

No. 24-6378

In the Supreme Court of the United States

VON CLARK DAVIS,
Petitioner,

v.

BILL COOL, Warden
Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF IN OPPOSITION

DAVE YOST
Attorney General of Ohio

T. ELLIOT GAISER*
Ohio Solicitor General
**Counsel of Record*

MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
JANA M. BOSCH
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
thomas.gaiser@ohioago.gov

Counsel for Respondent

CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

Von Clark Davis committed his second murder over forty years ago and received the death penalty. After several rounds of legal review spanning decades, the en banc Sixth Circuit denied him habeas relief. The questions presented are:

1. Do circuit courts have discretion to decide whether to respond directly to supplemental-authority letters?
2. Did the Sixth Circuit correctly apply this Court's clearly established law about knowing and voluntary waivers?
3. Did the Sixth Circuit correctly apply this Court's clearly established law about bargains?

LIST OF PARTIES

The Petitioner is Von Clark Davis, an inmate at the Ross Correctional Institution.

The Respondent is Bill Cool, the Warden of the Ross Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

Petitioner's list of related proceedings is complete and correct.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST OF DIRECTLY RELATED PROCEEDINGS.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	v
INTRODUCTION	1
JURISDICTION.....	1
STATEMENT.....	1
I. The court convicted and sentenced Davis for his second murder.....	1
II. Davis received habeas relief and returned for his third sentencing.	2
III. The en banc Sixth Circuit denied Davis further habeas relief.	3
REASONS FOR DENYING THE WRIT.....	5
I. The petition does not implicate any circuit split.....	5
A. The circuits are not split on responding to letters.....	5
B. The circuits are not split on the law of voluntary waivers.	7
C. The circuits are not split on the law of bargaining.....	9
II. This case is a poor vehicle for deciding any of Davis’s claims.	10
A. This case is a poor vehicle for expounding on <i>Loper Bright</i>	10
B. The Sixth Circuit’s rejection of Davis’s argument was fact-bound.	13
III. The Sixth Circuit did not err.....	14
A. The Sixth Circuit committed no error by not addressing Davis’s letter.....	14
B. The Sixth Circuit did not err in applying the law of knowing and voluntary waivers.....	16
C. The Sixth Circuit did not err in applying the law of bargains.	17
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269 (1942)	8, 16
<i>Andrew v. White</i> , 604 U.S. ___, 145 S. Ct. 75 (2025)	17, 18
<i>Berghuis v. Thompson</i> , 560 U.S. 370 (2010)	18
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	8, 16
<i>Brady v. United States</i> , 397 U.S. 742 (1970)	7, 8, 16
<i>Brown v. Davenport</i> , 596 U.S. 118 (2022)	12
<i>Brown v. Smith</i> , 551 F.3d 424 (6th Cir. 2008)	13
<i>Davis v. Coyle</i> , 475 F.3d 761 (6th Cir. 2007)	2
<i>Dennis v. City of Philadelphia</i> , 19 F.4th 279 (3d Cir. 2021)	6
<i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471 (2008)	12
<i>Eze v. Senkowski</i> , 321 F.3d 110 (2d Cir. 2003)	12, 13
<i>F.T.C. v. Cyberspace.Com LLC</i> , 453 F.3d 1196 (9th Cir. 2006)	6
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	18
<i>Garcia v. Hepp</i> , 65 F.4th 945 (7th Cir. 2023)	8

<i>Gardner v. Galetka</i> , 568 F.3d 862 (10th Cir. 2009)	12
<i>Hart v. Attorney General of Florida</i> , 323 F.3d 884 (11th Cir. 2003)	9
<i>Hernandez-Serrano v. Barr</i> , 981 F.3d 459 (6th Cir. 2020)	6
<i>Jamison v. Klem</i> , 544 F.3d 266 (3d Cir. 2008)	8
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	8, 16
<i>Kilpatrick v. Kijakazi</i> , 35 F.4th 1187 (9th Cir. 2022)	6
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. 369 (2024)	3, 7, 10, 11, 15
<i>Lorenzo v. Prime Commc'ns, L.P.</i> , 806 F.3d 777 (4th Cir. 2015)	6
<i>Mabry v. Johnson</i> , 467 U.S. 504 (1984)	17
<i>Orduna v. Garrett</i> , No. 23-15313, 2024 U.S. App. Lexis 20748 (9th Cir. Aug. 16, 2024)	8
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	17
<i>Santobello v. New York</i> , 404 U.S. 257 (1971)	17
<i>Shafer v. Bowersox</i> , 329 F.3d 637 (8th Cir. 2003)	8
<i>Shewchun v. Holder</i> , 658 F.3d 557 (6th Cir. 2011)	6
<i>Stanko v. Stirling</i> , 109 F.4th 681 (4th Cir. 2024)	8, 9
<i>State v. Davis</i> , CA89-09-123, 1990 WL 165137 (Ohio Ct. App. Oct. 29, 1990)	2

