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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

November 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TREMANE WOOD,

Petitioner - Appellant,

v.

CHRISTE QUICK, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 23-6134
(D.C. No. 5:10-CV-00829-HE)
(W.D. Okla.)

ORDER

Before **TYMKOVICH**, **MATHESON**, and **BACHARACH**, Circuit Judges.

In this appeal, Tremane Wood seeks to challenge the district court's order concluding his Fed. R. Civ. P. 60(b) motion was an unauthorized second or successive 28 U.S.C. § 2254 petition and transferring it to this court for consideration. The transferred matter was opened as No. 23-6129. Wood subsequently filed a notice of appeal, which resulted in this appeal. On September 19, 2023, the court issued an order directing Wood to address this court's jurisdiction to review the district court's transfer order via this appeal. On October 13, 2023, Wood filed a motion to remand to the district court in No. 23-6129.

Upon consideration of the jurisdictional briefing from the parties and the applicable law, we conclude this court 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. *See FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996) (holding that an order transferring a matter under 28 U.S.C. § 1631 is not immediately appealable); *see also Marmolejos v. United States*, 789 F.3d 66, 69 (2d Cir. 2015) (same for an order transferring an unauthorized second or successive § 2255 motion to a court of appeals under § 1631). In doing so, we note that Wood's challenge to the district court's conclusion is forth in his motion to remand, which is pending in No. 23-6129. We are not persuaded by Wood's suggestion that the district court's decision will evade full review in No. 23-6129 because 28 U.S.C. § 2244(b)(3)(E) prohibits petitions for rehearing and certiorari. *See Castro v. United States*, 540 U.S. 375, 380 (2003) (noting that § 2244(b)(3)(E)'s prohibition only applies where the subject of a petition for further review is the denial of authorization); *In re Clark*, 837 F.3d 1080, 1082 (10th Cir. 2016) (holding that § 2244(b)(3)(E) did not bar petition for rehearing as to procedural matter apart from the denial of authorization).

APPEAL DISMISSED.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TREMANE WOOD,	)	
	)	
Petitioner,	)	
vs.	)	NO. CIV-10-0829-HE
	)	
CHRISTE QUICK, Warden, Oklahoma State Penitentiary,	)	
	)	
	)	
Respondent.	)	

ORDER

Petitioner Tremane Wood has moved for relief from judgment in this case pursuant to Fed.R.Civ.P. 60(b)(6), arguing that the court procedurally erred in reaching its conclusion that his trial counsel had not provided ineffective assistance of counsel. Petitioner contends that the motion is a true Rule 60 motion and not a second or successive habeas petition because it only seeks to correct an error which occurred during the prior habeas proceedings.

I. Introduction

After a jury trial in 2004, petitioner was found guilty of first-degree felony murder, robbery with firearms, and conspiracy to commit a felony. He was sentenced to death for the felony murder. Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals ("OCCA"). He has also filed four applications for post-conviction relief, all of which have been denied by the OCCA.

This case was filed in 2010 — shortly after the first application was denied by the OCCA — and raised ten grounds for relief, the first of which was ineffective assistance of

trial counsel. Petitioner raised this claim in both his direct appeal and his first application for post-conviction relief. In the appeal, petitioner argued that his trial counsel was ineffective due to a failure to investigate his background, to present mitigating evidence during the sentencing portion of his trial, and by failing to impeach one of the accomplices to the crimes. The OCCA granted petitioner's motion for an evidentiary hearing and the trial court thereafter held a three-day hearing during which twenty-five witnesses testified. The OCCA concluded that trial counsel was not ineffective under the Strickland standard. On habeas review, this court agreed. Doc. #100. The court was affirmed by the Tenth Circuit, Wood v. Carpenter, 907 F.3d 1279 (10th Cir. 2018) and the Supreme Court denied certiorari. Wood v. Carpenter, 139 S. Ct. 2748 (2019).

In petitioner's first application for post-conviction relief, he argued that newly discovered evidence demonstrated the ineffectiveness of trial counsel and that the outcome of his trial would have been different if certain evidence had been admitted by the trial court. With respect to the ineffective assistance of counsel claim, he pointed to evidence that his trial counsel was involved in contempt proceedings in unrelated cases two weeks after the evidentiary hearing ordered by the OCCA and to an affidavit that his trial counsel had been suspended from the practice of law two months after the same hearing. These events appear to have been triggered by trial counsel's "client neglect, abuse of drugs and alcohol and emotional instability." Wood v. Oklahoma, No. PCD-2005-143, Order Denying Application for Post-Conviction Relief, *5 (Okla. Crim. App. June 30, 2010) [Doc. #35-4, p. 68]. While evidence had been presented in another case that "trial counsel's secretary noticed an increase in trial counsel's consumption of alcohol around the time of

Wood's trial", the OCCA denied petitioner's application stating: "Without proof trial counsel was suffering from his addiction during Wood's trial, evidence of trial counsel's subsequent struggles with substance abuse and other difficulties does not prove or show that he was more than likely incapacitated or ineffective during Wood's trial." *Id.*

The OCCA also noted that what Wood was challenging with the post-conviction application was "plainly of the same sort as other specific attorney errors subject to the performance and prejudice test set for in Strickland." *Id.* Ultimately, the OCCA concluded: "Nothing in the materials provided by Wood about his trial counsel's subsequent personal and professional difficulties calls into doubt our prior finding that trial counsel rendered effective assistance of counsel to Wood or convinces us to revisit that decision and order a new trial." *Id.* at *6.

In his petition to this court, petitioner presented the same arguments that had been presented on his direct appeal: that the trial court erred in excluding evidence from licensed clinical social worker Kate Allen about petitioner's childhood development and experiences and that trial counsel was ineffective for failing to investigate and present mitigating evidence during the penalty phase of his trial. The petition also contended that "circumstances surrounding [trial counsel's] life during his representation warrant additional consideration by [] the court in reviewing the IAC claim." Doc. #35, p. 57. These conditions included an "excessive" caseload as trial counsel began to battle a substance abuse problem. It alleged that around the time of petitioner's trial, counsel had begun to consume beer during business hours in his office. *Id.*, p. 58. The petition was also supported by an affidavit from trial counsel stating that he was defensive during the

evidentiary hearing due to a pending bar investigation and that he did not do the necessary investigation and preparation required for the case. Doc. #35-1, p. 9-10. The petition did not directly allege ineffective assistance of counsel due to substance abuse or addiction.

Ultimately, this court concluded "that petitioner has not shown that the OCCA rendered a decision on his trial counsel ineffectiveness claim which is unreasonable under Section 2254(d)." Doc. #100, p. 31. In his present motion, petitioner contends that the court erred in reaching this conclusion because it did not fully review the ineffective assistance of counsel claim that was included in his first application for post-conviction relief and denied by the OCCA on June 30, 2010.

II. Rule 60(b)(6)

> Rule 60(b)(6) allows federal courts to relieve a party from a judgment for any reason — other than those in the five enumerated preceding categories — that justifies relief. We have described Rule 60(b)(6) as a grand reservoir of equitable power to do justice in a particular case. Although the rule should be liberally construed when substantial justice will thus be served, relief under Rule 60(b)(6) is extraordinary and reserved for exceptional circumstances.

Johnson v. Spencer, 950 F.3d 680, 700-01 (10th Cir. 2020) (quotations and citations omitted. "Relief under Rule 60(b)(6) is appropriate when circumstances are so unusual or compelling that extraordinary relief is warranted, or when it offends justice to deny such relief. Cashner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996) (quotations and citation omitted). "Thus, the broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests." 11 Charles A. Wright, Arthur

R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2864, (citing Ackermann v. United States, 340 U.S. 193, 198 (1950)).

III. Discussion

Petitioner argues that the court failed to "discharge its independent obligation to apply § 2254(d) to the OCCA's last-reasoned decision denying the penalty-phase IAC claim on initial postconviction review." Doc. #130, p. 2. He contends that the court only addressed the ineffective assistance claim as it was addressed by the OCCA in his direct appeal. Petitioner asserts the case must be reopened some eight years after the court entered its judgment and four years after the Supreme Court denied certiorari on the Tenth Circuit's affirmance of the court's judgment. The court is unpersuaded.

Notably, petitioner acknowledges in his reply that his petition did not argue ineffective assistance of counsel due to the substance issue. *See* Doc. #130, p. 6. While the petition did argue in passing that substance use, in addition to an excessive caseload, was a contributing factor to counsel's alleged ineffectiveness in investigating and presenting mitigating evidence, substance abuse was not the basis for the claim in the petition. Petitioner argues, "however, it is the solemn task of the federal habeas court — not the parties — to independently ensure § 2254(d)'s proper application of a federal claim's merit, especially in a capital case that carries life and death consequences." *Id.* at 6-7. But petitioner's argument would create a system in which a petitioner could attack their underlying conviction an unlimited number of times simply by leaving arguments out of their original petition. This scenario has already been addressed:

> Some examples of Rule 60(b) motions that should be treated as second or successive habeas petitions because they assert or reassert a federal basis for relief from the underlying conviction include: a motion seeking to present a claim of constitutional error omitted from the movant's initial habeas petition; a motion seeking leave to present "newly discovered evidence" in order to advance the merits of a claim previously denied; or a motion seeking vindication of a habeas claim by challenging the habeas court's previous ruling on the merits of that claim.

Spitznas v. Boone, 464 F.3d 1213, 1216 (10th Cir. 2006). Because the substance of petitioner's argument as now advanced falls squarely within these circumstances, the court concludes that the motion is a second or successive habeas petition. Petitioner was aware of the denial of the post-conviction application when he filed the original petition. He relied on that denial as part of his arguments in support of his third and eighth grounds for relief. And he acknowledged that his ninth ground for relief — that the evidentiary hearing ordered in his direct appeal violated his due process right because of trial counsel's alleged issues — had not been exhausted in state court and would be the subject of a future application for post-conviction relief. In short, what petitioner now attempts to characterize as a procedural error is actually just an effort to raise an issue not previously presented. As such, the present petition must be dismissed absent authorization from the Court of Appeals.

IV. Conclusion

The court concludes that petitioner's motion is a second or successive habeas petition, not a true Rule 60(b) motion.[1] As a second or successive habeas petition, the court must determine whether to dismiss the petition for lack of jurisdiction or transfer it to the Tenth Circuit Court of Appeals. *See* In re Cline, 531 F.3d 1249, 1252 (10th Cir. 2008). Given the nature of the allegations in the petition and petitioner's sentence, the court concludes that transfer is appropriate. Accordingly, petitioner's motion [Doc. #127], construed as a second or successive petition for habeas relief, is **TRANSFERRED** to the Unites States Court of Appeals for the Tenth Circuit for consideration by that court.

IT IS SO ORDERED.

Dated this 13th day of September, 2023.

JOE HEATON
UNITED STATES DISTRICT JUDGE

[1] *The court has considerable doubt whether relief would be warranted even if petitioner's current motion was treated as a Rule 60 Motion. The OCCA's application of res judicata to the most recent post-conviction application appears consistent with its own prior practice and is otherwise unremarkable. The circumstances here bear little resemblance to the extraordinary circumstances in* Cruz v. Arizona, *598 U.S. 17 (2023), upon which the petitioner relies.*

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TREMANE WOOD, Appellant/Petitioner, vs. CHRISTE QUICK, Warden, Oklahoma State Penitentiary, Appellee/Respondent.	)	**Case No. 23-6134** **Death Penalty Case**

On Appeal from the United States District Court
for the Western District of Oklahoma

The Honorable Joe Heaton
District Court No. CIV-10-0829-HE

APPELLANT/PETITIONER'S JURISDICTIONAL MEMORANDUM BRIEF

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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)

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

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

In re Wood, No. 23-6129 (10th Cir. 2023) (on transfer of second or successive habeas application from the district court for authorization determination under 28 U.S.C. § 2244(b))

I. Introduction

Appellant/Petitioner Tremane Wood submits this jurisdictional memorandum brief as ordered by the Court on September 19, 2023.[1] Order at 2, *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 19, 2023). In that order, the Court asked Mr. Wood to address whether it has appellate jurisdiction to review the district court's September 13, 2023 order determining that Mr. Wood's motion pursuant to Federal Rule of Civil Procedure 60(b)(6) (alternatively hereafter "60(b) Motion") was "not a true Rule 60(b) motion[,]" but rather an unauthorized second or successive habeas petition that it transferred to this Court under 28 U.S.C. § 1631 for authorization under 28 U.S.C. § 2244(b).[2] Order at 1–2, *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 19, 2023). (Dist. Ct. ECF No. 131 at 6–7.)

This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's decision that Mr. Wood's 60(b) Motion was "not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider it. (Dist. Ct. ECF No. 131 at 6–7.) That decision terminated the litigation in the district court on the merits of Mr. Wood's 60(b) Motion, rendering it final and appealable. *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."). That the district court, in the same order, also

[1] The Court ordered Mr. Wood to file this jurisdictional brief within 14 days of its September 19, 2023 order, rendering it timely.

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

reconstrued Mr. Wood's 60(b) Motion as a second or successive habeas petition and, under 28 U.S.C. § 1631, transferred that new civil action to this Court for authorization under 28 U.S.C. § 2244(b) does not defeat the finality and appealability of its threshold legal determination that Mr. Wood did not bring a true Rule 60(b) motion to begin with and therefore had no right to seek to reopen the final judgment in his original habeas proceeding under the Rule's provisions. *See Catlin*, 324 U.S. at 233; *United States v. Pickard*, 676 F.3d 1214, 1218 (10th Cir. 2012) (discussing in the collateral order context a final appealable decision as one in which a "legal right [ ] was conclusively decided by the district court[]").

The Court's appellate jurisdiction over this dispositive legal question should be uncontroversial. 28 U.S.C. § 1291 (granting courts of appeals jurisdiction "from all final decisions of the district courts of the United States"). And unless the Court exercises that jurisdiction here, the correctness of the district court's decision below risks evading full appellate review in the *In re Wood*, No. 23-6129 (10th Cir. 2023) proceedings due to the statutory prohibitions on appeal, rehearing, and certiorari review of an adverse authorization decision in a § 2244(b) proceeding. *See* 28 U.S.C. § 2244(b)(3)(E). Such a result would contravene § 1291, the habeas statute, and the federal civil and appellate rules, as well as violate Mr. Wood's Fourteenth Amendment equal protection and due process rights.

II. Background

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 original habeas

action under Federal Rule of Civil Procedure 60(b)(6). (Dist. Ct. ECF No. 127.) Following full briefing on the merits of his Rule 60(b) motion (Dist. Ct. ECF Nos. 127, 129–30), the district court determined that it was "not a true Rule 60(b) motion" and declined to reach its merits. (Dist. Ct. ECF No. 131 at 6–7.) The court instead construed his motion as a second or successive habeas petition initiating a new civil action, and transferred that new civil action to this Court for authorization under 28 U.S.C. § 2244(b). (Dist. Ct. ECF No. 131 at 6–7.) Mr. Wood timely appealed. (Dist. Ct. ECF No. 133.)

On September 13, 2023, the Clerk captioned the district court's transfer of a second or successive habeas action to this Court as *In re Wood* and docketed it under case number 23-6129. Letter from 10th Cir. Clerk of Court, *In re 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 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 habeas petition and dismissing its merits on that basis as *Wood v. Quick* and docketed it under case number 23-6134. Letter from 10th Cir. Clerk of Court, *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 15, 2023).[3] It then ordered

[3] Mr. Wood has filed in *In re Wood* a Motion to Consolidate the appeals in case numbers 23-6129 and 23-6134. Motion to Consolidate Appeals, *In re Wood*, No 23-6129 (10th Cir. Sept. 18, 2023). The Court has taken that motion under advisement pending its consideration of the instant jurisdictional brief. Order, *In re Wood*, No. 23-6129 (Sept. 19, 2023).

sua sponte Mr. Wood to "file a jurisdictional memorandum brief setting forth any legal basis for this court to exercise appellate jurisdiction over the transfer order." Order at 2, *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 19, 2023).

This jurisdictional memorandum brief follows.

III. Argument

A. The district court's decision that Mr. Wood did not assert 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; *Pickard*, 676 F.3d at 1217; *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 60(b) Motion was "not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider it is final. (Dist. Ct. ECF No. 131 at 6–7.) That decision terminated the litigation on the merits of Mr. Wood's Rule 60(b) Motion in the district court, (*see* Dist. Ct. ECF No. 131 at 7 n.1 (the district court specifically declining to reach the merits of Mr. Wood's 60(b) Motion)), which "conclusively decided" that he has no legal right to seek the relief afforded under the Rule. *Pickard*, 676 F.3d at 1218.

