

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

REPLY BRIEF FOR THE PETITIONER

No execution date is presently scheduled.

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CAPITAL CASE: QUESTIONS PRESENTED

I.

Should this Court grant certiorari, vacate the judgment below, and remand for further consideration in light of *Andrew v. White*, 604 U.S. ___, 145 S. Ct. 75 (2025) (per curiam)?

II.

- 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)?

III.

- 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?

IV.

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?

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REPLY

Petitioner Von Davis presents two separate meritorious grounds for this Court to grant, vacate, and remand his case to the United States Court of Appeals for the Sixth Circuit so it may consider the effect of intervening authority from this Court in the first instance.

Respondent all but ignores the case Davis raised in his supplemental brief, *Andrew v. White*, 604 U.S. ____ (2025) (per curiam). That silence is telling. *Andrew* controls the outcome here, where the divided en banc court of appeals erroneously held that to agree with Davis that the clearly established federal law found in this Court's cases entitles him to relief would be to "raise[] the level of abstraction too high." *Davis v. Jenkins*, 115 F.4th 545, 562 (6th Cir. 2024); Pet.App'x. A-9; *see also id.* at 559; Pet.App'x. A-7 ("Prisoners may not sidestep the lack of Supreme Court precedent on a legal issue by raising the level of generality at which they describe the Court's holdings on other issues.") (internal quotation marks and alteration omitted). As this Court explained in *Andrew*, AEDPA does not "constrain[]" federal courts "to limit" its cases "to [their] facts" when determining clearly established federal law. 145 S. Ct. at 82. Because that is precisely what the majority did below, and because it did so without the benefit of this Court's recent guidance in *Andrew*, this Court should GVR Davis's case.

Respondent does attempt to rebut Davis's reasons for granting, vacating, and remanding this case to the Sixth Circuit so that it can address for the first time the argument he made in a Rule 28(j) letter based on this Court's intervening decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Nevertheless,

Respondent’s rejoinders are unconvincing. Only one of the cases Respondent cites as declining to address a supplemental-authority letter even involved an intervening case from this Court. And that single, unpublished case from a quarter-century ago is not followed today by the Second Circuit, whose approach now aligns with the consistent practice of the circuits in acknowledging similar Rule 28(j) letters.

Unsurprisingly, Respondent is unable to produce examples to support the “discretion theory” that the circuits behave with impunity regarding whether to pay attention to new authority from this Court. And Respondent’s predictions about how the Sixth Circuit might respond when it does consider Davis’s *Loper Bright* arguments are both premature and incorrect.

For all these reasons, and the reasons Davis has explained in his petition and supplemental brief, this Court should grant, vacate, and remand this case in light of either or both *Andrew* and *Loper Bright*, or, in the alternative, grant the petition for writ of certiorari.

I. When this Court has issued intervening authority, the proper course is to grant, vacate, and remand for the court of appeals to consider the new case(s) in the first instance.

Respondent does not dispute this Court’s “broad power to GVR” when it notices “a particular issue that [the court of appeals] does not appear to have fully considered,” or where a GVR will “improve the fairness and accuracy of judicial outcomes.” *Lawrence v. Chater*, 516 U.S. 163, 166-68 (1996) (per curiam).¹ Because

¹ As Justice Thomas noted just last month, “[t]his Court has routinely vacated and remanded cases so that lower courts can be the first to address any new developments.” *Monsalvo Velásquez v. Bondi*, 604 U.S. ___, ___ (2025) (Thomas, J.,

that is the precise situation here, where the court of appeals has not considered either *Andrew* or *Loper Bright*, a GVR is warranted.

A. *Andrew v. White* fundamentally undermines the majority’s reasoning below and accordingly, this Court should grant certiorari, vacate the judgment, and remand for further consideration.

Respondent devotes only a passing, parenthetical reference to *Andrew*. See BIO 17. That striking failure to confront *Andrew* and its clear application to Davis’s case speaks volumes, because the decision below turned on the existence of “clearly established federal law” emanating from this Court. In particular, the court of appeals repeatedly stated that Davis lacked the clearly established law necessary for habeas relief on his claim that his waiver was not knowing, voluntary, and intelligent. See *Davis*, 115 F.4th at 561-63.

Davis’s claim is that he unconstitutionally waived his right to a jury based upon the trial court’s unequivocal representation that he would be tried by the three specific judges identified in open court and named in his written waiver. As the state supreme court recognized, this claim is based “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.” *State v. Davis*, 9 N.E.3d 1031, 1040 (Ohio 2014).

dissenting) (joined by Alito, Kavanaugh, and Barrett, JJ.) (slip op. at 6). This is appropriate practice, especially when (as here) newly arising issues “ha[ve] not been passed upon by *any* court.” *Id.* (emphasis in original).