<i>State v. Davis</i> , No. CA2009-10-263, 2011 WL 646404 (Ohio Ct. App. Feb. 22, 2011)	2
<i>State v. Davis</i> , No. CA2012-12-258, 2013 WL 4806935 (Ohio Ct. App. Sept. 9, 2013).....	2
<i>Troy Corp. v. Browner</i> , 129 F.3d 1290 (D.C. Cir. 1997).....	14
<i>United States v. Allen</i> , 93 F.4th 350 (6th Cir. 2024).....	15
<i>United States v. Munoz</i> , 132 F. App'x 756 (10th Cir. 2005)	6
<i>United States v. Ruiz</i> , 536 U.S. 622 (2002)	8, 17, 18
<i>Von Moltke v. Gillies</i> , 332 U.S. 708 (1948)	8
<i>In re W.T. Grant Co.</i> , 699 F.2d 599 (2d Cir. 1983).....	14
<i>Williams v. Romarm, SA</i> , 756 F.3d 777 (D.C. Cir. 2014)	6
Statutes	
28 U.S.C. §1254.....	1
28 U.S.C. §2403.....	11
Ohio Rev. Code §2929.022	1
Ohio Rev. Code §2945.05	3
Other Authorities	
<i>8/26/2015 Case Announcements</i> , 2015-Ohio-3427	3
Petition for Rehearing and Suggestion for Rehearing En Banc, <i>Young</i> <i>v. United States</i> , No. 01-2518 (Aug. 23, 2002).....	6

INTRODUCTION

Ten federal judges have rejected the habeas claims Von Clark Davis asks this Court to review, reflecting the culmination of forty years of litigation. Nothing Davis raises now merits this Court’s attention. First, the Sixth Circuit’s decision did not create or widen any circuit split—not for failing to respond to a supplemental-authority letter, and not for applying the clearly established law that Davis invokes. Second, this case is a poor vehicle because Davis’s merits arguments are fact-bound and his other arguments are late-breaking theories. Finally, the Sixth Circuit did not err when the en banc court rejected Davis’s claims and chose not to directly respond to the supplemental-authority letter.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT

I. The court convicted and sentenced Davis for his second murder.

While on parole for killing his wife, Davis killed his ex-girlfriend. Pet.App.A-2. Before trial, Davis exercised his statutory right under Ohio law to elect a trial by a panel of three judges and waive a jury. *Id.*; Ohio Rev. Code §2929.022. He asked for information about who the judges would be on the panel, and the trial court noted that they would be the three judges who served in the General Division of that court. Pet.App.A-2. At the hearing, the court confirmed that Davis was waiving his right to a jury trial and opting for “a panel of three judges.” *Id.* Davis and his counsel then signed a form that said he was “voluntarily waiv[ing] [his] right to trial by jury and elect[ing] 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.” *Id.* Farther down the page, the trial judge signed the statement, “This jury waiver and election to be tried by a three-judge panel is hereby accepted and entered upon the journal of this Court.” *Id.* Davis later explained that he made that choice because he thought a jury would be prejudiced when it heard of his prior murder. Pet.App.A-8.

The panel convicted Davis and sentenced him to death. Pet.App.A-2. On direct appeal, the Ohio Supreme Court affirmed everything except the sentence, which it remanded. *Id.* The trial court imposed the death penalty again, and the Ohio appeals courts affirmed. *Id.*; *State v. Davis*, CA89-09-123, 1990 WL 165137, *1, *5 (Ohio Ct. App. Oct. 29, 1990), *aff’d*, 63 Ohio St. 3d 44, 51 (1992).

