No. 19-7603

In The

Supreme Court of the United States

MARK D. JENSEN,

Petitioner,

v.

WILLIAM POLLARD,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the district court abuse its discretion when it determined that the State had complied with the terms of its grant of conditional habeas corpus relief, and it thus lacked jurisdiction over Petitioner Mark D. Jensen's challenges to his reinstated judgment of conviction?

DIRECTLY RELATED CASES

The following cases arise from the same trial court case as the case in this Court or challenge the same criminal conviction challenged in this Court. *See* Sup. Ct. R. 14.1(b)(iii).

- *State v. Jensen*, No. 2004AP2481-CR, Wisconsin Supreme Court. Judgment entered February 23, 2007.
- *State v. Jensen*, No. 02-CF-314, Kenosha County Circuit Court. Judgment entered February 27, 2008.
- *State v. Jensen*, No. 2009AP898-CR, Wisconsin Court of Appeals. Judgment entered December 29, 2010.
- *State v. Jensen*, No. 2009AP898-CR, Wisconsin Supreme Court. Judgment entered June 15, 2011.
- *Jensen v. Schwochert*, No. 11-C-803, U.S. District Court for the Eastern District of Wisconsin. Judgment entered December 18, 2013.
- *Jensen v. Clements*, No. 14-1380, U.S. Court of Appeals for the Seventh Circuit. Judgment entered September 8, 2015.
- *State v. Jensen*, No. 02-CF-314, Kenosha County Circuit Court. Judgment entered September 8, 2017.
- *Jensen v. Clements*, No. 11-C-803, U.S. District Court for the Eastern District of Wisconsin. Judgment entered November 27, 2017.
- *Jensen v. Pollard*, No. 17-3639, U.S. Court of Appeals for the Seventh Circuit. Judgment entered May 15, 2019.
- *State v. Jensen*, No. 2018AP1952-CR, Wisconsin Court of Appeals. Judgment entered February 26, 2020.
- *State v. Jensen*, No. 2018AP1952-CR, Wisconsin Supreme Court. No judgment entered.

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INTRODUCTION

This Court should deny Jensen's request that this Court grant his petition for a writ of certiorari and summarily reverse the Seventh Circuit's decision. Jensen's petition does not acknowledge his ongoing proceedings in Wisconsin's appellate courts that challenge the same conviction he contests here. The Wisconsin Court of Appeals recently ordered that Jensen receive a new trial, the same remedy that he asks for from this Court. While state appellate proceedings remain ongoing, the possibility that Jensen will ultimately receive from the state courts the relief he seeks here weighs strongly against granting Jensen's petition.

In addition, Jensen has not offered any compelling reason for this Court to take his case. The Seventh Circuit held that the district court had not abused its discretion by concluding that it lost jurisdiction over Jensen's habeas petition because the State had complied with the district court's conditional writ of habeas corpus. That is the straightforward issue in this case, and Jensen largely ignores it in his petition. The Seventh Circuit's decision was correct and consistent with this Court's precedent. There is thus no basis for this Court to grant certiorari and summarily reverse the court of appeals' decision.

STATEMENT OF THE CASE

I. The State charges Jensen for killing his wife, Julie, the state courts admit Julie's letter and statements, and a jury convicts Jensen of first-degree intentional homicide.

Jensen's wife, Julie, died in 1998. Her autopsy showed that the cause of death was ethylene glycol poisoning and "asphyxia by smothering." *State v. Jensen*, 2011 WI App 3, ¶ 37, 331 Wis. 2d 440, 794 N.W.2d 482, (*Jensen II*), (R-App. 134).[1] In 2002, the State charged Jensen with first-degree intentional homicide for killing her. *Jensen v. Clements*, 800 F.3d 892, 896 (7th Cir. 2015) (*Clements*), (Pet-App. 15–36); Wis. Stat. § 940.01.

Before she died, Julie made statements to various people in which she said that she feared that Jensen was trying to poison her and make it look like a suicide. *Jensen II*, 794 N.W.2d 482, ¶¶ 5–7, 40–67, 72. She also said that she was not suicidal. *Id*. ¶ 67.

Julie gave an envelope to her neighbors, the Wojts, two weeks before her death and asked them to give it to the police if anything happened to her. *Clements*, 800 F.3d at 895. The envelope, which the Wojts gave to police after Julie died, held a letter addressed to Police Officer Ron Kosman and Detective Paul Ratzburg. *Id*. at 895;

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[1] Citations for the facts in the statement of the case are mostly to the state appellate and federal court decisions arising from Jensen's conviction and to the dockets of the courts below. Jensen's appendix contains the federal court decisions. Respondent's appendix contains the relevant state court decisions. Citations to "Dkt." refer to the docket of the Eastern District of Wisconsin in case number 11-cv-803. Citations to "Doc." refer to the Seventh Circuit's docket in case number 17-3639.

