pet. App. 003a–009a) Mr. Wood timely appealed. Notice of Appeal, *Wood v. Quick*, No. CIV-10-0829-HE (W.D. Okla. Sept. 14, 2023), ECF No. 133.

On September 13, 2023, the court of appeals captioned the second-or-successive habeas action transferred from the district court as *In re: Tremane Wood* and docketed it under case number 23-6129. Letter from 10th Cir. Clerk of Court, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Sept. 13, 2023). It subsequently ordered that, within 30 days of September 14, 2023, Mr. Wood should file either a Motion for Authorization to file a second-or-successive federal habeas petition or a Motion for Remand to the district

court. Letter from 10th Cir. Clerk of Court at 1–2, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Sept. 14, 2023).

On September 15, 2023, the clerk captioned Mr. Wood's appeal of the district court's decision construing his Rule 60(b) Motion as a second-or-successive petition as *Wood v. Quick* and docketed that appeal under case number 23-6134. Letter from 10th Cir. Clerk of Court, *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 15, 2023). The court of appeals then sua sponte ordered Mr. Wood to "file a jurisdictional memorandum brief setting forth any legal basis for the court to exercise appellate jurisdiction over the [district court's] transfer order." Order at 2, *Wood v. Quick*, No. 23-6234 (10th Cir. Sept. 19, 2023).

Mr. Wood filed his jurisdictional brief setting forth the legal bases for the court of appeals' appellate jurisdiction over the district court's Rule 60(b) decision on October 3, 2023. (Pet. App. 010a–031a.) On October 16, 2023, Respondent filed a jurisdictional brief arguing that the court of appeals lacked jurisdiction over Mr. Wood's appeal (Pet. App. 113a–131a), and Mr. Wood filed a supporting reply on October 19, 2023 (Pet. App. 032a–042a).

On November 6, 2023, the court of appeals dismissed Mr. Wood's appeal after concluding it lacked appellate jurisdiction over the district court's Rule 60(b) decision. (Pet. App. 001a–002a.) On January 25, 2024, the Honorable Justice Kavanaugh extended the time to seek this Court's certiorari review of the court of appeals' decision up to and including March 21, 2024. *Wood v. Quick*, No. 23A689 (U.S. Jan. 25, 2024).

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The court of appeals has jurisdiction under 28 U.S.C. § 1291 to review the district court's decision that Mr. Wood's Rule 60(b) Motion was not a "true" Rule 60(b) motion.

A. The district court's decision that Mr. Wood did not bring a "true Rule 60(b) motion" is final and appealable under 28 U.S.C. § 1291.

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]" 28 U.S.C. § 1291. A district court's decision is "final" when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233; *cf. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (noting that "[s]o long as [a] matter remains open, unfinished, or inconclusive" in the lower court "there may be no intrusion by appeal" since "[a]ppeal gives the upper court a power of review, not one of intervention[]").

Under this test, the district court's decision that Mr. Wood's Rule 60(b) Motion was "not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider it is final. (Pet. App. 008a–009a.) That decision terminated the litigation on the merits of Mr. Wood's Rule 60(b) Motion in the district court (*see* Pet. App. 009a n.1 (the district court declining to reach the merits of Mr. Wood's Rule 60(b) Motion)), which conclusively resolved his right to seek relief under the rule.

It makes no difference that the district court, in the same order deciding that Mr. Wood's Rule 60(b) Motion was not a "true" Rule 60(b) motion, also transferred under § 1631 what it construed as a second-or-successive habeas petition to the court of appeals for authorization under § 2244(b). The test of finality examines the specific *decision* over which appellate review is sought, *see* § 1291 (giving the courts of appeals "jurisdiction of appeals from all final decisions of the district courts . . ."), and asks whether that decision conclusively resolves the litigation over a matter in the lower court. *See* Jean-Claude André & Sarah Erickson André, Federal Appeals Jurisdiction and Practice § 7:5 (2023 ed.) (explaining that "the word 'final' as used in § 1257(a) dates to the Judiciary Act of 1789, and therefore may be taken to mean the same thing as in 28 U.S.C.A § 1291[.]"); *see also Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (describing "final" judgments under § 1257 as those which are "subject to no further review or correction" in the lower courts, and which are "final as an effective determination of the litigation").

