

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MALIK ALLAH-U-AKBAR, FKA ODRAE G. JONES
PETITIONER

v.

MARGARET BRADSHAW, WARDEN,
RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE¹

QUESTIONS PRESENTED

In 1998, Malik Akbar was sentenced to death after his court-appointed psychologist told an all-white jury he was thirty times more likely to have antisocial personality disorder and be dangerous because he was black. In 2022, a unanimous panel of the Sixth Circuit granted habeas corpus relief, ordering that a new penalty trial be conducted within 180 days. The panel later granted the state 190 additional days.

When Ohio failed to retry the penalty phase within the allotted time, the district court granted the unconditional writ and ordered the vacatur of Mr. Akbar's infirm death sentence and his "unconditional release" within five business days of February 29, 2024. Ohio took three months to vacate the death sentence. As of today, Mr. Akbar has remained in continuous physical custody for over 28 years and has not been re-tried. One possible sentence he could receive at retrial is parole eligibility after 25 years of imprisonment.

The questions presented are:

1. Where a sovereign fails to comply with a conditional writ of habeas corpus, does a district court's subsequent order of "unconditional release" entitle the petitioner to actual physical release? *See Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia & Thomas, JJ., concurring).
2. Where a sovereign fails to comply with an unconditional writ of habeas corpus, is the petitioner entitled to physical release without being subject to rearrest?

¹ This petition arises from a capital habeas appeal and challenges, *inter alia*, the court of appeals' refusal to bar a penalty phase retrial. Counsel continues to include the capital designation because the questions presented control Mr. Akbar's risk of future execution by Ohio.

PARTIES TO THE PROCEEDINGS

Petitioner Malik Allah-U-Akbar was the petitioner in the district court and appellant below.

Respondent Warden Margaret Bradshaw was the respondent in the district court and the appellee below.

RELATED PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

Allah-U-Akbar, fka Jones, v. Bradshaw, No. 24-3581 (October 9, 2025)

Jones v. Bradshaw, Nos. 07-3766/15-4308 (August 22, 2022)

United States District Court for the Northern District of Ohio

Jones v. Bradshaw, No. 1:03-cv-01192 (June 24, 2024) (multiple judgments)

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PETITION FOR WRIT OF CERTIORARI

Malik Akbar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, along with a dissenting opinion, is reported at *Allah-U-Akbar v. Bradshaw*, 154 F.4th 482 (6th Cir. 2025) and is reproduced at Appendix A to the petition. The judgment of the court of appeals was entered on October 9, 2025, and appears on the last page of Appendix A.

JURISDICTION

The district court had jurisdiction over this habeas corpus action pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The Court of Appeals for the Sixth Circuit issued its opinion on October 9, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2 of the United States Constitution states: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. Const. art. I, § 9, cl. 2.

Section 2243 of Title 28 of the United States Code provides:

A court, justice or judge entertaining an application for a writ of habeas corpus...shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2243.

STATEMENT OF THE CASE

On November 17, 1997, Ashtabula Police Officer William Glover was shot and killed. Less than six months later, Ohio tried twenty-one-year-old Malik Allah-U-Akbar (then known as Odraye Jones) for aggravated murder. The jury returned a guilty verdict and the trial advanced to a penalty phase, where the jury was tasked with sentencing Mr. Akbar to either (1) life in prison with parole eligibility after 25 years; (2) life in prison with parole eligibility after 30 years; (3) life in prison without the possibility of parole; or (4) death. *See* Appendix E at 3-5.

At the penalty phase, a court-appointed attorney presented a local psychologist who testified that Mr. Akbar had anti-social personality disorder, and that it was “too late to make any effective real change” in Mr. Akbar’s life after his birth mother died when he was thirteen. The psychologist opined that up to thirty percent of “African-American urban males”² suffer from this disorder and that this group, which included Mr. Akbar, commit more crimes and more murders than the general population. The psychologist told the jury that the only treatment for these men was to “throw them away, lock them up.” After hearing this testimony, the jury recommended the death penalty, and the trial court then sentenced Mr. Akbar to death. *Id.* at 2, 5-8.

Without a hearing, the Ohio courts denied Mr. Akbar’s direct appeal, petition for post-conviction relief, and post-conviction appeal. Without a hearing, the district court denied all claims Mr. Akbar raised in his federal habeas petition, an

² Mr. Akbar is from Ashtabula City, Ohio, a small town located in the largely rural county of Ashtabula, which borders Lake Erie. In 1997, the town’s population was approximately 20,000 residents.

amendment to that petition, and a Federal Rule of Civil Procedure 60(b) motion, but the court granted a certificate of appealability on various claims. *Id.* at 8-9.