Jensen II, 794 N.W.2d 482, ¶¶ 4–7. The letter said, among other things, "if anything happens to me, [Jensen] would be my first suspect." *Jensen II,* 794 N.W.2d 482, ¶ 7. It also said, "I would never take my life . . . ." *Id*. Julie had also previously left a voicemail for Kosman saying that she thought Jensen was trying to kill her. *Id*. ¶ 6. She later told him in person that, if she died, Jensen would be her first suspect and she would not have killed herself. *Id*.

Jensen asked the trial court to exclude Julie's letter and her statements to Kosman as violating his rights under the Confrontation Clause. *Id*. ¶ 9. The court initially denied the motion, but, after this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), it reconsidered and ruled that the evidence was testimonial hearsay and inadmissible. *Jensen II,* 794 N.W.2d 482, ¶ 10. The court also denied the State's request to admit the evidence under the forfeiture-by-wrongdoing doctrine. *Id*.

Both parties took an interlocutory appeal, and the case wound up before the Wisconsin Supreme Court. *Id*. ¶ 11. In 2007, the court held that the letter and the voicemails were testimonial. *Id*.

In doing so, the court adopted a "broad" definition of testimonial based on *Crawford*. *State v. Jensen*, 2007 WI 26, ¶ 24, 299 Wis. 2d 267, 727 N.W.2d 518 (*Jensen I*), (R-App. 108.). *Crawford* discussed three proposed definitions of testimonial without specifically adopting one. *Crawford*, 541 U.S. at 51–52. The Wisconsin Supreme Court analyzed Julie's letter and voicemails under *Crawford's* third formulation, which asks whether the circumstances "would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial." *Id*. (citation omitted); *see also Jensen I*, 727 N.W.2d 518, ¶ 20. Julie's letter was testimonial, the court said, because "a reasonable person in Julie's position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial," and she intended it "to be used to further investigate or aid in prosecution in the event of her death." *Jensen I,* 727 N.W.2d 518, ¶ 27. The court held that the voicemail was testimonial because Julie "sought to relay information in order to further the investigation of Jensen's activities." *Id*. ¶ 30. The Court did not address whether Julie's in-person statements to Kosman were testimonial.

The court then addressed the forfeiture-by-wrongdoing doctrine. *Id*. ¶¶ 35–57. It adopted a "broad" version of the doctrine under which a defendant forfeits his right to confront a witness if he is the cause of the witness's unavailability for cross-examination. *Id*. ¶ 57. It remanded to allow the trial court to address whether to admit the evidence on that basis. *Id*. ¶ 58.

On remand, the trial court found that Jensen had forfeited his right to confront Julie by killing her and admitted her letter and statements to Kosman. *Jensen II*, 794 N.W.2d 482, ¶ 14. And, after a trial that lasted more than 30 days, a jury convicted Jensen of first-degree intentional homicide for killing Julie. *Id*. ¶ 19. The trial court sentenced him to life in prison without the possibility of release. (Dkt. 25-2.)

II. The Wisconsin courts affirm Jensen's conviction on direct appeal, but the federal courts grant Jensen habeas corpus relief.

Shortly after Jensen's conviction, this Court decided *Giles v. California*, 554 U.S. 353 (2008), addressing the forfeiture-by-wrongdoing exception to the Confrontation Clause. *Jensen II*, 794 N.W.2d 482, ¶ 20. This Court held that, for the exception to apply, a defendant had to have made the witness unavailable by "conduct *designed* to prevent a witness from testifying." *Giles*, 554 U.S. at 365.

Jensen then appealed his conviction. He argued that *Giles*'s narrow interpretation of the forfeiture doctrine overruled the Wisconsin Supreme Court's broad interpretation that the trial court applied when admitting Julie's letter and statements. *Jensen II*, 794 N.W.2d 482, ¶ 20. The Wisconsin Court of Appeals affirmed Jensen's conviction in 2011. It assumed without deciding that *Giles* barred the admission of the evidence and held that any error was harmless. *Id.* ¶¶ 35–73. In so holding, the court determined that it was bound by the Wisconsin Supreme Court's prior ruling that the evidence was testimonial. *Id.* ¶ 27. The Wisconsin Supreme Court denied Jensen's petition for review.

