**No. 23-7066**

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**In the**

**SUPREME COURT OF THE UNITED STATES**

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**TREMANE WOOD,**

***Petitioner*,**

**-vs-**

**CHRISTE QUICK, Warden,**
**Oklahoma State Penitentiary**

***Respondent.***

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**On Petition for Writ of Certiorari to the**
**United States Court of Appeals for the Tenth Circuit**

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**REQUEST FOR EXECUTION DATE PENDING**

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**April 23, 2024**

**CAPITAL CASE**
**QUESTION PRESENTED**

When the United States District Court for the Western District of Oklahoma recognized Petitioner Tremane Wood's motion seeking relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) as an unauthorized second or successive habeas petition, the district court transferred the matter, pursuant to 28 U.S.C. § 1631, to the United States Court of Appeals for the Tenth Circuit for the authorization required by 28 U.S.C. § 2244(b)(3). The Tenth Circuit docketed the case as *In re Wood*, Case No. 23-6129.

But Wood appealed the district court's transfer decision too and claimed the district court's transfer order was a final one, disposing of all claims as defined by 28 U.S.C. § 1291 and warranting appellate court review. The Tenth Circuit docketed that appeal as *Wood v. Quick*, Case No. 23-6134, and ordered Wood to explain why the Tenth Circuit possessed jurisdiction over Wood's appeal of the transfer order pursuant to § 1291. Unpersuaded by Wood's analysis of the issue, the Tenth Circuit held it lacked jurisdiction, via Wood's appeal, to review the district court's action and dismissed the case. The Tenth Circuit reviewed and rejected Wood's claim concerning the Rule 60(b) motion in *In re Wood* two months later.

The question presented is:

> **Is a circuit court jurisdictionally bound to entertain the appeal of a district court action that is not a final decision, especially where the same circuit court decided the same issue(s) between the same parties in another case?**

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## INTRODUCTION

Wood requests that this Court find the Tenth Circuit possessed jurisdiction in his case of *Wood v. Quick* to review his Rule 60(b) motion filed in the district court. Embedded in Wood's claim is the concern that, without such a jurisdictional finding, the district court's determination that the filing was actually a second or successive habeas petition merely masquerading as a Rule 60(b) motion and, as such, required transfer to the Tenth Circuit for authorization, will escape appellate review.

But the Tenth Circuit already reviewed the appropriateness of that transfer decision and his Rule 60(b) motion in *In re: Wood*.

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Wood presents no compelling reason for why this Court should undertake a purely academic legal exercise to find the Tenth Circuit has jurisdiction to review a decision it has already reviewed. To grant certiorari over such a moot issue undoubtedly runs contrary to the principles that have guided this Court since its inception.

Wood's Petition voices disfavor with the appellate route by which the Tenth Circuit eventually did take up the issue of the true nature of his Rule 60(b) motion. But he never explains why the procedure employed by the Tenth Circuit in this case, which was entirely consistent with federal law, was preferable to his nonconformist approach. The issue is not one on which the circuits are split. And there is no indication a decision on the matter would impact other convicted persons who find their Rule 60(b) motions transferred to the appellate courts. As noted already, a decision would not even impact Wood as the issue has already been resolved. And

there is no indication Wood is unable to seek review of that resolved issue in this Court.

This Court should, therefore, deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

## STATEMENT OF THE CASE

Wood was convicted of first-degree felony murder and sentenced to death for stabbing and killing Ronnie Wipf—Wood committed the murder, not his brother—in an attempted robbery at an Oklahoma City motel in the early morning hours of New Year's Day 2001.[1] The Oklahoma Court of Criminal Appeals ("OCCA") upheld Wood's convictions and sentences following his direct appeal, *see Wood v. State*, 158 P.3d 467 (Okla. Crim. App. 2007),[2] and then later following his first application for post-conviction relief. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010) (unpublished).[3]

A year after the OCCA denied Wood's first application for post-conviction relief, Wood sought habeas relief in the Western District of Oklahoma. *Wood v. Workman*,

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[1] Wood was also convicted of Robbery with a Firearm (Count 2) and Conspiracy (Count 3), both after former conviction of a felony; he was sentenced to life on each count. *Wood v. State*, 158 P.3d 467, 470 (Okla. Crim. App. 2007 (citing OKLA. STAT. tit. 21, §§ 421, 801)).

[2] Wood originally sought a direct appeal in 2004, but procedural shortcomings meant he was forced to seek an appeal out of time at a later date. *See Wood v. State*, No. D-2004-550 (Okla. Crim. App. Feb. 10, 2005) (unpublished) (dismissing appeal and granting a direct appeal out of time).