After an oral argument, the Sixth Circuit Court of Appeals issued a separate certificate of appealability to examine whether Mr. Akbar's appointed trial counsel provided ineffective assistance with respect to the "racialized testimony." *Id.* at 2. After additional briefing and a second oral argument, the panel unanimously found that trial counsel was ineffective for allowing "racist evidence" to "infect" Mr. Akbar's penalty phase. It held that the psychologist's "racially prejudicial" expert opinion cast Black men as "violence prone" and offended the Constitution "on its face." *Id.* at 35-36 (citing *Buck v. Davis*, 580 U.S. 100 (2017)). The court of appeals remanded to the district court with "instructions to issue a writ of habeas corpus vacating [Mr. Akbar]'s death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of the remand." Appendix E at 37.

Still protesting that the expert's opinions were not racist, Ohio petitioned for rehearing *en banc*. Mr. Akbar filed a response, and Ohio's petition was denied without a single judge requesting a vote. Ohio moved to stay the mandate, but not long thereafter informed the Sixth Circuit that the state would no longer seek certiorari. The mandate issued on November 17, 2022. *See* Appendix D at 3.

After the mandate issued, Ohio transferred Mr. Akbar to the supermaximum Ohio State Penitentiary (OSP), increasing his level of custody above his death row classification. Though the trial court ordered Mr. Akbar to be housed at the local

county jail, the Ashtabula Sheriff refused to comply. During the mandate period and beyond, Mr. Akbar was regularly transported to and from OSP for court proceedings.

On day 141, Ohio asked the Sixth Circuit to be excused from the strictures of its mandate, arguing that “[i]t is manifest that the State has complied with the conditional writ.” *See* Case No. 07-3766, Doc. 333-1 at 3. The court of appeals denied the motion, first noting “there is no indication that the state court has vacated [Akbar’s] death sentence.” *Id.*, Doc. 335-1 at 4. The court was clear “the State has not yet satisfied the imposed obligation or demonstrated substantial compliance.” *Id.*

With only five days remaining until the mandate deadline, Ohio requested an extension of 190 days. The court of appeals granted the request, more than doubling the time for Ohio to fulfill its obligations under the conditional writ. The new date of compliance was November 22, 2023. On October 24, 2023, Ohio returned to the Sixth Circuit, this time requesting an additional 248 days within which to comply. After Mr. Akbar opposed, the court denied the state’s motion. Without another word from Ohio—in either state or federal court—the mandate period expired.

On November 30, 2023, Mr. Akbar filed a Motion to Issue an Unconditional Writ of Habeas Corpus and Bar Retrial with the district court. The district court did not hold argument on the motion until February 15, 2024. In the interim, the state court continued to subject Mr. Akbar to retrial proceedings, despite the mandate’s expiration.

Two weeks after argument, the district court granted the motion to issue the unconditional writ, but declined to bar retrial. *See* Appendix D. It plainly ordered

Ohio “to vacate the death sentence imposed by the Ashtabula County, Ohio, Court of Common Pleas in Case No. 1997 CR 00221 and unconditionally release [Akbar] from custody no later than five business days from the date of entry of this Order.” Appendix D at 22.

The state court docket reflects that on March 1, 2024, the trial prosecutor filed a request for an arrest warrant on the existing 1997 indictment with the state court clerk’s office. The indictment was unaltered and was still linked to Mr. Akbar’s intact convictions and death sentence.

On or about March 5, 2024, deputies with the Ashtabula Sheriff’s Office took Mr. Akbar from OSP to the Ashtabula County Jail in the exact same manner they had been transferring him since the conditional writ issued. The only difference was that the deputies showed Mr. Akbar a copy of his original arrest warrant. Mr. Akbar was never physically released by prison officials; rather, as usual, the county deputies came inside the prison and took custody of him. He was not given any *Miranda* warnings. Though the arrest warrant ordered the sheriff to bring him “before said court without unnecessary delay,” Mr. Akbar did not see a judge until 98 days later. He was never re-arraigned or afforded a bond hearing. *But see* Appendix B at 2 (district court finding that “[Akbar] was rearrested under the warrant and placed in the Ashtabula county Jail.”)

At no point during the compliance period did Ohio file a copy of the district court’s unconditional writ order with the state trial court or file a motion to vacate the unconstitutional death sentence. Ohio’s first communication with the state trial

judge concerning the unconditional writ came on March 22, 2024, over two weeks after the deadline for compliance had expired.

On April 1, 2024, Mr. Akbar filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b) in the district court and asked that the court reorder Mr. Akbar's unconditional release and bar retrial given Ohio's continued noncompliance with the terms of the unconditional writ. *See* Appendix B.

On May 29, 2024, three months after ordered to do so by the federal court, and 554 days after the Sixth Circuit issued the conditional writ of habeas corpus, Ohio finally vacated Mr. Akbar's original, unconstitutional death sentence.

On June 24, 2024, the district court denied Mr. Akbar's Motion for Relief under Rule 60(b). *See* Appendix B.

