

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRELL EWING,

Petitioner,

CASE NO. 2:15-cv-10523

v.

HON. DENISE PAGE HOOD

JEFFREY WOODS,

Respondent.

_____ /

**Answer Opposing Petitioner's Emergency Motion to
Unconditionally Grant Writ for Habeas
Corpus and Brief in Support**

Answer

Respondent, by his attorneys, Dana Nessel, Attorney General for the State of Michigan, and Andrea M. Christensen-Brown, Assistant Attorney General, hereby opposes Petitioner Darrell Ewing's Emergency Motion to Unconditionally Grant a Writ for Habeas Corpus for the reasons stated in the accompanying brief.

Brief in Support of Answer

I. Ewing has not shown that he is entitled to a second writ of habeas corpus. The terms of the original grant of habeas relief have been complied with by the state trial court.

In his motion, Ewing requests that this court enter a second order granting habeas relief because the relief he received violated the “spirit” of the original grant of relief. Not so.

Because habeas corpus is an equitable remedy, federal courts have broad discretion in conditioning a judgment granting habeas relief. *Gilmore v. Bertrand*, 301 F.3d 581, 582 (7th Cir. 2002) (citing *Hilton v. Braunskill*, 481 U.S 770, 775 (1987)). Indeed, conditional writs, like the one issued in this case, “provide states with an opportunity to cure their constitutional errors, out of a proper concern for comity among the co-equal sovereigns.” *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006); *see also Wilkinson v. Dotson*, 544 U.S. 74, 87 (Scalia, J., concurring) ([C]onditional writs “enable habeas courts to give states time to replace an invalid judgment with a valid one[.]”). Here, Respondent, and by extension the State in general, cured the error that occurred in this case by fully complying with this Court’s post-remand grant of a writ of habeas corpus.

To recap, on February 10, 2015, Petitioner Darrell Ewing filed his petition for writ of habeas corpus with this Court. (R. 1, Pet.) Pursuant to this Court's order requiring a responsive pleading (R. 2, Order), Respondent filed his response in opposition to the petition and all relevant Rule 5 materials. (R. 4, Resp. to Pet.; R. 5-1-5-28, Rule 5.)

On November 20, 2019, this Court issued an order conditionally granting Ewing habeas relief; specifically, he was granted a new trial based on a claim of juror misconduct. (R. 8, Op. and Order.) Respondent appealed, arguing that the remedy for such a trial error is a state-court evidentiary hearing to determine what impact, if any, the extrinsic evidence at issue had on the jurors' decision, not a new trial. *See Remmer v. United States*, 347 U.S. 227 (1954). The Sixth Circuit agreed and remanded the case to this Court with instructions to issue the grant premised on the State conducting an evidentiary hearing on the claim of juror misconduct. *Ewing v. Horton*, 914 F.3d 1027, 1034 (6th Cir. 2019).

On April 30, 2019, this Court issued an opinion modifying the original order granting habeas relief. (R. 16, Op. and Order, PgID 3416.) The order required "the State of Michigan to take action to

afford petitioner an evidentiary hearing on his juror misconduct claim in the Wayne County Circuit Court within 120 days of this Court's order[.]” (*Id.*, PgID 3416.)

After some brief delays,¹ the *Remmer* hearing was held over the course of two days in August and September 2019. (See Exhibit A, Ewing Register of Actions, Case No. 10-001495-02-FC.) At that point, and on motion to enlarge the conditional grant period, this Court issued an order granting the Respondent's motion, indicating that because “the State has ‘taken action to afford Petitioner with an evidentiary hearing’” and because “such a hearing has been held, the State has complied with the conditional writ.” (See R. 19, Order Enlarging Conditional Grant Period, PgID 3448.)

Following the issuance of this court's order indicating that the State had complied with the modified grant of habeas relief (R. 16, Op. and Order, PgID 3416), and following the multi-day *Remmer* hearing, the state trial court issued an order granting Ewing a new trial. (See

¹ On Respondent's motion, this Court enlarged the compliance date for the *Remmer* hearing due to unforeseen delays. (See R. 19, Order Enlarging Conditional Grant Period, PgID 3448.)

