No. 21-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL LINDSEY,

Petitioner-Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent-Appellee.

AMENDED ORDER

Before: GIBBONS, GRIFFIN, and LARSEN, Circuit Judges.

Carl Lindsey, an Ohio death-row prisoner, moves for a certificate of appealability so he can appeal from the district court's judgment denying his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254(c); Fed. R. App. P. 22(b)(1)-(2). We deny his motion.

I.

An Ohio jury convicted Lindsey of two counts of aggravated murder, two counts of aggravated robbery, and theft. The Supreme Court of Ohio summarized the facts that gave rise to Lindsey's conviction and resulting death sentence:

> In the early morning hours of February 10, 1997, appellant, Carl Lindsey, was at Slammers Bar near Mt. Orab along with Kathy Kerr, Kenny Swinford, A.J. Cox, and Joy Hoop, one of the bar owners. According to the testimony at trial, Joy had wanted her husband, Donald Ray "Whitey" Hoop, dead, and that night [Lindsey] told her "he would do him in." Joy then handed a small gun to [Lindsey], and [Lindsey] left the bar. Kathy Kerr also decided to leave the bar at that point, but heard a banging noise. As she left she saw Whitey lying on the ground, covered with blood, and [Lindsey] standing by the door. According to investigators, Whitey had been shot once in the face while seated inside his vehicle. He apparently then left his vehicle and remained in the parking lot where he was shot again in the forehead. Upon seeing Whitey on the ground, Kerr immediately left for her home, which was only a few hundred feet away. [Lindsey] followed her in his pickup truck, and she allowed him into her trailer to take a shower.
>
> At approximately the same time that these events were occurring, Brown County Deputy Sheriff Buddy Moore was on patrol and passed Slammers Bar. He noticed and was suspicious of a pickup truck in the parking lot and followed it from the bar south to the Kerr residence. A couple minutes later, he received a police dispatch that a shooting had been reported at Slammers and headed back toward the bar. On the way, Moore noticed a car pass him at a high speed going south. When he

> arrived at Slammers, he found Whitey Hoop's body lying in the parking lot. When backup arrived, Moore instructed a state trooper to go to Kerr's trailer, look for the pickup, and make sure that no one left the premises. Moore also left for Kerr's trailer.
>
> When Moore arrived at the Kerr residence, he found [Lindsey] in the bathroom, soaking his clothes in a tub full of red-tinted water. He also found a box of .22 caliber ammunition on the sink. At that point, Moore took [Lindsey] into custody. Upon a search of the premises, police seized from the Kerr trailer [Lindsey's] wallet, the ammunition, the clothing in the tub, and a .22 caliber Jennings semiautomatic pistol, which they discovered behind the bathroom door. They also found and seized Whitey's wallet, which was in a wastebasket in the bathroom. When discovered, Whitey's wallet was empty, although an acquaintance of Whitey's testified that Whitey habitually carried about $1,000 with him. Police also found $1,257 in [Lindsey's] wallet, although he had been laid off in late December 1996.
>
> The crime laboratory tested the bloodstains on the items seized by police and found the stains on [Lindsey's] jacket, jeans, boot, truck console, steering-wheel cover, driver's seat, driver's-side door, and door handle all to be consistent with Whitey's blood. One of the stains on the Jennings .22 pistol was also consistent with Whitey's blood.

State v. Lindsey, 721 N.E.2d 995, 999–1000 (Ohio), *reh'g denied*, 724 N.E.2d 812 (Ohio), *cert. denied*, 531 U.S. 838 (2000).

Lindsey exhausted state-court proceedings and filed a federal habeas corpus petition. It raised these claims, among others, as numbered in the petition: (2) the State withheld material exculpatory evidence of witness immunity and allowed perjured testimony, both in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; (3) the prosecution violated the Constitution by using inconsistent theories of guilt in the separate trials of Lindsey and his codefendant; (4) the trial court failed to ensure that the guilt phase was fair and reliable; (6) the prosecutor committed egregious misconduct in the guilt and penalty phases; and (9) the trial court in postconviction proceedings erred by denying Lindsey discovery and funding for an expert. He later added ten claims attacking Ohio's lethal-injection procedure.

