No. 23-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARREN M. REESE,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
JAY FORSHEY, Warden,)
)
Respondent-Appellee.)

Before: SUTTON, Chief Judge.

Darren M. Reese, an Ohio prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Reese moves the court for a certificate of appealability (COA) and to proceed in forma pauperis (IFP) on appeal.

In 2015, Reese entered a no-contest plea to four counts of trafficking in cocaine, in violation of Ohio Revised Code § 2925.03(A)(1); one count of illegal manufacture of cocaine, in violation of Ohio Revised Code § 2925.01(A); and one count of possession of cocaine, in violation of Ohio Revised Code § 2925.11(A). *State v. Reese*, 2016 WL 1570116, ¶¶ 1, 4 (Ohio Ct. App. Apr. 15, 2016), *rev'd*, 150 Ohio St. 3d 564, 564 (2016), and *aff'd*, 150 Ohio St. 3d 565, 565 (2017). As part of his plea, he stipulated to the lab results, which did not specify the purity of the cocaine. *Id.* ¶4. The court sentenced him to 16 years' imprisonment. *Id.* On appeal, Reese argued that the trial court improperly convicted and sentenced him based on the total weight of the cocaine mixture or substance that he was responsible for rather than the weight of the pure cocaine only. *Id.* at ¶ 5. The Ohio Court of Appeals affirmed. *Id.* at ¶ 7. The Supreme Court of Ohio reversed in *State v. Reese*, 150 Ohio St. 3d 564, 564 (2016), relying on *State v. Gonzales*, 150 Ohio St. 3d 261, 269 (2016) (*Gonzales I*), which held that the relevant weight for conviction and sentencing was the weight of pure cocaine. Upon a motion for reconsideration, the Ohio Supreme Court vacated

Gonzales I and ruled, in *State v. Gonzales*, 150 Ohio St. 3d 276, 281–82 (2017) (*Gonzales II*), that the relevant weight was the total substance weight. Relying on *Gonzales II*, the Supreme Court granted reconsideration of Reese's case and affirmed his original conviction and sentence. *State v. Reese*, 150 Ohio St. 3d 565, 565 (2017).

In 2018, Reese filed a motion in the trial court to correct a void judgment, arguing that the trial court lacked subject matter jurisdiction because the indictment failed to include specific numerical designations and that two of his convictions should have been merged for sentencing. *State v. Reese*, 2019 WL 4024730, ¶¶ 7-8 (Ohio Ct. App. Aug. 26, 2019). The trial court denied his motion. The state appellate court affirmed, *id.* at ¶¶ 1, 20, and the Supreme Court of Ohio denied leave for review, *State v. Reese*, 137 N.E.3d 1196 (Ohio 2020) (table). In 2019, while his appeal from his motion to correct a void judgment was pending, Reese applied to reopen his direct appeal of his conviction and sentence on the grounds that his appellate counsel was ineffective. The appellate court denied his motion as untimely, and the Ohio Supreme Court denied leave for review. *State v. Reese*, 133 N.E.3d 546 (Ohio 2019) (table).

In 2020, Reese filed his § 2254 petition. He raised four claims: (1) the appellate court used non-federal grounds to deny review of his federal claims, (2) his appellate counsel was ineffective, (3) his convictions and sentences are void for exceeding findings made by the grand jury, and (4) his sentences for similar offenses violated double jeopardy.

A magistrate judge construed Reese's first claim as a rule-of-lenity argument to overcome the time limit to reopen his direct appeal. Specifically, the magistrate judge understood Reese to be arguing that "(1) the rule of lenity in statutory interpretation is commanded by the United States Constitution, (2) applying the rule of lenity would require using only the weight of pure cocaine in a prosecution, (3) therefore Reese's convictions are void[,] and (4) there is no time limit on challenging a void conviction." The magistrate judge rejected this argument on the merits, concluded that Reese's remaining claims were procedurally defaulted, and recommended denying all grounds for relief.

The district court adopted the recommendation, over Reese's objections, and dismissed the petition. Reese now seeks a COA.

