
No. 26-

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID SANDERS

Petitioner

v.

LAURA PLAPPERT, WARDEN

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE QUESTIONS PRESENTED

The Court applied its decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron* Deference”) for forty years before finally addressing, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), whether *Chevron* Deference was illegal, and holding it was. Similarly, for the past thirty years, the Court has applied AEDPA’s 28 U.S.C. §2254(d)(1)’s requirement of deference to state court decisions dozens of times without addressing whether §2254(d)(1) violates Article III of the Constitution and/or the Separation of Powers Doctrine. The statute strips the federal courts of their independent authority to declare and apply the law (and to remedy a constitutional violation). As the Court recently did in the context of *Chevron* Deference, the Court should finally address whether AEDPA Deference (§2254(d)(1)) is unconstitutional.

Federal habeas comprises a fair portion of the federal court dockets. Since *Loper Bright*, litigation over §2254(d)(1)’s unconstitutionality has steadily increased and will continue to do so until the Court decides the matter. Sanders’s Petition presents an ideal vehicle through which to resolve the issue. Whether §2254(d)(1) is unconstitutional was fully developed below, with the Department of Justice intervening. That culminated in a 2–1 detailed decision as to whether §2254(d)(1) is unconstitutional. That matters here. The Sixth Circuit majority believed §2254(d)(1) required disregarding all cases decided after the state court decision and construed clearly established law so narrowly that it may conflict with *Andrew v. White*, 604 U.S. 86 (2025). That led to claims being rejected that very well may have prevailed without §2254(d)(1). The questions presented are as follows:

- I. Does 28 U.S.C. §2254(d)(1) violate either Article III of the United States Constitution or the Separation of Powers Doctrine (or both)?
- II. Under 28 U.S.C. §2254(d)(1), do the Court’s holdings that post-date a state court’s adjudication of a constitutional claim constitute “clearly established law,” if that holding does not create new law, as the Court’s previous reliance on such cases implies?
- III. Does *Ake v. Oklahoma*, 470 U.S. 68 (1985), provide a minimum level of expert assistance an attorney must ensure to provide effective assistance of counsel or is only an indigent defendant entitled to those protections?
- IV. Is a jury instruction unconstitutional under *Boyde v. California*, 494 U.S. 370 (1990), if the jury applied an erroneous instruction or higher standard proof than the law permits, or only if the instruction prevented consideration of constitutionally relevant evidence?

PARTIES TO THE PROCEEDING BELOW

Petitioner here, Appellant below, is David Sanders.

Respondent here, Appellee below, is Laura Plappert, Warden.

RELATED PROCEEDINGS

The proceedings directly related to this Petition are:

Sanders v. Plappert, 168 F.4th 837 (6th Cir. 2026).

Sanders v. White, 2015 WL 711262 (E.D. Ky.).

Sanders v. White, 2016 WL 3466138 (E.D. Ky.).

Sanders v. White, 2017 WL 2129305 (E.D. Ky.).

Sanders v. Commonwealth, 2022 WL 3640912 (Ky.).

Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002).

Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990).

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Petitioner David Sanders requests a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit.

CITATIONS TO OPINION BELOW

The United States Court of Appeals’ published opinion affirming the denial of federal habeas relief, *Sanders v. Plappert*, 168 F.4th 837 (6th Cir. 2026), is included within the Appendix (hereinafter App.) at 1a–78a. The order denying rehearing appears at App. 79a. The United States District Court for the Eastern District of Kentucky’s opinion denying habeas relief, *Sanders v. White*, 2015 WL 711262 (E.D. Ky.), appears at App. 80a–130a. The district court opinion and order granting a Fed. R. Civ. P. 59(e) motion on one claim, *Sanders v. White*, 2015 WL 4394169 (E.D. Ky.), appears at App. 131a–140a. The subsequent opinion and order denying habeas relief on that claim, *Sanders v. White*, 2016 WL 3466138 (E.D. Ky.), appears at App. 141a–149a. The district court order regarding a certificate of appealability, *Sanders v. White*, 2017 WL 2129305 (E.D. Ky.), appears at App. 150a–166a. The Kentucky Supreme Court opinion affirming on direct appeal, *Sanders v. Commonwealth*, 801 S.W.2d 665 (Ky. 1990), appears at App. 167a–181a. That court’s opinion affirming the denial of post-conviction relief, *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002), appears at App. 182a–190a. Its 2022 opinion further describing its ruling on one claim relevant here, *Sanders v. Commonwealth*, 2022 WL 3640912 (Ky.), appears at App. 191a–194a.

JURISDICTION

28 U.S.C. §1254(1) provides the Court with jurisdiction to review the United States Court of Appeals for the Sixth Circuit’s March 3, 2026, decision from which certiorari is sought. A timely petition for rehearing was denied on May 14, 2026. The Court extended the time to seek certiorari through, and including, October 11, 2026. This Petition is therefore timely filed.

Sanders challenges the constitutionality of 28 U.S.C. §2254(d)(1). 28 U.S.C. §2403(a) therefore applies, and Sanders will serve this Petition on the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001. The United States Court of Appeals for the Sixth Circuit certified to the United States Attorney General that Sanders challenged the constitutionality of 28 U.S.C. §2254(d)(1) in Sanders’s federal habeas proceedings, and the United States Department of Justice (“DOJ”) intervened.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article III says, in relevant part, “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States” Article VI states, in relevant part, “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” 28 U.S.C. §2254(d)(1), as written, prohibits granting habeas relief on a claim the state court decided on its federal constitutional merits

unless the adjudication “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.”

INTRODUCTION

Federal habeas petitions take up a significant portion of the federal court dockets, and the amount of time it takes for federal courts to resolve those cases is impacted significantly by procedural issues, such as the application of 28 U.S.C. §2254(d)(1) to individual habeas claims. That statutory provision applies to most federal habeas claims raised by those convicted in state court. It places significant restrictions on the federal courts’ Article III authority to state what the law is, to interpret the law, to apply the law, and to remedy a constitutional violation. Rather than simply decide whether there was constitutional error and grant relief if that error was not harmless (if harmless error analysis applies to a claim), courts must also tussle with the implications of 28 U.S.C. §2254(d)(1). The latter has led to significant litigation over the meaning of the statutory language and how it applies to a myriad of situations. This places a significant burden upon the courts in virtually all federal habeas cases. Often, the statutory restriction is the difference between whether a person’s conviction and sentence remain, including life and death. That is the case for David Sanders.

Despite the Court applying §2254(d)(1) dozens of times during the past thirty years and having interpreted the “contrary to” and “unreasonable application of” provisions in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court has not addressed

whether §2254(d)(1)'s restrictions are unconstitutional.¹ In the wake of the reasoning of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), this question has garnered renewed interest, more litigation, and more, not fewer, questions. That has further increased on the heels of the thorough, but split Sixth Circuit decision in *Sanders*, addressing whether §2254(d)(1) either unconstitutionally impedes on the federal courts' Article III power, or violates the Separation of Powers Doctrine, or both? Resultingly, the amount of litigation surrounding this has exploded, and the issue is being raised in a large number of federal habeas cases, much as the standard for determining whether a means of lethal injection was unconstitutional had become an issue in seemingly most death penalty cases until the Court finally tackled the matter in *Baze v. Rees*, 553 U.S. 35 (2008). This will continue to increase until the Court finally tackles and resolves whether §2254(d)(1) is unconstitutional.

