In the

United States Court of Appeals

For the Seventh Circuit

Nos. 20-2473 & 20-2474

DENTRELL BROWN,

Petitioner-Appellee, Cross-Appellant,

v.

FRANK VANIHEL, Warden,
Wabash Valley Correctional Facility,

Respondent-Appellant, Cross-Appellee.

Appeals from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:13-cv-1981-JMS-DML — **Jane Magnus-Stinson**, *Judge.*

ARGUED JUNE 17, 2021 — DECIDED AUGUST 5, 2021

Before SYKES, *Chief Judge,* and KANNE and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Petitioner Dentrell Brown was convicted of murder in an Indiana state court. His trial lawyer failed to object to a serious violation of his constitutional right to confront witnesses against him. The federal district court granted Brown a conditional writ of habeas corpus, and both sides appealed. The State appealed to try to reverse the writ;

petitioner Brown cross-appealed seeking an order barring any retrial. While these appeals were pending, the State complied with the writ, resulting in a state court order vacating the original judgment of conviction. Brown has moved to dismiss the State's appeal and, if we grant dismissal, to dismiss his cross-appeal. We conclude that the state court's vacatur of the conviction ended this court's jurisdiction under both 28 U.S.C. § 2254 and Article III of the United States Constitution. We dismiss the State's appeal as moot and dismiss Brown's cross-appeal upon his motion.

I. *Procedural History*

In 2009, petitioner Brown was convicted of murder in an Indiana state court and sentenced to sixty years in prison. He was thirteen years old when he was charged but was tried as an adult. *D.B. v. State*, 916 N.E.2d 750 (Ind. App. 2009) (affirming conviction and sentence). Brown sought but failed to win post-conviction relief in the state courts for ineffective assistance of counsel. *D.B. v. State*, 976 N.E.2d 146 (Ind. App. 2012). He then filed a federal petition for writ of habeas corpus, which the district court denied. Deciding a question of first impression, this court reversed and remanded for an evidentiary hearing. *Brown v. Brown*, 847 F.3d 502, 508 (7th Cir. 2017), rehearing en banc denied, 869 F.3d 507 (7th Cir. 2017).

On remand the district court granted Brown a conditional writ of habeas corpus in a thorough opinion. *Brown v. Brown*, 471 F. Supp. 3d 866, 869 (S.D. Ind. 2020). The root of the problem was a *Bruton* problem in Brown's joint trial. See *Bruton v. United States*, 391 U.S. 123 (1968). The court admitted an out-of-court statement (a jailhouse confession to another detainee) by the co-defendant. The statement was hearsay as to Brown but implicated him in the fatal shooting. Brown had no ability

to cross-examine the declarant, his co-defendant. Brown's trial lawyer failed even to ask for a limiting instruction, and the district court found that the failure amounted to deficient performance and prejudiced Brown. The conditional writ ordered:

> The State of Indiana shall vacate all criminal penalties stemming from Mr. Brown's murder conviction in Elkhart Circuit Court Case No. 20C01-0806-MR-00002 and release him from custody pursuant to that conviction unless the State of Indiana elects to retry Mr. Brown within 120 days of this Final Judgment.

The State's appeal to this court was docketed as No. 20-2474. Brown filed a cross-appeal, docketed as No. 20-2473, challenging the district court's denial of his motions to authorize discovery and expand the record in light of statements made by the elected county prosecutor in a 2018 campaign debate that Brown asserts directly contradicted the prosecution's theory at trial.

Less than 120 days after the district court's conditional writ, the State filed a motion in state court to vacate Brown's murder conviction and to initiate re-trial proceedings in a new criminal case. The State also requested to transfer Brown to pretrial custody. The state court issued an order to transport Brown to the Elkhart County jail for pretrial proceedings, which have begun. On March 24, 2021, the state court vacated Brown's 2009 conviction and sentence.

Brown filed three motions in this court to dismiss the State's appeal. The first argued that this court lost jurisdiction under Article III when the State elected to transfer Brown's

custody for pretrial proceedings. The second argued that Brown's transfer to pretrial custody meant that he was no longer "in custody" under the original conviction and sentence to which the district court's judgment was directed, so that jurisdiction under 28 U.S.C. § 2254(a) was lost. The third argued that once the state court vacated his underlying conviction to allow re-trial, the State's appeal became moot for constitutional purposes. We conclude that the order vacating the state court conviction caused the State's appeal to become moot under both § 2254 and Article III.[1]

II. *Mootness Under 28 U.S.C. § 2254*

A federal court may entertain "a writ of habeas corpus in behalf of a person in custody *pursuant to the judgment of a State court* … ." 28 U.S.C. § 2254(a) (emphasis added). The state court's vacatur of Brown's conviction ended this court's jurisdiction over the State's appeal because the appeal attacks an order directed to a judgment that no longer exists.