It makes no difference that the district court, in the same order, also construed Mr. Wood's 60(b) Motion as a second or successive habeas petition and, under 28 U.S.C. § 1631, transferred that new civil action to this Court for authorization under 28 U.S.C. § 2244(b). (Dist. Ct. ECF No. 131 at 6–7.) What Mr. Wood seeks to challenge in this appeal is not the per se transfer of a new civil action under § 1631, but rather the district court's antecedent legal determination that Mr. Wood did not bring a true Rule 60(b) motion to begin with, and therefore had no right to seek to reopen the final judgment in his original habeas proceeding. That threshold legal determination is "final" and appealable under § 1291. *See* Jean-Claude André & Sarah Erickson André, Federal Appeals Jurisdiction and Practice § 7:5 (2023 ed.) ("[T]he 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"); *cf. Crystal Clear Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 415 F.3d 1171, 1178 (10th Cir. 2005) (describing in the collateral order context final decisions as those which "conclusively determine[] the disputed question[]").

The cases cited in the Court's jurisdictional order for the proposition that a transfer order under 28 U.S.C. § 1631 "is generally not considered a final decision" nor "immediately appealable under the collateral order doctrine" have limited relevance in this context. *See* Order at 2, *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 19, 2023) (referencing *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996) (explaining that a transfer order

is not a final order or an immediately appealable collateral order); and *Marmolejos v. United States*, 789 F.3d 66, 69 (2d Cir. 2015) (same for an order transferring a § 2255 motion as second or successive)). 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 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. The facts and this Court's 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 60(b) Motion was neither an indisputably new "civil action" nor "could [it] have been brought" in this Court 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 60(b) Motion are over. *McGlamery* is thus inapposite here.

Nonetheless instructive, however, is *McGlamery*'s explication of § 1291's finality requirement, which supports—rather than undermines—the appealability of the district

court's decision below:

> 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.

Id. at 221 (emphasis added) (cleaned up). Under this test, this Court's appellate jurisdiction over the district court's decision below, which ended the litigation over Mr. Wood's Rule 60(b) Motion in the district court, is plain.

Marmolejos doesn't alter the analysis. 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.* ("Marmolejos has moved for a certificate of appealability to permit him to appeal from the district court's transfer 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. *Marmolejos*, like *McGlamery*, 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 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 appeals here is not the district court's per se transfer under § 1631 of a *new* civil action to the correct forum; rather, he appeals the district court's antecedent legal determination that his 60(b) Motion seeking to reopen the judgment in his *original* habeas action was not, in fact, a true Rule 60(b) motion at all—a decision that terminated the litigation over that motion in the district court. *See Catlin*, 324 U.S. at 233 (final decision "ends the litigation on the merits"); *see also D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031 (Fed. Cir. 1985) (discussing lower court determination—undisputed by the parties—that "a Rule 60(b) motion is a continuation of the original action" (internal quotations omitted)).

Peach v. United States, 468 F.3d 1269 (10th Cir. 2006) (per curiam), presented a scenario closer to the one here. After the denial of his first § 2255 motion, the petitioner moved to set aside that judgment under Federal Rule of Civil Procedure 60(b)(4) "on the ground that the district court had failed to rule on all the claims asserted in his § 2255 motion." 468 F.3d at 1270. The district court construed the 60(b) motion as a successive § 2255 motion and transferred it to this Court for consideration. *Id.* Peach did not notice an appeal from the district court's antecedent legal determination that his Rule 60(b) motion did not challenge a defect in the integrity of his initial § 2255 proceeding. Instead, he sent a letter to the Court disagreeing with the district court's characterization of his Rule 60(b) motion as successive and arguing that the district court overlooked a constitutional claim in his original § 2255 motion rendering the original judgment void. *Id.*at 1270.

The Court construed Peach's letter as a motion to remand, *id.*, and relying on *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006), determined that "his Rule 60(b) motion presented a 'true' Rule 60(b) claim" because, rather than challenge "the district court's resolution of the merits of the claim (since it never reached those merits)[,]" it "only alleged a defect in the integrity of the earlier § 2255 proceedings." *Id.* at 1271 (cleaned up). The Court distinguished the procedural posture of Peach's case (which arrived by way of transfer from the district court without a ruling on the merits of the Rule 60(b) motion) from *Spitznas* (which arrived by way of appeal following the district court's denial of the Rule 60(b) motion on the merits). *Peach*, 468 F.3d at 1271–72.

Whereas Spitznas was required to obtain a COA to appeal the district court's resolution of his 60(b) motion on the merits, the Court reasoned that the COA standard had no application in Peach's case where the district court never reached the merits of his 60(b) motion. *Id.* at 1271–72. The Court treated as self-evident its appellate jurisdiction to "determine[] that a portion of the petitioner's Rule 60(b) motion raised a 'true' Rule 60(b) claim," without first issuing a COA. *Id.*; *see also Spitznas*, 464 F.3d at 1218–19 ("[A] COA is not required as a threshold matter simply to determine whether the [Rule 60(b)] motion is, in fact, a second or successive petition and, if so, whether it should be authorized."). Reviewing de novo the district court's answer to that question, the Court concluded that Peach asserted a "true Rule 60(b)" motion and, on that basis, remanded his case to the district court for adjudication of the motion's merits. *Peach*, 468 F.3d at 1272.

Peach and *Spitznas* thus make it clear that this Court has appellate jurisdiction under § 1291 to review the district court's legal determination that Mr. Wood's 60(b) Motion was

"not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider the motion.[4] (Dist. Ct. ECF No. 131 at 6–7.)

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

That this Court has appellate jurisdiction to consider the district court's decision below that Mr. Wood's Rule 60(b) Motion was "not a true Rule 60(b) motion" is further supported by the text of the Anti-Terrorism and Effective Death Penalty Act ("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 v. Crosby*, 545 U.S. 524, 529 (2005), 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).

Were this Court to decline appellate jurisdiction over the district court's determination that Mr. Wood had no right to seek to reopen the original habeas judgment

[4] *Spitznas* and *Peach* also make it clear that a COA is not required to obtain appellate review of a district court's threshold legal determination that a Rule 60(b) motion is not a "true" Rule 60(b) motion. *Spitznas*, 464 F.3d at 1218–19; *Peach*, 468 F.3d at 1271–72. Rather, a COA is required only where a petitioner appeals a district court's denial of a true Rule 60(b) motion *on the merits*. *Spitznas*, 464 F.3d at 1218 ("[W]e conclude that a COA is required to appeal from the *denial* of a true Rule 60(b) motion." (emphasis added)); *Peach*, 468 F.3d at 1272 (noting that the COA standard applies only to a ruling on the merits of a Rule 60(b) motion).

under Rule 60(b)(6) because his motion was "not a true Rule 60(b) motion," that question risks evading a complete round of appellate review altogether. The questions before this Court in *In re Wood* are whether "Mr. Wood [ ] satisf[ies] the requirements set forth in 28 U.S.C. § 2244(b)"; whether "the district court should not have construed Mr. Wood's filing as a 'second or successive' § 2254 petition" or "he otherwise does not have to meet the requirements of 28 U.S.C. § 2244(b)"; and/or "why Mr. Wood's district court filing should not be treated as a 'second or successive' § 2254 petition or does not otherwise require authorization under § 2244(b)(3)." Letter from 10th Cir. Clerk of Court at 1–2, *In re Wood*, No. 23-6129 (10th Cir. Sept. 14, 2023). Mr. Wood can, as part of that pending case, obtain panel review in this Court of the district court's determination that he did not assert a "true Rule 60(b) motion." *See* 28 U.S.C. § 2244(b)(3)(B).

However, if the *In re Wood* panel were to conclude that the district court did not err in so construing Mr. Wood's 60(b) motion and deny remand because it is an unauthorized second or successive petition that fails to meet § 2244(b)(2)'s requirements, then Mr. Wood may be prohibited from ever seeking en banc or Supreme Court review of that decision. *See* 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."); *see also United States v. Altamirano-Quintero*, 504 F. App'x 761, 767 (10th Cir. 2012)[5] (construing "Rule 60(b)

[5] This unpublished decision is cited for persuasive value only. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A). And because it is "available in a publicly accessible electronic database," Mr. Wood is not attaching a copy of the decision to this brief. Fed. R. App. P. 32.1(b); 10th Cir. R. 32.1(B).

claim for IAC as an application to file a second or successive § 2255 petition, which we also deny" and noting that "[t]his denial 'shall not be the subject of a petition for rehearing or for a writ of certiorari.'" (quoting 28 U.S.C. § 2244(b)(3)(E))).

Such a result would implicitly engraft onto the habeas statute a jurisdictional bar on Rule 60(b) motions in habeas cases that cannot be squared with AEDPA's text or Congress's intent. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 77 (1982) (where Congress has spoken, courts have no authority to strike a different balance); *Hui v. Castaneda*, 559 U.S. 799, 812 (2010) (courts must read a statute according to its text); *see also United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said."). Nor can that result be squared with *Gonzalez* where the Supreme Court clarified that "AEDPA did not expressly circumscribe the operation of Rule 60(b)" whereas "[b]y contrast, AEDPA directly amended other provisions of the Federal Rules." 545 U.S. at 529.

Finally, such a result would 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 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 requires "that indigents have an adequate opportunity to present their claims fairly within the adversary system[,]" and prohibits subjecting some defendants to "merely a meaningless ritual" while affording others "meaningful" process (internal quotations omitted)).

The perverse and unconstitutional implications that would otherwise result from denying Mr. Wood the benefit of full appellate review of a district court's legal determination that a motion seeking relief under Fed. R. Civ. P. 60(b) is "not a true Rule 60(b) motion" when Congress specifically elected not to remove 60(b) relief from habeas litigants also support the existence of the Court's appellate jurisdiction over this question.

IV. Conclusion

Mr. Wood asks the Court to find that it has appellate jurisdiction under 28 U.S.C. § 1291 to review by way of this appeal the district court's decision that Mr. Wood's 60(b) Motion was "not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider the motion. (Dist. Ct. ECF No. 131 at 6–7.)

/ / /

Respectfully submitted this 3rd day of October, 2023.

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CERTIFICATE OF SERVICE

I certify that on October 3, 2023, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following ECF registrants: Joshua Lockett, Assistant Attorney General, Joshua.Lockett@oag.ok.gov; Jennifer Crabb, Assistant Attorney General, Jennifer.Crabb@oag.ok.gov.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I certify that, in accordance with Fed. R. App. P. 32(g) and 10th Cir. R. 27.3(B)(3), this memorandum brief complies with the word limit of 10th Cir. R. 27.3(B)(3) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), it consists of 4,213 words based on the word count of the word-processing system used to prepare it. I also certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(A), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point font.

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APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TREMANE WOOD, Appellant/Petitioner, vs. CHRISTE QUICK, Warden, Oklahoma State Penitentiary, Appellee/Respondent.	)	**Case No. 23-6134** **Death Penalty Case**

On Appeal from the United States District Court
for the Western District of Oklahoma

The Honorable Joe Heaton
District Court Case No. CIV-10-0829-HE

APPELLANT/PETITIONER'S REPLY IN SUPPORT OF JURISDICTIONAL MEMORANDUM BRIEF

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I. Introduction

Appellant/Petitioner Tremane Wood replies in support of his jurisdictional brief to address the arguments raised by Appellee/Respondent's response. Response to Petitioner's Jurisdictional Memorandum Brief, *Wood v. Quick*, No. 23-6134 (10th Cir. Oct. 16, 2023) (hereafter cited as "Response"). For the reasons discussed herein, and those in Mr. Wood's Jurisdictional Memorandum Brief, he respectfully asks the Court to find that it has appellate jurisdiction under 28 U.S.C. § 1291 to review by way of this appeal the district court's decision that his Rule 60(b) Motion was "not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider the motion. (Dist. Ct. ECF No. 131 at 6–7.)

II. Discussion

Critically, Appellee/Respondent does not dispute that 28 U.S.C. § 1291 gives this Court appellate jurisdiction over "all final *decisions* of the district courts of the United States[.]" 28 U.S.C. § 1291 (emphasis added). (*See also* Response at 9 (recognizing as much)).[1] Nor does Appellee/Respondent dispute that the district court's decision that Mr. Wood's 60(b) Motion was "not a true Rule 60(b) motion" (Dist. Ct. ECF No. 131 at 6–7) terminated the litigation on the merits of that motion in the district court. *See 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.").

[1] Citations to page numbers in documents that appear on this Court's docket refer to the CM/ECF page numbering in the heading of each page.

Instead, Appellee/Respondent argues that this Court lacks jurisdiction over the district court's Rule 60(b) decision because 1) "the transfer order was the *only* order entered by the district court"; and 2) transfer orders under 28 U.S.C. § 1631 "typically do[] not end the litigation[.]" (Response at 7, 10.) There are several problems with those arguments.

First, they invite the Court to focus myopically on the district court's decision to transfer to this Court under 28 U.S.C. § 1631 what it construed as a new civil action requiring authorization under 28 U.S.C. § 2244(b), and to ignore the antecedent decision terminating the litigation over Mr. Wood's Rule 60(b) Motion on which the district court's action was premised. But "[f]ederal 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." *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996) (internal quotation marks omitted). And as already noted, Appellee/Respondent does not dispute that the litigation over Mr. Wood's Rule 60(b) Motion in the district court is over.

More importantly, Appellee/Respondent's approach to federal appellate jurisdiction under 28 U.S.C. § 1291 was rejected by the U.S. Supreme Court in *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945), in assessing federal appellate jurisdiction under the precursor to 28 U.S.C. § 1257. *See* Jean-Claude André & Sarah Erickson André, Federal Appeals Jurisdiction and Practice § 7:5 (2023 ed.) ("[T]he 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."). There, the Woodmen of the World Life Insurance Society ("the Society") leased a radio station to petitioner Radio Station WOW. *Id.* 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.

The U.S. Supreme 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, the 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.

The Court nonetheless 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 non-reviewable) 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*" (emphasis added)). "[S]uch a controversy[,]" the 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, the U.S. Supreme Court found 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.[2] *Id.* at 127.

To sum up the lesson from *Radio Station WOW*: 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 the existence of federal appellate jurisdiction. Appellee/Respondent is thus misguided in arguing that "the transfer order was the *only* order entered by the district court" which renders unreviewable the district court's antecedent and final decision *contained in the same order* that Mr. Wood's Rule 60(b) Motion was not a "true" Rule 60(b) motion which terminated the litigation over that motion in the district court. *See Catlin*, 324 U.S. at 233 ("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.").

Second, Appellee/Respondent's claim that transfer orders under 28 U.S.C. § 1631 "typically do[] not end the litigation" (Response at 7, 10) is only accurate insofar as the litigation *over a new civil action* transferred to a different forum under 28 U.S.C. § 1631 remains ongoing. *McGlamery* and *Marmolejos v. United States*, 789 F.3d 66 (2d Cir. 2015)

[2] The federal question which the U.S. Supreme 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. The 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 "requir[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 station." *Id.* at 131–32.

illustrate that point, as discussed in Mr. Wood's Jurisdictional Brief. Appellant/Petitioner's Jurisdictional Memorandum Brief at 11–14, *Wood v. Quick*, No. 23-6134 (10th Cir. Oct. 3, 2023). Here, however, the litigation in the district court over Mr. Wood's Rule 60(b) Motion is over.

Finally, Appellee/Respondent's invocation of *In re Cline*, 531 F.3d 1249 (10th Cir. 2008), to support its overall approach to assessing this Court's appellate jurisdiction is likewise misguided. (*See* Response at 6 n.1, 8.) *In re Cline* simply clarified that district courts are not required to transfer second-or-successive habeas petitions to this Court under 28 U.S.C. § 1631; rather, the decision to transfer such new civil actions is discretionary and dependent on "whether or not it is in the interests of justice to do so." *In re Cline*, 531 F.3d at 1251. The case had nothing to do with this Court's appellate jurisdiction under 28 U.S.C. § 1291 to review a district court's determination that a motion brought under Federal Rule of Civil Procedure 60(b) is not a "true" Rule 60(b) motion. It thus lends no support to Appellee/Respondent's position.

III. Conclusion

For the reasons discussed here and in his Jurisdictional Memorandum Brief, Mr. Wood respectfully asks the Court to find that it has appellate jurisdiction under 28 U.S.C. § 1291 to review by way of this appeal the district court's decision that his Rule 60(b) Motion was "not a true Rule 60(b) motion" and that it therefore lacked subject matter jurisdiction to consider the motion. (Dist. Ct. ECF No. 131 at 6–7.)

/ / /

Respectfully submitted this 19th day of October, 2023.

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APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: TREMANE WOOD, Movant.	)	**10th Cir. Case No. 23-6129** Case No. CIV-10-00829-HE (W.D. Okla.) **Death Penalty Case**

On Transfer from the United States District Court
for the Western District of Oklahoma

The Honorable Joe Heaton
District Court Case No. CIV-10-00829-HE

MOTION FOR REMAND

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I. Introduction

Mr. Wood's case is extraordinary for several reasons. He is the only one of his four co-defendants who faces execution for participating in the crime that led to Ronnie Wipf's tragic and senseless death on New Year's Eve 2001. Although Mr. Wood's older brother and co-defendant Zjaiton ("Jake") Wood admitted killing Wipf, Jake was sentenced to life imprisonment while Mr. Wood was sentenced to death following a penalty phase that began and ended in the same afternoon.