II. Davis received habeas relief and returned for his third sentencing.

Davis’s first habeas petition yielded a vacated death sentence and a third sentencing. Pet.App.A-2; *Davis v. Coyle*, 475 F.3d 761, 781 (6th Cir. 2007). Before that sentencing, Davis moved to withdraw his election of a bench trial because the three judges from his trial and first two sentencings were no longer available. Pet.App.A-2. The court denied the motion and created a new panel. *Id.* The court heard testimony and accepted evidence. Pet.App.A-2–3. The panel sentenced Davis to death again. Pet.App.A-3. The appeals courts affirmed the sentence, and the state postconviction court denied relief. *Id.*; *State v. Davis*, No. CA2009-10-263, 2011 WL 646404, *1 (Ohio Ct. App. Feb. 22, 2011), *aff’d* 139 Ohio St. 3d 122, 148 (2014); *State*

v. Davis, No. CA2012-12-258, 2013 WL 4806935, *1 (Ohio Ct. App. Sept. 9, 2013), appeal not accepted for review, *8/26/2015 Case Announcements*, 2015-Ohio-3427.

III. The en banc Sixth Circuit denied Davis further habeas relief.

Davis filed a second habeas petition, which the district court denied. Pet.App.A-3. A panel of the Sixth Circuit reversed the district court and granted habeas relief on three claims. *Id.* The full court voted to rehear the case en banc. *Id.*

After oral argument and two months after this Court decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and while the en banc decision was pending, Davis filed a supplemental-authority letter citing *Loper Bright*. Pet.App.A-136–37. He also asked for supplemental briefing on the issue. Pet.App.A-139–144. The en banc court released its opinion the next day. Pet.App.A-1.

The full court rejected Davis’s arguments and affirmed the denial of habeas relief. Pet.App.A-13. Of the six arguments he raised, the first and second are relevant here because they correspond to Davis’s third and second questions presented.

First, the court addressed Davis’s argument that his jury waiver was a bargain that guaranteed him the same three-judge panel for trial, sentencing, and any potential re-sentencings. Pet.App.A-4. The court rejected the idea that Davis’s decision to opt for a three-judge panel was part of a bargain in which the State promised him something in return for his decision. Pet.App.A-7–8. Unlike plea bargains, choosing a bench trial instead of a jury is a statutory right for capital defendants in Ohio, meaning it provides a unilateral decision that defendants can invoke and revoke at will before trial. *Id.*; Ohio Rev. Code §2945.05. The court noted that the back-and-forth when Davis weighed the bench-trial election included the

three judges’ names, but not in a way that suggested they were guaranteed. Pet.App.A-7–8. It also discredited Davis’s assertion the he only chose a bench trial because he thought he was guaranteed those three judges; Davis earlier had said under oath that he had other overriding strategic reasons for waiving his jury right. Pet.App.A-8. Applying AEDPA, the court found that the state court’s decision on this claim was reasonable. *Id.*

Next, the court rejected Davis’s alternative argument that his waiver was not knowing, intelligent, and voluntary. Davis argued that he *thought* he had a right to be tried and sentenced by only those three judges, and his misunderstanding on that point rendered his decision void. *Id.* The court noted that Davis’s claimed misunderstanding looked nothing like the clearly established minimum required knowledge—that defendant understand the basics of the jury-trial right and what it means to waive it. Pet.App.A-9. Moreover, the court noted that there is no clearly established duty to “probe the minds of defendants in search of myths to bust before accepting a waiver.” Pet.App.A-10 (quotation omitted). In other words, precedent does not support the idea that Davis can assert any confusion about any expectation—no matter how unreasonable—in future proceedings to undermine the consequences of the decision he made. Applying AEDPA, the court rejected this claim.

The en banc court rejected Davis’s other claims as well and denied the request for habeas relief. Pet.App.A-10–13. Davis sought but did not receive en banc reconsideration. Pet.App.A-126, A-135. Davis petitioned this Court for certiorari.