A COA may be issued only if the applicant has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 578 U.S. 120, 127 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a claim is denied on procedural grounds, the petitioner must show both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

1. Defaulted claims—claims two, three, and four

The district court concluded that Reese procedurally defaulted his claims that (2) his appellate counsel was ineffective, (3) his convictions and sentences were void for exceeding findings made by the grand jury, and (4) his sentences violated double jeopardy. Reasonable jurists could not debate that conclusion. Reese raised his ineffective-assistance-of-appellate-counsel claim two years after his direct appeal, rendering it untimely under Ohio R. App. P. 26(B). The state appellate court denied the claim on that basis. And because Reese could have raised the remaining two claims on direct appeal but failed to do so, Ohio's doctrine of res judicata bars them. *See State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967). The state courts enforced that bar as well. *Reese*, 2019 WL 4024730, ¶¶ 13-17. Because they were defaulted pursuant to adequate and independent state procedural rules and because Reese failed to demonstrate cause for the default and actual prejudice, reasonable jurists would not debate the district court's disposition of these claims. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

2. Remaining claim—claim one

The district court reasoned that Reese's petition challenged the Ohio Supreme Court's interpretation of state law in *Gonzales II*—an issue that the court determined was not appropriate for federal habeas review. The court agreed with the magistrate judge's interpretation of Reese's first claim: Reese was arguing that, because his statute of conviction did not use the word

"mixture," it "failed to provide him fair warning because he believed that the severity of punishment for drug possession or trafficking was based on the amount of pure cocaine possessed or trafficked, but he was ultimately punished based on total weight." The court rejected this argument, reasoning that Reese failed to show that the statute provided him with insufficient notice regarding the prohibited conduct and the severity of punishment.

Reasonable jurists could not debate the district court's conclusion that this claim—as an attack on the state courts' interpretation of state law—did not raise a federal ground on which to challenge Reese's conviction and sentence. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *see, e.g.*, *House v. Hatch*, 527 F.3d 1010, 1028-29 (10th Cir. 2008) (holding that a state court's determination that a statute was not ambiguous "binds" a federal court on habeas review). Reese argues that federal grounds are present because of the rule of lenity. The rule of lenity "requires that any ambiguity in the statutory language" be resolved in favor of the criminal defendant. *United States v. Canal Barge Co.*, 631 F.3d 347, 353 (6th Cir. 2011). It is a mode of "statutory construction," used as a "last resort" to interpret ambiguous statutes. *Id.* (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)). But the rule of lenity is "a canon of statutory construction, not in itself federal law." *Lurie v. Wittner*, 228 F.3d 113, 126 (2d Cir. 2000).

Some courts have allowed a petitioner to use § 2254 to challenge a state court conviction on lenity grounds where the statute is unconstitutionally vague, *see, e.g.*, *Poole v. Wood*, 45 F.3d 246, 249 (8th Cir. 1995), or does not give sufficient notice of the prohibited conduct or severity of the punishment, *see, e.g.*, *Sabetti v. Dipaolo*, 16 F.3d 16, 18-19 (1st Cir. 1994). *See also Lurie*, 228 F.3d at 126. But even if such a claim is cognizable on federal habeas review, reasonable jurists could not debate the district court's denial of claim one because Reese failed to establish that his statute of conviction was unconstitutionally vague or provided him with insufficient notice.

Ohio Revised Code Section 2925.11(C)(4) is not "so vague that it fails to give ordinary people fair notice of the conduct it punishes," because it put Reese on notice that his possession of cocaine was criminal. *Welch*, 578 U.S. at 124 (quoting *Johnson v. United States*, 576 U.S. 591, 595 (2015)). And Ohio appellate courts pre-*Gonzales* had consistently interpreted Ohio drug

statutes to allow for sentences based on total substance weight, not just weight of pure cocaine. *See, e.g.*, *State v. Smith*, 2011 WL 2112609, at *3 (Ohio Ct. App. May 27, 2011); *State v. Lenoir*, 2010 WL 3921188, at *8 (Ohio Ct. App. Oct. 5, 2010); *State v. Remy*, 2004 WL 1531940, at *11 (Ohio Ct. App. June 10, 2004); *State v. Fuller*, 1997 WL 598404, at *2 (Ohio Ct. App. Sept. 26, 1997). Against this backdrop, Reese was not unable to discern that "the scope of the convicting law's prohibitions" included possessing a mixture containing the prohibited substance. *Lurie*, 228 F.3d at 128 (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Thus, he was on notice that he could be sentenced for the total weight of the substance.

