APPENDIX A

No. 23-3954

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH T. SHINE-JOHNSON,

Petitioner-Appellant,

v.

DAVID W. GRAY, Warden,

Respondent-Appellee.

ORDER

Before: SUTTON, Chief Judge; CLAY and DAVIS, Circuit Judges.

Joseph T. Shine-Johnson, an Ohio prisoner proceeding pro se, appeals a district court order denying his Federal Rule of Civil Procedure 59(e) motion for reconsideration of the district court's denial of his Federal Rule of Civil Procedure 60(b) motion for relief from the judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Shine-Johnson requests a certificate of appealability, which we construe in part as a motion for authorization to file a second or successive habeas corpus petition. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Shine-Johnson also moves for pauper status and judicial notice.

In 2017, a jury found Shine-Johnson guilty of murder and tampering with evidence, each with a firearm specification. He was sentenced to serve an aggregate sentence of 19 years to life in prison. The Ohio Court of Appeals affirmed Shine-Johnson's convictions, *State v. Shine-Johnson*, 117 N.E.3d 986 (Ohio Ct. App. 2018), and the Ohio Supreme Court declined to accept jurisdiction of his appeal. His application to reopen his direct appeal and his petition for post-conviction relief were unsuccessful.

In his habeas corpus petition, Shine-Johnson claimed that (1) his trial was tainted by prosecutorial misconduct; (2) the trial court failed to give the jury curative instructions; (3) he was denied a complete defense when the trial court failed to instruct the jury as requested; (4) trial

counsel was ineffective; (5) he was denied a fair trial based on the cumulative effect of evidentiary errors; (6) appellate counsel was ineffective; and (7) his murder conviction is void because a recent substantive change to a state statute concerning the burden of proof was not applied retroactively to his case. On the recommendations of a magistrate judge and over Shine-Johnson's objections, the district court adopted the magistrate judge's report, denied Shine-Johnson's habeas corpus petition, and denied a certificate of appealability. Also on the recommendations of the magistrate judge and over Shine-Johnson's objections, the district court denied Shine-Johnson's subsequent Rule 59(e) motion to alter or amend the judgment. This court denied a certificate of appealability, concluding that reasonable jurists would not debate the district court's conclusions that (1) Shine-Johnson's first five claims were procedurally defaulted, he failed to establish cause to excuse the default, and he failed to show that the failure to consider his procedurally defaulted claims would result in a fundamental miscarriage of justice; and (2) his sixth and seventh claims lacked merit. *Shine-Johnson v. Gray*, No. 21-4162 (6th Cir. June 27, 2022) (order).

Shine-Johnson moved the district court for relief from judgment under Rule 60(b)(1) and (6), asserting that the district court "made critical mistakes" when denying his habeas corpus petition. Specifically, he argued that the district court mistakenly (1) denied his first through fourth claims as inexcusably procedurally defaulted, (2) denied his motion for voir dire transcripts, (3) decided his ineffective-assistance-of-appellate-counsel claim, (4) failed to properly consider his actual innocence, and (5) concluded that the recent statutory change to the burden of proof in self-defense cases did not apply retroactively. The magistrate judge recommended denying the motion as untimely under Rule 60(b)(1) and improper under Rule 60(b)(6). Shine-Johnson objected to the recommended denial of his Rule 60(b) motion and moved to supplement that motion. The magistrate judge denied Shine-Johnson's motion to supplement his Rule 60(b) motion as untimely and lacking merit because it relied on *State v. Leyh*, 185 N.E.3d 1075 (Ohio 2022), which was decided after Shine-Johnson's habeas corpus petition was denied and changed Ohio law, but not retroactively. Shine-Johnson moved for reconsideration of and objected to the magistrate judge's denial of his motion to supplement. In a supplemental opinion, the magistrate

judge denied reconsideration, leaving the objections for the district court to decide. The district court overruled Shine-Johnson's objections, adopted the magistrate judge's report, denied Shine-Johnson's Rule 60(b) motion, and denied a certificate of appealability.

