

No. 17-

IN THE
Supreme Court of the United States

ROBERT HUDSON,

Petitioner,

v.

JACQUELINE LASHBROOK,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL P. DOSS
BENJAMIN I. FRIEDMAN
SARAH L. BAKKER
1 S. Dearborn Street
Chicago, IL 60603
(202) 736-8000

DANIEL M. GREENFIELD
RODERICK AND SOLANGE
MACARTHUR JUSTICE
CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611

JEFFREY T. GREEN *
MICHAEL B. BUSCHBACHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Petitioner

December 11, 2017

* Counsel of Record

QUESTIONS PRESENTED

1. Whether, after a federal district court grants a conditional writ of habeas corpus, the federal district court has jurisdiction under 28 U.S.C. § 2254 over a habeas petitioner's challenge to the adequacy of the State's remedial proceedings, and whether such challenge must be exhausted under § 2254(b)(2).

2. Whether, consistent with the habeas statutes, a district court can abstain from deciding whether State proceedings in fact remedied a Sixth Amendment violation that the District Court found in issuing a conditional writ of habeas corpus.

**PARTIES TO THE PROCEEDING AND RULE
29.6 STATEMENT**

Petitioner is Robert Hudson, Petitioner-Appellant below. Respondent is the Jacqueline Lashbrook, current warden of Menard Correctional Center, Respondent-Appellee below. Petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PRO- VISIONS INVOLVED	1
STATEMENT OF THE CASE.....	3
A. Petitioner’s Habeas Application And Claim	3
B. The District Court Grants A Conditional Writ Of Habeas Corpus	5
C. State Proceedings Following The Condi- tional Writ of Habeas Corpus.....	6
D. The Federal District Court Abstains From Deciding Whether The State Pro- ceedings Remedied The Sixth Amend- ment Violation.....	8
E. The Seventh Circuit Holds That The District Court Lacked Jurisdiction To Determine If The Sixth Amendment Vio- lation Was Remedied	10

TABLE OF CONTENTS—continued

	Page
REASONS FOR GRANTING THE PETITION...	11
I. THE LAW IS UNSETTLED AS TO WHEN A FEDERAL COURT, FOLLOWING THE ISSUANCE OF A CONDITIONAL WRIT, HAS JURISDICTION TO ENSURE THAT THE STATE CORRECTED THE CON- STITUTIONAL ERROR.....	11
II. SECTION 2254 GOVERNS THE SCOPE OF A FEDERAL HABEAS COURT’S JU- RISDICTION IN THIS CONTEXT, BUT ITS LANGUAGE HAS BEEN IGNORED....	16
A. The Seventh Circuit’s Approach Is Wrong	17
B. The District Court’s Abstention Decision Similarly Cannot Be Squared With § 2254.	20
III. THE QUESTIONS PRESENTED ARE IMPORTANT TO BOTH HUDSON AND THE FEDERAL COURTS	23
CONCLUSION	26
APPENDICES	
APPENDIX A: <i>Robert Hudson v. Jacqueline Lashbrook</i> , 863 F.3D 652 (7th Cir. July 12, 2017) (No. 16-3152).....	2a
APPENDIX B: Memorandum Opinion and Or- der, <i>Robert Hudson v. Kim Butler</i> , No 13 C 00678 (N.D. Ill. July 13, 2016)	10a
APPENDIX C: Judgment, <i>Robert Hudson v. Kim Butler</i> , No. 13 C 00678 (N.D. Ill. July 13, 2016)	53a

TABLE OF CONTENTS—continued

	Page
APPENDIX D: Memorandum Opinion and Order, <i>Robert Hudson v. Rick Harrington</i> , No. 13 C 00678 (N.D. Ill. Aug. 27, 2014)	54a

TABLE OF AUTHORITIES

CASES	Page
<i>In re Bonner</i> , 151 U.S. 242 (1894)	11
<i>Colo. River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976).....	20, 22
<i>Dowd v. U.S. ex rel. Cook</i> , 340 U.S. 206 (1951).....	11
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	16
<i>Eddleman v. McKee</i> , 586 F.3d 409 (6th Cir. 2009)	12, 13, 17
<i>Gall v. Scroggy</i> , 603 F.3d 346 (6th Cir. 2010)	12, 17
<i>Gentry v. Deuth</i> , 456 F.3d 687 (6th Cir. 2006)	18
<i>Gillispie v. Warden, London Corr. Inst.</i> , 771 F.3d 323 (6th Cir. 2014).....	12, 13, 17
<i>Girts v. Yanai</i> , 600 F.3d 576 (6th Cir. 2010)	16
<i>Gonzalez v. Crosby</i> , 545 U.S. 524 (2005).....	18, 19
<i>Hudson v. Lashbrook</i> , 863 F.3d 652 (7th Cir. 2017).....	13
<i>Jennings v. Stephens</i> , 135 S. Ct. 793 (2015).....	13, 19, 24
<i>Levin v. Att’y Registration & Disciplinary Comm’n</i> , 74 F.3d 763 (7th Cir. 1996)	22, 23
<i>Lonchar v. Thomas</i> , 517 U.S. 314 (1996).....	20, 21, 22
<i>Magwood v. Patterson</i> , 561 U.S. 320 (2010).....	17, 19
<i>Mason v. Mitchell</i> , 729 F.3d 545 (6th Cir. 2013)	24
<i>In re Medley</i> , 134 U.S. 160 (1890).....	11