REASONS FOR DENYING THE WRIT

This case does not warrant review. Davis identifies no circuit split; his arguments sound in mere error correction. And this case is a bad vehicle because of its fact-bound nature and Davis's strategic choices below. Lastly, even if mere error could command this Court's attention, there is none in the en banc Sixth Circuit's decision.

I. The petition does not implicate any circuit split.

Davis presents two arguments for a circuit split, but neither is borne out by the case law. First, he raises a supposed split on how circuit courts should handle supplemental-authority letters. Second, he claims that the circuits are split on the law of knowing and voluntary waivers. For both, there is no split in legal authority for this Court to resolve. And third, Davis does not claim the circuits are split on the law of bargaining at all—but that request for review should be denied in any event.

A. The circuits are not split on responding to letters.

Davis first argues that the Sixth Circuit created a circuit split by not explicitly addressing Davis's supplemental authority letter. Pet.13.

The better explanation is that courts sometimes choose to respond to supplemental-authority letters but are not required to do so. None of the cases Davis cites hold that courts *must* respond to supplemental-authority letters filed under Rule 28(j). *See* Pet.13. Nor does the Sixth Circuit here hold that courts should *not* respond to those letters. In reality, courts simply have discretion about which arguments to address in their opinions. Rule 28(j) imposes no opinion-writing mandate on circuit courts.

Davis is also incorrect that the Sixth Circuit is a “clear outlier” on this matter. Sometimes the Sixth Circuit responds to 28(j) letters. *See, e.g., Shewchun v. Holder*, 658 F.3d 557, 570 (6th Cir. 2011); *Hernandez-Serrano v. Barr*, 981 F.3d 459, 467 (6th Cir. 2020). But the courts’ ability to respond to such letters does not imply a responsibility to always do so. Sometimes other circuits expressly decline to address supplemental-authority letters. *See, e.g., Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1195 n.1 (9th Cir. 2022); *Williams v. Romarm, SA*, 756 F.3d 777, 786–87 (D.C. Cir. 2014); *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1202 n.5 (9th Cir. 2006); *United States v. Munoz*, 132 F. App’x 756, 758 (10th Cir. 2005). And sometimes they simply do not address the letters or cite the cases that the letters are about. *See, e.g., Dennis v. City of Philadelphia*, 19 F.4th 279, 282 (3d Cir. 2021) (not addressing 28(j) letter, No. 19-2390, Doc.52 (Nov. 11, 2021), or the case cited therein); *Lorenzo v. Prime Commc’ns, L.P.*, 806 F.3d 777 (4th Cir. 2015) (not addressing 28(j) letter, Nos. 14-1622/1727, Doc.47 (Sept. 30, 2015), 2015 WL 5821797, or the case cited therein). At least one other circuit has denied rehearing despite a petition that similarly raised an unaddressed supplemental-authority letter and Supreme Court case. *See* Petition for Rehearing and Suggestion for Rehearing En Banc 6, *Young v. United States*, No. 01-2518 (Aug. 23, 2002), 2002 WL 32856681 at *5. And even if there were a detectable pattern dividing the circuit courts’ approaches to addressing 28(j) letters (there is not), Davis fails to show why any inconsistencies cry out for this Court’s attention—as opposed to revealing the ably exercised discretion of the courts of appeals.

The Sixth Circuit’s decision not to explicitly address the letter or cite *Loper Bright* is nothing extraordinary.

B. The circuits are not split on the law of voluntary waivers.

Next, Davis asserts that the Sixth Circuit splits from other circuits on the law of knowing and voluntary waivers of constitutional rights. But a closer look reveals only differences in the facts.

Start with the Sixth Circuit’s opinion. Davis argued that he *thought* that he was guaranteed three specific judges forever, and if he was wrong, then his decision to choose a bench trial was not knowing and voluntary. The Sixth Circuit noted that a defendant’s waiver of a constitutional right must be “knowing, voluntary, and intelligent,” meaning he must understand the “nature of the right and how it would likely apply *in general*,” but not all the “remotely possible consequence[s]” of the waiver. Pet.App.A-9 (quotation omitted) (emphasis in original). It had already noted that reasonable jurists could doubt Davis’s factual assertion that he based his bench-trial election on the identities of the judges, especially since he earlier claimed that he had a different reason. Pet.App.A-8. The Court also determined that knowing the identities of the sentencing judges is nothing close to what this Court has included in the minimum required knowledge. Pet.App.A-9. On the unusual facts of this case, it was reasonable for the state court to conclude that the identities of the judges on re-sentencing was among the “remotely possible consequences” of the choice. Pet.App.A-9.