A district court's otherwise final decision on a legal issue (here, whether Mr. Wood's Rule 60(b) Motion challenged a defect in his habeas proceeding, or instead asserted a new substantive habeas claim) is not rendered indeterminate merely because the district court elects, in the same order, to transfer another non-final matter (here, a second-or-successive habeas petition) to a different forum for adjudication. This Court made that much clear in *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945), where it rejected such a hyper-technical approach to federal

appellate jurisdiction under the precursor to § 1257. *See* Jean-Claude André & Sarah Erickson André, *supra* (discussing similarities between "final" as it appears in § 1257 and § 1291).

There, the Woodmen of the World Life Insurance Society ("the Society") leased a radio station to petitioner Radio Station WOW. *Radio Station WOW*, 326 U.S. at 121. The Society and Radio Station Wow jointly applied to the Federal Communications Commission ("FCC") for consent to transfer the radio station license, after which respondent Johnson, a Society member, filed a lawsuit to set aside the lease to Radio Station WOW on the grounds of fraud. *Id.* While that litigation pended, the FCC agreed to the Society's assignment of the lease to Radio Station WOW and the Society transferred the license to operate the radio station accordingly. *Id.*

The trial court subsequently dismissed Johnson's civil suit against the Society finding no fraud, and the Nebraska Supreme Court reversed that decision. *Id.* at 122. It ordered that the Society's lease and license to Radio Station WOW to operate the station be set aside and "that an accounting be had of the operation of the station" since Radio Station WOW came into its possession "and that the income less operating expenses be returned to the Society." *Id.* While the Nebraska Supreme Court recognized that "the power to license a radio station, or to transfer, assign, or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission[,]" it nonetheless held that it had subject matter

jurisdiction over the lawsuit because "[t]he effect" of its decision did not go to "the question of the federal license" but rather "was to vacate the lease of the radio station and to order a return of the property to its former status[.]" *Id.* at 123 (quoting *Johnson v. Radio Station WOW*, 14 N.W.2d 666 (1944)).

This Court granted certiorari to address "the contention that the State court's decision had invaded the domain of the Federal Communications Commission[.]" *Id.* However because its appellate jurisdiction to review the Nebraska Supreme Court's decision was "seriously challenged[,]" *id.* at 121, this Court first addressed "whether the judgment is a final one and whether the federal questions raised by the petition for certiorari are properly presented by the record[,]" *id.* at 123. It began the analysis of its appellate jurisdiction over the state court decision with a discussion of foundational jurisdictional principles: "Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." *Id.* And "in very few situations . . . has there been a departure from this requirement of finality for federal appellate jurisdiction." *Id.* at 124.

Nonetheless, this Court recognized that "even so circumscribed a legal concept as appealable finality has a penumbral area[,]" and "[t]he problem of determining when a litigation is concluded so as to be 'final' to permit review here arises in this case because, . . . the Nebraska Supreme Court not only directed a transfer of property, but also ordered an accounting of profits from such property." *Id.* To assess

the "finality" of the Nebraska Supreme Court's decision, the Court rejected "mechanical rule[s]" and instead parsed the decision according to its final (and thus reviewable) and non-final (and thus unreviewable) components. *Id.* at 125–26 (noting that "the rationale" of its prior cases "is that a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting *even though that is decreed in the same order*." *Id*. at 126 (emphasis added)). "[S]uch a controversy[,]" this Court explained, "is a multiple litigation *allowing review of the adjudication which is concluded* because it is independent of, and unaffected by, another litigation with which it happens to be entangled" and is still underway in the lower court. *Id.* at 126–27 (emphasis added). On that basis, this Court determined that it had appellate jurisdiction over the final portion of the Nebraska Supreme Court's decision directing that immediate possession of the radio station property be transferred from Radio Station WOW back to the Society.[4] *Id.* at 127.