TABLE OF AUTHORITIES—continued

	Page
<i>Mickens-Thomas v. Vaughn</i> , 355 F.3d 294 (3d Cir. 2004).....	13, 15
<i>New Orleans Pub. Serv., Inc. v. Council of New Orleans</i> , 491 U.S. 350 (1989).....	22
<i>People v. Hudson</i> , 2017 IL App (3d) 160225 (2017).....	8
<i>Pitchess v. Davis</i> , 421 U.S. 482 (1975) (per curiam)	12
<i>Rogers v. Richmond</i> , 365 U.S. 534 (1961) ...	11
<i>Wilkinson v. Dotson</i> , 544 U.S. 74 (2005)	24
<i>Wilson v. Sec’y Pa. Dep’t of Corr.</i> , 782 F.3d 110 (3d Cir. 2015).....	15, 16
<i>Wolfe v. Clarke</i> , 718 F.3d 277 (4th Cir. 2013)	13, 15

STATUTES AND REGULATIONS

720 Ill. Comp. Stat. 5/33B-1 (2005)	23
730 Ill. Comp. Stat. Ann. 5/3-6-3	7, 23
28 U.S.C. § 2244	18, 19, 25
28 U.S.C. § 2254	2, 3, 17, 25

OTHER AUTHORITIES

Brian Means, <i>Federal Habeas Manual</i> § 13 (2017)	13, 14, 24
BLACK’S LAW DICTIONARY (10th ed. 2014) ...	18
U.S. Const. amend. VI.....	2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Hudson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 863 F.3d 652, and reprinted in the appendix at 2a-9a. (“Pet. App.”). The opinion of the United States District Court for the Northern District of Illinois denying petitioner’s motion to enforce his writ of habeas corpus is unreported, and is reprinted in the appendix. Pet. App. at 10a-53a. The opinion of the United States District Court for the Northern District of Illinois granting petitioner a conditional writ of habeas corpus is unreported, and is reprinted in the appendix. Pet. App. 54a-79a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 12, 2017. On September 27, 2017, Justice Kagan extended the time for filing this petition for sixty days, until December 9, 2017. Because December 9, 2017 is a Saturday, this petition is due by the next business day, December 11, 2017, under Supreme Court Rule 30. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 and 2241.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act, provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the require-

ment.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(a)-(d).

STATEMENT OF THE CASE

A. Petitioner's Habeas Application And Claim.

In 2005, Petitioner Robert Hudson was convicted of armed robbery and unlawful restraint. Pet. App. at 3a. The trial court sentenced Hudson to a mandatory life sentence without the possibility of parole, as required by the since-repealed Illinois' Habitual Criminal Act, 720 Ill. Comp. Stat. 5/33B-1 (2005). *Id.* After exhausting his State remedies, Hudson filed an application for a writ of habeas corpus under 28 U.S.C.

§ 2254 in federal district court on January 28, 2013. Pet. for a Writ of Habeas Corpus 1-15, *Hudson v. Lashbrook*, No. 16-3152 (7th Cir.), ECF No. 27-3 at 6-20 (“Pet. For Writ of Habeas Corpus”).¹

In that habeas application, Hudson presented a single claim: that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel had failed to advise him during plea negotiations that he faced a mandatory life sentence on conviction. *Id.* In support of this claim, Hudson showed that his trial counsel had misread his criminal history reports, leading the counsel to wrongly advise Hudson that, if convicted, he faced a “sentence of six to sixty years, with a likely sentence of forty-four years (and eligibility for day-for-day credit).” Pet. App. at 11a-12a. In reality, under the then-effective Illinois Habitual Criminal Act, Ill. Comp. Stat. 5/33B-1, Hudson faced a mandatory life sentence without the possibility of parole if convicted on the existing charges. *Id.* at 10a.

In further support of his habeas claim, Hudson’s application asserted that he was prejudiced by his counsel’s ineffective assistance because he had rejected each of the State’s increasingly generous plea offers of twenty years’, eighteen years’, seventeen years’, and sixteen years’ imprisonment thinking (wrongly) that he could be sentenced to as little as six years’ imprisonment on conviction. Pet. for Writ of Habeas Corpus 12-13. As for the appropriate remedy, Hudson’s habeas claim broadly requested that the

¹ The Record on Appeal is included in entries 27 and 28 on the Seventh Circuit’s docket. To the extent documents are not included in Petitioner’s Appendix, this petition refers to their location in the Record on Appeal.

district court “grant petitioner all relief to which he may be entitled.” *Id.* at 19.

B. The District Court Grants A Conditional Writ Of Habeas Corpus.

The district court granted Hudson’s habeas corpus application on August 27, 2014, relying in part on this Court’s decision in *Lafler v. Cooper*, 566 U.S. 156 (2012). Pet. App. at 54a. As required by 28 U.S.C. § 2254(b)(1)(a), the district court determined that Hudson had exhausted all remedies available to him in State court. *Id.* at 62a-63a. The district court then proceeded to evaluate Hudson’s habeas claim, recognizing the deferential review given to State-court decisions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132. *Id.* The district court described Hudson’s application as “raising one claim: the Illinois Appellate Court’s determination that he was not denied effective assistance of counsel was based on an unreasonable determination of the facts in light of the evidence presented and was based on an unreasonable application of clearly established federal law.” *Id.* at 62a.

