17-3639

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARK JENSEN,

Petitioner-Appellant,

vs.

WILLIAM POLLARD,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
the Honorable Judge William C. Griesbach

BRIEF AND REQUIRED SHORT APPENDIX OF RESPONDENT-APPELLANT MARK JENSEN

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DISCLOSURE STATEMENT

Consistent with demands of Circuit Rule 26.1, the Petitioner-Appellant, Mark. Jensen is a natural person, and no party is a corporation. Only the law firm of Federal Defender Services of Wisconsin, Inc., through Craig W. Albee, Joseph A. Bugni, and Brian T. Fahl, appeared for the petitioner-appellant in this matter in the United States District Court for the Eastern District of Wisconsin. And in the previous appeal, only attorneys Craig W. Albee and Joseph A. Bugni appeared for Mr. Jensen. After the remand, in the district court, only Federal Defender Services of Wisconsin, Inc., through attorneys Albee and Bugni appeared. In this current appeal, only attorneys Albee and Bugni are expected to appear for petitioner-appellant, Jensen, in the United States Court of Appeals for the Seventh Circuit.

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JURISDICTIONAL STATEMENT

This is the second time this case is before this Court. The first time, this Court affirmed the district court's granting of a writ of habeas corpus. *Jensen v. Clements*, 800 F.3d 892, 895 (7th Cir. 2015). The Mandate issued on October 19, 2015.

This is a direct appeal from a final order denying a habeas corpus petitioner's motion to enforce a judgment granting a conditional writ of habeas corpus. The district court had jurisdiction over the case under 28 U.S.C. § 2254. This Court has jurisdiction on appeal under 28 U.S.C. §§ 1291 and 2253, based on the district court's grant of a certificate of appealability.

The order being appealed—the order denying the motion to enforce the judgment—was entered on November 27, 2017, in the United States District Court for the Eastern District of Wisconsin, the Honorable William Griesbach presiding. R.101. The certificate of appealability was granted on December 18, 2017. R.103. Mr. Jensen filed a timely notice of appeal on December 27, 2017. R.105.

The district court did not issue a separate judgment from the order denying the motion to enforce the judgment, but it specifically determined that the order denying the motion to enforce the judgment was final and appealable. R.108.

STATEMENT OF ISSUES PRESENTED

This appeal presents two issues.

This Court affirmed the district court's grant of a conditional writ of habeas corpus based on the admission of a letter in violation of Jensen's confrontation rights. Despite this Court's determination, before trial the state court revisited the same confrontation issue and decided that the letter wasn't testimonial and its admission would not violate Jensen's constitutional rights. The state court then reinstated Jensen's conviction. Jensen asked the district court to require the State to retry or release Jensen in accord with the federal judgment, but the district court determined that the state court, not the federal court, should first judge compliance with the writ. Did it err?

When a habeas petition presents multiple claims, and a petitioner prevails on one and the court does not address the others, the petitioner may later seek relief on those unaddressed claims. Jensen raised two claims in his original petition; the district court granted relief on one claim and didn't address the second. When the State refused to comply with the writ and provide Jensen with a new trial, he asked that the district court rule on the second claim. The district court held that Jensen would have to exhaust that claim in state court first. Did it err?

STATEMENT OF THE CASE

A day after Julie Jensen's death in December 1998, her neighbors gave police a sealed letter. It was written by Julie two weeks earlier, and it was addressed to the police. In it, she said that if anything should happen to her, her husband would be her first suspect. Although the case was initially treated as a suicide, the letter had a powerful influence over the medical examiner's and expert's view that this was a murder. The case took nearly a decade to get to trial, much of which was spent by the State fighting to admit the letter. The trial court found it was testimonial under *Crawford,* but on interlocutory appeal, the Wisconsin Supreme Court found that while the accusatory letter was testimonial, Jensen had forfeited his confrontation right. With the letter as evidence, the State convicted him of first-degree murder.

On federal habeas review, both the district court and this Court found that the admission of the letter had violated Jensen's confrontation right and granted a conditional writ of habeas corpus. Yet the fight to admit the letter continued. On remand, the state trial court found that regardless of this Court's holding that the letter's admission violated Jensen's constitutional rights, the letter was not testimonial and re-admitting it would not violate the Confrontation Clause. On top of that, the state court reasoned there was no point in holding a new trial given that the evidence would be the same. So instead of the new trial contemplated by the federal writ, the state court reinstated the conviction and re-imposed Jensen's life sentence.

In finding that there had been no constitutional violation in admitting the letter, the state court relied on three Supreme Court cases that it said altered *Crawford*'s definition of testimonial. But those cases had all been decided before this Court' decision affirmed granting the writ, and none of them materially altered the testimonial analysis as it pertained to the letter. Worse still, although this Court's decision was (or should've been) controlling, the State asked the state court to effectively overrule it—without first seeking to modify the federal judgment through a Rule 60(b) motion.

In response to the State's refusal to grant him the new trial contemplated by the conditional writ, Jensen asked the district court to make the writ absolute and order his release. Despite this Court's decision in *Phifer*, holding that a district court retains jurisdiction to judge compliance with a habeas order, without first requiring the petitioner to exhaust the compliance issue through the state courts, the district court held that to challenge the state court's defiance of this Court's mandate, Jensen would have to litigate the issue through a full round of state appellate proceedings. And to be clear, Jensen was not asking the district court to decide a new legal issue, but merely to enforce what already had been decided—that he was entitled to a new trial without the letter that infected his first trial. That's a broad overview of this case; what follows are the highlights of two decades' worth of litigation showing that Jensen is entitled to release.

A. From charging through trial, the centerpiece of the State's case was Julie's letter to police accusing her husband.

Two weeks before her death, Julie Jensen wrote a letter to policer officer Ron Kosman, explaining that if anything should happen to her, her husband Mark would be the prime suspect.[1] She sealed the letter in an envelope and gave it to her neighbors, the Wojts, telling them that in case anything happened to her, they should give it to the police.[2] Days after writing the letter, Julie called Kosman and left a message: she said her husband was trying to kill her.[3] Kosman's out-of-office voicemail let Julie know that he was out of town hunting and would not check messages until he got back in a few days.[4] Days later, when Kosman heard the message, he visited Julie.[5] She told him that if she wound up dead, it was not a suicide, and Mark would be her first suspect.[6] Kosman offered to help her leave Mark and find a place to stay, but she declined—she said her emotions were running wild.[7]

While publicly Julie was claiming she feared Mark, privately she was seeking help for severe depression. Days before her death, she went to see her family physician, Dr. Borman.[8] Months earlier she had seen Dr. Borman for depression, but her condition had deteriorated.[9] During the visit, Dr. Borman became "very concerned" because Julie was

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[1] *Jensen v. Clements,* 800 F.3d 892, 895 (7th Cir. 2015).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 896.
[6] *Id.*
[7] R.28-4:13-15.
[8] *Jensen,* 800 F.3d at 906.
[9] R.30-5:17-18.

highly upset, in tears, and "seemed depressed and distraught and almost frantic."[10] She reported being "miserable" and had lost weight.[11] During the visit, she described her worries about being labeled "crazy."[12] She said she was worried about going down the same path as her mother, and then described her family's history of depression and mental illness.[13] That history included "allegations that she was abused, that her brother attempted suicide by slashing his wrists, that her mother struggled with alcoholism and depression before a drowning death that was rumored to be a possible suicide or homicide, and that another brother passed away in childhood under tragic and suspicious circumstances."[14] During the appointment, Julie worried aloud about losing her kids and her marriage, but she denied any domestic violence or fear of Mark. Attuned to domestic-violence issues, Dr. Borman saw no signs.[15]

Given Julie's symptoms, Dr. Borman prescribed Paxil, an antidepressant.[16] As the State's expert explained at trial, when depressed persons begin taking Paxil, it can have the unintended effect of giving them the energy to kill themselves when they had previously lacked it.[17] The day after seeing Dr. Borman, Julie became ill.[18] It started in the early morning hours, and by mid-morning Mark was concerned enough that he went to

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[10] *Jensen*, 800 F.3d at 906.
[11] R.30-5:24.
[12] *Id.* at 42.
[13] *Id.*
[14] R.65:8; *Jensen v. Schwochert*, 2013 WL 6708767, at *4 (E.D. Wis. Dec. 18, 2013)
[15] R.30-5:26-27.
[16] *Jensen*, 800 F.3d at 906–07.
[17] R.28–7:39.
[18] *Jensen*, 800 F.3d at 907.

see Dr. Borman.[19] He worried that Julie was suffering from Paxil's side effects, and Dr. Borman prescribed some additional medicine.[20]

Right after Mark left for Dr. Borman's office, Julie called her next-door neighbor, Margaret Wojt.[21] Julie told Mrs. Wojt that she was not going to see Julie outside that day but not to worry—nothing was wrong.[22] Mrs. Wojt thought that Julie sounded almost like she was drunk.[23] Julie told her that she didn't know the medicine would have such an effect on her.[24] Concerned, Mrs. Wojt offered to help.[25] But during their fifteen-minute conversation, Julie repeatedly refused, reassuring her that Mark was being good to her.[26] He had taken the kids to school and was following up with her doctor.[27]

When Mark came home the following day, he found his wife lying in bed; she wasn't breathing, so he called 911. As the paramedics tried to resuscitate Julie, a police officer took a short statement from Jensen.[28] Mark was visibly upset and crying; his nose was running and he had trouble standing, as he described his wife's recent depressed condition. He said that although she had not talked about suicide, the previous night she said that she knew their boys would be fine and that Mark and his parents loved them and would take good care of them.[29]

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[19] *Id.*
[20] R.30–5:43–44.
[21] R.27–7:15.
[22] *Id.*
[23] *Id.* at 16.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] R.28–3:6.
[29] *Id.* at 17; *id.* at 28–30.

The next day, the Wojts called Officer Kosman and gave him Julie's letter.[30] Although the case was initially viewed as a suicide, the State tried to build a case against Jensen and the letter weighed on its experts' and medical examiner's view that this was not a suicide but a murder.[31] The investigation revealed that in the days and weeks leading up to her death, Julie's erratic and inexplicable behavior went beyond calling Kosman and leaving a voicemail that her husband was trying to kill her—a voicemail that wouldn't be checked for several days. She'd also told the Wojts and her oldest son's teacher that she feared for her life.[32] In response, each offered her help with a place to stay or money—yet despite being adamant that her life was in danger, she declined every offer of assistance.[33] Julie also had trouble keeping her story straight. As one example, she told the Wojts that Mark was controlling because he insisted she get a job; she told the teacher Mark was controlling because he wouldn't let her get a job.

The investigation also revealed oxalic-acid crystals in Julie's kidneys, these crystals are suggestive of ethylene-glycol poisoning.[34] So specimens were sent to a toxicologist, Dr. Long, for further testing.[35] Three years later, he submitted his findings.[36] His report explained that when consumed, ethylene glycol (antifreeze) initially behaves like alcohol, but the products of metabolism are toxic.[37] Long determined that Julie's stomach had "a

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[30] R.65:3; *Jensen*, 2013 WL 6708767 *1.
[31] *Jensen*, 800 F.3d at 905.
[32] *Id* at 896; R.26–6:8.
[33] R.26–6:10.
[34] R.46–74.
[35] R.28–10:31.
[36] R.46–74.
[37] *Id*.

large concentration of ethylene glycol," demonstrating "an acute ingestion, at or near the time of death."[38] And he concluded that the large amount of ethylene glycol in the stomach contents meant that there were at least two doses, because there had not been time for the final dose to be absorbed.[39] Thus, based on his findings and the letter, he concluded that Julie Jensen's death was a homicide.[40] Days after receiving Dr. Long's report, the State charged Jensen with murder.