No circuits are split on the question Davis raises. All agree that waivers of constitutional rights must be knowing and voluntary and that this Court’s decisions clearly establish that proposition. Pet.App.A-9 (citing *Brady v. United States*, 397

U.S. 742 (1970); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *United States v. Ruiz*, 536 U.S. 622, 629 (2002)). The facts of the cases just call for different results.

Each of Davis’s case cites bears that out. *Jamison v. Klem* held that the mandatory minimum sentence is the “direct ... consequence of a guilty plea” rather than an indirect result such as “the collateral consequences,” so defendants must know the minimum sentence before pleading guilty. 544 F.3d 266, 277–28 (3d Cir. 2008). *Shafer v. Bowersox* held that a court’s “extremely limited exchange” before accepting a waiver of counsel and guilty plea failed “to discuss precisely [the] things” that this Court required in a case that addressed just that situation. 329 F.3d 637, 648–49 (8th Cir. 2003) (citing *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)). *Garcia v. Hepp* concerned when the right to counsel attached, and that case simply noted that irrelevant factual distinctions do not make Supreme Court precedent inapplicable. 65 F.4th 945, 955 (7th Cir. 2023). And *Orduna v. Garrett*, No. 23-15313, 2024 U.S. App. Lexis 20748, *2 (9th Cir. Aug. 16, 2024), merely cites *Brady* for the knowing-waiver concept. None of these cases present a legal conflict between circuits; they merely showcase how different facts lead to different outcomes.

In context, *Stanko v. Stirling* actually undermines Davis’s claim and reinforces that courts have latitude to determine whether a waiver is knowing and voluntary. The court in *Stanko* cited the requirement that a waiver be done “voluntarily, knowingly, and intelligently,” but it also wrote that “beyond that, the Supreme Court has

not gone; there is no Supreme Court precedent embroidering *Brady*'s general rule or spelling out the requirement for a conflict-waiver colloquy." *Stanko v. Stirling*, 109 F.4th 681, 694 (4th Cir. 2024) (brackets and quotation omitted). In other words, the details of how to apply the knowing-waiver principles are not clearly established in every possible circumstance; courts look at the facts, just like the Sixth Circuit did.

Davis's final case on this point, *Hart v. Attorney General of Florida*, helps to illustrate how the facts drive these cases to different conclusions. 323 F.3d 884 (11th Cir. 2003). Both *Hart* and the Sixth Circuit cited the basic AEDPA standards. *Id.* at 891; Pet.App.A-3–4. Both cases looked to the record for signs that the defendant made decisions based on material misconceptions. *Hart*, 323 F.3d at 893–94; Pet.App.A-8. And both considered whether the petitioner had been misled. *Hart*, 323 F.3d at 893–94; Pet.App.A-7–8. In *Hart*, the record showed that the defendant "did not fully understand his right to counsel and was asking for clarification" when the police affirmatively misled him. *Id.* at 893–94. In this case, the record showed that Davis did not express a misconception about his bench-trial election, that the identities of his judges were not the motivating factor for his choice, and that the court's statements did not even hint at a guarantee of the three judges forever. Pet.App.A-7–8. Davis may disagree with those factual determinations, but they do not create a circuit split.

C. The circuits are not split on the law of bargaining.

Davis does not claim that the circuits are split on this question. He confirms that the law in this area is already "squarely established," contending only that the Sixth Circuit misapplied it. Pet.29. The lack of a split on the question—even more than

the lack of error, *see* below at III—is a reason this case does not merit this Court’s attention.

II. This case is a poor vehicle for deciding any of Davis’s claims.

This case presents a poor vehicle for either of Davis’s two main claims—that *Loper Bright* renders AEDPA unconstitutional and that the Sixth Circuit erred in deciding his claim. On the first, this Court should not entertain Davis’s *Loper Bright* argument because it is a belated attempt to inject a new constitutional theory that has been available but has not been raised throughout this case’s lengthy habeas history. Invoking *Loper Bright* changes nothing because its holding (which is new) is not relevant, and the Article III commentary in the concurrences (which Davis thinks is relevant) is not new. On the second, Davis’s critiques of the Sixth Circuit’s opinion are as fact-bound as they are splitless.