The district court concluded that, “[e]ven in light of the deferential review given to state-court decisions,” Hudson had established that “his lawyer was ineffective in failing to advise Hudson that, if convicted of the charged offenses, Hudson was subject to a *mandatory* life sentence.” *Id.* at 54a. In particular, the district court found, following 28 U.S.C. § 2254(d)(2) and (e)(1), that Hudson had established, by clear and convincing evidence, that the “heart of the state court’s rational for determining that [Hudson’s trial counsel] performed reasonably” was based on “the court’s unreasonable determination of fact.” *Id.* at 72a. The district court further found, as required by 28 U.S.C. § 2254(d)(1), that the Illinois court “applied

Strickland unreasonably in deciding that Hudson was not deprived of his constitutional right to effective counsel in plea negotiations,” recognizing “[t]he ease with which [trial counsel] could have discovered Hudson’s complete criminal history,” which rendered him subject to a mandatory life sentence on conviction. *Id.* at 70a.

As for prejudice, the district court concluded that “the evidence shows that Hudson would have accepted a plea agreement if he had known he faced a mandatory natural-life sentence,” and that “the State would have made a plea offer to Hudson and the trial court would have accepted such an offer.” *Id.* at 73a, 75a.

Finally, the district court considered the appropriate remedy. Relying on *Lafler*, 566 U.S. 156, the district court issued a conditional writ of habeas corpus, allowing the State an opportunity to avoid Hudson’s release on a writ of habeas corpus by instituting proceedings to remedy the Sixth Amendment violation. In particular, the district court ordered the State prosecutor to reoffer Hudson’s original plea deal of twenty years (*i.e.*, the lengthiest of the plea deals the State had offered) to a new charge that would not trigger mandatory life imprisonment, which plea deal would then be presented to the State trial court. *Id.* at 78a.

The State moved for reconsideration, which the district court denied on February 14, 2015. *Id.* at 15a. The State did not appeal.

C. State Proceedings Following The Conditional Writ Of Habeas Corpus.

Following the district court’s decision, the State prosecutor offered Hudson a plea deal whereby the State would vacate Hudson’s original conviction and

sentence, file a new information charging Hudson with attempted armed robbery, and Hudson would plead guilty to the new charge in exchange for a twenty-year sentence. *Id.* at 15a, 21a. The revised charges avoided application of the Illinois Habitual Criminal Act. Hudson accepted the plea offer. *Id.* at 15a. Under the terms of this twenty-year plea agreement, Hudson would have been eligible for release from custody more than three years ago. See 730 Ill. Comp. Stat. Ann. 5/3-6-3(2) (providing day-for-day good time credit for Illinois inmates).

“[T]he parties [then] appeared before the state court five times over the course of almost a year to present the reoffered plea deal.” Pet. App. at 33a. During these proceedings, the State court repeatedly questioned its jurisdiction to consider the reoffered plea, even up to the final hearing in February 2016. *Id.* at 77a-79a. At the same time, the State trial court denied Hudson’s request to vacate his conviction and sentence, deeming it “both untimely and also an improper means in which to present a proposed disposition.” *Id.* at 21a (internal quotes omitted). The State court also made clear its disagreement with the federal habeas court’s finding that Hudson’s trial counsel was constitutionally ineffective, stating at various points that “[t]he only person who did anything wrong here ... is Mr. Hudson,” that Hudson’s trial counsel were “two of the finest trial lawyers in Will County and anyplace,” *id.* at 37a-38a, and, at the final hearing, that it was “standing by” its prior determination that “Hudson’s counsel was not ineffective,” Hudson’s Motion to Enforce, Ex. V at 21, *Hudson v. Lashbrook*, No. 16-3152 (7th Cir.), ECF No. 28-7 at 52.

The State court ultimately declined to accept any reoffered plea agreement, and offered no alternative

remedy for the Sixth Amendment violation. *Id.* at 53. No new judgment was issued; instead, Hudson’s original conviction and mandatory life sentence were left undisturbed. *Id.*²

D. The Federal District Court Abstains From Deciding Whether The State Proceedings Remedied The Sixth Amendment Violation.

Following the State trial-court’s decision to leave his original judgment and sentence undisturbed, Hudson returned to the federal habeas court on a motion to enforce the “habeas decision by ordering Hudson’s immediate release from the Illinois Department of Corrections.” *Id.* at 11a. Hudson argued that the State proceedings had provided no remedy for the Sixth Amendment violation found by the district court, leaving the unconstitutional judgment intact, and thus he should be granted immediate release by writ of habeas corpus. Mem. In Support of Motion to Enforce at 16, *Hudson v. Lashbrook*, No. 16-3152 (7th Cir.), ECF No. 28-1 at 27. Hudson’s motion was based on the same habeas application and claim previously

² Hudson appealed from the State trial court’s decision and, on November 21, 2017, the Appellate Court of Illinois issued an opinion reversing the trial court. *People v. Hudson*, 2017 IL App (3d) 160225 (2017). The court held that the trial court’s discretion under the federal habeas order “did not extend to rejecting a plea to a charge that did not trigger a mandatory life sentence,” and remanded the case “with directions to accept the plea to the Class 1 felony and resentence accordingly.” *Id.* at ¶ 16. The period for seeking rehearing or further review from that decision from the Illinois Supreme Court has not yet expired. This Illinois Appellate Court decision, even if not challenged by the State, does not moot Hudson’s petition because it does not provide the relief that Hudson sought in returning to the federal habeas court: vacation of the unconstitutional judgment and release from prison by writ of habeas corpus.

presented to the district court under 28 U.S.C. § 2254, that is, that he was in custody under the same judgment and sentence that arose from a violation of his Sixth Amendment rights.