Whereas Jake was represented at his capital trial by three experienced capital defense attorneys employed by the Oklahoma Indigent Defense System, Mr. Wood was represented by court-appointed conflict counsel, John Albert, who failed to use an investigator, received $10,000 total to defend Mr. Wood in a death penalty case, admittedly did little to no work on Mr. Wood's case outside of court, and was impaired by an addiction to alcohol, cocaine, and prescription pills during the period he was tasked with defending Mr. Wood's life. (*See* Dkt. 35-1, Ex. 3 ¶¶ 5, 8–9; *see also* Dkt. 127-2 at 161–65.)[1]

Around the same time that Albert represented Mr. Wood, he also represented two other capital defendants—Keary Littlejohn and James Fisher—whose cases he took to trial the year after Mr. Wood was sentenced to death.[2] Littlejohn and Fisher, like Mr. Wood,

[1] Entries from the district court docket are cited herein using "Dkt." followed by the docket number and page number corresponding to the CM/ECF file-stamped page numbering that appears in the heading of each document.

[2] Albert's representation of Mr. Wood overlapped with his representation of Littlejohn and Fisher by between two months to a year. Albert first appeared as counsel for Littlejohn on January 8, 2003, and as counsel for Fisher on January 23, 2004. *See* Docket Sheet, Oklahoma State Courts Network, *State v. Littlejohn et al.*, No. CF-2002-2384 (Okla. Cnty. Dist. Ct. May 1, 2002), available at

were sentenced to death. Later uncovered evidence of Albert's substance impairment and neglect of his cases throughout this period ultimately resulted in Littlejohn and Fisher obtaining relief from their death sentences based on Albert's ineffectiveness. *See Littlejohn v. State*, 181 P.3d 736, 745 (Okla. Crim. App. 2008) (vacating death sentence and remanding for resentencing after finding that Albert "could have, and should have, focused his energies on developing a more extensive mitigation case"); *Fisher v. State*, 206 P.3d 607, 613 (Okla. Crim. App. 2009) (reversing conviction and death sentence and remanding for new trial after affirming district court's finding that Albert's "failure to conduct anything approaching an adequate second stage investigation cannot be labeled a reasonable trial strategy." (internal quotations omitted)). Of the three, only Mr. Wood has been denied relief from his death sentence despite his diligent attempts to vindicate his Sixth Amendment right to effective trial counsel in Oklahoma's courts.

In the district court Rule 60(b) proceeding below, the State acknowledged that Mr. Wood raised at his first available opportunity (i.e., in his first state postconviction application) a penalty-phase IAC claim supported by evidence that Albert suffered from a substance abuse impairment during the period he represented Mr. Wood. (*See* Dkt. 129 at 3–4.) The State also acknowledged that the Oklahoma Court of Criminal Appeals ("OCCA") denied Mr. Wood's penalty-phase IAC claim on the merits in that initial

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https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2002-2384; Docket Sheet, Oklahoma State Courts Network, *State v. Fisher*, No. CF-1983-137 (Okla. Cnty. Dist. Ct. Feb. 23, 1983), available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-1983-137.

postconviction proceeding without granting his requests for discovery and a hearing (hereafter "2010 denial"). (*See* Dkt. 129 at 4–5 (the State discussing the OCCA's 2010 denial of Mr. Wood's penalty-phase IAC claim on the merits).) It is thus undisputed between the parties that the OCCA's 2010 denial of Mr. Wood's penalty-phase IAC claim is the last reasoned state court decision adjudicating that claim's merits.

Mr. Wood raised his penalty-phase IAC claim as Claim One in his petition for writ of habeas corpus. (Dkt. 35 at 23–81.) When the district court considered that claim, however, rather than subject the OCCA's last-reasoned 2010 denial to review under 28 U.S.C. § 2254(d), it instead reviewed an *earlier* decision of the OCCA which rejected Mr. Wood's penalty-phase IAC claim *on direct appeal*. (Dkt. 100 at 8–31.) That oversight[3] prevented the district court from discharging what it recognized was its independent obligation to review the correct state court decision under § 2254(d).[4] (*See* Dkt. 100 at 6 ("[A] federal habeas court must also examine the state court's resolution of the presented

[3] In the habeas briefing before the district court, Mr. Wood and the State committed this same oversight. (*See* Dkt. 35 at 10–68; *see also* Dkt. 65 at 7.) At the end of the day, however, "Section 2254(d) speaks directly to federal courts[,]" *Miller-El v. Dretke*, 545 U.S. 231, 282 (2005) (Thomas, J., dissenting), which have an independent duty to ensure § 2254(d)'s proper application to the last-reasoned state court decision adjudicating a federal claim's merits. *See Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014) (noting that even where "neither party addressed the issue of the proper standard by which we are to review [petitioner's] claim[,] [n]evertheless, we have the obligation to apply the correct standard, for the issue is non-waivable" (citing *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009)); *see also Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008) ("[A] party cannot 'waive' the proper standard of review by failing to argue it."), *overruled on other grounds by Cullen v. Pinholster*, 563 U.S. 170 (2011); *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001) ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived.").

[4] Unadorned statutory citations are to Title 28 of the United States Code.

claim."). *See also Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (federal habeas courts must apply § 2254(d) to the last reasoned state court decision rejecting a federal claim); *Church v. Sullivan*, 942 F.2d 1501, 1507 (10th Cir. 1991) ("As instructed by the Supreme Court, we must focus on the last state court decision explaining its resolution of [the petitioner's] federal claims." (citing *Ylst*, 501 U.S. at 803–05)).

It is that fundamental defect in the integrity of Mr. Wood's habeas proceeding—which is neither a challenge to the district court's resolution of the merits of his penalty-phase IAC claim, nor asserting a basis for relief from his conviction or sentence—that Mr. Wood's Rule 60(b) Motion challenges and which the district court erroneously construed as a second-or-successive habeas petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005) ("We hold that a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction."); *cf. In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012) ("[A] Rule 60(b) motion is actually a second-or-successive petition if success on the motion depends on a determination that the court had incorrectly ruled on the merits in the habeas proceeding.").

Because Mr. Wood's is a true Rule 60(b) motion, the Court should remand to the district court with instructions to consider the motion on its merits. *See Spitznas v. Boone*, 464 F.3d 1213, 1219 (10th Cir. 2006) ("If we determine that the district court improperly characterized a true Rule 60(b) motion as a second or successive petition, we will ordinarily remand to permit the district court to address the true Rule 60(b) issues in the first instance."); *see also Peach v. United States*, 468 F.3d 1269, 1272 (10th Cir. 2006) (per

curiam) ("[H]aving determined that Mr. Peach's motion presents a true Rule 60(b) claim over which the district court had jurisdiction and not a second or successive § 2255 motion requiring our prior authorization, we shall remand this matter to the district court so that it can rule on the Rule 60(b) motion in the first instance.").

Alternatively, if the Court concludes that Mr. Wood's Rule 60(b) Motion is not a "true" Rule 60(b) motion, it should construe it as a second in time but not second-or-successive habeas petition raising a Fourteenth Amendment due process and equal protection challenge to the OCCA's preclusion of his penalty-phase IAC claim last year, which "generate[d] this catch-22" that has made it "impossible for [Mr. Wood] . . . to obtain relief" on his diligently pursued penalty-phase IAC claim to which Oklahoma has opened its collateral review forum. *See Cruz v. Arizona*, 598 U.S. 17, 28–29 (2023); *see also In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir. 2013) (per curiam) (a second in time § 2255 motion is not "second or successive" where "the basis for [the] proposed § 2255 claim did not exist" "until after [the] first § 2255 proceedings were concluded[]" and therefore doesn't require prior authorization from this Court under § 2255(h)); *id.* at 1110 (noting that § 2255(h)'s gatekeeping provisions are "similar" to the limitations on second-or-successive habeas petitions under § 2244(b)).

In either case, remand to the district court is appropriate. *See Spitznas*, 464 F.3d at 1219; *In re Weathersby*, 717 F.3d at 1111.

II. Factual and procedural background

A. First state postconviction proceeding

Following the conclusion of his direct appeal proceedings, Mr. Wood discovered that on March 9, 2006, just days after Albert testified at a Rule 3.11[5] hearing about his professional performance in Mr. Wood's case, a contempt hearing was held in state court concerning Albert's grossly unprofessional conduct in a first-degree murder case. (Dkt. 127-2 at 23–24.) Mr. Wood also discovered that Albert had been suspended from the practice of law on April 24, 2006—just months after his Rule 3.11 testimony—and had been under investigation by the Oklahoma State Bar for gross professional misconduct related to his problems with "alcohol and possibly even drugs[]" at the time he testified about his performance in Mr. Wood's case. (*Id.* at 23.) In his first application for postconviction relief, Mr. Wood argued that "this information is critical in determining whether Mr. Albert rendered effective assistance of counsel in [his] case[,]" and "would have assisted this Court [on direct appeal] in determining whether Mr. Albert rendered effective assistance of counsel in Mr. Wood's case." (*Id.* at 24, 29.) He requested discovery and "remand . . . for a full and fair evidentiary hearing[.]" (Dkt. 127-2 at 9, 70.)

Without affording Mr. Wood either discovery or a hearing, the OCCA denied his penalty-phase IAC claim on the merits. (Dkt. 127-7 at 27–30.) That denial was predicated on the OCCA's factual finding—rendered without a hearing—that Albert's drug abuse

[5] OCCA Rule 3.11 allows defendants to raise ineffective-assistance-of-counsel claims on direct appeal and seek supplementation of the record. *See* Okla. Stat. Ann. tit. 22, Ch. 18, App. (2023).

onset in 2005 (Dkt. 127-7 at 28–30 & n.5) and Mr. Wood had failed to present "proof trial counsel was suffering from his addiction during [his] trial[.]" (Dkt. 127-7 at 29.) But the onset of Albert's drug addiction—and whether Albert was impaired by addiction during his handling of Mr. Wood's capital case—was a material issue of fact that Oklahoma law required the OCCA to resolve at a hearing. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(4)–(5) (2006) (mandating a hearing to resolve any "controverted, previously unresolved factual issues material to the legality of the applicant's confinement" based on grounds that could not have been previously raised on direct appeal).

B. Successor state postconviction proceeding

Following Albert's death in 2018, Mr. Wood uncovered the proof that Albert's substance abuse predated and persisted throughout Mr. Wood's capital trial. In April 2022, two witnesses with firsthand knowledge of Albert's substance abuse revealed in sworn statements that his drug addiction began at least as early as the late-1990s.

Benito Bowie, who first became acquainted with Albert in 1998, attests that "[d]uring the almost decade I knew John [Albert], he did cocaine every day. John also drank regularly, probably daily." (Dkt. 127-2 at 162 ¶¶ 2, 4.) In fact, starting in 1999 or 2000, Albert represented all the members of the Playboy Gangsta Crips who regularly supplied him with drugs. (Dkt. 127-2 at 162 ¶ 3.) Michael Maytubby, who first met Albert in 2001, attests to Albert's use of alcohol, painkillers, and anti-anxiety drugs—including in combination—during the period he knew Albert. (Dkt. 127-2 at 164 ¶ 3.) He is "sure Johnny was using cocaine in 2002 because [he] would give it to [Albert] as payment for legal fees." (Dkt. 127-2 at 164 ¶ 4.) Maytubby further attests that, "[b]y 2004 to 2005,

Johnny's drug and alcohol abuse had gotten so bad that he looked like someone from the streets. I heard Johnny was using 'ice' (crystal meth) by that time." (Dkt. 127-2 at 164 ¶ 7.)

Within 60 days of uncovering this new evidence, Mr. Wood filed a successor postconviction application in the OCCA re-raising his penalty-phase IAC claim. (Dkt. 127-3.) He argued that this new evidence constituted prima facie proof that Albert suffered from a serious addiction to multiple substances during the time he handled Mr. Wood's death penalty case. (Dkt. 127-3 at 19.) For the same reason the OCCA granted relief in *Littlejohn* and *Fisher* based on evidence of Albert's substance addiction, Mr. Wood argued this new evidence mandated relief in his case as well. (Dkt. 127-3 at 33–34, 39–40.) He also asked for discovery and a hearing. (Dkt. 127-4; Dkt. 127-5.)

In response to Mr. Wood's successor application, the State—to its credit—recognized "the seriousness of the issue" and that, with this new evidence of Albert's substance impairment, Mr. Wood's case is indistinguishable from Fisher's and Littlejohn's cases where the "implications [of Albert's substance abuse] warranted death-sentence relief[.]" (Dkt. 127-7 at 18.) It nevertheless maintained—without rebutting the evidence Mr. Wood presented in support of the timeliness of his application—that Mr. Wood's IAC claim was barred from merits review on res judicata, waiver, and diligence grounds. (Dkt. 127-7 at 13–14.)

As before, the OCCA closed its doors to Mr. Wood's penalty-phase IAC claim without discovery or a hearing. It subjected his successor application to the onerous requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)—requirements Mr. Wood

demonstrated he satisfied; failed to give him the benefit of *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), which established the OCCA's plenary power to grant a successive postconviction application "when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 46 P.3d at 710; and placed Mr. Wood in an impossible catch-22 by invoking the doctrines of res judicata and waiver to hold against him his prior diligence in raising and attempting to factually develop his penalty-phase IAC claim in his initial postconviction proceeding. (*See* Dkt. 127-8 at 2–7.) The OCCA's rules barred Mr. Wood from seeking rehearing from the court's denial. *See* OCCA Rule 3.14(E) & Rule 5.5.

While Mr. Wood's petition for writ of certiorari to the OCCA pended, the Supreme Court decided *Cruz v. Arizona* where it clarified that a state cannot insulate from federal review a prisoner's diligently-pursued federal claims to which the state opens its collateral forum by "generat[ing]" a procedural "catch-22" that makes it "impossible for [a petitioner], and similarly situated capital defendants, to obtain relief." *Cruz*, 598 U.S. at 28–29. On April 3, 2023, the Supreme Court declined to review Mr. Wood's petition. *See Wood v. Oklahoma*, No. 22-6538 (U.S. April 3, 2023).

C. U.S. district court Rule 60(b)(6) proceeding

A little over two weeks later, Mr. Wood moved the district court to reopen the judgment in his habeas proceeding under Federal Rule of Civil Procedure 60(b)(6) ("Rule 60(b) Motion") based on extraordinary circumstances that warranted correcting the defect in the integrity of his habeas proceeding stemming from the district court's failure to apply § 2254(d) to the OCCA's 2010 decision denying his penalty-phase IAC claim on the merits.

(Dkt. 127.) Following full briefing (Dkt. Nos. 127, 129–30), the district court determined that Mr. Wood's Rule 60(b) Motion was "not a true Rule 60(b) motion" and declined to reach its merits (Dkt. 131 at 6–7).[6] The court instead construed the Rule 60(b) Motion as a second-or-successive habeas petition and transferred that new civil action to this Court for authorization under § 2244(b). (Dkt. 131 at 6–7.)

On September 14, 2023, the Clerk of Court ordered Mr. Wood to file within 30 days of that date a Motion for Authorization to file a second-or-successive habeas petition and/or a Motion for Remand to the district court "explain[ing] why [his] district court filing should not be treated as a 'second or successive' § 2254 petition or does not otherwise require authorization under § 2244(b)(3)." Letter from 10th Cir. Clerk of Court at 1–2, *In re Wood*, No. 23-6129 (10th Cir. Sept. 14, 2023).

This motion for remand follows.[7]

III. Argument

A. Mr. Wood's Rule 60(b) Motion is a "true" Rule 60(b) motion that challenges a defect in the integrity of his habeas proceeding

"[A] Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, *claims of error* in the movant's state conviction." *Gonzalez*, 545 U.S. at 538 (emphasis added). A "claim of error" is "an asserted federal *basis for relief* from a state court's judgment of conviction." *Id.* at 530 (emphasis added).

[6] Mr. Wood timely appealed the district court's decision construing his Rule 60(b) Motion as "not a true Rule 60(b) motion." (Dkt. No. 133.) That proceeding is captioned as *Wood v. Quick*, No. 23-6134 (10th Cir. Sept. 15, 2023), and remains pending.

[7] This motion is being filed on October 13, 2023, which is within 30 days of September 14, 2023, rendering it timely.

Determining whether a Rule 60(b) motion brought in a habeas case improperly asserts a claim of error, rendering it a disguised second-or-successive habeas petition, requires a court to examine "the relief sought." *United States v. Nelson*, 465 F.3d 1145, 1148–49 (10th Cir. 2006). This inquiry "must proceed case by case" and requires a court to "examine the factual predicate set forth in support of a particular motion." *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1297 (11th Cir. 2004) (Tjoflat, J., concurring and dissenting in part) (quoting *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003)).

