No.

IN THE

Supreme Court of the United States

MARK D. JENSEN,

Petitioner,

v.

WILLIAM POLLARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal courts found that his wife's voice-from-the-grave letter violated Jensen's confrontation right and granted his habeas petition, ordering the State to release him or initiate proceedings to retry him within 90 days. The question is whether the State may refuse to retry a successful habeas petitioner, who has established a constitutional trial error, by simply initiating proceedings that do not cure the petitioner's injury with a new trial.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Mark Jensen. Respondent is William Pollard, the warden of the prison where Jensen is imprisoned. No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Jensen respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 924 F.3d 451 (App 1–6). The opinion of the Seventh Circuit denying the petition for rehearing en banc is not reported (App. 7). The opinion of the district court denying enforcement of the writ is reported at 2017 WL 5712690 (App. 8–14). The previous decisions related to the petition include the opinion of the Seventh Circuit affirming the grant of the writ of habeas corpus, which is reported at 800 F.3d 892 (App. 15–36). The district court's opinion granting the writ is reported at 2013 WL 6708767 (App. 37–49). The district court's order denying the State's motion to alter or amend the judgment is reported at 2014 WL 257861 (App. 50–55).

JURISDICTION

The Seventh Circuit issued its decision on May 15, 2019. (App. 1). Petitioner filed a timely petition for rehearing, which was denied on November 6, 2019. (App. 7). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

In 2013, the district court held that the admission of an accusatory letter from Jensen's deceased wife violated the Confrontation Clause, granted the writ of habeas corpus, and ordered Wisconsin to initiate proceedings to retry Jensen within 90 days or release him.[1] In 2015, the Seventh Circuit affirmed.[2] Despite the federal courts' finding of a confrontation violation and an order to retry Jensen, the state trial court revisited the confrontation issue. It then determined (contrary to the federal courts' determination) that the voice-from-the-grave letter was not testimonial and therefore admissible—effectively overruling the federal courts' determination. Its decision rested on three cases decided *before* the Seventh Circuit's decision affirming the writ.[3] The state trial court then reinstated Jensen's murder conviction and life sentence, without a retrial.[4]

Jensen moved to enforce the writ, but the district court held that the State had complied by merely "initiating proceedings."[5] The Seventh Circuit affirmed, reasoning that although the State had rejected the federal court's determination that the letter violated the Confrontation Clause and refused to hold a new trial, the State had complied with the writ: it had "initiated proceedings."[6] The concurring judge noted that reinstating "the very same judgment that the federal courts had found constitutionally infirm," was a "procedural scenario that I believe I have not encountered in my nearly thirty-five years

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[1] *Jensen v. Schwochert,* 2013 WL 257861 (E.D. Wis. 2013).
[2] *Jensen v. Clements,* 800 F.3d 892 (CA7 2015).
[3] R.94–5:50.
[4] *Id.*
[5] *Jensen v. Clements,* 2017 WL 5712690 (E.D. Wis. 2017).
[6] *Jensen v. Pollard,* 924 F.3d 451 (CA7 2019).

on the federal bench."[7] The judge hadn't seen that before because it's well understood that when a constitutional error infects the fairness of a trial and results in a writ of habeas corpus, the remedy is a new trial. The writ's command to "initiate proceedings" was not the relief Jensen sought, nor was it the relief he was entitled to, and it certainly did not limit Jensen's relief. Rather, the phrase "initiate proceedings" was directed at ensuring that the State moved expeditiously (within 90 days) to begin the process of providing him a new trial—the *new trial* being the relief he'd sought and was entitled to under the writ. But that relief hasn't come; instead, it's been over six years since the first federal court held that Jenson is being held in violation of the Constitution.

