

No. 25-6909

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

HAROLD MAY, WARDEN,
RESPONDENT

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

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
*CAPITAL CASE***

ELISA A. LONG
Federal Public Defender

KATHRYN BAILEY
Assistant Federal Public Defender
Capital Habeas Unit
Counsel of Record

KIRK J. HENDERSON
Assistant Federal Public Defender
Capital Habeas Unit

FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
1001 Liberty Avenue
Suite 1500
Pittsburgh, PA 15222
(412) 644-6565
kara_bailey@fd.org

Counsel for Petitioner Malik Allah-U-Akbar

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REPLY IN SUPPORT OF CERTIORARI

Never in the history of the American death penalty has a state failed to abide an unconditional writ of habeas corpus, until now. Despite its non-compliance, Ohio never lost custody of Mr. Akbar's body, retains his conviction, and now is free to continue its pursuit of a new death sentence without any time constraint. Yet Ohio declares this unprecedented outcome to be "unremarkable and unworthy of this Court's review." Brief in Opposition (BIO) at 2.

Ohio ignores the substance of Mr. Akbar's presented questions and predictably casts his petition as seeking merits review of "Sixth Circuit precedent." BIO at 26. But what Mr. Akbar plainly asks is for this Court to announce what type of "release" the unconditional writ requires when a petitioner successfully attacks his death sentence, and what remedy exists when the state fails to meet those requirements.

The BIO does not answer what "unconditional release" and "rearrest" mean for Mr. Akbar, because the answers expose that neither was achieved here. Ohio instead spliced his judgment to both retain his conviction and limit any retrial to sentencing. The BIO also rejects out of hand that a successful habeas petitioner can ever have a remedy when a state—without any excuse—is "only" seventeen days late to act on an unconditional writ order and continues to seek his execution at its leisure. BIO at 26.

Until this Court decides Mr. Akbar's important federal questions, Ohio cannot claim "full" compliance with anything, and its jurisdictional protests evaporate. Especially where Ohio clings to part of the prior state court judgment, this Court has jurisdiction. Certiorari should be granted.

I. Less than one month ago, Ohio argued in the trial court that Dr. Eisenberg's racist opinions should come into Mr. Akbar's retrial.

The BIO provides no response to Mr. Akbar's arguments that Ohio has compromised the defect-curing function of his retrial by reintroducing the same unconstitutional evidence underlying the habeas grant. *See* Petition at 15-18.

Nor does counsel for Respondent inform this Court that a mere ten days before filing its BIO, the Ohio Attorney General was actively defending Ohio's 2023 reintroduction of the racist expert evidence and successfully argued for its continued admissibility. *See* Appendix F (State's Memorandum Contra Defendant's Motion to Exclude Dr. Eisenberg's Report, Testimony and Opinions (Apr. 17, 2026); Judgment Entry (Apr. 22, 2026) (accepting State's position with no mention of Eisenberg)).¹

Before the trial court, Ohio again takes no responsibility for supplying Dr. Eisenberg's unconstitutional expert opinions to the court-appointed competency examiner in 2023 without even flagging for that examiner the reason for the retrial. *See generally* Appendix F. Instead, Ohio again blames Mr. Akbar for his (since-discharged) appointed counsel's failure to object to his retrial being infected with this tainted material, identifying literally the same error for which the Sixth Circuit granted habeas relief in the first place. *See* Appendix F at 2; Appendix E at 36.

Ohio's claim that Dr. Eisenberg's psychological findings (evidentially apart from his objectively racist testimony) are admissible is indefensible and unethical. In 1998, without any valid testing, and contrary to the clear diagnostic requirements in the

¹ As of January 2025, the Ohio Attorney General assumed control over Mr. Akbar's capital re-prosecution from the Ashtabula County Prosecutor.

DSM-IV, Dr. Eisenberg's only expert opinion of Mr. Akbar was that he had Antisocial Personality Disorder. That diagnosis is inseparable from Dr. Eisenberg's racist belief that "urban, African American males" like Mr. Akbar were up to thirty times more likely to be Antisocial than the general population. As his testimony shows, Dr. Eisenberg believed that Mr. Akbar was thirty times more likely to be "dangerous," have "contempt for the suffering of others," and "commit murders." Dr. Eisenberg also rooted Mr. Akbar's "condition" for which there was "no cure" in his "genetic[s]," calling his deceased mother, Darlene Jones, "equally Antisocial." This diagnosis, too, was based only on Ms. Jones' race and some criminal dockets and ignored ASPD-disqualifying facts about his mother, including her own mother's murder which led to her foster care placement and her inpatient treatment history for serious mental illness and substance abuse disorder.