[3] Wood's post-conviction application also alleged a claim of ineffective assistance of trial counsel but relied on new evidence and a new theory of relief.

No. CIV-10-0289, *Petition for a Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254* (W.D. Okla. June 30, 2011) (Doc. 35) ("Habeas Petition"). In his habeas petition, Wood raised—among other claims—a claim ("Claim One") asserting ineffective assistance of trial counsel during the penalty stage of his trial for failing to investigate and present certain mitigating evidence. Habeas Petition at 23-81.[4] In his summary of the argument contained within Claim One, Wood cited to the OCCA's *direct appeal opinion*, arguing the opinion violated 28 U.S.C. § 2254(d).[5] Habeas Petition at 23. Wood thereafter repeatedly referred to the OCCA's direct appeal opinion throughout his Claim One to make his argument. Habeas Petition at 23, 28-29, 36-37, 39-43, 48-53. At no point in his Claim One did Wood reference the OCCA's year-old decision in his post-conviction case as the opinion to be assessed in light of his arguments; no aspect of his claim from his first application for post-conviction relief was set forth in Claim One. *See* Habeas Petition at 23-81.

Taking these cues from Wood, the Western District of Oklahoma, in a Memorandum Opinion issued in October of 2015, assessed Wood's Claim One in association with the OCCA's direct appeal opinion and denied habeas relief, finding the opinion was neither contrary to nor an unreasonable application of clearly

[4] References to pages numbers within documents filed in the federal district court will be to the ECF page number as opposed to any internal page numbering within the document.

[5] As important context, in Oklahoma, claims of ineffective assistance of trial counsel are generally raised and considered on direct appeal.

established federal law and did not include any unreasonable determination of facts in light of the evidence presented. *Wood v. Trammell*, No. CIV-10-0829-HE, *Memorandum Opinion*, (W.D. Okla. Oct. 30, 2015) (Doc. 100 at 8-31) *affirmed by Wood v. Carpenter*, 907 F.3d 1279 (10th Cir. 2018), *cert. denied Wood v. Carpenter*, 139 S.Ct. 2748 (2019).

Almost eight years later, on April 19, 2023, Wood filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) in the federal district court. *Wood v. Quick*, No. CIV-10-0829-HE, *Petitioner Tremane Wood's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6)* (W.D. Okla. April 19, 2023) (Doc. 127) ("Rule 60(b) Motion"). Wood's motion alleged, among other things,[6] that the Western District of Oklahoma had failed to review the OCCA's "last-reasoned decision," *i.e.*, its post-conviction denial in relation to his claim of ineffective assistance asserted on direct appeal and presented in Claim One of his original habeas petition. Rule 60(b) Motion at 18-30.

The district court construed the filing to be a second or successive petition instead of a Rule 60(b) motion because it was, in truth, just an effort to raise an issue not previously presented, *i.e.*, the ineffective assistance claim raised on post-conviction. Pet. Appx. at 006a-009a. As a result, the district court was faced with the decision "whether to dismiss the petition for lack of jurisdiction or transfer [the

[6] Wood also argued that this Court's recent decision in *Cruz v. Arizona*, 598 U.S. 17 (2023), revealed how the OCCA and its rules had placed him an untenable position, making review of certain claims of ineffective assistance impossible to obtain despite his alleged diligence in the matter. Rule 60(b) Motion at 19-20.

matter] to the Tenth Circuit Court of Appeals." Pet. Appx. at 009a. The district court chose the latter option and transferred the matter in accord with 28 U.S.C. § 1631. Pet. Appx. at 009a.

The Tenth Circuit docketed the transferred matter as *In re Wood*, Case No. 23-6129, on September 13, 2023. In a letter to Wood's counsel the following day, the Tenth Circuit ordered Wood to either file a Motion for Authorization to file a second or successive § 2254 application, or, in the event Wood felt the district court should not have construed the filing as it did, a Motion for Remand to the district court. Letter at 1-2, *In re Wood*, No. 23-6129 (10th Cir. Sept. 14, 2023).

The next day though, Wood instead filed a notice of intent to appeal in the district court; the Tenth Circuit docketed Wood's appeal a day later as *Wood v. Quick*, Case No. 23-6134.