The state court's reinstatement of the very same conviction that the federal courts found to violate the Constitution was contrary to the writ's purpose because it didn't remedy the error. This Court's law is clear: the writ requires correcting the error that prompted it by replacing the "invalid judgment with a valid one."[8] Instead of demanding that state courts remedy the invalid judgment with a retrial, the Seventh Circuit's decision permits state courts to evade the writ's command through a rigidly literal construction of the writ's language—inviting state courts to flaunt (and effectively overrule) federal judgments. State courts, however, cannot overrule federal courts on questions of federal law: "[A] right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions."[9] Yet by allowing the

[7] *Id.*at 456 (Rovner, J., concurring).
[8] *Jennings v. Stephens*, 135 S.Ct. 793, 799 (2015); *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1251 (2005) (Scalia, J. concurring).
[9] *Deposit Bank of Frankfort v. Bd. of Councilmen of City of Frankfort*, 191 U.S. 499, 517 (1903)

state courts to simply "initiate proceedings," as opposed to actually retrying Jensen, that is precisely what the Seventh Circuit's decision does: it allows the state courts to take away the rights Jensen possesses under the federal court's judgment. Those issues of federalism—the power and effect of a writ—are at the heart of this petition. Here are the facts that undergird those issues.

Two weeks before her death, Julie Jensen wrote a letter to the police, sealed it in an envelope, and gave it to her neighbors, the Wojts, telling them to give it to the police in case something happened to her.[10] Days after writing the letter, Julie called Officer Kosman and left a message: she said her husband was trying to kill her.[11] 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.[12] Days later, when Kosman heard the message, he visited Julie. She told him that if she wound up dead, it was not a suicide; Mark would be her first suspect.[13] Kosman offered to help her leave Mark and find a place to stay, but she declined—she said her emotions were "running wild."[14]

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.[15] Months earlier she had seen Dr. Borman for depression, but her condition had deteriorated.[16] During the visit, Dr. Borman became "very concerned" because Julie was

[10] 800 F.3d at 896
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] R.28-4:13-15.
[15] *Jensen,* 800 F.3d at 906.
[16] R.30-5:17-18.

highly upset, in tears, and "seemed depressed and distraught and almost frantic."[17] She reported being "miserable" and had lost weight.[18] During the visit, she described her worry of being labeled "crazy."[19] 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.[20] 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."[21] 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.[22]

Given Julie's symptoms, Dr. Borman prescribed Paxil, an antidepressant.[23] 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.[24] The day after seeing Dr. Borman, Julie became ill.[25] It started in the early morning hours, and by mid-morning Mark was concerned enough that he went to

[17] *Jensen,* 800 F.3d at 906.
[18] R.30-5:24.
[19] *Id.* at 42.
[20] *Id.*
[21] R.65:8, *Jensen,* 2013 WL 6708767, at *4.
[22] R.30-5:26-27.
[23] *Jensen,* 800 F.3d at 906–07.
[24] R.28–7:39.
[25] *Jensen,* 800 F.3d at 907.

see Dr. Borman.[26] He worried that Julie was suffering from the Paxil's side effects, and Dr. Borman prescribed some additional medicine.[27]

Right after Mark left for Dr. Borman's office, Julie called her next-door neighbor, Margaret Wojt.[28] Julie told Mrs. Wojt that she was not going to see Julie outside that day but not to worry—nothing was wrong.[29] Mrs. Wojt thought that Julie sounded almost like she was drunk.[30] Julie told her that she didn't know the medicine would have such an effect on her.[31] Concerned, Mrs. Wojt offered to help.[32] But during their fifteen-minute conversation, Julie repeatedly refused, reassuring her that Mark was being good to her.[33] He had taken the kids to school and was following up with her doctor.[34]

When Mark came home the following day, he found his wife motionless, 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.[35] 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.[36]

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[26] *Id.*
[27] R.30–5:43–44.
[28] R.27–7:15.
[29] *Id.*
[30] *Id.* at 16.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] R.28–3:6.
[36] *Id.* at 17; *id.* at 28–30.