The Sixth Circuit has explained the relevant metaphysics of habeas corpus jurisdiction in two helpful cases. The critical point is that a federal writ affects only the body of the petitioner; it does not act upon (such as vacate) a state court judgment. If the state court vacates the underlying judgment, there is usually nothing more for the federal courts to do.

In *Eddleman v. McKee*, 586 F.3d 409 (6th Cir. 2009), as here, the district court had issued a conditional writ of habeas

[1] We are not persuaded by Brown's second motion, which argued that his physical move from the state prison to the county jail undermined jurisdiction under 28 U.S.C. § 2254(a). The § 2254(a) "in custody" requirement applies only when the petition is filed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). We deny Brown's first motion as moot.

corpus: release the prisoner or retry him. The Sixth Circuit had affirmed in an earlier appeal and remanded with instructions to order release unless the state promptly granted a new trial. The state court then vacated the original conviction and released Eddleman. The prosecution then quickly re-arrested him on the same charges. The district court found that the state courts had not re-tried Eddleman quickly enough and issued an order barring retrial. The state appealed that order, and the Sixth Circuit held that after the original conviction was vacated, the district court acted without jurisdiction when it issued the new order barring retrial:

> For federal habeas jurisdiction to exist under § 2254, therefore, a state prisoner must be held pursuant to a judgment—rather than, say, an indictment or criminal information. That limitation, among other reasons, is why § 2254 petitions come to us after a state prisoner is convicted and not before.
>
> More to the point here, the limitation also means that, once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254.

Id. at 413 (emphasis omitted). As the Sixth Circuit explained, the district court's conditional writ gave the state an option: either retry Eddleman within a reasonable time or release him. The state chose the latter course. After Eddleman's conviction was vacated in state court, thereby releasing him from custody pursuant to the unconstitutional judgment, "per the plain terms of § 2254, the district court's jurisdiction over Eddleman's case came to an end." *Id.* The district court therefore did not have jurisdiction to grant the unconditional writ barring re-prosecution.

Similarly, in *Gillispie v. Warden*, 771 F.3d 323 (6th Cir. 2014), the district court granted a conditional writ of habeas corpus. After the state court later vacated Gillispie's convictions, the district court denied the state's motion for relief from that state judgment. The Sixth Circuit affirmed, holding that the state court's vacatur of Gillispie's convictions divested the district court of jurisdiction over the habeas petition. "[T]he vacatur of Gillispie's criminal judgment, combined with his by-then unconditional release, meant that all the purposes of the conditional writ had been met." *Id.* at 326. The court explained: "*Eddleman*'s unequivocal holding, standing alone, is enough to establish that the district court was without further jurisdiction in Gillispie's case once his criminal judgment was vacated; but it bears mention that even the facts of *Eddleman* are materially identical to those here." *Id.* at 328.

The critical facts in this case are also identical: the conditional writ ordered the State of Indiana to either release Brown or elect to re-try him. The State picked both, just as the state effectively did in *Eddleman* by releasing Eddleman and later re-arresting him. Here, the State moved to release Brown and to vacate his conviction and sentence. As in *Eddleman* and *Gillispie*, the state court's vacatur of Brown's conviction ended federal jurisdiction over Brown's habeas corpus petition under the terms of § 2254.

III. *Article III Mootness*

As an alternate ground for dismissing the State's appeal, the vacatur also rendered the State's appeal moot under Article III of the Constitution. The proper question for mootness on appeal is "not whether we may return the parties to the status quo ante, but rather, whether it is still possible to 'fashion *some* form of meaningful relief' to the appellant in the

event he prevails on the merits." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995), quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1993) (emphasis in original). The answer is no, it is no longer possible to grant meaningful relief to the appellant.