Mr. Akbar again appealed to the Sixth Circuit, challenging the district court's initial denial of the retrial bar and its later denial of the Rule 60(b) Motion. *See* Appendices B & C. Mr. Akbar argued that the district court erred by finding that Ohio had substantially complied with the unconditional writ and improperly blamed Mr. Akbar for the state's failure to comply with the unconditional writ. Mr. Akbar also argued that the district court erred when it held that no extraordinary circumstances existed to warrant a retrial bar, including, *inter alia*, Ohio's reintroduction of the racist expert evidence into retrial proceedings, Respondent's repeated triangulation of responsibility for Ohio's failure to comply with federal orders, and Ohio's inexcusable neglect in failing to comply with the unconditional

writ. Mr. Akbar asked the court of appeals to re-order his unconditional release and bar any further proceeding against him. *See* Case No. 24-3581, Docs. 13 & 20.

Following briefing, the court again heard oral argument. After supplemental briefing on jurisdiction, the Court issued a published opinion affirming jurisdiction and affirming the judgments of the district court.

Fewer than four pages of the Sixth Circuit’s seventeen-page opinion addressed the merits. The court of appeals properly found that the state’s motion for vacatur “came well after the deadline imposed by the unconditional writ” and agreed with Mr. Akbar that “more could have been done to ensure the unconditional writ was fully complied with in a timely manner” but failed to address why the state’s failure to take those unspecified actions did not constitute bad faith or inexcusable neglect. Appendix A at 16-17. *But see Harvest v. Castro*, 531 F.3d 737, 746 (9th Cir. 2008) (granting release where the state’s attorney general “provided no reason at all for the error” for her failure to communicate with the trial prosecutor and waited three additional days before alerting the federal court of her inadvertent non-compliance). The court of appeals also agreed that the collective lack of responsibility from state actors was “troubling” but held that because the delay was “only temporary” and resentencing proceedings were “advancing,” the years-long delay and Ohio’s repeated noncompliance did “not rise to the level of extraordinary circumstances warranting relief.” Appendix A at 17.

This timely Petition for Certiorari follows.

REASONS FOR GRANTING THE PETITION

“Habeas corpus is at its core a remedy for unlawful [sovereign] detention.” *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 119 (2020). The consequence for non-compliance with a conditional writ of habeas corpus is “always release.” *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia & Thomas, JJ., concurring).

Before securing habeas relief from the court of appeals, Mr. Akbar spent more than two decades suffering from a death sentence braced by expert opinions the court of appeals unanimously found to be “racist.”³ One of Ohio’s first moves after the mandate issued in November 2022 was to affirmatively re-introduce the 1998 report from the same disgraced expert into Mr. Akbar’s retrial proceedings.

Even with a doubled mandate period, Ohio failed to comply with the terms of the conditional writ. When it issued the absolute writ, the district court ordered Ohio to “unconditionally release [Mr. Akbar] from custody.” Appendix D at 22. Instead, Mr. Akbar received a transfer from an Ohio supermax penitentiary to the county jail with his infirm death sentence intact. Ohio took three more months to vacate the unconstitutional death sentence, though the court had ordered it to do so within five business days.

³ Counsel of record began to represent Mr. Akbar only during his habeas appeal, and she filtered the unconstitutional evidence through *Strickland* to avoid an otherwise certain procedural default. However, it was Ohio’s prosecutor who first elicited the racist “statistics” about Black men’s proclivity for dangerous behavior during the court-appointed defense psychologist’s testimony. The prosecutor then leveraged these race-based opinions in closing argument when asking for death.

In denying Mr. Akbar any remedy, the Sixth Circuit upcycled the “extraordinary circumstances” framework it employs when analyzing a state’s noncompliance with a conditional writ. Its opinion wrongly credited Ohio’s custodial transfer of Mr. Akbar as “unconditional release” and gave no weight to the extraordinary—if not unprecedented—circumstance of Ohio’s non-compliance with an unconditional writ of habeas corpus in a capital case because “the delay was only temporary.” Appendix A at 17.

This Court should grant certiorari to vindicate the seriousness of its power to release prisoners in unlawful custody, to affirm the original meaning of “unconditional release,” to announce the remedy when a state fails to comply with an unconditional writ of habeas corpus, and because this is a capital case.

I. The Sixth Circuit’s assessment of “unconditional release” conflicts with an opinion of this Court and other circuit opinions.

The Sixth Circuit found that Mr. Akbar’s transfer to the county jail satisfied the district court’s order that he be “unconditionally released.” *See* Appendix A at 4, 11 (finding that Ohio complied “in part” with the unconditional writ order). That conclusion was wrong and conflicts with this Court’s treatment of release in the capital habeas context and other circuit and district court opinions assessing “unconditional release.”

Supreme Court opinions

This Court ordered the actual physical release of a death-sentenced state prisoner over 130 years ago. *In re Medley*, 134 U.S. 160 (1890). After Colorado condemned him to die, Medley petitioned directly to the Supreme Court for the writ

of habeas corpus. *Id.* at 162. The Court found his death sentence to be unconstitutional but declined to “remand the prisoner to the custody of the sheriff of the proper county to be proceeded against.” *Id.* at 174. Because the Court had found an *ex post facto* violation pertaining to the death sentence, the Court noted it was “not advised whether the [state trial] court possesses any power to deal further with the prisoner or not.” *Id.* Even so, the Court held that “it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands.” *Id.* Not swaying from the “core” of habeas relief, the Court ordered Medley’s physical release from the state penitentiary, with advance notice to be sent to the state attorney general. *Id.* The continuing validity (or invalidity) of the underlying murder conviction did not affect the Court’s execution of the writ.