It took three years for the State to charge Jensen with his wife's murder, and another six years for the parties to litigate the admissibility of Julie's letter.[41] For simplicity's sake, this brief refers generally to the "letter"; but all of Julie's testimonial statements (including her oral statements to police) were challenged before trial, on appeal, and through the habeas proceedings. During pretrial litigation, the State emphasized that the letter was crucial to its case, calling it "an essential component of the State's case," "highly relevant to the central issues of this case: suicide, motive and fear," and of "extraordinary value."[42]

Relying on *Crawford*, the trial court found that Julie's letter was testimonial hearsay and thus inadmissible.[43] The trial court recognized that the Sixth Amendment protects "against condemnation of an individual by a poison-penned letter."[44] With the exclusion of "this essential component of the State's case," the State sought interlocutory review by

[38] *Id.* at 2.
[39] *Id.*
[40] R.46–74:1–3.
[41] *Jensen,* 800 F.3d at 896-97
[42] R.45–21:22; R.45–11:17–18.
[43] R.45–17.
[44] R.45–22:5.

the Wisconsin Supreme Court, which also analyzed the letter under *Crawford* and *Davis*.[45] In a lengthy brief like this, it is easy to skip over a block quote, but it's worth reading what the Wisconsin Supreme Court had to say about the letter and its testimonial nature:

> Perhaps most tellingly, Julie's letter also resembles Lord Cobham's letter implicating Sir Walter Raleigh of treason as discussed in Crawford. At Raleigh's trial, a prior examination and letter of Cobham implicating Raleigh in treason were read to the jury. Raleigh demanded that Cobham be called to appear, but he was refused. The jury ultimately convicted Raleigh and sentenced him to death. In the Supreme Court's view, it was these types of practices that the Confrontation Clause sought to eliminate. *While Julie's letter is not of a formal nature as Cobham's letter was, it still is testimonial in nature as it clearly implicates Jensen in her murder.* If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe *Crawford* and the Confrontation Clause do not support such a result.[46]

That court rightly deemed the letter testimonial, but held that it could be admitted at trial if Jensen had "forfeited" his confrontation right.[47]

On remand, the trial court held a two-week hearing to decide whether Jensen had caused Julie's absence from trial by killing her.[48] At the hearing, and under the scrutiny of defense experts, the State's medical evidence fell apart.[49] While Long had concluded that Julie's stomach contents were mostly antifreeze, the 660 milliliters of stomach contents (a little more than 22 ounces) actually contained just a half teaspoon of ethylene glycol (0.083 ounces).[50] What Long had characterized as a "large concentration" was, in

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[45] 800 F.3d at 896-97.
[46] *State v. Jensen*, 727 N.W.2d 518, 528 (Wis. S.Ct. 2007) (*Jensen I*) (citation omitted) (emphasis added).
[47] *Id*. at 530–31.
[48] *Jensen*, 2013 WL 6708767 *3.
[49] R.27–4:49–53; R.28–6:68–69.
[50] R.27–4:195.

fact, only 1/276th of the contents.[51] This destroyed the foundation for Long's opinion that the death was a homicide: his notion that Julie couldn't have consumed that large quantity on her own.[52] But basic measurement wasn't Dr. Long's only shortcoming—in another murder prosecution involving ethylene glycol, he had altered evidence by whiting out numbers on the mass spectra.[53]

Despite the lack of medical evidence and various other problems with the State's case, the trial court found by a preponderance of the evidence that Jensen murdered his wife.[54] Commenting on the trial court's forfeiture decision, this Court noted that there "are serious reasons to question this finding."[55] But it was the finding, and under the forfeiture doctrine articulated by the Wisconsin Supreme Court, the letter was admitted.[56]

Not surprisingly given the six years of litigation that the State went through to get the letter into evidence, it was the State's centerpiece at trial. As this Court observed: "[the letter] played a key role in the trial from the outset. The jury first heard about the letter early in the State's opening statement, when it read the letter in its entirety out loud for the jury to hear. The State used Julie's own words from the letter and her statements to Officer Kosman in its opening statement to underscore its themes of fear, motive, and absence of intent to take her own life."[57] And it used the letter in closing, "to argue its

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51 R.28–5:41; R.49–1.

52 *Id.*

53 R.28–5:31–36. In the Missouri case, Patricia Stallings was wrongfully convicted of murdering her infant son with ethylene glycol. See https://en.wikipedia.org/wiki/Patricia_Stallings

54 *Jensen,* 800 F.3d at 897.

55 *Id.* at 897 n.1.

56 *Id.* at 897.

57 *Id.* at 904.

theory of the case, while undermining the defense's suicide theory, because Julie Jensen's unconfronted words established her version of the facts."[58] With the letter and after 30 hours of deliberations, the jury convicted Jensen of homicide.[59]

As the trial neared its end, the Supreme Court granted certiorari in *Giles v. California*, to define the forfeiture-by-wrongdoing exception to the confrontation right.[60] Sensing that *Giles* could mean that "grave constitutional error" occurred at the trial, a week before sentencing the trial judge *sua sponte* decided that the letter was admissible as a dying declaration.[61] Jensen was ultimately sentenced to life imprisonment, without the possibility of parole.[62]

B. **The Wisconsin Court of Appeals, this Court, and the Seventh Circuit all find that the letter is testimonial**.

Several months after Jensen's trial and before he filed his appeal, the Supreme Court in *Giles* ruled that forfeiture only applies if the prosecution proves that the defendant acted with the specific purpose of preventing the witness from testifying.[63] Based on *Giles,* Jensen argued that the letter was wrongfully admitted—there was no evidence he acted with such purpose.[64] On appeal, the State abandoned any claim that the letter was a dying declaration and it did not argue that the letter was not testimonial. In its opinion, the appellate court held that "the statements Julie made to Kosman,

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58 *Jensen,* 2013 WL 6708767, * 10.
59 *Jensen,* 800 F.3d at 898, 905.
60 554 U.S. 353, 376–77 (2008).
61 R.37B:124.
62 *Jensen*, 2013 WL 6708767 at *1.
63 *Giles*, 554 U.S. 353, 359.
64 *State v. Jensen*, 794 N.W.2d 482, 491 (Wis. Ct. App. 2011).

including the letter addressed to the police, are 'testimonial.'"[65] Regarding forfeiture, the court of appeals assumed that based on *Giles*, the trial court applied the wrong standard.[66] Nevertheless, it affirmed the conviction on the ground the letter's admission was harmless.[67]

After the Wisconsin Supreme Court denied review, Jensen petitioned for a writ of habeas corpus. This was in 2011.[68] In the petition, Jensen argued that the letter was testimonial, that he had not forfeited his right to confrontation, and that the letter's presence at trial was not harmless.[69] The State opposed the petition, asserting in its Answer that the letter wasn't testimonial, along with various other procedural defenses.[70] Despite asserting in its Answer that it disputed that the letter qualified as testimonial, in later briefing, the State did not contest the letter's testimonial character.[71] The district court made that plain: "The parties do not dispute that both the letter and Julie Jensen's statements to Officer Kosman were testimonial and that Jensen did not have a prior opportunity to cross-examine her."[72] The district court also ruled that the letter's admission was anything but harmless: "To say that the letter was not a key piece of evidence and to downplay its effect on trial is to create a sterilized, post-hoc rationalization for upholding the result."[73] With that, it granted the writ: "Jensen is

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[65] *Id.* at 492.
[66] *Id.* at 493.
[67] *Id.* at 494–95.
[68] 2013 WL 6708767, *1.
[69] *See* R.50 (brief in support).
[70] R.25:2.
[71] R.57:19.
[72] *Jensen,* 2013 WL6708767 *6.
[73] *Id.* at *16.

therefore ordered released from custody unless, within 90 days of the date of this decision the State initiates proceedings to retry him."[74]

Weeks after the decision was issued, the State filed with the district court a motion to alter judgment under Rule 59(e).[75] In it, the State argued that (for the purpose of affording deference under 28 U.S.C. § 2254(d)(1)) the district court should have considered the last-reasoned decision on the forfeiture ruling to be the state trial court's, not the Wisconsin Court of Appeals'.[76] The State argued that "because no clearly established Supreme Court case extant at the time of the trial court's forfeiture ruling required that the forfeiture-by-wrongdoing exception to the confrontation right include a specific intent to prevent the witness from testifying, Jensen is not entitled to relief on his confrontation claim."[77] In its motion to alter judgment (filed in 2014) the State did not argue that the letter was not testimonial, only that Jensen could not get the benefit of *Giles*.[78] The district court denied the motion and stressed that the "State must therefore decide whether it will appeal the court's ruling *or proceed now to a retrial*." [79]

On appeal, before this Court, the State still didn't argue that the letter wasn't testimonial; instead, it continued to argue that the letter's admission under the forfeiture doctrine should be analyzed without the benefit of *Giles* and that, regardless, it was harmless.[80] This Court rejected both arguments and, in doing so, noted that "[t]he warden

[74] *Id.* at *17.
[75] *Jensen,* 2014 WL 257861, *1.
[76] R.67:2–4.
[77] *Id.* at 9.
[78] *Jensen,* 2014 WL 257861, *3.
[79] *Id.* at *8 (emphasis added).
[80] *Jensen*, 800 F.3d at 897; *see also id.* at 899.

makes no argument that the letter and statements were admissible under *Giles.*"[81] That is, the State made *no* argument that the letter wasn't testimonial or that the forfeiture analysis used by the trial court complied with *Giles.* Ultimately, this Court held that the letter's presence at Jensen's trial had a substantial and injurious effect on the verdict: "No other piece of evidence had the emotional and dramatic impact as did this letter from the grave."[82] Because the letter violated Jensen's confrontation rights and its admission was not harmless, Jensen was entitled to a new trial—without the letter.[83]

In response to the panel opinion, the State moved for rehearing and argued that the Court and the parties had "overlooked the threshold question whether there is any clearly established federal law, as determined by the Supreme Court of the United States, that establishes that an unsolicited letter addressed to the police, lacking any indicia of formality, constitutes a testimonial statement under *Crawford v. Washington*, or post-*Crawford* cases decided before the state appellate court rendered its decision in Jensen's direct appeal."[84] In its brief, the State cited, among other cases, *Bryant*, *Williams,* and *Clark,* decided in 2011, 2012, and 2014, respectively, in claiming that in 2009, the Supreme Court case law did not clearly establish that the letter was testimonial.[85] In about ten pages, those three cases become very important to this appeal, all three of which were decided *before* this Court's decision affirming the writ.

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[81] *Id.* at 899.
[82] *Id.* at 894
[83] *Id.* at 908.
[84] Seventh Circuit Case No. 14–1380, docket 53:7. (citation omitted); R.94–11:38–49 (petition's table of contents)
[85]); R.94–11:38–40 (citing *Michigan v. Bryant*, 562 U.S. 344 (2011); *Williams v. Illinois*, 567 U.S. 50, 56 (2012); *Ohio v. Clark*, 135 S. Ct. 2173, 2178 (2014)).

To be clear, in the petition for rehearing, the State didn't argue that the letter was *not* testimonial; rather, the State's argument was that at the time of the Wisconsin Court of Appeals' decision, the law was not clearly established that the letter *was* testimonial.[86] In fact, in all the years since *Jensen I* (decided in 2007), and through the federal proceedings, although the State recognized that Jensen was only entitled to relief if the statements were testimonial, it had never actually argued that the letter was not testimonial. And for good reason: the trial court and the Wisconsin Supreme Court, both applying *Crawford* (very clearly established precedent), found that the letter *was* testimonial, and both the district court and this Court noted that it was beyond dispute that the letter was testimonial. In the decade since *Jensen I*, the only issue raised by the State was whether the letter could come in under forfeiture or whether its admission at trial was harmless. This Court denied the State's petition for rehearing, and on October 19, 2015 (over two years ago), the mandate issued.[87]

C. The state court vacates Jensen's conviction and he prepares for retrial.

After getting an extension to file a cert petition, the State chose not to press the argument that it had "overlooked" until the petition for rehearing. So the state court vacated Jensen's conviction and scheduled a bond hearing.[88] At the hearing, the newly assigned judge set Jensen's bail at $1.2 million dollars and appointed indigent counsel. Jensen could not post the bond, so he remained in county jail awaiting trial.

