

No. 24-6378 (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

---

SUPPLEMENTAL BRIEF

---

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**

## TABLE OF CONTENTS

|                                                                                                                                                                        |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| TABLE OF AUTHORITIES .....                                                                                                                                             | ii |
| SUPPLEMENTAL BRIEF .....                                                                                                                                               | 1  |
| I.    In denying habeas corpus relief, the court of appeals interpreted<br>28 U.S.C. §2254(d)'s requirement of "clearly established federal<br>law" too narrowly. .... | 1  |
| II.   In <i>Andrew v. White</i> , this Court rejected a narrow and highly<br>restrictive interpretation of "clearly established federal law." .....                    | 3  |
| III.  This Court should GVR for further consideration in light of<br><i>Andrew</i> . ....                                                                              | 5  |
| CONCLUSION.....                                                                                                                                                        | 8  |

## TABLE OF AUTHORITIES

|                                                                                          | Page(s)  |
|------------------------------------------------------------------------------------------|----------|
| <b>Cases</b>                                                                             |          |
| <i>Adams v. U.S. ex rel. McCann</i> ,<br>317 U.S. 269 (1942) .....                       | 5, 7     |
| <i>Andrew v. White</i> ,<br>604 U.S. ___, 145 S.Ct. 75 (2025) ( <i>per curiam</i> )..... | 1, 3-8   |
| <i>Begay v. United States</i> ,<br>553 U.S. 137 (2008) .....                             | 8        |
| <i>Boykin v. Alabama</i> ,<br>395 U.S. 238 (1969) .....                                  | 3, 5-7   |
| <i>Brady v. United States</i> ,<br>397 U.S. 742 (1970) .....                             | 5-7      |
| <i>Carey v. Musladin</i> ,<br>549 U.S. 70 (2006) .....                                   | 7        |
| <i>Chambers v. United States</i> ,<br>555 U.S. 122 (2009) .....                          | 8        |
| <i>Davis v. Jenkins</i> ,<br>115 F.4th 545 (6th Cir. 2024) ( <i>en banc</i> ).....       | 2-3, 5-7 |
| <i>Gall v. United States</i> ,<br>552 U.S. 38 (2007) .....                               | 8        |
| <i>Hudson v. Spisak</i> ,<br>552 U.S. 945 (2007) .....                                   | 7        |
| <i>Johnson v. Zerbst</i> ,<br>304 U.S. 458 (1938) .....                                  | 5, 7     |
| <i>Kimbrough v. United States</i> ,<br>552 U.S. 85 (2007) .....                          | 8        |
| <i>Lawrence v. Chater</i> ,<br>516 U. S. 163 (1996) ( <i>per curiam</i> ) .....          | 7        |

|                                                                            |        |
|----------------------------------------------------------------------------|--------|
| <i>Loper Bright Enterprises v. Raimondo</i> ,<br>603 U.S. 369 (2024) ..... | 1, 7-8 |
| <i>Mabry v. Johnson</i> ,<br>467 U.S. 504 (1984) .....                     | 3, 6-7 |
| <i>Payne v. Tennessee</i> ,<br>501 U.S. 808 (1991) .....                   | 4      |
| <i>Puckett v. United States</i> ,<br>556 U.S. 129 (2009) .....             | 3, 6-7 |
| <i>Santobello v. New York</i> ,<br>404 U.S. 257 (1971) .....               | 3, 6-7 |
| <i>Schriro v. Landrigan</i> ,<br>550 U.S. 465 (2007) .....                 | 8      |
| <i>Townsend v. United States</i> ,<br>553 U.S. 1050 (2008) .....           | 8      |
| <i>Vincent v. United States</i> ,<br>555 U.S. 1133 (2009) .....            | 8      |
| <b>Statutes</b>                                                            |        |
| 28 U.S.C. §2254(d) .....                                                   | 1, 4   |
| <b>Other Authorities</b>                                                   |        |
| U.S. Constitution Amend. VI .....                                          | 7      |
| U.S. Constitution Amend. VIII .....                                        | 4      |
| U.S. Constitution Amend. XIV .....                                         | 3      |