The Tenth Circuit almost immediately expressed concerns as to its jurisdiction in Wood's appeal though. In an Order filed in *Wood v. Quick* dated September 19, 2023, the Tenth Circuit required Wood to file a Jurisdictional Memo. Order at 2, *Wood v. Quick*, No. 23-6234 (10th Cir. Sept. 19, 2023). The Order noted that generally the appellate jurisdiction of the Tenth Circuit was limited to review of final decisions, citing 28 U.S.C. § 1291 as authority. *Id.* at 1-2. Wood had indicated in his docketing statement that the district court's order below was a final decision, *see* Docketing Statement at 2, *In re Wood*, No. 23-6129 (10th Cir. Sept. 18, 2023); but the Order pointed out that a transfer order under 28 U.S.C. § 1631 was generally not considered

a final decision, nor was it immediately appealable under the collateral order doctrine. *Id*.

Wood complied with the Order and briefed the matter, filing his Jurisdictional Memo in the Tenth Circuit case of *Wood v. Quick* on October 3, 2023. Pet. Appx. at 010a-031a. Counsel for Quick filed a response on October 16, 2023, asserting the circuit court lacked jurisdiction over the appeal for the reasons it suspected, Pet. Appx. at 113a-131a; Wood filed a reply three days later. Pet. Appx. at 032a-42a.

But, as the earlier letter he had received in the case of *In re Wood* instructed him, Wood also filed a Motion to Remand that argued the district court had misconstrued the true nature of his motion. Pet. Appx. at 043a-066a. Within the filing, Wood alternatively contended his filing should be construed as a "second in time but not second-or-successive habeas petition."[7] Pet. Appx. at 062a-063a.

The Tenth Circuit dismissed the case of *Wood v. Quick* on November 3, 2023. Pet. Appx. at 001a-002a. The circuit court found it "lack[ed] 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." Pet. Appx. at 001a-002a, citing *FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996); *Marmolejos v. United States*, 789 F.3d 66, 69 (2d Cir. 2015). Critical to the instant case though, the dismissal also addressed Wood's concern that his claim as to the exact nature of his filing in the

[7] Wood never filed a motion for authorization to file a second or successive habeas petition before the Tenth Circuit; his alternative argument before the Tenth Circuit was that his claim fell outside the prohibitions of 28 U.S.C. § 2244(b). *See* Pet. Appx. at 062a-063a. Thus, he is mistaken when he claims that the Tenth Circuit in *In re Wood* found that he "fail[ed] to satisfy § 2244(b)'s requirements[.]" Petition at 18; *see* Pet. Appx. at 077a-078a.

district court below would evade full review given the limitations in 28 U.S.C. § 2244(b)(3)(E) prohibiting petitions for rehearing and certiorari from "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application." *Id*. at 002a. The Tenth Circuit noted that 28 U.S.C. § 2244(b)(3)(E) did not apply where the subject of the petition for further review extended to some aspect of the case apart from the denial of authorization. *Id*., citing *Castro v. United States*, 540 U.S. 375, 380 (2003); *In re Clark*, 837 F.3d 1080, 1082 (10th Cir. 2016).

Two months later, the Tenth Circuit took up the issues set forth in Wood's Motion to Remand in *In re Wood*. Pet. Appx. at 067a-078a. The panel assigned the case denied Wood's motion, finding the filing "did not raise a claim of a defect in the integrity of the habeas proceeding," and that "[t]he district court correctly held it lacked jurisdiction to rule on the merits of the motion." Pet. Appx. at 077a. The panel further denied Wood's alternative argument as to the second-or-successive nature of his filing. Pet. Appx. at 077a-78a.

On March 21, 2024, Wood's petition for writ of certiorari was placed on this Court's docket.

## REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant certiorari to review the issues in Wood's case, *Wood v. Quick*. *See* Sup. Ct. R. 10 (noting this Court grants certiorari "only for compelling reasons"). As Wood frames it, his question presented is a purely procedural one. But it is a procedural question that has no bearing on the outcome of his case; the Tenth Circuit has already decided the issue at the heart of

Wood's procedural question in a separate appeal. So, any decision this Court might render in this case would have no impact whatsoever in Wood's overall proceedings. Moreover, despite Wood's claim on the matter, the procedure employed by the Tenth Circuit does not appear to be one dividing circuits. Instead, the Tenth Circuit's resolution of Wood's appeal in this case was the correct one in light of the legal precedent involving the transfer of appeals, finality of district court decisions, and habeas cases. For these reasons, this Court should deny Wood's petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