[4] The federal question which this Court reviewed was whether the Nebraska Supreme Court's decree transferring the radio station property back to the Society "in effect involves an exercise of the very authority" belonging exclusively to the FCC over the transfer of Radio Station WOW's license to operate "which the court disavowed." *Id.* at 127–28. This Court held that while the state court had the power "to adjudicate . . . the claim of fraud in the transfer of the station by the Society to [Radio Station] WOW and upon finding fraud to direct a reconveyance of the lease to the Society[,]" it did not have the power to "require[e] retransfer of the [radio station's] physical properties until steps are ordered to be taken, with all deliberate speed, to enable the [FCC] to deal with new applications in connection with the situation." *Id.* at 131–32.

The lesson from this Court in *Radio Station WOW* can be summed up as follows: A single lower court order can and should be assessed according to its final (and thus reviewable) and non-final (and thus unreviewable) components to determine whether and over which parts federal appellate jurisdiction exists. The court of appeals below disregarded that lesson in contravention of § 1291 and this Court's precedent when it refused to accept jurisdiction over Mr. Wood's appeal of the district court's dispositive Rule 60(b) decision simply because, in the same order, the district court also transferred to the court of appeals a reconstrued second-or-successive habeas petition for authorization under § 2244(b). (Pet. App. 001a–002a.)

Relying on *FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996), and *Marmolejos v. United States*, 789 F.3d 66, 69 (2d Cir. 2015), the court of appeals held that the district court's entire order, including its Rule 60(b) decision conclusively resolved therein, was "not immediately appealable." (Pet. App. 001a–002a.) But that holding not only contravenes § 1291 and this Court's precedent, *see Catlin*, 324 U.S. at 233; *Radio Station WOW*, 326 U.S. at 126–27, but it is also predicated on a misreading of *McGlamery* and *Marmolejos*.

In *McGlamery*, a New Mexico bank sought to appeal the United States District Court for the District of New Mexico's order transferring its civil lawsuit to federal court in Texas under § 1631 for lack of personal jurisdiction over the Texas defendants. 74 F.3d at 219–20. The court of appeals held that "[b]ecause the district court's transfer order did not end the litigation," which remained underway in a lower

Texas federal court, nor did it "fall[] within a recognized exception to the final-judgment rule[,]" it was non-final and thus not immediately appealable. *Id.* at 221–22.

McGlamery had nothing to do with Rule 60(b) or the appealability of a district court's decision that a motion brought under the rule in a habeas case was not a "true Rule 60(b) motion" but rather an entirely new civil action. Rather, the facts of that case and the court of appeals' analysis were limited to addressing the appealability of a district court's transfer under § 1631 of an indisputably new (and ongoing) civil action filed in the wrong forum. *Id.* at 220 ("Section 1631 permits a district court to transfer an action to any other court in which the action could have been brought . . . ."). By contrast, Mr. Wood's Rule 60(b) Motion was neither an indisputably new "civil action" nor "could [it] have been brought" in the court of appeals in the first instance. *Id.* And unlike the ongoing district court proceedings in *McGlamery*, the proceedings in the district court on the merits of Mr. Wood's Rule 60(b) Motion were over at the time he sought to appeal the district court's decision construing his Rule 60(b) Motion as not a "true" Rule 60(b) motion. *McGlamery* is thus inapposite, and the court of appeals erred in relying on it in contravention of this Court's precedent when it denied jurisdiction over Mr. Wood's appeal.[5]

[5] The court of appeals also disregarded *McGlamery*'s explication of § 1291's finality requirement which is consistent with this Court's cases addressing how the existence of federal appellate jurisdiction must be assessed:

Neither does *Marmolejos* salvage the court of appeals' decision. There, a federal defendant filed in the district court what was indisputably a second motion to vacate under § 2255 (i.e., the equivalent of a second habeas petition under § 2254). 789 F.3d at 67. The district court transferred that second § 2255 motion to the court of appeals for certification under §§ 2255(h) and 2244(b). *Id.* Rather than appeal the threshold legal determination preceding the district court's transfer order (i.e., that the second in time § 2255 motion was also "second or successive" within the meaning of § 2244(b)), *id.* at 68, Marmolejos instead sought a certificate of appealability ("COA") from the Second Circuit to appeal the district court's transfer order itself. *Id.* at 69 ("Marmolejos has moved for a certificate of appealability to permit him to appeal from the district court's [t]ransfer order."). The court of appeals denied that COA request, *id.* at 72, after concluding that "to the extent that Marmolejos seeks to appeal the Transfer Order, his appeal must be dismissed for lack of jurisdiction[,]" *id.* at 68. Like *McGlamery*, *Marmolejos* had nothing to do with the appealability of a district court's decision on a Rule 60(b) motion. And in neither case was it ever in dispute that what

---

> Federal appellate jurisdiction generally depends on the existence of a *decision* by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. The finality requirement in § 1291 evinces a legislative judgment that *restricting appellate review to final decisions* prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.

McGlamery, 74 F.3d at 221 (cleaned up and emphasis added).

the petitioners filed and what the district court transferred under § 1631 were new civil actions.

To sum up the point: Unlike the appellants in *McGlamery* and *Marmolejos*, what Mr. Wood appealed was not the district court's per se transfer under § 1631 of a *new* civil action to the correct forum; rather, he appealed the district court's antecedent legal determination that his Rule 60(b) Motion seeking to reopen the judgment in his *original* habeas action was not a true Rule 60(b) motion at all—a decision that terminated the litigation over the merits of that motion in the district court. *See Catlin*, 324 U.S. at 233 (final decision "ends the litigation on the merits").

B. AEDPA left intact the familiar rule that district court decisions on Rule 60(b) motions are reviewable on appeal.

That the court of appeals erred when it held that it lacked jurisdiction over Mr. Wood's appeal of the district court's Rule 60(b) decision is further evidenced by the text of AEDPA. *See* 28 U.S.C. § 2241 et seq. There, Congress expressly stripped federal district courts of subject matter jurisdiction over a second or successive habeas petition not first authorized by the court of appeals for filing, 28 U.S.C. § 2244(b)(3)(A); and it explicitly qualified the jurisdiction of federal appeals courts in habeas cases by the COA standard, 28 U.S.C. § 2253(c). However "AEDPA did not expressly circumscribe the operation of Rule 60(b)[,]" *Gonzalez*, 545 U.S. at 529, or alter the familiar rule that "[a] timely appeal may be taken under Fed. Rule App. Proc. 4(a) from a ruling on a Rule 60(b) motion[,]" *Browder v. Director, Dept. of Corr.*

of Illinois, 434 U.S. 257, 263 n.7 (1978). Yet the court of appeals' decision below does exactly that.

In refusing jurisdiction over Mr. Wood's appeal of the district court's Rule 60(b) decision, the court of appeals pointed to its remand procedure in *In re: Tremane Wood* as sufficient to allow Mr. Wood to obtain appellate review of the district court's decision. (Pet. App. 002a.) But there, the court of appeals recently held that Mr. Wood's Rule 60(b) motion is, in fact, a second-or-successive habeas petition that fails to satisfy § 2244(b)'s requirements and denied his motion for remand on that basis. (Pet. App. 075a–077a.) Mr. Wood requested panel rehearing and en banc consideration of that denial, which the court of appeals denied without specifying whether that was due to its lack of jurisdiction to entertain that request under § 2244(b)(3)(E), or Mr. Wood's failure to meet the substantive criteria for reconsideration under the court of appeals' rules. (Pet. App. 112a.)

