

In the

Supreme Court of the United States

CLARENCE FRY,

Petitioner,

v.

TIMOTHY SHOOP, *WARDEN,

Respondent.

This is a Capital Case.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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* Warden Timothy Shoop is the current warden of Ross Correctional Institution, where Petitioner Clarence Fry is presently incarcerated. Timothy Shoop was previously warden of Chillicothe Correctional Institution, where Petitioner was incarcerated during habeas proceedings in the Northern District of Ohio. Petitioner was relocated to Ross Correctional Institution during proceedings at the Sixth Circuit, at which time William Cool was warden. By the time Petitioner's Petition for Writ of Certiorari was filed in this Court, Timothy Shoop had succeeded William Cool as warden of Ross Correctional Institution. See Rule 35.3.

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REPLY

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I. Fry's right to testify

In addressing Fry's claims about his right to testify, the State overwhelmingly spends its time avoiding the fundamental issue in Fry's case: that the record before every court on review plainly demonstrates that Fry wanted to testify at his capital trial, that his counsel knew he wanted to testify, that they misled the trial court about Fry's desire to testify, and that the trial court (despite being on notice) also failed to make an inquiry of Fry that could have cured the deprivation he suffered at counsel's hands. Fry's trial counsel themselves admitted as much on cross-examination in state post-conviction proceedings: that Fry had, at a minimum, vacillated in his desire to testify and that he had told counsel he wanted to testify the very day before counsel gave the trial court an unwavering answer in the negative.

On this undisputed record, the decision of state courts was contrary to, or an unreasonable application of, clearly established federal law and was based on an unreasonable determination of the facts in light of the evidence presented in the state

court proceedings. Despite the plain face of the record, the district court denied Fry relief and the Sixth Circuit Court of Appeals affirmed that denial.

Consider this: under the district court's assessment of the factual record in Fry's case, as long as trial counsel convincingly misleads a trial court about the wishes of their client, then no remedy is owed for the subsequent constitutional violation, even if a core constitutional right is implicated. This does not comport with the guarantees of the Sixth Amendment and the constitutional right to Due Process. The Sixth Circuit Court of Appeals affirmed this decision, holding that in the absence of on-point case law from this Court, there is no showing that the state courts violated clearly established law.

Recently, this Court held that "A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court. This Court has no occasion to defer to other federal courts' erroneous interpretations of its own precedent. Nor is such double deference necessary to prevent expansion of federal habeas relief to those who rely on 'debatable' interpretations or extensions of our holdings. Andrew does not rely on an interpretation or extension of this Court's cases *but on a principle this Court itself has relied on over the course of decades.*" *Andrew v. White*, 604 U. S. ____ (2025)(internal citations omitted)(emphasis added). The same is true here. The principle upon which Fry's claims below rested, and which he again asserts here, is plain: a defendant's right to testify is a fundamental right afforded by the United States Constitution. Particularly in a capital case, every petitioner should be afforded

such basic rights. Fry seeks relief from the deprivation of this core constitutional right, and this Court has the power and duty to provide that relief.

As a final note, nowhere does Fry abandon his ineffective assistance of counsel claims. The first question presented to this court in his Petition for Certiorari illustrates Fry's claimed constitutional deprivation. The briefing of the issue, as well as the facts outlined, articulated that Fry suffered this deprivation in two ways: first, due to the ineffective assistance of counsel, and second, through the failure of the trial court to properly inquire of Fry when it was on notice of his interest in testifying. This Court's review of Fry's constitutional deprivation should extend to both the affirmative actions of counsel and the failures of the trial court.

At his capital trial, with his life on the line, Fry was denied his constitutional right to testify in his own defense, a right that this Court has described as "essential to due process.". *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 (1975)). As articulated in Fry's Petition for Certiorari, he would have found relief under federal law any number of times by now, had his trial and review of the case simply occurred in a different jurisdiction. The State passed this off as evidence that federal law can be appropriately applied in different ways. But where there is such a fundamental disparity between remedies in the lower courts, fundamental rights cannot be adequately protected. This Court should grant the writ.

II. Fry's waiver of mitigation

In its BIO, the State failed to address the fundamental issue raised regarding Fry's waiver of mitigation, that the particular facts and circumstances surrounding Fry's waiver were not properly weighed by the trial court, and that failure has not been addressed by reviewing courts since. The Supreme Court of Ohio, as the State pointed out, held that the trial court was not required to conduct a more extensive inquiry regarding Fry's waiver of mitigating evidence.

However, this ruling sidesteps the fundamental issue with the trial court in allowing Fry's waiver. The critical problem is that the trial court was aware of the broad facts and circumstances leading to Fry's waiver: namely, Fry's overwhelming discontent with his counsel; his obvious misunderstanding of his circumstances and the process before him; and his plainly stated belief that further engaging with the trial court and counsel was only a waste of time. Despite this knowledge, none of these issues were interrogated in the colloquy with Fry, nor otherwise considered by the trial court. Thus, the trial court failed in its duty when it allowed the waiver to move forward without weighing "the particular facts and circumstances surrounding th[e] case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

As this Court has explained, the validity of a constitutional waiver depends upon those specific considerations found in *Zerbst*. *Id.* The parameters for assessing the waiver of a right is "a principle this Court itself has relied on over the course of decades." *Andrew v. White*, 604 U. S. ____ (2025).

In affirming the trial court's failure, the district court and the Sixth Circuit Court of Appeals both erred. Both courts also failed to comply with existing clearly established federal law by failing to afford weight and consideration to the relevant facts and circumstances surrounding Fry's waiver. When those facts and circumstances are considered, the record is plain: the waiver was not knowing, voluntary, and intelligent, and, therefore, it was invalid.

The State failed to contest the merits of Fry's claim and that the underlying lower court decisions are tainted by both an unreasonable application of clearly established federal law and based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d), (e). Instead, the State simply asserted that the decisions of the state courts were correct and completely ignored the circumstances surrounding Fry's waiver. But those circumstances unique to Fry's case were sufficient to put the trial court on notice regarding the nature of Fry's waiver.

Instead of conducting further inquiry into these issues or correcting Fry's misunderstandings, the trial court erroneously accepted the uninformed waiver. In allowing the waiver, the trial court violated Fry's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The reviewing courts likewise failed to correct this grievous constitutional error. This Court should grant the writ.

CONCLUSION

For the aforementioned reasons, Fry was denied his rights to a fair trial and to his constitutional right to Due Process as guaranteed by the Fifth, Sixth Eighth, and Fourteenth Amendments to the U.S. Constitution. The evidence in the record plainly shows that trial counsel prevented Fry from testifying in his own defense and that the trial court failed in its duty to protect Fry's constitutional rights. This Court should grant the writ, vacate the conviction, and remand the case with instructions that will direct the lower courts to afford Fry the opportunity to testify in his own defense and present mitigating evidence at new trial.

Respectfully Submitted,

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