## I. A decision on the issue would have no impact.

Wood's Petition argues that the Tenth Circuit possesses jurisdiction to review the transfer decision of the district court. An important aspect of that decision by the district court was a determination that Wood's Rule 60(b) motion was actually a second or successive habeas petition. Pet. Appx. at 003a-009a. The district court transferred the case to the Tenth Circuit pursuant to 28 U.S.C. § 1631. Pet. Appx. 009a (citing *In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (noting that transfer to the circuit court is pursuant to § 1631)). As a result, the Tenth Circuit opened the case of *In re Wood*, No. 23-6129. The circuit court directed Wood's counsel to file either a Motion for Authorization to file a second or successive § 2254 application, or—in the event Wood felt the district court should not have construed his Rule 60(b) motion as it did—a Motion for Remand to the district court. Letter at 1-2, *In re Wood*, No. 23-6129 (10th Cir. Sept. 14, 2023). But, as noted above, Wood also appealed the transfer

decision on September 15, 2023, causing the Tenth Circuit to open this case, *Wood v. Quick*, No. 23-6134.

While Wood protested the Tenth Circuit's application of federal appellate rules in *Wood v. Quick* through the filing of his jurisdictional memo, reply to Quick's response, and Petition for Rehearing *En Banc*, *see* Pet. Appx. 010a-042a, 079a-111a, 113a-131a, he also—as directed—filed a Motion to Remand in his companion case, *see* Pet. Appx. 043a-066a. He did not, however, file a motion for authorization.

The Tenth Circuit denied Wood's attempts to have the district court's transfer decision reviewed via the appeal in *Wood v. Quick*. Pet. Appx. 001a-002a. But the circuit court reviewed that same transfer decision in *In re Wood*, and found "[t]he district court correctly held it lacked jurisdiction to rule on the merits of the motion," as it was an unauthorized second or successive habeas petition and denied the motion to remand. Pet. Appx. 077a.

Under Article III, § 2 of the Constitution, a federal court has jurisdiction over disputes arising between parties only if there is a "case" or "controversy." This Court has identified this principle as a "bedrock requirement." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *see also Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

With the Tenth Circuit having reviewed in *In re Wood* the very decision he complains should have been examined in *Wood v. Quick*, there is no valid reason for this Court to take up Wood's case. Any decision rendered by this Court would have no effect upon the rights of Wood.[8] *See DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)) (finding the controversial issue between the parties had "clearly ceased to be 'definite and concrete' and no longer 'touch[ed] the legal relations of parties having adverse legal interests'"). Furthermore, any ruling on the issue would be nothing more than an advisory opinion, which this Court has been reluctant to provide since its inception. *See* 3 Correspondence and Public Papers of John Jay 488-89 (Henry P. Johnston ed., 1891) (declining to issue a response on behalf of the Court to a question posed by President Washington); *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (this Court does not issue advisory opinions, but rather decides "'concrete legal issues, presented in actual cases, not abstractions'") (quoting *United Public Works of American (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)); *cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[This Court is] not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [this Court's] review could amount to nothing more than an advisory opinion."). This Court's limited judicial resources are better utilized elsewhere. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) ("Courts should

[8] Wood's contention that the district court's finding that his purported Rule 60(b) motion was actually a second or successive habeas petition will not be reviewable by this Court will be shown, *infra*, to be without merit.

think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'") (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009)).

## II. The Tenth Circuit is not an "outlier among the lower federal courts" on this issue.

Wood states early on in his Petition that the transfer procedure employed by the Tenth Circuit and imposed upon federal district courts below is an "outlier" when compared to others within the federal system. Petition at 3. According to Wood, that procedure jeopardizes his and other habeas petitioners' rights to appellate review of any decision as to a Rule 60(b) motion in the federal district courts within the Tenth Circuit. Petition at 3.

But Wood never explains how the procedure employed by the Tenth Circuit here makes it an "outlier" amongst its circuit counterparts. In fact, Wood cites almost exclusively to the decisions of this Court or the Tenth Circuit in his Petition to make his argument. *See* Petition 1-21. The sole exception is his citation to the Second Circuit's decision in *Marmolejos v. United States*, 789 F.3d 66 (2d Cir. 2015).