## SUPPLEMENTAL BRIEF

Petitioner-Appellant Von Clark filed a Petition for Writ of Certiorari on January 17, 2024. Subsequently, this Court decided *Andrew v. White*, 604 U.S. \_\_\_, 145 S.Ct. 75 (2025) (*per curiam*). Because *Andrew* informs the proper resolution of Questions II and III in Davis’s petition, *see* Pet. i & 20-32, Davis respectfully submits this supplemental brief in support of his petition.

The court of appeals below made the same error in misapplying AEDPA that this Court just criticized in reversing the Tenth Circuit in *Andrew*. *Andrew* thus supplies an independent reason why this Court should grant, vacate, and remand (GVR) Davis’s case, in addition to the reasons Davis identified in his petition for a GVR in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). *See* Pet. 11-19.

**I. In denying habeas corpus relief, the court of appeals interpreted 28 U.S.C. §2254(d)’s requirement of “clearly established federal law” too narrowly.**

In denying Davis habeas corpus relief, the court of appeals made a profound mistake by interpreting 28 U.S.C. §2254(d)’s requirement of “clearly established law” too restrictively, in conflict with decisions of this Court and many other courts of appeals. *See* Pet. 20-32.

First, in denying Davis’s claim that his jury waiver was invalid, the court of appeals concluded that Davis lacked clearly established law. It reasoned that this Court had not clearly established that the identity of judges was information which, if not provided, would invalidate a jury waiver. *See id.* at 22 (citing *Davis v.*

*Jenkins*, 115 F.4th 545, 562-63 (6th Cir. 2024) (en banc), Pet.App'x. A-9). Yet, as Davis has shown, this Court has clearly established (for generations) that a waiver is invalid if it is not knowing, intelligent, and voluntary, and a waiver is not knowing, intelligent, and voluntary if, given the unique circumstances attending a waiver, it is based upon misinformation or misrepresentation, including unfulfilled or unfulfillable promises or commitments made by the court or counsel. *See* Pet. 20-21 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 468 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1969)); *id.* (citing *Brady v. United States*, 397 U.S. 742, 755 (1970); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278 (1942)).

Davis's jury waiver suffers these precise constitutional shortcomings because he waived jury based upon the unfulfilled promise and commitment to be tried and sentenced by the three judges named in his waiver. Pet. 6-9. Thus, clearly established law entitles Davis to relief, even though this Court has not found a waiver invalid under identical circumstances. *See* Pet. 20-27; *id.* at 23-24 (quoting *Davis*, 115 F.4th at 578-81 (Moore, J., dissenting), Pet. App'x A-20-22 (Question II)).

Second, in denying Davis's claim that he is entitled to withdraw his jury waiver as a matter of due process because the promise or commitment that induced his waiver has not been fulfilled, the court of appeals again concluded that Davis lacked clearly established law. *Davis*, 115 F.4th at 558-60, Pet. App'x A-7-8. In particular, it determined that habeas relief was unavailable because "Davis has not identified a Supreme Court case holding that enforcement of a jury waiver in a similar circumstance violates fundamental fairness or the Due Process Clause of the

Fourteenth Amendment.” *Davis*, 115 F.4th at 558, Pet. App’x A-7. *See* Pet. 29 (Question III).

Davis, however, identified *Santobello v. New York*, 404 U.S. 257 (1971), *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Puckett v. United States*, 556 U.S. 129 (2009), as clearly establishing that, as a matter of due process and fundamental fairness, contract principles apply to his waiver of constitutional rights. Davis could not be sentenced by three judges to whom he never agreed when he was induced to waive his right to a jury based on the promise of being tried and sentenced by three completely different judges. Pet. 28-30. Yet the court of appeals concluded that this Court’s cases are limited to their facts and apply only to guilty pleas, not jury waivers, *Davis*, 115 F.4th at 559, Pet. App’x A-7, despite the constitutional significance of guilty pleas *including* waivers of rights such as the right to a jury, *Boykin*, 395 U.S. at 243.