The ever-rising amount of litigation surrounding the issue, and the lack of clear guidance to the lower courts, weigh heavily in favor of addressing it now, instead of letting it continue to fester and take up even more of the lower courts' precious time. Those courts deserve to receive high court resolution on this matter, both because it continues to weigh down their dockets, and because it hampers

¹ In *Williams v. Taylor*, the Court declined to grant certiorari on whether AEDPA is unconstitutional. Compare *Williams v. Taylor*, 529 U.S. 362 (No. 98-8384) (containing four questions presented), with *Williams v. Taylor*, 526 U.S. 1050 (1999) (granting certiorari on all questions other than the constitutionality of §2254(d)(1)). Since then, the Court has assumed §2254(d)(1)'s constitutionality, just as it had assumed the constitutionality of *Chevron* Deference for forty years. The Court has never directly held that 28 U.S.C. §2254(d)(1) is constitutional.

their authority to fully function as the independent judiciary our Framers intended. Victim family members, the public, and habeas petitioners, also deserve high court resolution of the matter. The Court resolving the matter now would ensure more constitutionally reliable adjudications of federal habeas cases, and significantly reduce the delay that Congress, through AEDPA, sought to lessen but instead increased through the adoption of §2254(d)(1). Sanders’s case provides an ideal vehicle for final resolution of the issue and for the Court to restore judicial powers to where they belong.

His case comes before the Court with a fully developed record on the issue, made outside the confines of the expedited proceeding process surrounding the need for a stay of execution. This case is apparently the only one to reach the Court with a fully developed and adjudicated record on the numerous arguments as to why §2254(d)(1) is unconstitutional.² Sanders first challenged §2254(d)(1)’s constitutionality before the federal district court years ago. Then, on appeal, the Sixth Circuit authorized post-*Loper Bright* supplemental briefing on §2254(d)(1)’s unconstitutionality. Moreover, unlike many other cases where this issue has been raised, Sanders did not simply rely on *Loper Bright*. He presented thorough arguments that regardless of *Loper Bright*’s implications, §2254(d)(1) violates the federal judiciary’s independent Article III authority and violates the Separation of

² Counsel expect a certiorari petition that will raise the same issue arising out of the Eighth Circuit to be filed by different attorneys next month on a less developed record with no dissenting opinion. That Petition would therefore be a good candidate for consolidation with Sanders’s Petition, or to be “held” pending disposition of Sanders’s Petition.

Powers Doctrine. Recognizing the significance of the issue and the importance of it being resolved, the DOJ intervened, briefed the issue, participated in oral argument that was extended by fifteen minutes per side so the §2254(d)(1) unconstitutionality matter could be specifically addressed, and expressly asked the panel to decide the issue.

The Sixth Circuit did so, with both the majority and the dissent comprehensively addressing—and disagreeing as to—whether §2254(d)(1) is unconstitutional. With the Sixth Circuit having addressed the issue in detail from all sides, Sanders’s case is the first one in recent times, perhaps ever, to have considered and addressed the full panoply of arguments as to why §2254(d)(1) is unconstitutional. The Court is unlikely to see a cleaner and more fully developed record on this question for some time, making it the ideal vehicle for the Court to address the matter once and for all.

Finally, this case presents a situation where §2254(d)(1)’s constitutionality matters. The majority rejected Sanders’s claims under §2254(d)(1) in ways that would not have occurred if §2254(d)(1) was held unconstitutional. For example, in contradiction to the Court’s precedent, the majority ruled that §2254(d)(1) required it to disregard all cases decided after the state court decision—even when they announced no new law. Said differently, they misconstrued what constitutes clearly established law. The panel failed to understand that §2254(d)(1) allows for consideration of cases that simply apply existing clearly established law, so long as those cases make no new law. While that was error even with §2254(d)(1), it would

not have happened without the majority misunderstanding §2254(d)(1)'s clearly established law component.

Nor would it have happened without the need to interpret the requirement of clearly established law that emanates from §2254(d)(1), a statute that has confused many courts. Without the statute, the panel would have relied on the Court's precedent supporting Sanders's claim regarding the unconstitutional jury instruction on his insanity defense and his trial counsel ineffectiveness claim in relation to expert services. Even though the panel should have relied upon the Court's precedent regardless of the statute, the statute was a barrier to its proper understanding as to what constitutes a holding and thus what constitutes clearly established law.

Secondarily, by ruling that it is not clearly established that the expert services to which one is entitled under *Ake* provides a baseline minimum performance for counsel effectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984), the panel disregarded the Court's precedent that makes clear Sanders did not receive the representation to which he was constitutionally entitled. None of this would have happened without §2254(d)(1). Thus, while correct application of governing law should have led to Sanders prevailing for the reasons Judge Stranch explained in her dissent, §2254(d)(1) undoubtedly caused the majority to deny habeas relief. That means whether §2254(d)(1) is unconstitutional matters for Sanders's capital case, in addition to its impact on nearly all habeas cases.

Whether §2254(d)(1) is unconstitutional will continue to arise with regularity until the Court directly puts the matter to rest. Sanders’ s case gives the Court the opportunity to do so, and is an excellent vehicle for deciding the issue, because the issue was fully briefed and, at the DOJ’s request, the Sixth Circuit put considerable time and thought into the issue, addressing the critical arguments regarding §2254(d)(1)’s unconstitutionality in detail (pursuant to its split decision), and no impediments to the Court’s review exist. Certiorari is warranted here.

STATEMENT OF THE CASE

It is undisputed that Sanders murdered the victims; his only trial defense was insanity. *Sanders v. Plappert*, 168 F.4th 837, 854 (6th Cir. 2026), App. 4a, 18a. Trial counsel sought a state psychiatric center psychological evaluation despite the center’s conclusions being fully available to the prosecution. App. 3a–4a. When that adverse evaluation was provided shortly before trial, counsel obtained a pro bono expert, Dr. Cooke, whom counsel provided with only the psychiatric center evaluation and police reports. App. 4a, 24a, App. 41a, 71a (Stranch, J., dissenting); App. 211a. Dr. Cooke evaluated Sanders briefly only days before he testified, had no time to prepare a report, and did not assist trial counsel in preparing the insanity defense, or even in preparation for cross-examining the prosecution’s expert. App. 24, App. 41a–42a, 71a (Stranch, J. dissenting); App. 210a–211a, 222a.

During his testimony, Dr. Cooke got Sanders’s name wrong, testified that he performed the evaluation on a day that he could not have because Sanders was in court, and acknowledged the entire evaluation and administration of tests took him

less than three hours. App. 4a–5a; App. 41a–42a, 71a (Stranch, J., dissenting), App. 222a. The prosecution responded with testimony from the psychologist who authored the state psychiatric center evaluation. Then, during closing argument, he emphasized the brevity of Dr. Cooke’s evaluation in comparison to the lengthy, comprehensive state psychiatric center evaluation and stressed that Dr. Cooke should not be believed since he got Sanders’s name wrong and did not know when he evaluated Sanders. App. at 41a–42a (Stranch, J., dissenting); App. 270a–272a.

