

No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2024

VON CLARK DAVIS,
Petitioner,

v.

WARDEN BILL COOL,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

Joseph Medici,
Federal Public Defender

Erin G. Barnhart (OH 0079681)

**Counsel of Record*

Jordan S. Berman (OH 0093075)

(Supreme Court Bar No. 285543)

Assistant Federal Public Defenders

Office of the Federal Public Defender

for the Southern District of Ohio

Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

(614) 469-4141

(614) 469-2999 (Fax)

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner Von Clark Davis

CAPITAL CASE: QUESTIONS PRESENTED

I.

- a. When a party brings to the attention of the court of appeals, via a notice filed pursuant to Federal Rule of Appellate Procedure 28(j), a new decision of this Court that bears on whether the party is entitled to relief, may the court of appeals render judgment without addressing that new decision?
- b. Should this Court grant certiorari, vacate the judgment below, and remand for further consideration in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)?

II.

- a. Is petitioner entitled to habeas corpus relief for involuntarily, unknowingly, and unintelligently waiving jury where he decided to waive only after he was given representations that he would be tried and sentenced by three specific judges—whom the court identified by name twice in open court and whose names the prosecutor typed in the written waiver document which the petitioner and the court signed—but afterwards, petitioner was re-sentenced to death by three completely different judges?
- b. Under this Court’s clearly established law governing knowing, voluntary, and intelligent waivers, can petitioner secure habeas relief when the identity of his three-judge panel changed from what he was assured it would be—without reservation, multiple times, on the record in open court and in writing—and when he informed the court such information was necessary to his waiver decision?

III.

Does a defendant have a clearly established due process right, under *Puckett v. United States*, 556 U.S. 129 (2009), *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Santobello v. New York*, 404 U.S. 257 (1971), for relief when promises that induced him to waive his constitutional right to a jury trial cannot be fulfilled, and is Davis entitled to habeas relief on his claim?

DIRECTLY RELATED CASES

Ohio Trial Court:

State v. Davis, No. CR 83-12-0614 (Ohio Ct. Common Pleas, Butler Cty.)
(conviction entered Sept. 21, 2009)

Ohio Supreme Court:

State v. Davis, 9 N.E.3d 1031 (Ohio 2014) (judgment entered April 22, 2014)

Ohio Court of Appeals:

State v. Davis, 2013-Ohio-3878 (Ohio 12th Dist. Sept. 9, 2013)

United States District Court:

Davis v. Shoop, No. 2:16-cv-495, 2020 U.S. Dist. LEXIS 106444 (SD OH June 16, 2020) (Magistrate's R&R)

Davis v. Shoop, No. 2:16-cv-495, 2021 U.S. Dist. LEXIS 59175 (SD OH Mar. 29, 2021) (Opinion and Judgment)

United States Court of Appeals:

Davis v. Jenkins, 79 F.4th 623 (6th Cir. 2023) (vacated panel opinion)

Davis v. Jenkins, 115 F.4th 545 (6th Cir. 2024) (en banc) (judgment entered Aug. 20, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Von Clark Davis respectfully requests that the Court grant, vacate, and remand his case to the United States Court of Appeals for the Sixth Circuit to consider the argument he raised in a Notice of Supplemental Authority before the court of appeals rendered its decision or, in the alternative, grant a writ of certiorari to review the decision of the en banc court this case.

OPINIONS BELOW

The District Court's decision is published at *Davis v. Shoop*, No. 2:16-cv-495, 2021 U.S. Dist. LEXIS 59175 (S.D. Ohio Mar. 29, 2021), and reproduced at Pet.App'x.A-48. The Sixth Circuit's panel's decision is published at *Davis v. Jenkins*, 79 F.4th 623 (6th Cir. 2023), and reproduced at Pet.App'x.A-31. The Sixth Circuit's en banc decision is published at *Davis v. Jenkins*, 115 F.4th 545 (6th Cir. 2024) (en banc), and reproduced at Pet.App'x.A-1. The Sixth Circuit's order denying the motion for en banc reconsideration is reported at *Davis v. Jenkins*, No. 21-3404, 2024 U.S. App. LEXIS 25932 (6th Cir. October 15, 2024) (en banc) and reproduced at Pet.App'x.A-135.

JURISDICTIONAL STATEMENT

In this petition, Davis seeks review of the Sixth Circuit's August 20, 2024 en banc decision in his capital case. Pet.App'x.A.-1. Following this decision, the Sixth Circuit denied his petition for en banc reconsideration on October 15, 2024. Pet.App'x.A-135. The time for filing Davis's petition for certiorari was extended to January 17, 2025, by order of Justice Kavanaugh on Nov 14, 2024, No. 24A479. This Court has jurisdiction under 28 U.S.C. §1254(1).

Davis challenges the constitutionality of 28 U.S.C. §2254(d) in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and 28 U.S.C. §2403(a) may apply. Accordingly, Davis will serve this petition on Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

In the proceedings before the United States Court of Appeals, the Sixth Circuit certified to the Attorney General the fact that the constitutionality of 28 U.S.C. §2254(d) was drawn into question. A September 23, 2024 letter from Clerk of the Court Kelly L. Stephens to United States Attorney General Merrick B. Garland stated: “In his motion for reconsideration and subsequent notice of constitutional question, the petitioner raises the application of *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024), to the deference afforded to state court determinations pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §2254(d). The petitioner specifically calls into question the constitutionality of §2254(d).” (Doc. 73.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides, in relevant part:

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section One of the Fourteenth Amendment to the United States Constitution

provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2254 of Title 28 of the United States Code provides, in relevant part:

(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.

Federal Rule of Appellate Procedure 28 provides, in relevant part:

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

INTRODUCTION

Von Clark Davis asks this Court to grant, vacate, and remand this case to the court of appeals to consider in the first instance an argument it should have already adjudicated when he raised it before that court decided his case. Instead, the en banc court: said nothing in its Opinion about the argument in Davis's timely Rule 28(j) Letter; attempted to prevent him from raising this omission; and eventually refused to adjudicate the matter by claiming it had already "fully considered" it in its original decision. Davis submits the record in this case shows otherwise.

The argument the court of appeals refused to address was based on a new decision this Court issued after oral argument in Davis's case, *Loper Bright Enterprises v. Raimondo*. Davis argued that case calls into question the constitutionality of AEDPA deference, and that accordingly the court of appeals should have considered his habeas claims de novo.

Even if the Sixth Circuit applied the correct deference, its decision nevertheless deviated from the law of this Court and its sister circuits, and accordingly, this Court should grant this petition for writ of certiorari to address these departures.

