

No. 10-6338

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

STEPHEN MICHAEL WEST,

Appellant,

v.

RICKY BELL, Warden,

Appellee.

**RESPONSE TO APPLICATION FOR
CERTIFICATE OF APPEALABILITY**

Petitioner, Stephen West, has filed an application seeking issuance of a certificate of appealability from the district court's order of October 27, 2010, transferring his successive habeas petition to this Court for consideration under 28 U.S.C. § 2244(b)(3)(A). (R. 217). However, a certificate of appealability is neither warranted nor permissible in this matter, and the motion should be denied.

On October 15, 2010, the petitioner, Stephen West, filed a motion in the district court pursuant to Fed. R. Civ. P. 60(b) and 60(d) seeking relief from the

court's September 2004 judgment denying habeas corpus relief.¹ (R. 189). 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. (D.E. 217). As the district court made clear 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). The district court denied petitioner's request for issuance of a COA. (R. 221). Petitioner now applies to this Court for a certificate of appealability as to the district court's determination that his motion constitutes a successive habeas application. The application should be denied.

Twenty-eight U.S.C. § 2253(a) provides that "the *final order* [in a habeas corpus proceeding] shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." (emphasis added). However, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the *final order in a habeas corpus proceeding*

¹ This Court affirmed the district court's judgment denying habeas relief in 2008. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008) (reh. denied May 20, 2009), *cert. denied*, 130 S.Ct. 1687 (2010).

in which the detention complained of arises out of process issues by a State court” 28 U.S.C. § 2253(c)(1)(A) (emphasis added). The district court’s order transferring petitioner’s motion to this Court for review under § 2244(b)’s gatekeeping provisions is not a “final order” in a habeas proceeding. Specifically, the order did not 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 the court of appeals to determine if the statutory requirements to proceed on a successive application are satisfied. Indeed, the Clerk of this Court promptly docketed the matter for that purpose. *See In re: Stephen Michael West*, No. 10-6333 (6th Cir.) (docketed Oct. 27, 2010). Moreover, by transferring this matter under 28 U.S.C. § 1631, the district court recognized that it lacked jurisdiction to entertain petitioner’s motion for relief from judgment.² Because, by statute, the action now proceeds in this Court “as if it had been filed” there originally, the proper mechanism to grieve the transfer decision is not a separate appeal of the district

² 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.”

court's decision in this Court, but a motion in the transferred case requesting a retransfer of the matter to the district court. *See Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008) ("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.").

WHEREFORE, respondent requests that the Court deny petitioner's application for a certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing response was filed electronically on November 2, 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

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