For the foregoing reasons, Reese's application for a COA is **DENIED**, and his IFP motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 11/30/2023.

Case Name: Darren Reese v. Jay Forshey
Case Number: 23-3494

Docket Text:
ORDER filed denying motion grant certificate of appealability [7008336-2] filed by Mr. Darren M. Reese; denying as moot motion to proceed ifp [7012940-2] filed by Mr. Darren M. Reese. Jeffrey S. Sutton, Chief Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Darren M. Reese
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, OH 43724

A copy of this notice will be issued to:

Mr. Richard W. Nagel
Ms. Mary Anne Reese
Ms. Stephanie Lynn Watson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

DARREN M. REESE,

Petitioner, : Case No. 2:20-cv-4124

- vs - Chief Judge Algenon L. Marbley
Magistrate Judge Michael R. Merz

JAY FORSHEY, WARDEN,
Noble Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS ON MOTION TO ALTER OR AMEND THE JUDGMENT

This habeas corpus case, brought *pro se* by Petitioner Darren Reese under 28 U.S.C. § 2254, is before the Court on Petitioner's Motion to Alter or Amend the Judgment under Fed.R.Civ.P. 59(e).

For a district court to grant relief under Rule 59(e), "there must be '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006)).

> Motions to alter or amend judgment may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe*, 146 F.3d at 374, newly discovered evidence, *see id.*, an intervening change in controlling constitutional law, *Collison v. International Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n.3 (1st Cir. 1993); *School District No. 1J v. ACANDS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to prevent manifest injustice. *Davis*, 912 F.2d at 133; *Collison*, 34 F.3d

> at 236; *Hayes*, 8 F.3d at 90-91 n.3. *See also North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).
>
> To constitute "newly discovered evidence," the evidence must have been previously unavailable. *See ACandS*, 5 F.3d at 1263; *Javetz v. Board of Control, Grand Valley State Univ.* 903 F. Supp. 1181, 1191 (W.D. Mich. 1995)(and cases cited therein); Charles A. Wright, 11 *Federal Practice and Procedure* § 2810.1 at 127-28 (1995).

Gencorp, Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999), accord, *Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 551-52 (6th Cir. 2011), quoting *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010).

A motion under Fed. R. Civ. P. 59(e) is not an opportunity to reargue a case. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)(citation omitted). Thus, parties should not use them to raise arguments which could and should have been made before judgment issued. *Id.* Motions under Rule 59(e) must establish either a manifest error of law or must present newly discovered evidence. *Id.* Petitioner's argument is that this Court committed a manifest error of law in denying his Petition for Writ of Habeas Corpus. The Magistrate Judge concludes, however, that Petitioner has not shown any error of law in the Court's final judgment and is merely re-presenting the arguments he has already made and which the Court rejected.

At the outset of its Opinion deciding this case, the Court wrote:

> "Petitioner's prayer for relief is, at bottom, rooted in his belief that Ohio state courts have improperly interpreted state statutes; but as the Magistrate Judge pointed out, Petitioner's argument [about] the rule of lenity and its proper application to Ohio drug laws "misunderstands our role," as "it is not the province of a federal habeas court to reexamine state court determinations on state law questions."