While Dr. Cooke testified to Sanders’s desired conclusion, because of trial counsel’s failure to prepare him, he did so in a way that was not believable. As the dissent recognized, Dr. Cooke, or another expert, would have been believable if trial counsel had retained an expert in a timely manner, provided the expert with essential information, facilitated the evaluation enough in advance of trial that a report could have been prepared, and utilized an expert to assist with developing the insanity defense and with cross-examination of the prosecution’s expert. This is not speculative. As the Sixth Circuit dissent noted, expert conclusions and reports resulting from extensive evaluations of Sanders conducted as part of a separate case in which death was not imposed, but that is part of the state post-conviction court record here, do exactly that. App. 73a (Stranch, J., dissenting).

According to the dissent, this means one of two conclusions must be correct. Either Sanders was deprived of his constitutional right to expert assistance because of how counsel utilized Dr. Cooke regarding the sole defense at trial, or sufficient

evidence of insanity was negated at trial by a constitutionally faulty instruction. One or the other merits habeas relief. App. 72a–74a (Stranch, J., dissenting).

Under Kentucky law, insanity must be proven only by a preponderance of the evidence. App. 19a. This was never communicated to the jury. The jury was instructed four times in a row that the prosecution must prove guilt beyond a reasonable doubt to convict. With beyond a reasonable doubt the only standard mentioned with the instructions, the jury was then instructed that Sanders had to prove insanity “from the evidence,” leaving the jury with no direction as to the standard to apply. App. 18a–19a, 196a–201a (jury instructions). Then, in the presumption of innocence instruction, the jury was told it shall find Sanders guilty if “satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty.” App. 203a. By its plain language, this indicated either “from the evidence” corresponded with beyond a reasonable doubt or “from the evidence” provided what it could rely on to base its decision, but said nothing as to the standard of proof, leaving beyond a reasonable doubt as the only standard for the jury to apply. In the absence of any clarity, Sanders was convicted of murder and sentenced to death.

Sanders unsuccessfully litigated the jury instruction claim on direct appeal. App. 176a. He also litigated his expert assistance claim, mainly as a trial counsel ineffectiveness claim, losing before the Kentucky Supreme Court because the expert testified to the conclusion Sanders desired and because the court believed Sanders had no right to anything beyond a qualified expert. App. 184a. Sanders then pursued these claims in federal habeas proceedings before the district court and the

Sixth Circuit, challenging the constitutionality of §2254(d)(1) before both courts. A rehearing en banc petition was denied.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

There is no dispute that Sanders presented his federal constitutional claims in state court and that the court decided the federal constitutional merits of the claims at issue here. Nor is there any dispute that Sanders fully raised those claims before the federal district court, where he also challenged, well before *Loper Bright*, the constitutionality of §2254(d)(1).

After losing in the district court, Sanders obtained a certificate of appealability on the underlying constitutional claims relevant to this Petition. Within the briefs, Sanders relied on the Court's cases, specifically *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *McWilliams v. Dunn*, 582 U.S. 183 (2017), pointing out the latter did not create new law and was thus applicable clearly established law under the Court's precedent. Sanders argued that those cases provide a minimum floor for counsel's performance because the whole purpose of providing a minimum level of expert services to indigent defendants was to put them on the same playing field as those with means. Sanders further argued, pursuant to *Boyde v. California*, 494 U.S. 370 (1990) and *Estelle v. McGuire*, 502 U.S. 62 (1991), that there was a reasonable likelihood the jury applied a standard higher than the state law preponderance of the evidence standard when determining whether he was insane at the time of the crime.

After merit briefing, the Court decided *Loper Bright*. Sanders subsequently successfully sought leave for supplemental briefing solely regarding the constitutionality of §2254(d)(1). The DOJ intervened and filed its own comprehensive brief. Resultingly, the Sixth Circuit received extensive briefing from Sanders, the Warden, and the DOJ, all addressing whether §2254(d)(1) is unconstitutional because it violates a federal court's Article III authority and/or violates the Separation of Powers Doctrine, both in light of, and without, *Loper Bright*. The panel then extended argument time from thirty to forty-five minutes per side, so the matter of first impression before the Sixth Circuit could be explored in detail during argument. Splitting the argument with the State, the DOJ spent that additional time arguing §2254(d)(1)'s constitutionality. Sanders spent equal time explaining why it is unconstitutional.

The roughly thirty minutes of argument dedicated to whether §2254(d)(1) is unconstitutional gave the panel the opportunity to ask detailed questions regarding that, and the DOJ expressly urged the panel to decide the matter in a reasoned opinion. The panel obliged. The majority dedicated approximately eight pages of its opinion to explaining why it rejected each argument challenging §2254(d)(1)'s unconstitutionality, to which the dissenting judge responded with twenty pages tracing the Framers' intent, the Federalist Papers, and the Court's early decisions establishing the federal court's role in our constitutional system, to explain why the majority was wrong on each point. App. 10a–18a, 45a–64a. The meticulous process below has set a comprehensive foundation for the Court to decide an issue that has

been in the works for three decades, facilitating a final determination as to whether §2254(d)(1) is unconstitutional.

Sanders addressed errors in the majority’s opinion via a rehearing en banc petition, in which he relied on Judge Stranch’s dissent and the Court’s precedent. Therein, Sanders focused on the importance of deciding en banc whether §2254(d)(1) is unconstitutional and urged the en banc court to correct the panel’s errors as to the applicable constitutional law—and specifically the Court’s binding precedent.

Sanders pointed out that the panel interpreted clearly established law for the purposes of whether *Ake*, *McWilliams*, and *Hinton v. Alabama*, 571 U.S. 263 (2014), applied so narrowly that it conflicts with the Court’s recent decision in *Andrew*, as to what constitutes a holding, and thus what constitutes clearly established law. *Andrew v. White*, 604 U.S. 86, 92 (2025) (“When this Court relies on a legal rule or principle to decide a case, that principle is a ‘holding’ of the Court.”). He also argued that the panel made the same type of error as in *Andrew*, when determining what constitutes clearly established law for purposes of Sanders’s argument regarding the likelihood that the jury was led to believe the burden of proof on insanity was higher than the law permitted.

Sanders further argued what happened in his case is materially indistinguishable from *McWilliams*, and that the panel majority improperly disregarded favorable Supreme Court cases solely because of when those cases were decided. That ran afoul of the Court, which, for example, in *Wiggins v. Smith*, 539

U.S. 510, 522 (2003), applied in the §2254(d)(1) context, a case decided after the state court decision because it merely applied existing controlling Supreme Court law. Rehearing en banc, Sanders argued, was therefore necessary to bring the panel's decision into conformity with this Court's governing precedent.