STATEMENT OF THE CASE

Davis agreed to waive his rights to be tried and sentenced by a jury only after he asked for, and was assured of, the identities of the three judges who would perform those roles in lieu of a jury. Twice on the record, the judge named these jurists for him, and in open court, the judge and Davis signed a written agreement (prepared by the prosecutor) in which each judge was identified by name.

None of these judges was on the bench, however, when Davis returned years later following the Sixth Circuit's grant of relief in prior habeas litigation. Nevertheless, the State chose to again pursue a death sentence against Davis, despite knowing that would necessitate proceeding before three different judges. At the same time, it argued Davis ought not be released from his jury waiver.

Accepting the State's arguments, the trial court forced Davis to be sentenced by three different judges from those identified to him on the record and named in his waiver agreement. Those new judges, one of whom, when he was a prosecutor, sought the death penalty against Davis's nephew, deliberated for less than an hour before sentencing Davis to death.

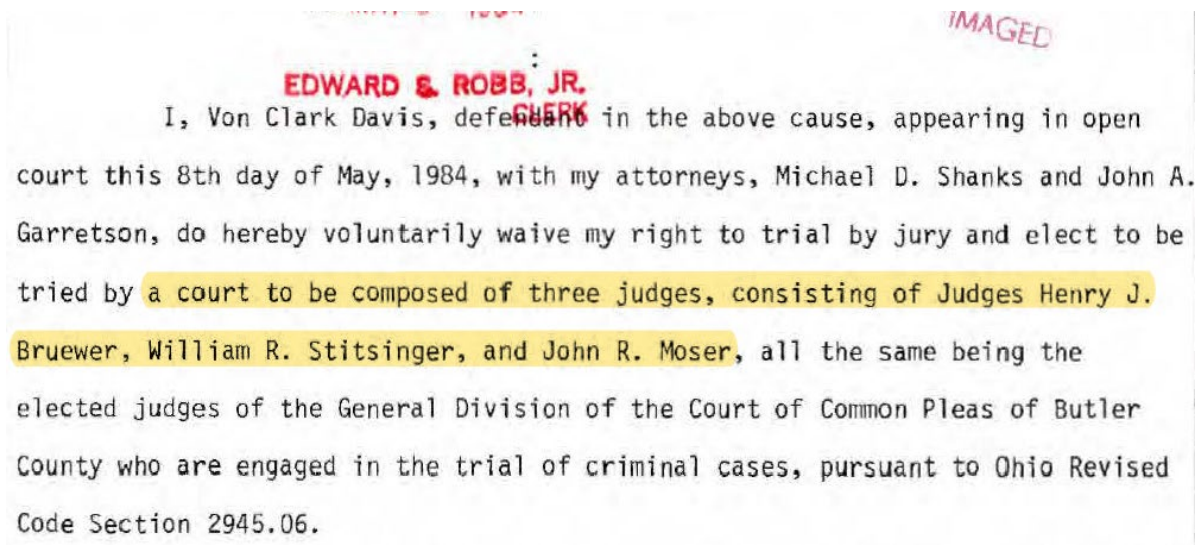
What happened to Davis can only be explained as a breach of the promises that induced him to waive his fundamental constitutional right to a jury, or—if the promise memorialized in his waiver agreement was actually meaningless—then he did not waive his rights in a knowing, intelligent, or voluntary manner.

* * *

1. In pre-trial proceedings, Davis specifically requested the names of the three judges who would try and sentence him should he agree to waive his constitutional right to a jury. (Mot. for Notice of Prospective Three-Judge Panel, Apr. 27, 1984, R.4-1, PageID 212-13; Pet.App'x.A-338-39.) His motion stated he was unable "to make a valid, fully informed decision as to whether or not he should waive his right to trial by jury . . . unless he [could] be notified in advance of the names of the three Judges that would serve in the event [he did] waive his right to

jury trial.” (*Id.* at PageID 213 & Pet.App’x.A-339; *see also* Mot. Hr’g, R.5-1, PageID 7209; Pet.App’x.A-341 (attorneys discussing motion).)

“For the record,” Judge Brewer provided the judges would be “Judge Stitsinger, Judge Moser, and [him]self.” (Mot. Hr’g, May 2, 1984, R.5-1, PageID 7209; Pet.App’x.A-341.) Then, the State typed out the names of all three judges when it drafted the waiver document on the prosecutor’s stationery, which memorialized that Davis “waive[d his] right to trial by jury” and would instead face “a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser.”



EDWARD S. ROBB, JR.
CLERK

I, Von Clark Davis, defendant in the above cause, appearing in open court this 8th day of May, 1984, with my attorneys, Michael D. Shanks and John A. Garretson, do hereby voluntarily waive my right to trial by jury and elect to be tried by a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser, all the same being the elected judges of the General Division of the Court of Common Pleas of Butler County who are engaged in the trial of criminal cases, pursuant to Ohio Revised Code Section 2945.06.

(Jury Waiver, R.4-3, PageID 433; Pet.App’x.A-340 (emphasis added).)

Back in court for a waiver colloquy, Davis read and signed this document. So did Judge Brewer, who concluded the proceedings by reiterating that, as that document stated, “myself and Judge Moser and Judge Stitsinger” would be empaneled to hear Davis’s case. (Mot. Hr’g, May 8, 1984, Doc. 5-1, PageID 7225; Pet.App’x.A-345.)

This bargain was initially upheld when the judges named in the waiver document tried *and* sentenced Davis. But on remand twenty-five years later, all three named judges were unavailable. Despite this, the State again sought death against Davis while simultaneously arguing he should not be released from his waiver. (*See* Memo. In Opp., R.4-35, PageID 4242-53; Mot. Hr'g, R.5-6, PageID 8068-73.) The trial court denied Davis's request to withdraw the waiver that had been induced by a now-broken promise.

2. On direct appeal, Davis argued his Due Process and Sixth Amendment rights should have released him from his waiver because the State “fail[ed] to live up to its end of the bargain” that induced it. (Appellant's Br., R.4-43, PageID 5866.) The Ohio Supreme Court acknowledged Davis's “claims center on the fact that the three-judge panel that sentenced him in 2009 was not the same three-judge panel before which he had expected to be tried and sentenced when he waived a jury trial in 1984,” considering that in his most-recent resentencing, “he was sentenced by a different panel” of judges than “the specific panel mentioned in his jury waiver: Judges Bruewer, Stitsinger, and Moser.” *State v. Davis*, 9 N.E.3d 1031, 1040 (Ohio 2014); Pet.App'x.A-319. But the state court pointed to the fact that “in a capital case in Ohio, when the initial trial and sentencing proceedings were held before a three-judge panel, impaneling a jury solely for the purpose of resentencing is precluded by statute.” *Id.* at 1041; Pet.App'x.A-320 (citing Ohio. Rev. Code §2929.06(B)); *see also id.* (“Under this provision, because Davis had been tried to a three-judge panel, he was not entitled to a jury on resentencing.”).