(Opinion, ECF No. 53 at PageID 810, citing Report and Recommendations, ECF No. 43, PageID 731-32, quoting *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Reese claims the Court has misunderstood his argument, but his current Motion reinforces this analysis. For example, in his

Motion to Amend Petitioner argues that the Ohio Supreme Court is bound to strictly construe Ohio sentencing laws, interpreting the words the Ohio General Assembly has written and citing Ohio Supreme Court precedent to that effect. (ECF No. 55, PageID 838). But that obligation is one imposed by **Ohio** law. Reese cites no United States Supreme Court precedent imposing strict construction as a **federal** constitutional duty. The same thing is true of the rule of lenity. While the federal courts generally follow that rule in interpreting federal criminal statutes, Reese cites no precedent making that a federal constitutional duty imposed on the state courts.

Reese argues at some length his claim that the statute under which he was convicted did not give him "fair warning" of what conduct was prohibited, as required by the Due Process Clause (Motion, ECF No. 55, PageID 838-45). This Court's Opinion discussed that argument and noted that the Ohio courts had found the statute sufficiently clear to provide fair warning. Reese responds by drawing on more general jurisprudence holding criminal statutes void for vaguensss (Motion, ECF No. 55, PageID 845, citing *Kolender v. Lawson,* 461 U. S. 352 (1983).

A law may be void for vagueness for two independent reasons. "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. *Chicago v. Morales,* 527 U.S. 41 (1999), *citing Kolender v. Lawson,* 461 U.S. 352 (1983). "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). As the Opinion makes clear, the statute in suit is crystal clear on the "conduct it prohibits," to wit, the possession or distribution of cocaine. Reese does not pretend he misunderstood what conduct he was prohibited from engaging in. Surely the prohibition of possession of cocaine is one of the most widely

understood criminal prohibitions in America.

Instead of the basic criminal conduct, Reese argues there is ambiguity in the punishment statute, which graduates punishment according to the weight of cocaine possessed. His argument throughout has been that, for punishment purposes, only the pure cocaine in any seized mixture of cocaine with baby powder, corn starch, etc., should be counted for punishment purposes. Linguistically, the argument has appealed to some judicial readers of the statute. But it makes no sense as a fair warning argument. Does Reese seriously contend that he and other drug dealers add the adulterants they use to defraud their buyers with a view to minimizing possible punishment rather than maximizing profit from a given quantity of pure cocaine? It is prohibited conduct to which the vagueness doctrine is directed, not ambiguity in statutes setting the degree of punishment for various forms of engaging in the prohibited conduct.

More importantly, Reese's argument is directed to a claim not made in his Petition. None of his claims in the Petition asserts that the cocaine possession statute is unconstitutionally vague and a new claim for relief cannot be inserted into a habeas case at the motion to amend judgment stage of proceedings. Indeed, the courts regularly reject attempts to add claims at the traverse stage. *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir. 2011), *citing Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005).

Reese next argues the Ohio Supreme Court abused its discretion in reconsidering its decision in *State v. Gonzales*, 150 Ohio St.3d 261 (2016) (Motion, ECF No. 55, PageID 845-48)("*Gonzales I*"). Once again Reese is asking this Court to overrule the Ohio Supreme Court on the basis of that Court's decision of a question of state law, to wit, was "cocaine" in the drug control statutes to be understood as "pure cocaine" or the mixture of cocaine with adulterants?

The question of whether a state court judge has abused his or her discretion is not a claim

cognizable in habeas corpus. A claim of abuse of discretion by a state court judge is not sufficient to state a constitutional violation. *Sinistaj v. Burt,* 66 F.3d 804 (6th Cir. 1995).

The Supreme Court of Ohio decided *Gonzales I* on December 23, 2016, and vacated that decision on reconsideration March 6, 2017. *State v. Gonzales*, 150 Ohio St.3d 276 (2017). Reese argues that reconsideration of a judgment already entered is somehow improper, but that it exactly what he is acting this Court to do. Furthermore, the question of whether a state supreme Court can properly reconsider its own decisions and when is a question of state law.

Certificate of Appealability

As required by the Rules Governing § 2254 Proceedings, this Court decided the question of whether to grant or deny a certificate of appealability at the time it entered judgment and denied a certificate applying the standard of whether a reasonable jurist would disagree with the Court's conclusions. Reese asks us to reconsider that decision on the basis *James v. Buchanan,* 2019 U.S. Dist. LEXIS 99467 (S.D. Ohio 2019)(Sargus, D.J.).