A. This case is a poor vehicle for expounding on *Loper Bright*.

Davis argues that this Court should grant, vacate, and remand for consideration in light of *Loper Bright*. Pet.14–19. Even if Davis’s arguments about *Loper Bright* had merit (they do not), they merely echo longstanding critiques of AEDPA that Davis chose not to make. Davis chose not to challenge AEDPA’s constitutionality at any point until the eve of the en banc court’s decision. Instead, he argued that his claims either met AEDPA’s requirements or qualified for AEDPA’s exclusions. Davis’s 6th Cir. Supp. Br., R.53, at 4, 6–7, 14–21; *see also* Davis’s Merit Br., R.20, at 26, 40–44, 51, 58–60, 73–76, 89–91. In other words, he argued that he prevailed because he met AEDPA’s standards. Davis’s new argument questions whether those standards apply at all. Pet.16–18. As for authorities, Davis’s arguments before the Sixth Circuit

rested on AEDPA and various constitutional amendments. Davis’s 6th Cir. Supp. Br., R.53, at v; *see also* Davis’s Merit Br., R.20, at 8 (AEDPA and Sixth, Eighth, and Fourteenth Amendments). Davis’s new argument is based on Article III. Pet.16–18; Pet.App.A-136–37. Indeed, not until his motion for en banc reconsideration did the court certify a constitutional challenge to the U.S. Attorney General. *See* 28 U.S.C. §2403(a); Notification of Certification (Sept. 16, 2024), R.70. Those sets of arguments do not overlap.

Failing to raise this theory was not due to its unavailability. When Davis first raised this theory in his motion for reconsideration, he cited precedents from the 1870s and from the first decade after AEDPA’s passage. Mot. for Recon., Pet.App.A-158–59; *see also* Mot. for Leave to File Mot. for Recon., Pet.App.A-141. And a separate writing in *Loper Bright* drives the point home. One Justice noted that he had “previously explained at length” the constitutional problems with *Chevron* deference, and indeed, roughly half of the writing simply pointed to previous writings on the matter. *Loper Bright*, 603 U.S. at 413–14 (Thomas, J., concurring). Granting, vacating, and remanding would reward Davis’s eleventh-hour attempt to insert a new theory that he could have invoked long ago.

Davis argues that he properly preserved his new theory because, if true, the theory would only lead to the same de novo review he has always asked for under AEDPA. He says that means his new theory is merely “additional support for his unquestionably preserved position that he is entitled to de novo review.” Pet.19 n.1.

This Court has already rejected that theory of preservation. Broad claims supported by particular theories do not preserve all possible future theories, even if they support the same kind of broad claims. For example, arguing unconstitutionality does not preserve all constitutional challenges, and arguing statutory preemption does not preserve all theories of statutory preemption. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486–87 (2008). Otherwise, “a litigant could add new constitutional claims as he went along, simply because he had ‘consistently argued’ that a challenged regulation was unconstitutional.” *Id.* at 487. In fact, Davis’s theory of preservation seems to go even further than the whole-constitution-preservation theory that this Court rejected. His theory only requires that the desired outcome be the same, not that any of the arguments or citations overlapped. If Davis’s theory were right, then there would be no forfeitable claims under AEDPA at all; every new argument would go to support de novo review.

Davis also argues that his constitutional argument was nonforfeitable because it touches on the standard of review, but that is not correct for two reasons. *First*, when courts have found the AEDPA standard nonforfeitable, some have explained that they mean AEDPA’s barriers to relief are mandatory. *See, e.g., Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009); *Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003). That makes sense. This Court has described AEDPA as “a constitutionally valid rule of decision” that limits courts’ power to grant the writ, but it is not a command to issue the writ in any given situation. *Brown v. Davenport*, 596 U.S. 118, 127–28 (2022). In other words, “AEDPA’s standard of review ... is not a procedural defense”

that the State could forfeit. *Eze*, 321 F.3d at 121. Although the Sixth Circuit applied the nonforfeitability idea more broadly to prevent *petitioner* forfeitures, it did not account for the rationale animating the principle. *See Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008). But in the end, this point is eclipsed by another reason that Davis is wrong.