The next day, the Wojts gave police Julie's sealed letter.[37] In it, Julie told police that she feared her husband was going to kill her and that she would never commit suicide. Although the case was initially viewed as a suicide, the State tried to build a case against Jensen and the letter weighed heavily on its experts' and medical examiner's view that this was not a suicide but a murder.[38] The medical investigation revealed crystals in Julie's kidneys, these are suggestive of ethylene-glycol poisoning.[39] So specimens were sent to a toxicologist, Dr. Long, for further testing.[40] Three years later, he submitted his findings.[41] His report explained that when consumed, ethylene glycol (antifreeze) initially behaves like alcohol, but the products of metabolism are toxic.[42] Long determined that Julie's stomach had "a large concentration of ethylene glycol," demonstrating "an acute ingestion, at or near the time of death."[43] 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.[44] Thus, based on his findings and the letter, he concluded that Julie Jensen's death was a homicide.[45] 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.[46] During

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[37] R.65:3; 2013 WL 6708767 *1.
[38] *Jensen,* 800 F.3d at 905.
[39] R.46–74.
[40] R.28–10:31.
[41] R.46–74.
[42] *Id.*
[43] *Id.* at 2.
[44] *Id.*
[45] R.46–74:1–3.
[46] *Jensen,* 800 F.3d at 896-97

pretrial litigation, the State emphasized that the letter was crucial to its case, calling it "an essential component," "highly relevant to the central issues of this case: suicide, motive and fear," and it was of "extraordinary value."[47] Relying on *Crawford*,[48] the trial court found that Julie's letter was testimonial hearsay and thus inadmissible.[49] The trial court recognized that the Sixth Amendment protects "against condemnation of an individual by a poison-penned letter."[50] With the exclusion of "this essential component of the State's case," the State sought interlocutory review by the Wisconsin Supreme Court.[51] That court deemed the letter testimonial, but held that it could be admitted at trial if Jensen had "forfeited" his confrontation right.[52]

On remand, the trial court held a two-week hearing to decide whether Jensen had caused Julie's absence from trial by killing her.[53] At the hearing, and under the scrutiny of defense experts, the State's medical evidence fell apart.[54] 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).[55] What Long had characterized as a "large concentration" was, in fact, only 1/276th of the contents.[56] This destroyed the foundation for Long's opinion that the death was a homicide: his notion that Julie couldn't have consumed that large

[47] R.45–21:22; R.45–11:17–18.
[48] *Crawford v. Washington*, 451 U.S. 36 (2004).
[49] R.45–17.
[50] R.45–22:5.
[51] 800 F.3d at 896-97.
[52] *Id*. at 530–31.
[53] *Jensen*, 2013 WL 6708767 *3.
[54] R.27–4:49–53; R.28–6:68–69.
[55] R.27–4:195.
[56] R.28–5:41; R.49–1.

quantity on her own.[57] 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.[58]

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.[59] Although the Seventh Circuit would later note that there "are serious reasons to question this finding," it was the finding; and under the forfeiture doctrine articulated by the Wisconsin Supreme Court, the letter was admitted.[60]

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 the Seventh Circuit 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, underscoring its themes of fear, motive, and absence of intent to take her own life."[61] With the letter and after 30 hours of deliberations, the jury convicted Jensen of homicide.[62] He was ultimately sentenced to life imprisonment, without the possibility of parole.[63]

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[57] *Id.*
[58] 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
[59] *Jensen,* 800 F.3d at 897.
[60] *Id.* at 897, n.1.
[61] *Id.* at 904.
[62] *Jensen,* 800 F.3d at 898, 905.
[63] *Jensen,* 2013 WL 6708767 at *1.

A few months after Jensen's trial, this Court decided *Giles v. California*, establishing that the Wisconsin Supreme Court erred in its interpretation of the forfeiture-by-wrongdoing doctrine.[64] On appeal, the Wisconsin appellate court "assumed" that the letter was inadmissible under *Giles*, but found the error harmless.[65] After exhausting his claim that the letter violated his confrontation rights, Jensen headed to federal court with the same argument: the letter is testimonial and its presence at trial violated his Sixth Amendment rights. The district court agreed: the letter was testimonial—a point the State didn't contest—and its admission wasn't harmless. In fact, the district court pointedly criticized the state court's finding of harmlessness as "a sterilized, post-hoc rationalization for upholding the result."[66] So, it granted the writ and ordered the State to either release Jensen or within 90 days "initiate proceedings to retry him."[67] On appeal, the Seventh Circuit affirmed and found that the letter is testimonial and that there is "no doubt that Jensen's rights under the federal Confrontation Clause were violated."[68]

