

Harris v. Thompson

United States Court of Appeals for the Seventh Circuit

February 13, 2013, Submitted; February 20, 2013, Decided

No. 12-1088

Reporter

2013 U.S. App. LEXIS 16715

NICOLE HARRIS, Petitioner-Appellant, v. , Respondent-Appellee.

Prior History: [*1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:10-cv-06257. James B. Zagel, Judge.

[Harris v. Thompson, 698 F.3d 609, 2012 U.S. App. LEXIS 21727 \(7th Cir. Ill., 2012\)](#)

Case Summary

Overview

HOLDINGS: [1]-The appellate court recalled the mandate to the district court to grant a prisoner's habeas petition for the limited purpose of resolving the State's renewed motion to stay the mandate and the inmate's motion for release from custody pending disposition of the State's certiorari petition; [2]-Pursuant to *Fed. R. App. P. 23(c)*, the inmate was entitled to be released on reasonable conditions where the State failed to convince the appellate court that there was a reasonable probability that its decision would be reversed, the inmate was not likely to attempt to flee, and there was uncertainty as to whether the State was likely to convict the inmate in a new trial.

Outcome

Inmate released.

Counsel: For NICOLE HARRIS, Petitioner - Appellant: Alison R. Flaum, Attorney, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Bluhm Legal Clinic, Chicago, IL; Robert R. Stauffer, Attorney, JENNER & BLOCK LLP, Chicago, IL.

SHERYL THOMPSON, Warden, Respondent - Appellee: Erin O'Connell, Attorney, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL.

Judges: Before DANIEL A. MANION, Circuit Judge, MICHAEL S. KANNE, Circuit Judge, DAVID F. HAMILTON, Circuit Judge.

Opinion

ORDER

Last October, we reversed the denial of Nicole Harris's petition for a writ of habeas corpus after concluding that her conviction for murdering her four-year-old son, Jaquari Dancy, should be vacated. [Harris v. Thompson, 698 F.3d 609, 650 \(7th Cir. 2012\)](#). We remanded the case to the district court with instructions to grant a writ of habeas corpus unless the State elects to retry Harris within 120 days after issuance of the mandate. Then, in December, this court denied a motion by respondent Sheryl Thompson (the State) to stay the mandate because the State had failed to show that there is a reasonable probability that [*2] the Supreme Court will grant review of and reverse this court's decision, or that issuance of the mandate would cause it irreparable harm. The mandate issued December 3, 2012, and the State filed a petition for writ of certiorari on January 16, 2013.

Harris now asks for release from custody pending disposition of the State's certiorari petition. See *Fed. R. App. P. 23(c)*. The State opposes this request for relief and renews its request for this court to stay the mandate. The State contends that the issues raised in its petition are likely to succeed in the Supreme Court and that, even if it does not prevail in the Supreme Court, it is likely to convict Harris in a new trial. At the outset, the State questions whether we have jurisdiction to grant release, pointing out that the issuance of our mandate generally returns jurisdiction to the district court. See [Kusay v. United States, 62 F.3d 192, 194 \(7th Cir. 1995\)](#). Because we recall the mandate for the limited purpose of resolving these motions, we need not resolve this question today. Supreme Court precedent and the language of *Fed. R. App. P. 23(c)*, however, suggest that we would have jurisdiction to adjudicate the application for [*3] release even if we did not recall the mandate. See [United States ex rel. Cerullo v. Follette, 396 U.S. 1232, 90 S. Ct. 146, 24 L. Ed. 2d 56 \(1969\)](#) (Harlan, J., in chambers) (finding that petitioner's application for release on bond should have been made first to court of appeals although mandate had already issued). Further, for the reasons that follow, we order that Harris be released and that

the State's deadline for electing to retry Harris be extended until 14 days after the Court denies the petition or, if it is granted, 14 days after the Court issues a final opinion.

Rule 23(c) creates "a presumption of release pending appeal where a petitioner has been granted habeas relief." *O'Brien v. O'Laughlin*, 557 U.S. 1301, 1301, 130 S. Ct. 5, 174 L. Ed. 2d 602 (2009) (Breyer, J., in chambers). In evaluating whether the State can overcome this presumption, we evaluate the same factors we weighed in deciding whether to stay the mandate: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, which, in this context, means that it is reasonably likely that four Justices of [the Supreme Court] will vote to grant the petition for writ of certiorari, and that, if they do so vote, there is a fair prospect that a [*4] majority of the Court will conclude that the decision below was erroneous; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.*

Although this court already rejected the State's contention that it is likely to prevail in the Supreme Court in the earlier order denying the motion to stay the mandate, the State contends that the arguments in its certiorari petition are stronger than the arguments it raised in the stay motion. The petition presents two arguments: (1) that this court's decision impermissibly awarded habeas relief based on a new rule of law by applying the balancing test to a compulsory process claim, and (2) that this court failed to defer to a factual determination by the state appellate court that Harris's other son, six-year-old Diante, was sleeping at the time Jaquari died.

We are not convinced that these arguments create a reasonable probability that the Supreme Court will grant review of and then reverse this court's decision. First, our decision did not create a new rule about witness exclusion but rather [*5] applied the established balancing test required under the Supreme Court's decisions interpreting the Compulsory Process Clause. *Harris*, 698 F.3d at 633-37. Second, we acknowledged in our decision that Diante had told an investigator that he was asleep when his brother died, but explained in some detail why we concluded that this "admission" did not make the exclusion of Diante as a witness harmless. The admission did not undermine the probative value of Diante's unambiguous and consistent reports that he watched his brother wrap the elastic cord around his own neck just before he died and saw a "bubble" form on Jaquari's lips before Jaquari "fell asleep." *Id.* at 629-30.