After his state-court appeal, Jensen filed a petition for a writ of habeas corpus in the Eastern District of Wisconsin. (Dkt. 1.) He argued that the court of appeals had unreasonably resolved his confrontation claim. (Dkt. 1:15–17); *Jensen v. Schwochert*, No. 11-C-0803, 2013 WL 6708767, at *6 (E.D. Wis. Dec. 18, 2013) *(Schwochert)*, (Pet-

App. 37–49). The State did not challenge *Jensen I*'s holding that Julie's letter statements were testimonial. *Schwochert,* 2013 WL 6708767, at *6.

The court granted Jensen's petition in 2013. *Id*., at *17. The court held that the Wisconsin Court of Appeals had unreasonably concluded that the letter's and statements' admission was harmless error. *Id*., at *9–16. The court did not address whether the letter and statements were testimonial, noting instead that "the parties do not dispute" the issue. *Id*., at *6.

The court ordered that Jensen be "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id*., at *17.

The State appealed, and a divided panel in the Seventh Circuit affirmed. *Clements*, 800 F.3d 892. The majority agreed with district court's holding that the admission of the letter and the statements was not harmless. *Id*. at 901–08. It did not address whether the evidence was testimonial. *Id*. at 899–908. The dissent concluded that the Wisconsin Court of Appeals' harmlessness decision was a reasonable application of federal law. *Id*. at 908–13. The Seventh Circuit issued its mandate in October 2015. (Dkt. 79.)

III. The state trial court admits Julie's letter and statements and reinstates Jensen's judgment of conviction.

In December 2015, the Kenosha County Circuit Court vacated Jensen's judgment of conviction. (Dkt. 101:1–2, 5); *Jensen v. Clements*, No. 11-C-803, 2017 WL

5712690, at *1–2 (E.D. Wis. Nov. 27, 2017), (Pet-App. 8–14). The State said it intended to retry Jensen. (Dkt. 101:5.)

Jensen moved to exclude Julie's statements and letter. (Dkt. 94-3:97; 101:5.) The parties extensively briefed and orally argued the motion. (Dkt. 101:5 & n.1.) The State argued that the Wisconsin Supreme Court's 2007 holding that the statements and letter were testimonial was no longer valid because this Court had narrowed the definition of testimonial since that decision. (Dkt. 94-5:50.) Under current law, the State argued, the statements were no longer testimonial. (Dkt. 94-5:50.) The State further argued that, under Wisconsin's law-of-the-case doctrine, the court should apply the current law rather than following the supreme court's 2007 decision. (Dkt. 94-5:74–77.)

The circuit court determined that Julie's statements and letter were admissible. (Dkt. 94-9:68–71; 101:5.) Specifically, it concluded that under *Ohio v. Clark*, 576 U.S. 237 (2015), and *Michigan v. Bryant*, 562 U.S. 344, 349 (2011)—both issued since the Wisconsin Supreme Court's 2007 decision—the letter and statements were no longer testimonial. (Dkt. 94-9:70–71; 101:5.) The trial court also addressed whether the law-of the-case doctrine required it to follow the state appellate courts' or federal courts' decisions. (Dkt. 94-9:69–70.) It determined that, of these courts, only the Wisconsin Supreme Court had addressed whether the statements and letter were

testimonial. (Dkt. 94-9:69–70.) And, the court concluded, it was able to revisit that decision under the law-of-the-case doctrine and apply current law. (Dkt. 94-9:69–70.)

The State then did two things. First, it filed a motion to clarify in the district court. (Dkt. 86; 101:5.) It indicated that it intended to move the trial court to reinstate Jensen's judgment of conviction based on the court's ruling but wanted to ensure that such a step did not violate the federal district court's order granting habeas relief. (Dkt. 86:5; 101:5–6.) It asked the federal district court to explain if it intended its grant of habeas relief to require the State to conduct a jury trial or just to restart its prosecution of Jensen. (Dkt. 86:5–6; 101:6.) Second, the State moved the trial court to reinstate Jensen's judgment of conviction. (Dkt. 101:6.)