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[86] *Id.* at 44–48.
[87] R.79.
[88] R.94–1:1.

Although the State had argued on appeal and in federal proceedings that the letter was insignificant and harmless, the State almost immediately began fighting to get the letter back into evidence. Despite this Court's decision finding that the admission of the letter was constitutional error, at a hearing in May 2016, the State argued that the letter was admissible as a "dying declaration."[89] Recall that the trial judge made this ruling after the first trial and before sentencing, but the State had not defended it on appeal or in the federal courts.

Given the State's position that despite the federal court's orders, it would try to introduce the letter, the defense filed a motion to exclude the letter as a dying declaration.[90] In support, it set out the law and then quoted this Court's opinion that "[u]nder *Giles*, the admission of Julie's letter and statements to the police, none of which were dying declarations, violated the Confrontation Clause and was federal Constitutional error."[91] Days later, the State said it was abandoning the dying-declaration argument.[92]

As the parties prepared for trial, the defense filed a motion to exclude all testimonial statements.[93] This was in November 2016, as the parties prepared for a week of hearings on myriad pretrial motions.[94] When the defense filed its motion, the trial was set for March 2017. Unfortunately, in early December the defense had to seek an

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[89] *Id.* at 07.
[90] *Id.* at 48–55.
[91] *Id.* at 51 (quoting *Jensen*, 800 F.3d at 899)
[92] *Id.* at 18–19.
[93] R.94–3:97–100; R.94–4:1–10
[94] *Id.* at 27 (anticipating a "full week for pretrial motions"); R.94–3:92–100; R.94–4:1–100 (the various motions filed).

adjournment because its expert pathologist had to withdraw.[95] The State had enforced a contract provision that prevented the pathologist from working for the defense.[96] So the defense asked for another six to eight weeks to get a new expert.[97] Over the defense's objection, the court set a new trial date more than nine months out, in September 2017.[98] This was because the State asserted it could not try the case sooner, for a variety of reasons, including the prosecutor's desire to spend time with family throughout the summer.[99]

Then at the end of March—after the original trial date and 17 months after the mandate issued—the State asked the trial judge to revisit the letter's admissibility.[100] It argued that no court since the trial had actually held that the letter was testimonial and that three recent Supreme Court decisions (*Bryant, Clark,* and *Williams*) redefined what constitutes a testimonial statement, such that the letter no longer qualifies.[101] Concerning the first point, it's worth noting that the original trial judge, the Wisconsin Court of Appeals, the Wisconsin Supreme Court, the district court, and this Court had all noted that the letter was testimonial (or that the point was undisputed). Indeed, there would have been no constitutional violation giving rise to relief if the letter was not

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[95] R.94–5:12; *see also* R.94–11:16–17.
[96] R.94–10:96.
[97] *Id.*
[98] *Id.*
[99] *Id.*; R.94–11:19–20.
[100] R.94–5:47.
[101] R.94–5:50 ("the Supreme Court of the United States has substantially narrowed the definition of testimonial"); *see also id.* at 460–61 (*citing Michigan v. Bryant*, 562 U.S. 344 (2011); *Williams v. Illinois,* 567 U.S. 50, 56 (2012); *Ohio v. Clark*, 135 S. Ct. 2173, 2178 (2014)).

testimonial—the *sine qua non* of granting a writ of habeas corpus is, after all, a constitutional violation.

When it came to the State's second argument (that there'd been a ground-shift in Confrontation Clause cases), the three cases cited by the State were all decided *before* this Court's decision affirming the writ. And two of the cases were decided before Jensen filed the opening brief in support of his petition in the district court.[102] So the State could have raised those cases in its original briefing before the district court and this Court—but it didn't. Rather, after asserting in its Answer that the statements weren't testimonial, it never again raised that issue. And when it did cite those same cases in its petition for rehearing, it didn't use them to argue that the letter wasn't testimonial (ergo no constitutional violation); instead, its "overlooked" argument was a far narrower one about application of the "clearly established" standard under § 2254(d)(1).[103]

In response to the defense's argument that this Court's decision was binding, the State argued that the trial court should not focus on what the federal courts had done:

> I only want the Court to follow the current U.S. Supreme Court analysis. So it really doesn't matter what the 7th Circuit said. It really doesn't matter what the Federal District Court said. It doesn't matter even what the Court said in *Jensen II* about the testimonial statement. Because all of them were simply applying as the law of the case the ruling of the Wisconsin Supreme Court.[104]

That is, the State was claiming that the law had changed—*Crawford* was no longer good law. In response to the binding nature of this Court's decision, the State argued that this

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[102] *Bryant* was decided in 2011, *Williams* in 2012, *and Clark* in 2014. Jensen's opening brief in this Court in support of the petition was filed in February 2013. R.50.

[103] R.53:5. (Seventh Circuit Case No. 14–1380)

[104] R.94–9:4.

Court did not have the power to decide for itself whether the letter was testimonial: "the 7th Circuit could not decide what was or was not [a] testimonial statement because that was not decided by the [Wisconsin] Court of Appeals."[105] In essence, the State's position was that the federal courts were precluded from deciding whether there was a constitutional error in the first instance. Ultimately, the trial judge agreed with the State's argument and concluded that the letter was not testimonial and thus admissible.[106]

D. The State argues that since the letter was admissible, there's no point in having a trial.

A month later, the State moved for the trial court to reinstate the verdict. It argued that since the court had ruled that the letter was not testimonial, there had been no constitutional error at Jensen's original trial. Hence, despite this Court's command (not to mention the Supremacy Clause), no trial was necessary. The trial court could simply reinstate the judgment of conviction and all would be well.

As that issue was being briefed, the State went back to federal court and sought clarification of the writ.[107] It asserted that the district court's judgment could be read in two ways: first, that it required the State to merely recommence its prosecution of Jensen without regard to whether the State actually afforded him a trial. Second, the court's order could be interpreted as intending that the proceedings culminate in a jury verdict unless Jensen enters a plea.[108] The State recognized that under the second interpretation, reinstituting Jensen's original judgement from 2008 might not comply with the

[105] R.94–7:38.
[106] R.94–9:72–80.
[107] R.86:3.
[108] R.86:5.

conditional writ.[109] So it wanted clarification to avoid the possibility of a contempt proceeding.

The defense read the State's motion for clarification as a request for an advisory opinion, but also noted that it had been undisputed for years that the letter was testimonial.[110] The defense emphasized that the district court's order denying the State's motion to alter the judgment had been unambiguous: the "State must therefore decide whether it will appeal the court's ruling or proceed now to a retrial."[111] At that point, Jensen's trial was still set for September 25, 2017, and his attorneys were working on a motion for the trial court to reconsider the letter's admissibility. So Jensen could not yet complain that the writ had been violated—the trial was still scheduled and there was still time for the judge to change his mind on the letter. The defense did, however, foreshadow that if Jensen were denied a trial, or had a trial that included the letter, he would ask the district court to make the writ absolute and order him released.[112] The district court granted the State's motion to clarify; at that time, the State was in compliance with the writ since retrial proceedings had been initiated. The district court would not say, however, whether the State would be in contempt if the trial were taken off the calendar because that would amount to an advisory opinion.[113]

Back in state court, and over the defense's vociferous objection, the trial judge adopted the State's view that holding a bond hearing and revisiting the issue of the

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[109] *Id*. at 5-6.
[110] R.87.
[111] *Jensen*, 2014 WL 257861 at *8 (emphasis added).
[112] R.87:11.
[113] R.90:5–6.

letter's admissibility complied with the writ. It then simply reinstated the original judgment of conviction and Jensen's life sentence.[114]

After reimposition of the judgment, Jensen asked the district court to make the conditional writ absolute.[115] He made three arguments. First, the State had not complied with the writ. The constitutional error (the testimonial letter's admission at trial) necessitated a new trial.[116] It did not provide an additional opportunity for the State to argue that the letter wasn't testimonial under some "new" standard.[117] Second, even if the cases cited by the State did have that effect (and they didn't), the State was obligated to seek relief in the federal district court under Rule 60(b), rather than asking the state court to consider the matter.[118] After all, the state court was dealing with a federal judgment dealing with a question of federal law that it had to comply with. Third, Jensen pointed out that he had raised an additional error (besides the *Crawford* claim) in his original habeas petition.[119] The district court had not considered that second issue because it granted relief on the first issue: the letter's admission violated Jensen's Sixth Amendment rights. Consequently, even if the letter could somehow be considered admissible and the State's refusal to file a motion under Rule 60(b) could otherwise be excused, Jensen was entitled to a ruling on the second claim in his habeas petition alleging that judicial bias had prejudiced him.[120]

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[114] *Id.* at 1011–12.
[115] R.93.
[116] *Id.* at 3.
[117] *Id.* at 24.
[118] *Id.* at 22.
[119] *Id.* at 32–34.
[120] *Id.*

After briefing, the district court denied relief.[121] It acknowledged that "[w]hen a State fails to correct the constitutional violation within the time established by the district court, 'the consequence . . . is always release.'"[122] Yet it noted that "[g]iven this uncertainty over whether the parties would need to retry the case, and if they did, how much time they would need to prepare for and complete a new trial, the court deliberately required only the initiation of proceedings for a retrial within the time allowed in order for the State to comply with the writ."[123] Acknowledging that the State could not simply vacate the conviction and then reinstate it, the district court adopted the view that there was a continuum of compliance: "[S]urely, a State cannot claim to have complied with a conditional order for release under § 2254 by vacating the previous judgment, initiating proceedings for a new trial, and then, with no further analysis or development of the record, simply reinstat[e] the same judgment that was the subject of the previous order."[124] Rather, "[t]o be meaningful, a federal court's jurisdiction to determine whether a party has complied with the terms of its order allows, indeed requires, the court to inquire into whether the State's actions *constitute a good faith effort* to comply with the substance, as well as the form, of the court's order, or instead amounts to nothing more than a sham intended to circumvent the federal court's writ."[125] In the district court's view, so long as the proceedings that resulted in Jensen not getting his trial were undertaken in "good faith" with a "unique set of circumstances" the State had

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[121] R.101.
[122] R.101:7 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring)).
[123] *Id.* at 8.
[124] *Id.* at 4.
[125] *Id.* (emphasis added).

complied with the writ.[126] Thus, while the initiated proceedings may not have cured the constitutional violation, the State had acted in good faith and Jensen would have to seek relief in state court before the district court could rule on the letter being readmitted. There is, in fact, no "good faith" standard for judging compliance with a writ—that was an invention of the district court.

Moreover, the district court read this Court's decision in *Hudson v. Lashbrook* as requiring Jensen to again exhaust his state remedies before raising those arguments in federal court.[127] The district court believed that it was up to the Wisconsin courts to determine whether the trial court was free to revisit a question of federal law decided by the federal courts.

> Whether the circuit court was free to revisit the issue at this stage of the proceedings, and if so, whether the letter and related statements are indeed non-testimonial and thus admissible under the Confrontation Clause are, to be sure, important questions that Jensen has every right to challenge. But his challenge to the circuit court's rulings, at least as an initial matter, must be by appeal to the Wisconsin appellate courts.[128]

The district court didn't address the reverse question: whether the State had an obligation to argue that the letter was not testimonial in the habeas proceedings or at the very least file a Rule 60(b) motion in the district court. It did, however, grant a certificate of appealability, and this appeal timely follows.

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[126] R.101:15.
[127] *Id.* at 13.
[128] *Id.* at 13.

SUMMARY OF THE ARGUMENT

Jensen's original habeas petition argued that the letter's use at trial violated the Confrontation Clause. To succeed on that claim, the letter had to both violate the Sixth Amendment and its use at trial had to have a substantial and injurious effect on the verdict. When the federal courts granted Jensen's petition, both points were conclusively established. The writ entitled him to relief that would cure the violation—placing him the position he was before the constitutional violation. That meant the State had to either release Jensen or provide him a trial free of the letter's testimonial statements. Like any federal judgment, the district court maintained jurisdiction over the writ to make sure the State complied.