The district court denied and dismissed the petition, dismissed the action, and denied a certificate of appealability ("COA"). Lindsey moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) and to amend the petition pursuant to Federal Rule of Civil Procedure 15. The latter motion sought to add five claims. The district court granted in part and denied in part the motion to alter or amend the judgment and denied the motion to amend the petition. Lindsey timely appealed.

II.

A COA shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). If the district court denied the habeas petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason could find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

III.

In Claim 2, Lindsey argues that the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, withheld material evidence that one of the witnesses against him, Kathy Kerr, was promised testimonial immunity before she testified. The district court reviewed this claim de novo and held it meritless because there was no prejudice.

A prosecutor must disclose evidence that is favorable to the accused and material to guilt or punishment. *See id.* at 87. Evidence is *favorable* if either exculpatory or impeaching, *see Strickler v. Greene*, 527 U.S. 263, 281–82 (1999), and *material*—i.e., failure to reveal it was prejudicial, *see id.* at 282, 289, 296—"if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citation omitted). For a true *Brady* violation, the evidence must also have been "suppressed by the State, either willfully or inadvertently." *Strickler*, 527 U.S. at 282. The defendant has the burden of proving a *Brady* violation. *See id.* at 291, 296; *see also Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000).

Reasonable jurists would agree that it is not reasonably probable that the result of either phase of trial would have been different even had the revelation of the promise of testimonial immunity led to Kerr's successful impeachment. The evidence of Lindsey's guilt was overwhelming. Right after the murder, police found him in Kerr's bathroom washing his bloodstained clothes in the tub. A box of .22 caliber ammunition was on the sink. A .22 caliber Jennings semiautomatic pistol was behind the bathroom door. That was the same type of gun that had killed the victim. On it were bloodstains, at least one of which was consistent with the

victim's blood. More bloodstains consistent with the victim's blood were on Lindsey's clothes and in Lindsey's truck. And an atomic absorption test on Lindsey's hands was positive, indicating that Lindsey had recently discharged a firearm. All of this was established without Kerr's testimony.

Lindsey argues that the State needed Kerr's testimony to prove the aggravated-robbery element of the felony-murder death specification. He is mistaken. Police found the victim's wallet in the wastebasket of the bathroom where Lindsey was trying to wash the blood off his clothes. That wallet was empty. Lindsey's had $1,257 in it. Witnesses other than Kerr testified that the victim usually carried a thousand dollars with him, while Lindsey had been laid off more than a month before.

He additionally contends that "the prosecutor relied on Kerr's testimony to establish a conspiracy in order to admit prejudicial hearsay statements of co-defendant Hoop." It is not reasonably probable that impeaching Kerr with the immunity evidence would have kept the statements out. When finding that her testimony was sufficient to set forth the prima facie showing of conspiracy needed to satisfy the co-conspirator exception to the hearsay rule, the Ohio Supreme Court held that "Kerr's veracity was a question for the trier of fact." *Lindsey*, 721 N.E.2d at 1001.

Jurists of reason would not disagree with the district court's resolution of Claim 2.

IV.

In Claim 3, Lindsey argues that the prosecution violated the Eighth Amendment, as well as his rights to fundamental fairness and due process, by securing his convictions with a theory of guilt inconsistent with the one the prosecution would later use to secure the convictions of codefendant Joy Hoop. But no clearly established Supreme Court precedent holds it unconstitutional for the prosecution to argue one theory of guilt in one defendant's trial, then a contradictory theory in a codefendant's. *See Burns v. Mays*, 31 F.4th 497, 506 (6th Cir. 2022). The state court's rejection of this claim was therefore not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See* § 2254(d)(1). Reasonable jurists could not disagree.

V.

In Claim 4, Lindsey argues that the trial court failed to ensure that the guilt phase was fair and reliable. Specifically, he alleges that the trial court improperly: (1) admitted the hearsay of Joy Hoop as statements of a co-conspirator; and (2) qualified the coroner as an expert in blood-spatter analysis. We address each in turn.

A.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This right applies to the states via the Fourteenth Amendment's Due Process Clause. *Pointer v. Texas*, 380 U.S. 400, 403, 406 (1965).