In the alternative, if there was no significance to specifying the names of the judges in Davis’s waiver agreement, then, Davis argued in state court, he “did not knowingly and intelligently waive his right to a jury trial” because he lacked “sufficient awareness of the relevant circumstances and likely consequences of his waiver,” including that there could be “new judges determining [his] fate.” (Merit Brief, R.4-43, PageID 5875.) The Ohio Supreme Court denied this claim because it determined relief would “appear[] to require that a defendant waiving a jury trial possess more information than courts have usually held sufficient for a knowing and intelligent jury waiver.” *Davis*, 9 N.E.3d at 1042; Pet.App’x.A-321.

3. Davis eventually obtained habeas relief from a panel of the Sixth Circuit. *See Davis v. Jenkins*, 79 F.4th 623 (6th Cir. 2023); Pet.App’x.A-31, *vacated by* 115 F.4th 545 (6th Cir. 2024) (en banc); Pet.App’x.A-1. The en banc Sixth Circuit vacated that decision, received supplemental briefing, and heard oral argument in the case.

4. While the case was under advisement, this Court decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Davis in turn filed with the court of appeals a Notice of Supplemental Authority under Federal Rule of Appellate Procedure 28(j), (Doc. 61; Pet.App’x.A-136), and a Motion for Leave to File a Supplemental Brief, (Doc. 62; Pet.App’x.A-139). In both submissions, he argued that *Loper Bright* provided an additional argument supporting his position that he was entitled to de novo review on his claims, because it demonstrated that AEDPA deference is unconstitutional.

5. The court of appeals issued its en banc Opinion denying all of Davis's claims the day after he had moved for supplemental briefing (and the week after he had filed his Rule 28(j) letter), but that Opinion did not address the arguments Davis raised in his Rule 28(j) Letter, and instead evaluated his claims using AEDPA deference. *See* Pet.App'x.A-1. Further, the court did not rule on his motion requesting supplemental briefing.

6. Because the Court had overlooked these matters, Davis attempted to file a Motion for En Banc Reconsideration on August 30, 2024, by submitting it through the court of appeals' electronic filing system. (Doc. 64-1; Pet.App'x.A-147.) Later that day, the motion was returned to undersigned counsel as "unfiled." (*See* Letter, Doc. 65-2; Pet.App'x.A-167.) A letter to counsel from the en banc coordinator stated that Davis's motion was "not accepted for filing" because "[n]either the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for rehearing/reconsideration of an opinion of the en banc court." (*Id.*)

Following a conversation with the Clerk, Davis filed a Motion for Leave to file his Motion for Enc Banc Reconsideration. (Doc. 66-1; Pet.App'x.A-168.) He reiterated (as he had noted in his initial motion) that the court of appeals had previously accepted and adjudicated a similar motion in the identical procedural posture when the government filed in it *United States v. Havis*, 929 F.3d 317, 318 (6th Cir. 2019) (en banc). (*See id.* at Pet.App'x.A-169.) On September 13, 2024, the court of appeals issued an order, (Doc. 68), granting Davis's motion for leave to file the en banc reconsideration motion, ordering the Warden to file a response, and

denying Davis’s pending motion for supplemental briefing as moot. Davis then filed his motion, (Motion for En Banc Reconsideration, Doc. 69-1; Pet.App’x.A-297), the Warden responded, (Doc. 72) and Davis replied, (Doc. 76).

On the afternoon of October 15, 2024, the en banc court issued an order denying Davis’s motion for en banc reconsideration. (Order, Doc. 77-1; Pet.App’x.A-135.) Although, as noted, the en banc Opinion never mentioned either Davis’s Rule 28(j) letter or *Loper Bright*, the order stated that the en banc court “reviewed the motion and concludes that the issues raised in the motion were fully considered upon the original submission and decision.” (*Id.*)

Despite this, the next morning, a panel of the Sixth Circuit granted a motion in another capital habeas case that requested (frequently in language identical to that in Davis’s filings), supplemental briefing on *Loper Bright*’s impact on the AEDPA deference standard of review. *See* Order, *Sanders v. Plappert*, No. 16-6152 (6th Cir. Oct. 16, 2024).

REASONS FOR GRANTING THE WRIT

- I. **This Court should grant certiorari, vacate the judgment below, and remand for further consideration of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).**
 - A. **This Court should grant certiorari, vacate, and remand because the decision below conflicts with decisions of all the other circuits involving citation of a new Supreme Court decision under Rule 28(j).**

In his Notice of Supplemental Authority filed under Federal Rule of Appellate Procedure 28(j) (submitted after oral argument and before judgment), Davis identified *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), as an

intervening decision that bears on his entitlement to relief, arguing *Loper Bright* demonstrates he is entitled to *de novo* review of his constitutional claims and thus, to habeas corpus relief. Pet.App’x.A-136. As Davis explained, *Loper Bright* establishes that the court of appeals, as an Article III court, cannot defer to a merely “reasonable” adjudication by a non-Article III state court, in the very same way *Loper Bright* concluded that an Article III court must not defer to a “reasonable” interpretation of law from a non-Article III bureaucrat. *See id.* at Pet.App’x.A-136-37 (citing *Loper Bright*, 603 U.S. at 385-87, 392-93; *id.* at 414-15 (Thomas, J., concurring); and *id.* at 430, 434-35 (Gorsuch, J., concurring).)

Rather than adjudicating the impact of *Loper Bright* on Davis’s case, the court of appeals instead proceeded to judgment without addressing Davis’s arguments based on this new authority. Afterwards, when denying *en banc* reconsideration, the court of appeals asserted that it “fully considered” Davis’s arguments “upon the original submission and decision.” (Doc. 77-1; Pet.App’x.A-135.) But the en banc Opinion speaks for itself. The entire 65-page Opinion does not once mention Davis’s 28(j) letter, nor does it even contain the words “*Loper Bright*.” (Doc. 63-2; Pet.App’x.A-1.)

As a result, although *Loper Bright* bears on Davis’s entitlement to relief, the court of appeals failed to apply *Loper Bright* or to adjudicate its impact on Davis’s case, even though Davis properly raised it under Federal Rule of Appellate Procedure 28(j). This has created a circuit split.