At this point, anyone familiar with habeas law would have expected the case to return to state court for a retrial—unless the State dismissed the case or the parties agreed to a plea bargain. The district court's order requiring the State to either release Jensen or initiate proceedings to retry him within 90 days was consistent with that expectation. And anyone familiar with the case's background (as the district court was) would have understood that the case's complexities forced it to fashion its order this way—it was a

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64 554 U.S. 353, 376–77 (2008).
65 *State v. Jensen*, 794 N.W.2d 482, 491 (Wis.Ct.App.2011).
66 Jensen, 2013 WL 6708767 at *16.
67 *Id.*
68 800 F.3d at 908.

seven week trial loaded with experts on both sides.[69] So while the case couldn't be retried within 90 days, the State couldn't drag its feet in moving the case toward trial.

When Jensen's case returned to state court, the conviction was vacated, a bond hearing was held, and a trial date was set.[70] Those were the natural first steps towards retrying Jensen and fulfilling the writ. And they all conform with what happens when a conviction is invalidated: "the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had taken place."[71] But none of those initial steps are *the relief* ensured by the writ. That is, as the case moves towards a trial, those steps are consistent with the writ, but they are not themselves the relief ensured by the writ: a new trial. That's because the steps don't "correct the constitutional violation found by the court."[72] And correcting the error that prompted the writ is the writ's entire purpose: "to replace an invalid judgment with a valid one."[73] Only a trial would do that.

A full two years after the Seventh Circuit affirmed the writ and as the trial drew near, the State wanted the letter in evidence. It then urged the trial court to revisit whether the letter was testimonial based on three Supreme Court cases it argued narrowed *Crawford*.[74] Of course, Rule 60(b) is the appropriate mechanism for modifying a judgment when there is a change in the law.[75] But the State didn't return to federal court. Instead,

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[69] *Jensen,* 2013 WL 6708767 * 10.
[70] *Jensen,* 2017 WL 5712690 *3
[71] *United States v. Ayers,* 76 U.S. 608, 610 (1869).
[72] *Hilton v. Braunskill,* 481 U.S.770, 775 (1987).
[73] *Wilkinson,* 544 U.S.at 87 (Scalia, J. concurring).
[74] *Jensen*, 2017 WL 5712690 **4–6.
[75] *Ritter v. Smith,* 811 F.3d 1398, 1400 (CA11 1987).

it persuaded the state trial court that the letter could come in under Wisconsin's law-of-the-case doctrine because "it really doesn't matter what the 7th Circuit said. It really doesn't matter what the Federal District Court said."[76] The trial court agreed and then held that since the evidence would be the same at a retrial (with the letter) a trial was unnecessary. And it reinstated the same judgment that the federal courts had found was infected by constitutional error and returned Jensen to prison, for life.[77]

In response, Jensen asked the district court to make the writ absolute.[78] The conditional writ entitled Jensen to release or retrial. And once the federal judgment was in place finding the letter testimonial and that its presence violated Jensen's Sixth Amendment rights, the State couldn't refuse Jensen a new trial. Despite a federal judgment finding that Jensen was being held in violation of the Constitution, the State claimed that under the judgment all it had to do was "initiate proceedings to retry," not actually retry Jensen.[79] That is, the State's position mirrored the question presented here: does a writ of habeas corpus finding a trial violation entitle a petitioner to a new trial.

The district court, however, agreed with the State: it had complied with the writ when it initiated proceedings.[80] The Court went on to note: "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

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[76] R.94–9:4.
[77] *Jensen*, 2017 WL 5712690 **3–4
[78] R.93:18–20
[79] R.99.
[80] *Jensen*, 2017 WL 5712690 *7

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."[81]

On appeal, Jensen again argued that the writ entitled him to a retrial. There had been a violation of his trial rights, and the writ couldn't be fulfilled until he was released or 12 citizens sat in the jury box and determined his guilt or innocence. What's more, the state courts are not free to revise or ignore or defeat a federal judgment by appealing to the State's law-of-the-case doctrine. The panel opinion, however, affirmed, finding that the judgment only provided that the State initiate proceedings.[82] So despite a federal ruling that the letter was testimonial and that Jensen's custody under the state-court judgment violated the Constitution, the State only had to *initiate* proceedings. It did not have to cure the error with a trial, which is the writ's purpose. Requiring the State to "initiate proceedings" within 90 days was not a limit to Jensen's relief but a means to expedite it. Yet instead of using that language to hasten Jensen's relief, the State exploited it to deny him that relief.