At the time of Lindsey's trial and direct appeal, an out-of-court statement was admissible under *Ohio v. Roberts*, 448 U.S. 56 (1980), only if it "bore sufficient indicia of reliability, either because the statement fell within a firmly rooted hearsay exception or because there were 'particularized guarantees of trustworthiness' relating to the statement in question." *Whorton v. Bockting*, 549 U.S. 406, 412 (2007) (quoting *Roberts*, 448 U.S. at 56). Although *Crawford v. Washington*, 541 U.S. 36 (2004) abrogated *Roberts*, *Crawford* does not apply retroactively to cases, like Lindsey's, already final on direct review. *See Bockting*, 549 U.S. at 409, 421. Accordingly, *Roberts* is controlling.

Citing *Bourjaily v. United States*, 483 U.S. 171, 183 (1987), Lindsey concedes that the co-conspirator exception to the hearsay rule is a firmly rooted hearsay exception. Nonetheless, he argues that the State failed to satisfy the Ohio version of that exception. According to him, the Ohio version mandates that, before the co-conspirator's out-of-court statement may be admitted, proof of the conspiracy independent of the statement must be provided. But we are concerned not with Ohio's hearsay rule, but rather with what the Constitution requires. *See Smith v. Phillips*, 455 U.S. 209, 221 (1982) (stating that federal writ of habeas corpus "reaches only convictions obtained in violation of some provision of the United States Constitution"). The Constitution does not mandate that the conspiracy be proven independently before the co-conspirator's out-of-court statement may be admitted. *Cf. Bourjaily*, 483 U.S. at 176–84. Reasonable judges would not disagree.

B.

Lindsey next argues that the trial court erred in allowing the coroner, over defense objections, to testify as an expert in the field of blood-spatter analysis. The district court held this subclaim procedurally defaulted. Reasonable jurists could not disagree.

According to Lindsey, he raised this trial-court error argument as part of a postconviction claim that also raised trial counsel's ineffective assistance. The postconviction trial court held the ineffectiveness argument meritless. But what Lindsey seems not to realize is that the trial court also dealt with the trial-court-error argument, holding it barred by res judicata because it should have been raised on direct appeal.

Generally, federal courts are barred from hearing claims that were procedurally defaulted in state court. *See Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (holding that a violation of a state procedural rule, if adequate and independent, may bar federal review). When analyzing whether such default occurred, federal courts in this circuit ask (1) whether there is a state procedural rule in place that the petitioner failed to follow, (2) whether the state courts actually enforced the rule, and (3) whether that rule is an adequate and independent state ground to foreclose federal relief. *See Murphy v. Ohio*, 551 F.3d 485, 501–02 (6th Cir. 2009).

Lindsey's claim is procedurally defaulted: (1) there is an applicable state procedural rule, *see State v. Perry*, 226 N.E.2d 104, 105–07 (Ohio 1967) (holding res judicata bars from post-conviction proceedings any claim that could have been fully litigated at trial or on direct appeal), which Lindsey failed to follow; (2) the state court enforced it; and (3) it is adequate and independent, *see Mason v. Mitchell*, 320 F.3d 604, 628 (6th Cir. 2003).

Lindsey denies default because he met one of the rule's exceptions. According to him, the subclaim "could not have been raised on direct appeal, as it relied on evidence outside of the record to prove [the coroner] was unqualified to render his opinion." It is true that res judicata does not bar from Ohio postconviction proceedings a claim that is supported by off-the-record evidence upon which the claim depends for its resolution. *See State v. Cole*, 443 N.E.2d 169, 170–71 (Ohio 1982). But Lindsey's trial-court-error subclaim is that *the trial court* erred. Testimony not given until much later, at a different trial, is irrelevant. The trial judge cannot have been expected to know what had not happened yet.

VI.

In Claim 6, Lindsey argues that the prosecutor committed egregious misconduct in the guilt and penalty phases. Prosecutorial misconduct that does not touch on a specific provision of the Bill of Rights is reviewed under the general standard for due-process violations: whether the misconduct was so egregious as to deny the defendant a fundamentally fair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643–45 (1974). If the misconduct was harmless, then as a matter of law, there was no due-process violation. *See Greer v. Miller*, 483 U.S. 756, 765 & n.7 (1987). In federal habeas, this means asking whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 637–38 (1993) (citation omitted); *see also Fry v. Pliler*, 551 U.S. 112, 121–22 (2007).