Unlike the court of appeals below, all the other courts of appeals have, in published decisions, properly considered the application of any new Supreme Court decision raised in a Rule 28(j) letter. *See e.g., United States v. Castillo-Martinez*, 16 F.4th 906, 914 n. 3 (1st Cir. 2021); *United States v. Avenatti*, 81 F.4th 171, 194 n. 27 (2d Cir. 2023); *United States v. Doe*, 810 F.3d 132, 153 n. 12 (3d Cir. 2015); *Brickey v. Hall*, 828 F.3d 298, 308 n. 7 (4th Cir. 2016); *United States v. Greenlaw*, 84 F.4th 325, 347 n. 11 (5th Cir. 2023); *United States v. Lupton*, 620 F.3d 790, 803 n. 3 (7th Cir. 2010); *United States ex rel. Kraemer v. United Dairies, L.L.P.*, 82 F.4th 595, 605 (8th Cir. 2023); *United States v. Wright*, 46 F.4th 938, 950 n. 11 (9th Cir. 2022); *Foster v. PPG Indus.*, 693 F.3d 1226, 1235 n. 5 (10th Cir. 2012); *Rose v. Sec’y*, 87 F.4th 469, 485 (11th Cir. 2024); *Corbett v. Transp. Sec. Admin.*, 19 F.4th 478, 489 (D.C. Cir. 2021); *Sanders v. MSPB*, No. 2023-2243, 2024 U.S. App. Lexis 23192, at *4 (Fed. Cir. Sept. 10, 2024).

The court of appeals’ refusal to address an intervening decision of this Court is thus a clear outlier, warranting this Court’s review and relief. *See e.g., Davis v. United States*, 589 U.S. 345, 347 (2020) (per curiam) (granting certiorari and vacating judgment given court of appeals’ “outlier practice” of refusing to review factual issues for plain error); *Manuel v. City of Joliet*, 580 U.S. 357, 363-64 (2017) (granting certiorari and reversing where court of appeals’ position made it “an outlier among the Courts of Appeals, with ten others taking the opposite view.”).

Critically, by failing to consider *Loper Bright*, the court of appeals has rendered Rule 28(j) meaningless, while creating remarkable inefficiency. When this

Court renders a new decision, Rule 28(j) provides a method to ensure that a court of appeals is informed of the new authority, so that it may promptly consider and apply that new precedent. This secures the parties' due process right to be heard, while ensuring that the new decision is properly examined, evaluated, and applied. When a court of appeals disregards a 28(j) letter, however, unfairness and judicial inefficiency ensue: An aggrieved party (like Davis) must then invoke this Court's jurisdiction to secure application of the principles and reasoning set forth in the new decision. Such a multi-step process is inefficient and flouts Rule 28(j)'s design.

In this capital case, therefore, the court of appeals has created a stark split with all the other circuits, undermined Rule 28(j)'s purpose, and caused extraordinary judicial inefficiency. As such, this petition is an clear candidate for certiorari. This Court should grant Davis's petition, vacate the judgment below, and order the court of appeals to engage in further consideration of *Loper Bright*, as raised and argued by Davis in his Rule 28(j) letter.

B. Given this Court's GVR jurisprudence, this Court should grant certiorari, vacate, and remand for further consideration in light of *Loper Bright*.

The court of appeals' failure to engage with Davis's Rule 28(j) letter has engendered a circuit conflict that warrants certiorari. Certiorari is also warranted given this Court's established jurisprudence for granting certiorari, vacating a judgment, and remanding in light of an intervening decision from this Court. Here, such a "GVR" order is "an appropriate exercise of" this Court's "discretionary certiorari jurisdiction." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam).

Under 28 U.S.C. §2106, this Court may “vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.” Section 2106 “confer[s] upon this Court a broad power to GVR,” which is properly exercised when this Court “flag[s]” for the court of appeals “a particular issue that it does not appear to have fully considered.” *Lawrence*, 516 U.S. at 166, 167. Ultimately, a GVR order secures justice, because it “guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations.” *Stutson v. United States*, 516 U.S. 193, 197 (1996) (per curiam).

Accordingly, when a party identifies a “recent development[] that we have reason to believe the court below did not fully consider,” a GVR order is warranted if there is any “reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration,” if such reconsideration “may determine the ultimate outcome of the litigation.” *Lawrence*, 516 U.S. at 167. This includes all situations in which an intervening factor or change in law “might bear upon the judgment.” *Youngblood v. West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, J., dissenting). The appropriateness of a GVR order also depends on the equities, and a remand is warranted when it will “improve the fairness and accuracy of judicial outcomes.” *Lawrence*, 516 U.S. at 168.

Significantly, GVR orders *are not limited* to situations in which this Court issues a new decision after the court of appeals renders judgment. *See e.g., Webster v. Cooper*, 558 U.S. 1039 (2009). Rather, the operative question is whether the court

of appeals “fully considered” a decision of this Court, regardless of its timing. When the court of appeals failed to fully consider a new (though extant) decision, a GVR order is fully justified. *See e.g., Webster*, 558 U.S. at 1040 & *id.* at 1041 (Scalia, J., dissenting) (GVR where court of appeals denied relief without addressing Supreme Court decision rendered two months prior); *Robinson v. Story*, 469 U.S. 1081 (1984) (GVR where court of appeals did not fully consider Supreme Court decision issued three months earlier); *Grier v. United States*, 419 U.S. 989 (1974).

Given these standards, this Court should enter a GVR order requiring the court of appeals to consider *Loper Bright*, because Davis satisfies all of the GVR criteria. First, there is no question that the court of appeals did not fully consider *Loper Bright* or its undeniable implications for Article III judicial review. The court of appeals’ opinion never mentioned *Loper Bright*, nor did the court of appeals’ order denying Davis’s motion for *en banc* reconsideration.

Second, there is a reasonable probability that, upon adjudicating the application of *Loper Bright*, the court of appeals will conclude that Davis is entitled to *de novo* review and to relief because 28 U.S.C. §2254(d) deference to an adjudication of a non-Article III state court is unconstitutional. The majority opinion in *Loper Bright* makes clear that when conducting judicial review (as incorporated by the Administrative Procedure Act), Article III judges must conduct independent review and not “defer” to determinations of law made by Article II decisionmakers, 603 U.S. at 384-407, 412; Justice Thomas emphasized that such “deference” contravenes the independence of Article III judges, *id.*, 603 U.S. at 416

(Thomas, J., concurring); and Justice Gorsuch also recognized that “deference” violates Article III, because independent Article III judges do not defer to determinations made by non-Article III bureaucrats, *id.*, 603 U.S. at 429-34 (Gorsuch, J., concurring).