"When the motion's factual predicate deals primarily with the constitutionality of the underlying state [or federal] conviction or sentence, then the motion should be treated as a second or successive habeas petition." *Id.* However, if the factual predicate "deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief[,]" then "[t]hat is the classic function of a Rule 60(b) motion, and such a motion should be treated within the usual confines of Rule 60(b)." *Id.*; *see also Gonzalez*, 545 U.S. at 538 (Breyer, J., concurring) (agreeing with "Judge Tjoflat's description" of the standard for differentiating a true Rule 60(b) motion from a second-or-successive petition in his partial concurrence).

An examination of the relief that Mr. Wood's Rule 60(b) Motion seeks, and the factual predicate for that relief, demonstrates its "true" Rule 60(b) character. *First*, Mr. Wood's Rule 60(b) Motion seeks to reopen the habeas judgment to correct the district court's failure to apply § 2254(d) to the OCCA's last-reasoned 2010 denial of Mr. Wood's penalty-phase IAC claim. (Dkt. 127 at 11–12, 23–25, 30; Dkt. 130 at 1–3, 8.) Nowhere does Mr. Wood's Rule 60(b) Motion argue that he is entitled to relief from his death

sentence, that his death sentence is unconstitutional, or that the district court erred in denying habeas relief on his penalty-phase IAC claim when it adjudicated Claim One in his habeas petition. (*See generally* Dkt. 127, 130.) *Cf. Gonzalez*, 545 U.S. at 538 (disguised Rule 60(b) motion asserts claims of error in the movant's state conviction); *Rodwell*, 324 F.3d at 71 (disguised Rule 60(b) motion makes "direct challenge to the constitutionality of the underlying conviction[]"); *United States v. Washington*, 653 F.3d 1057, 1063 (9th Cir. 2011) (disguised Rule 60(b) motion "assert[s] federal basis for relief from a judgment of conviction" (quoting *Gonzalez*, 545 U.S. at 530) (cleaned up)).

To the contrary, the relief Mr. Wood's Rule 60(b) Motion seeks is, by definition, an attack not on "the substance of the federal court's resolution of a claim on the merits, but [on] some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S at 532 (footnote omitted); *see also Peach*, 468 F.3d at 1271 (district court overlooking claim is a "defect in the integrity" of earlier habeas proceedings); *Jones v. Ryan*, 733 F.3d 825, 836 (9th Cir. 2013) (suggesting defect in integrity of habeas proceeding may occur where not "in accord with law"). Mr. Wood's Rule 60(b) Motion challenges the district court's failure at "[t]he first step . . . to determine which state court decision [to] review" under § 2254(d) when it adjudicated his penalty-phase IAC claim. *Amado*, 758 F.3d at 1130. That is a non-merits-based attack on the integrity of the district court's adjudication of the claim. *Cf. Hancock v. Trammell*, 798 F.3d 1002, 1006 (10th Cir. 2015) (deciding as to various issues that due to § 2254(d) threshold "we cannot reach the merits of the claim").

Second, the factual predicate for Mr. Wood's Rule 60(b) Motion consists of the procedural catch-22 in which the OCCA's decision last year placed him, which has

rendered it impossible for him to vindicate his Sixth Amendment right to effective counsel in Oklahoma courts, along with the other extraordinary circumstances in his case that render enforcement of the judgment inequitable. (*See* Dkt. 127 at 19–25 (discussing extraordinary circumstances present under Fed. R. Civ. P. 60(b)(6)).) *See also* Sections I & II, *supra*. Because that factual predicate does not challenge the constitutionality of Mr. Wood's conviction or death sentence, his Rule 60(b) Motion does not assert a second-or-successive habeas claim. *See Gonzalez*, 545 U.S. at 538; *see also Rodwell*, 324 F.3d at 70.

B. The district court erred in construing Mr. Wood's Rule 60(b) Motion as a disguised second-or-successive habeas petition raising a new substantive IAC claim

At the outset of its order construing Mr. Wood's Rule 60(b) Motion as a disguised second-or-successive habeas petition, the district court characterized Mr. Wood's motion as "arguing that the court procedurally erred in reaching its conclusion that his trial counsel had not provided ineffective assistance of counsel[.]"[8] (Dkt. 131 at 1.) But that is incorrect.

[8] The district court's characterization of Mr. Wood's Rule 60(b) Motion as attacking its de novo denial of his penalty-phase IAC claim is inconsistent with its later conclusion that Mr. Wood's Rule 60(b) Motion is a disguised second-or-successive habeas petition that raises a new IAC claim supported by evidence of Albert's substance abuse. (*See* Dkt. 131 at 5.) In other words, the district court concluded that Mr. Wood's motion attacks the court's de novo rejection of a habeas claim previously raised and seeks to advance a new habeas claim not previously raised. But both cannot be true.

The district court's order contains other inconsistencies as well. For example, elsewhere the court states that Mr. Wood's Rule 60(b) Motion "contends that the court erred in reaching th[e] conclusion [that the OCCA's direct appeal denial of the penalty-phase IAC claim wasn't unreasonable under § 2254(d)] *because it did not fully review* the ineffective assistance of counsel claim that was included in [the] first application for post-conviction relief and denied by the OCCA on June 30, 2010." (Dkt. 131 at 4 (emphasis added).) But that misunderstands the matter. Mr. Wood's argument is not that the district court did not "fully review" the penalty-phase IAC claim presented as Claim One in his habeas petition. Rather, his argument is that the district court *did not review at all* the

Not only did Mr. Wood's Rule 60(b) Motion never argue that the district court erred in concluding that trial counsel was not ineffective (*see generally* Dkt. 127; Dkt. 130), but the district court never made that de novo conclusion because it denied Mr. Wood's penalty-phase IAC claim after concluding that the OCCA's *direct appeal denial* was reasonable under § 2254(d). (Dkt. 100 at 31.)

That threshold error is not the only one the district court committed. The district court recognized that Mr. Wood raised the penalty-phase IAC claim in his first application for postconviction relief following the OCCA's earlier rejection of the issue on direct appeal. (Dkt. 131 at 1–2.) It further recognized that the OCCA denied that claim on the merits and that Mr. Wood raised the penalty-phase IAC claim in his petition for writ of habeas corpus. (*Id.* at 2–3.) However the court reasoned that Mr. Wood's Rule 60(b) Motion was not a "true" Rule 60(b) motion because: 1) his "petition did not argue ineffective assistance of counsel due to the substance issue[]"[9]; and 2) his challenge to the court's failure to discharge its independent obligation to apply § 2254(d) to the last-reasoned state court decision adjudicating a federal claim's merits "would create a system in which a petitioner could attack their underlying conviction an unlimited number of times simply by leaving arguments out of their original petition." (Dkt. 131 at 5.) Neither conclusion is responsive to whether Mr. Wood's Rule 60(b) Motion challenged a defect in

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correct, last-reasoned decision of the OCCA denying that claim on the merits during Mr. Wood's postconviction proceedings in 2010.

[9] The court recognized that Mr. Wood supported the penalty-phase IAC claim raised as Claim One in his habeas petition with allegations pertaining to Albert's substance abuse, but puzzlingly characterized the "substance abuse" as "not the basis for the claim in the petition." (Dkt. 131 at 5.)

the integrity of his habeas proceeding. Moreover, the first conclusion is premised on a misunderstanding of Mr. Wood's Rule 60(b) argument as discussed *supra*, and the second conclusion doesn't disagree that the court had an independent duty to identify the last-reasoned state court decision adjudicating a federal claim to review under § 2254(d)—only that reopening the judgment to correct that oversight might lead to gamesmanship by habeas litigants.

The district court's gamesmanship[10] concerns, while understandable, overlook that it is a federal habeas court's independent duty to ensure § 2254(d)'s application to the last-reasoned state court decision adjudicating a federal claim's merits. *See* Section III(A), *supra*. Additionally, Rule 60(b)(6)'s standard itself safeguards against gamesmanship by requiring a petitioner who seeks to invoke the relief afforded under the rule to prove the existence of "extraordinary circumstances" justifying that relief. *Ackermann v. United States*, 340 U.S. 193, 199–202 (1950).

Finally, the district court relied on *Spitznas* to conclude that Mr. Wood's Rule 60(b) Motion "falls squarely" within its description of disguised Rule 60(b) motions that "seek[] to present a claim of constitutional error omitted from the [ ] initial habeas petition[,]" "seek[ ] leave to present 'newly discovered evidence' in order to advance the merits of a claim previously denied[,]" or "seek[ ] vindication of a habeas claim by challenging the habeas court's previous ruling on the merits of that claim." (Dkt. 131 at 6.) But that analysis failed to examine the nature of the relief Mr. Wood's Rule 60(b) Motion seeks and its

[10] As discussed *supra* n.2, there was no gamesmanship involved in the oversight that occurred here.

factual predicate, neither of which support the district court's conclusion. *See* Section III(A), *supra*.

The Court should conclude that Mr. Wood's Rule 60(b) Motion was a "true" Rule 60(b) Motion and remand to the district court with instructions to consider the motion on its merits. *See Spitznas*, 464 F.3d at 1219.

C. Alternatively, the Court should construe Mr. Wood's Rule 60(b) Motion as a second in time but not second-or-successive habeas petition raising a Fourteenth Amendment challenge to the procedural catch-22 in which the OCCA's actions last year placed him

The Supreme Court "has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). *Panetti* "creat[ed] an exception[n] to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application." *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (discussing *Panetti* in parenthetical citation) (second alteration in original) (internal quotation marks omitted). An unripe claim is one whose factual basis "did not exist when th[e] [first habeas] proceedings were ongoing[.]" *In re Weathersby*, 717 F.3d at 1111. Such a claim brought in a second in time habeas application "is not 'second or successive' and does not require [this Court's] prior authorization" before the district court may consider it. *Id.* Here, the events giving rise to Mr. Wood's Fourteenth Amendment due process and equal protection challenge to the procedural catch-22 in which the OCCA placed him did

not exist until August 18, 2022. (Dkt. 127-8.) As such, he could not have raised this claim in his habeas petition rendering it not "second or successive."

States have no obligation to provide a collateral review process, but when they elect to do so the fundamental fairness mandated by the Fourteenth Amendment's Due Process Clause governs their administration. *Pennsylvania v. Finley*, 481 U.S. 551, 557–58 (1987) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause[.]" (internal quotations omitted)). Just as a state's administration of its collateral review mechanism is governed by the Due Process Clause's fundamental fairness guarantee, it must also comply with the Equal Protection Clause. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). Although equal protection "does not require absolute equality[,]" it forbids "unreasoned distinctions" between classes of individuals. *Id.* at 612. It also requires "that indigents have an adequate opportunity to present their claims fairly within the adversary system[,]" and prohibits states from subjecting some defendants to "merely a meaningless ritual" while affording others "meaningful" process. *See id.* (internal quotations omitted).

The OCCA's actions last year, which amounted to an arbitrary, capricious, and discriminatory administration of Oklahoma's collateral review mechanism to prevent Mr. Wood from vindicating his diligently pursued penalty-phase IAC claim in Oklahoma's courts, violated these bedrock Fourteenth Amendment guarantees. Remand is thus appropriate to permit the district court to consider this second in time but not second-or-successive habeas claim on the merits.

IV. Conclusion

The Court should remand Mr. Wood's Rule 60(b) Motion to the district court with instructions to consider the motion on the merits. Alternatively, the Court should construe Mr. Wood's Rule 60(b) Motion as a second in time but not second-or-successive habeas petition raising a Fourteenth Amendment claim and remand to the district court with instructions to consider it.

Respectfully submitted this 13th day of October, 2023.

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CERTIFICATE OF SERVICE

I certify that on October 13, 2023, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following ECF registrants: Joshua Lockett, Assistant Attorney General, Joshua.Lockett@oag.ok.gov; Jennifer Crabb, Assistant Attorney General, Jennifer.Crabb@oag.ok.gov.

s/Amanda C. Bass
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I certify that, in accordance with Fed. R. App. P. 32(g) and 10th Cir. R. 32, this motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) and 10th Cir. R. 27 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), it consists of 5,196 words based on the word count of the word-processing system used to prepare it. I also certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(A), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point font.

s/Amanda C. Bass
Amanda C. Bass
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APPENDIX F

APPENDIX F

FILED
United States Court of Appeals
Tenth Circuit

January 8, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: TREMANE WOOD, Movant.	No. 23-6129 (D.C. No. 5:10-CV-00829-HE) (W.D. Okla.)

ORDER

Before **BACHARACH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Tremane Wood is an Oklahoma prisoner who has been sentenced to death. He does not currently have an execution date. He recently filed a motion in district court to vacate the 2015 judgment ending his 28 U.S.C. § 2254 proceedings. The district court construed this motion as an unauthorized second or successive § 2254 petition and transferred it here for authorization. Mr. Wood has moved to remand, arguing the district court should not have construed his motion as an unauthorized second or successive § 2254 petition. Mr. Wood is represented by counsel, as he has been in all previous state and federal proceedings relating to his crime. We deny his motion for the reasons explained below.

I. BACKGROUND & PROCEDURAL HISTORY

A. The Crime and the Trial

On New Year's Eve 2001, Mr. Wood and his older brother robbed two men, Ronnie Wipf and Arnold Kleinsasser. *See Wood v. State*, 158 P.3d 467, 471 (Okla. Crim. App. 2007). During the robbery, Mr. Wood and his brother struggled with

Mr. Wipf and Mr. Kleinsasser. *Id.* at 472. During the struggle, Mr. Wipf was fatally stabbed in the chest. *Id.* Mr. Kleinsasser escaped. *Id.*

Mr. Kleinsasser said Mr. Wood wielded a knife during the robbery, in contrast to his older brother, who wielded a gun. *See id.* at 472 & n.6. But Mr. Kleinsasser did not see how Mr. Wipf got stabbed. *See id.* at 472.

The State of Oklahoma charged Mr. Wood with felony murder, which only required proof that Mr. Wipf was killed in the course of the robbery in which Mr. Wood participated, *see id.* at 470, 472–73, as opposed to proof that Mr. Wood dealt the fatal blow. In April 2004, a jury convicted, recommended the death penalty, and the trial court sentenced Mr. Wood accordingly. *Id.* at 470–71. Mr. Wood's brother, in a separate trial, received life without parole. *Id.* at 471 n.5.

B. Direct Appeal and Concurrent Proceedings

Mr. Wood appealed to the Oklahoma Court of Criminal Appeals (OCCA). With new counsel on appeal, he argued that the performance of his trial attorney, Mr. Johnny Albert, during the penalty phase amounted to ineffective assistance of counsel. Specifically, Mr. Wood claimed that Mr. Albert failed to investigate his background, present mitigating evidence, and impeach a witness. *See id.* at 470, 479.

In March 2006—while the appeal was pending—Mr. Albert faced a state-court contempt hearing in a different case, where it became clear he was failing to represent his current clients appropriately due to alcohol abuse. Moreover, in April 2006, Mr. Albert's law license was suspended.

It is not clear precisely when Mr. Wood learned of these developments. However, he raised them in an application for postconviction relief filed with the OCCA in April 2007, when his direct appeal was still pending. He argued these developments, among other things, were "newly discovered evidence which render[ed] his conviction unreliable." ECF No. 127-2 at 23.[1]

Five days after Mr. Wood filed his postconviction application, the OCCA decided his direct appeal, and denied all relief. *See Wood*, 158 P.3d at 471. The OCCA's opinion discusses only the arguments raised on appeal, not the new arguments raised in the postconviction application.

C. The *Fisher* Decision

In 2009, the OCCA held that Mr. Albert had been constitutionally ineffective at both the guilt and penalty phases of a different death-penalty trial. *Fisher v. State*, 206 P.3d 607, 610, 613 (Okla. Crim. App. 2009). Summarizing the record supporting such a conclusion, the OCCA noted Mr. Albert's testimony at an evidentiary hearing that "he began drinking heavily and abusing cocaine" during the trial. *Id.* at 610–11. Mr. Wood says this trial took place in 2005, a year after his. The OCCA vacated the defendant's conviction and remanded for a new trial. *Id.* at 613.[2]

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[1] Because no appellate record has been created for this proceeding, we take judicial notice of the district court filings. *See, e.g.*, *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

[2] The year before *Fisher*, the OCCA vacated another death sentence in a case where Mr. Albert represented the defendant. *See Littlejohn v. State*, 181 P.3d 736, 744–45 (Okla. Crim. App. 2008). The court noted materials in the record indicating Mr. Albert had been "suffering from substance abuse problems" while he represented that

D. Resolution of Mr. Wood's First State Postconviction Application

In June 2010, the OCCA resolved Mr. Wood's postconviction application (the one he filed just before it resolved his direct appeal in April 2007). The OCCA interpreted Mr. Wood's arguments about Mr. Albert's substance abuse as a claim that "trial counsel's representation was so deficient as to give rise to prejudice per se under *United States v. Cronic*, 466 U.S. 648, 658–61 (1984)." *Wood v. State*, No. PCD-2005-143, slip op. at 4 (Okla. Crim. App. June 30, 2010) (parallel citations omitted).[3] *Cronic* says a defendant is denied the Sixth Amendment right to counsel when "under the[] circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." 466 U.S. at 660–61.