Applying this Court's decision in *Buck v. Davis*, the Sixth Circuit ordered a capital retrial free from this expert "evidence," which it held to be "racist" and offensive to the Constitution "on its face." Appendix E at 37. Contrary to Ohio's Memorandum, absolutely **nothing** about Dr. Eisenberg's singular diagnosis of Mr. Akbar can be divorced from his false and racist beliefs. It is his work product, and not Black men, as Eisenberg told the jury, that should be "thrown away." Appendix E at 2, 7. This Court should grant certiorari and hold Ohio accountable for its actions.

II. Ohio admits that it is holding Mr. Akbar's body pursuant to the original state court judgment.

Ohio endeavors to convince this Court that its holding of Mr. Akbar's body in its Department of Rehabilitation and Correction (DRC) is somehow distinct from its

uninterrupted holding of Mr. Akbar’s body in the Ashtabula County Jail and this difference divests the federal court of jurisdiction. *See, e.g.*, BIO at ii, 3. *But see Wolfe v. Clarke*, 718 F.3d 277 (4th Cir. 2013), *cert. denied*, 571 U.S. 1197 (2014) (transfer of petitioner’s body to county jail is not an “unconditional release” from custody).

As an initial matter, Ohio’s DRC administers and supervises its county jails. *See* O.R.C. 5120.10. *See also* O.R.C. 2949.25 (allowing the sheriff from county of conviction to attend Ohio-sanctioned executions along with DRC officials). Today, more than two years after the unconditional writ issued, Ohio’s DRC offender registry still lists Mr. Akbar as an incarcerated prisoner in its custody under a sentence of death. *See* <https://appgateway.drc.ohio.gov/OffenderSearch/Search/Details/A358112> (last accessed 5/10/2026).²

More fundamentally, Ohio’s custody-based jurisdictional arguments fail where the State disavows that it is “retrying” Mr. Akbar at all but claims an entitlement to resentence Mr. Akbar pursuant to his “valid” conviction that “remains undisturbed.” BIO at 24-25. As Ohio admits, “the only **portion** of his original judgment that the

² The BIO also inaccurately reports that Mr. Akbar was imprisoned on the ultra-secure death row unit Ohio maintains at its Supermax facility, the Ohio State Penitentiary (OSP). *See* BIO at ii. Only 11 of Ohio’s 109 death-sentenced prisoners are confined on this largely no-contact unit. *See* <https://drc.ohio.gov/about/capital-punishment/death-row> (last accessed 5/10/2026). Until 2022, however, Mr. Akbar was imprisoned on Ohio’s main death row at the Chillicothe Correctional Institution. It was only after Mr. Akbar prevailed on habeas review that Ohio transferred him to the Supermax and *increased* his level of custody. Counsel briefed this and several other instances of state actor retaliation—many of which caused disruption and delay in the mandate period—before the district court.

courts below found constitutionally problematic was his *sentence*.” BIO at 25 (italics in original.)

But a state’s entitlement to resentence a petitioner on an undisturbed conviction is exactly the accommodation a *conditional* writ affords. During the mandate period, a state can correct the infirmity within the judgment, whether in whole (conviction and sentence) or in part (sentence only). Once the writ springs to life, however, unconditional release from the **judgment** is required: “the prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined is invalidated.” *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia & Thomas, JJ., concurring). *See also Magwood v. Patterson*, 561 U.S. 320, 352 (2010) (dissenting justices agreeing that a criminal judgment is singular with component parts). Ohio’s grafting of language from cases where a full judgment was removed does not save it here, because, as its BIO shows, it vigorously claims to retain part of Mr. Akbar’s infirm judgment.

Not understanding the substantive constitutional right conferred by the writ itself, Ohio complains that no precedent exists for federal courts to “prohibit resentencing” of a previously convicted petitioner. BIO at 25. But neither does Ohio acknowledge the inverse—that no case authorizes a state to retain a conviction and continue with only a resentencing trial after an unconditional writ issues. At least one case decided by this Court suggests the opposite.