At first it did: vacating the judgment and holding a bond hearing. But instead of giving Jensen a new trial, without the letter, the State moved (over the defense's strenuous objection) to reintroduce the letter at the new trial—essentially having the state trial court revisit the constitutional issue already decided by the federal courts. There were serious problems with this. First, the state court can't overrule the federal courts on questions of federal law, and two federal courts had already decided that the letter's admission violates the Confrontation Clause. Second, beyond that basic (and dispositive) fact, the State's motion was based on Supreme Court cases rendered before this Court's decision. Thus, the State could have raised them in this Court. And substantively, none of the cases impacted the definition of testimonial. Third, if the State thought that there was a change in the law from cases decided *before* this Court delivered its opinion, it had two choices: petition for cert or file a Rule 60(b) motion. It did neither. Apart from those

steps and in the face of a federal judgment, the lower court (and the State) had one choice—comply: release Jensen or provide him with a trial free of the letter. And since the State chose not to retry Jensen, the district court maintained the power to order him released.

Yet when Jensen moved to enforce the writ, the district court adopted the State's argument that it didn't have jurisdiction. It found that the State had acted in good faith when it revisited whether the statement was testimonial, so Jensen would have to go through another round of exhaustion before presenting his claims to the federal courts. That decision wasn't just contrary to settled procedure, it flipped the standard. Instead, of forcing the state to establish extraordinary circumstances under Rule 60(b), the State complied so long as it "initiated proceedings" and acted in good faith.

But that has never been the standard for judging compliance with a writ—especially not in this Circuit where the law has been clear for twenty years that the district court maintains jurisdiction to judge the State's compliance. If the standard were as the district court conceived it, the granting of a writ would be an empty form of relief, easily frustrated by piecemeal decisions and ever more appeals, all the while Jensen sits in prison waiting for his day in court. Rather, the writ ensures that the constitutional violation will be remedied and that the district court will ensure the State's compliance. Because the State has not complied with the writ and provided Jensen with that new trial, this case should be remanded with instructions for the district court to convert the conditional writ and order Jensen's immediate release from custody.

ARGUMENT

I. The district court should have ordered the State to retry Jensen without the letter to cure the constitutional error and satisfy the conditional writ

Over two years ago, this Court affirmed the district court's finding that Julie Jensen's letter violated Jensen's Sixth Amendment rights: "That the jury improperly heard Julie's voice from the grave in the way it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated."[129] After the mandate issued, Jensen was "ordered released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him."[130] The purpose of a conditional writ like this one is to replace an invalid judgment with a valid one.[131] In this case, that meant either releasing Jensen or providing him with a trial free of the letter.

While the State did initiate proceedings by vacating the judgment and setting bond, it never provided Jensen with the full relief he was entitled to. Instead, it had the trial court revisit the question of whether the letter was testimonial—a question of federal law decided by two federal courts. And after the trial court decided the letter wasn't testimonial (effectively overruling this Court), the State had the judgment of conviction reinstated and Jensen returned to prison. This wasn't a new judgment, but the same one that this Court had already found was infected by constitutional error—doubling Jensen's injury from the letter rather than curing it.

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[129] *Jensen*, 800 F.3d at 908.
[130] *Jensen*, 2013 WL 6708767 at *17.
[131] *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J. concurring).

When Jensen sought to enforce the writ, this Court's decision in *Phifer* provided clear guidance on the district court's jurisdiction over the writ and the procedure for enforcement.[132] When a conditional writ is granted, the district court maintains jurisdiction to judge the State's compliance and if necessary enforce the writ because a new round of exhaustion would be "cumbersome and unnecessarily consumptive of judicial resources" and thus not required.[133] Despite the clarity of this Court's holding in *Phifer* and the universal understanding in other circuits that a "conditional writ of habeas corpus quite clearly involves the supervision of changing conduct or conditions," the district court agreed with the State's argument and held that before it could evaluate the State's refusal to comply with the writ, Jensen would have to seek another round of exhaustion.[134] Yet by its very nature, a writ of habeas corpus is meant to restore a petitioner to his place before the constitutional violation and like any federal judgment a district court has the power to enforce it and make sure that happens. This Court reviews the district court's decision de novo.[135]

A. The purpose of habeas relief is to restore the petitioner to his place before the constitutional violation.

When a federal district court grants a writ of a habeas corpus, it has broad discretion in conditioning a judgment granting relief. Under 28 U.S.C. § 2243, federal

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[132] *Phifer v. Warden, U.S. Penitentiary, Terre Haute, Ind.*, 53 F.3d 859, 860 (7th Cir. 1995).

[133] *Id.* at 865; *see also Gentry v. Deuth,* 456 F.3d 687, 692 (6th Cir. 2006); *Mason v. Mitchell*, 729 F.3d 545, 549 (6th Cir. 2013) (noting "conditional writs 'would be meaningless' if a habeas court could not determine compliance with them and order sanctions accordingly" (quotation omitted)).

[134] *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008).

[135] *Mason*, 729 F.3d at 550 ("We review de novo 'the district court's legal conclusion that the state has complied with the terms of [a conditional] writ.'").

courts are authorized to dispose of matters "as law and justice require."[136] With that power, federal courts can enter a conditional writ, which gives the State "time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release."[137] When a federal court grants a conditional writ, it "represent[s] a district court's holding *that constitutional infirmity justifies petitioner's release*."[138] That is, before a district court enters a conditional writ, there first has to be a constitutional violation that justifies petitioner's release.

When granting a writ of habeas corpus, the judgment that a court enters is like any judgment that a court enters in a civil case.[139] The writ resolves the claims and arguments that were part of the case that prompted the judgment. That is, the judgment contains not just the precise form of relief but the substance of what will (if disputed) later guide any issues related to claim and issue preclusion with the full force of res judicata.[140] In the habeas context, the remedy "is not a compensatory remedy."[141] Instead, it's equitable, and it entitles Jensen to have the State cure the constitutional deficiencies that are holding him in custody.[142] So the granting of the writ establishes two things: one, it sets out that there was a constitutional violation—the one that was raised in the petition and adjudged

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[136] *Hilton v. Braunskill,* 481 U.S. 770, 775 (1987)

[137] *Wilkinson*, 544 U.S. at 87 (Scalia, J. concurring).

[138] *Phifer*, 53 F.3d at 864–65 (emphasis added).

[139] *Braunskill,* 481 U.S. at 776 (recognizing civil in nature);

[140] *Griggs v. United States*, 253 F. App'x 405, 409–10 (5th Cir. 2007); *Gentry v. Duckworth*, 65 F.3d 555, 560 (7th Cir. 1995); *Wilson v. Fullwood*, 772 F. Supp. 2d 246, 264 (D.D.C. 2011); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984) (recognizing that findings in a habeas proceeding can form the basis for collateral estoppel in subsequent litigation).

[141] *Allen v. Duckworth*, 6 F.3d 458, 460 (7th Cir. 1993).

[142] *Id.*; *see also Schlup v. Delo*, 513 U.S. 298, 319 (1995) (noting that the Court has "adhered to the principle that habeas corpus is, at its core, an equitable remedy").

deficient by the federal courts. And two, it sets the remedy: release Jensen or retry him. Either remedy would have filled the goal of the writ and "put [Jensen] back in the position he would have been in if the … [constitutional] violation never occurred."[143]

B. Under *Phifer*, the district court has the authority to require the state court to remedy the constitutional violation or release the petitioner.

After a conditional writ issues, the federal court maintains supervisory power over the writ to ensure that the violation is, in fact, cured.[144] The seminal case in this area is *Phifer*, where this Court rejected the State's argument that absent a second round of exhaustion a district court is incapable of judging a state's compliance with a conditional writ.[145] There, Phifer's habeas petition raised several constitutional challenges to the parole commission's revocation of his parole. The district court found a constitutional violation, declined to consider the other grounds raised, and ordered a new hearing.[146] After the parole commission again revoked Phifer's parole, he moved to enforce the conditional writ claiming that the commission had given him only a partial hearing, rather than the full hearing contemplated by the conditional writ. Like the district court here, the district court in *Phifer* held that it lacked jurisdiction to consider Phifer's claim that the partial-revocation hearing violated the conditional writ—he'd have to go through another round of exhaustion.[147] An analogous but less severe situation to what we have here, where the State provided Jensen with only a particle of the entitled relief.

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[143] *Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003).
[144] *Phifer*, 53 F.3d at 864; *see also Gibbs v. Frank,* 500 F.3d 202, 206 (3d Cir. 2007).
[145] *Phifer*, 53 F.3d at 865.
[146] *Id.* at 861.
[147] *Id.*

On appeal, this Court reversed the district court finding that the court retained jurisdiction to determine whether the government had complied with the terms of the conditional order: because "questions existed concerning the State's compliance with the district court's mandate, proceedings between the parties revived."[148] And that was true even though Phifer had been afforded a new hearing—though not the *full* hearing he was entitled to under the writ. In holding that the district court retained jurisdiction to enforce its writ, this Court recognized that a rule that required a petitioner to file a second habeas claim to assess compliance with the first writ, would be "cumbersome and unnecessarily consumptive of judicial resources."[149] This Court went on to note that even though a hearing had been held, the district court could decide whether it violated the writ because "when a habeas petitioner alleges non-compliance with a conditional order, jurisdiction exists for the purpose of determining whether the state acted in accordance with the Court's mandate."[150]

Phifer should not be confused with situations where the State complies with the conditional writ but something else (other than what prompted the original writ) goes awry.[151] An example of that is *Pitchess v. Davis*, where the Supreme Court addressed a federal district court's attempt to micromanage state court proceedings after granting habeas relief.[152] There, the district court granted habeas relief because the State violated

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[148] *Id*. at 865.
[149] *Id*. at 865.
[150] *Id*. at 865.
[151] *Magwood v. Patterson,* 561 U.S. 320, 323–24 (2010)
[152] 421 U.S. 482 (1975) (per curiam)

Brady by failing to turn over a favorable lab report in a sexual-assault case.[153] The state then provided the lab report and set the case for retrial—the remedy that a trial error demands. As the trial neared, it was discovered that the state had destroyed the physical evidence.[154] That issue was not raised by the original habeas petition.[155] Although the district court maintained jurisdiction to make sure Pitchess received his new trial with the lab report that constituted *Brady* material, the district court went beyond that and entered an order prohibiting a retrial based on the destruction of evidence.[156] The Supreme Court reversed the decision barring of re-prosecution based on the destruction of evidence because that issue hadn't been exhausted in the state courts.[157] Again, that issue (the destruction of evidence) wasn't part of the original writ—only the *Brady* material being available at trial was at issue.

When a district court oversees a conditional writ, *Pitchess* and *Phifer* provide guidance on two of the different scenarios that can arise. *Phifer* illustrates that a new proceeding might not comply with a conditional writ—if that proceeding is inadequate to cure the constitutional infirmity and doesn't replace the invalid judgment with a valid one.[158] That is true even if it results in a new judgment after a new hearing.[159] And when the petitioner challenges the State's compliance, as it relates to the issues resolved by the original writ, then consistent with *Phifer* the federal court maintains jurisdiction—there

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[153] *Id.* at 483
[154] *Id.* at 484.
[155] *Id.* at 484–85.
[156] *Id.* at 485.
[157] *Id.* at 486–87.
[158] *Phifer*, 53 F.3d at 864–65.
[159] *Id.*

is no need to exhaust. While *Pitchess* illustrates that new issues (apart from compliance) that arise out of the conditional writ, are new claims—claims that must be exhausted. The harmony of those two points was best expressed by Justice Thomas when discussing both cases and how if the original error that prompted the writ was allowed to be repeated, it would render the writ worthless:

> Thus, a conditional-release order will not permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court. But neither will a conditional-release order permit a State to hold a prisoner under *a new judgment infected by the same constitutional violation that justified the order's entry in the first place*. Such an interpretation of habeas judgments would render the writ hollow.[160]

And yet that's almost precisely what has happened here. Just that in this case, the State didn't bother with a new judgment; it just reimposed the old one "marred by the same constitutional error" that prompted the original writ.[161]

Here, the State's refusal to comply with the writ and either release Jensen or provide him with a trial free of the letter is not a new claim unrelated to the original writ, but like the claim in *Phifer*, it is the enforcement of the writ. The State's argument and district court's view that vacating the judgment and holding a bond hearing constituted compliance was simply mistaken. Vacating the conviction and holding a bond hearing do not in themselves satisfy the writ's demands. After all, Jensen's habeas petition didn't complain about the bond hearing, but the use of the letter at trial and the life sentence

[160] *Jennings v. Stephens,* 135 S.Ct. 793, 805 (2015) (Thomas, J., dissenting) (emphasis added) (citing *Davis*, 421 U.S. at 490; *Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring); *Castro*, 531 F.3d at 750; *Phifer*, 53 F.3d at 864–865)).