While the latter motion was pending, the district court addressed the State's motion for clarification. (Dkt. 90.) The court noted its continuing jurisdiction to ensure that the State was complying with its conditional grant of habeas relief and its authority to clarify its order. (Dkt. 90:5.) It then explained that its conditional writ said that the State had to release Jensen from custody "unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." (Dkt. 90:5.) The court concluded that "[t]he State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order." (Dkt. 90:5.) It also noted that the prison warden had already released Jensen from custody, so the Respondent "has no power to release him in any event, and thus cannot be found in contempt for failing

to do so." (Dkt. 90:5–6.) But the court declined to say what it would do if the state trial court reinstated Jensen's conviction, concluding that such a ruling would be an advisory opinion since the trial court had not yet acted on the State's motion. (Dkt. 90:6.)

The trial court then reinstated Jensen's judgment of conviction. (Dkt. 94-11:4–5; 101:6–7.) The court reasoned that, because of its decision to admit Julie's letter and statements, "the evidence in a new trial would be materially the same as in the first trial." (Dkt. 94-11:4; 101:6–7.) It further explained that "it doesn't make a whole lot of sense to me as far as judicial economy to have a new trial on the same evidence as in the first trial." (Dkt. 94-11:5.) The trial court entered a judgment of conviction sentencing Jensen to life imprisonment without the possibility of release. (Dkt. 94-11:11–12.)

IV. Jensen returns to federal court seeking enforcement of the district court's conditional writ and appeals his reinstated judgment of conviction in state court.

After the circuit court entered the judgment, Jensen asked the Eastern District to enforce its judgment granting habeas relief. Jensen argued that the trial court violated the order by reinstating the judgment without holding a jury trial. (Dkt. 93; 101:2, 7.) The court denied Jensen's request. (Dkt. 101:1, 7–16.) It rejected his argument that the court's order required a retrial without Julie's letter and statements. (Dkt. 101:7–8.) Instead, the court said, the order required only that the State begin retrial proceedings. (Dkt. 101:8.) The court then determined that once the

State complied with the writ, it lost jurisdiction over Jensen's habeas case, and Jensen needed to challenge his new conviction in a new federal petition after exhausting his state remedies. (Dkt. 101:16.)

Jensen appealed the district court's order to the Seventh Circuit, which unanimously affirmed with one judge concurring. *Jensen v. Pollard*, 924 F.3d 451, 453 (7th Cir. 2019) (*Pollard*), (Pet-App. 1–6). The majority opinion agreed that the district court had continuing jurisdiction to determine whether the State had complied with its conditional habeas writ, but once the State complied, the district court lost jurisdiction. *Pollard,* 924 F.3d at 454. Thus, the court explained, the only issue to review was whether the State had complied with the district court's writ. *Id*. The court then considered the writ's language and the district court's conclusion that the writ required only that the State reinitiate proceedings for a retrial within the time limit. *Id*. at 455. It held that the district court had not abused its discretion in interpreting its own writ. *Id*. And the Court rejected Jensen's argument that the writ necessarily required a retrial without the letters and the statements, pointing to this Court's warning in *Jennings v. Stephens* "that courts 'should not infer . . . conditions from silence' when interpreting conditional writs." *Id*. (alteration in original) (quoting *Jennings v. Stephens*, 574 U.S. 271, 277 (2015).

Jensen moved for rehearing en banc, which the court denied after requesting a response from the State. (Doc. 47; 48; 52; 54.)

In the meantime, Jensen had appealed his reinstated conviction to the Wisconsin Court of Appeals. *See State v. Jensen*, No. 2018AP1952-CR (Wis. Ct. App. Dist. II Feb. 26, 2020), (R-App. 143–55). Jensen argued that the trial court had violated the conditional habeas writ by reinstating his judgment without a trial. (R-App. 144, 152.). He also claimed that the court was bound by Wisconsin's law-of-the-case doctrine to follow the prior decisions of the federal courts and Wisconsin's appellate courts and deem Julie's letter and statements testimonial. (R-App. 144, 152.) Jensen further argued that the trial court had erred by finding the letter and statements nontestimonial based on *Clark* and *Bryant*. (R-App. 144, 152.)

The Wisconsin Court of Appeals reversed the trial court on February 26, 2020. (R-App. 152–55.) Sidestepping most of the issues Jensen raised, it concluded that it and the trial court were bound to follow the Wisconsin Supreme Court's 2007 *Jensen I* decision holding that Julie's statements and letter were testimonial. (R-App. 152–54.) The court determined that the trial court had thus erred by reinstating the judgment based on inadmissible evidence and remanded to the trial court for a new trial. (R-App. 152–54.)