Yet the court of appeals decided that Davis could not secure relief because it held that the knowledge of one's judges has not been clearly established by this Court as a basis for invalidating a waiver:

Davis asserts that whether a waiver was knowing, voluntary, and intelligent depends, per *Adams*, on "the unique circumstances of each case," and here those unique circumstances included the waiver's naming of three particular judges to the panel. *But this is not a unique circumstance that has been clearly established.*

Davis, 115 F.4th at 562 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278 (1942)) (emphasis added); Pet.App'x. A-9. *See also id.* at 563; Pet.App'x. A-10 (holding that this Court has "not clearly establish[ed] that a defendant's knowing, voluntary, and intelligent jury waiver must be predicated on the identity of the sentencing judge").

But *Andrew v. White* makes clear that the court of appeals misapprehended what federal law *does* clearly establish as the requirements for a knowing, voluntary, and intelligent waiver. To begin, Davis's argument is not that the validity of *every* defendant's waiver is based on knowledge of the identity of their jurist. Consistent with this Court's holdings, however, he argues that because he notified the court that *he* was relying on that knowledge to make his waiver decision, and was never informed such reliance was irrelevant to *his* decision to waive, the identities of the judges *was* relevant to *his* waiver's validity.

As this Court explained, it is the "legal rule or principle" upon which it bases a decision that serves as the "holding" of this Court for purposes of AEDPA," *Andrew*, 145 S. Ct. at 81, not the specific factual circumstances to which this Court

has previously applied that rule or principle. Thus, clearly established law entitles Davis to habeas relief, given *Adams*' holding that the validity of a waiver "depend[s] upon the unique circumstances of each case," 317 U.S. at 278, as well as the holding of *Brady v. United States*, 397 U.S. 742 (1970), that "the relevant circumstances" include "the actual value of any commitments made," and that waivers cannot stand if "induced by . . . misrepresentation (including unfulfilled or unfulfillable promises)." *Id.* at 748-49, 755.

The "relevant" and "unique circumstances" of Davis's waiver set him apart from a generic defendant whose circumstances lack the particular facts of Davis's case. Davis filed a written motion stating that before he could make a decision about waiver, he needed to know which three judges would be empaneled in lieu of a jury to try and sentence him. (Mot. for Notice of Prospective Three-Judge Panel, Apr. 27, 1984, R.4-1, PageID 212-13; Pet.App'x. A-338-39.) As important as what did happen after that is what did *not* happen:

- No one responded to this request by informing him that, while he could learn who those judges were likely to be, their identities were not guaranteed.
- No one explained to him that because elections, sickness, death, and recusals are all routine reasons why an anticipated judge might not end up sitting, no defendant has a right to any particular jurist(s).
- And no one told him that, therefore, even by waiving a fundamental constitutional right, in writing, in a document that lists three specific judges by name, he could not "lock in" his entitlement to those judges.

Indeed, just the opposite occurred. Davis was informed, and reasonably understood—as did everyone in the courtroom—that, if he waived his right to a jury, he would be tried by the three specific judges identified in his jury waiver:

- “For the record,” the presiding judge responded to Davis’s motion by stating the names of all three judges in open court. (Mot. Hr’g, May 2, 1984, R.5-1, PageID 7209; Pet.App’x. A-341.)
- Then, the document Mr. Davis and that judge signed, which the State had typed on the prosecutor’s office stationery, again recited all three judges’ names. (Jury Waiver, R.4-3, PageID 433; Pet.App’x.A-340.)
- And finally, after presiding over the waiver colloquy which reviewed that very document that contained all three judges’ names, the presiding judge reiterated that the trial was to begin the next week and would, as that document indicated, be conducted before himself and the two other judges named in it. (Mot. Hr’g, May 8, 1984, Doc. 5-1, PageID 7225; Pet.App’x. A-345.)

Given these undisputed record facts, it was disingenuous for the court of appeals to claim that Davis was merely “harbor[ing] a private belief,” *Davis*, 115 F.4th at 563, that his waiver was conditioned on these three judges trying and sentencing him (and thus, should those judges no longer be available, his waiver would no longer be valid). It was publicly understood at the time that his waiver was dependent upon the identity of the judges, where the Court provided this information in response to Davis’s specific motion stating 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.” (Mot.

for Notice R.4-1, PageID 213; Pet.App'x. A-339 (emphasis added).)² That unambiguous request and the unequivocal responses to it also left no need to “probe” Davis’s “mind[] . . . in search of myths to bust before accepting [his] waiver,” *Davis*, 115 F.4th at 563 (internal quotation marks omitted). Taking into account, under clearly established federal law, these relevant and unique circumstances, it is wholly unfair for Respondent to characterize this claim as resting on “the idea that Davis can assert any confusion about any expectation—no matter how unreasonable—” to invalidate his waiver, BIO 4.