To be sure, retrial uncertainties are present in the instant case. At the time the unconditional writ issued, Mr. Akbar already had served more than 25 years of imprisonment; Ohio’s entitlement to the continuous holding of his body pending retrial was, at the very least, subject to challenge. Further, the state court’s refusal to vacate Mr. Akbar’s unconstitutional death sentence during and beyond the mandate period was driven by the court’s stated belief that, under Ohio law, the judgment against Mr. Akbar was not severable and that any vacatur would risk disturbing his underlying murder conviction. As in *Medley*, however, the state law implications of the writ were not before the federal courts here. The district court’s proper concern was the “core” of habeas relief: freeing Mr. Akbar’s body from the

unlawful custody and enforcing the Supremacy Clause. But the ordered release here simply did not happen.

Four years after *In re Medley*, this Court decided *In re Bonner*, 151 U.S. 242 (1894), and conditioned the issuance of the writ on the state's provision of a proper (non-capital) resentencing proceeding. This case does not inform the proper enforcement of the unconditional writ here, where Ohio already had been afforded such an opportunity and failed to meet the proscribed condition.

As Justices Scalia and Thomas reminded the majority in *Dotson*, “the prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined has been invalidated.” 544 U.S. at 86 (Scalia & Thomas, JJ., concurring). That Mr. Akbar's body was being held in violation of the Constitution pursuant to a singular, infirm judgment is entirely consistent with this Court's opinion in *Magwood v. Patterson*, 561 U.S. 320 (2010). Distinguishing the text of §2254 from §§ 2255 and 2241, which expressly allow for challenges to “sentences”, this Court held that “[c]ustody is crucial for § 2254 purposes, but it is inextricable from the judgment that authorizes it.” *Id.* at 333. *See also Monge v. California*, 524 U.S. 721, 732 (1998) (a capital penalty phase “is in many respects a continuation of the trial on guilt or innocence of capital murder.”); *Bullington v. Missouri*, 451 U.S. 430, 431 (1981) (capital sentencing phase has “the hallmarks of a trial on guilt or innocence”).

Circuit Opinions

In *Wolfe v. Clarke*, 718 F.3d 277 (4th Cir. 2013), *cert. denied*, 571 U.S. 1197 (2014), the Fourth Circuit Court of Appeals assessed Virginia’s compliance with a conditional writ order that “presented the Commonwealth with a choice: it could either provide [petitioner] with a new trial or unconditionally release him from custody.” *Id.* at 285. Virginia maintained that by transferring Mr. Wolfe from the state prison to the county jail and providing him with a bail hearing, it had complied with the unconditional release order. The Fourth Circuit agreed with the district court that Virginia had never unconditionally released the petitioner when considering the plain meaning of the words:

[i]n presenting the option of releasing the Petitioner “unconditionally” from custody, the Court used the word “unconditionally” in its traditional and widely underst[ood] context: “Not limited by a condition; not depending on an uncertain event or contingency; absolute.” *Black’s Law Dictionary* (9th ed. 2009). Under this meaning of the word “unconditional,” it is self-evident that releasing Petitioner from the custody of the Virginia Department of Corrections to Prince William County for the purposes of retrial did not constitute releasing Petitioner “unconditionally from custody.”

Id. at 286 (4th Cir. 2013) (quoting from district court’s Order Enforcing Judgment). Holding that Virginia had failed to comply, the Fourth Circuit pointed out that the state’s theory of compliance “fails to take into account the purpose of a new-trial contingency in the habeas setting, which is to delay **actual release** of the successful petitioner.” *Id.* (citing *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (emphasis added)). The Sixth Circuit’s opinion here conflicts with *Wolfe*.

The Sixth Circuit’s interpretation of “unconditional release” is also in conflict with the Seventh Circuit’s decision in *Pope v. Taylor*, 100 F.4th 918 (7th Cir. 2024) (Easterbrook, J.). In *Pope*, the district court granted the conditional writ and ordered that “[u]pon the failure of the circuit court to vacate the judgment of conviction and grant a new trial within six months after the date of actual physical delivery of Pope to the custody of the Wisconsin court, Pope shall be finally discharged from custody. See *Pope v. Kemper*, 689 F. Supp. 3d 657, 679 (E.D. Wis. 2023), *aff’d as modified sub nom. Pope*, 100 F.4th 918. With only two weeks left on the mandate clock, Wisconsin moved to stay the mandate and appealed the order, asserting that the district court lacked the authority to order a state court to vacate a judgment of conviction. The Seventh Circuit confirmed the granting of the conditional writ, but modified its terms. Its order makes clear that the Seventh Circuit, like the Fourth Circuit in *Wolfe*, understood “unconditional release” to be total physical release:

In September 2023 the district court gave Wisconsin six months to vacate Pope’s conviction and begin the process of retrial. That time has passed. The state does not get another six months from our decision. It should have been preparing for a trial to follow on the heels of our decision—if a fair trial is possible so long after the events of 1995. (Indeed, prosecutors should have begun preparing in 2017, when the state’s circuit court held that Pope is entitled to another trial.) Pope must be released on bail unless that trial begins within two months—and, if the trial has not started in three months, the conviction must be vacated and Pope released unconditionally. The district court’s decision is modified to include these deadlines and, as so modified, is **AFFIRMED**.

Id. The Seventh Circuit’s understanding of “unconditional release” is in line with that of the Fourth Circuit and at odds with the Sixth Circuit’s opinion here.

Sixth Circuit internal inconsistency

That the “unconditional release” ordered by the district court here should have resulted in Mr. Akbar’s physical release also is supported by the authority invoked in the district court’s own opinion authorizing the unconditional writ. *See* Appendix D at 12 (invoking *Lovins v. Parker*, 604 Fed.Appx. 489 (6th Cir. 2015) and *Means v. Phillips*, 136 F. Supp. 3d 872 (W.D. Tenn. 2015)).

Though not published, *Lovins* was decided by two of the same Sixth Circuit judges on Mr. Akbar’s panel. 604 Fed.Appx. 489. Like Mr. Akbar, Mr. Lovins prevailed on habeas review and the state (Tennessee) failed to resentence him in accordance with the Constitution within the mandate period. *Id.* at 490. Also like Mr. Akbar, the district court granted the unconditional writ, but denied Lovins’ request to bar reprosecution. *Id.* Unlike Ohio here, Tennessee complied with the unconditional writ order and physically released Lovins from prison, though he was “immediately rearrested.” *Id.* Notably, Lovins had not reached the minimum period of incarceration for second-degree murder at the time he was physically released. *Id.*

Likewise, in *Means v. Phillips*, 136 F. Supp. 3d 872 (W.D. Tenn. 2015), the district court issued the unconditional writ of habeas corpus after Tennessee failed to reduce a successful habeas petitioner’s sentence for multiple aggravated robberies. The state argued that unconditional release was “not justified” where the petitioner’s convictions were still valid and the [minimum] sentences “for those offenses had not expired.” *Id.* at 880. The district court rejected this argument and correctly ordered the state to “unconditionally release Petitioner from custody on the judgments”

within five business days. *Id.* at 896.⁴ *Accord Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009) (the “release power” under § 2254 releases a prisoner from “the custody pursuant to the unconstitutional judgment.”). *See also* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.2 at 1903-1904 (6th ed. 2011) (where unconditional release without prejudice to retrial is ordered, “the order is analogous to a grant of bail pending appeal or retrial.”)

This Court should grant certiorari where the Sixth Circuit’s published opinion is in tension with all of these decisions, and where, left uncorrected, the opinion will carry great weight in a limited, but supremely consequential, area of law.

II. Lower federal courts require guidance on the available remedies flowing from the failure to comply with writs of habeas corpus.

Guidance is needed regarding non-compliance with an absolute writ

This Court should grant certiorari to announce the remedy where a state fails to comply with an unconditional writ deadline. This Court has addressed an absolute writ only once, over 50 years ago. *See Pitchess v. Davis*, 421 U.S. 482 (1975) (reversing and remanding for vacatur of unconditional writ on jurisdictional grounds). The Sixth Circuit’s opinion here is precedential and is not anchored in any controlling authority concerning unconditional writs. Its holding can be reduced to the proposition that Ohio deserved a more vigorous finger-wagging the second time around. *See* Appendix A at 17 (“We agree with Allah-U-Akbar that more could have been done to ensure the

⁴ The district court in *Means* took care to note that the only reason that its writ did not result in the petitioner’s physical release from prison was because Means “has other sentences to serve.” *See* 136 F. Supp. 3d at 875, n.2.

unconditional writ was fully complied with in a timely manner.”); *id.* (“it is troubling that the Warden, the county prosecutor, and the state court did not take accountability to ensure compliance with a federal court’s unconditional writ.”). Without weigh-in from this Court, the Sixth Circuit’s opinion will remain the only constitutional roadmap available to other federal courts. When a sovereign repeatedly fails to effectuate a prisoner’s release, another substantive constitutional injury occurs. The buck must stop somewhere. Certiorari should be granted to announce how federal courts should proceed in such a circumstance.

Guidance is needed regarding the propriety of a re prosecution bar

Mr. Akbar requested that the district court bar Ohio from re prosecuting him nearly thirty years after his original trial on two separate occasions: when he sought the unconditional writ and after he had waited more than a month for Ohio to comply with the terms of the unconditional writ order.