Lindsey argues that, in the guilt phase, the prosecutor (1) suppressed evidence that Kathy Kerr had been induced to testify with a promise of testimonial immunity and other compensation,

(2) allowed her perjured testimony to go uncorrected, and (3) secured Lindsey's convictions with a theory of guilt inconsistent with the one the prosecutor would later use to secure the convictions of Joy Hoop. Reasonable jurists would agree that the first two arguments fail for lack of prejudice. The misconduct, if any, caused no harm in either phase of trial. Reasonable jurists also could not deny that, as to the third argument, no clearly established Supreme Court precedent holds that such prosecutorial conduct is unconstitutional. *See* § 2254(d)(1).

With respect to the penalty phase, Lindsey contends that the prosecutor committed misconduct in closing argument by arguing nonstatutory aggravators. But reasonable jurists would all agree that any such misconduct was cured when the Ohio Supreme Court independently reweighed aggravation and mitigation, *see Lindsey*, 721 N.E.2d at 1008–09. *See Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006).

Finally, Lindsey argues that the cumulative effect of the prosecutorial misconduct harmed him. Reasonable jurists would agree that this argument fails. Remove from the analysis what cannot get past § 2254(d)(1), and all that is left to cumulate are the harmless and the cured.

VII.

In Claim 9, Lindsey argues that the postconviction trial court denied him due process by denying him discovery and expert funding. This claim is not cognizable in § 2254 proceedings. Habeas corpus cannot be used to challenge errors or deficiencies in state postconviction proceedings. *See Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001); *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986). Reasonable jurists could not disagree.

VIII.

In Claims 11-20, Lindsey argues that Ohio's lethal-injection protocol is unconstitutional. The district court dismissed these claims as noncognizable in § 2254 proceedings. Reasonable jurists would not disagree. Under this circuit's controlling precedent, challenges to the method of execution (rather than the sentence that petitioner *be* executed) are not cognizable in federal habeas corpus proceedings. *In re Campbell*, 874 F.3d 454, 460–67 (6th Cir. 2017) (per curiam). Method-of-execution claims must proceed under § 1983. *Id.* at 464. That case has been neither overruled nor abrogated. *See also Nance v. Ward*, 142 S. Ct. 2214 (2022).

IX.

Finally, Lindsey argues that the district court erred in denying his postjudgment motion to amend his federal petition by adding five claims. The district court denied amendment because

Lindsey failed to show that he could not have raised the claims before the district court entered final judgment. Reasonable jurists would not debate that decision.

A.

After the district court denied his petition (by then, in its third amended version), Lindsey moved to file a fourth amended petition pursuant to Federal Rule of Civil Procedure 15. He wanted to add five claims (numbered 21–25), all based on what he called "newly discovered evidence." The first two concerned the discovery that he has Fetal Alcohol Spectrum Disorder:

> (21) Trial counsel were ineffective in failing to investigate and present mitigating evidence that Lindsey has Fetal Alcohol Spectrum Disorder.
>
> (22) Executing someone with Fetal Alcohol Spectrum Disorder would be unconstitutional.

The last three concerned the discovery that the prosecutor had offered, then withdrawn, several plea deals:

> (23) Direct-appeal and postconviction counsel were ineffective in failing to timely communicate a plea offer from the prosecutor.
>
> (24) Lindsey's death sentence is unconstitutional because the prosecutor pursued it after independently determining that a life sentence was appropriate.
>
> (25) Trial counsel were ineffective for failing to object to the prosecutor's withdrawal of the plea offers.

The district court denied permission to add the new claims: the two Fetal-Alcohol-Spectrum-Disorder claims, because Lindsey failed to show that the claims and the evidence supporting them could not have been discovered sooner through the exercise of due diligence; and the three plea-deal claims, because he offered no compelling justification for the delay in seeking leave to amend.