**II. In *Andrew v. White*, this Court rejected a narrow and highly restrictive interpretation of “clearly established federal law.”**

In *Andrew*, this Court held that when this Court has previously “relie[d] on a legal rule or principle to decide a case,” that legal rule or principle is a “‘holding’ of this Court for purposes of AEDPA.” *Andrew*, 145 S.Ct. at 81. “Following these principles,” this Court held that “it is clear that Andrew identified clearly established federal law” in support of her habeas claims. *Id.*

In federal habeas corpus proceedings, Andrew asserted that the introduction of highly prejudicial evidence rendered her guilt and penalty phases fundamentally unfair. *Andrew*, 145 S.Ct. at 80. The court of appeals, however, determined that she

had failed to identify “clearly established federal law governing her claim,” as required by §2254(d)(1), concluding that the discussion of the Due Process Clause in *Payne v. Tennessee*, 501 U.S. 808 (1991), was a “pronouncement” rather than a “holding” of the Court. *Id.* This Court vacated the court of appeals’ judgment for erroneously interpreting and applying the “clearly established federal law” requirement. *Id.* at 83.

In *Payne*, this Court concluded that the Eighth Amendment did not categorially bar admission of victim-impact evidence where the Due Process Clause already “provides a mechanism for relief” against the introduction of evidence “that is so unduly prejudicial that it renders the trial fundamentally unfair.” *Andrew*, 145 S.Ct. at 81 (quoting *Payne*, 501 U.S. at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986))). This Court thus held that given protections guaranteed by due process, it “could permit victim impact evidence where appropriate without risking undue prejudice to defendants.” *Id.* (citing *Payne*, 501 U.S. at 825).

In *Andrew*, this Court emphasized that the court of appeals was “mistaken” to believe “itself constrained by AEDPA to limit *Payne* to its facts.” *Andrew*, 145 S.Ct. at 82. Rather, “[g]eneral legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court,” including general rules or principles such as the Eighth Amendment prohibition against a disproportionate sentence. *Id.* Because “[t]he legal principle on which *Andrew* relies” was “indispensable to the decision in *Payne*,” it was therefore “a holding of this Court for purposes of AEDPA.” *Id.* at 81. “The Court of Appeals thus erred by



refusing even to consider whether the [Oklahoma courts] unreasonably applied established due process principles to Andrew's case." *Andrew*, 145 S.Ct. at 82.

### **III. This Court should GVR for further consideration in light of *Andrew*.**

This Court should GVR Davis's case in light of *Andrew*. The court of appeals here improperly decided an important federal question in the same way this Court found necessary to correct in *Andrew*. *Andrew* demonstrates the correctness of Davis's arguments as to what constitutes "clearly established federal law" for his claims in Questions II and III.

The very debate in the court of appeals below was whether Davis's claims were supported by clearly established federal law. Though Davis cited *Johnson v. Zerbst*, *Adams ex rel. U.S. v. McCann*, *Boykin v. Alabama*, and *Brady v. United States* as entitling him to relief on his claim that his jury waiver was not knowing, voluntary, and intelligent, the majority below (like the Tenth Circuit in *Andrew*) demanded a more specific holding from this Court before it would grant relief. The court of appeals below (like the Tenth Circuit in *Andrew*), erroneously "limit[ed] [*Johnson, Adams, Boykin, and Brady*] to [their] facts." *Andrew*, 145 S.Ct. at 82.