Second, even if AEDPA's applicability in a given circumstance is nonforfeitable, that does not mean that every argument *about* AEDPA is nonforfeitable. Parties may dispute how to apply a standard, or even whether the standard applies under a statute's or rule's terms. It is entirely different to argue that the statute, rule, or precedent imposing that standard is unconstitutional. Blending those two ideas only confuses the matter.

B. The Sixth Circuit's rejection of Davis's argument was fact-bound.

The fact-bound nature of Davis's claim is another reason to deny certiorari. Take the two claims in the same order as the Sixth Circuit. For Davis's bargaining claim to prevail, he would first have to show that he had a bargain. But the Sixth Circuit held, as a matter of fact, that reasonable jurists could reject that idea. Pet.App.A-7–8. The statutory scheme, the judge's statements, the colloquy, and common sense all refute the bargain claim. *Id.* And perhaps most tellingly, Davis previously claimed a *different* reason for choosing a bench trial, back when he wanted to support a different claim for relief: he did not want to face a jury that would hear evidence about his previous conviction for murder to support the State's weapons-under-disability charge. Pet.App.A-8.

Likewise, for Davis's unknowing-waiver argument to prevail, he would first have to show that he believed he had a promise that the same three judges would preside on this case forever. The same inconsistent prior statement casts doubt on whether Davis really did harbor a secret belief in such a promise. Pet.App.A-8.

At bottom, Davis's disagreement with the Sixth Circuit is over these factual conclusions. When he asserts that the Sixth Circuit did not adequately consider the full unique circumstances of the case, he fundamentally disagrees with the court's view of the circumstances of the case. And no amount of legal argument could make Davis's claims appear meritorious without first rejecting the court's description of the factual circumstances.

III. The Sixth Circuit did not err.

Davis's main plea sounds in error correction, which itself should dissuade this Court from granting certiorari. But even on its own terms, the claim for error correction is wrong because the Sixth Circuit did not err.

A. The Sixth Circuit committed no error by not addressing Davis's letter.

The Sixth Circuit had no need to address Davis's supplemental authority letter because courts have no duty to respond to every argument or every citation that a litigant raises. *Troy Corp. v. Browner*, 129 F.3d 1290, 1293 (D.C. Cir. 1997); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). That courts sometimes address all claims does not mandate that courts always do so.

Although the Sixth Circuit need not give a reason for declining to mention the letter, it may have done so because the letter was improper. According to Davis, the

letter introduced an “additional argument supporting his position that he was entitled to de novo review.” Pet.9. But the Sixth Circuit does not “allow parties to raise new arguments through a 28(j) letter.” *United States v. Allen*, 93 F.4th 350, 358 (6th Cir. 2024). And even if it may sometimes give grace for arguments that could not have been raised previously, the unconstitutionality of AEDPA deference is not one of those arguments, *see above* at II.A.

And had the Sixth Circuit addressed *Loper Bright*, it would not have changed anything because *Loper Bright* is irrelevant to this case. *Loper Bright* was a statutory case involving the interpretation of the Administrative Procedure Act. This Court held,

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Loper Bright Enterprises, 603 U.S. at 412–13. This Court did not hold that deference to agencies would be unconstitutional if a different statute, unlike the APA, provided for it. It also did not extend its holding to contexts outside the APA. Given *Loper Bright*’s holding, there is no reason to grant, vacate, and remand for further consideration. The Sixth Circuit did not apply *Chevron*. It did not involve “an agency.” *Id.* The authority at issue was not “delegate[d].” *Id.* Nothing here happened “under the APA.” *Id.* Nothing about AEDPA implicates the separation of powers between the three federal branches of government. *Id.* at 413–14 (Thomas,

J., concurring). If the Sixth Circuit attempted to apply *Loper Bright*'s holding, it would have no relevant material to apply.

B. The Sixth Circuit did not err in applying the law of knowing and voluntary waivers.

The Sixth Circuit correctly rejected Davis's voluntariness claim because he failed to meet AEDPA's demanding standard. Davis argues that this analysis was wrong because it required Davis to produce a Supreme Court decision "on identical facts," Pet.20, but that is not true.