The OCCA said Mr. Wood's evidence showed Mr. Albert's troubles began sometime after Mr. Wood's trial. Evidence from Mr. Albert's state bar disciplinary proceeding more specifically showed his "substance abuse disorder began in earnest in March 2005, a year after [Mr.] Wood's death penalty trial." *Wood*, No. PCD-2005-143, slip op. at 5 & n.5. Given this, the OCCA rejected Mr. Wood's renewed ineffective-assistance attack against Mr. Albert.

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client, but it held Mr. Albert's ineffective assistance was evident regardless of that possibility. *Id.* at 744 n.7.

[3] This decision is available on the district court docket at ECF No. 35-4, beginning at page 64.

E. Section 2254 Proceedings

In June 2011, Mr. Wood filed a § 2254 petition in the United States District Court for the Western District of Oklahoma. Mr. Wood claimed, among other things, that the OCCA's direct-appeal decision had unreasonably applied the law and unreasonably determined the facts when it rejected his argument that Mr. Albert had been ineffective during the penalty phase of the trial. *Cf.* 28 U.S.C. § 2254(d) (establishing that a federal court may not grant habeas relief to a state prisoner unless the state court acted contrary to, or unreasonably applied, clearly established federal law, or rendered a decision based on an unreasonable determination of the facts). Mr. Wood did *not* argue that the OCCA's *postconviction* decision (which accounted for Mr. Albert's substance abuse) was likewise unreasonable.

The district court resolved this claim, and other habeas claims no longer relevant, in October 2015. The court held that the OCCA's direct-appeal decision was reasonable on the law and the facts. The court therefore denied relief.

In 2018, this court affirmed in part and denied a certificate of appealability as to all other issues. *See Wood v. Carpenter*, 907 F.3d 1279, 1285 & n.1 (10th Cir. 2018). Mr. Albert passed away that same year.

F. Mr. Wood's Postconviction Application Alleging New Evidence

In June 2022, Mr. Wood filed another postconviction application with the OCCA. He claimed he had recently uncovered new evidence suggesting Mr. Albert had been abusing alcohol and drugs in 2004, when he represented Mr. Wood. Specifically, Mr. Wood produced affidavits from two of Mr. Albert's former clients,

both of whom claimed Mr. Albert was regularly drinking and using cocaine before 2004. One of the affiants alleged he gave Mr. Albert cocaine in exchange for legal services in 2002, and he also saw Mr. Albert using cocaine in 2003. The other affiant said he knew Mr. Albert from roughly 1998 to 2007, and he further claimed that Mr. Albert drank and used cocaine every day during that time, although he did not explain how he knew about Mr. Albert's daily habits.

The OCCA resolved this postconviction application in August 2022. It held that Mr. Wood had not shown a need to reopen his case for three reasons. First, it held that its rejection of this claim in 2010 was res judicata, despite new evidence. Second, Mr. Wood had not shown the new factual support for the claim was previously unavailable (a requirement of the Oklahoma statute governing successive postconviction applications). Third, Mr. Wood had not shown he filed the application within sixty days of when the new information reasonably could have been discovered (a requirement of the OCCA's rules governing successive postconviction applications).

Mr. Wood sought certiorari, which the Supreme Court denied on April 3, 2023.

G. Mr. Wood's Rule 60(b) Motion

On April 19, 2023, Mr. Wood filed a motion in district court that he captioned as a Federal Rule of Civil Procedure 60(b)(6) motion for relief from the October

2015 judgment ending his § 2254 case.[4] Mr. Wood recognized that Rule 60(b) motions in § 2254 cases must rely on "some defect in the integrity of the federal habeas proceedings," as opposed to "a new ground for relief" or an argument "attack[ing] the federal court's previous resolution of a claim *on the merits*." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Otherwise, the Rule 60(b) motion is, in substance, and unauthorized second or successive habeas petition, *see id.*, which the district court lacks jurisdiction to resolve, *see* 28 U.S.C. § 2244(b)(3)(A).

The alleged defect, according to Mr. Wood, was the district court's failure, in its 2015 order, to address the OCCA's 2010 postconviction disposition of his ineffective-assistance challenge against Mr. Albert based on his substance abuse. If the district court had addressed that issue, then, in Mr. Wood's view, the court would have seen that the OCCA made what was effectively an evidentiary ruling on the timing of Mr. Albert's impairment, despite an Oklahoma statute requiring an evidentiary hearing to resolve disputed factual issues arising in postconviction proceedings. And this, he argued, created a federal habeas claim, *i.e.*, a failure to permit him to develop a federal claim through procedure to which he was entitled under state law.

Importantly, however, Mr. Wood conceded he had not brought this claim in his § 2254 petition. He told the district court this had been "an oversight." ECF No. 130

[4] Rule 60(b)(6) says the district court "may relieve a party . . . from a final judgment . . . for . . . any other reason that justifies relief [*i.e.*, other than the specific scenarios described in 60(b)(1)–(5)]."

at 6. He insisted, however, it was "the solemn task of the federal habeas court—not the parties—to independently ensure § 2254(d)'s proper application to the last-reasoned state court adjudication of a federal claim's merits, especially in a capital case that carries life and death consequences." *Id.* at 6–7. This duty, he argued, comes from *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which "establish[ed] [a] presumption that [a] federal habeas court must apply § 2254(d) to the last-reasoned state court decision rejecting a federal claim," ECF No. 127 at 25.

To rephrase, Mr. Wood essentially argued as follows:

- His § 2254 petition had challenged the OCCA's disposition of his *direct-appeal* claim against Mr. Albert.
- The OCCA's last reasoned decision regarding *any* aspect of Mr. Albert's effectiveness came in its denial of postconviction relief.
- Given the alleged duty to review the last reasoned state court decision, the district court had a duty to *sua sponte* review the OCCA's postconviction decision on this issue.

In light of Mr. Wood's concession that he was asking the court to reach an issue he had overlooked in his § 2254 petition, the district court interpreted the Rule 60(b) motion as one "seeking to present a claim of constitutional error omitted from the movant's initial habeas petition," which is among the examples this court has given "of Rule 60(b) motions that should be treated as second or successive habeas petitions," *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006). The district court then construed Mr. Wood's motion as a motion for authorization to file a

second or successive petition and transferred it to this court for adjudication. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) ("When a second or successive § 2254 or § 2255 claim is filed in the district court without the required authorization from this court, the district court may transfer the matter to this court if it determines it is in the interest of justice to do so . . . .").

We gave Mr. Wood thirty days to file a motion explicitly arguing for authorization to file a successive § 2254 claim, or to file a motion to remand arguing that the district court had jurisdiction to grant Rule 60(b) relief. Mr. Wood timely filed the motion to remand that is now before us.

II. ANALYSIS

If a district court "fail[s] to consider one of [a petitioner's] habeas claims," it is "a defect in the integrity of the federal habeas proceedings" that supports "a 'true' 60(b) claim." *Spitznas*, 464 F.3d at 1225. But Mr. Wood concedes the district court did not fail to consider any claim he previously asserted. Rather, he wants to assert a claim he admittedly overlooked. As the district court recognized, *Spitznas* identifies this as a situation in which the district court should treat a Rule 60(b) motion as an unauthorized second or successive habeas petition. 464 F.3d at 1216.

Mr. Wood cannot avoid this outcome through the last-reasoned-decision presumption. That presumption addresses how a federal court interprets an "unexplained denial of a petition for habeas corpus by a state court." *Ylst*, 501 U.S. at 799. The Supreme Court held that "[w]here there has been one reasoned state judgment rejecting a federal claim," the federal court should presume "later

unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. This has nothing to do with the present situation—there are no unexplained state-court orders at issue. And, without more, *Ylst* and the other cases cited by Mr. Wood do not convince us a federal district court has an independent duty to search the last reasoned state-court decision for habeas claims the petitioner has not raised.[5]

For the first time in his reply brief, Mr. Wood argues that the district court's duty to identify the last reasoned decision, and to address its reasoning, is jurisdictional. And so the district court's failure to discharge that duty here, the argument goes, amounted to a defect that the court must fix through Rule 60(b). We disagree. The last-reasoned-decision presumption has nothing to do with the district court's "power or authority to hear and decide [cases]." *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939).

Mr. Wood points to the Supreme Court's statement that "[s]ection 2254(d) is part of the basic structure of federal habeas jurisdiction," *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and to roughly similar statements in other cases, *see* Reply at 4–7, but these statements do not establish the rule for which he argues. Section 2254(d) provides that a claim of error arising from a state criminal trial "is barred in federal court unless one of the exceptions . . . set out in §§ 2254(d)(1) and (2)

[5] We will assume the OCCA's 2010 postconviction decision is the relevant decision for purposes of Mr. Wood's last-reasoned-decision argument. The State does not argue otherwise. *See* Resp. Br. at 11–17.

applies." *Harrington*, 562 U.S. at 103. This is a limit on federal court jurisdiction, not a command to search the last reasoned decision for claims the habeas petitioner could have made but did not. *Cf. Wood v. Milyard*, 566 U.S. 463, 472 (2012) (observing, in a § 2254 case, "that a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system").

In short, Mr. Wood's Rule 60(b) motion did not raise a claim of a defect in the integrity of the habeas proceedings. The district court correctly held it lacked jurisdiction to rule on the merits of the motion. We therefore deny the motion to remand.

III. REQUEST FOR ALTERNATIVE RELIEF

For the first time on appeal, Mr. Wood argues for an alternative disposition:

> [I]f the Court concludes that Mr. Wood's Rule 60(b) Motion is not a true Rule 60(b) motion, it should construe it as a second in time but not second-or-successive habeas petition raising a Fourteenth Amendment due process and equal protection challenge to the OCCA's preclusion of his penalty-phase [ineffective assistance of counsel] claim [*i.e.*, the OCCA's August 2022 decision].

Mot. for Remand at 5 (internal quotation marks and brackets omitted). And if we embrace this construction, he says, then we should "remand to the district court with instructions to consider [the petition]." *Id.* at 18.

Mr. Wood is correct that some successive habeas petitions are not "second or successive" for purposes of 28 U.S.C. § 2244(b), such as when the new claims were not ripe when the first petition was decided. *See Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). But Mr. Wood does not explain why this is a proper basis for

remand. We would not be remanding to correct any error. As already noted, Mr. Wood requested this relief for the first time before us, not before the district court. And he assured the district court that his Rule 60(b) motion "*does not assert a basis for relief from his underlying convictions* and instead simply asserts that he did not get a fair shot in the original habeas proceeding." ECF No. 130 at 6 (emphasis added) (internal quotation marks and brackets omitted).

In any event, if Mr. Wood indeed has a new claim that falls outside of the "second or successive" category, he may simply file a new § 2254 petition in district court. *See Panetti*, 551 U.S. at 947 (holding that the "[p]etitioner's [successive] habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim," because he filed it when it was "first ripe"). Mr. Wood gives us no reason why he cannot take this route, nor why he has not already done so. We therefore deny his alternative request for remand.

IV. CONCLUSION

We deny Mr. Wood's motion for remand and terminate this proceeding. We deny his motion to consolidate as moot.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX G

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: TREMANE WOOD, Movant.	)	**10th Cir. Case No. 23-6129** Case No. CIV-10-00829-HE (W.D. Okla.) **Death Penalty Case**

On Transfer from the United States District Court
for the Western District of Oklahoma

The Honorable Joe Heaton
District Court Case No. CIV-10-00829-HE

MOVANT TREMANE WOOD'S PETITION FOR REHEARING AND REQUEST FOR EN BANC CONSIDERATION

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II. The Panel recharacterized the defect in the habeas proceedings which Mr. Wood's Rule 60(b) Motion and Motion for Remand challenge in a manner that finds no support in the record. 5

III. The Panel's decision conflicts with the U.S. Supreme Court's decisions in *Ylst* and *Wilson*, with the Tenth Circuit's decision in *Church*, and with the decisions of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits interpreting and applying *Ylst*. 10

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Movant Tremane Wood timely[1] petitions this Court for en banc consideration and/or rehearing under Rules 35 and 40 of the Federal Rules of Appellate Procedure and the corresponding provisions of Tenth Circuit's Local Rules. *See* Fed. R. App. P. 35; Fed. R. App. P. 40; 10th Cir. R. 35.1.

Rule 35(b)(1) Statement[2]

On January 8, 2024, the Panel denied Mr. Wood's Motion for Remand in an order[3] predicated on grave misapprehensions of the record and well-settled law which place the Panel's decision in direct conflict with the decisions of the U.S. Supreme Court in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), and *Gonzalez v. Crosby*, 545 U.S. 524 (2005); with the Tenth Circuit's decision in *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991); and with the decisions of *every* Circuit Court of Appeals interpreting and applying *Ylst*.[4] The gravity of the Panel's errors, especially in this death penalty case, calls out for this Court's en banc intervention "to secure and maintain

[1] Consistent with Rules 35(c) and 40(a)(1) of the Federal Rules of Appellate Procedure, this petition for en banc consideration and/or panel rehearing is being filed within 14 days of the Panel's January 8, 2024 decision denying Mr. Wood's Motion for Remand. *See* Fed. R. App. P. 35(c), 40(a)(1).

[2] *See* Fed. R. App. P. 35(b)(1).

[3] A copy of the Panel's order which is the subject of the instant request for en banc consideration is attached hereto as Exhibit A. *See* 10th Cir. R. 35.2(B).

[4] Those decisions, discussed *infra*, are *Mark v. Ault*, 498 F.3d 775, 783 (8th Cir. 2007); *Bond v. Beard*, 539 F.3d 256, 289–90 (3d Cir. 2008), *as amended* (Oct. 17, 2008); *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1261 n. 12 (11th Cir. 2009); *Loza v. Mitchell*, 766 F.3d 466, 473 (6th Cir. 2014); *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014); *Lee v. Corsini*, 777 F.3d 46, 54 (1st Cir. 2015); *Jordan v. Hepp*, 831 F.3d 837, 843 (7th Cir. 2016); *Lucio v. Lumpkin*, 987 F.3d 451, 465 (5th Cir. 2021); *McCray v. Capra*, 45 F.4th 634, 640 (2d Cir. 2022); *Allen v. Stephan*, 42 F.4th 223, 247 (4th Cir. 2022).

uniformity" of the Tenth Circuit's decisions, *see* Fed. R. App. P. 35(a)(1)—including to ensure that the law of this Circuit conforms to the decisions of the U.S. Supreme Court—and to resolve the conflict with the decisions of *every other* Circuit Court of Appeal to which the Panel's decision gives rise and is "a question of exceptional importance[,]" *see* Fed. R. App. P. 35(a)(2), (b)(1)(B); 10th Cir. R. 35.1(A).

At minimum, rehearing is necessary to correct the Panel's numerous and significant misapprehensions of the uncontroverted record in this death penalty case. *See* Fed. R. App. P. 40(a)(2).

I. The Panel overlooked the uncontroverted fact that the Oklahoma Court of Criminal Appeals adjudicated Mr. Wood's *Strickland*-based IAC claim—which he raised as Claim One in his habeas petition—on initial postconviction review.

The Panel found, first, that during Mr. Wood's initial postconviction proceeding in 2010, the Oklahoma Court of Criminal Appeals ("OCCA") adjudicated his ineffective-assistance-of-counsel ("IAC") claim under *United States v. Cronic*, 466 U.S. 648 (1984). Order at 4, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Jan. 8, 2024).[5] Relying on page 4 of the OCCA's initial postconviction decision, the Panel overlooked the critical fact that—just one page later—after denying Mr. Wood's *Cronic*-based IAC claim, the OCCA also adjudicated and denied relief on the merits of Mr. Wood's *Strickland*[6]-based IAC claim (hereafter "*Strickland* claim"), which renders that adjudication the OCCA's last reasoned decision on the merits of Mr. Wood's *Strickland* claim. *Compare* Order at 4, *In*

[5] Citations herein use CM/ECF page numbering.
[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

re: Tremane Wood, No. 23-6129 (10th Cir. Jan. 8, 2024) (the Panel discussing only the OCCA's decision on Mr. Wood's *Cronic* claim), *with* Dist. Ct. ECF No. 35-4 at 65 (the OCCA specifically finding on page 5 of its initial postconviction decision that "[t]he aspects of counsel's performance challenged by Wood are plainly of the same sort as other specific attorney errors subject to the performance and prejudice test set forth in *Strickland* [,]" and on page 6 denying relief on Mr. Wood's *Strickland* claim (emphasis added)).