Indeed, the majority below asserted that this Court has not found knowledge of the identity of judges who would replace a jury as a basis for invalidating a waiver. *Davis*, 115 F.4th at 562-63, Pet.App'x. A-9. Yet *Andrew* makes clear that Davis does rely on clearly established federal law. This Court has repeatedly "relie[d] on [the] legal rule or principle" that a waiver must be knowing, voluntary, and intelligent under the circumstances, and this Court has set forth the parameters of that "legal rule or principle" in its holdings in *Johnson, Adams*,

*Boykin*, and especially *Brady. Andrew*, 145 S.Ct. at 81. Most notably, *Brady* has clearly established that: (a) a waiver is not valid if the defendant is not informed of the direct consequences of his waiver, including “the ***actual value of any commitments made to him by the court***, prosecutor, or his own counsel,” *Brady*, 397 U.S. at 755 (emphasis supplied); and (b) a waiver cannot stand if it was “induced by threats (or promises to discontinue improper harassment), ***misrepresentation (including unfulfilled or unfulfillable promises)***, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (*e.g.* bribes).” *Id.* (emphasis supplied).

*Andrew* demonstrates that Davis relies upon holdings from this Court, *i.e.*, clearly established federal law, that support his entitlement to habeas corpus relief, and confirms the court of appeals erred by concluding otherwise. Once the court of appeals’ misinterpretation of clearly established law is corrected, Davis should be granted habeas corpus relief on his invalid-waiver claim, exactly as Judge Moore and her colleagues explained in dissent. *See Davis*, 115 F.4th at 578-81 (Moore, J., dissenting), Pet. App’x A-20-22.

Similarly, on his due-process challenge to being denied the three judges to whom he specifically agreed in exchange for waiving his jury right, Davis relies on clearly established constitutional principles set forth by *Santobello*, *Mabry*, and *Puckett*. *Andrew* makes plain that the court of appeals improperly limited this Court’s holdings in those cases to their facts by restricting their application to “the government’s purported violation of a *plea agreement*, not a *jury waiver*.” *Davis*, 115

F.4th at 559; Pet.App'x.A-7 (emphasis supplied). Rather, those decisions 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. Yet again, upon application of *Andrew* on remand, the court of appeals should conclude that Davis does rely on clearly established law and that his claim warrants habeas relief, exactly as Judge Moore and her colleagues concluded. *See Davis*, 115 F.4th at 570-77 (Moore, J., dissenting), Pet. App'x A-14-19.

Ultimately, *Andrew* confirms that the court of appeals erred in denying relief by imposing a too narrow and erroneous reading of this Court's holdings in *Johnson*, *Adams*, *Boykin*, *Brady*, *Santobello*, *Mabry*, and *Puckett*. On remand, therefore, the court of appeals should reject the premises upon which it earlier denied Davis relief. *See Lawrence v. Chater*, 516 U. S. 163, 167-68 (1996) (*per curiam*). There is thus a reasonable probability that, by applying *Andrew*, the court of appeals may reach a different conclusion about Davis's entitlement to habeas relief, especially where the court was closely split when denying relief.

This Court, therefore, should GVR in light of *Andrew*, in addition issuing a GVR in light of *Loper Bright* for the reasons set forth in Davis's petition. When either of two intervening decisions from this Court might lead to a different outcome in a capital habeas proceeding, this Court should GVR for consideration of both intervening decisions. *See e.g., Hudson v. Spisak*, 552 U.S. 945 (2007) (in capital habeas proceeding, GVR for further consideration in light of *Carey v. Musladin*, 549

U.S. 70 (2006) and *Schriro v. Landrigan*, 550 U.S. 465 (2007)). See also *Vincent v. United States*, 555 U.S. 1133 (2009) (GVR for reconsideration in light of *Begay v. United States*, 553 U.S. 137 (2008) and *Chambers v. United States*, 555 U.S. 122 (2009)); *Townsend v. United States*, 553 U.S. 1050 (2008) (GVR for reconsideration in light of *Gall v. United States*, 552 U.S. 38 (2007) and *Kimbrough v. United States*, 552 U.S. 85 (2007)).

### CONCLUSION

This Court should grant the petition for writ of certiorari, vacate the judgment below, and remand to the Sixth Circuit for further consideration in light of *Andrew v. White*, as well as *Loper Bright Enterprises v. Raimondo*.

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**

March 12, 2025