In *James*, then Chief Judge Sargus of this Court ruled on the merits of the same questions raised in this case in the same manner as this Court has ruled. He then issued a certificate of appealability without discussing the opinions of any other judges who might have disagreed. On appeal, however, the Sixth Circuit agreed on the merits with Judge Sargus and also with this Court's decision now sought to be reconsidered. *James v. Buchanan,* Case No. 19-3655 (6th Cir. Apr. 15, 2020)(unpublished). Thus questions that might have divided reasonable jurists at the time of Judge Sargus's decision found no acceptance in the Sixth Circuit and Reese has pointed to no other precedent adopting his position. Reese has not shown any error of law in denying a certificate

of appealability in this case, although he may apply to the Sixth Circuit itself for a certificate.

Conclusion

For the foregoing reasons, the Magistrate Judge respectfully recommends that Petitioner's Motion to Alter or Amend the Judgment should be denied.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

February 13, 2023.

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

DARREN M. REESE,

Petitioner, : Case No. 2:20-cv-4124

- vs - Chief Judge Algenon L. Marbley
Magistrate Judge Michael R. Merz

JAY FORSHEY, WARDEN,
Noble Correctional Institution,

:

Respondent.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS ON MOTION TO ALTER OR AMEND THE JUDGMENT

This habeas corpus case, brought *pro se* by Petitioner Darren Reese under 28 U.S.C. § 2254, is before the Court on Petitioner's Objections ("Objections," ECF No. 59) to the Magistrate Judge's Report and Recommendations ("Report," ECF No. 56) recommending denial of Petitioner's Motion to Alter or Amend the Judgment under Fed.R.Civ.P. 59(e)("Motion," ECF No. 55).

On January 20, 2023, Chief Judge Marbley adopted prior Reports of the undersigned and dismissed this case with prejudice (ECF No. 53). Petitioner's instant Motion was then timely filed on February 10, 2023. Although the undersigned has recommended denial of the Motion, Chief Judge Marbley has recommitted the matter for reconsideration in light of Petitioner's extensive Objections.

The Report stated the standard for granting relief under Fed.R.Civ.P. 59(e) as "there must

be '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006)). Petitioner offers no objection to that standard. Instead, he structures his Objections around two questions for the Court to answer. This Supplemental Report will deal with those questions in order.

Is the cannon [sic] of strict construction, a part of the rule of lenity and thus implicated in due process arguments, a federal constitutional duty that must be imposed on state courts?

(Objections, ECF No. 59, PageID 861).

Reese begins by asserting, correctly, that strict construction of criminal statutes is codified in Ohio law. He cites Ohio Revised Code § 2901.04(A) which provides: "(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." The Magistrate Judge agrees with Petitioner that this statute codifies the rule of lenity. It was adopted as part of the recodification of Ohio criminal law effective January 1, 1974.

It is of course a matter of procedure because it instructs Ohio courts to apply the rule of lenity. But the fact that it purports to regulate procedure does not mean it rises to the level of Due Process as that term is used in the Fourteenth Amendment. "A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993), *cert. denied,* 509 U.S. 907 (1993), overruled in part on other grounds by *Thompson v. Keohane,* 516 U.S. 99 (1995).

To obtain relief in habeas corpus, Reese cannot succeed by proving that the rule of lenity "must be imposed on the state courts." Rather he must show that the rule of lenity has already been imposed on the state courts as a matter of due process in a previous holding of the United States Supreme Court. 28 U.S.C. § 2254(d)(1) allows a habeas court to grant relief if but only if the state court ruling on the relevant question of federal constitutional law is contrary to or an objectively unreasonable application of holdings of applicable Supreme Court precedent. *Lang v. Bobby*, 889 F.3d 803, 810 (6th Cir. 2018) (citing *Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000)). "Precedent" of course refers to decisions already made by the Supreme Court, not to decisions they could or should make in the future.