When, on federal habeas review, Mr. Wood raised the *Strickland* claim as Claim One in his federal habeas petition, *see* Dist. Ct. ECF No. 35 at 23, 53–81, the district court had an independent duty under *Ylst* and *Church* to review the OCCA's last reasoned postconviction denial of that *Strickland* claim under 28 U.S.C. § 2254(d). *See Ylst*, 501 U.S. at 805 (directing that on habeas review " . . . we begin by asking which is the last *explained* state-court judgment on the [federal] claim."); *Wilson*, 138 S. Ct. at 1196 (reaffirming *Ylst* and holding that federal habeas courts must "look through" even "silent decision[s]" of the state courts "for a specific and narrow purpose—to identify the grounds for the higher court's decision, as AEDPA directs us to do[]" (emphasis added)); *see also id.* at 1198 (Gorsuch, J., dissenting) ("As the text and our precedent make clear, a federal habeas court must focus its review on the final state court decision on the merits, not any preceding decision by an inferior state court." (citing *Greene v. Fisher*, 565 U.S. 34, 40 (2011) (emphasis added))); *Church*, 942 F.2d at 1507 ("As instructed by the Supreme Court, we must focus on the last state court decision explaining its resolution of [the petitioner's] federal claims." (citing *Ylst*, 501 U.S. 803) (emphasis added)).

The district court's failure to carry out that independent duty to examine the OCCA's last reasoned postconviction denial of Mr. Wood's *Strickland* claim when it adjudicated Claim One in his habeas petition is what Mr. Wood argued in his Rule 60(b) Motion and Motion for Remand amounted to a non-merits-based "defect in the integrity of his habeas proceeding" under Federal Rule of Civil Procedure 60(b). Dist. Ct. ECF No. 127 at 12, 21–22, 26–29 (Mr. Wood's Rule 60(b) Motion citing *Ylst* and arguing that the "defect" in his habeas proceeding was the district court's adjudication of his IAC claim without consideration of the "last-reasoned state-court decision"); Motion for Remand at 7–8, 10–13, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 13, 2023) (Mr. Wood's Motion for Remand citing *Ylst*, *Church*, and *Amado*, and arguing that he "raised his penalty-phase IAC claim as Claim One in his petition for writ of habeas corpus[.] . . . When the district court considered that claim, however, rather than subject the OCCA's last-reasoned 2010 denial to review under 28 U.S.C. § 2254(d), it instead reviewed an *earlier* decision of the OCCA which rejected Mr. Wood's penalty-phase IAC claim *on direct appeal*[,]" and arguing further that "[t]hat oversight prevented the district court from discharging what it recognized was its independent obligation to review the correct state court decision under § 2254(d)" (footnote omitted)).

In light of this uncontroverted fact, the only question before the Panel was whether the district court's failure to comply with the dictates of *Ylst* and *Church* when it adjudicated Claim One in Mr. Wood's habeas petition (his *Strickland* claim) is a "defect" in the habeas proceeding under Rule 60(b) of the Federal Rules of Civil Procedure. However, because the Panel overlooked the uncontroverted record demonstrating that the

OCCA did in fact adjudicate Mr. Wood's *Strickland* claim on initial postconviction review, the Panel erroneously concluded that Mr. Wood's Rule 60(b) Motion sought to require the district court to consider "habeas claims the petitioner has not raised." Order at 10, *In re: Tremane Wood* No. 23-6129 (10th Cir. Jan. 8, 2023). The Panel's oversight thus resulted in it misconstruing the entire factual premise of Mr. Wood's Rule 60(b) Motion and Motion for Remand, and rehearing is necessary to correct that dispositive error. *See* Fed. R. App. P. 40(a)(2).

II. The Panel recharacterized the defect in the habeas proceedings which Mr. Wood's Rule 60(b) Motion and Motion for Remand challenge in a manner that finds no support in the record.

In a paragraph devoid of any citations to or quotes from either Mr. Wood's Rule 60(b) Motion, Motion for Remand, or supporting Replies, the Panel next proceeded to re-characterize Mr. Wood's Rule 60(b) argument as follows:

> The alleged defect, according to Mr. Wood, was the district court's failure, in its 2015 order, to address the OCCA's 2010 postconviction disposition of his ineffective-assistance challenge against Mr. Albert based on his substance abuse. If the district court had addressed that issue, then, in Mr. Wood's view, the court would have seen that the OCCA made what was effectively an evidentiary ruling on the timing of Mr. Albert's impairment, despite an Oklahoma statute requiring an evidentiary hearing to resolve disputed factual issues arising in postconviction proceedings. And this, he argued, created a federal habeas claim, *i.e.*, a failure to permit him to develop a federal claim through procedure to which he was entitled under state law.

Order at 7, *In re: Tremane Wood* No. 23-6129 (10th Cir. Jan. 8, 2023). The Panel's re-characterization of Mr. Wood's Rule 60(b) argument in this manner is untethered from the facts and refuted by the record.

First, the record shows that the "defect" which Mr. Wood's Rule 60(b) Motion has, at all times, challenged is the district court's failure to carry out its independent obligation under *Ylst*, *Church*, and 28 U.SC. § 2254(d) to review the OCCA's last-reasoned postconviction denial of his *Strickland* claim when it adjudicated Claim One in his federal habeas petition. *See* Dist. Ct. ECF No. 127 at 12, 21–22, 26–29 (Mr. Wood's Rule 60(b) Motion citing *Ylst* and arguing that the "defect" in his habeas proceeding was the district court's adjudication of his IAC claim without consideration of the "last-reasoned state-court decision"); Dist. Ct. ECF No. 130 at 2–11 (Mr. Wood's Reply in Support of his Rule 60(b) Motion arguing that "Mr. Wood's Motion seeks to correct the [District] Court's failure to discharge its independent obligation to apply § 2254(d) to the OCCA's last-reasoned decision denying the penalty-phase IAC claim on initial postconviction review[]"); Motion for Remand at 7–8, 10–13, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 13, 2023) (Mr. Wood's Motion for Remand citing *Ylst*, *Church*, and *Amado*, and arguing that he "raised his penalty-phase IAC claim as Claim One in his petition for writ of habeas corpus[,] . . . When the district court considered that claim, however, rather than subject the OCCA's last-reasoned 2010 denial to review under 28 U.S.C. § 2254(d), it instead reviewed an *earlier* decision of the OCCA which rejected Mr. Wood's penalty-phase IAC claim *on direct appeal*[,]" and arguing further that "[t]hat oversight prevented the district court from discharging what it recognized was its independent obligation to review the correct state court decision under § 2254(d)" (footnote omitted)); Reply in Support of Motion for Remand at 5–6, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 30, 2023) (Mr. Wood's Reply in Support of his Motion for Remand arguing that, in light

of facts undisputed by the State, "the only contested question here is whether the district court's failure to review the OCCA's 2010 denial of Mr. Wood's penalty-phase IAC claim constitutes a 'defect' in the integrity of the habeas proceeding under Federal Rule of Civil Procedure 60(b)(6)" and citing *Church*, *Ylst*, and *Amado*).

Considering that the record plainly demonstrates what Mr. Wood did—and did *not*—argue both in the district court and before this Court, the Panel's recasting of Mr. Wood's Rule 60(b) argument as one in which "he argued" that the OCCA's postconviction denial without a hearing "created a federal habeas claim, i.e., a failure to permit him to develop a federal claim through procedure to which he was entitled under state law[,]" Order at 7, *In re: Tremane Wood* No. 23-6129 (10th Cir. Jan. 8, 2023), is simply unsupportable. In fact, Mr. Wood's Rule 60(b) Motion and Supporting Reply make explicit that the OCCA's postconviction denial of his *Strickland* claim without a hearing in 2010 and again in 2022 is only relevant to the "extraordinary circumstances" analysis under Rule 60(b)(6) because of the procedural catch-22 to which the OCCA's actions gave rise. (Dist. Ct. ECF No. 127 at 19–20 (Mr. Wood's Rule 60(b) Motion discussing the OCCA's actions under the heading "A. Extraordinary circumstances warrant reopening this Court's judgment"); Dist. Ct. ECF No. 130 at 11 (Mr. Wood's Reply in Support of his Rule 60(b) Motion discussing the OCCA's "procedural catch-22" as part of the "extraordinary circumstances" analysis under Rule 60(b)(6))). That "extraordinary circumstances" analysis is completely separate from and irrelevant to Rule 60(b)'s threshold "defect" question, which was the only question before the Panel: Whether the district court's failure to comply with the dictates of *Ylst* and *Church* when it adjudicated Mr. Wood's *Strickland*

claim (Claim One in his habeas petition) by overlooking the OCCA's last reasoned postconviction decision adjudicating Mr. Wood's *Strickland* claim is a "defect" under Rule 60(b). *See Gonzalez*, 545 U.S. at 532–38 (explaining that federal habeas courts confronted with a Rule 60(b) motion must determine, first, whether "a Rule 60(b) motion attacks[] . . . some defect in the integrity of the federal habeas proceeding[]" and then, only if so, whether Rule 60(b)(6)'s "extraordinary circumstances" factor is satisfied) (footnote omitted). The Panel's decision collapses and conflates those distinct Rule 60(b) analyses.

Second, after erroneously refashioning Mr. Wood's Rule 60(b) argument, the Panel concluded that it necessarily meant that Mr. Wood had "[i]mportantly . . . conceded he had not brought this claim in his § 2254 petition." Order at 7–9, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Jan. 8, 2024). Not so. As already discussed *supra*, the record here is uncontroverted that Mr. Wood's Rule 60(b) Motion and Motion for Remand at all times argued that the district court's dereliction of its independent duty under *Ylst* and *Church* was a "defect" under Rule 60(b) and not a "claim." *See* Dist. Ct. ECF No. 127 at 27–30 (Mr. Wood's Rule 60(b) Motion arguing that it does not present a second-or-successive claim "because it challenges the Court's failure to apply § 2254 to the last-reasoned state court decision addressing Mr. Wood's Sixth Amendment claim"); Motion for Remand at 14–17, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 13, 2024) (Mr. Wood's Motion for Remand explaining why his Rule 60(b) Motion does not advance a "claim" under *Gonzalez* and instead challenges a defect in the integrity of his habeas proceeding under Rule 60(b)).

Indeed, the only thing that Mr. Wood has ever "conceded" is that in the original habeas briefing before the district court on Claim One (the *Strickland* claim), both he and the State of Oklahoma inadvertently neglected to point out for the district court that the OCCA's last reasoned postconviction decision on Mr. Wood's *Strickland* claim (Claim One in his habeas petition) is the decision it was required to review under *Ylst* and § 2254(d). *See* Motion for Remand at 7 n.3, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 13, 2024) (Mr. Wood recognizing the State's and his own oversight but maintaining that the district court nonetheless had an independent duty to properly apply *Ylst*); *see also Robinson v. Louisiana*, 606 F.App'x 199, 207–08 (5th Cir. 2015) (unpublished) ("[W]e follow *Ylst*'s instruction to look through the unexplained orders to the last reasoned state-court decision to assess its resolution of [petitioner's] claim—*even if, due to inadvertence . . . the district court neglected to do so*." (emphasis added)).[7] The Panel's refashioning of Mr. Wood's "concession" in this manner defies the record and the U.S. Supreme Court's decision in *Gonzalez* where it held that "a 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." 545 U.S. at 530.

Even assuming for the sake of argument that the Panel was training its attention exclusively on the alternative argument advanced in Mr. Wood's Motion for Remand (*see* Motion for Remand at 20–23, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Oct. 13,

[7] *See* Fed. R. App. P. 32.1(a) (permitting citations to unpublished decisions "issued on or after January 1, 2007); *see also* 10th Cir. R. 32.1(A) (permitting citations to unpublished decisions "for their persuasive value[]"). This decision is publicly available on Westlaw. *See* Fed. R. App. P. 32.1(b) (requiring copy of unpublished decision cited only where "not available in a publicly accessible electronic database[]"); 10th Cir. R. 32.1(B) (same).

2023)), the Panel nonetheless disregarded basic rules of pleading by overlooking, misapprehending, and refashioning Mr. Wood's primary Rule 60(b) argument in a manner patently contradicted by the record, as discussed *supra*. *See* Fed. R. Civ. P. 8(a)(3) (permitting parties to seek "relief in the alternative or different types of relief"); Fed. R. Civ. P. 8(d)(2) (permitting parties to plead "alternatively or hypothetically"); Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1282 (4th ed.) (noting that Fed. R. Civ. P. 8(d)(2) "should be read in conjunction with Rule 8(a)(3), which permits relief to be demanded in the alternative[]. . ."); *see also Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co.*, 168 F.2d 381, 386–87 (10th Cir. 1948) (discussing that "the right . . . to seek relief in the alternative given by the Rules of Civil Procedure is not limited to the trial in the District Courts. Such right with respect to controversial questions of law obtains until final disposition on appeal[]").

III. The Panel's decision conflicts with the U.S. Supreme Court's decisions in *Ylst* and *Wilson*, with the Tenth Circuit's decision in *Church*, and with the decisions of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits interpreting and applying *Ylst*.

Beyond the errors already discussed, the Panel's decision upends what has been a longstanding and—until now—uncontroversial rule of federal habeas law: A federal habeas court must apply 28 U.S.C. § 2254(d) to the last reasoned decision adjudicating a federal claim's merits. *Ylst*, 501 U.S. at 805 ("[W]e begin by asking which is the last explained state-court judgment on the [federal] claim." (first emphasis added, second emphasis omitted)); *Wilson*, 138 S. Ct. at 1196 (reaffirming *Ylst* and holding that federal habeas courts must "look through" even silent decisions of the state courts "for a specific

and narrow purpose—to identify the grounds for the higher court's decision, as AEDPA directs us to do[]" (emphasis added)); *id.* at 1198 (Gorsuch, J., dissenting) ("As the text and our precedent make clear, a federal habeas court must focus its review on the final state court decision on the merits, not any preceding decision by an inferior state court." (citing *Greene*, 565 U.S. at 40) (emphasis added)).

This Circuit together with *every other* Circuit Court of Appeals all recognize and apply *Ylst*'s last-reasoned-decision rule as the methodology federal habeas courts must use when tasked with reviewing an exhausted federal claim. *See Church v. Sullivan*, 942 F.2d 1501, 1507 (10th Cir. 1991) ("As instructed by the Supreme Court, we must focus on the last state court decision explaining its resolution of [petitioner's] federal claims."); *Mark v. Ault*, 498 F.3d 775, 783 (8th Cir. 2007) ("[W]e apply the AEDPA standard to . . . the 'last reasoned decision' of the state courts."); *Bond v. Beard*, 539 F.3d 256, 289–90 (3d Cir. 2008), *as amended* (Oct. 17, 2008) (noting that its decision to review last reasoned state court decision "accords with those of seven of our sister circuit courts that consider the 'last reasoned decision' of the state courts in the AEDPA context[]"); *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1261 n. 12 (11th Cir. 2009) ("We focus here on . . . the 'last reasoned decision' of the state courts on this issue."); *Loza v. Mitchell*, 766 F.3d 466, 473 (6th Cir. 2014) ("We review the decision of 'the last state court to issue a reasoned opinion on the issue[s]' raised in a habeas petition") (emphasis omitted); *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014) ("The first step in determining whether we give deference under § 2254(d) is to determine which state court decision we review. Under the Supreme Court's decision in *Ylst v. Nunnemaker*, we look 'to the last reasoned decision'

that finally resolves the claim at issue in order to determine whether that claim was adjudicated on the merits."); *Lee v. Corsini*, 777 F.3d 46, 54 (1st Cir. 2015) ("[W]e look to the 'last reasoned opinion' of the state court to discern the grounds for its decision."); *Jordan v. Hepp*, 831 F.3d 837, 843 (7th Cir. 2016) ("We apply [§ 2254(d)'s] standard to the decision of the last state court to rule on the merits of the petitioner's claim."); *Lucio v. Lumpkin*, 987 F.3d 451, 465 (5th Cir. 2021) ("[T]he Supreme Court says that we must train our attention on the last related state-court decision that provides a relevant rationale to a particular claim." (cleaned up)); *McCray v. Capra*, 45 F.4th 634, 640 (2d Cir. 2022) ("On a habeas petition under section 2254, we review the 'last reasoned decision' by the state court[] . . ."); *Allen v. Stephan*, 42 F.4th 223, 247 (4th Cir. 2022) ("In assessing a petitioner's habeas claims, we look to the last reasoned decision of the state court addressing the claim." (internal quotation marks omitted)).

Yet, in clear contravention of U.S. Supreme Court, Tenth Circuit, and *every other* Court of Appeals precedent interpreting and applying *Ylst* to independently require federal habeas courts to identify the last reasoned decision adjudicating a federal claim's merits when applying § 2254(d), the Panel improperly limited *Ylst*'s last-reasoned-decision rule to only "unexplained state court orders," rejected that it imposes an "independent duty" on federal habeas courts in this context, and erroneously concluded that *Ylst* "has nothing to do with the present situation" including based on its numerous and grave misapprehensions of the record as discussed *supra*. Order at 9–10, *In re: Tremane Wood*, No. 23-6129 (10th Cir. Jan. 8, 2024). This Court's en banc intervention is necessary to resolve this conflict which presents a question of exceptional importance. *See* Fed. R. App. P. 35 (a)–(b).