Now that this Court has placed “a tombstone on *Chevron* no one can miss,” *Loper Bright*, 603 U.S. at 417 (Gorsuch, J., concurring), it certainly appears that AEDPA deference has likewise met its demise. In fact, years ago, Judge Easterbrook concluded that §2254(d) deference could not be deemed unconstitutional, because, among other things, that “would mean that deference in administrative law under *Chevron* is unconstitutional.” *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev’d on other grounds*, 521 U.S. 320 (1997). He was correct: *Chevron* deference and AEDPA deference rise and fall together, and now they have fallen together.

Applying Judge Easterbrook’s logic, the court of appeals on remand certainly could (and should) conclude that AEDPA deference is now unconstitutional. As *Loper Bright* teaches, independent Article III judges are not—and cannot be—constrained by conclusions reached by non-Article III decisionmakers, whether they be Article II bureaucrats or elected state court judges, whose independence is not protected like that of Article III jurists. *See also Loper Bright*, 603 U.S. at 429-431, (Gorsuch, J., concurring). Because *Loper Bright* has “obvious legal bearing” on the applicable standard of review and the correctness of the judgment below, this Court should GVR for consideration of *Loper Bright*. *Cf. Coonce v. United States*, 142 S.Ct.

25, 25-31 (2021) (Sotomayor, J., dissenting). See Amsterdam and Liebman, *Loper Bright and The Great Writ*, 56 COL. HUM. RTS. L. REV. ____ (forthcoming Feb. 2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4991093 (discussing impact of *Loper Bright*).

Significantly, when upholding Davis’s death sentence, the court of appeals stated that Davis was not entitled to habeas corpus relief because “*federal courts may not displace with their own judgment the valid adjudications of state courts.*” *Davis*, 115 F.4th at 569; Pet.App’x.A-13 (emphasis supplied). **That conclusion flies in the face of *Loper Bright*.** *Loper Bright* establishes that the opposite is true: An Article III court’s independent judgment necessarily trumps the judgment of a non-Article III actor. Because the court of appeals denied relief by applying a standard of review that has been undermined by *Loper Bright*, Davis has a reasonable probability of securing habeas corpus relief on remand.

Third, and finally, a GVR order is warranted as a matter of equity. This is a capital case, and the court of appeals’ refusal to address *Loper Bright* is “unjust in and of” itself, “particularly where the stakes for [Davis] are high.” *Grzegorzczuk v. United States*, 142 S.Ct. 2580, 2585 (2022) (Sotomayor, J., dissenting from denial of a grant, vacate, and remand order). Davis provided notice of *Loper Bright* to the court of appeals and explained its impact upon his entitlement to relief. Yet the court of appeals’ response was silence, which can’t possibly be right in a capital

case. A GVR order requiring consideration of *Loper Bright* is therefore manifestly “just under the circumstances.” 28 U.S.C. §2106.¹

Rule 28(j) and this Court’s GVR jurisprudence lead to the same conclusion: This Court should grant certiorari, vacate the judgment below, and order the court of appeals to consider *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

¹ Should Respondent try to short-circuit Davis’s request for a GVR order by now raising issues that the court of appeals has never adjudicated, Davis notes that all such issues must be decided in the first instance by the court of appeals. This Court is “a court of review, not of first view.” *Moody v. Netchoice, LLC*, 603 U.S. 707, 708-702 (2024). It would be unfair to require Davis to litigate such issues in truncated fashion here.

Regardless, any objections the Warden might raise based on “forfeiture” or “waiver” are meritless. As an initial matter, the Warden never responded to Davis’s Rule 28(j) letter, a failure that itself forfeits any assertion of forfeiture. Davis also could not “forfeit” this additional argument because it is based on a new decision from this Court, and he raised the issue promptly after that decision issued. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143-45 (1967) (party did not waive or forfeit claim based upon intervening decision of this Court that “brought out the constitutional question here”).

Moreover, the Warden seemed to misapprehend the nature of this issue below; Davis has not attempted to raise a new *claim* past the deadline for doing so; his arguments based on *Loper Bright* provide additional support for his unquestionably preserved position that he is entitled to de novo review. In any event, as the Sixth Circuit and Justice Alito have acknowledged, a party cannot forfeit the applicable standard of review. *Brown v. Smith*, 551 F.3d 424, 428, n.2 (6th Cir. 2008); *Moody v. Netchoice, LLC*, 603 U.S. 707, 779-80 (2024) (Alito, J., concurring) (citing cases holding that party cannot forfeit, waive, or abandon standard of review). Finally, the courts of appeals set their own standards for consideration of new issues, *see Singleton v. Wulff*, 428 U.S. 106 (1976), and, under *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988), the Sixth Circuit would fully consider Davis’s *Loper Bright* arguments, because they are purely legal in nature.

II. In conflict with decisions of this Court and other courts of appeals, the court of appeals denied Davis’s jury waiver claim by interpreting 28 U.S.C. §2254(d)’s requirement of “clearly established federal law” as requiring a decision of this court on identical facts.

Davis sought habeas corpus relief because his waiver of a jury was not knowing, voluntary, and intelligent. His jury waiver was induced by (and based upon) the trial court’s assurance and commitment that he would be tried and sentenced by three specific judges, yet years later, after his sentence had been vacated, he was not allowed to withdraw his waiver and was then sentenced to death by three different judges despite his objection.

Davis is entitled to relief under 28 U.S.C. §2254(d)(1) because the state court unreasonably applied “clearly established” federal law from this Court. Under clearly established law, his jury waiver—like the waiver of any constitutional right— must have been knowing, voluntary, and intelligent. And it could not have been predicated on “unfulfilled or unfulfillable promises,” *Brady v. United States*, 397 U.S. 742, 755 (1970), like the promise that Davis would be tried and sentenced by the three judges named in his waiver.