Rather than applying the clearly established law to these facts, the court of appeals rejected Davis’s argument as akin to relying on “general proposition[s] that originate[] with a few quotations from far-afield decisions.” *Davis*, 115 F.4th at 562 (internal quotation marks omitted); Pet.App'x. A-9. Likewise, Respondent argues this Court’s cases do “not clearly establish anything close to [Davis’s] claim.” BIO 16. In doing so, however, the court of appeals and Respondent commit the same mistake the Tenth Circuit did in *Andrew*, which erroneously characterized the clearly established federal law in *Payne v. Tennessee*, 501 U.S. 808 (1991), as “a

² That Davis considered waiving to avoid having a jury hear prejudicial information was entirely consistent with wanting to know whether the judicial panel that would result would be an acceptable substitute. Indeed, Davis waived only *after* being assured of the identity of his judges. The court of appeals’ and Respondent’s suggestions that this motivation for his waiver somehow invalidated Davis’s desire to learn who his judges would be is therefore nonsensical. Davis’s desire to avoid waiving blindly proved prescient, as the panel that was forced upon him in 2009 (after his request to withdraw his waiver was denied) included a judge who had capitally prosecuted a member of his family. See *Davis v. Jenkins*, 115 F.4th at 551-52; Pet.App'x. A-2.

pronouncement, not a holding, of this Court.” *Andrew*, 145 S. Ct. at 80 (internal quotation marks omitted). The error in these positions is in ignoring the “underlying . . . principle” supporting the holdings of this Court’s cases. *Andrew*, 145 S. Ct. at 82. Indeed, “[g]eneral legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court.” *Id.* Pointing to those general principles as clearly established law does not, as the court of appeals incorrectly determined, “raise[] the level of abstraction too high.” *Davis*, 115 F.4th at 562; Pet.App’x. A-9. The court of appeals must reconsider its rejection of *Adams* and *Brady* as “far-afield” decisions and apply their holdings as clearly established federal law governing Davis’s claim.

At bottom, the court of appeals relied on an understanding of “clearly established law” that has now been rejected in *Andrew*, and thus, a GVR for reconsideration in light of *Andrew* is fully warranted.

B. This Court should also grant certiorari, vacate, and remand for further consideration in light of *Loper Bright*.

While this Court should GVR in light of *Andrew v. White*, the Court should also GVR in light of *Loper Bright*.

i. By failing to address an intervening decision of this Court submitted via a Rule 28(j) letter, the court of appeals below placed itself at odds with all the other circuits.

As an initial matter, Respondent errs in claiming that there is no split in the way the circuits handle Rule 28(j) citations to intervening decisions from this Court. Trying to counter the circuits’ consistent pattern of addressing this Court’s intervening decisions, Respondent musters just a handful of cases. BIO 6. And as

Respondent acknowledges, only one of those cases involved the situation presented here: a 28(j) letter citing an intervening case from this Court. *Id.* (citing *Young v. United States*, No. 01-2518 (Aug. 23, 2002) 2002 WL 32856681, at *5 (2nd Cir.) (petition for rehearing)). *Young*, however, was an unpublished non-precedential summary affirmance from 23 years ago. The Second Circuit’s recent published opinion in *United States v. Avenatti*, 84 F.4th 171, 194 n.27 (2d Cir. 2023), shows that court now faithfully applies Rule 28(j) to address intervening Supreme Court decisions. A lone unpublished decision from a generation ago does not undermine Davis’s showing that the court of appeals’ treatment of Davis’s Rule 28(j) submission is truly an outlier.

ii. On remand, the court of appeals could rule in Davis’s favor when considering *Loper Bright*.

Ultimately, Respondent maintains that a GVR in light of *Loper Bright* would be a fool’s errand, because “*Loper Bright* is irrelevant to this case,” and “[n]othing about AEDPA implicates the separation of powers between the three federal branches of government.” BIO 15. Respondent is wrong on both accounts.

In laying the foundation for overruling *Chevron* deference, *Loper Bright* made clear that the Framers established Article III courts to exercise independent judgment, unconstrained by other political actors: “To ensure the ‘steady, upright and impartial administration of the laws,’ the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches.” *Loper Bright*, 603 U.S. at 385 (citations omitted). And while Article III courts might provide “due respect” to an Article II agency interpretation of federal

law, they were never bound to defer to agency interpretations: “Otherwise, judicial judgment would not be independent at all.” *Id.* at 385-86.