Reese admits the question has never been addressed directly by the Supreme Court. (Objection, ECF No. 59, PageID 861). He says it therefore falls "under the due process guarantees of the United States Constitution." *Id.* But until and unless the Supreme Court holds that the rule of lenity is required by the Fourteenth Amendment, it is not part of due process enforceable in habeas corpus.

Petitioner then proceeds to give a lengthy and erudite history of the rule of lenity (Objections, ECF No. 59, PageID 866-925). He then turns back to arguing this case: "The resolution of statutory doubt should not be applied to the defendant at bar." He concludes this section by arguing this Court must impose on the Ohio courts a duty to obey Ohio Revised Code § 2901.04(A). *Id.* at PageID 927. But the Supreme Court of Ohio, not this Court, is the ultimate arbiter of what that statute means and how it shall be enforced. Federal courts are bound to adhere to state court decisions on matters of state law. *Bradshaw v. Richey*, 546 U.S. 74 (2005).

May a federal court overturn a decision of a State's highest court when that state court commits a procedural error in order to come to its decision?

(Objections, ECF No. 59, PageID 927).

Reese argues the Supreme Court of Ohio violated its own rule on reconsideration when it decided *State v. Gonzales*, 150 Ohio St.3d 276 (2017), vacating *State v. Gonzales*, 150 Ohio St.3d 261 (2016) ("*Gonzales I*"). He relies on Ohio S. Ct. Prac. R. 18.02(B) which provides "A motion for reconsideration shall not constitute a reargument of the case". He quotes extensively from the dissenting opinions of Justices Kennedy and O'Neill who argue that was exactly what the State was doing in its motion for reconsideration of *Gonzales I.*

In his Fed.R.Civ.P. 59(e) motion, he argued that what the Ohio Supreme Court did was an abuse of discretion. The Report points out that abuse of discretion is not a cognizable claim in habeas corpus (ECF No. 56, PageID 856, citing *Sinistaj v. Burt,* 66 F.3d 804 (6th Cir. 1995)). In his Objections, Reese has shifted ground very slightly to argue the Supreme Court of Ohio did not have discretion to decide *Gonzales II* as it did because all the State did was to reargue the case.

The question of how to properly interpret Ohio Supreme Court Rules of Practice is a question of Ohio law. Whether the rule in question allows for the result on *Gonzales II* is therefore a question of Ohio law. Any decision by this Court or any other federal court that the interpretation of that rule by the *Gonzales II* majority was not permitted under Ohio law would have no effect. To answer Reese's second question, we do not have authority to impose on the Ohio courts our own interpretation of their jurisprudence, either rules of practice or precedent.

Quite astutely, Reese points out that the Report, in rejecting his Rule 59(e) motion, relies on the same principle as the Ohio Supreme Court rules of Practice in question: motions for reconsideration are not properly occasions for rearguing the case made before judgment. He asks only that "this Court to hold the State to the same standard it would hold itself to: to follow the

rules prescribed by, and for, itself." (Objections, ECF No. 59, PageID 931). That analysis relies on the parallel language in the two rules in question, but misses the underlyng authority. The Ohio Supreme Court Rules of Practice are adopted by the Ohio Supreme Court itself under the Modern Courts Amendment to the Ohio Constitution, adopted in 1968. Fed.R.Civ.P. 59(e), on the other hand, was adopted by the United States Supreme Court under the Rules Enabling Act, 28 U.S.C. § 2072 and thereby imposed on all federal courts and practitioners. Cases interpreting that rule to prohibit mere reargument of points made before judgment are binding on lower federal courts not because we choose to be bound by them, but because we are bound to follow them under the doctrine of precedent. "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987).

Petitioner's argument is a testament to textualism, the belief that words have the same meaning regardless of the context in which they are used. He had a strong ally in Justice Scalia, as his citations in the Objections show. But ultimately it is a question of authority to interpret and that authority lies in the interpreting institution – here, the Ohio Supreme Court – and not in the words themselves. See "The Meaninglessness of the Plain Meaning Rule," Michael R. Merz, 4 Univ. Dayton L. Rev. 31 (1979).

