

**No. 10-6338**

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

**STEPHEN MICHAEL WEST,**

**Appellant,**

**v.**

**RICKY BELL, Warden,**

**Appellee.**

---

**MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

---

The appellee, Warden Ricky Bell, respectfully moves this Court under 6 Cir. R. 27(d)(1) to dismiss the appeal filed in this matter for lack of jurisdiction, as the district court's order transferring this case does not constitute a "final decision" under 28 U.S.C. § 1291, nor does it come within the limitations of § 1292 or the "collateral order doctrine." *See also Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008) (second-or-successive transfer orders to court of appeals are non-appealable).

## PROCEDURAL HISTORY

On December 18, 2008, this Court affirmed the district court's judgment denying habeas corpus relief to appellant, Stephen West, a Tennessee inmate currently under sentence of death for two counts of first-degree murder. The United States Supreme Court subsequently denied a petition for a writ of certiorari on March 1, 2010. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008) (reh. denied May 20, 2009), *cert. denied*, 130 S.Ct. 1687 (2010) (reh. denied).

On July 15, 2010, the Tennessee Supreme Court ordered that West's execution be carried out on November 8, 2010. On October 15, 2010, less than one month before his scheduled execution date, West filed a motion in the district court under Fed. R. Civ. P. 60(b) seeking relief from the court's 2004 habeas judgment. Specifically, West argued that re-litigation of his ineffective assistance claim relative to his capital sentencing proceeding was appropriate "due to a misapprehension of the relationship between 28 U.S.C. § 2254(d) and (e)."

In an order entered October 27, 2010, the district court transferred petitioner's filing to this Court pursuant to 28 U.S.C. § 1631 as a successive habeas application. As the Court explained in its accompanying Memorandum, "After reviewing the pleading and briefs filed by both parties . . . , the Court finds Petitioner's Rule 60(b) motion, in substance, is a second or successive habeas petition and therefore will

**IMMEDIATELY TRANSFER** this action to the United States Court of Appeals for the Sixth Circuit.” (R. 216) (emphasis in original).

[I]t is apparent that Petitioner’s Rule 60(b) motion is, in substance, a successive habeas petition. In particular, Petitioner’s argument that the Court incorrectly applied the AEDPA in denying his ineffective assistance of counsel claim amounts to an argument that the Court’s analysis was incorrect and, as a result, reviewing Petitioner’s argument would inextricably lead to a re-examination of the merits of petitioner’s prior claim in his habeas petition. Similarly, Petitioner’s contention that, based on new intervening law, this review is necessary also amounts to a request for another merits determination of his claim. Accordingly, Petitioner’s challenge constitutes a second or successive habeas application.

(R.216 (Memorandum), p. 7).

The district court’s conclusion is borne out by a review of the earlier decisions in this case, which plainly shows that both the district court and this Court previously rejected West’s ineffective-assistance claim on the merits. *See West*, 550 F.3d at 554 (“[W]e cannot grant habeas unless West is ‘in custody of the Constitution or laws or treaties of the United States.’ 28 U.S.C. § 2254(a). . . . A careful review of the record demonstrates that West’s counsel was not so ineffective as to constitute a denial of his constitutional rights. For this reason, we must deny West’s petition for a grant of habeas corpus relief even though the state court decision was an unreasonable application of clearly established federal law.”).

Upon entry of the district court's transfer order, the Clerk of this Court promptly docketed the matter for consideration of whether petitioner's filing is a permissible successive habeas petition under 28 U.S.C. § 2244(b). *See In re: Stephen Michael West*, No. 10-6333 (6th Cir.) (docketed Oct. 27, 2010). In addition, however, petitioner filed a notice of appeal in the district court, thus triggering the docketing of a separate appeal, *Stephen Michael West v. Ricky Bell, Warden*, No. 10-6338 (6th Cir.), which is the subject of this motion.

Because the district court's transfer order is not a final appealable order, the instant case should be dismissed for want of jurisdiction.