[161] *Patterson v. Haskins,* 470 F.3d 645, 668 (6th Cir. 2006).

he's serving because of the letter's use at trial. Thus, consistent with *Phifer,* the State cannot fail to correct the constitutional violation that prompted the writ and then proclaim sanctuary by reissuing the same judgment—with the same date of conviction—and force Jensen to go through another round of exhaustion to challenge it. The writ would, indeed, be hollow if Jensen had to go through another decade of appeals before the federal courts could enforce its order.

C. *Hudson* recognizes that federal courts can't micromanage state court proceedings after a habeas grant, but that's not this case.

Overlooking the logic laid out above (particularly this Court's very clear holding in *Phifer*), the district court analogized Jensen's case to this Court's recent decision in *Lashbrook v. Hudson* and found that based on it Jensen would have to seek another round of review.[162] In *Hudson,* the district court found that but for trial counsel's ineffective assistance, Hudson would have accepted a plea to twenty years—he was doing life for a murder case.[163] The district court granted the writ, and directed that the State reoffer the original 20-year plea.[164] The state complied. It reoffered the deal, the petitioner accepted, and the parties filed a joint motion to vacate the conviction. But the original trial judge denied the motion, holding that if the plea was initially offered and accepted she would have rejected the plea agreement—based on the petitioner's extensive criminal history.[165]

[162] R.101:13.
[163] 863 F.3d 652, 654 (7th Cir. 2017)
[164] *Id.*
[165] *Id.* at 654

So the petitioner went back to federal court and asked that the district court enforce the order by making the trial court accept the reoffered plea.[166] The district court declined to force the trial judge to accept the plea.[167] It found that it was up to the Illinois courts to define the discretion that a trial judge has to accept a re-offered plea deal under Illinois law.[168] And this court affirmed, noting "whether [the] merits ruling was proper or improper are matters of state law, pending on appeal."[169]

The problem with using *Hudson* as a guide for handling this case is that the relief Hudson was entitled to was, like in any habeas case, limited to the constitutional error he suffered: his inability to accept the plea based on counsel's failure to properly advise him about the plea offer. And so, the writ corrected that by directing the state to re-offer him the plea.[170] But there was no guarantee before the original trial that the judge would accept the plea offer—that's a risk in every case. Likewise, there was no guarantee after the writ was granted that the judge would accept the plea deal. And Hudson was never entitled to the judge accepting the 20-year deal, just that it would be offered, which put him back in the place he would have been without the constitutional violation. Thus, "[o]nce the state reoffered the plea deal, the habeas writ was complied with, and the district court lost jurisdiction over the case."[171]

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[166] *Id.* at 655.
[167] *Id.*
[168] *Id.*
[169] *Id.* at 656.
[170] *Id.* at 654.
[171] *Id.* at 656.

The remedy in *Hudson* was limited to the error: offering a plea deal that could ultimately be rejected. The state judge's ability to accept or reject that plea deal was a matter of her discretion under state law, and so the matter was analogous to *Pitchess*, where the petitioner was seeking relief beyond what had been at issue in the original habeas petition.[172] By the same token, while the violation of Jensen's Sixth Amendment rights in the original trial entitles Jensen to a new trial free of the letter, it does not entitle him to a not guilty verdict at his retrial. Yet, unlike the petitioner in *Hudson*, the letter's admissibility is not a question of state law or a matter entrusted to the trial court's discretion. It is an issue governed by the Constitution, and it is one that has been authoritatively decided by the federal courts—two of them. And the only place to revisit the letter and whether it violates the Sixth Amendment is in federal court.

D. If the State thought there had been a change in the law warranting relief from the judgment, it should have sought relief under Rule 60(b).

Just as the district court maintains jurisdiction to ensure that the writ is complied with, the Rules of Civil Procedure left the State with options if it really thought that this Court's decision was in error, and that based on a change in the law, the letter was not testimonial. In such cases, the Rules of Civil Procedure prescribe a precise course of action: file for relief from judgment under Rule 60(b). Yet the State didn't move under Rule 60(b)—probably because it would have lost. Instead, it asked the state trial court to overrule this Court's decision that the letter violated Jensen's constitutional rights. But

[172] *Id.* at 656 (discussing *Lafler v. Cooper,* 566 U.S. 156, 171 (2012)).

having the state trial court revisit the letter's constitutionality was never a permissible option.

i. **Rule 60(b) was the proper vehicle for seeking relief, not asking the state court to revisit an issue of federal law.**

If the State believed there was a change in the law, the appropriate course was to file a Rule 60(b) motion in the district court: "[T]he district court has the authority to modify a conditional writ in order to give the State more time to cure the constitutional deficiency, but that such modifications are governed by the Habeas Rules and, by incorporation, the Rules of Civil Procedure, including Rule 60."[173] In an extraordinary case, a state might be able to obtain relief as a result of a new Supreme Court case that undercuts a habeas decision—at least one circuit has held as much.[174] That case, *Ritter*, provides a good illustration of not just how the State must honor a federal writ, but also the procedure that should be followed to show compliance. There, the Eleventh Circuit granted a habeas petition, finding Alabama's death penalty statute was unconstitutional.[175] The Supreme Court denied Alabama's cert petition for *Ritter*, but it granted Alabama's petition in a different case raising the identical issue.[176] In the case raising the identical issue as Ritter's, the Supreme Court upheld the constitutionality of Alabama's death penalty expressly disagreeing with the *Ritter* opinion.[177] Given that the

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[173] *Castro*, 531 F.3d at 745.

[174] *See Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987); *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (noting that in some instances the State, rather than the habeas petitioner, may seek to use Rule 60(b) to reopen a habeas judgment).

[175] *Ritter*, 811 F.2d at 1399–1400.

[176] *Id.* at 1400.

[177] *Id.*

Supreme Court had issued an opinion expressly disagreeing with *Ritter*, Alabama filed a motion under Rule 60(b)(6) asking for relief from the judgment.[178]

The Eleventh Circuit held that under "extraordinary circumstances" a change in the law could provide a basis for the trial court to reopen a judgment.[179] The court found those circumstances existed. The nation's highest court had, after all, decided the identical question addressed by the lower court's ruling. But the *Ritter* opinion also emphasized that a change in law in itself is not an "extraordinary circumstance" under Rule 60(b).[180] In fact, courts often have stressed that "a change in decisional law rarely constitutes the 'extraordinary circumstances' required to prevail on a Rule 60(b)(6) motion."[181] So while a Rule 60(b) motion is not a substitute for the cert petition that the State failed to file, it does give a state the vehicle to make an argument about extraordinary circumstances and that is supposed to take place in the district court.

Thus, the State would not be without options if there was a sea change in the law. It could have raised the argument in its response to Jensen's original petition in the district court; it could have raised the argument in its Rule 59(e) motion after the writ was originally granted; it could have raised the argument in its appeal before this Court; it could have raised the argument with its other "overlooked" argument in its petition for rehearing from the panel opinion; it could have raised the argument to the Supreme Court in a cert petition; and it could have raised it in a Rule 60(b) motion to the district

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[178] *Id.*

[179] *Id.* at 1400–01.

[180] *Id.* at 1401 ("Our investigation thus leads us to conclude that something more than a "mere" change in the law is necessary to provide the grounds for Rule 60(b)(6) relief.").

[181] *Stevens v. Miller*, 676 F.3d 62, 68-69 (2d Cir. 2012).

court. The State could have done all those things if it believed that *Bryant, Clark,* and *Williams* did, in fact, overrule *Crawford* but it just couldn't do what it did: make the argument to the state trial court—seventeen months after the mandate returned.

ii. **The State could never prevail under Rule 60(b) because *Crawford* remains good law.**

Even if the State had sought reconsideration under Rule 60(b), it wouldn't have prevailed because "there is no doubt that Jensen's rights under the federal Confrontation Clause were violated."[182] The "watershed cases" that the State cited as grounds for revisiting the issue (*Bryant*, *Williams*, and *Clark*) were all decided before this Court affirmed granting the writ, and they were all cited by the State in its petition for rehearing to this Court, which was denied.

Beyond those foundational points, it's important to note that there is no red flag next to *Crawford* because of those cases.[183] That's probably why the district court didn't say these cases warranted a different result, but merely that they "arguably narrowed" the definition of testimonial—hardly a sea change.[184] And to be clear, they do not undermine the testimonial nature of a letter written by the decedent, to the police, accusing her husband of her murder.[185] *Bryant* and *Clark* simply clarified the test for testimonial statements under specific fact-patterns—in *Clark*, it was statements made by a minor to his preschool teacher, to make sure that he is not abused; and in *Bryant*, the

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[182] *Jensen*, 800 F.3d at 908.

[183] *Richardson v. Griffin,* 866 F.3d 836, 840 (7th Cir. 2017) ("Applying Crawford's holding to the present case, . . . ").

[184] R.101:10.

[185] *See id.* at 841.

statements concerned "an on-going emergency."[186] For its part, *Williams* dealt with how *Crawford* relates to expert testimony concerning DNA evidence.[187] The application of *Crawford* to situations dealing with kindergartners reporting abuse to a teacher, experts testifying about DNA results, or cops responding to an emergency simply do not implicate the testimonial nature of Julie Jensen's letter—a letter that was only a notary's stamp short of matching up on all fours with the affidavit that convicted and condemned Sir Walter Raleigh to death.[188]

What's more, the "primary purpose" analysis that the State claimed was so earth shattering and articulated in those three cases but absent in *Crawford* was actually first pronounced in *Davis v. Washington* decided in 2006—over a year *before* Jensen's trial.[189] And the Wisconsin Supreme Court discussed *Davis* and the primary purpose test when it held that Julie Jensen's oral statements to Officer Kosman were, like her letter to the police, testimonial:

> Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial.[190]

So it strains credulity to argue that the primary-purpose test and the iterations or application of that test in *Bryant, Clark,* and *Williams* would demand the district court to

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[186] *Michigan v. Bryant*, 562 U.S. 344 (2011); *Ohio v. Clark*, 135 S. Ct. 2173, 2178 (2014).

[187] *Williams v. Illinois,* 567 U.S. 50, 56–57 (2012).

[188] *Crawford v. Washington,* 541 U.S. 36, 44 (2004); *see also Williams,* 567 U.S. at 97 (noting how DNA profiles are different from "the Lord Cobham-type affidavits" where the "declarant was essentially an adverse witness making an accusatory, testimonial statement").,

[189] 547 U.S. 813, 822 (2006).

[190] *Jensen I,* 727 N.W.2d at 287–88.

take another look at the letter under Rule 60(b)—let alone support a different finding on whether the letter was testimonial.[191] What's more, under Rule 60(b), "a change in law alone will not suffice"; rather the circumstances must be extraordinary such as they were in *Ritter*.[192]

In sum, even if there was a viable argument that those cases fundamentally altered *Crawford*, that argument could have (and should have) been raised earlier and wasn't. Indeed, the State's Answer to Jensen's petition contended that the letter was not testimonial, but never again did the State argue or brief the issue in federal court. Thus, apart from being waived, if the argument could have been raised in any court (after the mandate issued), it would have had to have been raised in the district court under a Rule 60(b) motion.