Certificate of Appealability

Petitioner concludes his Objections by asking the Court to reconsider its denial of a certificate of appealability (ECF No. 59, PageID 932). To qualify for a certificate of appealability,

a habeas petitioner must show that reasonable jurists would disagree on one or more critical points in a decision. While Petitioner has argued forcefully that the rule of lenity should be imposed on state courts as a matter of due process, he has not cited any reasonable jurist who claims the Supreme Court has done so.

Conclusion

Having reconsidered the case in light of Petitioner's Objections, the Magistrate Judge recommends those Objections be overruled and the Petition dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*. Petitioner can seek a certificate and leave to proceed *in forma pauperis* from the Sixth Circuit Court of Appeals if he appeals.

March 21, 2023.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

DARREN M. REESE,

Petitioner, : Case No. 2:20-cv-4124

- vs - Chief Judge Algenon L. Marbley
Magistrate Judge Michael R. Merz

JAY FORSHEY, WARDEN,
Noble Correctional Institution,

:

Respondent.

OPINION AND ORDER

This habeas corpus case, brought *pro se* by Petitioner Darren Reese under 28 U.S.C. § 2254, is before the Court on Petitioner's Objections ("Objections," ECF No. 59) to the Magistrate Judge's Report and Recommendations ("Report," ECF No. 56) recommending denial of Petitioner's Motion to Alter or Amend the Judgment under Fed.R.Civ.P. 59(e) ("Motion," ECF No. 55), and Petitioner's Objections (ECF No. 62) to the Magistrate Judge 's Supplemental Report and Recommendations reaching the same conclusion (ECF No. 61).

A motion to alter or amend a judgment is a dispositive motion on which a disappointed litigant is entitled to *de novo* review of the Magistrate Judge's Reports and Recommendations. The Court has conducted that review and determined that the Reports are not contrary to law nor clearly erroneous. They are therefore ADOPTED and Petitioner's Objections are OVERRULED.

Petitioner offers no disagreement with the standard for decision of a motion to amend or alter a judgment, but strongly asserts the Reports are based on a mistake of law. That is he

continues to claim that the rule of lenity in the construction of state criminal statutes is mandated by the Due Process Clause of the Fourteenth Amendment (Objections, ECF No. 62, PageID 943).

Petitioner takes issue with the Magistrate Judge's holding that federal courts must follow state court decisions on the question of interpreting state law. *Id.* at PageID 943. Instead, he says, "It is not a matter of interpretation of a state law; it is a matter of whether state law and/or procedure and/or rules were followed here, thus implicating due process considerations by a federal court." But the fact that a state law or procedure or rule was not followed in a particular case does not create a violation of the Due process Clause. "A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993), *cert. denied,* 509 U.S. 907 (1993). And the question of whether a state court has followed a state procedure or rule is a question of the interpretation of that State's law, an interpretation which federal courts are bound to follow. *Bradshaw v. Richey*, 546 U.S. 74 (2005).

Petitioner is correct that he has cited many "case and scholarly works" supporting the desirability of the rule of lenity in interpreting criminal statutes. The federal courts generally employ the rule in interpreting federal criminal statutes. But its general desirability dos not authorize us to impose it on the State of Ohio as a matter of Due Process.

In seeking a certificate of appealability, Petitioner notes that no less a jurist than Justice Scalia strongly favored use of the rule of lenity. But that is not the critical question. In deciding whether to issue a certificate, a district court must find that reasonable jurists disagree on the question of law which determines the outcome of the case. That question is whether a state conviction is unconstitutional because the Fourteenth Amendment mandates applying the rule of lenity to the underlying statute. Petitioner has identified no reasonable jurist who holds that

position.

The Motion to Alter or Amend is DENIED, making the Court's judgment (ECF No. 54) final and appealable. The Court confirms its denial of a certificate of appealability as to the underlying Petition and extends it to the Motion to Amend. The Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

IT IS SO ORDERED.

ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATED: May 9, 2023