The balance of other factors also weighs in favor of releasing Harris. As noted in the order denying the State's original

motion to stay the mandate, "the harm to Harris is self-evident: Maintaining the status quo increases the length of time she spends in prison on an unconstitutional conviction obtained by excluding probative evidence of actual innocence." Any harm to the State pales in comparison. The State has not meaningfully contended that Harris is a danger to the community. On the contrary, accounts from friends [*6] and family, and even a prison chaplain and the coordinator of Clinical Services at the Cook County Jail's Female Division speak of Harris as a compassionate and caring person who has been serving as a caregiver in the state prison's hospital, while serving her sentence under minimum security conditions. Although the State argues that she is a flight risk based on the length of her remaining sentence, we disagree. Harris is a lifelong resident of Chicago and her family, including her son Diante, lives here, persuading us that she is not likely to attempt to flee.

We also disagree with the State that it is likely to convict Harris in a new trial. The State emphasizes Harris's videotaped confession and the earlier-discussed "admission" by Diante that he was asleep. But the State will need to prove its case beyond a reasonable doubt, and there are many reasons to doubt the alleged evidence of Harris's guilt. For example, Harris's confession is essentially the only evidence against her, and there are many reasons to question it. When she first supposedly confessed to killing Jaquari, she claimed to have wrapped a phone cord around his neck. All other physical evidence, including the autopsy [*7] report, showed that was undisputably false. Her videotaped confession came only after she stayed overnight in a holding cell and took a polygraph examination with inconclusive results. *Harris*, 698 F.3d at 631-32.

Additionally, the doctor who examined Jaquari's body postmortem initially concluded that the boy's death was accidental, and only *after* learning about Harris's confession from a detective did he revise his opinion to conclude that the death was a homicide. Since this doctor's opinion was the only medical evidence presented, there seems to be a lack of independent medical support for the State's theory. Moreover, of course, as we emphasized in our original opinion, the unconstitutional exclusion of Diante's testimony barred from trial "the most valuable piece of evidence for Harris's defense." *Harris*, 698 F.3d at 638. Although the State focuses on minor inconsistencies in Diante's accounts to different interviewers, a jury is likely to find his recollection of his brother's death from the day after it happened—that Jaquari was playing with an elastic band that got wrapped around his neck—particularly probative, especially since this account was also consistent with his testimony [*8] at the competency hearing.

Finally, the State has raised a reasonable concern about its deadline to retry Harris. This court's earlier ruling on the stay motion noted that the Supreme Court would have "a good deal of time to review the petition," even if the State waited until the deadline to file its petition, and encouraged the State to file the petition sooner. The State nonetheless waited until the deadline, and then Harris was granted an extension of time to file a response by March 21, 2013, less than two weeks before the State's current deadline for electing to retry Harris. Thus, the State says, "the earliest that the Supreme Court may dispose of the petition is April 22, 2013, twenty days *after* the State must elect to retry petitioner." Additionally, the State notes, if the petitioner seeks any additional extension of time, it may be forced to conduct an actual retrial of Harris before the Supreme Court decides whether to review this court's decision. As the order on the stay motion noted, the State should be able to prepare for retrial and Supreme Court review simultaneously. But we do not think it prudent to require the State to begin a retrial before the Supreme Court's [*9] resolution of the certiorari petition. A reasonable resolution of the competing interests here is to release Harris on reasonable conditions while also extending the State's time to decide whether to retry Harris until 14 days after the Court denies the petition or, if it is granted, 14 days after the Court issues a final opinion.

Accordingly,

IT IS ORDERED that the mandate in this appeal is **RECALLED** and **MODIFIED AS FOLLOWS**:

The State's deadline for retrial is extended to 14 days after the Court denies the petition or, if it is granted, 14 days after the Court issues a final opinion.

Pursuant to *Fed. R. App. P. 23(c)*, Nicole Harris is **RELEASED** from prison effective at noon Central Standard Time on Monday, February 25, 2013, and shall be subject to supervision by the United States Probation Office for the Northern District of Illinois on the following conditions:

1. Petitioner Harris must report to the U.S. Probation Office for the Northern District of Illinois, 55 East Monroe Street, Room 1500, Chicago, Illinois, within 72 hours after her release from the Illinois Department of Corrections facility where she is currently housed. She shall continue to report to the Probation Office periodically [*10] as directed by the United States District Court or the Probation Office.
2. The petitioner shall not commit any federal, state, or local crime.
3. The petitioner shall not unlawfully use or possess a

controlled substance. The district court may order periodic drug testing if deemed advisable.

4. The petitioner shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5. The petitioner shall not leave the Northern District of Illinois without the permission of the United States District Court or the Probation Office.

6. The petitioner shall answer truthfully all inquiries by the Probation Office and follow the instructions of the Probation Office.

7. The petitioner shall refrain from excessive use of alcohol.

8. The petitioner shall reside with Karen Collins, 7827 South May Street, Chicago, Illinois, and shall notify the Probation Office at least ten days prior to any change in residence or employment. There shall be no restrictions on the petitioner's contact with Diante Dancy or Sta-Von Dancy.

9. The petitioner shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

10. The petitioner shall not associate [*11] with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the Probation Office.

11. The petitioner shall permit a Probation Officer to visit her at any time at home or elsewhere and shall permit confiscation of any contraband observed in the plain view of the Probation Officer.

12. The petitioner shall notify the Probation Office within 72 hours of being arrested or questioned by a law enforcement officer.

13. The petitioner shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

14. The petitioner shall, as directed by the Probation Office, notify third parties of risks that may be occasioned by her criminal record or personal history or characteristics and shall permit the Probation Office to make such notifications and to confirm the petitioner's compliance with such notification requirement.

The district court shall remain free to hold a hearing to

modify these conditions as that court deems appropriate in the exercise of its sound discretion.

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