IV. Conclusion

The gravity of the Panel's errors in this death penalty case warrants this Court's en banc intervention "to secure and maintain uniformity" of the Tenth Circuit's decisions, *see* Fed. R. App. P. 35(a)(1)—including to ensure that the law of this Circuit conforms to the decisions of the U.S. Supreme Court in *Ylst*, *Wilson*, and *Gonzalez*—and to resolve the conflict with the decisions of every other Circuit Court of Appeal to which the Panel's decision gives rise, *see* Fed. R. App. P. 35(a)(2), (b)(1)(B); 10th Cir. R. 35.1(A).

At minimum, rehearing is necessary to correct the Panel's numerous and significant misapprehensions of the uncontroverted record in this death penalty case. *See* Fed. R. App. P. 40(a)(2).

/ / /

Respectfully submitted this 19th day of January, 2024.

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CERTIFICATE OF SERVICE

I certify that on January 19, 2024, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following ECF registrants: Joshua Lockett, Assistant Attorney General, Joshua.Lockett@oag.ok.gov; Jennifer Crabb, Assistant Attorney General, Jennifer.Crabb@oag.ok.gov.

s/Amanda C. Bass
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I certify that, in accordance with Fed. R. App. P. 32(g) and 10th Cir. R. 32, this Petition for Rehearing and Request for En Banc Consideration complies with the word limit of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), it consists of 3,861 words based on the word count of the word-processing system used to prepare it. I also certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(A), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point font.

s/Amanda C. Bass
Amanda C. Bass
Assistant Federal Public Defender

EXHIBIT A

FILED
United States Court of Appeals
Tenth Circuit

January 8, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: TREMANE WOOD, Movant.	No. 23-6129 (D.C. No. 5:10-CV-00829-HE) (W.D. Okla.)

ORDER

Before **BACHARACH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Tremane Wood is an Oklahoma prisoner who has been sentenced to death. He does not currently have an execution date. He recently filed a motion in district court to vacate the 2015 judgment ending his 28 U.S.C. § 2254 proceedings. The district court construed this motion as an unauthorized second or successive § 2254 petition and transferred it here for authorization. Mr. Wood has moved to remand, arguing the district court should not have construed his motion as an unauthorized second or successive § 2254 petition. Mr. Wood is represented by counsel, as he has been in all previous state and federal proceedings relating to his crime. We deny his motion for the reasons explained below.

I. BACKGROUND & PROCEDURAL HISTORY

A. The Crime and the Trial

On New Year's Eve 2001, Mr. Wood and his older brother robbed two men, Ronnie Wipf and Arnold Kleinsasser. *See Wood v. State*, 158 P.3d 467, 471 (Okla. Crim. App. 2007). During the robbery, Mr. Wood and his brother struggled with

Mr. Wipf and Mr. Kleinsasser. *Id.* at 472. During the struggle, Mr. Wipf was fatally stabbed in the chest. *Id.* Mr. Kleinsasser escaped. *Id.*

Mr. Kleinsasser said Mr. Wood wielded a knife during the robbery, in contrast to his older brother, who wielded a gun. *See id.* at 472 & n.6. But Mr. Kleinsasser did not see how Mr. Wipf got stabbed. *See id.* at 472.

The State of Oklahoma charged Mr. Wood with felony murder, which only required proof that Mr. Wipf was killed in the course of the robbery in which Mr. Wood participated, *see id.* at 470, 472–73, as opposed to proof that Mr. Wood dealt the fatal blow. In April 2004, a jury convicted, recommended the death penalty, and the trial court sentenced Mr. Wood accordingly. *Id.* at 470–71. Mr. Wood's brother, in a separate trial, received life without parole. *Id.* at 471 n.5.

B. Direct Appeal and Concurrent Proceedings

Mr. Wood appealed to the Oklahoma Court of Criminal Appeals (OCCA). With new counsel on appeal, he argued that the performance of his trial attorney, Mr. Johnny Albert, during the penalty phase amounted to ineffective assistance of counsel. Specifically, Mr. Wood claimed that Mr. Albert failed to investigate his background, present mitigating evidence, and impeach a witness. *See id.* at 470, 479.

In March 2006—while the appeal was pending—Mr. Albert faced a state-court contempt hearing in a different case, where it became clear he was failing to represent his current clients appropriately due to alcohol abuse. Moreover, in April 2006, Mr. Albert's law license was suspended.

It is not clear precisely when Mr. Wood learned of these developments. However, he raised them in an application for postconviction relief filed with the OCCA in April 2007, when his direct appeal was still pending. He argued these developments, among other things, were "newly discovered evidence which render[ed] his conviction unreliable." ECF No. 127-2 at 23.[1]

Five days after Mr. Wood filed his postconviction application, the OCCA decided his direct appeal, and denied all relief. *See Wood*, 158 P.3d at 471. The OCCA's opinion discusses only the arguments raised on appeal, not the new arguments raised in the postconviction application.

C. The *Fisher* Decision

In 2009, the OCCA held that Mr. Albert had been constitutionally ineffective at both the guilt and penalty phases of a different death-penalty trial. *Fisher v. State*, 206 P.3d 607, 610, 613 (Okla. Crim. App. 2009). Summarizing the record supporting such a conclusion, the OCCA noted Mr. Albert's testimony at an evidentiary hearing that "he began drinking heavily and abusing cocaine" during the trial. *Id.* at 610–11. Mr. Wood says this trial took place in 2005, a year after his. The OCCA vacated the defendant's conviction and remanded for a new trial. *Id.* at 613.[2]

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[1] Because no appellate record has been created for this proceeding, we take judicial notice of the district court filings. *See, e.g.*, *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

[2] The year before *Fisher*, the OCCA vacated another death sentence in a case where Mr. Albert represented the defendant. *See Littlejohn v. State*, 181 P.3d 736, 744–45 (Okla. Crim. App. 2008). The court noted materials in the record indicating Mr. Albert had been "suffering from substance abuse problems" while he represented that

D. Resolution of Mr. Wood's First State Postconviction Application

In June 2010, the OCCA resolved Mr. Wood's postconviction application (the one he filed just before it resolved his direct appeal in April 2007). The OCCA interpreted Mr. Wood's arguments about Mr. Albert's substance abuse as a claim that "trial counsel's representation was so deficient as to give rise to prejudice per se under *United States v. Cronic*, 466 U.S. 648, 658–61 (1984)." *Wood v. State*, No. PCD-2005-143, slip op. at 4 (Okla. Crim. App. June 30, 2010) (parallel citations omitted).[3] *Cronic* says a defendant is denied the Sixth Amendment right to counsel when "under the[] circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." 466 U.S. at 660–61.

The OCCA said Mr. Wood's evidence showed Mr. Albert's troubles began sometime after Mr. Wood's trial. Evidence from Mr. Albert's state bar disciplinary proceeding more specifically showed his "substance abuse disorder began in earnest in March 2005, a year after [Mr.] Wood's death penalty trial." *Wood*, No. PCD-2005-143, slip op. at 5 & n.5. Given this, the OCCA rejected Mr. Wood's renewed ineffective-assistance attack against Mr. Albert.

---

client, but it held Mr. Albert's ineffective assistance was evident regardless of that possibility. *Id.* at 744 n.7.

[3] This decision is available on the district court docket at ECF No. 35-4, beginning at page 64.

E. Section 2254 Proceedings

In June 2011, Mr. Wood filed a § 2254 petition in the United States District Court for the Western District of Oklahoma. Mr. Wood claimed, among other things, that the OCCA's direct-appeal decision had unreasonably applied the law and unreasonably determined the facts when it rejected his argument that Mr. Albert had been ineffective during the penalty phase of the trial. *Cf.* 28 U.S.C. § 2254(d) (establishing that a federal court may not grant habeas relief to a state prisoner unless the state court acted contrary to, or unreasonably applied, clearly established federal law, or rendered a decision based on an unreasonable determination of the facts). Mr. Wood did *not* argue that the OCCA's *postconviction* decision (which accounted for Mr. Albert's substance abuse) was likewise unreasonable.

The district court resolved this claim, and other habeas claims no longer relevant, in October 2015. The court held that the OCCA's direct-appeal decision was reasonable on the law and the facts. The court therefore denied relief.

In 2018, this court affirmed in part and denied a certificate of appealability as to all other issues. *See Wood v. Carpenter*, 907 F.3d 1279, 1285 & n.1 (10th Cir. 2018). Mr. Albert passed away that same year.

F. Mr. Wood's Postconviction Application Alleging New Evidence

In June 2022, Mr. Wood filed another postconviction application with the OCCA. He claimed he had recently uncovered new evidence suggesting Mr. Albert had been abusing alcohol and drugs in 2004, when he represented Mr. Wood. Specifically, Mr. Wood produced affidavits from two of Mr. Albert's former clients,

both of whom claimed Mr. Albert was regularly drinking and using cocaine before 2004. One of the affiants alleged he gave Mr. Albert cocaine in exchange for legal services in 2002, and he also saw Mr. Albert using cocaine in 2003. The other affiant said he knew Mr. Albert from roughly 1998 to 2007, and he further claimed that Mr. Albert drank and used cocaine every day during that time, although he did not explain how he knew about Mr. Albert's daily habits.

The OCCA resolved this postconviction application in August 2022. It held that Mr. Wood had not shown a need to reopen his case for three reasons. First, it held that its rejection of this claim in 2010 was res judicata, despite new evidence. Second, Mr. Wood had not shown the new factual support for the claim was previously unavailable (a requirement of the Oklahoma statute governing successive postconviction applications). Third, Mr. Wood had not shown he filed the application within sixty days of when the new information reasonably could have been discovered (a requirement of the OCCA's rules governing successive postconviction applications).

Mr. Wood sought certiorari, which the Supreme Court denied on April 3, 2023.

G. Mr. Wood's Rule 60(b) Motion

On April 19, 2023, Mr. Wood filed a motion in district court that he captioned as a Federal Rule of Civil Procedure 60(b)(6) motion for relief from the October

2015 judgment ending his § 2254 case.[4] Mr. Wood recognized that Rule 60(b) motions in § 2254 cases must rely on "some defect in the integrity of the federal habeas proceedings," as opposed to "a new ground for relief" or an argument "attack[ing] the federal court's previous resolution of a claim *on the merits*." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Otherwise, the Rule 60(b) motion is, in substance, and unauthorized second or successive habeas petition, *see id.*, which the district court lacks jurisdiction to resolve, *see* 28 U.S.C. § 2244(b)(3)(A).

The alleged defect, according to Mr. Wood, was the district court's failure, in its 2015 order, to address the OCCA's 2010 postconviction disposition of his ineffective-assistance challenge against Mr. Albert based on his substance abuse. If the district court had addressed that issue, then, in Mr. Wood's view, the court would have seen that the OCCA made what was effectively an evidentiary ruling on the timing of Mr. Albert's impairment, despite an Oklahoma statute requiring an evidentiary hearing to resolve disputed factual issues arising in postconviction proceedings. And this, he argued, created a federal habeas claim, *i.e.*, a failure to permit him to develop a federal claim through procedure to which he was entitled under state law.

Importantly, however, Mr. Wood conceded he had not brought this claim in his § 2254 petition. He told the district court this had been "an oversight." ECF No. 130

[4] Rule 60(b)(6) says the district court "may relieve a party . . . from a final judgment . . . for . . . any other reason that justifies relief [*i.e.*, other than the specific scenarios described in 60(b)(1)–(5)]."

at 6. He insisted, however, it was "the solemn task of the federal habeas court—not the parties—to independently ensure § 2254(d)'s proper application to the last-reasoned state court adjudication of a federal claim's merits, especially in a capital case that carries life and death consequences." *Id.* at 6–7. This duty, he argued, comes from *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which "establish[ed] [a] presumption that [a] federal habeas court must apply § 2254(d) to the last-reasoned state court decision rejecting a federal claim," ECF No. 127 at 25.

To rephrase, Mr. Wood essentially argued as follows:

- His § 2254 petition had challenged the OCCA's disposition of his *direct-appeal* claim against Mr. Albert.
- The OCCA's last reasoned decision regarding *any* aspect of Mr. Albert's effectiveness came in its denial of postconviction relief.
- Given the alleged duty to review the last reasoned state court decision, the district court had a duty to *sua sponte* review the OCCA's postconviction decision on this issue.

In light of Mr. Wood's concession that he was asking the court to reach an issue he had overlooked in his § 2254 petition, the district court interpreted the Rule 60(b) motion as one "seeking to present a claim of constitutional error omitted from the movant's initial habeas petition," which is among the examples this court has given "of Rule 60(b) motions that should be treated as second or successive habeas petitions," *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006). The district court then construed Mr. Wood's motion as a motion for authorization to file a

second or successive petition and transferred it to this court for adjudication. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) ("When a second or successive § 2254 or § 2255 claim is filed in the district court without the required authorization from this court, the district court may transfer the matter to this court if it determines it is in the interest of justice to do so . . . .").

We gave Mr. Wood thirty days to file a motion explicitly arguing for authorization to file a successive § 2254 claim, or to file a motion to remand arguing that the district court had jurisdiction to grant Rule 60(b) relief. Mr. Wood timely filed the motion to remand that is now before us.

II. ANALYSIS

If a district court "fail[s] to consider one of [a petitioner's] habeas claims," it is "a defect in the integrity of the federal habeas proceedings" that supports "a 'true' 60(b) claim." *Spitznas*, 464 F.3d at 1225. But Mr. Wood concedes the district court did not fail to consider any claim he previously asserted. Rather, he wants to assert a claim he admittedly overlooked. As the district court recognized, *Spitznas* identifies this as a situation in which the district court should treat a Rule 60(b) motion as an unauthorized second or successive habeas petition. 464 F.3d at 1216.

Mr. Wood cannot avoid this outcome through the last-reasoned-decision presumption. That presumption addresses how a federal court interprets an "unexplained denial of a petition for habeas corpus by a state court." *Ylst*, 501 U.S. at 799. The Supreme Court held that "[w]here there has been one reasoned state judgment rejecting a federal claim," the federal court should presume "later

unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. This has nothing to do with the present situation—there are no unexplained state-court orders at issue. And, without more, *Ylst* and the other cases cited by Mr. Wood do not convince us a federal district court has an independent duty to search the last reasoned state-court decision for habeas claims the petitioner has not raised.[5]

For the first time in his reply brief, Mr. Wood argues that the district court's duty to identify the last reasoned decision, and to address its reasoning, is jurisdictional. And so the district court's failure to discharge that duty here, the argument goes, amounted to a defect that the court must fix through Rule 60(b). We disagree. The last-reasoned-decision presumption has nothing to do with the district court's "power or authority to hear and decide [cases]." *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939).

Mr. Wood points to the Supreme Court's statement that "[s]ection 2254(d) is part of the basic structure of federal habeas jurisdiction," *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and to roughly similar statements in other cases, *see* Reply at 4–7, but these statements do not establish the rule for which he argues. Section 2254(d) provides that a claim of error arising from a state criminal trial "is barred in federal court unless one of the exceptions . . . set out in §§ 2254(d)(1) and (2)

[5] We will assume the OCCA's 2010 postconviction decision is the relevant decision for purposes of Mr. Wood's last-reasoned-decision argument. The State does not argue otherwise. *See* Resp. Br. at 11–17.

applies." *Harrington*, 562 U.S. at 103. This is a limit on federal court jurisdiction, not a command to search the last reasoned decision for claims the habeas petitioner could have made but did not. *Cf. Wood v. Milyard*, 566 U.S. 463, 472 (2012) (observing, in a § 2254 case, "that a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system").

In short, Mr. Wood's Rule 60(b) motion did not raise a claim of a defect in the integrity of the habeas proceedings. The district court correctly held it lacked jurisdiction to rule on the merits of the motion. We therefore deny the motion to remand.

III. REQUEST FOR ALTERNATIVE RELIEF

For the first time on appeal, Mr. Wood argues for an alternative disposition:

> [I]f the Court concludes that Mr. Wood's Rule 60(b) Motion is not a true Rule 60(b) motion, it should construe it as a second in time but not second-or-successive habeas petition raising a Fourteenth Amendment due process and equal protection challenge to the OCCA's preclusion of his penalty-phase [ineffective assistance of counsel] claim [*i.e.*, the OCCA's August 2022 decision].

Mot. for Remand at 5 (internal quotation marks and brackets omitted). And if we embrace this construction, he says, then we should "remand to the district court with instructions to consider [the petition]." *Id.* at 18.

Mr. Wood is correct that some successive habeas petitions are not "second or successive" for purposes of 28 U.S.C. § 2244(b), such as when the new claims were not ripe when the first petition was decided. *See Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). But Mr. Wood does not explain why this is a proper basis for

remand. We would not be remanding to correct any error. As already noted, Mr. Wood requested this relief for the first time before us, not before the district court. And he assured the district court that his Rule 60(b) motion "*does not assert a basis for relief from his underlying convictions* and instead simply asserts that he did not get a fair shot in the original habeas proceeding." ECF No. 130 at 6 (emphasis added) (internal quotation marks and brackets omitted).

In any event, if Mr. Wood indeed has a new claim that falls outside of the "second or successive" category, he may simply file a new § 2254 petition in district court. *See Panetti*, 551 U.S. at 947 (holding that the "[p]etitioner's [successive] habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim," because he filed it when it was "first ripe"). Mr. Wood gives us no reason why he cannot take this route, nor why he has not already done so. We therefore deny his alternative request for remand.