On July 13, 2016, almost two years after its original order granting Hudson’s habeas application, the district court denied Hudson’s enforcement motion. Pet. App. at 52a. In denying the motion, the federal district court found that, although the State proceedings amounted to an “almost . . . an outright rejection of *Lafler* and the habeas opinion,” it would decline to reach the question whether these proceedings remedied the Sixth Amendment violation found by its original habeas order. *Id.* at 33a, 38a n.3. Instead, the district court concluded that, “Hudson must first pursue a state appeal of the [trial court’s] rejection of the twenty-year plea deal,” and, “[i]f, at the end of the state appellate process, Hudson still does not receive his requested relief, then he may file another habeas petition to argue that the federal constitutional remedy was not properly effectuated, and that he thus is in custody in violation of the Constitution.” *Id.* at 44a.

In issuing this ruling, the district court recognized it had “little guidance” from case law, and that “[r]easonable jurists” could debate “the correct next procedural step.” *Id.* at 40a, 52a. The district court offered three considerations in support of its ruling. First, the court read *Lafler v. Cooper*, as “emphasiz[ing] the role of the state-court system in implementing a remedy.” *Id.* at 40a. Second, the court reasoned that its ruling was supported by principles of federalism and comity, citing the *Rooker-Feldman* doctrine. *Id.* at 43a (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923)). Third, the district court cited the *Younger* abstention doctrine, which “prevents federal court interference with ongoing

state criminal proceedings.” *Id.* (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971)). Notably, the court did not rely on the language of 28 U.S.C. § 2254, or contend that Hudson’s motion should be considered a separate habeas application or claim requiring exhaustion under § 2254(b)(1)(A).

“In view of the complexity of the issues,” the federal district court granted Hudson a certificate of appealability under 28 U.S.C. § 2253(c). *Id.* at 52a. Though perhaps not required, the district court entered final judgment under Rule 58(a) “to ensure appealability.” *Id.*

E. The Seventh Circuit Holds That The District Court Lacked Jurisdiction To Determine If The Sixth Amendment Violation Was Remedied.

Hudson appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit dismissed the case “for lack of jurisdiction,” characterizing “Hudson’s return to federal court *not* as a continuation of his prior habeas case . . . but as a new habeas case.” Pet. App. 6a, 8a. The Seventh Circuit held that, as a “new habeas case,” Hudson was once again required to exhaust “his state remedies,” and “[u]pon exhaustion . . . Mr. Hudson undoubtedly has a new habeas claim he can file.” *Id.* at 8a n.2. Remarkably, although Hudson’s habeas application, and subsequent motion, sought release from an unconstitutional judgment, the Seventh Circuit asserted that Hudson “had received all the relief requested.” *Id.* at 8a.

The Seventh Circuit made no reference to the language of 28 U.S.C. § 2254 and did not explain how Hudson’s motion seeking a remedy for the Sixth Amendment violation previously found by the habeas court constituted a new habeas “application” or

“claim” under section 2254. Instead, the Seventh Circuit asserted 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 7a-8a.

REASONS FOR GRANTING THE PETITION

I. THE LAW IS UNSETTLED AS TO WHEN A FEDERAL COURT, FOLLOWING THE ISSUANCE OF A CONDITIONAL WRIT, HAS JURISDICTION TO ENSURE THAT THE STATE CORRECTED THE CONSTITUTIONAL ERROR.

The core remedy in habeas proceedings is to order a prisoner’s release from custody that stems from an unconstitutional judgment. See, e.g., *In re Medley*, 134 U.S. 160, 173-74 (1890) (“[U]nder the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary.”). This Court has long recognized, however, federal court authority to delay a petitioner’s release to allow States the opportunity to remedy the constitutional error that led to the writ’s issuance.³ Despite the long-standing use of such “conditional writs,” this Court has never weighed-in on the issue at the heart of this petition: Whether, after a conditional writ issues, a federal habeas court’s jurisdiction to review follow-on State proceedings is governed by terms of the order granting a conditional writ or by 28 U.S.C. § 2254. Without guidance from this Court, the lower courts have developed two different approaches. This Court should grant the peti-

³ *Rogers v. Richmond*, 365 U.S. 534, 549 (1961); *Dowd v. U.S. ex rel. Cook*, 340 U.S. 206, 209-10 (1951); *In re Bonner*, 151 U.S. 242, 261 (1894).

tion to provide much needed guidance on this fundamental—and, oft-recurring—jurisdictional question.⁴

One approach, as exemplified by decisions from the Sixth Circuit, holds that federal habeas courts retain jurisdiction under § 2254 until the petitioner is free from the unconstitutional judgment identified by the district court, regardless of the particular terms of the habeas court’s conditional release order. In *Gillispie v. Warden, London Corr. Inst.*, 771 F.3d 323 (6th Cir. 2014), for example, the court recognized that “§ 2254, and not a district court’s own conditional-writ orders, defines the limits of the court’s habeas jurisdiction,” and “§ 2254 empowers the district court to achieve a single end: to terminate the petitioner’s unconstitutional custody.” *Id.* at 329. Similarly, in *Gall v. Scroggy*, 603 F.3d 346 (6th Cir. 2010), the court held that “[t]he federal court retains jurisdiction to afford . . . relief *until the unconstitutional judgment is gone*.” *Id.* at 353 (emphasis added). These decisions rely on an earlier Sixth Circuit decision in *Eddleman v. McKee*, 586 F.3d 409 (6th Cir. 2009). In