The Sixth Circuit failed to fix these significant errors. Sanders now comes to the Court with the ideal vehicle to finally address whether §2254(d)(1) is unconstitutional—a question that has percolated for approximately thirty years. Certiorari is further justified because the Sixth Circuit deviated from the Court's binding, controlling precedent regarding what law can be relied upon in the §2254(d)(1) context and as to what constitutes a holding.

REASONS FOR GRANTING THE WRIT

I. Whether 28 U.S.C. §2254(d)(1) is unconstitutional is an important question of federal law arising in almost all federal habeas cases.

It is difficult to envision anything that arises more often and places more limits on a federal court's authority to determine what is the law and to remedy a constitutional violation, than 28 U.S.C. §2254(d)(1). Since the issuance of *Loper Bright*, petitioners have been challenging §2254(d)(1)'s constitutionality more than ever before, creating significant work for the federal courts. That will only change when the Court takes a case to finally decide the question that has been lurking in the background of its many AEDPA decisions: is §2254(d)(1) unconstitutional? Sanders's case is the ideal case for the Court to do so. It is unlikely that the Court has previously been presented with a case that squarely offers the full panoply of arguments for its unconstitutionality, which Sanders's case does. Moreover, it is

outside the constraints of an execution date and without procedural hurdles to review.

Whether §2254(d)(1) is unconstitutional was fully briefed below by both parties and by the DOJ, who saw the issue as being so significant that it intervened, briefed, participated in oral argument, and expressly asked the panel to address the issue in full. The Sixth Circuit panel obliged, writing a detailed 2-1 decision that addressed each potential argument regarding §2254(d)(1)'s unconstitutionality. App. 10a–18a. The decision ended with an experienced judge's comprehensive conclusion that §2254(d)(1) is unconstitutional. The twenty pages of painstakingly thorough analysis as to why, beginning with the Framers and the Federalist Papers, §2254(d)(1) runs afoul of the Constitution, cannot be reconciled with the majority decision. App. 45a–64a. It is for the Court to decide which interpretation is correct, and if the Court is to ever address the issue—which would ease the ever-increasing burden on the lower courts—this is as good a case as it may ever see.

A. Whether §2254(d)(1) is unconstitutional is an important, recurring issue that warrants the Court's attention now.

Arguably, the most fundamental aspects of our system of government are the Separation of Powers Doctrine and the Supremacy Clause. Going back to *Marbury v. Madison*, 5 U.S. 137 (1803), the Court made clear that for the Court to reign supreme, its decisions must be followed by the other branches of government, and neither the legislative nor executive branches may interfere with the Court's authority to declare what is the law, to interpret the law, and to remedy a constitutional violation. The Great Writ of habeas corpus, wisely written into the

Constitution by our Framers, provides a mechanism for the Court to remedy constitutional violations and to ensure decisions are made by a federal judiciary that is, through life-time appointments, insulated from the public pressure and political influence that occurs when judges are elected, as is so for state court judges. That could not be any more important than it is now, with the federal judiciary seemingly under constant attack and criticism.

While this is not the first time the judiciary has faced attempts to limit its authority, the Court has never had its independence so constantly challenged as we see in current times. No one may reasonably dispute that by adopting §2254(d)(1), Congress interfered with how federal judges decide federal habeas claims, and more particularly, made themselves the arbiters as to what constitutes applicable law, thus curtailing federal judges' authority to decide what is the law, and their authority to remedy a constitutional violation. The legislative history suggests, and scholars have debated, that the Court's interpretation of §2254(d)(1) in *Williams v. Taylor*, 529 U.S. 362 (2000), exceeded Congress' intent. Whether Congress intended to supplant the Court's role and its authority to do so, remain open questions. *Loper Bright* and other recent cases have shown that *this* Court is ready to address long dormant difficult constitutional questions. Few, if any issues, have as critical an impact on the functioning of the federal courts and the application of justice, then the unaddressed question as to whether §2254(d)(1) is unconstitutional.

Loper Bright made clear that operating under a paradigm, even for four decades, does not make it correct. Thus, it is important for the Court to answer the

question here regardless of whether the Court agrees with the *Sanders* dissent or the majority. Federal habeas proceedings comprise a massive portion of a federal court's docket. As of early 2026, 1,993 people are under a death sentence in the United States. Death Row U.S.A. Spring 2026, NAACP LDF, available at <https://www.naacpldf.org/wp-content/uploads/DRUSASpring2026.pdf>. Some 20,000 federal habeas petitions are filed annually, adding to the large number that remain pending from prior years. See *Federal Judicial Caseload Statistics*, available at <https://bit.ly/4dpVnem>. Most of the federal habeas claims those individuals present reach the merits and thus have §2254(d)(1) implications.

The amount of time litigants and the courts spend interpreting and applying §2254(d)(1) is immense. Federal habeas litigation would likely take less time without §2254(d)(1), as most petitioners would receive merits resolution faster. A substantial amount of litigation time is due to the amount of litigation surrounding whether §2254(d)(1) is unconstitutional, which has increased significantly in the wake of *Loper Bright* striking down *Chevron* Deference. At this point, it is therefore not so much whether the Court will now also strike down §2254(d)(1) that matters as to whether to grant certiorari, but rather the need for the Court to decide one way or the other and thus finally put to rest the ever-increasing amount of litigation surrounding the matter. Regardless of the outcome, a large number of cases will be resolved by a decision one way or the other, lessening the burden on the lower courts and promoting finality by resolving a matter that has taken, and will otherwise continue to take up, a great deal of the lower courts' time.

B. Significant questions exist as to whether §2254(d)(1) is unconstitutional.

It would be unsurprising if the Warden and/or the DOJ file briefs in support of certiorari because the record is so well-developed on the issue that this is an ideal case to resolve a matter for which everyone seems to want final resolution. If they do not take this step of supporting certiorari, they will likely point out that courts have been upholding §2254(d)(1)'s constitutionality and the Court has applied it many times over the years without pausing to determine first whether it is constitutional. But the Court's precedent is clear that a matter hiding in the background that has not been decided remains an open issue. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Plus, the Court is more than willing to strike down law that it has routinely applied for decades without first deciding the legality of that law. It did so in *Loper Bright* and, in recent years, has overruled its own precedent at rates seemingly never seen before.

That does not mean the Court needs to overrule its own precedent to strike down §2254(d)(1), because it has never directly addressed the issue. That is why, along with the potential impact of *Loper Bright*, the issue continues to be litigated before the lower courts in a massive number of federal habeas cases. That will change only when the Court grants certiorari to resolve the matter. It should do so now for this purpose and because there are significant reasons to question

§2254(d)(1)’s constitutionality. The Court needs to look no further than Judge Stranch’s dissent in *Sanders* to see that. App. 45a–64a.

Federal courts have the authority to determine whether an individual is in custody in violation of the Constitution. “The fundamental issue is whether, when a federal court exercises that grant and finds the imprisonment unconstitutional, Congress can make that court’s ability to grant relief dependent on deference to a state interpretation of the Constitution.” App. 45a (Stranch, J., dissenting).