E. Failure to take those steps and gain relief from the judgment meant the State had one choice: comply with the federal order.

The State did not take the necessary steps to raise its argument about the "change in the law"; instead, it counseled the trial court that "it really doesn't matter what the 7th Circuit said."[193] But the writ is a federal judgment that the State and the state trial court were obligated to comply with. This Court made that point clear in *Madej v. Briley*, where the federal court ordered Illinois to resentence Madej within 60 days, which it did not do.[194] Instead, the governor commuted his sentence from a capital sentence to life in

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[191] See 11 Wright & Miller, *Federal Practice and Procedure* § 2857 (showing "a good claim or defense" is a precondition of Rule 60(b)(6) relief).

[192] *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015)

[193] Bates 804

[194] *Madej v. Briley*, 371 F.3d 898, 899 (7th Cir. 2004).

prison. Illinois then asked the court to vacate the writ as moot. The district court denied the request, noting that Madej could ask for a sentence as low as 20 years at a new sentencing hearing, so commuting the sentence to life was not the relief contemplated by the writ.[195]

Like the State did in Jensen's case, Illinois argued steps short of curing the defect that prompted the original writ established compliance: the Governor's commutation barred resentencing as a matter of state law.[196] But this Court recognized that "the Constitution supersedes any incompatible state principles."[197] The full remedy for the constitutional shortcoming at his original sentencing was to allow Madej to seek that lower sentence at a new hearing.[198] Relevant to Jensen's case, this Court added: "It is irrelevant that the state believes the order ineffectual. It is for the federal judiciary, not the Attorney General of Illinois, to determine the force of such orders, and even erroneous directives must be obeyed while they are outstanding."[199] *Madej* thus also makes clear that a state cannot deprive a petitioner of relief simply by interposing a new judgment that doesn't remedy the constitutional violation. But here, the State didn't even do that; it just reimposed the old one and shipped Jensen back to prison. As a final note, this Court framed the importance of following federal writs and reminded states of what happens

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[195] *Id.* at 899.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.* at 899–900.

when a federal order is not followed: "Illinois should count itself lucky that the district judge did not hold the warden (or perhaps the prosecutor) in contempt of court."[200]

When it comes to a conditional writ, case law is clear: when the State fails to abide by a court's order, the remedy is (at the very least) to change the conditional writ into an absolute one.[201] The reasoning is that there has been a constitutional violation, and the State has been given an opportunity to cure it. If it refuses to take advantage of that opportunity, the wrongfully imprisoned is entitled to release.[202] That is, in fact, the very essence of habeas relief: "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.'"[203]

And here, the State hasn't complied with the outstanding federal writ. Instead, it has taken its own deliberate and creative steps short of compliance—steps which have not fulfilled this Court's order but frustrated it. And so, after over a decade of litigation over his wife's letter and despite two federal courts agreeing that the letter could not be admitted into evidence and that Jensen is entitled to release, he remains incarcerated. Held in prison by a judgment that was tainted (if not fully driven by) his wife's testimonial statements—statements that he never had the opportunity to confront. The district court's order and this Court's opinion were meant to remedy that with Jensen

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[200] *Id.* at 899.

[201] *Castro,* 531 F.3d at 742; *see also Wolfe v. Clarke,* 718 F.3d 277, 285–88 (4th Cir. 2013)*; Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006) (affirming district court's granting of immediate release upon the State's failure to comply with the conditional writ).

[202] Randy Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.3 ("If the state fails to act within the time set for retrial (or for some other proceeding) to occur, the petitioner must be released from custody immediately.").

[203] *Phifer,* 53 F.3d at 864 (citations omitted) (emphasis added).

either being released or having a trial free of his wife's testimonial statements. Neither of those have happened, and thus the conditional writ which gave the State time to remedy the violation should be made absolute: Jensen should be ordered immediately released from prison.

II. The district court erred when it refused to adjudicate all the claims contained in Jensen's original petition.

When Jensen filed his original petition in 2011, he raised two arguments. The first consumed the lion's share of energy and briefing: whether the letter violated the Sixth Amendment and whether it had a substantial and injurious effect on the verdict. The second claim he raised concerned the bias of the trial judge who oversaw the ten-day forfeiture hearing and found by a preponderance of the evidence that Jensen had killed his wife. The problem with this same judge presiding over the trial was that he already had pre-judged Jensen as guilty. Jensen's original petition argued that it was judicial bias for the same judge to preside over the forfeiture hearing (and make that ruling) as the one who presided over the trial. In its original order granting Jensen's petition, the district court stated that it was not necessary to address Jensen's due process argument regarding judicial bias in light of its finding that the admission of Julie Jensen's testimonial statements was not harmless.[204] When Jensen asked the district court to make the writ absolute and order his release, he alternatively asked that if the court declined to enforce the writ that at the very least it rule on his second claim. And this is the gist of Jensen's second claim:

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[204] R.23:8.

Before trial, the Wisconsin Supreme Court directed the trial court to hold a forfeiture hearing, and there, the trial court found that Jensen had murdered his wife. Thus, he forfeited his confrontation rights. The same judge who conducted the forfeiture hearing then presided over Jensen's murder trial. Because Wisconsin's forfeiture procedure required the trial judge to prejudge Jensen's guilt, Jensen's due process rights were violated. And the denial of his right to an impartial judge is a "structural error," and therefore is not subject to the harmless-error analysis.[205]

The trial court made its finding under the Wisconsin Supreme Court's short-lived and unconstitutional forfeiture standard. When a trial judge forms an opinion about a defendant's guilt before trial, he is no longer impartial.[206] As the Court recognized in *Giles*: a pretrial judicial finding of guilt, "after less than a full trial, mind you, and of course before the jury has pronounced guilt" is "repugnant to our constitutional system of trial by jury."[207] A person's right to be tried by an impartial judge stems from his fundamental right to a fair trial guaranteed by the due-process clause.[208]

Fairness requires not only an absence of actual bias in the trial of cases, but the absence of even the appearance of unfairness.[209] When a judge prejudges the facts that will be presented at trial, that judge is actually biased.[210] In *Franklin*, this Court found that Judge Schroeder (the same judge in Jensen's original trial) was actually biased because

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[205] *See Neder v. United States*, 527 U.S. 1, 8 (1999); *Bracy v. Schomig*, 286 F.3d 406, 411 (7th Cir. 2002).
[206] *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005).
[207] *Giles*, 554 U.S. at 374.
[208] *In re Murchison*, 349 U.S. 133, 136 (1955).
[209] *Id.*
[210] *Franklin*, 398 F.3d at 962.

he had prejudged Franklin's case. In that case, the judge assumed Franklin's guilt in a case still pending before him. This Court determined that "the only inference that can be drawn from the facts of record is that Judge Schroeder decided that Franklin was guilty before he conducted [his] trial. This is a clear violation of Franklin's due process rights."[211]

A pretrial finding of guilt is unconstitutional. In this case, the judge's pretrial finding of guilt was ordered by the Wisconsin Supreme Court under its unconstitutional forfeiture standard, which meant Jensen was tried by a biased judge. Here, any appearance of unfairness was called into question when the trial judge *sua sponte* raised the bond to $1.2 million, and it was completely dispelled when the court found that Jensen had killed his wife, so that the letter could come into evidence. Because Jensen was denied his constitutional right to be tried by an impartial judge, the writ should have been granted on the alternate grounds presented in his original petition and supporting brief.

That claim was made and it was preserved in the district court but not ruled upon. If Jensen were afforded a new trial on the letter, the second claim would be a non-issue because the new trial would have cured the harm Jensen suffered from the judicial bias that ineffected the first trial. But when the district court refused to enforce the writ, Jensen was entitled to have the judicial-bias claim ruled upon. This Court made that point clear in (for the millionth time) *Phifer*. There, this Court held that "[g]ranting a writ but leaving claims unresolved fails to take the possibility of reversal on appeal into account; should

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[211] *Id.*

an appellate court reverse the conditional grant of the writ, a petitioner's remaining claims will have to be addressed."[212] In this case, the district court wasn't just wrong in holding that Jensen would have to exhaust his claim that reinstating the verdict did not comply with the writ, it also erred in deciding that Jensen would have to proceed again in state court before his previously raised and unruled-upon claim concerning judicial bias would have to be exhausted. This Court's precedent is clear: his remaining claims have to be addressed. Thus, at the very least, Jensen is entitled to a remand and a ruling on his judicial-bias claim.

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[212] *Phifer*, 53 F.3d at 863.

CONCLUSION

When this Court affirmed the district court's order granting the writ, the issue seemed settled: after over a decade of fighting, Jensen would finally get a trial that afforded him the rights guaranteed by the Constitution. Yet despite the finality that attaches to federal court decisions, the State didn't honor the writ and ensure that Jensen's constitutional rights would be honored. Instead, it sought to defeat the writ by convincing the trial court that it "really doesn't matter what the 7th Circuit said," then it had the trial court revisit whether the letter was testimonial and finally reinstate the judgment—the same judgment that was judged constitutionally defective. Those steps didn't cure the constitutional error or place Jensen in the same position he would have been without the error. Instead, they doubled his injury and forced him to sit in prison years longer on a conviction that has been determined by two federal courts to violate the Constitution. That should never have happened. After all, the writ was meant to ensure that the constitutional infirmity was remedied, and the district court was empowered to ensure that the State complied with the writ. Thus, in the face of the State's refusal to retry Jensen, this Court must remand this case with instructions that the district court order Jensen immediately released.

Dated this 23rd day of February, 2018.

Respectfully submitted,

Mark Jensen, Petitioner-Appellant

/s/ Craig W. Albee
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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d) (7th Cir.), counsel for the defendant-appellant certifies that all of the materials specified in Circuit Rules 30(a) and 30(b) are included in the appendix to this brief.

Date: February 23, 2018

Craig W. Albee
Counsel for Defendant-Appellant,
Mark Jensen

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), counsel for the defendant-appellant certifies that this brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B), because it contains no more than 14,000 words. Specifically, all portions of this brief other than the disclosure statement, table of contents, table of authorities, and certificates of counsel contain 13,010 words.

Date: February 23, 2018

Craig W. Albee
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Mark Jensen

CERTIFICATE OF SERVICE

Counsel for the petitioner-appellant hereby certifies that on today's date a digital version of this brief was delivered via the Court's CM/ECF system to opposing counsel for the government in this action.

Date: February 23, 2018

Craig W. Albee
Counsel for Defendant-Appellant
Mark Jensen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARK D JENSEN,

Petitioner,

v. Case No. 11-C-803

MARC CLEMENTS,

Respondent.

DECISION AND ORDER DENYING MOTION TO ENFORCE JUDGMENT

This court granted Petitioner Mark D. Jensen's application for a writ of habeas corpus on December 18, 2013, on the ground that the Wisconsin Court of Appeals had unreasonably applied clearly established federal law in deciding that the admission at his state trial of out-of-court statements his deceased wife had made implicating him in her death, though a violation of Jensen's rights under the Confrontation Clause, was harmless error. *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013), ECF No. 65. The court ordered Jensen "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id.* at *17. On appeal, during which the order was stayed, a divided panel of the Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015). Respondent's petitions for reconsideration and en banc review were denied.

After the Seventh Circuit's mandate issued on October 19, 2015 (ECF No. 79), Jensen was returned to the Kenosha County Jail, and the Kenosha County Circuit Court vacated his judgment of conviction on December 29, 2015, and set the matter for a new trial. ECF No 86-1 at 21. In the

proceedings leading up to the trial, the circuit court determined that in light of recent Supreme Court precedent, the statements at issue were not testimonial and their admission at trial did not violate Jensen's Sixth Amendment confrontation right. ECF No. 94-9 at 73–74. The circuit court thereafter determined that its new ruling on Julie's statements, including her letter and reports to police, cured the constitutional defect in Jensen's first trial, and based upon this determination reinstated Jensen's conviction and sentence. ECF No. 94-11 at 11–12, 35–36. This matter now returns to this court on Jensen's motion to enforce judgment, which argues that the State violated this court's order to release or retry Jensen with the series of events that resulted in the reinstatement of his conviction and sentence. ECF No. 93.