Re prosecution bar where the defect recurs

Relying on the multi-justice dissent in *Jennings v. Stephens*, Mr. Akbar argued that Ohio’s reintroduction of Dr. Eisenberg’s racist expert opinions into his penalty phase retrial proceedings, evidence that Ohio admitted was “used to determine [Mr. Akbar] was competent,” sufficiently frustrated the defect-curing purpose of the habeas grant and should warrant a retrial bar. *See Jennings v. Stephens*, 574 U.S. 271, 287–88 (2015) (Thomas & Kennedy & Alito, JJ., dissenting) (“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.")

The Sixth Circuit dismissed "the state's continued reliance on Dr. James Eisenberg's tainted testimony" as a reason to bar retrial, because "[w]e first granted Allah-U-Akbar habeas relief only because he received ineffective assistance of counsel at his penalty-phase trial." Appendix A at 17. The court of appeals then admonished that Mr. Akbar must wait to re-litigate Dr. Eisenberg's influence on his retrial through another full round of state appeals and federal habeas review. *See id.*

The Sixth Circuit forgets that it also found that the *substance* of Eisenberg's expert opinions that Black men are "violence prone", like those of the expert in *Buck v. Davis*, 580 U.S. 100 (2017), "offends the Constitution on its face." Appendix E at 36. Mr. Akbar's original trial counsel was constitutionally ineffective only because he put on an expert who presented unconstitutional, unreliable evidence.

The court of appeals' reasoning also conflates a constitutional **vehicle** with a constitutional **defect**. This approach conflicts with the dissent in *Jennings*, which endorsed that ineffective assistance of counsel errors in successful habeas actions should be assessed according to the underlying violation. *See* 574 U.S. at 289 (dissent pointing out that a *Wiggins* ineffective assistance error is distinct from a *Spisak* ineffective assistance error). The writ here issued to grant Mr. Akbar a penalty phase trial that was not "infected" with racist expert evidence, *i.e.*, a "*Buck* error." Ohio's near-immediate reintroduction of Dr. Eisenberg's impermissibly race-based expert opinions thwarted the very purpose of the retrial, to cure a penalty phase infected by

racism. And, because no one—the trial judge, the prosecutors, or new trial counsel—objected to the reintroduction of Dr. Eisenberg’s opinions, the ineffective assistance of counsel also recurred.⁵ This Court should weigh in on whether the standard discussed by the dissenting justices in *Jennings* has been met here.

Reprosecution bar where a state acts in bad faith

Nearly all circuits interpret § 2243 to include the authority to bar a successful habeas petitioner’s reprosecution in the appropriate circumstances, including a state’s bad faith or inexcusable neglect. *See, e.g., D’Ambrosio v. Bagley*, 656 F.3d 379, 389 (6th Cir. 2011), *cert. denied*, 565 U.S. 1185 (2012); *Capps v. Sullivan*, 13 F.3d 350, 352-53 (10th Cir. 1993); *Burton v. Johnson*, 975 F.2d 690 (10th Cir. 1992), *cert. denied*, 507 U.S. 1043 (1993); *Mickens-Thomas v. Vaughn*, 355 F.3d 294, 309–10 (3d Cir. 2004); *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993); *Smith v. Goose*, 205 F.3d 1045, 1054 (8th Cir.), *cert. denied*, 531 U.S. 985 (2000).

In *Wolfe v. Clarke*, discussed previously, the petitioner prevailed on a *Brady* claim and sought certiorari in this Court from the denial of his request to bar retrial. 718 F.3d 277 (4th Cir. 2013), *cert. denied*, 571 U.S. 1197 (2014). Wolfe claimed that Virginia was in violation of the conditional writ and was continuing the same, “extraordinary” *Brady* misconduct along with other “deliberat[e]” steps to deny him a fair trial. *Wolfe v. Clarke*, 2013 WL 5883718 (U.S.), at *1 (Petition for Writ of

⁵ Though the Respondent has been aware of these events since at least Mr. Akbar’s November 2023 Motion to Issue Unconditional Writ, Ohio has taken no steps in the trial court to strike Eisenberg’s report from the record or request a court ruling that all parties and future penalty phase experts be precluded from relying on it.

Certiorari) (October 13, 2013). He also claimed a circuit split between the Sixth and Fourth Circuits where the latter’s “rigid approach” to retrial bars reflected a “dramatic departure from the more flexible principles embraced by other courts of appeals.” 2014 WL 216156 (U.S.), at *1–3 (Reply Brief of Petitioner). This Court declined to grant certiorari and delineate the circumstances in which a state’s misconduct and/or bad faith could warrant a reprosecution bar. Eleven years later, in July 2025, the Fourth Circuit found that Wolfe had satisfied the near-impossible *Schlup* actual innocence gateway and remanded his case to the district court for full adjudication of his (otherwise defaulted) substantive habeas claims. *See Wolfe v. Dotson*, 144 F.4th 218, 221 (4th Cir. 2025), *cert. pending*, No. 25-6664 (2026). Even if this Court does not find that the Fourth Circuit’s approach to “bad faith” retrial bars constitutes a true split, it should grant certiorari to resolve the question of whether a state’s persistent bad faith and/or inexcusable neglect are appropriate bases on which a federal court sitting in habeas can impose a reprosecution bar.