Again, a federal court's writ of habeas corpus does not vacate the disputed state conviction. Only a state court may do that. Nor can federal courts reinstate state convictions. Federal courts reviewing state convictions under 28 U.S.C. § 2254 act only on the body of the petitioner, not on the conviction itself. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner." *Fay v. Noia*, 372 U.S. 391, 430–31 (1963) (citation omitted), abrogated on other grounds by *Coleman v. Thompson*, 501 U.S. 722 (1991). See also *In re Medley*, 134 U.S. 160, 173 (1890) ("But under the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary … .") (emphasis omitted).[2]

If this court were to rule in favor of the State in this appeal and conclude that the district court erred by granting the writ of habeas corpus, there is no "meaningful relief" that we

[2] Federal courts reviewing federal convictions can, of course, reinstate, or instruct lower federal courts to reinstate, a vacated federal conviction. *United States v. Gochis*, 256 F.3d 739, 747 (7th Cir. 2001) (reversing district court's vacatur of conviction and reinstating magistrate judge's final judgment); *Moore v. United States*, 865 F.2d 149, 154 (7th Cir. 1989) (reversing district court's grant of habeas corpus petition and vacatur of conviction with instructions to reinstate).

could provide to the State. See, e.g., *McCrory v. Donnellon*, 2016 WL 894576, at *1–2 (E.D. Mich. Mar. 9, 2016) (finding any claims concerning petitioner's trial and sentencing moot because the relevant conviction and sentence had been reversed by the state court, and petitioner was presently awaiting retrial in state court: "There is no additional relief that this Court could grant."). Cf. *Edwards v. Terris*, 2015 WL 1966672, at *2 (E.D. Mich. Apr. 30, 2015) (dismissing as moot petitioner's claims because they were based on a since-vacated disciplinary conviction). At best for the State here, this court could issue an advisory opinion saying that the district court had erred in issuing the writ with which the state courts had already complied. By mentioning this possibility, we are not suggesting any view on the merits here. But such an advisory opinion would not be "meaningful relief." Federal courts are not in the business of offering advice to their colleagues in state courts.

There were paths available to the State that could have avoided this result, but the State chose not to take them. The State could have sought a stay of the writ pending the conclusion of the appeal before this court, and in the interim neither initiated pretrial proceedings nor moved the state court to vacate the conviction in dispute. District and appellate courts regularly grant such stays. See, e.g., *Coulter v. McCann*, 484 F.3d 459, 462 (7th Cir. 2007) (discussing sua sponte stay of district court's order directing that petitioner be released pending appeal); *Lee v. McCaughtry*, 892 F.2d 1318, 1319 n.2 (7th Cir. 1990) (noting grant of stay pending appeal); *Brinson v. Vaughn*, 339 F. App'x 171, 173 (3d Cir. 2009) (same).

The State points out that it was not guaranteed success in seeking a stay. In our legal system, the lack of guaranteed

success is not a sound basis for excusing a party from at least seeking relief. See, e.g., *Greer v. United States*, 141 S. Ct. 2090, 2099 (2021) (unpreserved claim subject to plain-error review even if precedent foreclosed the claim at the time the defendant could have objected); *Fulks v. Watson*, — F.4th —, —, 2021 WL 3027265, at *5–6 (7th Cir. 2021) (concluding that Fulks could have raised his *Atkins* claim in his initial § 2255 motion even though his chances of success were slim); *Bourgeois v. Watson*, 977 F.3d 620, 636 (7th Cir. 2020) (concluding that nothing formally prevented Bourgeois from raising earlier each of the errors he sought to raise under § 2241, and that he was not eligible for savings-clause relief).

In addition, the prospect of mootness is certainly something that federal courts should consider when deciding whether to stay conditional writs pending appeal. See *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (staying order granting writ of habeas corpus where state's certiorari petition to review the grant could not be acted upon until after the scheduled date of retrial: "When … the normal course of appellate review might otherwise cause the case to become moot, … issuance of a stay is warranted") (citations and quotations omitted). See generally *Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal"; father's appeal from district court order directing return of his daughter to Scotland was not rendered moot by mother's return to Scotland with daughter).

Under both § 2254 and Article III, we are concerned about the following scenario in the absence of a stay. Suppose that we deny Brown's motions to dismiss and proceed with merits

briefing and argument on the State's appeal. Then suppose that while that appeal is pending, Brown is retried in state court and acquitted. And then suppose that we decided that the federal writ should not have issued. What relief should be ordered in that scenario? We could not reinstate his original conviction, which the state courts had vacated. The prospect that the state courts might then disregard the new acquittal and somehow reinstate his original conviction would pose a very knotty problem. That problem is entirely avoidable if a state in such a case seeks and obtains a stay before a new trial.

This court cannot reinstate Brown's state court conviction; we could at most advise the state court to do so. Because we can grant no "meaningful relief" to the State, its appeal is moot under Article III.