"Except in cases where the district court bases its decision on the legal conclusion that an amended complaint could not withstand a motion to dismiss, we review a district court's denial of leave to amend for abuse of discretion." *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). "Under Rule 15, a court may grant permission to amend a complaint 'when justice so requires' and in the normal course will 'freely' do so." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting Fed. R. Civ. P. 15(a)). But it is different once judgment issues. Then, "concerns about finality dilute the otherwise permissive amendment policy of the Civil Rules." *Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.*, 833 F.3d 680, 692 (6th Cir. 2016). "In post-judgment motions to amend, as a result, the Rule 15 and Rule 59

inquiries turn on the same factors." *Leisure Caviar*, 616 F.3d at 616 (internal quotation marks omitted). Thus, a postjudgment Rule 15 motion, too, cannot be used "to raise arguments which could, and should, have been made before judgment issued." *Id.* (citation omitted). And "a court acts within its discretion in denying a postjudgment Rule 15 . . . motion on account of undue delay—including delay resulting from a failure to incorporate previously available evidence." *Id.* (internal quotation marks and alterations omitted). "A claimant who seeks to amend a complaint *after* losing the case must provide a compelling explanation to the district court for granting the motion." *Id.* at 617.

The district court applied the postjudgment Rule 15 standard and denied Lindsey's petition. Lindsey filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), and shortly thereafter, he filed his Rule 15 motion to amend the petition. The sequence is significant in Lindsey's view. He argues that the filing of the Rule 59 motion altered the standard otherwise applicable to the Rule 15 motion, claiming that "[w]hen a petitioner 'timely submits a Rule 59(e) motion, there is no longer a final judgment to appeal from,'" the case is placed in prejudgment posture, and hence the more-liberal prejudgment standard applies to the Rule 15 motion. (Quoting *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020)).

But the filing sequence in Lindsay's case (Rule 59 motion followed by Rule 15 motion) is the same as the sequence we faced in *Leisure Caviar*, and we still held that the higher, postjudgment standard applied. 616 F.3d at 616. Absent en banc or intervening Supreme Court authority, we must follow *Leisure Caviar*. *See United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000); *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

Lindsey argues *Banister v. Davis*, 140 S. Ct. 1698 (2020), abrogated *Leisure Cavier*. Reasonable jurists would not accept this contention. *Banister* did not concern a Rule 15 motion (and indeed, Banister did not file one). *Id.* at 1704. So the question there was not what effect a Rule 59 motion might have on a subsequently filed Rule 15 motion, but rather whether a Rule 59 motion constituted a second or successive federal habeas corpus petition. *See id.* at 1705. To answer that question, the Supreme Court looked to the larger legal backdrop. *See id.* at 1702-04, 1705-08. It is from that discussion that Lindsey gets the quotes upon which his argument depends: If a litigant "timely submits a Rule 59(e) motion, there is no longer a final judgment to appeal from," for that motion "'suspended the finality of any judgment, including one in habeas." *Id.* at 1703, 1706 (brackets and internal quotation marks omitted). And "only the disposition of

that motion restores the finality of the original judgment." *Id.* at 1703 (brackets and internal quotation marks omitted).

But *Banister* also provides that "[t]he filing of a Rule 59(e) motion within the 28-day period suspends the finality of the original judgment *for purposes of an appeal*." *Id.* (emphasis added and internal quotation marks omitted). A Rule 15 motion is not an appeal, not even when it is a postjudgment Rule 15 motion. By its nature, it is an attempt to change the thing ruled upon—to change the *object* the judgment judged—not to point out errors in the judgment. That does not make the motion a second or successive petition, of course—not, at least, when filed before the district court lost jurisdiction, *see Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016)—but it also does not make the motion an appeal. For these reasons, *Banister* did not abrogate *Leisure Caviar*. Reasonable jurists would not disagree.

B.

Reasonable jurists would also agree that the district court did not abuse its discretion in denying amendment. Consider the plea-deal claims first.

To counter the accusation of unjustified delay, Lindsey points to two factors. He first argues that he "should not be penalized simply because he sought to exhaust his claims in state court in accordance with § 2254(b)(1)(A) before moving to amend in federal court." While his federal petition was still pending in district court, Lindsey filed in July 2020 a postconviction petition in state court raising these claims. The petition was still in the state trial court when the district court (unaware of this latest state-court activity) denied the federal petition in December 2020. Hence—goes his argument—he was not delaying bringing the claims and was instead diligently trying to exhaust them before bringing them to federal court.