⁴ In one pre-AEDPA case, *Pitchess v. Davis*, 421 U.S. 482, 490 (1975) (per curiam), the Court held that a habeas petitioner, after being awarded a conditional writ, could not return to the federal habeas court in order to present a new constitutional claim without first exhausting that claim through the State courts. In *Pitchess*, the petitioner’s original conviction had been vacated following the conditional writ, and the State was about to initiate a new trial, when the petitioner sought to return to the federal habeas court to present a new complaint that the State had destroyed certain evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This Court (per curiam) ruled that the federal court had no authority to review such a new habeas claim until petitioner had exhausted his State remedies on this claim under the Court’s then-effective exhaustion doctrine. *Id.* at 487-488.

Eddleman, the court had “conditionally granted the writ,” ordering the petitioner’s release unless the State granted him a new trial “within a reasonable period.” *Id.* at 411. The State chose instead to vacate petitioner’s original conviction and re-arrest him for the same charge, thus beginning criminal proceedings anew. *Id.* at 412. When petitioner returned to federal court to complain that he was not being retried “within a reasonable period,” the Sixth Circuit held that the federal habeas court lacked jurisdiction, because “once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254.” *Id.* at 413. In other words, the federal court’s jurisdiction was not tied to the particular language of the order granting the conditional writ, but rather was governed by § 2254, which vests courts with jurisdiction over applications “in behalf of a person in custody *pursuant to the judgment* of a State court”—that is, until “the unconstitutional judgment is gone.” *Id.* at 413; see also *Jennings v. Stephens*, 135 S. Ct. 793, 804 (2015) (Thomas, J., dissenting) (“A habeas petitioner’s rights under the conditional-release order are . . . defined by the violation that justified its entry, not by the wording of the order.”); *Gillispie*, 711 F.3d at 328 (“Here, Gillispie’s criminal judgment was gone by November 7, 2012 . . . which means that, per the plain terms of *Eddleman*, the district court’s jurisdiction over Gillispie’s [habeas] case was gone by then too.”).

A second approach, exemplified by decisions in the Third, Fourth, and Seventh Circuits, holds that, after a conditional writ issues, the terms of the conditional writ govern the federal court’s jurisdiction to review follow-on State proceedings. See *Wolfe v. Clarke*, 718 F.3d 277 (4th Cir. 2013); *Mickens-Thomas v. Vaughn*, 355 F.3d 294 (3d Cir. 2004); *Hudson v. Lashbrook*, 863 F.3d 652 (7th Cir. 2017); see also Brian Means,

Federal Habeas Manual, § 13:12 (2017) ([W]hen a state meets the terms of the habeas court’s condition . . . the habeas court does not retain any further jurisdiction over the matter.”). Under this approach, federal habeas courts’ jurisdiction extends no further than ensuring that the State abided by the particular terms of its order, even where the petitioner claims that the original unconstitutional judgment remains in place.

The Seventh Circuit’s decision here is the starkest example of this approach. After finding that Hudson had received ineffective-assistance of counsel under *Lafler*, 566 U.S. 156, the federal district court ruled as a remedy that “[t]he State must reoffer the twenty-year deal, and the offer must be to a charge that would not trigger mandatory life imprisonment.” Pet. App. at 78a. The State in fact did reoffer the twenty-year deal. From the Seventh Circuit’s perspective, the district court lost jurisdiction at that point to consider any further challenges to the State proceedings. “Once the state reoffered the plea deal, the habeas writ was complied with, and the district court lost jurisdiction over the case.” *Id.* at 7a-8a. The Seventh Circuit went so far as to conclude that the district court’s authority to review the State proceedings following a conditional writ was limited to its “contempt authority,” that is, a challenge to whether State officials violated the four corners of the habeas order. *Id.* at 8a. Any broader challenges to whether the State proceedings cured the Sixth Amendment violation, and replaced an unconstitutional judgment with a constitutional one, were unavailable to Hudson.⁵

⁵ As the district court itself recognized Pet. App. 32a-37a, Hudson had substantial and credible challenges to the State proceedings, which left him with no remedy for his Sixth Amendment violation. For example, the State trial court ulti-

This Seventh Circuit decision is echoed in prior decisions by the Third and Fourth Circuits. In *Wolfe v. Clarke*, 718 F.3d 277 (4th Cir. 2013), for example, the court considered whether the federal district court had jurisdiction to enter an order “enforcing judgment,” which barred the State from retrying the petitioner. The conditional writ at issue required the State to either release petitioner from custody or retry him within 120 days. Petitioner later returned to the federal habeas court arguing that the State had not met either condition. Given this posture, the court held that the federal district court “possessed jurisdiction to enforce its judgment.” *Id.* at 286 n.10.