This Court should weigh in on the Sixth Circuit’s post-writ jurisprudence

Courts below would also benefit from this Court’s assessment of the Sixth Circuit’s approach to assessing compliance with conditional writs of habeas corpus, which it expanded in Mr. Akbar’s case to reach unconditional writs. Its post-writ jurisprudence is the most developed of any Circuit and shows no signs of slowing. The Sixth Circuit expressly allows for retrial bars in “extraordinary circumstances,” that include a state’s bad faith or inexcusable neglect, even where the prior defect can theoretically be cured at a retrial. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 370

(6th Cir. 2006) (inexcusable or abusive failure to act can constitute extraordinary circumstance), *cert. denied*, 549 U.S. 1281 (2007). If the Sixth Circuit’s framework is proper, this Court should say so and examine Mr. Akbar’s case against it where he again faces the death penalty. If the framework requires correction, the time is ripe for the Court to do so.

The Court’s intervention here is particularly warranted where Mr. Akbar secured habeas relief in August of 2022 and is still without a constitutionally valid sentence despite having surpassed the minimal carceral sentencing term. *See Harvest v. Castro*, 531 F.3d 737, 747 (9th Cir. 2008) (granting unconditional writ and petitioner’s release from custody where, “[c]ertainly, staying in prison when one might have been released constitutes prejudice.”).⁶ *See also Betterman v. Montana*, 578 U.S. 437, 441, n.2 (2016) (reserving the question of whether the Speedy Trial Clause applies to capital sentencing proceedings); *Moore v. Zant*, 972 F.2d 318, 320 (11th Cir. 1992) (“In this case, if Georgia waits too long, the state could lose the right to sentence [successful habeas petitioner] to death.”), *cert. denied*, 507 U.S. 1007

⁶ It is far from clear how Mr. Akbar’s new capital jury will assess the four sentencing options without perceiving from Mr. Akbar’s age, the date of the crime or the date of his arrest that he has remained in custody far beyond the minimum sentence. The jury will reasonably presume that someone—whether a judge or parole board—already has deemed Mr. Akbar unfit for release into society. The converse assumption is equally prejudicial—that Mr. Akbar somehow has evaded custody or arrest in the interim.

The jury will also face the unpalatable task of weighing Mr. Akbar’s execution against his immediate eligibility for release. Undersigned counsel cannot fathom a curative instruction that would adequately guard against these prejudices and insulate the presumption of life. Yet again, Mr. Akbar faces a penalty phase trial where untrue assumptions will be drawn about his putative dangerousness, which is not a valid statutory aggravating circumstance in Ohio.

(1993); Hertz & Liebman § 33.2 at 1903 (unconditional release with prejudice to retrial may be appropriate “even when the prosecution itself is not unlawful and the error found by the federal court is theoretically susceptible to correction by retrial, if the violation nonetheless is so egregious, its consequences so **grave**, and the unlawful restraints already imposed on the petitioner’s liberty so **lengthy** or **severe** that law and justice mandate unconditional discharge”) (emphasis added). *Carter v. Boesen*, 10 F.4th 715, 716 (7th Cir. 2021) (holding a four-year delay in resolving even a criminal appeal makes state procedures “ineffective to protect the rights” secured by the United States Constitution pursuant to §2254(b)(1)(B)(ii)).

This Court should grant certiorari to give needed guidance to the lower courts.

III. Ohio is a frequent Respondent in writ enforcement litigation.

Federal habeas standards for relief are difficult to meet, because they “were meant to be.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Habeas grants are infrequent by design, and, as any habeas practitioner knows, a high percentage of cases where a petitioner has succeeded on habeas review either do not proceed to reprosecution or are resolved by plea deal. Even so, Ohio has appeared before the Sixth Circuit in a post-writ posture more frequently than any other state. *See, e.g.*, *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010), *cert. denied*, 562 U.S. 891 (2010); *D’Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011) (retrial bar granted on account of repeated prosecutorial misconduct), *cert. denied*, 565 U.S. 1185 (2012); *Mason v. Mitchell*, 729 F.3d 545 (6th Cir. 2013), *reh’g en banc denied*, 2013 U.S. App. LEXIS

20654 (Oct. 9, 2013), *cert. denied*, 572 U. S. 590 (2014); *Gillispie v. Warden, London Corr. Inst.*, 771 F.3d 323 (6th Cir. 2014).

Last year, Ohio was defending its inexcusable noncompliance in Mr. Akbar’s case at the same time it was defending its questionable actions in *Smith v. Davis*, a murder retrial out of Toledo. *See Smith v. Davis*, No. 25-3381, 2025 WL 1826652, at *1 (6th Cir. July 2, 2025) (citing *Jennings*) (vacating stay and enforcing unconditional writ ordering petitioner from custody “immediately” after Ohio failed to comply with Sixth Circuit’s order not to again utilize suggestive identification procedures at petitioner’s retrial.) Ohio’s Department of Rehabilitation and Correction was also the non-prevailing party before this Court in *Dotson*. *See* 544 U.S. 74.