As Judge Stranch described, the Framers reached a compromise memorialized within Article III of the Constitution for federal judges to “void[] unconstitutional state law” so we can “avoid situations in which state judges, loyal to state law, would misapply national law to preserve their own state law.” App. 46a. Moreover, as she described, and based on statements within the Madison Papers regarding the importance of ensuring the federal courts provide a remedy for unconstitutional state action, “the Founders would have objected to a rule that required federal courts to subject their interpretation of the Constitution, even in a single case, to that of the state courts. Doing so would undermine the very purpose of lower federal courts—stopping biased state judges from circumventing the Constitution.” App. 47a (Stranch, J., dissenting).

Judge Stranch did not find that *Loper Bright* rendered §2254(d)(1) unconstitutional, but she noted it recognized problems with federal judges deferring to non-Article III actors. App. 47a (quoting *Loper Bright*, 603 U.S. at 385) (The Framers “envisioned that the final ‘interpretation of the laws’ would be ‘the proper

and peculiar province of the courts.’ . . . 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.”).

In *Loper Bright*, the Court looked to *Marbury v. Madison*, where “Chief Justice Marshall famously declared that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’” *Id.* *Marbury* was, of course, just the beginning. Judge Stranch also looked to *Cohens v. Virginia*, 19 U.S. (6. Wheat.) 264, 404 (1821), concluding that, “[i]t would be ‘treason[ous] to the [C]onstitution’ for Article III courts to defer to a state reading of the Constitution and decline to provide an independent reading simply because the matters were doubtful.” App. 48a (Stranch, J., dissenting) (quoting *Cohens*). “Presumably, Congress cannot mandate that courts commit treason against the Constitution.” *Id.* The question therefore becomes whether Congress essentially mandated that with §2254(d)(1), or more specifically, whether it “can create an end run around the unconstitutionality of deference to the state courts by saying that Article III courts can recognize a state’s unconstitutional actions but cannot do anything about them unless the state acted unreasonably.” App. 48a (Stranch, J., dissenting).

Section 2254(d)(1) “is subtly different from what occurs in all . . . other types of cases. It does not just provide a limit on relief for the underlying constitutional violation; it makes relief dependent on the state law regarding that violation—which state law may, itself, be unconstitutional.” App. 49a (Stranch, J., dissenting). Rather than focus on the violation or a fact of no significance to determine whether

to grant relief, §2254(d)(1) “makes a federal court’s decision to grant habeas relief dependent on the substance, not only of the underlying constitutional violation, but on the rule of decisional law the state announces when it decides the prisoner’s case.” *Id.* This means, under §2254(d)(1), “Article III courts cannot grant relief for a constitutional violation for which they could otherwise grant relief if a particular non-Article III actor happens to have a different interpretation of the Constitution.” App. 50a (Stranch, J., dissenting).

As Judge Stranch made clear in quoting *Marbury*, “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” The way to do this is for the courts “to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.” App. 51a (quoting *Marbury*, 5 U.S. at 177–78). Said differently, “Article III courts cannot recognize that a law is unconstitutional and then apply it anyway to a particular case, letting it—rather than the Constitution—dictate the outcome of the case.” *Id.* To do so would, “[a]t the very least,” teach that, “while Congress can prohibit Article III courts from granting relief for a constitutional violation in some cases, the fact that Congress dictates relief rather than directly dictating a rule of constitutional decision does not automatically make permissible Congress’s attempts to interfere with constitutional adjudication by Article III courts.” *Id.* Judge Stranch wisely

conceptualized that “there must be some intermediate rule governing when Congress can and cannot prohibit Article III courts from granting relief that distinguishes between cases like plain error review and cases like the hypothetical in which Congress simply prohibits courts from granting relief from any of its reasonable but unconstitutional laws.” App. 51a. She believes two cases provide that rule: *United States v. Klein*, 80 U.S. 128 (1871), and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

Under *Klein*, “Congress can regulate relief in some ways, just as it can regulate jurisdiction. But Congress cannot use its power to regulate relief to functionally create an erroneous rule of decision any more than it can tailor jurisdiction to do the same.” App. 53a (Stranch, J., dissenting). Nor may Congress gerrymander relief or jurisdiction “to force courts to functionally decide cases by an unconstitutional rule of decision put forward by a non-Article III actor.” *Id.*

Under *Reynoldsville Casket Co.*, “courts cannot simply substitute an unconstitutional reading of the law for a constitutional one by couching what they are doing in the same language of ‘remedy’ or ‘jurisdiction,’” because where “the effect of the choice of ‘remedy’ is functionally the application of a different rule of decision, the choice of ‘remedy’ is as unconstitutional as the original rule of decision was.” App. 54a (Stranch, J., dissenting).

To Judge Stranch, that is exactly what §2254(d)(1) does by making state courts “the non-Article III body to whose musings Article III courts must subject their ability to grant relief.” App. 55a. The Framers “expressly rejected the idea

that States should be treated as though their interpretations of constitutional law [were] equal to the federal court’s interpretations in finality and independence” because they “considered state courts to be just as much political entities as federal legislative and executive bodies.” *Id.* (citing Letter from James Madison to George Washington (Apr. 16, 1787) in *Madison Papers* 382, 384). Resultingly, “Congress cannot use its power to regulate relief to, for all practical intents and purposes, force Article III courts to defer to state courts’ interpretation of the Constitution any more than Congress could simply mandate directly that Article III courts defer to state law.” *Id.*

Judge Stranch explained that Congress, through §2254(d)(1), attempted “to give effect to an unconstitutional action of a non-Article III entity on grounds that the same non-Article III entity reviewed the action and said it was not unconstitutional,” which, according to *Marbury, Klein, and Reynoldsville Casket Co.*, is unconstitutional. App. 56a. That is because while “Congress may place some limitations on Article III courts’ ability to grant relief in habeas cases, . . . it may not make the ability of those courts to grant relief for a constitutional violation dependent on the existence of a state law saying that the action in question is not a violation” and thus §2254(d)(1)’s limitation on relief language, instead of explicit decisional rule language, makes no difference. App. 56a–57a.

As this demonstrates, significant questions as to whether §2254(d)(1) is unconstitutional exist. The Court should resolve them, particularly with Sanders’s panel having been so bitterly split on an issue that cuts to the heart of a federal

court's authority, and specifically, as to what the legislative branch may do to interfere with the federal judiciary's authority. It is time for the Court to decide whether §2254(d)(1) "is a wolf in sheep's clothing" that "disrupts the delicate balance of power between state courts and Article III federal courts established by the Founders in 1787." App. 63a–64a (Stranch, J., dissenting).

C. Whether §2254(d)(1) is unconstitutional makes a difference for Sanders's habeas claims.

Whether §2254(d)(1) is unconstitutional matters for Sanders's habeas claims. Take, for example, two claims: 1) ineffective assistance of counsel regarding trial counsel's failure to timely prepare an expert on insanity and to provide that expert witness with the necessary resources to conduct an analysis; and 2) improper jury instruction on insanity.