As already discussed, *supra* note 2, Mr. Wood intends to seek this Court's certiorari review of the court of appeals' *In re: Tremane Wood* decision. The questions presented there will include whether this Court has jurisdiction to review the court of appeals' decision under § 2244(b)(3)(E) since the court of appeals' denial was premised on construing Mr. Wood's motion as a second-or-successive habeas petition that fails to meet § 2244(b)'s requirements.[6] *Compare* Pet. App. 075a–077a (court of

[6] In its order denying jurisdiction over Mr. Wood's appeal, the court of appeals cited *Castro v. United States*, 540 U.S. 375 (2003), for the proposition that "[section]

appeals denying Mr. Wood's motion for remand after construing it as presenting an unauthorized second-or-successive habeas claim over which "the district court correctly held it lacked jurisdiction"), *with* 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."). If the answer to that anticipated question is "no"—i.e., that § 2244(b) strips this Court of jurisdiction to consider the court of appeals' *In re: Tremane Wood* decision—then unless appellate jurisdiction over the district court's Rule 60(b) decision exists here under § 1291, the court of appeals' outlier transfer procedure for adjudicating Mr. Wood's Rule 60(b) Motion will have circumscribed the operation of Rule 60(b) contrary to AEDPA and *Gonzalez*; and it

---

2244(b)(3)(E)'s prohibition only applies where the subject of a petition for further review is the denial of authorization," and presumably would not prevent him from further appealing an adverse decision in *In re: Tremane Wood*. (Pet. App. 002a.) But the question before this Court in *Castro* was whether the petitioner's motion to vacate under section 2255 was his first or second such motion. 540 U.S. at 380 (specifying that "[t]he 'subject' of Castro's petition [for certiorari] . . . is the lower courts' refusal to recognize that this § 2255 motion is his first, not his second."). In light of that narrow question, it was straightforward for this Court to conclude that the "subject" of Castro's certiorari petition was not the denial of authorization to file a second-or-successive § 2255 motion. *In re: Tremane Wood*, however, is the result of the district court's transfer to the court of appeals of what it explicitly construed as a second-or-successive habeas petition requiring authorization under § 2244(b). That renders the facts of *In re: Tremane Wood* materially different from those in *Castro*, where this Court had no occasion to address whether § 2244(b)(3)(E) removes this Court's jurisdiction to review a certiorari petition where the "subject" is the court of appeals' denial of a motion to remand a second-or-successive petition transferred by the district court.

will have altered the familiar rule that "[a] timely appeal may be taken under Fed. Rule App. Proc. 4(a) from a ruling on a Rule 60(b) motion[,]" in contravention of *Browder*, 434 U.S. at 263 n.7.

Finally, such a result would also violate Mr. Wood's rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses by denying him "an adequate opportunity" to obtain relief under Rule 60(b), *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system[.]'" (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974))), and by singling out him and other indigent habeas litigants who seek relief under Rule 60(b) for unequal treatment that Congress neither authorized nor intended. *See Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." (internal quotations omitted)); *Ross*, 417 U.S. at 612 (equal protection prohibits the state from subjecting some defendants to "merely a meaningless ritual" while affording others "meaningful" process (internal quotations omitted)).

The perverse and unconstitutional consequences that would otherwise result from denying Mr. Wood the benefit of full appellate review of the district court's Rule 60(b) decision when Congress specifically elected *not* to remove Rule 60(b) relief from habeas litigants also support the existence and exercise of appellate jurisdiction over

the question presented here. *See Castro*, 540 U.S. at 381 (expressing concern about "clos[ing] our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent").

CONCLUSION

This Court should summarily reverse the decision below and remand with instructions to take jurisdiction over Mr. Wood's appeal.

Respectfully submitted: March 21, 2024.

JON M. SANDS
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

AMANDA C. BASS
Counsel of Record
KEITH HILZENDEGER
ALISON Y. ROSE
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 382-2800 facsimile
Amanda_Bass@fd.org
Keith_Hilzendeger@fd.org
Alison_Rose@fd.org

s/ Amanda C. Bass
AMANDA C. BASS
ASSISTANT FEDERAL PUBLIC DEFENDER

Counsel for Petitioner