Similarly, in *Mickens-Thomas v. Vaughn*, 355 F.3d 294 (3d Cir. 2004), the habeas court found that the Pennsylvania Parole Board had violated the Ex Post Facto Clause in denying petitioner parole, and conditioned issuance of the writ on the Board conducting a new hearing. *Id.* at 295. The Board again denied Mickens-Thomas parole. *Id.* at 296. Petitioner returned to federal court arguing that the Parole Board had not satisfied the particular requirements of the conditional writ, and the court held that it had “continuing jurisdiction” to determine “whether the Board has complied with the District Court’s remand order.” *Id.* at 303; see also *Wilson v. Sec’y Pa. Dep’t of Corr.*,

mately rejected the plea agreement, and declined to consider any alternative remedies, based in large part on its disagreement with the federal habeas court’s finding of ineffective assistance of counsel, stating at various points that “[t]he only person who did anything wrong here ... is Mr. Hudson,” that Hudson’s trial counsel were “two of the finest lawyers in Will County and anyplace,” Pet. App. 37a-38a, and, at the final hearing, that it was “standing by” its prior determination that “Hudson’s counsel was not ineffective.” Hudson’s Motion to Enforce, Ex. V at 21, *Hudson v. Lashbrook*, No. 16-3152 (7th Cir.), ECF No. 28-7 at 52.

782 F.3d 110, 115 & n.3 (3d Cir. 2015) (disagreeing with *Eddleman*, and finding jurisdiction to address compliance with the terms of the conditional writ).⁶

There thus is a fundamental disagreement among the lower courts about the source and scope of their jurisdiction after granting a conditional writ of habeas corpus. The Seventh Circuit’s approach rests a federal habeas court’s jurisdiction on the particular terms of the order granting the conditional writ. Other courts, like the Sixth Circuit in *Eddleman*, hold that jurisdiction continues under § 2254 until the unconstitutional judgment is vacated or replaced. This Court is needed to resolve the dispute and clarify the scope of habeas courts’ jurisdiction after granting a conditional writ of habeas corpus.

II. SECTION 2254 GOVERNS THE SCOPE OF A FEDERAL HABEAS COURT’S JURISDICTION IN THIS CONTEXT, BUT ITS LANGUAGE HAS BEEN IGNORED.

Despite this Court’s admonition to “begin, as always, with the language of the statute,” *Duncan v. Walker*, 533 U.S. 167, 172 (2001), the lower courts often ignore the language of 28 U.S.C. § 2254 when considering their continuing habeas jurisdiction following the issuance of conditional writs. In this case in particular, the Seventh Circuit failed to even reference, much less faithfully apply, Congress’s jurisdictional grant in § 2254. Had it properly done so, it

⁶ Notably, the Sixth Circuit also includes decisions that appear to follow this second approach. For example, in *Girts v. Yanai*, 600 F.3d 576, 582 (6th Cir. 2010) the Sixth Circuit held that a district court sitting in habeas has jurisdiction to consider the circumstances that exist up “until the state complies with a conditional writ” but does not have jurisdiction “to consider circumstances that unfold after the state complies with the writ.”

would have been compelled to conclude that, once a petitioner successfully invokes § 2254 and obtains a conditional writ, jurisdiction remains until the petitioner is freed from the unconstitutional judgment—either because it was vacated or replaced, or because the petitioner was released. This Court should grant the petition to settle this important jurisdictional issue.

A. The Seventh Circuit’s Approach Is Wrong.

The Seventh Circuit’s holding cannot be reconciled with § 2254. Section 2254 vests federal courts with jurisdiction over habeas corpus “applications” of State prisoners, providing that the federal courts “shall entertain an application . . . in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” See 28 U.S.C. § 2254(a). As this Court has found, an “application” under § 2254 “seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner’s confinement.” *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005)). Once federal jurisdiction is properly invoked under § 2254(a), therefore, the jurisdiction continues until either: (i) the application is denied, or (ii) the applicant is relieved from the unconstitutional judgment authorizing his confinement. “The federal court retains jurisdiction to afford . . . relief until the unconstitutional judgment is gone,” *Gall*, 603 F.3d at 353. And, conversely, “once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254.” *Eddleman*, 586 F.3d at 413; *accord Gillispie*, 771 F.3d at 329.

The Seventh Circuit’s conclusion that Hudson’s motion to enforce the district court’s conditional release

order should be considered a new habeas claim requiring a new application (after exhaustion of State remedies) cannot be squared with statute's language. "[A]n 'application' for habeas relief is a filing that contains one or more 'claims,'" and a "claim" is "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). Fundamentally, a "claim" includes not just a set of facts and a legal theory, but also a request for a specific remedy. *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A demand . . . a legal remedy to which one asserts a right."). Therefore, a challenge to the adequacy of a habeas remedy provided in State court proceedings *is part of the original claim for relief*—it seeks enforcement of the District Court's habeas order, lest the violation of a petitioner's constitutional rights go unremedied. See *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006).

Here, Hudson has presented one application for a writ of habeas corpus containing one claim and accompanying request for relief (grounded on the now-established Sixth Amendment violation). The request for a remedy for the Sixth Amendment violation is an integral part of Hudson's single habeas claim. The Seventh Circuit's decision rests on a nonsensical view of a habeas "claim" that would split the constitutional right from the remedy for its violation.

The Seventh Circuit's jurisdictional ruling also cannot be reconciled with AEDPA's other jurisdictional limitations. Section 2244(b), for example, bars second and successive applications raising new claims unless petitioners obtain pre-authorization by showing that the "claim" relies on a new, retroactive rule of constitutional law or involves new facts establishing that "no reasonable factfinder would have found the applicant guilty." 28 U.S.C. § 2244(b)(2)(ii).