In *Richmond v. Lewis*, this Court found the petitioner’s death sentence unconstitutional and reversed and remanded. 506 U.S. 40 (1992), *holding modified*

by *Brown v. Sanders*, 546 U.S. 212 (2006). The Court directed the district court to enter the writ of habeas corpus “unless the State of Arizona within a reasonable period of time either corrects the constitutional error in petitioner’s death sentence or vacates the sentence and imposes a lesser sentence consistent with law.” 506 U.S. at 52.

This Court’s mandate in *Richmond* supports its understanding that a state is allowed to exercise the option of either replacing or removing just the death sentence “portion” of judgment during the conditional writ period only.³ The mandate language in *Richmond* would be meaningless if, had a “reasonable time” expired without Arizona satisfying either condition, this Court would have entered an unconditional writ that permitted Arizona to vacate only the death sentence and continue *ad infinitum* with a penalty phase retrial, leaving the petitioner in a worse position than he was under the terms of the conditional writ.

In this way, *Richmond* illustrates the gamesmanship inherent in Ohio’s flawed, custody-based jurisdictional arguments. Under the BIO’s logic, Arizona could have ignored this Court’s clear directives and vacated only the death sentence, and this Court would be utterly powerless to do anything else, including enforcing the terms of its own mandate.

Here, Ohio enjoyed a (more than doubled) conditional writ period to impose *any*

³ An unconditional writ never materialized in *Richmond*. Upon remand, the Arizona Supreme Court vacated the infirm, more than twenty-year-old death sentence and imposed life without parole. See *State v. Richmond*, 886 P.2d 1329 (Ariz. 1994), *abrogated on other grounds by State v. Mata*, 916 P.2d 1035 (Ariz. 1996).

constitutional sentence upon Mr. Akbar and failed to get it done. It then failed to vacate even the infirm sentence portion of the judgment until **85 days** after the unconditional writ deadline expired.⁴

⁴ Ohio's failures since habeas relief was granted are broader than the BIO's reductive arguments about delay, which are designed to divert from Mr. Akbar's clear, non-fact-bound Questions Presented. As a sovereign, the State enjoys immense power. But instead of utilizing that power and all State mechanisms at its disposal to resentence an imprisoned, impoverished man raised in its foster care system, who holds a high school diploma equivalency, and has documented neurological deficits after someone sunk a claw hammer into his skull when he was a teenager, Ohio chooses to blame Mr. Akbar for its non-compliance.

It is true that Mr. Akbar invoked *Faretta*, but he asserted this right just 22 days into the original mandate period. After his first trial experience and nearly thirty years on death row, Mr. Akbar is wary of the lawyers and psychologists Ohio provides to protect him. But it was Ohio and not Mr. Akbar who took 10 months to decide his *Faretta* motion; it was Ohio who dusted off Dr. Eisenberg's racist expert opinions and provided them to the competency examiner, who then wholly adopted them to declare that any indicia of Mr. Akbar's incompetency were explained away by his "Antisocial" personality; and it was Ohio who still later revoked his *Faretta* rights.

It is also true that Mr. Akbar filed a *pro se* interlocutory appeal in early March 2024. He requested that the state appellate court force the trial judge to vacate his unconstitutional death sentence. *But see* BIO at 9 (generalizing Mr. Akbar's filing as a challenge to "some of the trial court's pretrial decisions.") Hardly "interfer[ing] with his timely resentencing" (*id.*), Mr. Akbar filed that appeal because, though the federal mandate had expired months earlier in November 2023, Ohio still was subjecting him to capital retrial proceedings with his entire judgment still intact. Mr. Akbar had no way of knowing that the federal district court would simultaneously enter the unconditional writ he diligently requested through habeas counsel back in November.

In further attempt to avoid accepting responsibility, Ohio also points the finger at its state courts. *See* BIO at 26. But Ohio's counsel knows how to file an emergency motion in the state appellate court. In fact, only six days before it filed this BIO, the Ohio Attorney General faxed such a motion to quash an interlocutory challenge to the validity of an aggravating circumstance in Mr. Akbar's resentencing trial. *See State of Ohio v. Malik Allah U Akbar*, 2026-A-0016 (Ohio Ct. App. 11th District) (4/21/2026 Emergency Motion for Ruling on Stay). Ohio could and should have followed that identical procedure in March 2024 instead of claiming powerlessness.