The State's petition for review from the court of appeals' decision is currently pending in the Wisconsin Supreme Court. The State is requesting that the court grant review to address the court of appeals' conclusion that it was bound to follow *Jensen I* and to assess whether Julie's letter and statements are testimonial under *Clark* and *Bryant*. It is also asking the court, should it rule in favor of the State on these issues,

to remand to the court of appeals to address in the first instance whether the circuit court erred by reinstating Jensen's judgment of conviction.

REASONS TO DENY THE PETITION

I. This Court should deny Jensen's petition because of the ongoing state-court proceedings that have granted him the same remedy that he seeks from this Court.

This Court should deny Jensen's petition, first, because not only are appellate proceedings from his reinstated judgment of conviction still pending in state court, but the Wisconsin Court of Appeals has granted him a new trial. If the Wisconsin Supreme Court declines review of or affirms the court of appeals' decision, Jensen will have obtained the same remedy from Wisconsin's courts that he asks for from this Court, and his case will become moot. This Court should not get involved with this case while the state-court proceedings are ongoing.

This Court has denied certiorari when a petitioner has an adequate remedy under state law. *See Pert v. Wainwright*, 383 U.S. 972 (1966); *Bryant v. Wilkins*, 383 U.S. 972 (1966); *Milne v. Milne*, 382 U.S. 896 (1965).

Further, federal court "[a]bstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (quoting *Allegheny Cty. v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)). Federal courts should also generally

abstain from exercising their jurisdiction when a defendant has invoked it to enjoin state criminal proceedings. *Colorado River*, 424 U.S. at 816 (citing *Younger v. Harris*, 401 U.S. 37 (1970), and *Douglas v. City of Jeanette*, 319 U.S. 157 (1943)). And abstention is warranted when there are ongoing parallel state-court criminal trial or appellate proceedings. *See Heck v. Humprhey*, 512 U.S. 477, 487 n.8 (1994) (citing *Colorado River*, 424 U.S. 800).

These principles support this Court's denying Jensen's petition. Jensen's direct appeal of his reinstated conviction is an adequate remedy for his claims of federal constitutional error. Jensen argued in both the state trial court and the Wisconsin Court of Appeals that the trial court could not reinstate his judgment of conviction without violating the district court's order granting him habeas relief and his right to a jury trial. That is the same claim he raises here. This Court should not grant review when the petitioner has an adequate remedy for his claims under state law.

In addition, this Court should decline review because Jensen's ongoing state proceedings might render his petition moot. The Wisconsin Court of Appeals has already granted Jensen, on state-law grounds, the same remedy of a new trial that he seeks from this Court. If the Wisconsin Supreme Court, in its discretion, denies the State's petition for review, or grants review and affirms the court of appeals, then the state trial court will give Jensen a new trial. *See* Wis. Stat. § (Rule) 809.62(1r) (review in the Wisconsin Supreme Court "is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented").

If the state court's order for a new trial stands, then it would be impossible for this Court to grant Jensen any effectual relief. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

Similarly, this Court should allow the state-court proceedings to play out before possibly becoming involved in this case. Granting Jensen's petition would be tantamount to invoking federal jurisdiction to restrain ongoing state criminal proceedings. *Colorado River*, 424 U.S. at 816. Such intervention is appropriate only when there is evidence of bad faith, harassment, or prosecution under an invalid statute. *Id*. No such concerns are present here. There has never been any suggestion that Jensen's prosecution under Wisconsin's unquestionably valid homicide statute was meant to harass him. And the courts below all concluded that the State and the trial court either acted in good faith or it was a question that a federal court should not reach. (Dkt. 101:9–13); *Pollard*, 924 F.3d at 455–56. Further, the Wisconsin Court of Appeals' decision to grant Jensen a new trial refutes any argument that the state-court proceedings are a sham. This Court should decline review in light of the parallel proceedings that are still ongoing in Wisconsin's state courts.

II. The Seventh Circuit's decision comports with this Court's precedent, and Jensen has not presented any compelling reasons why this Court should grant his petition.

This Court should also deny Jensen's petition because the Seventh Circuit's opinion is consistent with this Court's case law. For that reason, and because Jensen

has not provided any compelling reasons in support of granting his petition, this Court should reject Jensen's request to summarily reverse the Seventh Circuit.

A. The Seventh Circuit's opinion comports with this Court's precedent.

There is no reason for this Court to grant Jensen's request to summarily reverse the Seventh Circuit because its opinion is correct and consistent with this Court's case law. (Pet. 24.)