### ARGUMENT

**THIS COURT DOES NOT HAVE APPELLATE JURISDICTION IN THIS MATTER, AS THE ORDER OF THE DISTRICT COURT WAS NEITHER A FINAL ORDER UNDER 28 U.S.C. § 1291, NOR DOES IT FALL WITHIN THE LIMITED CLASS OF APPEALABLE COLLATERAL ORDERS UNDER 28 U.S.C. § 1292 OR THE COLLATERAL ORDER DOCTRINE.”**

This Court's appellate jurisdiction is statutory and limited to review of final decisions of district courts or to interlocutory orders that: (1) grant, continue, modify, refuse or dissolve injunctions, or refuse to dissolve or modify injunctions; (2) orders dealing with receivers; or (3) orders that determine the rights and liabilities of parties to admiralty cases. 28 U.S.C. §§ 1291 and 1292(a). In certain other cases, where the district court determines that the order involves a controlling

question of law and that an appeal may materially advance the ultimate termination of the litigation, the judge may certify an interlocutory appeal. 28 U.S.C. § 1292(b). The United States Supreme Court has also construed § 1291 to permit certain limited appeals under the “collateral order doctrine.” *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under that doctrine, appeals may be taken from “decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.” *Swint v. Chambers County Commission*, 514 U.S. 35, 42 (1995).

As this Court has noted, a final decision for purposes of invoking § 1291’s appellate jurisdiction, is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Archie v. Lanier*, 95 F.3d 438, 442 (6th Cir. 1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In this case, the order being appealed is the district court’s order transferring petitioner’s Rule 60(b) motion to this Court for review under 28 U.S.C. § 2244(b)’s gatekeeping requirements. This transfer order did not in any way end the litigation on the merits; rather, it recognized that, under AEDPA, a petitioner is entitled to only one petition for habeas corpus relief, and that further attempts to challenge the underlying conviction must initially be reviewed by this Court to determine if the

statutory requirements are met. Indeed, this Court has made clear that such transfer orders are not appealable orders. *See Howard*, 533 F.3d at 474 (“Our court’s practice in the case of second-or-successive transfer orders to this court is to treat the transfer order as non-appealable, and to consider in the transferred case whether such a transfer was necessary or appropriate.”).

As an interlocutory or collateral order, the transfer order likewise fails to satisfy the requirements for appellate review. The order does not constitute an injunction, nor does it address receiverships or admiralty. Nothing in the district court’s order resolved an important question that was otherwise unreviewable upon entry of a final judgment. Thus, this Court lacks jurisdiction of this appeal. *See, e.g., Murphy v. Reid*, 332 F.3d 82 (2d Cir. 2003) (district court’s order transferring federal prisoner’s habeas petition as second or successive was not an appealable order); *Brinar v. Williamson*, 245 F.3d 515 (5th Cir. 2001) (same); *McGhee v. Myers*, 188 F.3d 508 (Table) (6th Cir. 1999) (same); *Van Orman v. Purkett*, 43 F.3d 1201 (8th Cir. 1994) (order transferring case to different district court within state not appealable); *Dobard v. Johnson*, 749 F.2d 1503 (11th Cir. 1985) (transfer orders pursuant to *form non conveniens* are not appealable).

Because West’s Rule 60(b) motion sought to re-litigate an issue previously denied on the merits, the district court properly deemed it a second or successive

habeas application subject to 28 U.S.C. § 2244(b)'s gatekeeping requirements. Thus, under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631, the court was required to transfer the application to this Court for consideration in the first instance. By transferring this matter under § 1631, the district court recognized that it lacked jurisdiction to entertain petitioner's motion for relief from judgment.<sup>1</sup> And because, by statute, the action now proceeds in this Court "as if it had been filed" here originally, consistent with *Howard, supra*, petitioner may only properly challenge transfer decision within the context of the transferred case. There is no basis for jurisdiction of a separate appeal, and this case should be dismissed.

---

<sup>1</sup> 28 U.S.C. § 1631 provides: "Whenever a civil action is filed in a court as defined in section 610 of this title . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action . . . shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."

## CONCLUSION

For the reasons stated, this appeal should be dismissed.

Respectfully submitted,

ROBERT E. COOPER, JR.  
Attorney General & Reporter

/s/ Jennifer L. Smith  
JENNIFER L. SMITH  
Associate Deputy Attorney General  
Criminal Justice Division  
P.O. Box 20207  
Nashville, Tennessee 37202-0207  
(615) 741-3487

## CERTIFICATE OF SERVICE

I certify that the foregoing response was filed electronically on October 29, 2010. A copy of the document will be served via the Court's electronic filing process on: Roger W. Dickson, Miller & Martin LLP, 832 Georgia Ave., Suite 1000, Chattanooga, TN 37402; and Stephen Ferrell, Federal Defender Services of Eastern Tennessee, Inc., 800 S. Gay St., Suite 2400, Knoxville, TN 37929.

/s/ Jennifer L. Smith  
JENNIFER L. SMITH  
Associate Deputy Attorney General