The clearly established law governing this claim has existed for generations. It includes *Johnson v. Zerbst*, 304 U.S. 458, 464, 468 (1938), which held, in the context of the right to counsel, that a waiver must be an “intentional relinquishment or abandonment of a known right,” it must be made “competently and intelligently,” and “whether there has been an intentional waiver” “must depend . . . upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” Likewise,

Adams v. U.S. ex rel. McCann, 317 U.S. 269, 278 (1942), held that whether an accused has made an intelligent, competent waiver of jury “must depend upon the unique circumstances of each case.” The clearly established law also embraces *Boykin v. Alabama*, 395 U.S. 238 (1969), which held that trial by jury is one of the rights waived by a guilty plea, and any waiver must be intentional, knowing, and voluntary. *Id.* at 243 & n.5 (citing *Johnson v. Zerbst*). It further includes *Brady v. United States*, 397 U.S. 742, 748, 749, 755 (1970), which similarly held that: a waiver of jury is included in a guilty plea; “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences;” when evaluating validity of a waiver, a reviewing court must “consider[] all the relevant circumstances,” including “the actual value of any commitments made to [the accused] by the court, prosecutor, or his own counsel;” and any plea and its attendant waivers cannot stand if “induced by . . . misrepresentation (including unfulfilled or unfulfillable promises)”

Despite Davis’s invocation of *Johnson*, *Adams*, *Boykin*, and *Brady* as clearly established law entitling him to relief, the court of appeals concluded that Davis’s waiving of his jury in reliance on the identity of the three judges named in his waiver agreement does not provide grounds for relief because the waiver’s “naming of three particular judges to the panel” is not a “unique circumstance that has been clearly established” as invalidating a waiver. *Davis*, 115 F.4th at 562; Pet.App’x.A-9.

While recognizing that a defendant is entitled to know the “likely consequences” of his waiver, the court held those likely consequences did not include the identity of Davis’s sentencing judge(s), as the identities of judges are “a far cry” from the information that “in general” is required for a jury waiver to be valid. *Davis*, 115 F.4th at 562-63; Pet.App’x.A-9. But the court of appeals refused to acknowledge that the identity of the three judges *was* pivotal to Davis’s decision to waive a jury. Davis’s motion requesting the judges’ names stated plainly that he needed that information “to make a valid, fully informed decision” on the waiver. (Mot., R.4-1, PageID 212-13; Pet.App’x.A-338-39.) Because Davis relied on the identities of the judges as a basis for his waiver decision, they were one of the “unique circumstances of [his] case.” *Adams*, 317 U.S. 278. That made the identities of the judges, if not enforced, a “misrepresentation,” an “unfulfilled promise” and/or an unfulfilled “commitment” that induced his waiver. *See Davis*, 115 F.4th at 580; Pet.App’x.A-21 (Moore, J., dissenting) (majority’s reasoning about what information “in general” should inform a waiver “falls flat,” given specific circumstances surrounding Davis’s waiver).

In denying relief, the court of appeals erroneously narrowed what constitutes clearly established law, in conflict with decisions of this Court and other courts of appeals. As this Court held in *Marshall v. Rodgers*, 569 U.S. 58 (2013), under 28 U.S.C. §2254(d), “the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since ‘a general standard’ from this Court’s cases can supply such law.” *Id.* at 62 (citing *Yarborough*

v. Alvarado, 541 U.S. 652, 664 (2004)). As such, 28 U.S.C. §2254(d) does not require an “identical factual pattern before a legal rule must be applied” as clearly established law. *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). See also *Smith v. Titus*, 141 S. Ct. 982, 987 (2021) (Sotomayor, J., dissenting) (“When this Court announces a legal principle and applies it to a particular factual situation, it is the legal principle itself, not the factual outcome, that becomes clearly established federal law.”).

The court of appeals’ interpretation of what constitutes “clearly established law” runs headlong into this Court’s decisions. *Rodgers* and *Woodall* make manifest that “general rules” are indeed “clearly established” for purposes of §2254(d), and they must be applied to the specific circumstances of any habeas petitioner’s case (as *Johnson*, *Adams*, *Boykin*, and *Brady* must here). See also *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (no dispute that general rule of *Strickland v. Washington*, 466 U.S. 668 (1984), was clearly established law applicable to petitioner’s habeas claim). Cf. *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam) (overturning court of appeals’ conclusion that there was no “clearly established law” enabling 42 U.S.C. §1983 plaintiff to overcome qualified immunity).

Judge Moore correctly perceived this error in the court of appeals’ §2254(d) analysis. As she has explained:

The Ohio Supreme Court, however, failed to consider the ‘relevant circumstances and likely consequences’ specific to Davis’s jury waiver, despite *Brady* and *McCann* requiring that it do so. *Brady*, 397 U.S. at 748; *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278 (1942). Most relevant here, the Ohio Supreme Court did not consider

whether Davis’s jury waiver was ‘induced by . . . misrepresentation (including unfulfilled or unfulfillable promises).’ *Brady*, 397 U.S. at 755 (citation omitted). Accordingly, this aspect of the decision constitutes an unreasonable application of Supreme Court precedent. For these reasons, I would find that the Unknowing-Waiver Claim is subject to de novo review that includes consideration of all the relevant circumstances, as required by Supreme Court precedent.

Davis, 115 F.4th at 578; Pet.App’x.A-20 (Moore, J., dissenting). Yet “[u]nlike other cases that have addressed similar claims under *Brady*, here the record leading up to the waiver, the waiver colloquy, and the language included in the waiver all lead to the same conclusion: Davis agreed to waive his jury right based on his understanding—informed by the court, his counsel, and the written jury waiver—that he would be tried and sentenced by a specific three-judge panel.” *Id.* at 579; Pet.App’x.A-20. And as Judge Moore noted, when one examines “the aspect of *Brady* that controls this case,” Davis has “clearly established law” that entitles him to habeas corpus relief: In *Brady*, this “Court explicitly contemplated that the relevant circumstances and likely consequences include ‘unfulfillable promises,’ ‘misrepresentation,’ and ‘the actual value of any commitments made to [the defendant] by the court, prosecutor, or his own counsel,’ *Brady*, 397 U.S. at 748, 754-55,” but “Davis was induced to waive his jury right based on the unfulfillable promise of a specific three-judge panel.” *Davis*, 115 F.4th at 580-81; Pet.App’x.A-21-22 (Moore, J., dissenting).

While the court of appeals’ unduly restrictive interpretation of “clearly established law” conflicts with *Brady* and its predecessors, it highlights two related conflicts within the lower courts. First, the court of appeals’ misreading of “clearly

established law” conflicts with at least one other court of appeals’ decision that a reviewing court must not require a case involving identical facts before finding that there is “clearly established law” allowing habeas corpus relief. As the Third Circuit explained, it is “myopic and constrained” to view “the AEDPA standard of review” to prohibit relief on invalid waiver claim by asserting that the claim is not “governed by clearly established law because no Supreme Court has specifically held” a waiver invalid under similar circumstances. *Jamison v. Klem*, 544 F.3d 266, 273 (3d Cir. 2008).² *See also Garcia v. Hepp*, 65 F.4th 945, 955 (7th Cir. 2023).³

Second, the court of appeals’ failure to acknowledge *Johnson*, *Adams*, *Boykin*, and/or *Brady* as “clearly established law” entitling Davis to habeas relief under the unique circumstances of this case highlights a related conflict: Numerous other courts of appeals have concluded that such cases have “clearly established” that waivers of constitutional rights (including a jury) must be knowing, voluntary, and intelligent *under the particular, or unique, circumstances surrounding a waiver*. Unlike the court of appeals here, these other courts have concluded that the “unique circumstances” of a particular case do not preclude the existence of “clearly

² *See also id.* (“[W]e have never interpreted the standard of review in §2254 to suggest that Congress intended habeas review to turn on whether the Supreme Court had previously decided an issue in a case involving a fact pattern that is identical to the facts underlying a habeas petitioner’s claim for federal relief.”).