The obvious result of the Seventh Circuit's decision is not just a departure from how writs operate—curing the error that prompted it, replacing the invalid judgment with a valid one—it also endorses a true cycle of endless litigation. All the while Jensen remains incarcerated on a judgment that *two* federal courts have found violates the Constitution. He is now entering his fifth year of incarceration *after* the Seventh Circuit affirmed.

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[81] *Id.* at *6.
[82] *Jensen,* 924 F.3d at 453.

I. When a federal court grants a writ in response to a violation of a petitioner's trial rights, the petitioner is entitled to a new trial.

To understand why the Seventh Circuit's decision breaks from the way constitutional errors are cured (after a writ is granted), it's important to flesh out some first principles. Habeas relief is supposed to put the petitioner "back in the position he would have been in if the … [constitutional] violation never occurred."[83] Or in this Court's words: "to replace an invalid judgment with a valid one."[84] So when a petitioner's sentencing hearing is found to violate the constitution, he is entitled "to either release, resentencing, or commutation of his sentence."[85] Or when a petitioner is denied a pre-trial hearing to determine whether his constitutional rights were violated (with, for instance, an involuntary confession), he is entitled to a hearing to decide the issue or release.[86] And when it comes to a trial error, he is entitled to a new trial or release: "[w]here the error warranting relief goes to the offense of conviction and the error is susceptible to correction at a new trial."[87]

When a federal court grants a writ, it's entering a judgment and adjudicating the parties' rights. The judgment defines the prevailing party's rights. In the habeas context, it "is not a compensatory remedy."[88] Instead, it's equitable, and it entitles the petitioner to have the State cure the constitutional deficiencies that are holding him in custody.[89] So

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[83] *Nunes v. Mueller*, 350 F.3d 1045, 1057 (CA9 2003).
[84] *Jennings,* 135 S.Ct. at 799.
[85] *Id.* at 798
[86] *Jackson v. Denno,* 378 U.S. 368, 393 (1964).
[87] Brian R. Means, *Federal Habeas Manual* § 13:31 (2017 Ed.).
[88] *Allen v. Duckworth*, 6 F.3d 458, 460 (CA7 1993).
[89] *Id.*; *see also Schlup v. Delo*, 513 U.S. 298, 319 (1995).

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 by the federal courts. And two, it sets the remedy: release the petitioner or remedy the error, either step fulfills the writ's goal and puts the petitioner "back in the position he would have been in if the … [constitutional] violation never occurred."[90] Consistent with that principle, the substance of Jensen's rights were then contained in the writ. [91] First, he is being held on an invalid judgment (one that violated the Constitution); and second, because of that he is entitled to a new trial.

Once the constitutional violation is found and the writ is granted, the State courts are not free to revisit the issue or do anything other than fulfill the judgment's demands. As this Court has unequivocally held: "[A] right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions."[92] Building on that point, *Wright & Miller* has gone so far as to describe it this way: "[i]t would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts."[93]

Yet that's precisely what the state court did here. It disregarded both the finding that the letter was testimonial and the relief ordered, cloaking its decision in sophistry: it had complied with the writ's demand by "initiating proceedings," even if it disregarded

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[90] *Nunes v. Mueller*, 350 F.3d 1045, 1057 (CA9 2003).
[91] *Griggs v. United States*, 253 F. App'x 405, 409–10 (CA5 2007); *Gentry v. Duckworth*, 65 F.3d 555, 560 (CA7 1995); *Wilson v. Fullwood*, 772 F. Supp. 2d 246, 264 (D.D.C. 2011); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (CA9 1984).
[92] *Deposit Bank of Frankfort*, 191 U.S. at 517.
[93] 18B Wright & Miller, *Federal Practice and Procedure* § 4468.