The panel's decision is straightforward. It recognized that the issue was whether the district court had correctly concluded that it lost jurisdiction over Jensen's petition because the State complied with the conditional writ. That question, in turn, depended on the meaning of the language that the district court used when issuing the writ. *Pollard,* 924 F.3d at 454–55. Applying established circuit precedent, the panel explained that it would review the district court's interpretation of its own order for an abuse of discretion. *Id.* at 454–55 (citing *Pidgeon v. Smith*, 785 F.3d 1165, 1172 (7th Cir. 2015)). The panel held that the writ's unambiguous language supported the district court's interpretation that the writ required the State just to initiate retrial proceedings. *Pollard*, 924 F.3d at 455. It then rejected Jensen's argument that the writ necessarily contained a right to a new trial without Julie's letter and statements. *Id.* Specifically, the panel explained that this Court in *Jennings* had warned courts not to "infer . . . conditions from silence" when

interpreting conditional writs. *Id.* (alteration in original) (quoting *Jennings*, 574 U.S. at 277).

This decision was correct. The issue it resolved was narrow: whether the district court abused its discretion when it interpreted its order granting Jensen habeas relief. The court held that the district court had not erred by interpreting the order to require only that the State initiate proceeding to retry Jensen within 90 days or release him from custody. The court's holding that the district court had not abused its discretion is logical. The district court was interpreting its own order, which contemplates either the State initiating retrial proceedings or releasing Jensen. An appellate court would be hard-pressed to conclude that the district court meant something other than what it said it meant by its own unambiguous language. The Seventh Circuit properly held that the district court did not abuse its discretion.

The Seventh Circuit's decision is also consistent with this Court's precedent. The court correctly recognized that its review was limited to whether the district court had abused its discretion in interpreting its order granting habeas relief. "Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require.'" *Murray v. Carrier*, 477 U.S. 478, 512 n.18 (1986) (Stevens, J., concurring) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963); 28 U.S.C. § 2243). Habeas courts have "broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

The court's rejection of Jensen's request to read a condition of a right to a jury trial without Julie's letter or statements into the writ also comported with this Court's case law. As the Seventh Circuit recognized, *Jennings* cautioned federal courts not to read unstated conditions into conditional writs of habeas corpus. *Pollard*, 924 F.3d at 455 (citing *Jennings*, 574 U.S. at 277). A petitioner's "rights under the judgment were what the judgment provided." *Id.* (quoting *Jennings*, 574 U.S. at 276). Interpreting a conditional writ to contain more conditions than it states would improperly transform habeas relief into "a general grant of supervisory authority over state trial courts." *Id.* (quoting *Jennings*, 574 U.S. at 278).

The Seventh Circuit's review of the district court's interpretation of the conditional writ for an abuse of discretion, and its holding that it could not read additional conditions into the writ, were consistent with this Court's precedent. Accordingly, there is no basis for this Court to grant Jensen's petition and summarily reverse the Seventh Circuit's opinion.

B. Jensen offers no compelling reasons why this Court should grant his petition.

This Court should also deny Jensen's petition because it contains no "compelling reasons" for this Court to grant his petition. Sup. Ct. R. 10.

Jensen never explains precisely why he thinks his case is important enough to warrant this Court's review. He does not argue that his case falls under any of the reasons listed in Rule 10 that typically justify this Court's exercise of certiorari

jurisdiction. Jensen does not, for example, explicitly identify any conflict between the Seventh Circuit's decision and the decision of another United States court of appeals or a state court of last resort. Sup. Ct. R. 10(a) and (b).

Jensen asks this Court to summarily reverse the Seventh Circuit. (Pet. 24.) Though he does not directly say so, this request suggests that he thinks that the Seventh Circuit's decision resolved an important issue of federal law that this Court needs to address or that conflicts with this Court's decisions. Sup. Ct. R. 10(c).

Jensen's petition fails to show that the Seventh Circuit's decision meets this standard for two reasons.

First, Jensen's petition completely ignores the Seventh Circuit's reasoning. He acknowledges that the court affirmed the district court's decision that the writ required the State only to initiate retrial proceedings. (Pet. 8, 18–19.) But he does not mention how the court reached this conclusion or explain why it is wrong. Jensen does not recognize that the Seventh Circuit, applying circuit law, said that the district court's jurisdiction was limited to determining whether the State had complied with the conditional writ's terms. He does not discuss that the Seventh Circuit reviewed the district court's interpretation of its writ for an abuse of discretion. Jensen does not mention the Seventh Circuit's conclusion that, under this standard of review, the district court did not abuse its discretion because the writ's plain language required only that the State reinitiate proceedings. He also does not say anything about the Seventh Circuit's holding that, because the State had complied with the writ, both it

and the district court lacked jurisdiction to consider his petition further. And finally, Jensen does not acknowledge the court's rejection of his argument, based on this Court's warning in *Jennings*, that the writ necessarily required a retrial. Jensen cannot show that the Seventh Circuit decided an important issue warranting this Court's review by refusing to engage with the court's actual decision.