³ *Id.* at 955 (“[I]f *any* factual distinction sufficed to affirm a lower court’s judgment as one that is not ‘unreasonable,’ then courts applying clearly established laws to new sets of facts would *never* satisfy the ‘unreasonable application’ clause. Such a conclusion would render the ‘unreasonable application’ clause altogether redundant.”)

established law” required by §2254(d). *See e.g., Stanko v. Stirling*, 109 F.4th 681, 694 (4th Cir. 2024) (on habeas review, inquiry is whether state court unreasonably applied “the clearly established rule of *Brady*” requiring that a waiver be voluntary, knowing, and intelligent); *Jamison v. Klem*, 544 F.3d at 274 (granting habeas relief on claim that plea was not knowing, voluntary, and intelligent, recognizing that “Jamison’s challenge to his guilty plea,” with its attendant waivers, “goes to the heart of the principle that was clearly established in *Boykin*, *Brady*, and *Henderson* [*v. Morgan*, 426 U.S. 637 (1976)]”); *Shafer v. Bowersox*, 329 F.3d 637 (8th Cir. 2003) (en banc) (granting habeas relief in capital case, finding that guilty plea and waiver of counsel at sentencing were not knowing, voluntary, and intelligent, and that state court unreasonably applied clearly established law of *Johnson v. Zerbst* and *Edwards v. Arizona*, 451 U.S. 477 (1981), which require examination of the particular facts and circumstances of a case); *Orduna v. Garrett*, No. 23-15313, 2024 U.S. App. Lexis 20748 (9th Cir. Aug. 16, 2024) (on habeas review, applying *Brady* as clearly established law governing claim that plea was not knowing, voluntary, and intelligent). *See also Hart v. Atty. Gen.*, 323 F.3d 884, 891 (11th Cir. 2003) (this Court has “clearly established” that government must establish knowing, voluntary, and intelligent waiver of right to counsel).

At bottom, in denying relief, the court of appeals has interpreted “clearly established law” too restrictively, and in a way that precludes relief in this capital case, *despite* “clearly established law” (*Johnson*, *Adams*, *Boykin*, *Brady*) that otherwise entitles Davis to habeas relief. Davis is entitled to a proper application of

Marshall v. Rodgers and *White v. Woodall* and to the type of “clearly established law” analysis conducted by Judge Moore in her dissent and the Third Circuit in *Jamison*. With that assessment, Davis would not be denied relief given the absence of “clearly established law,” but would be entitled to habeas relief given the unique facts in his case, because the state courts unreasonably applied the clearly established law set forth in *Johnson*, *Adams*, *Boykin*, and *Brady*, and his waiver was not knowing, voluntary, and intelligent. *Davis*, 115 F.4th at 577-81; Pet.App’x.A-19-22 (Moore, J., dissenting).

III. The Sixth Circuit improperly ignored clearly established federal law that a waiver of a constitutional right binds a defendant only insofar as he waived the right in that particular agreement.

Pursuant to Supreme Court Rule 10(c), certiorari is warranted because rather than applying this Court’s precedent, the Sixth Circuit carved away at this Court’s due process and fundamental fairness jurisprudence.

Clearly established federal law recognizes that contract-law principles govern waivers of constitutional rights. *Puckett v. United States*, 556 U.S. 129, 137 (2009); *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *Santobello v. New York*, 404 U.S. 257, 262 (1971). This means a defendant has a due process right to hold the government to the promises it made that induced him to waive the right. *Santobello*, 404 U.S. at 262.

This Court has long recognized these constitutional principles apply where a defendant “forfeits not only a fair trial, but also other accompanying constitutional guarantees,” *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002), “including [a

defendant's] privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers," *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *see also, e.g., Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (listing "the right to trial by jury" as one of the "federal constitutional rights . . . involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial"); *Corbitt v. New Jersey*, 439 U.S. 212, 220, n.9 (1978) (recognizing the contractual aspects of "guilty pleas and jury waivers").)

Here, in pre-trial proceedings, Davis specifically requested the names of the three judges who would try and sentence him should he agree to waive his constitutional rights to a jury. (Mot. for Notice of Prospective Three-Judge Panel, Apr. 27, 1984, R.4-1, PageID 212-13; Pet.App'x.A-338-39.) He made clear that he could not validly waive his right to a jury without knowing this information. (*Id.*) Satisfied with the three names provided, Davis agreed to a waiver under those terms. The State prepared the written waiver agreement setting forth these agreed terms on the prosecutor's letterhead, (Jury Waiver, R.4-3, PageID 433; Pet.App'x.A-340), and the judge confirmed them on the record in open court, (Mot. Hr'g, May 2, 1984, R. 5-1, PageID 7209; Pet.App'x.A-341).

That bargain was initially upheld when the judges named in the agreement tried *and* sentenced Davis. But on remand twenty-five years later, all three named judges were unavailable. Despite this, the State again sought death against Davis (which necessitated a sentencing hearing before a three-judge panel) while simultaneously arguing he should not be released from his waiver. (*See* Memo. In

Opp., R.4-35, PageID 4242-53; Mot. Hr'g, R.5-6, PageID 8068-73.) The trial court denied Davis's request to withdraw the waiver that was induced by a now-broken promise.

This Court has squarely established the rules that govern this claim. Davis had a constitutional right to be tried by a jury. U.S. Const. Amend. VI; *see, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). He waived this fundamental right *to be tried by a jury* in exchange for a promise to be “*tried and sentenced*” by a panel of three specifically named judges. *State v. Davis*, 9 N.E.3d 1031, 1040 (Ohio 2014); Pet.App'x.A-319 (emphasis added).

As a matter of due process, once the State was no longer able to provide him with the benefit of the bargain, Davis was entitled to a remedy, such as rescinding the waiver of his fundamental constitutional right, because that waiver had been induced by terms that could no longer be met. *See, e.g., Puckett*, 556 U.S. at 137. Instead, the Sixth Circuit improperly limited this Court's holdings in *Puckett*, *Mabry*, and *Santobello* to their facts, by restricting their application to “the government's purported violation *of a plea agreement, not a jury waiver.*” *Davis v. Jenkins*, 115 F.4th 545, 559 (6th Cir. 2024) (en banc); Pet.App'x.A-7 (emphasis supplied).