The misguided extension of capital penalty retrials past the entry of an unconditional writ also has a fairness problem that full retrials (where proper release and rearrest can—and usually are permitted to—occur) do not. As Mr. Akbar’s case demonstrates, if a judgment can be halved after the writ issues, successful “sentencing” petitioners would not receive the benefit of actual physical release or any of the Constitutional protections that accompany a full retrial, including re-arrest, re-presentment, bail determinations, the presumption of innocence, or speedy-trial guarantees. When the writ is properly executed, all those rights re-attach, and the mandate “clock” is made obsolete. *See Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009) (explaining that once petitioner is released from the full judgment and rearrested, the responsibility that he receives “not only a fair trial, but a timely one, then passe[s] to the [state trial court] in the first instance.”). Mr. Akbar has received none of these protections.

The absolute writ does not permit a state to preserve one “portion” of the judgment and vacate another while also claiming that federal courts lack jurisdiction. This Court should grant certiorari where Ohio continues to have it both ways.

III. Ohio also asks for substantive review.

Ohio expends most of its BIO seeking this Court’s reversal of the jurisdictional

ruling below. See BIO at 12-24.⁵ Ohio’s jurisdictional arguments are wrong for multiple reasons. First, as Ohio admits, when a state prisoner is held pursuant to a state court judgment, “jurisdiction under §2254 remains.” *Eddleman*, 586 F.3d at 413; see BIO at 14. Second, this Court, like lower federal courts, enjoys jurisdiction to enforce and assess compliance with conditional and unconditional writs of habeas corpus, or such orders would be meaningless. Ohio’s defense of “full compliance” is a legal conclusion; this Court must decide whether the Sixth Circuit’s interpretations of “unconditional release” and “rearrest and retry” were wrong before it can opine on jurisdiction. Third, even if the unconditional writ ordered here was legally sufficient, which it was not, this Court has jurisdiction to decide whether Ohio’s failure to comply with it entitles Mr. Akbar to a remedy.

At a minimum, the Court should reject Ohio’s suggestion that it could substantively decide mootness “even if it otherwise denies [Mr.] Akbar’s Petition.” See BIO at 24. This Court certainly should not issue a jurisdictional ruling in a capital case involving an issued unconditional writ of habeas corpus without full briefing, especially where the BIO does not acknowledge, let alone distinguish, this Court’s *per*

⁵ Contrary to the BIO’s intimations, Ohio did not initiate a jurisdictional challenge below. Its decision was understandable, as Ohio has repeatedly lost this argument, and this Court consistently has declined to review those rulings. See, e.g., *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); *D’Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011), *cert. denied*, 565 U.S. 1185 (2012); *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010), *cert. denied*, 562 U.S. 891 (2010). Here, one judge broached jurisdiction at oral argument, and supplemental briefing was ordered. Only then did Ohio take a position against jurisdiction. After the majority affirmed jurisdiction, Ohio did not seek panel reconsideration, *en banc* review, or certiorari.

curiam jurisdictional holdings in *Calderon v. Moore*, 518 U.S. 149 (1996) or *Kernan v. Cuero*, 583 U.S. 1 (2017). *See generally* BIO. If anything, Ohio’s lengthy gripe weighs in favor of a grant of certiorari.

IV. Ohio does not defend its continuous holding of Mr. Akbar’s body beyond the minimum sentence.

Mr. Akbar now has served more time in prison (28 years, 5 months, and counting) than the Ohio legislature requires under one of four permissible sentencing options (parole eligibility after twenty-five years’ imprisonment) for aggravated murder. Mr. Akbar’s yet-to-be-empaneled jury must meaningfully consider this sentence even where the murder victim was a police officer. *See* Petition at 20. Ohio wholly ignores this due-process disaster. It instead characterizes Mr. Akbar’s petition as seeking a “monstrous doctrine” and, with a straight face, accuses a man who has spent nearly three decades incarcerated on an unconstitutional death sentence of trying “to escape punishment altogether.” BIO at 25. This Court should grant certiorari to address whether Mr. Akbar has a remedy.

CONCLUSION

This Court should grant certiorari to correct the extreme constitutional malfunctions in this case, to assess Ohio’s responsibility for them, and to provide needed clarity for lower federal courts as they craft and enforce writs of habeas corpus for petitioners who successfully attack their sentences. As the merits will further illuminate, this Court’s jurisdiction is clear.

Respectfully submitted,

ELISA A. LONG
FEDERAL PUBLIC DEFENDER



KATHRYN BAILEY
Assistant Federal Public Defender
Capital Habeas Unit
Counsel of Record

KIRK J. HENDERSON
Assistant Federal Public Defender
Capital Habeas Unit

FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
1001 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
(412) 644-6565

Counsel for Petitioner

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