Exhibit B, 10/24/19 Order Granting Ewing a New Trial, Case No. 10-001495-02-FC.)

Ewing appears to believe that the “spirit” of this Court’s grant of habeas relief was violated when the prosecutor filed an appeal from the trial court’s order granting him a new trial. Nonsense.

This Court’s grant of relief mandated that a *Remmer* hearing be held. (R. 16, Op. and Order, PgID 3416.) After all, an evidentiary hearing is required where a defendant presents a colorable claim of extraneous influence on the jury. *Smith v. Phillips*, 455 U.S. 209, 215, 217 (1982); *Remmer*, 347 U.S. at 229, 230. That is precisely what happened here. The error that occurred in the state court in this case—the denial of a *Remmer* hearing following a judicial misconduct claim supported by prima facie evidence—was remedied the moment the hearing was held. (R. 16, Op. and Order, PgID 3416.) Indeed, this Court held as such. (See R. 19, Order Enlarging Conditional Grant Period, PgID 3448.)

Had the trial court granted a *Remmer* hearing when it should have, prior to any state or federal appeals being taken, and had Ewing been granted a new trial, the State would have had the ability to appeal

that order. The same is true here. That Ewing was granted a new trial as a result of the *Remmer* hearing matters not. This Court's jurisdiction over Ewing's case ended when the hearing was held. *Gentry*, 456 F.3d at 692; *see also D'Ambrosio v. Bagley*, 656 F.3d 378, 382–90 (6th Cir. 2011) (“A federal court retains jurisdiction to determine whether a state has complied with the terms of a conditional order in a habeas case.”). The United States Supreme Court made clear that when 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. *Pitchess v. Davis*, 421 U.S. 482, 490 (1975).

Despite Ewing's terse protestations to the contrary, Ewing was not guaranteed a new trial without objection from the prosecution vis-à-vis this Court's grant of a *Remmer* hearing. *Remmer* is clear—a hearing is the proper remedy—and that is exactly what Ewing received. *Remmer*, 347 U.S. at 229, 230; *Dennis v. United States*, 339 U.S. 162, 171–72 (1950); *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998); (R. 16, Op. and Order, PgID 3416.). Moreover, any argument posited by the Wayne County Prosecutor's Office to the Michigan Court

of Appeals in support of its application for leave to appeal the grant of a new trial is squarely before the state courts and is ripe for adjudication. In the event Ewing disagrees with the outcome of his case, he is more than welcome to utilize the appellate process, and later, file a petition for writ of habeas corpus in the federal court based on that outcome. However, Ewing is not able to seek respite from this Court in the midst of appropriate proceedings taking place in state courts.

In *Gentry v. Death*, as noted above, the Sixth Circuit outlined that when a state meets the terms of the conditional writ (thereby avoiding the writ's actual issuance), the habeas court does not retain any further jurisdiction over the matter. *Gentry*, 456 F.3d at 692; *see also Pitchess*, 421 U.S. at 490. Indeed, such an outcome would divest Michigan courts of the comity that federal habeas requires. *See id.*

For these reasons, Respondent submits that he, and by extension the State, complied with the terms of this Court's conditional writ, severing jurisdiction on the county prosecutor's actions taken after the *Remmer* hearing was held. Additionally, should Ewing disagree with the outcome of his case in the Michigan appellate courts, he is able to

file another petition for writ of habeas corpus in the federal court following exhaustion of his claims.

Accordingly, Respondent respectfully requests that this Court deny Ewing's emergency motion for an unconditional grant of habeas relief.

Conclusion and Relief Requested

Respondent respectfully requests that this Court deny Ewing's emergency motion for an unconditional grant of habeas relief.

Respectfully submitted,

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Dated: July 31, 2020

Certificate of Service

I certify that on July 31, 2020, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

HONORABLE DENISE PAGE-HOOD
MAGISTRATE JUDGE PATRICIA T. MORRIS
PHILLIP D. COMORSKI, ATTORNEY FOR PETITIONER

Respectfully submitted,

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