Nothing in the language of those decisions limits their application to plea agreements only, however. To the contrary, they hold that when a defendant waives rights like the Sixth Amendment right to a jury trial, the Constitution (not just the contract) requires the government to live up to the promises it uses to induce the

waiver. *Santobello*, 404 U.S. at 262–63; *see also* *Brady v. U.S.*, 397 U.S. 742, 748 (1970) (noting that the constitutional significance of a plea is “a waiver of his right to trial before a jury or a judge”). The Sixth Circuit’s decision is particularly illogical given that the constitutional significance of plea agreements is that they *include* jury waivers, among other rights, *Boykin*, 395 U.S. at 243, so the facts of Davis’s case already fit comfortably within the clearly established law and require no extension of it.

The Sixth Circuit correctly noted no clearly established “due process constitutional right to have a particular judge” in a typical case exists, *Davis*, 115 F.4th at 560; Pet.App’x.A-8, but that is not the issue here. No constitutional right to a sentence of 10 years, or to a chance for parole, or to concurrent sentences exists in the abstract either. Yet, once one of those specific terms becomes part of an agreement through which the defendant waives his constitutional rights in exchange for the promised sentence, it takes on constitutional significance. Likewise, the State’s failure to uphold the promise used to induce Davis to waive his constitutional rights—which here happened to be a promise for particular judges, instead of for a particular length or type of sentence—violated the fundamental fairness of the proceedings. *See Santobello*, 404 U.S. at 261.

The Sixth Circuit also noted that “[d]efendants routinely waive constitutional rights without inducements,” and that the right to a jury can be waived via

unilateral statutory procedure. *Davis*, 115 F.4th at 559; Pet.App’x.A-7.⁴ Some defendants may do so, but Davis did not. Davis’s waiver had all the hallmarks of an enforceable agreement based on explicit conditions accepted by the court—particularly in comparison to an earlier partial waiver in this same case, which was a true mere statutory election with no other conditions. (*See* Mot. Hr’g., May 4, 1984, R. 5-1, PageID 7221-22, Pet.App’x.A-341; Waiver and Election, R. 4-3, PageID 432, Pet.App’x.A-340.)⁵ His earlier waiver did not contain any terms to be breached or enforced, but the jury waiver here contained and was conditioned upon the identity of these judges. Therefore it could be (and was) breached by the failure to fulfill that stated condition.⁶

⁴ Moreover, even if “statutory procedure was the operating force in Davis’s case,” *Davis*, 115 F.4th at 559; Pet.App’x.A-7, a state violates Due Process when it privileges its own procedure over federal constitutional guarantees, *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

⁵ In contrast to the jury waiver in exchange for being tried and sentenced by three specific judges, the sparse partial waiver does not identify an agreed-upon judge by name; it states only that “the trial judge” would make the specification determination. (Waiver and Election, R. 4-3, PageID 432; Pet.App’x.A-340.) If the broader waiver had done the same, Davis would have no due process claim. But that agreement did not say only that he would be tried by ‘the trial judge’ and ‘two other judges’; it said he would be tried by three *specific* judges and listed them by name.

⁶ The Sixth Circuit questioned whether the promise of the three named judges truly induced the 1984 waiver, instead noting that a “reasonable jurist could credit Davis’s 1993 affidavit” —which attributed it to the additional reason of the court’s denial of a motion to sever—as an “earlier and more consistent” statement about other reasons for his waiver. *Davis*, 115 F.4th at 560-61; Pet.App’x.A-8.

That opinion ignores that *at the time of the waiver*, everyone involved knew Davis relied on the identity of the three named judges in deciding to waive, because he requested the names in advance to “make a valid, fully informed decision” on the waiver. (Mot., R.4-1, PageID 212-13; Pet.App’x.A-338-39.) The Sixth Circuit does

Given the explicit language of the waiver agreement, due process and fundamental fairness prohibited substituting three completely different judges without allowing Davis to withdraw his waiver. As structural error, the denial is not subject to harmless-error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). Alternatively, even if prejudice were not presumed, the violation was not harmless here. Davis never would have agreed to waive jury to be tried by a panel that included a judge who had sought the death penalty against a member of his family. (See Davis Aff., R.4-46, PageID 6271.)

Because the Sixth Circuit denied this claim in a manner that “conflicts with relevant decisions of this Court,” certiorari is warranted. Sup. Ct. R. 10(c).

not explain why a reasonable jurist would rely on the 1993 affidavit as opposed to what Davis articulated at the time of the waiver, and continues to say now.

Moreover, in response, the trial court informed Davis “[f]or the record” that the three judges would be Judge Stitsinger, Judge Moser, and Judge Bruewer, (Mot. Hr’g, May 2, 1984, R. 5-1, PageID 7209; Pet.App’x.A-341), and later informed Davis in the waiver colloquy itself that he would be tried and sentenced by the three judges specified in his form, (Mot. Hr’g, May 8, 1984, R. 5-1, PageID 7225; Pet.App’x.A-345). The Sixth Circuit insists that this exchange was “outside the colloquy”—despite it clearly being part of the back and forth between the trial court and Mr. Davis—but also says the court shouldn’t consider the colloquy anyway, as it is “outside of the four corners of the document[.]” *Davis*, 115 F.4th at 560; Pet.App’x.A-7-8. But all record statements about Davis’s waiver were consistent with the language in the “four corners” of the written document, that his court was “to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser.” (Jury Waiver and Election of Three-Judge Panel, R.4-3, PageID 433; Pet.App’x.A-340).

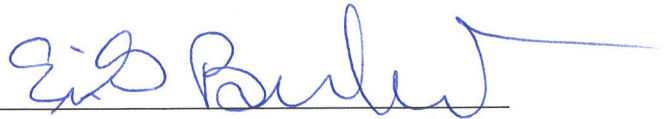
CONCLUSION

For the foregoing reasons, Davis respectfully requests that this Court grant the petition for writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Alternatively, he requests this Court grant the petition for writ of certiorari.

Respectfully submitted,

Joseph Medici,
Federal Public Defender

by:



Erin G. Barnhart (OH 0079681)

**Counsel of Record*

Jordan S. Berman (OH 0093075)

(Supreme Court Bar No. 285543)

Assistant Federal Public Defenders
Office of the Federal Public Defender
for the Southern District of Ohio
Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

(614) 469-4141

(614) 469-2999 (Fax)

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner Von Clark Davis

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