For purposes of determining whether a habeas application is second or successive “the existence of a new judgment is dispositive.” *Magwood*, 561 U.S. at 338. When “there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive at all.” *Id.* (citation omitted). Thus, if a State putatively complies with the terms of a conditional release order (as the Seventh Circuit contends here) but leaves the unconstitutional judgment in place, then petitioner’s subsequent habeas petition could be subject to challenge as second and successive.⁷

A similar anomaly would occur under the Seventh Circuit’s ruling with respect to § 2244(b)(2)’s exception for new “claims.” Obtaining authorization to file a second and successive petition requires showing that the “claim” was not presented in a prior application. 28 U.S.C. § 2244(b)(1). A “claim as used in § 2244(b) is an asserted federal basis *for relief from a state court’s judgment of conviction.*” *Gonzalez*, 545 U.S. at 530 (emphasis added). An applicant, like Hudson, complaining that the State proceedings in response to a conditional writ did not “replace an invalid judgment with a valid one,” *Jennings*, 135 S. Ct. at 799, is based on the same constitutional grounds, challenging the same unconstitutional judgment, regarding which the federal habeas court has already ruled. Under this Court’s precedents, such a challenge may not be deemed a new “claim” under § 2244 that is cognizable in federal court.

⁷ The Seventh Circuit asserted that any subsequent habeas challenge by Hudson seeking a remedy for the Sixth Amendment violation found by the district court should not be considered “second or successive” under 2244(b), but does not explain why. Pet. App. at 8a.

The Seventh Circuit thus erred in concluding that the district court's jurisdiction under § 2254 ended even though the unconstitutional State court judgment was neither replaced nor vacated. That decision is contrary to § 2254's text and cannot be squared with related provisions of the habeas statute. Instead, under § 2254, federal courts retain jurisdiction to afford relief until the petitioner is freed from the unconstitutional judgment, that is, until the State has "replace[d] an invalid judgment with a valid one." *Id.* Because there is no dispute that Hudson remains in custody from the same judgment the district court found unconstitutional, the federal district court had jurisdiction to hear his motion to obtain his release under his original habeas application.

B. The District Court's Abstention Decision Similarly Cannot Be Squared With § 2254.

The district court afforded no more respect to § 2254 than did the Seventh Circuit. Rather than recognize § 2254 as a grant of jurisdiction that federal courts have a "virtually unflagging" obligation to exercise, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), the district court created an exception to the exercise of jurisdiction under § 2254 found nowhere in the statute. Specifically, the district court thought that "principles of equity, comity, and federalism" required Hudson first to appeal to the Illinois Appellate Court and thus declined to exercise jurisdiction over Hudson's enforcement motion. Pet. App. at 43a. Federal habeas courts cannot refuse to exercise their jurisdiction for "special ad hoc 'equitable' reasons," *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996), and thus the district court's decision to abstain cannot be squared with this Court's precedent or § 2254.

In *Lonchar*, this Court considered whether federal habeas courts can dismiss habeas petitions “for general equitable reasons beyond those embodied in the relevant statutes, Federal Habeas Corpus Rules, and prior precedents.” *Id.* at 316. It held they cannot. This conclusion is result of the evolution of the writ of habeas corpus from a safeguard against “serious abuses of power by a government” to a means of ensuring that “constitutional doctrines” apply in all criminal proceedings. *Id.* at 322. With this shift, “Congress, the Rule writers, and the courts have developed more complex procedural principles” that balance the “courts’ freedom to issue the writ” with the legal system’s interest in avoiding “improper delay, expense, [and] complexity,” and “a State’s interest in the ‘finality’ of its own legal processes.” *Id.* at 322-23. The result of this Congressionally struck balance are the “statutes, rules, precedents, and practices that control the writ’s exercise,” and which federal habeas courts cannot ignore. *Id.* (“[T]he fact that the writ has been called an “equitable” remedy, does not authorize a court to ignore this body of statutes, rules, and precedents. “There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.””) (citation omitted). Federal habeas courts therefore cannot dismiss habeas petitions “for special ad hoc ‘equitable’ reasons not encompassed within” the habeas statutes or procedural rules. *Id.* at 322-24.

The district court’s decision to abstain from exercising jurisdiction under § 2254 is contrary to *Lonchar*’s holding. The district court acknowledged that its decision was not based on precedent (or rule or statute), noting that “caselaw is thin, to say the least, as to the proper procedure to follow” in Hudson’s case and that “[t]here is no easy answer to this procedural question.” Pet. App. at 31a, 44a. Rather it rested on “prin-

ciples of equity, comity, and federalism” that suggested abstaining was the proper course. *Id.* at 43a. “[T]hat the writ has been called an ‘equitable’ remedy, does not authorize a court to ignore [the] body of statutes, rules, and precedents” governing the issuance of writs of habeas corpus. *Lonchar*, 517 U.S. at 322 (citation omitted). Moreover, equity principles do not authorize courts to layer atop AEDPA’s carefully crafted statutory scheme new, ad hoc obstacles to obtaining relief, and AEDPA itself does not authorize federal courts to decline to resolve habeas applications and claims properly before it, so long as they otherwise meets the requirements of § 2254.