As the dissent explained, what happened as to expert assistance in Sanders's case is no different from what happened in *McWilliams v. Dunn*, 582 U.S. 183 (2017). Applying §2254(d)(1) in *McWilliams*, the Court held that the state court unreasonably applied *Ake* by ruling McWilliams' constitutional rights were satisfied by an evaluation done by experts who were not "available to the defense and independent from the prosecution." *Id.* at 198. The Court also held that despite McWilliams' expert testifying to the conclusion the defense desired, McWilliams' clearly established constitutional rights were violated because the expert was given inadequate time to assist with preparation and presentation of the defense and thus the state court's conclusion that being provided an expert is alone sufficient, was wrong. *Id.* at 190, 198–99. Simply, as *McWilliams* stated, even where an expert is

qualified, under *Ake*, a defendant’s constitutional rights are violated if the expert “is given so little time to prepare that he cannot effectively assist counsel in reviewing information, preparing for trial, and effectively presenting a case.” App. 70a (Stranch, J., dissenting) (citing *McWilliams*, 582 U.S. at 199). Moreover, the expert must be “sufficiently independent from the prosecution” to perform these roles. *Id.*

The question here should have therefore been whether, based on trial counsel’s actions, “Dr. Cooke was given sufficient time to adequately play the role that a defense mental health expert should play,” rather than the Kentucky Supreme Court’s focus on whether the defense was provided an expert who formed conclusions favorable to Sanders. App. 77a (Stranch, J., dissenting).

What happened here was at least as extreme as in *McWilliams* and *Rogers v. Dzurenda*, 25 F.4th 1171 (9th Cir. 2022), where ineffective assistance of counsel was found for how counsel utilized expert services under a similar situation. Here, the state psychiatric center evaluation was not independent and trial counsel “did not begin preparing Dr. Cooke, the only expert who could testify to insanity, until a few days before trial—far less than the month in *Rogers*—leaving him unable to prepare a report.” App. 71a (Stranch, J., dissenting). Trial counsel “did not provide Dr. Cooke with all the information available to him, or with a complete investigation of Sanders’s background and childhood (having never done one).” *Id.* Trial counsel “allowed Dr. Cooke time to do only a cursory evaluation of a few hours the day before jury selection,” and “failed to prepare Dr. Cooke to testify sufficiently such that the doctor would be able to adequately remember Sanders’s name or even

respond to questions about the differences between Cooke’s conclusions and the KCPC Report.” *Id.*; App. 210a–211a, 222a (Dr. Cooke testimony).

Yet, the majority did not rely on *McWilliams*, disregarded *Rogers*, and overlooked *Hinton*, which held that whether the trial expert was believable and whether another expert would have been believable if counsel performed effectively, is what matters—not whether the expert merely testified to the conclusion the defense desired. The majority ignored all of this because it believed it had to apply §2254(d)(1) and incorrectly believed §2254(d)(1) prohibited reliance in Sanders’s favor on cases decided after the relevant state court decision. The majority took a much too narrow approach to what constitutes clearly established law, rebuffing what *Andrew v. White* permits, as well as cases from the Court that applied cases post-dating the state court decision when the Court’s subsequent cases did not announce new law. Compare App. 23a–25a, 32a, with App. 76a. Resultingly, the majority held that it was not unreasonable for the state court to have ruled that Sanders received all he was entitled to by receiving an expert who testified Sanders was insane. App. 25a. Without §2254(d)(1), the majority would have considered *McWilliams*, *Rogers*, *Hinton*, and its own independent judgment, and almost certainly would have reached a different conclusion, as the dissent did. Whether §2254(d)(1) is unconstitutional patently impacted the resolution of this claim.

The same is true for the claim regarding the jury instruction on insanity, where the majority again took too narrow an approach to what constitutes clearly established law. The majority interpreted the Court’s clearly established precedent

to mean a constitutional violation occurs *only* if there is a reasonable likelihood that the jury applied an instruction in a way that prevented consideration of constitutionally relevant evidence. Construing the Court’s precedent that narrowly in this context conflicts with *Andrew* (*see infra* section IV), as to what constitutes a holding. The focus should have been on whether there was a reasonable likelihood the jury erroneously applied an instruction or relied on an incorrect standard of proof. But for §2254(d)(1)’s clearly established law requirement, the majority could have easily determined in its independent judgment that the jury likely applied the wrong standard and thus, as the dissent concluded, habeas relief should be granted.

As this demonstrates, whether §2254(d)(1) is unconstitutional significantly impacts the standard applied to at least two of Sanders’s habeas claims and ultimately affected whether the Sixth Circuit likely would have granted habeas relief. Thus, the important issue of whether §2254(d)(1) is unconstitutional makes all the difference here, further demonstrating what should already be clear—this is an ideal case for the Court to finally address an issue that has been awaiting confrontation for three decades—whether §2254(d)(1) is unconstitutional. In this case, the potential legal theories coalesce with a fully developed record and a split decision below. Certiorari is highly warranted here.

D. No procedural impediments exist, and the lower court thoroughly addressed the arguments as to why §2254(d)(1) is or is not unconstitutional, splitting as to the result.

There are no potential procedural hurdles for the Court to address or that need to be overcome for the Court to reach the merits as to whether §2254(d)(1) is

unconstitutional. The matter was clearly preserved, having been raised in the district court before *Loper Bright* and then addressed through extensive supplemental briefing in the Sixth Circuit after *Loper Bright*. During oral argument in the latter, the DOJ urged the court to write a reasoned opinion fully addressing the matter. Doing so, the panel split 2–1, in a detailed opinion that provides a roadmap for the Court’s adjudication and ultimate decision resolving the matter once and for all.

Indeed, the dissenting opinion’s length, detail, and comprehensive analysis dating back to the Framers, all but directly invites the Court to finally address this matter, which has been lurking in the background for three decades. Outside of resolution by the Court, there is no end in sight. All parties seemed to have seen the Court as the grand finale, with almost no doubt that certiorari would be granted if Sanders had prevailed below, and with the DOJ recognizing the importance of the case by intervening, thoroughly briefing, arguing, and requesting a merit ruling.

Under these circumstances, it would not be surprising to see the Solicitor General choose to file a brief in response to this Petition. Of course, the Court need not wait for that. It makes sense for the Court to invite the Solicitor General to express the views of the United States, so this matter is as fully briefed here as it was below. Even without further briefing, the parties set this case up well for review, as the previous briefing and the lower court opinion make Sanders’s case an ideal vehicle to now address the issue the Court punted on for three decades.

II. The Court should address whether lower courts may rely on decisions of the Court that post-date the relevant state court decision, but do not create new law, when determining whether the state court decision is contrary to, or an unreasonable application of, clearly established law.

A finding that §2254(d)(1) is unconstitutional would require a remand that would render this issue moot. However, certiorari should nonetheless be granted on this question, so it may be addressed if the Court either upholds §2254(d)(1)'s constitutionality or does not grant certiorari on the first question presented.

Where a subsequent case does not create new law, the Court has a long history of applying that precedent to state court decisions that predated it, when considering whether the decision was contrary to, or an unreasonable application of, clearly established law. This Court did so in *Wiggins*, where it applied *Williams*, 529 U.S. 362, even though *Williams* had not been decided at the time of *Wiggins*' state court decision. In doing so, the Court acknowledged “*Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case,” but still *applied Williams* in the §2254(d)(1) context because *Williams* “made no new law in resolving Williams’ ineffectiveness claim.” *Wiggins*, 539 U.S. at 522. Very recently, the Court also did so in *Pitchford v. Cain*, 608 U.S. 391, 400 (2026), applying *Flowers v. Mississippi*, 588 U.S. 284 (2019), even though *Flowers* was decided after the relevant state court decision. Relevant here, *Hinton* and *McWilliams* did not create new law.