In Mr. Akbar’s case, the Respondent made considerable and repeated efforts to distance herself from the “State of Ohio” in briefing and argument before the district court and court of appeals.⁷ Asserting that the Ohio Attorney General represented the Warden only, the Respondent was unprepared at both oral arguments to account for Ohio’s actions in the state trial court with respect to critical aspects of the conditional and unconditional writs. *See* Appendix D at 18 (district court finding that the Respondent’s communications to the federal courts were “confusing at best and misleading at worst”); Case No. 07-3766, Doc. 345 at 4 (Respondent disavowing to the court of appeals that the Ohio Attorney General’s Office represents the State of Ohio).

⁷ As undersigned counsel pointed out during oral argument before the Sixth Circuit, the state’s lack of accountability was also frustrated by the sequential appearance of no fewer than seven lawyers from the Ohio Attorney General’s Office on behalf of the Warden between 2022 and 2025 in Mr. Akbar’s case.

This Court should grant certiorari to dispel any confusion about the role the Ohio Attorney General's Office should play in the effectuation of habeas writs and to prevent future resource-heavy post-writ litigation for both Ohio and her prisoners.

IV. Judicial enforcement of habeas corpus relief is an issue of national importance, and this case is an ideal vehicle to address it.

As the Court is aware, federal courts are experiencing a “tsunami” of habeas corpus filings.⁸ And the executive response to habeas orders issued by district courts for presentment and/or release has been underwhelming. *See Juan T.r. v. Noem*, No. 26-cv-0107, 2026 WL 232015, at *2 (D. Minn. Jan. 28, 2026) (Chief Judge Schiltz appending list “hurriedly compiled by extraordinarily busy judges” of 74 habeas cases in which 96 orders were not obeyed in January 2026 alone). Certiorari is appropriate here to announce the consequence(s) where a sovereign fails to comply with habeas orders, especially where the Court has funneled immigration transfer claims exclusively into the habeas sphere. *See Trump v. J. G. G.*, 604 U.S. 670, 674 (2025). *See also Juan T.r.*, 2026 WL 232015 at *1 (district court inviting immigration detention petitioner to file a properly supported motion for “monetary sanctions” against ICE).

Even setting aside the brewing habeas crisis, Mr. Akbar's case is of great public importance where the same state that expressly leveraged his race as a reason to put him to death the first time seeks to extinguish his life once again. As the imposers of such punishments, the American people have a critical stake in the fair

⁸ *See* <https://www.cbsnews.com/news/tsunami-immigration-detention-cases-strains-doj-us-attorneys-offices-across-america/> (accessed February 21, 2026).

administration of the death penalty and due process protections where a penalty phase retrial is occurring more than 28 years after the crime and already has languished for more than three-and-one-half years. *See Monge v. California*, 524 U.S. 721, 732 (1998) (recognizing “an acute need for reliability in capital sentencing proceedings”).

Mr. Akbar’s case is an effective vehicle to address multiple, but narrow questions related to the federal courts’ enforcement of writs of habeas corpus. As with the immigration detention cases, the sovereign here has claimed an ongoing entitlement to re-take Mr. Akbar’s body and again place him in custody. Further, by granting certiorari in this case, the Court will have occasion to address a sovereign’s serial noncompliance with both writs. Third, it can settle any doubt that the substantive constitutional right of “unconditional release” applies equally to petitioners whose sentences—and not just convictions—are unconstitutional. Finally, it will have the option to reach a sovereign’s bad faith and inexcusable neglect and whether those factors can ever warrant sanctions, including a reprosecution bar.

An essential element of habeas corpus relief is the urgency with which it is bestowed. After all, habeas corpus is a substantive constitutional right. *See Thuraissigiam*, 591 U.S. at 143-44 (Thomas, J., concurring) (tracing history of the writ in the United States). Where a writ is issued only after an explicit finding that the Constitution has been violated, federal courts must act swiftly to cure the unlawful holding of the body. And speed requires legal clarity. Bodies, unlike

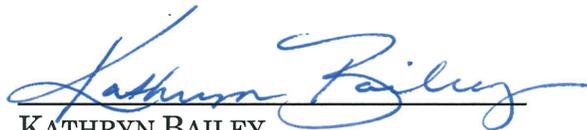
developing legal doctrines and tests, should not percolate. This Court should grant certiorari in light of these important public concerns.

CONCLUSION

The petition for a writ of certiorari should be granted, or else held pending the grant of certiorari in another case that implicates one or more of the questions presented. Alternatively, the petition should be granted, the judgment below vacated, and the matter remanded with instructions to order Mr. Akbar's unconditional release from custody with prejudice to any retrial.

Respectfully submitted,

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