But the Tenth Circuit cited to *Marmolejos* as rationale for why it *lacked* jurisdiction to review Wood's claim within this appeal. Pet. Appx. 001a-002a. And Wood only references the case in his Petition to explain why the Tenth Circuit misread the decision in *Marmolejos* and how the circumstances present there "had nothing to do with the appealability of a district court's decision on a Rule 60(b) motion." Petition at 14, 16-17. Thus, there is nothing within his Petition—apart from

a bald assertion—to show this Court why the Tenth Circuit's procedure for resolving situations such as those arising here is anything but consistent with those mandated by federal statute and employed by other circuit courts. *See United States v. Akers*, 519 F.Supp.2d 94, 95-97 (D.D.C. Nov. 6, 2007) (granting the government's motion to transfer the prisoner's alleged Rule 60(b)(6) motion to the D.C. Circuit Court because the motion was actually a collateral attack on his conviction under 28 U.S.C. § 2255).

## III. Appellate review remains available to Wood with regard to his Rule 60(b) claim.

Wood's final subsection raises the specter that no review of the panel's decision in *In re Wood* would be available to him on his Rule 60(b) claim were this Court to find the Tenth Circuit rightly concluded it lacked jurisdiction in his appeal, *Wood v. Quick*, and then later to determine 28 U.S.C. § 2244(b)(3)(E) precluded the filing of a petition for rehearing (which Wood has already filed) or if a petition for writ of certiorari in *In re Wood*. Petition at 21. But no such result appears likely given that ADEPA does not restrict the application of certain federal rules such as Rule 60(b).

This Court has indicated as much in its opinions. For instance, in *Gonzalez v. Crosby*, this Court stated that "AEDPA did not expressly circumscribe the operation of Rule 60(b)," and noted that "[i]f neither the [Rule 60(b)] motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as

denominated creates no inconsistency with the habeas statute or rules." 545 U.S. 524, 529, 533 (2005).[9]

As such, Wood will not be placed in limbo by this Court's denial of certiorari in this case.

## IV. The Tenth Circuit correctly concluded it lacked jurisdiction to entertain Wood's claim via the appeal in *Wood v. Quick*.

"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. *See, e.g., Cruz v. Ridge*, 383 F.3d 62, 64 (2d Cir. 2004).

Despite Wood's argument in his Petition, *see* Petition at 10-14, a case such as *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945), does not indicate that a piecemeal appellate strategy is to be employed in situations like those presented here. The decision in *Radio Station WOW* involved a unique set of circumstances, in which the Supreme Court of Nebraska ordered the immediate delivery of physical property, but where additional matters remained to be resolved in the case. *Id*. at 124-26. The

[9] Respondent's agreement that Wood is not foreclosed by § 2244(b)(3)(E) from seeking certiorari review of the *In re Wood* decision is simply that and not a concession that this Court *should* grant a writ of certiorari. Respondent will address any request for review in *In re Wood* at the appropriate time.

issue involving the physical property was key in this Court's decision to take up the case:

> "[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. In effect, such a controversy 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."

*Id*. at 126 (emphasis added); *see also id*. at 127 ("Since, by awarding an execution, the Nebraska Supreme Court directed immediate possession of the property to be transferred, the case comes squarely within [this Court's jurisdiction].").

Wood's case obviously does not involve the immediate delivery of physical property. Thus, there is no concern that allowing the litigation concerning the nature of his Rule 60(b) motion in the Tenth Circuit to proceed to its finality, which it has already achieved and from which Wood expressly stated he intends to seek certiorari review, Petition at 18, risks any of the legal harms that warranted the fragmented review in *Radio Station WOW*. *See id*. at 121-27.

And despite Wood's argument to the contrary, *see* Petition at 14-17, 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), both of which were cited by the Tenth Circuit in its order dismissing the case in *Wood v. Quick*, *see* Pet. Appx. at 0002a, support the circuit court's decision.

Wood attempts to distinguish these cases, claiming they have "nothing to do with the appealability of a district court's decision on a Rule 60(b) motion." Petition at 16. But the rules governing the appellate jurisdiction of the circuit courts discussed in these decisions 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.

Wood is correct that *McGlamery* had nothing to do with a Rule 60(b) motion filed in the district court. Petition at 15 (citing *McGlamery*, 74 F.3d at 220). But the circuit court there 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. *McGlamery*, 74 F.3d at 220. In *McGlamery*, the Tenth Circuit 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 (similar to the blatant second or successive petition at issue in *In re Wood*). *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 Marmolejos 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."[10] *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.

Because the Tenth Circuit's decision was correct, this Court should deny Wood's Petition. *See McClung v. Silliman*, 19 U.S. 598, 603 (1821) ("The question before an appellate court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed.") (emphasis in original); *see also The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (this Court only decides "questions of public importance" in the "context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when the issue is posed less abstractly").

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

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

Respectfully submitted,

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