“Because *McWilliams* made no new law and merely determined the bounds of ‘proper application’ of *Ake*, its holdings are applicable to cases like [*Sanders*] that

were decided after *Ake*, even if they were decided before *McWilliams* and must now be evaluated under AEDPA.” App. 76a (Stranch, J., dissenting). Yet, the Sixth Circuit majority in *Sanders* believed incorrectly that §2254(d)(1)’s “clearly established law” requirement, and the Court’s interpretation of that phrase, prohibited reliance on cases post-dating the state court decision. As explained in subsection D of the immediately preceding section, that erroneous interpretation impacted the resolution of two of Sanders’s habeas claims, and appears irreconcilable with *Wiggins* and *Pitchford*.

While the Court’s practice is instructive, the Court has not expressly stated that its decisions that post-date the relevant state court decision, but do not create new law, shall be relied upon by lower courts when determining whether the state court decision is contrary to, or an unreasonable application of, clearly established law. Because some members of the Sixth Circuit appear to not have extrapolated the rule from what the Court has done and said in its own cases dating back to *Wiggins*, the Court should grant certiorari to make that rule clear and to resolve what appears to be a conflict between the Sixth Circuit’s decision and this Court’s two decades of precedent, dating back at least to *Wiggins*. Alternatively, the Court should grant certiorari, vacate, and remand on Question II in light of the principle’s applied in the intervening decision of *Pitchford*, so the Sixth Circuit may consider the rule therefrom.

III. Whether the minimum level of expert assistance that *Ake* guaranteed to an indigent defendant established a baseline for objectively reasonable counsel in utilizing an expert warrants review.

“[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.” *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). “[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Id.* “[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense,” so “a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy.” *Id.* at 77. *Ake*’s constitutional foundation emanates from the simple premise that wealthy defendants should not have a greater opportunity to defend themselves than indigent defendants. Specifically, *Ake* focused on rights regarding expert services.

Relevant here, in *Ake*, the Court held the “requirement that indigent defendants have access to a competent psychiatrist to conduct an appropriate examination and assist in evaluation, preparation, and presentation was part and parcel of ensuring that the defendant received his right to due process under the Fourteenth Amendment, on par with the right to effective assistance of counsel.” App. 70a (Stranch, J. dissenting) (citing *Ake*, 470 U.S. at 76). As Judge Stranch recognized, *Ake* must have established a bare minimum for reasonably effective

assistance of counsel as to expert assistance. *Id.* (“[I]t is hardly reasonable to say that there is a threshold of representation so ‘crucial to the defendant’s ability to marshal his defense’ that the State must provide it to the indigent defendants because otherwise ‘the risk of an inaccurate resolution of sanity issues is extremely high,’ but counsel is not ineffective when they fail for no strategic reason to ensure its provision.”) (citing *Ake*, 470 U.S. at 80–82, and *Skaggs v. Parker*, 235 F.3d 261, 272–73 (6th Cir. 2000)). Despite that sound reasoning, the majority stated it was unclear whether *Ake* applied since Sanders was able to afford an attorney. App. 24a–25a. The Court should resolve the dispute, making clear that *Ake* relies on a minimum threshold that affects the reasonableness of counsel’s performance.

Granting certiorari to resolve the matter not only makes a difference to Sanders’s claim regarding expert assistance, it would make clear that “counsel’s failure to ensure that a defendant receives even the baseline assistance required to satisfy the Fourteenth Amendment for indigent defendants is ineffective assistance.” App. 71a (Stranch, J. dissenting).

IV. The Court should determine whether *Boyde*’s “reasonable likelihood” standard applies where a jury relies on an erroneous instruction or standard of proof, or only to the jury’s consideration of evidence.

In *Andrew*, 604 U.S. at 92, the Court held that “[w]hen this Court relies on a legal rule or principle to decide a case, that principle is a ‘holding.’” It so ruled in the context of an AEDPA-governed federal habeas case as to the rule stemming from *Payne v. Tennessee*, 501 U.S. 808 (1991). The Court held *Payne*’s rule is much broader than just the matter of victim impact evidence that was at issue in *Payne*.

Despite *Andrew*, the Sanders majority took a narrow approach to the holding of *Boyde*, 494 U.S. at 378=80, as it pertains to jury instructions. The dissent emphasized the majority’s failure to correctly identify the governing law, underscoring a significant question as to whether the majority decision conflicts with *Andrew*, and as to what constitutes the clearly established law.

The majority held that a jury instruction violates *Boyde* only if there “is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” App. 20a (citing *Boyde*, 494 U.S. at 380). Based on that, it then held no error occurred because Kentucky courts ruled the given instruction comported with Kentucky law. App. 20a–21a. Completely absent from that is that the instructions must be construed as a whole. See *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The “legal principle . . . indispensable to the [Court’s] decision” (*Andrew*, 604 U.S. at 93) in *Boyde* was that “reasonable likelihood” was the “standard for determining whether various claimed errors in instructing a jury require reversal of a conviction.” *Boyde*, 494 U.S. at 379. Applying that standard here, a reasonable likelihood exists, as the dissent concluded, that the jury applied an erroneous instruction or too high a standard of proof to Sanders’s insanity defense, which was the only trial defense.

Instruction number seven stated, in part, “*if you believe from the evidence that at the time David Lee Sanders committed these offenses (if he did so) he was of unsound mind, you shall find him not guilty and say in your verdict that you find*

him not guilty on the ground of insanity.” App. 201a (emphasis added). The instruction begged the question: what standard were the jurors to use?

Relevant to that question, immediately beforehand, the jury was reminded of “[I]nstructions No. 2, No. 3, No. 4 and No. 5,” wherein jurors were given a clear standard: beyond a reasonable doubt. *Id.* Instruction numbers 2, 3, 4, and 5 each repeated in part that the jury should take an action “if, and only if, you believe from the evidence beyond a reasonable doubt” some fact or facts. App. 196a–199a.

While trained legal readers may infer that the absence of “beyond a reasonable doubt” in instruction seven indicates a different standard, jurors are not trained in the law. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen.”). Thus, even if jurors recognized the absence of “beyond a reasonable doubt” meant some other standard applied, the question remains which one? In Kentucky, it is preponderance of the evidence, a standard never once articulated in Sanders’s case.

The dissent used a hypothetical to encapsulate this problem, and to explain how the jurors reasonably likely, but incorrectly, interpreted the law:

I tell my clerk on Monday to “cite check a document, being careful to check all case citations as well as the record citations” then use that exact language to direct her on Tuesday and on Wednesday, but, on Thursday, I simply say conduct a “cite check.” The commonsense assumption is not that this one time she does not need to check the record cites—it is that I used a shorthand for the same instruction I had given three times before.

App. 67–68 (Stranch, J., dissenting).