In truth, the Sixth Circuit held that the cases Davis cited did not clearly establish anything close to his claim. He pointed to *Johnson*, which was about waiver of counsel without advice of counsel on whether to waive. 304 U.S. at 464. Since the accused would be making such a consequential decision on his own, the Court thought that the "background, experience, and conduct of the accused" would shed light on whether he was able to make that decision without professional advice. *Id.* Notably, this Court did not direct attention to the accused's "expectations" or "beliefs" about how that waiver would impact his trial. Next, *Adams* focused on the accused's understanding of the nature of the trial right, not how he thought his jury-trial waiver would help his trial plan. 317 U.S. at 277–79. And *Boykin* and *Brady* both stand for the idea that trial by jury is a constitutional right that defendants waive by pleading guilty, Pet.21, but they do not help to explain why Davis's claimed misconceptions could undermine his strategic choice at trial.

At bottom, Davis's claimed misunderstanding has nothing to do with the constitutionally required knowledge. Noting that mismatch is not the same as asking

for an “identical factual pattern” or overlooking a binding “general standard.” Pet.22–23 (quotation omitted). It is merely pointing out that the standards that apply do not countenance Davis’s involuntariness claim that is based on unreasonable subjective expectations unrelated to the nature of the right being waived. (All these reasons also explain why this Court should not grant, vacate, and remand in light of *Andrew v. White*, 604 U.S. ___, 145 S. Ct. 75 (2025) (per curiam). See Supp. Br.)

C. The Sixth Circuit did not err in applying the law of bargains.

Finally, Davis argues that his form electing a bench trial really was a contract guaranteeing him three specific judges, and that the Sixth Circuit ignored clearly established law in rejecting his claim. Davis’s error here is best summed up in a misstatement in his brief in the second sentence under this point. This Court’s cases do not hold “that contract-law principles govern *waivers* of constitutional rights” as a category. Pet.27 (emphasis added) (citing *Puckett v. United States*, 556 U.S. 129, 137 (2009), *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and *Santobello v. New York*, 404 U.S. 257, 262 (1971)). Instead, those cases govern *bargains* between the government and the defendant, which in all three cited cases meant plea bargains. The Sixth Circuit correctly noted that fact and pointed out that Davis’s bench-trial election was more like other commonly non-negotiated waivers than it was like a plea bargain. Pet.App.A-7. (Davis attempts to bridge from the trio of cases above to non-plea-bargain waivers with a quotation from *Ruiz*, Pet.27, but in context, *Ruiz* does not say what his snippet implies. Here is the full sentence: “When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees.” *Ruiz*, 536 U.S. at 628.)

Regardless, for this Court's precedents on bargains to apply, the bench-trial election and waiver of jury trial would have to be a bargain in the first place. And the Sixth Circuit concluded from the facts that "[r]easonable jurists could reject Davis's attempt to paint his waiver as a bargain with the prosecution or the court." Pet.App.A-7. Foremost, the election was a statutory right that Davis could invoke and withdraw at will before trial. *Id.* Also, the statements in the record around the time of the waiver did not support the idea that it was a bargain. Pet.App.A-7–8. Even more, Davis's past statements refuted the idea that the waiver was a bargain motivated entirely by the guaranteed three judges forever. Pet.App.A-8. Defendants routinely waive rights without inducements—for example, by choosing to speak with officers, *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010), pleading guilty without any plea deal, *Ruiz*, 536 U.S. at 625–26, or waiving the right to counsel, *Faretta v. California*, 422 U.S. 806, 835 (1975). The court's reasoning and holding were correct, not an error, and certainly not an error so momentous as to claim this Court's attention. (Again, these same reasons go to why this Court should not grant, vacate, and remand in light of *Andrew*, 145 S. Ct. 75. *See* Supp. Br.)

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s/ T. Elliot Gaiser

T. ELLIOT GAISER*

Ohio Solicitor General

**Counsel of Record*

MICHAEL J. HENDERSHOT

Chief Deputy Solicitor General

JANA M. BOSCH

Deputy Solicitor General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614.466.8980

thomas.gaiser@ohioago.gov

Counsel for Respondent