IV. *The State's Authorities*

The State cited several Supreme Court decisions to oppose dismissal. None apply here. In *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 307–08 (1946), the Court concluded that the district court's grant of a writ of habeas corpus and Samuels' later release from military custody did not render the appeal moot. But *Samuels* involved a release from *custody* on conditions imposed by the writ. There was no vacatur of an underlying conviction, as there was here. *Samuels* explains why a stay of an otherwise unconditional release can prevent an appeal from becoming moot, but it does not address the problem here, where the underlying judgment of conviction has been vacated without further conditions.

Two other cited cases do not apply here; both involved disputes about only sentences. In both cases, the state-court convictions remained intact. In *Mancusi v. Stubbs*, 408 U.S. 204

(1972), Stubbs was convicted of a felony in New York and sentenced as a second offender due to a prior Tennessee murder conviction. He sought federal habeas corpus, claiming the Tennessee conviction had violated his constitutional right to confront witnesses against him and thus could not be used as a predicate for a stiffer punishment. The district court denied his petition for a writ, the court of appeals reversed, and the state obeyed the appellate court's mandate and resentenced Stubbs. The Supreme Court concluded that the state's compliance with the mandate did not render the state's appeal of the grant of habeas corpus moot. *Id.* at 207. And in *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017), the court of appeals had held that the state court had made a mistake of federal law in sentencing Cuero and reversed and remanded the district court's denial of habeas relief. The state court, in light of the appellate court's mandate, resentenced Cuero, and the Supreme Court held that the state's compliance with the mandate did not render its appeal moot. *Id.* at 8.

It is clear from *Samuels*, *Stubbs*, and *Cuero* that compliance with a federal court's writ of habeas corpus with respect to the petitioner's sentence or custody does not render the complying state's appeal of that writ moot. However, none of these cases dealt with a vacatur of the underlying conviction: there was no conviction in *Samuels* (military custody), and the underlying convictions remained intact in both *Stubbs* and *Cuero*, which addressed only mootness following re-sentencing. These cases also do not save the State's appeal from mootness.

Both parties discuss *Jensen v. Pollard*, 924 F.3d 451 (7th Cir. 2019), and *Hudson v. Lashbrook*, 863 F.3d 652 (7th Cir. 2017). We do not see either case as particularly helpful to either

party. In *Jensen*, the district court had ordered the petitioner released or retried, and we had affirmed. See 924 F.3d at 452. Then, in proceedings leading to the expected new trial, and based on intervening developments in the law, the state convinced the state courts to cancel the new trial and reinstate the original conviction. Jensen turned to the federal district court to challenge that reinstatement. This court concluded that the federal courts had retained jurisdiction only to determine compliance with the writ, that the state had complied with the writ by initiating proceedings for retrial, and that federal courts lacked jurisdiction to review the reinstated conviction. The reinstatement amounted to an intervening judgment that re-started the requirement to exhaust state court remedies. *Id.* at 455–56 ("Jensen is free to challenge any perceived constitutional errors via his direct appeal in state court. Indeed, he must exhaust those remedies before raising any constitutional claims in a new § 2254 petition."). *Jensen* differs from this case both because it involved an appeal *after* the execution of a conditional writ and because that appeal was of an intervening judgment. In this case, there is no longer any underlying state-court judgment against Brown.

In *Hudson*, the district court had granted habeas relief and ordered the state to reoffer a plea deal. 863 F.3d at 654. State prosecutors complied with the writ, but the state judge rejected the deal. Hudson then filed a "motion to enforce" before the federal district court, which the district court denied. Hudson appealed, and we dismissed for lack of jurisdiction because Hudson had received all the relief he requested from the writ of habeas corpus. *Id.* at 656. Hudson's proper next step was to pursue an appeal in the state courts. *Id. Hudson* differs from this case because it involved reoffering a plea deal, not vacating an underlying conviction. However, both

Jensen and *Hudson* provide some limited guidance: in both, this court concluded that the state court, not the federal, was the proper forum to pursue disputes about state-court decisions made after the state complied with a federal writ of habeas corpus. Similarly, here, the State's compliance with the writ, because it resulted in a vacatur of Brown's conviction, ended the federal courts' jurisdiction over the state's appeal of the writ.

* * *

The State's appeal, No. 20-2474, is DISMISSED as moot. Brown's motion to dismiss voluntarily his cross-appeal, No. 20-2473, is GRANTED. Brown's motion to file a special appendix in No. 20-2474 is DENIED.