As this demonstrates, a reasonable likelihood exists that jurors may not have seen the absence of beyond a reasonable doubt as meaningful. Even if they did, a reasonable likelihood exists that the jury did not know what standard to then apply. They may not have even known that the never mentioned preponderance of the evidence standard existed. In that vacuum, they were left with only the four times instructed beyond a reasonable doubt standard—the only one ever mentioned.

Instructions two through five reinforced beyond a reasonable doubt and created a reasonable likelihood the jury applied that standard when making their insanity determination. Assuming they did not, and that they somehow innately knew what the other standards were despite none of the instructions identifying the existence of *any* other standard of proof, there is at least as reasonable a likelihood that they applied a clear and convincing evidence standard, or any other standard, as it is that the jury applied a preponderance of the evidence standard.

The prior instructions said, “if, and only if, you believe from the evidence beyond a reasonable doubt,” making the latter clause a limiting clause. Instruction seven had no limitation, requiring the jury only “believe from the evidence.” Devoid of the bar, a reasonable likelihood exists that jurors thought their belief required something approaching certainty. *See* “BELIEF,” Webster’s Ninth New Collegiate Dictionary 126 (1985) (“conviction of the truth of some statement . . . especially when based on examination of evidence”); *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 285 n.11 (1990) (noting “clear and convincing evidence” has been

defined as that producing “a firm belief or conviction as to the truth” of the proposition offered) (citation omitted).

Applying the common understanding of “believe” would have led the jurors to impose a higher standard than beyond a reasonable doubt. Thus, if the jury recognized the common understanding of “believe,” a reasonable likelihood exists that it applied a standard of proof far exceeding the actual one. Without articulating the applicable standard of proof, the “believe from the evidence” language made the ambiguity worse. Sanders was not required to prove he was insane beyond a reasonable doubt, by a higher standard, by clear and convincing evidence, or to any certainty. The plain language of the insanity instruction supported a high standard, “[b]efore the defendant can be excused on the ground of insanity you must believe from the evidence that . . .” App. 201a.

Were it a lower standard, commonsense would dictate a less forbidding, simpler construction, such as “you may excuse the defendant on the ground of insanity if you believe . . .” Thus, the language of the instruction indicates a reasonable likelihood the jury applied a standard higher than preponderance, even if they recognized beyond a reasonable doubt was not the standard.

With only one defense, Sanders’s sole benefit was that Kentucky has a low threshold for insanity, requiring only proof by a preponderance of the evidence. Critically important to that was making sure the jurors understood how low a hurdle Sanders had to clear. That did not happen because Kentucky has established a vague and misleading jury instruction that does not explain the

standard in a way that is at all clear or even intuitive. Kentucky eschews “preponderance from the evidence,” believing the phrase, “believe from the evidence,” appropriately encapsulates the standard. It does not.

The court instructed the jury four times: “if, and only if, you believe from the evidence beyond a reasonable doubt” some fact(s). App. 196a–199a. But as to insanity, the court instructed only, “if you believe from the evidence that . . . he was of unsound mind.” App. 201a. Making that worse, the presumption of innocence instruction told the jury to find Sanders not guilty unless it was “satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty.” App. 203a. It is reasonably likely that a juror interpreted that either to mean “from the evidence” within the insanity instruction referred to the beyond a reasonable doubt instruction within the presumption of innocence instruction, or that “from the evidence” meant what facts they should consider and had nothing to do with what standard of proof to apply.

As Judge Stranch noted, “[t]he instructions did not clarify that this was a lower burden or a different burden;” rather, “[t]he jury had been repeatedly instructed that, to find something ‘from the evidence,’ they needed to find it ‘beyond a reasonable doubt.’ It was never clarified that ‘beyond a reasonable doubt’ was an additional requirement for those instructions, rather than one associated with finding something ‘from the evidence.’” App. 66a (Stranch, J., dissenting).

As this Court has explained, “instructions bearing on the burden of proof . . . are in one way or another designed to get the jury off dead center and to give it

some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard.” *Cupp v. Naughten*, 414 U.S. 141, 148–49 (1973). To achieve that requires guidance Sanders’s jurors did not get. While courts are required to assume jurors follow instructions and bring to the table their ordinary understanding and life, lay people should not ordinarily be expected to innately realize that an insanity defense must be proven only by a preponderance.

In the absence of clear direction, a reasonable likelihood exists that the jurors defaulted to the standard they see on television—beyond a reasonable doubt. Most lay people do not even know what the preponderance standard is, let alone when it applies. Moreover, preponderance is generally a civil standard that does not intuitively apply to criminal trials, so even the rare jurors who may be familiar with the standard would not reasonably know to apply it in this context without guidance. Resultingly, without being instructed that the standard was preponderance, a reasonable likelihood exists that the jurors would have believed the beyond a reasonable doubt standard applied even without being told in four previous instructions to rely on that standard.

There was no guidance that “from the evidence” meant some other standard applied. Lacking clear instruction, jurors were left to make up the applicable standard. Accordingly, a reasonable likelihood exists that the jury did not recognize and apply the preponderance standard.

The dissent keyed into this problem, noting that when “[t]he jury was then told it needed to find insanity ‘from the evidence’—the same language used in the

beyond a reasonable doubt instruction,” the “mirroring “is enough to raise a reasonable likelihood that the jury would apply the ‘beyond a reasonable doubt’ standard to insanity too, even if it was not directly instructed to.” App. 66a–67a (Stranch, J., dissenting). A reasonable likelihood exists that jurors would not have seen the absence of beyond a reasonable doubt as meaningful. The majority expected jurors would intuitively know what standard to use despite an instruction devoid of clear guidance, but Judge Stranch recognized that the state court “reasoned that ‘from the evidence,’ being sufficient for civil cases, [it] was also sufficient for criminal cases in which the defendant had a preponderance burden,” concluding, “[t]hat is the wrong legal rule.” App. 75a (Stranch, J., dissenting). “The question is not merely whether requiring the jury to find insanity ‘from the evidence’ sufficiently explains the preponderance standard in a vacuum (as it would be in a civil case);” rather “[i]t is whether in the context of the jury instructions in *this case* there is a ‘reasonable likelihood’ that a juror could get confused and apply the wrong standard.” App. 75a (Stranch, J., dissenting) (emphasis in original) (citing *Boyd*, 494 U.S. at 380 (quoting *Estelle*, 502 U.S. at 72)).

Sanders does not discuss in detail the jury instructions and the problems with them to ask this Court to make a fact-intensive analysis of error correction here (although he would not mind if the Court did). He does so instead to demonstrate how the majority’s failure to apply *Andrew*, as the dissent evidently and correctly did, to determine what constitutes the holding and to accurately identify the correct holding from *Boyd*, makes a difference in Sanders’ case. That

difference underscores why certiorari matters here. The Court should therefore grant certiorari, which it could do through a summary reversal in light of *Andrew*, to address whether the majority's narrow approach to what constitutes a holding comports with *Andrew*, and to articulate whether the majority or the dissent is correct as to the holding, and thus the clearly established law of *Boyde* that is applicable to Sanders's claim.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted.

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