The exact principles that informed *Loper Bright*—that Article III courts must exercise independent judgment free from the influence of the political branches and not defer to non-Article III actors—also govern the question of constitutionality of AEDPA deference. Given its Article III foundations, *Loper Bright* is indeed relevant to the question whether Von Davis is entitled to a fully independent Article III review of the constitutionality of his death sentence.

In fact, AEDPA deference’s assault on judicial independence is even more virulent than that of *Chevron* deference. With *Chevron* deference, Article III courts improperly *chose* to defer to Article II agency interpretations of law; while with AEDPA deference, Congress (as a political matter) has ostensibly *forced* Article III courts to renounce their full judicial independence by requiring them to defer to the adjudications of non-Article III state courts.

It also would not be completely novel for the court of appeals to conclude, on remand, that the demise of *Chevron* deference leads to the demise of AEDPA deference, where jurists and scholars alike have noted the connection between *Chevron* deference and AEDPA deference. Judge Easterbrook emphasized that AEDPA deference did not violate Article III, because to conclude otherwise “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). Now, in reality, *Chevron* deference lacks constitutional

grounding (even though *Loper Bright* was able to avoid the constitutional question by ensuring judicial independence through an interpretation of the Administrative Procedure Act). *See Loper Bright*, 603 U.S. at 413-16 (Thomas, J., concurring) (*Chevron* deference violates Article III, taking judicial power from the courts, which is then exercised by non-Article III agencies). *See also id.* at 416-48 (Gorsuch, J., concurring). And with there being “a tombstone on *Chevron* no one can miss,” *id.* at 417 (Gorsuch, J., concurring), scholars have noted that AEDPA deference no longer survives. *See* Amsterdam and Liebman, *Loper Bright and the Great Writ*, 56 COLUM. HUM. RTS. L. REV. 54 (2025). On remand from this Court, the court of appeals could reach that same conclusion, and certainly, it should be given the opportunity to assess all such arguments in the first instance.

iii. On remand, the court of appeals would address Davis’s arguments.

Finally, Respondent asserts that this Court ought not GVR because the court of appeals would conclude that Davis’s *Loper Bright* arguments were somehow forfeited. BIO 10-12. Not only does Respondent put the cart in front of the horse, Respondent is wrong on the law as it would be applied by the court of appeals.

First, while the court of appeals has never considered the substance of *Loper Bright*, it has likewise never considered Davis’s right to be heard on the application of *Loper Bright* and Article III to his claims for relief. The court of appeals should properly address all such issues in the first instance on remand.

Second, Respondent never comes to grips with the fact that the court of appeals will address all of Davis’s *Loper Bright* arguments for all the reasons Davis

has stated in footnote 1 of his petition. *See* Pet. 19 n.1. And indeed, the law in the Sixth Circuit is that new, purely legal issues that arise during the course of an appeal, like *Loper Bright*, are not forfeited and must be addressed by the court of appeals. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988). Moreover, the court of appeals on remand is constrained to apply *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143-45 (1967), which fully entitles Davis to have his constitutional challenges decided, because they are based upon an intervening decision of this Court. And Respondent never explains how it makes any sense for an Article III court to apply a standard of review that violates Article III. Where Article III courts have no business applying invalid standards of review (as was the case in *Loper Bright*), an unconstitutional standard of review does not get a free pass. *See also Moody v. NetChoice, LLC*, 603 U.S. 707, 779-80 (2024) (Alito, J., concurring) (proper standard of review cannot be waived).³

The point is that the court of appeals has fully overlooked *Loper Bright* and all related arguments, and thus, it is for that court to address all such issues in the first instance, including, for example, the application of *Loper Bright*, *Pinney Dock*, and *Curtis Pub. Co.* The proper disposition is for this Court to GVR so that the court of appeals may do so.

³ One final note: While Respondent notes that this Court has “described AEDPA” as “a constitutionally valid rule of decision,” BIO 12 (citing *Brown v. Davenport*, 596 U.S. 118, 127-28 (2022)), *Brown* itself makes clear that that description is not binding in a post-*Loper Bright* world. Indeed, *Brown* was a “decision[] that had no reason to pass on the argument [Davis] presents today,” *id.* at 141, which was not briefed in *Brown* and which pre-dated the jurisprudential sea-change marked by *Loper Bright*.

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 *Andew v. White* and *Loper Bright Enterprises*. Alternatively, he requests this Court grant the petition for writ of certiorari.

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