There is no dispute that Jensen has the right to challenge the circuit court's ruling that the out-of-court statements of his deceased wife are admissible after all and its decision to enter a judgment of conviction against him for the murder of his wife based on the earlier verdict, both procedurally and on the merits. The question presented by the unusual facts of the case is whether he must first seek review in the appellate courts of the State of Wisconsin before returning to this court for relief under 28 U.S.C. § 2254. For the reasons set forth below, I conclude that he must do so. Jensen's motion will therefore be denied.

BACKGROUND

Earlier orders by this court and the Seventh Circuit recite the history of Jensen's case in great detail, so only a brief summary and discussion of recent procedural developments is necessary here. *See Jensen*, 800 F.3d at 895–98; *Jensen*, 2013 WL 6708767, at *1–5. Julie Jensen was found dead in the Jensens' home on December 3, 1998. *Jensen*, 2013 WL 6708767, at *1. Her death was initially treated as a suicide, but there was no dispute that her death resulted at least in part from

poisoning by ethylene glycol, a chemical used in antifreeze. *Id.* Prosecutors eventually charged her husband, Mark Jensen, with first degree intentional homicide on March 19, 2002. *Id.* at *3. The case against Jensen relied in part upon a sealed letter she had given to neighbors and several statements to police that Julie made in the weeks before her death expressing her fear that her husband was plotting to kill her. *Id.* at *1–2. The admissibility of the letter and statements has been the focal point of litigation in this case over the past fifteen years.

Before Jensen's trial for Julie's murder, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which recast the right protected by the Sixth Amendment's Confrontation Clause. As a result, the circuit court determined that Julie's letter and statements were inadmissible testimonial statements. *Jensen*, 2013 WL 6708767, at *3. The State sought an interlocutory review of that decision, and after granting a bypass petition allowing the case to skip the Wisconsin Court of Appeals, the Wisconsin Supreme Court reversed the circuit court's decision. *State v. Jensen*, 2007 WI 26, ¶ 2, 727 N.W.2d 518. Although the Wisconsin Supreme Court agreed with the circuit court that the statements were testimonial, it adopted a broad "forfeiture by wrongdoing doctrine" and remanded for a hearing to determine whether Jensen had "lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant . . . caused." *Id.* On remand, the Kenosha County Circuit Court conducted a ten-day evidentiary hearing and concluded that Jensen forfeited his confrontation right by killing Julie and therefore causing her absence from trial. *Jensen*, 2013 WL 6708767, at *3. As his defense at the trial that followed, Jensen attempted to show that Julie committed suicide and sought to frame him for her death, but the jury—which saw the letter and Julie's other statements—ultimately convicted Jensen of first-degree intentional homicide. *Id.* at *4–5.

While Jensen's direct appeal to the Wisconsin Court of Appeals was pending, the Supreme Court decided *Giles v. California*, 554 U.S. 353 (2008), which rejected the broad forfeiture by wrongdoing doctrine adopted by the Wisconsin Supreme Court in Jensen's case. Nevertheless, the Wisconsin Court of Appeals affirmed Jensen's conviction on direct review. *State v. Jensen*, 2011 WI App 3, ¶ 1, 794 N.W.2d 482. Assuming, without deciding, that the circuit court erred under *Giles* by admitting the testimonial letter and statements, the court of appeals concluded that any error was harmless beyond a reasonable doubt in light of the weight of the state's evidence and the strength of its case. *Id.* ¶ 35. The Wisconsin Supreme Court denied Jensen's petition for review on June 15, 2011.

On August 24, 2011, Jensen filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and this court issued its decision granting the petition on December 18, 2013. *Jensen*, 2013 WL 6708767. Noting that "[t]he parties [did] not dispute that both the letter and Julie Jensen's statements to [a police officer] were testimonial," this court concluded that those "erroneously admitted testimonial statements had a 'substantial and injurious effect' on the jury's verdict." *Id.* at *6–7, *10 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993)). Because the erroneous admission of the letter and statements therefore was not harmless, the decision by the Wisconsin Court of Appeals constituted an unreasonable application of clearly established federal law. *Id.* at *17. The court issued the following direction with regard to Jensen:

> Jensen is therefore ordered released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him. The Clerk is directed to enter judgment accordingly. In the event Respondent elects to appeal, the judgment will be stayed pending disposition of the appeal.

Id. Respondent appealed, and the Seventh Circuit affirmed, agreeing that "the improperly admitted letter and accusatory statements resulted in actual prejudice to Jensen." *Jensen*, 800 F.3d at 908.

Under this court's order, the 90-day window for the State to release Jensen or initiate proceedings to retry him opened when the Seventh Circuit issued its mandate on October 19, 2015. ECF No. 79.

On December 29, 2015, the Circuit Court of Kenosha County vacated Jensen's judgment of conviction and reopened the case. ECF No. 86-1 at 21. That day, the State also communicated its intent to retry Jensen. *Id.* In anticipation of the new trial, Jensen filed a motion on November 29, 2016, to exclude all of Julie's testimonial statements, including the letter. ECF No. 94-3 at 97. After two rounds of extensive briefing and oral argument on the motion,[1] the circuit court found in July 2017 that Julie's letter and statements to officers were non-testimonial based upon the post-*Crawford* evolution of the meaning of "testimonial" in cases such as *Michigan v. Bryant*, 562 U.S. 344 (2011), and *Ohio v. Clark*, 135 S. Ct. 2173 (2015), both decided after Jensen's first trial. ECF No. 94-9 at 73–74, 96. The circuit court therefore denied Jensen's motion and concluded that the letter and related statements would be admissible at Jensen's new trial. ECF No. 94-9 at 96.

The State took two relevant actions in response the circuit court's decision that Julie's letter and statements would be admissible at Jensen's second trial. First, Respondent filed a motion for clarification in this court on August 10, 2017. ECF No. 86. After explaining recent developments in Jensen's case, Respondent informed this court that the Kenosha County prosecutors intended to move the circuit court to reinstate Jensen's conviction on the grounds that the trial court's recent conclusion that the letter and statements were not testimonial "cure[d] the constitutional error believed to have existed in the first trial." *Id.* at 4. Respondent sought clarification as to whether

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[1] *See* ECF No. 94-3 at 97–100 & ECF No. 94-4 at 1–9 (Jensen's motion); ECF No. 94-5 at 47–89 (State's response); ECF No. 94-6 at 70–100, ECF No. 94-7 at 1–100, & ECF No. 94-8 at 1–45 (first motion hearing); ECF No. 94-8 at 47–71 (Jensen's response brief); ECF No. 94-8 at 75–85 (State's reply); ECF No. 94-8 at 88–89 (Jensen's response letter); ECF No. 94-8 at 90–95 (State's response letter); ECF No. 94-8 at 97–100, ECF No. 94–9 at 1–100, & ECF No. 94-10 at 1–2 (second motion hearing).

reinstatement of Jensen's conviction under these circumstances would comply with this court's order 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 5. This court granted Respondent's motion in an August 18, 2017 order. ECF No. 90. Recognizing that this court possessed continuing jurisdiction to assess Respondent's compliance with the conditional writ of habeas corpus, this court concluded that, because "[t]he State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order[,] . . . Respondent is not required to release Jensen from his custody." *Id.* at 5. The court further observed that because "Jensen is no longer in Respondent's custody, but is being held awaiting trial in the Kenosha County Jail[,] . . . Respondent has no power to release him in any event." *Id.* at 5–6. However, the court declined to offer an opinion "as to whether the circuit court's determination that the challenged statements are non-testimonial is proper and whether Jensen's previous conviction can be constitutionally reinstated without a new trial," recognizing that addressing either would constitute improper issuance of an advisory opinion. *Id.* at 6.

Second, as represented to this court, the State filed a motion in the Kenosha County Circuit Court on August 11, 2017, seeking to reinstate Jensen's judgment of conviction and accompanying life sentence. ECF No. 94-10 at 42–56.[2] The circuit court held a hearing on the motion on September 1, 2017 . *Id.* at 97–100 & ECF No. 94-11 at 1–10. Citing this court's August 18, 2017 order, the circuit court concluded that "it's clear that the State would not be in contempt if there were no trial because the State did, in fact, reinitiate proceedings to try" Jensen. ECF No. 94-11 at 4. The circuit court further found that, as a result of its decision to admit Julie's letter and statements at the upcoming trial, "the evidence in a new trial would be materially the same as in the

[2] *See also* ECF No. 94-10 at 69–77 (Jensen's response); *id.* at 84–94 (State's reply); *id.* at 95–96 (Jensen's response letter).

first trial." *Id.* Questioning the appropriateness of investing court time and resources in holding a duplicate trial, the circuit court granted the State's motion. *Id.* at 5. The circuit court entered the new judgment of conviction and life sentence for Jensen on September 8, 2017. *Id.* at 11–12. A September 18, 2017 written order briefly elaborated on the circuit court's reasoning: "There is no constitutional necessity at this point for proceeding with a new trial for [Jensen] has already been tried to a jury with [the letter and statements] placed before it and has been found guilty." *Id.* at 35–36 (alterations in original) (quoting *Jackson v. Denno*, 378 U.S. 368, 394 (1964)). Returning to this court, Jensen filed his motion to enforce judgment on September 29, 2017. ECF No. 93.

ANALYSIS

A district court that grants a petition for a writ of habeas corpus may nonetheless "delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Consequently, when a district court issues a conditional writ of habeas corpus, the court "retains jurisdiction to determine whether a party has complied with the terms of [the] conditional order." *Phifer v. Warden, U.S. Penitentiary, Terre Haute, Ind.*, 53 F.3d 859, 861 (7th Cir. 1995). When a State fails to correct the constitutional violation within the time established by the district court, "the consequence . . . is always release." *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring). But "[o]nce . . . the habeas writ [is] complied with, . . . the district court [loses] jurisdiction over the case." *Hudson v. Lashbrook*, 863 F.3d 652, 656 (7th Cir. 2017).

Jensen first argues that this court's conditional writ was clear: "if the State failed to retry Jensen without the letter, Jensen was entitled to release." Mot. to Enforce J., ECF No. 93 at 18. But that is not what this court's order said. As the court noted in its Decision and Order Granting

Respondent's Motion for Clarification, the order stated that Jensen was to be "released from custody *unless, within 90 days of the date of this decision, the State initiates proceedings to retry him*." ECF No. 90 at 5 (quoting ECF No. 65 at 33) (emphasis added). Given the complexity and length of the original trial, the court certainly did not expect the State to retry Jensen within 90 days of the effective date of its order. The original trial lasted six weeks and involved experts in toxicology, pathology, and psychiatry. Moreover, cases in which a writ of habeas corpus is issued frequently do not result in a retrial. The parties are often able to reach agreement on a disposition that obviates the need for a new trial. Given this uncertainty over whether the parties would need to retry the case, and if they did, how much time they would need to prepare for and complete a new trial, the court deliberately required only the initiation of proceedings for a retrial within the time allowed in order for the State to comply with the writ. And as the court likewise noted in its clarification order, the State did comply at least with the letter of the court's conditional writ: "The State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order." *Id.* As a result, the court concluded that the State was not required to release Jensen from its custody at that time. *Id.*

The State argues that having already determined that it complied with the letter of the writ by initiating proceedings to retry Jensen, the court no longer has jurisdiction over the original petition: "[W]hen a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter." *Gentry v. Deuth*, 456 F.3d 678, 692 (6th Cir. 2006) (citing *Pitchess v. Davis*, 421 U.S. 482, 490 (1975) (per curiam)). But surely, a State cannot claim to have complied with a conditional order for release under § 2254 by vacating the previous judgment, initiating proceedings for a new trial, and then, with

no further analysis or development of the record, simply reinstating the same judgment that was the subject of the previous order. To be meaningful, a federal court's jurisdiction to determine whether a party has complied with the terms of its order allows, indeed requires, the court to inquire into whether the State's actions constitute a good faith effort to comply with the substance, as well as the form, of the court's order, or instead amounts to nothing more than a sham intended to circumvent the federal court's writ.