To the contrary, this Court’s jurisprudence requires federal habeas court’s to exercise jurisdiction over habeas corpus applications. See *Stewart*, 523 U.S. at 643 (stating that a habeas petitioner is “entitled to an adjudication of all of the claims presented in his . . . reviewable[] application for federal habeas relief”). Federal courts have a “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” *Colo. River Water Conservation Dist.*, 424 U.S. at 817 (citing *England v. La. State Bd. Of Med. Exam’r.*, 375 U.S. 411, 415 (1964)); see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989) (“only exceptional circumstances justify a federal court’s refusal to decide a case in deference to the States”). “The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.” *Colo. River Water Conservation Dist.*, 424 U.S. at 813; *cf.*, *e.g.*, *Levin v. Att’y Registration & Disciplinary Comm’n*, 74 F.3d 763, 766 (7th Cir. 1996) (noting that habeas petitions are congressionally au-

thorized an exception to the rule that a “litigant cannot obtain collateral review of a state court judgment in federal district court”).

The district court’s decision to abstain from exercising jurisdiction over Hudson’s enforcement motion is contrary to *Lonchar* and inconsistent with § 2254. This Court’s precedents and § 2254 require federal habeas courts to exercise the jurisdiction given them under § 2254. As explained in Part I, that jurisdiction extends to resolving whether the State had replaced Hudson’s unconstitutional judgment with a constitutional one.

III. THE QUESTIONS PRESENTED ARE IMPORTANT TO BOTH HUDSON AND THE FEDERAL COURTS.

Although Hudson’s sentence is not the death penalty, it is a “death in prison” sentence. He is serving the longest possible sentence available in Illinois: life imprisonment without the possibility of parole, a sentence he received under Illinois’ now-repealed “three-strikes” law. See Illinois’ Habitual Criminal Act, 720 Ill. Comp. Stat. 5/33B-1 (2005). It is undisputed that Hudson would have been released over *three years* ago had the plea agreement ordered by the federal district court as part of the conditional writ been accepted by the State trial court.⁸ Hudson remains in prison because the State trial court refused to provide *any remedy* for the Sixth Amendment violation and

⁸ Illinois provides day-for-day credit for good conduct so that, for a prisoner like Hudson with no significant prison infractions, a twenty-year sentence leads to a ten-year term of imprisonment. 730 Ill. Comp. Stat. Ann. 5/3-6-3(3). Notably, Hudson’s codefendants in this case were released years ago after the trial court accepted plea agreements for them that called for sentences of seven and twelve years respectively.

left his original judgment and sentence undisturbed. The stakes for Hudson in this petition thus could not be higher.

Moreover, the jurisdictional issue presented here is one of significant importance to the administration of habeas cases in the federal courts. It is “common practice” for a district court to grant a conditional writ, which provides the State the option to avoid a prisoner’s release by “correct[ing] the constitutional error through a new hearing.” *Wilkinson v. Dotson*, 544 U.S. 74, 89 (2005) (Kennedy, J., dissenting); see also *Jennings*, 135 S. Ct. at 803 (Thomas, J., dissenting) (“[W]hen a district court issued the writ, it usually enters a conditional-release order, offering the State a choice between immediate release or a retrial (or resentencing) within a defined period of time.”). Indeed, a habeas court’s grant of unconditional, immediate release occurs only “[i]n rare cases.” Means, *supra*, at § 13:8.

Every conditional writ cases raises the prospect of the defendant seeking to return to federal court to challenge whether the State proceeding appropriately cured the constitutional error previously found. See, e.g., *Jennings*, 135 S. Ct. at 804 (Thomas, J., dissenting) (conditional release orders “entitl[e] a habeas petitioner not just to a new proceeding, but to a new proceeding that cures the specific defect identified by the district court”). And such challenges to a State’s remedial proceedings following conditional writs occur frequently, as evidenced in part by the cases cited in Part I above.

Although they are the norm, conditional writs “would be meaningless” if federal habeas courts do not have authority to evaluate whether State proceedings cured the constitutional error. *Mason v. Mitchell*, 729 F.3d 545, 549 (6th Cir. 2013). Despite

this importance, however, this Court has not yet ruled on the nature and scope of a district court's ongoing jurisdiction under 28 U.S.C. § 2254 after such conditional release orders have issued. The Court should do so now.

The need for resolution of this jurisdictional issue is especially critical in light of the many restrictions AEDPA places on prisoner habeas corpus rights. For example, *new* applications and claims under 28 U.S.C. § 2254 must have first exhausted all State remedies, § 2254(b)(1)(A), cannot be “second or successive,” § 2244(b), are subject to a one-year limitations period, § 2244(d)(1), and, even if a petitioner clears those hurdles, State court decisions can only be disturbed if they are “contrary to” or result from an “unreasonable application” of this Court's precedents, § 2254(d)(1).

Finally, this jurisdictional issue is ripe for review by this Court and this case provides an excellent vehicle for such review. As reflected above, many of the courts of appeals have already issued opinions on this topic, so there is no need for further “percolation” of this issue in the courts of appeals. Moreover, this case presents the jurisdictional issue squarely, based upon straightforward record, and benefits from two written opinions that take two starkly different approaches to the exercise of federal habeas jurisdiction following a conditional release order.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL P. DOSS
BENJAMIN I. FRIEDMAN
SARAH L. BAKKER
1 S. Dearborn Street
Chicago, IL 60603
(202) 736-8000

JEFFREY T. GREEN *
MICHAEL B. BUSCHBACHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

DANIEL M. GREENFIELD
RODERICK AND SOLANGE
MACARTHUR JUSTICE
CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Petitioner

December 11, 2017

* Counsel of Record