Second, nothing that Jensen says in his petition shows that his case is important enough for this Court to take. As he did below, Jensen contends that, as a matter of law, the district court's conditional writ entitled him to a new trial without Julie's letter. But Jensen's arguments do not even prove that the Seventh Circuit erred, let alone decided an important issue of federal law that this Court should address.

Jensen contends this Court has held that conditional habeas writs require correction of the underlying error by replacing the "invalid judgment with a valid one." (Pet. 9, 17, 19) He further says that the Seventh Circuit's decision that the writ required just reinitiating proceedings was "rigidly literal." (Pet. 9.) The court, he argues, let the State trial court effectively overrule the federal-court judgments on his confrontation claim and take away his rights under those decisions. (Pet. 9–10, 21.) Jensen maintains that only steps that "correct the constitutional violation found by the court" would satisfy the district court's order. (Pet. 17 (quoting *Braunskill*, 481 U.S. at 775)). He also argues that the Seventh Circuit's decision "breaks from the way constitutional errors are cured" after a court grants habeas relief. (Pet. 20–21.) The

writ is meant to put petitioners in the same position they would be in had no constitutional error occurred. (Pet. 20–21.) This requires giving him a new trial since the constitutional error that led to his getting habeas relief happened at his trial. (Pet. 20–21.)

These arguments fail. Jensen selectively quotes this Court's decisions when he says that it has held that a conditional writ requires replacing the "invalid judgment with a valid one." The cases that Jensen cites say that conditional writs "give States time" and "an opportunity" to replace an invalid judgment. *Jennings*, 574 U.S. at 278, 286 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring)); *see also Braunskill*, 481 U.S. at 775. These cases do not support Jensen's claim that the conditional writ required the State to hold a trial without Julie's letters and statements. As argued, *Jennings* specifically warns federal courts against reading conditions into a writ that are not there. And the state trial court took the opportunity to replace Jensen's invalid judgment with a valid one by concluding that, under current confrontation case law, there had been no constitutional error at Jensen's trial. Whether that court was correct is a matter outside the limited scope of the issue presented here—whether the State complied with the conditional writ.

Further, Jensen is wrong that the Seventh Circuit's decision allowed the state courts to overrule the federal judgments on his confrontation claim. The federal judgment here is the conditional writ granting habeas relief, not the opinions addressing his claim. *See Jennings*, 574 U.S. at 277 (stating that, on appeal, a court's

judgment, not its opinion, is under review; "[a] prevailing party seeks to enforce not a district court's reasoning, but the court's *judgment*."). The district court determined that its judgment required the State only to begin retrial proceedings and that the State had complied with that order. Moreover, the case Jensen relies on to assert that a state court cannot overrule a federal judgment, *Deposit Bank of Frankfort v. Bd. of Councilmen of Frankfort*, 191 U.S. 499, 517 (1903), does not involve habeas corpus litigation. (Pet. 21.) It thus does not show that the Seventh Circuit's opinion conflicts with any decision of this Court.

And even if the federal opinions on Jensen's claim were relevant, the trial court did not contradict them. The trial court determined that Julie's letter and statements were not testimonial. The district court and the Seventh Circuit did not resolve this issue. Both courts assumed that the evidence was testimonial and instead found error in the state court's findings of harmlessness. Jensen has pointed to no decision of this Court that prevented the state trial court from reassessing a prior state-court decision that the evidence was testimonial based on current law when the federal habeas decisions were silent on the issue.

Jensen also cites *United States v. Ayers*, 76 U.S. 608, 610 (1869), to say that an order granting a new trial vacates the former judgment and leaves the parties as if no trial had taken place. (Pet. 17.) But the conditional writ here did not grant Jensen a new trial. And *Ayers* involves an appeal from the Court of Claims, not the

interpretation of a grant of habeas corpus relief to a state prisoner, so it does not conflict with the Seventh Circuit's opinion. *Ayers*, 76 U.S at 609.