the finding that the letter was testimonial and hadn't provided Jensen with a new trial. But simply "initiating proceedings to retry" Jensen "within 90 days" wasn't enough under the writ—that language was just setting the time frame for the first, critical step in remedying the constitutional error. And the constitutional trial error can only be remedied through release or retrial. That is, the phrase "initiate proceedings" in the judgment did not stand as the sum of Jensen's rights; rather, it provided the state needed flexibility to get the ball rolling. That's natural. There are, after all, no magic words for a habeas writ. Federal courts routinely enter orders to "commence," "initiate," or "institute proceedings," within a certain time-period.[94] In fact, in the *Davis* case from this Court the original writ provided that the "trial court shall institute proceedings to retry petitioner within 60 days."[95] The right conferred by the writ was not the right to have "proceedings instituted," but to cure the error: release the petitioner or provide him a new trial, expeditiously. And by the same token, the State can't escape providing that new trial by relying on a rigidly literal construction of the writ that creates an absurd result.

This is not, of course, the first time that states have tried to cleverly exploit a writ's language. But until *Jensen,* when states have tried to claim that all they had to do was "decide" or "elect to retry," or "institute proceedings" instead of affording the petitioner a new trial, federal courts have held that's not enough.[96] As one court observed when the State argued that all it needed to under a writ was "elect to retry" and not actually have

[94] *See e.g., Jones v. Basinger*, 635 F.3d 1030, 1056 (CA7 2011) ("elects to retry"); *McManus v. Neal*, 779 F.3d 634, 660 (CA7 2015) ("gives notice of intent to retry").
[95] *Davis v. Pitchess,* 388 F.Supp. 105, 114 (C.D. CA 1975).
[96] *United States ex rel. Owens v. Duncan*, 2015 WL 5950124, *1n.1 (N.D.Ill. 2015).

a trial such a reading of the judgment "would contravene the spirit of the . . . mandate if not the letter, and would set a precedent that would allow the state in future cases to make a 'decision' and then delay implementing that decision for an indefinite period of time."[97] Just as the literal reading "elect to retry" can't trump the object of the writ (to retry), so too here "initiate proceedings to retry" cannot be divorced from the writ's purpose: to retry Jensen. In other words, the writ's verbal formulation was not the substance of Jensen's rights; and the term initiate proceedings was not a limit upon Jensen's relief but a means of expediting it.

Here, the federal courts have held that Jensen's trial did not comply with the Constitution and ordered his release or a new trial; the State hasn't done that. Instead, it has repeated the error that prompted the writ and continues to hold Jensen on an invalid judgment. The absurdity of this was best expressed by Justice Thomas (albeit in a dissent) when discussing 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*.[98]

And yet that's almost precisely what the Seventh Circuit's precedent allows to happen. Under it, the State can re-impose the old judgment, the one "marred by the same

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[97] *Id*.

[98] *Jennings,* 135 S.Ct. at 805 (Thomas, J., dissenting) (emphasis added) (citation omitted).

constitutional error" that prompted the original writ.[99] The only way to avoid that and keep this from being repeated is to grant certiorari and summarily reverse the Seventh Circuit by holding that when a federal court has found that a petitioner's trial rights have been violated, the petitioner is entitled to a new trial.

CONCLUSION

If the Seventh Circuit's opinion stands, the State's clever maneuvering to circumvent the writ and keep a person incarcerated for a half-decade after the writ was granted will be repeated—that much is certain. And it's important that when constitutional violations are found that they are remedied. When they aren't, not only has the writ been rendered "hollow," the courts are subjected to an endless cycle of litigation—having the state courts rule *again* on the issue that habeas relief was granted on. The federal courts found that the letter was testimonial and that it violated Jensen's constitutional rights. That should be the end of the matter. Since the federal courts have found that his wife's voice-from-the-grave letter violated Jensen's confrontation rights, he is entitled to a new trial—the only remedy (apart from release) for a person whose trial rights have been violated.

Respectfully submitted,

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[99] *Patterson v. Haskins,* 470 F.3d 645, 668 (CA6 2006).