Jensen suggests that the State has not acted in good faith. He argues that rather than use the opportunity afforded by the conditional writ to retry him, the State has sought to delay his retrial, defy this court's order, and further violate his constitutional rights. He contends that the State waited seventeen months after the federal mandate before submitting its brief arguing that the letter was not testimonial and never presented the argument to this court pursuant to Rule 60(b)(6). The State then defied this court's ruling, Jensen contends, by duping the trial judge into revisiting the settled issue of whether the letter was testimonial and ruling it admissible. The State then went even further, Jensen argues, and convinced the trial judge to take the unprecedented step of skipping the trial and reinstating his conviction. Mot. to Enforce J., ECF No. 93 at 7, 27.

Jensen overlooks the fact that it was a state court, not the prosecutor or other officer of the executive branch of state government, that ultimately set the trial date, ruled that the letter was non-testimonial after all, and reinstated the judgment of conviction. The State court might have been in error, but to claim that the judge was "duped" and characterize the court's rulings as the State's deliberate defiance of this court's order ignores the lengthy briefing on the issues offered by the parties in the state court proceedings, the independent analysis undertaken by the trial court, and the respect due to state courts and state proceedings. As the Seventh Circuit recently noted in another

habeas case challenging the proceedings in state court following the issuance of a conditional order of release, "State authorities applying their own criminal laws are not marionettes controlled by the federal courts, and the writ of habeas corpus, while a 'great writ,' is not without limit. The writ is directed to the person detaining another: it is not directed at the state government in toto." *Hudson*, 863 F.3d at 655–56.

The circuit court in this case did not lightly undertake the task of revisiting an issue that had been seemingly decided by the Wisconsin Supreme Court more than ten years earlier in the lengthy procedural history of this case. The question of whether the letter and related statements were testimonial under current law was raised by the State in its response to Jensen's motion *in limine* seeking to preclude the State from making any reference to or attempting to admit into evidence in any manner Julie Jensen's letter. The State filed a 100-page brief in response, 26 pages of which argued that under the Supreme Court's more recent decisions in *Bryant* and *Clark*, the letter and related statements to police were not testimonial statements within the meaning of the Confrontation Clause of the Sixth Amendment. ECF No. 94-5 at 48–74. As the State pointed out, it is true that in the years since Jensen's trial, the United States Supreme Court has issued a number of decisions that have arguably narrowed the definition of the kind of "testimonial statements" to which *Crawford* held the Confrontation Clause strictly applies. *Id.* at 52–53.

In *Bryant*, for example, decided three years after Jensen's conviction, the Court held that statements by the mortally wounded victim of a shooting identifying the shooter and location of the shooting in response to questions put to him by police officers dispatched to the place to which he had fled were not testimonial. In reaching this conclusion, the Court noted that "the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements

are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." 562 U.S. at 358. The primary purpose of the police interrogation in that case, the Court observed, was to enable police assistance to meet an ongoing emergency, rather than to gather evidence to prove past events potentially relevant to later criminal prosecution. The Court also commented on the informality of the encounter: "the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*." *Id.* at 366. Based on its consideration of these factors, the Court concluded that the victim's statements to police were not testimonial and that their admission at trial did not violate the Confrontation Clause. *Id.* at 378.

Then in *Ohio v. Clark*, decided more than seven years after Jensen's previous conviction, the Court held that a three-year-old victim's statements to his preschool teachers identifying the defendant as the person who caused his injuries were not testimonial. There the Court again reiterated the importance of the purpose of the interrogation and the formality surrounding it as important factors to consider in determining whether the resulting statement was testimonial. 135 S.Ct. at 2179–80. "In the end," the Court stated, "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2180 (quoting *Bryant*, 562 U.S. at 358). In holding that the child victim's statements were not testimonial, the Court noted that the interrogation was by teachers, not police, and for the purpose of protecting the child from further abuse, not to gather evidence for a prosecution. *Id.* at 2181.

It was in light of these more recent decisions that the State argued Julie's letter and related statements to police prior to her death should not be considered testimonial. The State also argued in its response to Jensen's motion *in limine* that under a well-established exception to the law of the case doctrine, the court could and should revisit the question of whether the letter and related statements were testimonial. ECF No. 94-9 at 74–77. That exception applies when controlling legal authority has arrived at a contrary decision of the law under which an earlier determination was made. *Id.* at 74 (citing *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986), and *White v. Murtho*, 377 F.2d 428, 431–31(5th Cir. 1967)). Only after additional and extensive briefing and argument by both parties did the court render its decision that the law of the case doctrine did not bar the court from revisiting the issue and that, under the more recent decisions of the United States Supreme Court, the letter and related statements to the police were not testimonial and therefore admissible at trial. ECF No. 94-9 at 68–74.

In light of the circuit court's conclusion that the letter and related statements were not testimonial and thus their admission at trial did not violate the Confrontation Clause, the State then moved for reinstatement of the judgment of conviction based on the jury's verdict in the previous trial. "The defendant is not entitled to a new trial," the State argued, "since he has already had a trial by a jury of his peers which was free of constitutional error." Br. in Supp. of Mot. to Reinstate, ECF No. 94-10 at 42. In the State's view, the determination by the federal courts that the Wisconsin Court of Appeals had unreasonably applied clearly established federal law in finding the admission of such evidence harmless error was not dispositive once the circuit court found that admission of the same evidence was not error. Since the original jury trial was not tainted by the erroneous admission of evidence in violation of Jensen's confrontation rights, the State argued that the circuit

court should reinstate the previous judgment of conviction, or alternatively, enter a new judgment of conviction on the jury's verdict. *Id.* at 51. The circuit court agreed and granted the State's motion.

Whether the circuit court was free to revisit the issue at this stage of the proceedings, and if so, whether the letter and related statements are indeed non-testimonial and thus admissible under the Confrontation Clause are, to be sure, important questions that Jensen has every right to challenge. But his challenge to the circuit court's rulings, at least as an initial matter, must be by appeal to the Wisconsin appellate courts. This is because the trial court's reinstatement of the judgment of conviction represents a new state court judgment for purposes of § 2254, and a federal court cannot grant relief from such a judgment "unless it appears . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).

In this respect, the case is similar to *Hudson v. Lashbrook*, 863 F.3d 652 (7th Cir. 2017). There, a federal district court, following *Lafler v. Cooper*, 566 U.S. 156 (2012), held that but for the ineffective assistance provided by his trial attorney, the petitioner would have accepted the State of Illinois' plea offer of twenty years rather than go to trial which, upon conviction, resulted in a mandatory life term. 863 F.3d at 654. Based upon this determination, the federal court ordered the State to reoffer the petitioner the original plea deal of twenty years. In accordance with the federal court's order, the State extended the offer, which the petitioner accepted, and then both parties filed a joint motion to vacate the original conviction and sentence. Noting that she would have rejected the plea agreement based on the petitioner's criminal history even if she was considering it for the first time, however, the state judge refused to accept the agreement and denied the motion. *Id.* The petitioner then returned to the federal district court on a motion to enforce that court's order. The

district court denied the motion on the grounds that the petitioner's state appeal remained pending and that "the Illinois Appellate Court should have the first opportunity to both define *Lafler's* discretionary factors and in deciding how to resentence or treat a reoffered plea, and to determine whether the state trial court operated within the bounds of fair discretion in this case." *Id.* at 655. The Seventh Circuit affirmed, noting that "[o]nce the state reoffered the plea deal, the habeas writ was complied with, and the district court lost jurisdiction over the case." *Id.* at 656. Explaining further, the court noted:

> The state judge, faced with what she thought was also not a case or controversy, declined to opine until, finally, she considered and rejected it. Whether she had jurisdiction, and whether her merits ruling was proper or improper are matters of state law, pending on appeal. And it bears mentioning that at no point was the state judge herself a party before the federal district judge in this case.

Id.

Similarly, in this case, the state trial judge, who was not himself a party before the court, concluded that significant changes in the law concerning a defendant's Sixth Amendment right to confront the witnesses against him allowed him to revisit an issue that the Wisconsin Supreme Court had seemingly decided more than ten years ago when the case first came before it prior to Jensen's trial. Given the state supreme court's determination under then-existing law that the letter and related statements were testimonial, the State shifted to the alternative theory of admissibility—forfeiture by wrongdoing—that the supreme court had approved in the same decision. After the expenditure of much time and effort, the State succeeded in introducing the evidence under that theory, resulting in Jensen's conviction, only to have the broad form of the forfeiture by wrongdoing exception that the Wisconsin Supreme Court had adopted in *Jensen I* rejected by the United States Supreme Court in *Giles*. Whether under this unique set of circumstances the state trial

court had the authority to revisit the issue of whether the letter and related statements were testimonial, as well as whether the court's determination on the merits that they were not, are matters of state and federal law of which Jensen is free to seek review in the Wisconsin Court of appeals. Indeed, it appears that Jensen has already filed a Notice of Intent to Seek Post Conviction Relief from the new judgment of conviction entered against him. *See* Wisconsin Circuit Court Access for Kenosha County Case No. 2002CF000314, at https://wcca.wicourts.gov (last visited Nov. 27, 2017).

The fact that the circuit court characterized its action as "reinstating" the judgment of conviction, as opposed to entering a new judgment of conviction on the original verdict, does not change the result. It remains the case that the original conviction was vacated and the State initiated proceedings for a new trial. Only after the trial court later determined that the letter and statements that were the subject of the previous harmless error analysis were not testimonial under current law and thus lawfully admissible did the court decide that the original trial was free of error and the resulting verdict valid. It thereupon ordered entry of a judgment of conviction upon the verdict rendered after the earlier trial, thereby giving rise to new rights for Jensen to appeal and/or seek post-conviction relief. It is for the Wisconsin appellate courts to determine, at least as an initial matter, whether this procedure is lawful and complies with the Constitution and laws of the United States, as well as those of the State of Wisconsin.

Finally, the court declines Jensen's request to take up the due process judicial bias claim raised in his original petition. This court granted Jensen's original petition based on his harmless error argument, so it was not necessary to address his due process argument at that time. Jensen argued that he was denied due process of law because the judge who adjudicated his trial was no

longer impartial after forming an opinion as to Jensen's guilt as a consequence of the forfeiture hearing ordered by the Wisconsin Supreme Court. As already discussed above, however, Jensen obtained the relief he sought in his original habeas corpus petition: the Kenosha County Circuit Court vacated his tainted judgment of conviction, and the State chose to initiate a new prosecution. The judgment of conviction resulting from that renewed prosecution is the one now before the court, meaning that any remaining objections to Jensen's previous judgment of conviction are moot. To the extent he believes that bias on the part of the previous judge infected the jury trial upon which a different judge entered a new judgment of conviction, he is free to raise that issue in the appellate courts of Wisconsin and, if unsuccessful, seek federal relief pursuant to § 2254.

CONCLUSION

For the reasons set forth above, the court concludes that the State of Wisconsin complied with this court's conditional order when the State initiated a new prosecution after the Kenosha County Circuit Court vacated Jensen's life sentence and judgment of conviction. As a result, the court concludes that it no longer possesses jurisdiction over Jensen's petition. Thus, the State now holds Jensen in custody pursuant to a judgment as to which Jensen has not yet exhausted his state court remedies. Jensen's motion to enforce judgment (ECF No. 95) is therefore **DENIED**.

SO ORDERED this 27th day of November, 2017.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court