IV. CONCLUSION

We deny Mr. Wood's motion for remand and terminate this proceeding. We deny his motion to consolidate as moot.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX H

APPENDIX H

FILED
United States Court of Appeals
Tenth Circuit

February 9, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: TREMANE WOOD, Movant.	No. 23-6129 (D.C. No. 5:10-CV-00829-HE) (W.D. Okla.)

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX I

APPENDIX I

Case No. 23-6134

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TREMANE WOOD,
Petitioner-Appellant,
v.
CHRISTE QUICK, Warden,
Respondent-Appellee.

RESPONSE TO PETITIONER'S JURISDICTIONAL MEMORANDUM BRIEF

On Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-10-0829-HE)
The Honorable Joe Heaton, United States District Judge

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OCTOBER 16, 2023

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In re Wood, No. 23-6129 (10th Cir. 2023) (on transfer of second or successive habeas application from the district court for authorization determination under 28 U.S.C. § 2244(b))

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TREMANE WOOD,	)	
	)	
***Petitioner-Appellant*,**	)	
	)	
v.	)	**Case No. 23-6134**
	)	
CHRISTIE QUICK, Warden,	)	
	)	
***Respondent-Appellee*.**	)	

RESPONSE TO PETITIONER'S JURISDICTIONAL MEMORANDUM BRIEF

On September 13, 2023, the Western District of Oklahoma concluded that Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) ("Rule 60(b) Motion") [Dist. Ct. ECF No. 127] was actually a second or successive habeas petition as opposed to a true Rule 60(b) motion. [Dist. Ct. ECF No. 131 at 7]. In light of that conclusion, the district court was tasked with determining whether to dismiss the petition for lack of jurisdiction or transfer the matter to this Court. [Dist. Ct. ECF No. 131 at 7 (citing *In re Cline*, 531 F.3d 1249 (10th Cir. 2008))].[1] The district court concluded transfer was appropriate. [Dist. Ct. ECF No. Doc. 131 at 7]. Critical to the jurisdictional issue under consideration now,

[1] *In re Cline* delineates the appropriate procedure a district court may employ when it finds itself facing a Rule 60(b) motion that is more properly construed as a second or successive habeas petition. 531 F.3d at 1251-53. This Court explained that the district court in those situations may transfer the matter to this Court, pursuant to 28 U.S.C. § 1631, for further review. *Id*.

it is worth noting the transfer order was the *only* order entered by the district court. [Dist. Ct. ECF No. 131 at 7].

That same day, this Court, in light of the transfer decision of the district court, opened the case of *In re Wood*, Case No. 23-6129. The next day, this Court, by way of a letter sent to counsel for Petitioner, ordered Petitioner to file either a Motion for Authorization to file a second or successive § 2254 application or, in the event Petitioner felt the district court should not have construed the filing as it did, a Motion for Remand to the district court. *In re Wood*, 9/14/23 Letter.

Two days later, on September 15, 2023, Petitioner filed in this Court an appeal, *Wood v. Quick*, Case No. 23-6134, seeking review of the district court's order. In his docketing statement, Petitioner stated that the final judgment of the district court was entered on September 13, 2023, and characterized the order as a "final order *dismissing* Petitioner/Appellant's motion to reopen the judgment in his federal habeas case under Fed. R. Civ. P. 60(b)(6), which the district court construed as a second or successive habeas petition and transferred to this Court." *Wood v. Quick*, 9/15/23 Petitioner's Docketing Statement at 5 (emphasis added).

Thereafter, on September 19, 2023, this Court filed an Order raising a potential jurisdiction defect in *this* case, the appeal filed by Petitioner. The Order explained:

> Generally, this court's appellate jurisdiction is limited to review of final decisions. 28 U.S.C. § 1291. In his

> docketing statement, Appellant indicated that the district court's order is a final decision. However, an order transferring a matter under 28 U.S.C. § 1631, is generally not considered a final decision. Nor is it immediately appealable under the collateral order doctrine. *F.D.I.C.* [*v.*] *McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996) (explaining that a transfer order is not a final order or an immediately appealable collateral order); *see also Marmolejos v. United States*, 789 F.3d 66, 69 (2d Cir. 2015) (same for an order transferring a § 2255 motion as second or successive). Accordingly, it appears this court lacks jurisdiction to review, *via this appeal*, the district court's transfer order.

Wood v. Quick, 9/19/23 Order at 1-2 (emphasis added). The Order required Petitioner to file a jurisdictional memorandum brief setting forth the legal rationale for this Court to exercise its appellate jurisdiction over the matter. *Id*.

Petitioner filed that brief on October 3, 2023 ("Jurisdictional Memo").[2] In his brief, Petitioner argued this Court had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and claimed the decision of the district court did two things: "terminated the litigation in the district court on the merits of [Petitioner]'s 60(b) Motion, rendering it final and appealable" and transferred the matter to this Court as a second or successive habeas petition. Jurisdictional Memo at 2-3. Petitioner went on to argue

[2] Since filing his Jurisdictional Memo, Petitioner has filed a Motion to Remand his case back to the federal district court, contending that his Rule 60(b) motion in the lower court was truly what it claimed to be and not a second or successive habeas petition. *See In re Wood*, 10/13/23 Motion to Remand. The State in no way concedes the merits of that motion, but does believe that, pertinent to the issue at hand in this case, it is the appropriate pathway by which Petitioner can preserve review as to the nature of his Rule 60(b) motion.

that "unless th[is] Court exercises that jurisdiction here, the correctness of the district court's decision below risks evading full appellate review…." Jurisdictional Memo at 3.

As shown above, Petitioner's characterization of what occurred below is incorrect. The district court rendered no final ruling on Petitioner's Rule 60(b) motion. [Dist. Ct. ECF No. Doc. 131 at 7]. And other federal cases out of this Circuit legitimize the concern over jurisdiction to review the district court's actions in Petitioner's case. As a result, this Court should summarily dismiss the instant case as the avenues granted to Petitioner in the case of *In re Wood*, Case No. 23-6129 are sufficient to preserve his rights with regard to the decision of the district court.

ARGUMENT

Petitioner's Desired Appellate Procedure Is Unsupported by Caselaw and Concerns as to the Inability of this Court to Review His Filing in the District Court Are Unfounded.

"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.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); *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…."). But

a transfer order pursuant to 28 U.S.C. § 1631 typically does not end the litigation, as this Court noted in its recent Order. Order at 2.

Cases such as *F.D.I.C. v. McGlamery*, 74 F.3d 218 (10th Cir. 1996) (noting that a transfer order is not a final order or an immediately appealable collateral order), and *Marmolejos v. United State*, 789 F.3d 66 (2d Cir. 2015) (same for an order transferring a § 2255 motion as second or successive), cited by this Court in its Order here, support this point.

Petitioner attempts to distinguish these cases, claiming they have "limited relevance in this context." Jurisdictional Memo at 6. But the rules governing the appellate jurisdiction of this Court apply in a variety of situations. Their versatility is their strength. And they do not depend necessarily upon the context of the subject matter to which they apply.

Petitioner is correct that *McGlamery* had nothing to do with a Rule 60(b) motion filed in the district court. Jurisdictional Memo at 7 (citing *McGlamery*, 74 F.3d at 220). But the Court was nonetheless tasked with assessing its jurisdiction over a matter transferred pursuant to § 1631, the same mechanism utilized by the district court in this matter. *Id*. In *McGlamery*, this Court found its jurisdiction lacking because the district court's transfer order did not end the litigation. *Id*. at 221. The same finding is warranted here.

Marmolejos likewise did not involve a Rule 60(b) motion at the district court level, but instead a blatant subsequent petition under 28 U.S.C. § 2255. *See* 789 F.3d at 68-69. The district court transferred the filing to the circuit court via 28 U.S.C. § 1631, for a determination on whether he should have been allowed to file his subsequent petition. *Id*. Marmolejos sought a certificate of appealability as to the transfer order itself, which the Second Circuit denied. *Id*. But before arriving at that conclusion, the Second Circuit noted, "this Court lacks jurisdiction to entertain a purported appeal of, or to grant a certificate of appealability to permit the appeal of, the district court's Transfer order." *Id*. at 69. "An order of a district court transferring a § 2255 motion as second or successive is neither a final decision appealable pursuant to 28 U.S.C. § 1291 nor a decision that would be appealable under the collateral order doctrine."[3] *Id*. (citing *Cruz v. Ridge*, 383 F.3d 62, 64-65 (2d Cir. 2004), and *Murphy v. Reid*, 332 F.3d 82, 83-85 (2d Cir. 2003)). Although arising out of a slightly different context, the sentiment remains and should be enforced here.

At the heart of Petitioner's briefing lies his concern that review of the district court's conclusion that his Rule 60(b) motion was not what it claimed to be but instead a second or successive habeas petition will evade any form of review. *See, e.g.,* Jurisdictional Memo at 12 ("[T]hat question risks evading a complete round of

[3] Petitioner makes no attempt to argue in his brief that his case would be appealable under the collateral order doctrine.

appellate review altogether."). But the pathway offered to Petitioner by this Court in its September 14, 2023 letter (filing a motion for remand to the district court) does not foreclose such review; it merely seems to come in the form that Petitioner disfavors for some reason. And Petitioner has not explained, at least not in his briefing on the issue thus far, why he is legally entitled to his preferred method of review over that adhered to by this Court for some time now.

Indeed, Petitioner's disfavor of that route is even more perplexing given the case which he claims should serve as a guide for the current situation, *Peach v. United States*, 468 F.3d 1269 (10th Cir. 2006) (per curiam), proceeded down the same path already available to Petitioner. In *Peach*, the petitioner, after being denied relief under 28 U.S.C. § 2255, moved to set aside the district court's determination in that matter by filing a motion under Rule 60(b)(4). *Id*. at 1270. Much like what occurred here, the district court concluded the petitioner's motion was a successive § 2255 claim, for which he had not received authorization from the circuit court, and—without ruling on the merits of the Rule 60 motion—transferred the matter to this Court. *Id*. Following the district court's transfer, the petitioner submitted a letter to the Court, *which this Court construed as a motion to remand*, arguing that the district court had incorrectly found his Rule 60 motion to be a successive § 2255 motion. *Id*. Recognizing the differences between how the instant case arrived at its doorstep and what occurred in *Spitznas v. Boone*, 464 F.3d 1213, 1215-19 (10th Cir.

2006), which arrived via an appeal, this Court noted that the petitioner had "never received a ruling from the district court on his Rule 60(b) motion." Thus, this Court "remand[ed] th[e] matter to the district court, so that it can rule on the Rule 60(b) motion in the first instance." *Id*. at 1272 (citing *Dragenice v. Ridge*, 389 F.3d 92, 100 (4th Cir. 2004) (remanding a case which was transferred to the circuit court by way of a transfer back to the district court after concluding that the district court had erred in determining it lacked jurisdiction over the matter)). By following this route, the petitioner would then have been able to obtain a "final order" which could be appealed to the circuit court in the event the district court ruled against him.

That same procedure allowed for review of the petitioner's case in *In re Cline*, 531 F.3d 1249 (10th Cir. 2008), which the Western District cited in its transfer order in this case. [Dist. Ct. ECF No. 131 at 7]. There, the federal prisoner filed two Rule 60(b) motions in the district court, with each one being transferred to this Court. *In re Cline*, 531 F.3d at 1250-51. With one, this Court denied authorization for Cline to file a second or successive § 2255 motion; with the other, this Court denied Cline's motion to remand back to the district court and dismissed the matter. *Id*. Undeterred, Cline filed yet another motion in the district court that, like those that came before, was transferred to this Court. *Id*. Cline filed a motion to remand the matter back to the district court and this Court denied the motion after fully reviewing the issue concerning the true nature of his Rule 60(b) motion. *Id*.

Petitioner also cites to this Court's decision in *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006), as support for his desired appellate procedure in his case. But again, the subtle distinctions between exactly how the case arrived in this Court must be emphasized. In *Spitznas*, the federal district court—which involved not just the same court (the Western District of Oklahoma) and the same judge (Judge Joe Heaton)—*denied* the petitioner's Rule 60(b) motion. *Id*. at 1215 ("Here, Mr. Spitznas is appealing the district court's *denial* of his Rule 60(b) motion…." (emphasis added)), 1224 ("The district court *denied* Mr. Spitznas's Rule 60(b) motion…." (emphasis added)). No such denial occurred in this case; the only action executed by the district court was the transfer order. Thus, Petitioner's reliance upon *Spitznas* is misplaced.

Petitioner expresses concern that his case might somehow slip between the cracks of complete appellate review should this Court agree with the district court that his Rule 60(b) motion was actually an unauthorized second or successive habeas petition. Jurisdictional Memo at 11-13. Petitioner cites to the unpublished case of *United States v. Altamirano-Quintero*, 504 Fed. Appx. 761 (10th Cir. 2012),[4] as the looming specter foreshadowing an unreviewable fate similar to his own action. But an examination of *Altamirano-Quintero* reveals Petitioner's worries are unfounded.

[4] Unpublished opinion cited for its persuasive value only. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

There, the petitioner, after the district court had denied both his original § 2255 motion as well as a second filed in the district court, filed a Rule 60(b) motion in the district court arguing a Fourth Amendment claim as well as a claim of ineffective assistance of counsel. 504 Fed. Appx. at 764. The district court denied the Rule 60(b) motion[5] but dealt with the two claims differently. *Id*. at 764-65. The court found the Fourth Amendment claim proper for the purpose of a Rule 60(b) motion but denied the claim on its merits. *Id*. The court found it had no jurisdiction to review the ineffective assistance claim as it was simply a reassertion of a claim contained in his original § 2255 motion. *Id*. On appeal from the denial, this Court analyzed the two aspects of the petitioner's claim differently. *Id*. at 765 ("We must treat claims that parties properly raise under Rule 60(b) separately from claims that should be classified as second or successive habeas motions."). Examining the Fourth Amendment claim, this Court declined to grant a COA. *Id*. at 765-66. As for the ineffective assistance claim, this Court construed the claim within the petitioner's Rule 60(b) motion as an application for authorization to file a second or successive § 2255 petition. *Id*. at 766-67. In its conclusion, this Court restated its legal conclusions as to the petitioner's claim. Petitioner highlights the Court's language from that section indicating that the denial was not to be the subject of a petition for

[5] This point alone is worth emphasizing as it distinguishes the procedural history in *Altamirano-Quintero* from that in the case.

rehearing or for a writ of certiorari in the Supreme Court. Jurisdictional Memo at 12-13 (citing *Altamirano-Quintero*, 504 Fed. Appx. at 767). But that language only went to the Court's holding concerning the denial of the application for authorization to file the second or successive § 2255 petition, not the denial of a COA. *Altamirano-Quintero*, 504 Fed. Appx. at 767 (citing 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.")).[6] *See Hohn v. United States*, 524 U.S. 236, 253 (1998) ("We hold that this Court has jurisdiction under [28 U.S.C.] § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals."). Making the case even less applicable, the option Petitioner has available to him here so that he might obtain a final decision or order on his Rule 60(b) motion, filing a motion to remand, was not ever discussed in *Altamirano-Quintero* because of the way in which the case arrived in this Court.

[6] To the extent Petitioner expresses concern that were he to seek authorization to file a second or successive habeas petition in this Court he would be denied review of that decision, he is correct. But any argument concerning congressional intent with regard to the AEDPA on this front exposes Petitioner as being the one seeking to evade the force of statute by couching his second or successive habeas petition as a Rule 60(b) motion. Petitioner argues the district court overlooked his claim, but in his recently-filed motion to remand he admits it was an "oversight" on his part to not draw the post-conviction decision of the Oklahoma Court of Criminal Appeals at issue in his Rule 60(b) motion to the district court's attention. *In re Wood*, 10/13/23 Motion to Remand at 3 n.3 [utilizing internal pagination].

As to Petitioner's final argument, the above-cited cases also demonstrate that Petitioner's due process and equal protection claims are without merit. *See* Jurisdictional Memo at 13-14. Petitioner has at his disposal a procedure that grants him the review to which he believes himself entitled. As noted above in a footnote (Footnote 2), Petitioner has now taken that pathway, thereby ensuring that his rights are protected.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests this Court dispose of the instant appeal (*Wood v. Quick*, Case No. 23-6134) and allow Petitioner to pursue relief as outlined in its September 14, 2023 Letter to Petitioner in *In re Wood*, Case No. 23-6129.

Respectfully submitted,

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I certify that this response is proportionally spaced and contains 3,024 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), which complies with the word limitations for memorandum briefs set forth in Fed. R. App. P. 27.3(B)(3). The typeface used is Times New Roman, 14-point font, in Microsoft Word.

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s/JOSHUA L. LOCKETT

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I hereby certify that a copy of the foregoing document was electronically filed with the Clerk of this Court on October 16th, 2023, and for electronic transmission to:

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