That argument is unpersuasive. First, when dismissed, his case had already been in the district court more than 17 years. Even if convincing, the above explanation would cover only the last five months of that period. Moreover, Lindsey did not have to wait those five months. His argument hinges on the assumption that he had to exhaust in state court before filing in federal court. But in his postjudgment motion to amend the federal petition, he set out this plan he would follow if amendment were granted. He "would then request the Court stay and hold federal proceedings in abeyance to await the final resolution of his pending petition for post-conviction relief, which seeks to exhaust the claims and evidence Mr. Lindsey now moves to add to his petition." He could have followed the same plan five months earlier: moved to amend the federal petition and, if permission was granted, move to stay and abey.

But what of the years before that final five months? That brings us to Lindsey's second argument that delay was justified: For many years, habeas counsel labored under a conflict of interest that precluded their raising these claims. Counsel cannot be expected to raise their own ineffectiveness, their office's ineffectiveness, or the ineffectiveness of other attorneys within that office. Yet raising these claims would have required just that. The office that for many years represented Lindsey in habeas proceedings was the same office that had represented him in postconviction proceedings. Claim 23 directly accuses postconviction counsel of ineffectiveness. What is more, if any of the three claims was held defaulted (Lindsey continues), one of his counterarguments would be that default was excused by postconviction counsel's ineffectiveness.

Some more facts are in order. Attorneys from the Office of the Ohio Public Defender represented Lindsey during state postconviction proceedings. One stayed through the first two years of federal habeas proceedings, leaving in 2005. And that office, in the person of one or another of its attorneys, worked on Lindsey's habeas case continually from its inception in 2003 until June 2015. Not until then did the last of the assistant state public defenders leave the case and the Office of the Federal Public Defender take over complete representation. But the district court did not dismiss until 2020. As it pointed out when denying amendment, Lindsey had not provided any explanation for the five-year delay in raising the claims. He still has not.

Reasonable jurists would therefore agree that the district court did not abuse its discretion in denying amendment to add his plea-deal claims.

Next, consider the Fetal Alcohol Spectrum Disorder claims. To justify the delay in filing them, Lindsey argues he had to exhaust in state court before filing in federal. For reasons already given, that argument misses the mark.

He also argues he could not have raised these claims earlier, because they are based on "newly discovered evidence"—a doctor's diagnosis that he has the disorder and "additional supporting evidence" proving it. But as the district court held, the diagnosis could have been made much earlier. One of Lindsey's own proposed claims is that trial counsel were ineffective for failing to present evidence that he has the disorder. Its "diagnostic criteria" were already well established then. And evidence indicating that he might have the disorder—or, at least, that investigation in that general direction was warranted—was available at the time of trial. That is the very basis of his claim that trial counsel were ineffective: from the available evidence, they should have known *then* to investigate the matter. That was in 1997. More evidence pointing in the same direction existed in 1998. Lindsey's attorneys knew of his family's history with alcohol,

including that his mother was a "heavy" drinker during her pregnancies, as this information was included in an expert affidavit he filed with his postconviction petition that year—five years before federal habeas proceedings began. In short, whatever previous counsel failed to do, when habeas counsel filed the initial habeas petition, they were "on notice" *then* that this was a matter to be investigated. Yet Lindsey filed nothing on the matter until almost 17 years later.

Lindsey argues that the continuity of representation by the state public defender's office stayed his hand. He contends that, if these claims were held defaulted, he would have tried to excuse the default by arguing postconviction counsel's ineffectiveness. Even if that argument is accepted, it provides an excuse only until 2015. Aside from vaguely alluding to "a comprehensive investigation [begun] once the Federal Public Defender's Office became lead counsel," Lindsey still cannot explain a five-year delay.

Finally, Lindsey cites "the trial court's denial of expert funding during post-conviction proceedings." But the federal public defenders had the money for an expert (and even hired one). What happened earlier does not explain the delay once they took over.

X.

Accordingly, the application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: December 01, 2022

Mr. Jordan S. Berman
Ms. Julie Roberts
Mr. Charles L. Wille
Ms. Carol A. Wright

Re: Case No. 21-3745*, Carl Lindsey v. Charlotte Jenkins*
Originating Case No.: 1:03-cv-00702

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Richard W. Nagel

Enclosure