Next, Jensen asserts that the trial court's reasoning that it needed only to initiate proceedings to comply with the writ was "sophistry" because starting the proceedings did not comply with the writ. (Pet. 21–22.) But the writ was directed at the State, not the trial court. *Pollard*, 924 F.3d at 455. The district court that issued the writ determined that the State complied, and the Seventh Circuit affirmed that decision. And, again, Jensen fails to confront the latter court's reliance on *Jennings*'s warning not to read unstated conditions into writs.

Jensen also argues that the phrase "initiate proceedings" is just a recognition that a full retrial could not happen within 90 days because of his case's complexity. (Pet. 16–17, 22.) He contends that courts routinely use such language and points to the writ's language in *Pritchess v. Davis*, 421 U.S. 482, 483 (1975), as an example. (Pet. 22 (citing *Davis v. Pritchess*, 388 F. Supp. 105, 114 (C.D. Cal. 1974)). But *Davis* did not involve a claim that the State failed to comply with a conditional writ. On the contrary, this Court recognized that the State complied with the writ's language when it "moved to retry" the petitioner within the specified time period. *Davis*, 421 U.S. at 483–84. Likewise, the two Seventh Circuit cases that Jensen points to as examples of writs ordering the State to begin proceedings within a certain time do not involve claims that the State failed to comply with the writ's language. (Pet. 22 (citing

McManus v. Neal, 779 F.3d 634, 660 (7th Cir. 2015), and *Jones v. Basinger*, 635 F.3d 1030, 1056 (7th Cir. 2011)).)

Next, Jensen points to a district court order that rejected the State's request to interpret a conditional writ issued by the Seventh Circuit to require that the State only decide whether to retry the petitioner within the specified time period. (Pet. 22–23 (citing *United States ex rel. Owens v. Duncan*, No. 08-C-7159, 2015 WL 5950124, at *1 n.1 (N.D. Ill. 2015)).) The Seventh Circuit gave the State "120 days in which to decide whether to retry" the petitioner or release him. *Owens v. Duncan*, 781 F.3d 360, 366 (7th Cir. 2015). Despite this language, the district court determined that the State, to comply with the letter and the spirit of the Seventh Circuit's order, needed to "actually initiate retrial proceedings within 120 days" rather than merely deciding whether to retry him. *Duncan*, 2015 WL 5950124, at *1 n.1.

Duncan does not help Jensen. It is a district court decision, not a decision of a federal court of appeals or this Court, so any conflict between it and the Seventh Circuit's decision does not justify review. And, anyway, the *Duncan* decision does not conflict with the Seventh Circuit's decision below. The district court in *Duncan* was merely interpreting, in its discretion, an order granting habeas relief. Here, the Seventh Circuit said that the district court was doing the same thing. And whatever else *Duncan* says, it does not hold that conditional habeas writs entitle a petitioner to a retrial no matter the actual language of the writ.

Finally, Jensen complains that the State has repeated the error from his first trial by obtaining admission of Julie's letter and statements, and it continues to hold him on an invalid judgment. (Pet. 23–24.) This, his says, violates Justice Thomas's dissent in *Jennings*, which argued that a conditional order does not permit entry of "a new judgment infected by the same constitutional violation that justified the order's entry in the first place." (Pet. 23–24 (quoting *Jennings*, 574 U.S. at 288).) According to Jensen, this Court must step in to prevent the State from reinstating faulty judgments against petitioners who prevail in federal habeas in the future. (Pet. 23–24.)

These arguments do not persuade. Whether Jensen's reinstated conviction is based on the same constitutional violation as his original one is one of the issues in his state-court appeal. As argued, that process should play out before this Court considers becoming involved. The narrow issue here is whether the district court erred by interpreting the plain language of the conditional writ. That issue, reviewed for an abuse of discretion, does not justify this Court's review.

And Jensen is wrong that states will begin reinstating judgments in response to grants of habeas relief. Jensen appears to suggest that states will reinstate these judgments in bad faith to prevent petitioners from getting the relief given by the federal courts. But here, the trial court acted in good faith, and its decision to reinstate the judgment was based on the unique facts of this case. Confrontation law changed several times throughout the proceedings, primarily to Jensen's advantage.

But when the case returned to state court, the trial court determined that further changes to the law had now made Julie's letter and statements admissible and reinstated Jensen's conviction. That decision may be incorrect. But regardless of whether the trial court was wrong, similar circumstances are unlikely to recur such that courts would even occasionally have the opportunity to do something like trial court did. Jensen's speculation that state courts will routinely undertake such actions, whether or not in good faith, does not justify this Court's review.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Dated at Madison, Wisconsin, this 26th day of May 2020.

Respectfully submitted,

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