Shine-Johnson moved for reconsideration of the denial of his Rule 60(b) motion. The magistrate judge construed Shine-Johnson's motion as a Rule 59(e) motion and recommended its denial. Shine-Johnson moved for reconsideration. In a supplemental report, the magistrate judge concluded that Shine-Johnson's motion for reconsideration should be treated as objections to the report recommending denial of the construed Rule 59(e) motion and denied. Of note, the magistrate judge withdrew the prior recommendation that the district court find Shine-Johnson's Rule 60(b) motion untimely, recommended that the motion be denied on the merits, and recommended that the motion to supplement again be denied as untimely. Over Shine-Johnson's objections to the supplemental report, the district court adopted the magistrate judge's reports, but addressed the merits of the *Leyh* claim asserted in the motion to supplement, and denied reconsideration.

A certificate of appealability may be issued only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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).

RULE 60(b)

To the extent that the district court's order denying Shine-Johnson's Rule 60(b) motion is a "judgment" that can be challenged under Rule 59(e), Shine-Johnson's appeal of the order denying his Rule 59(e) motion brings up for review that underlying "judgment." Fed. R. Civ. P. 59(e); *see Banister v. Davis*, 590 U.S. 504, 507 (2020). Rule 60(b)(1) provides for relief from a final order based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Rule 60(b)(1) "is intended to provide relief . . . when the judge has made a substantive

mistake of law or fact in the final judgment or order." *Penney v. United States*, 870 F.3d 459, 461 (6th Cir. 2017) (quoting *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002)). Rule 60(b)(6) provides for relief from a final order based on "any other reason" justifying relief that is not covered by the rule's other five provisions; relief is unavailable under this subsection unless exceptional circumstances are shown. Fed. R. Civ. P. 60(b)(6); *see Tanner v. Yukins*, 776 F.3d 434, 443 (6th Cir. 2015). Because Shine-Johnson's motion alleged various mistakes in the district court's denial of his habeas corpus petition, no reasonable jurist would debate the district court's decision to consider his motion as brought under Rule 60(b)(1) rather than Rule 60(b)(6).

A Rule 60(b) motion constitutes a second or successive habeas corpus petition when it presents "one or more 'claims.'" *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A "claim" is presented when a Rule 60(b) motion asserts that there has been a "change in the substantive law governing [a] claim," intends "to add a new ground for relief," or "attacks the federal court's previous resolution of a claim *on the merits*." *Id.* at 531-32. A Rule 60(b) motion is not considered a second or successive habeas corpus petition if it "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4.

Shine-Johnson's Rule 60(b) motion in part alleged procedural errors appropriate for consideration under Rule 60(b) because they did not attack "the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. In particular, he attacked the district court's determination that his first through fourth claims were procedurally defaulted and challenged the denial of voir dire transcripts. But these procedural arguments were or could have been presented to this court in Shine-Johnson's prior application for a certificate of appealability. Rule 60(b) is not a substitute or alternative for an appeal; thus, "arguments that were, or *should have been*, presented on appeal are generally unreviewable on a Rule 60(b)(6) motion." *FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 286-87 (6th Cir. 2018) (quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007)). Therefore, reasonable jurists would not debate the

RULE 59(e)

Reasonable jurists would not debate the denial of Shine-Johnson's Rule 59(e) motion. To obtain relief under Rule 59(e), the movant must show "(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. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006)).

Shine-Johnson did not demonstrate any of the four factors required for alteration or amendment of the district court's denial of his Rule 60(b) motion. Shine-Johnson sought to revisit his *Leyh* and ineffective-assistance-of-appellate-counsel claims and to assert a due-process claim based on the state appellate court's denial of his Rule 26(B) application as untimely. These arguments are insufficient to obtain Rule 59(e) relief. "A Rule 59(e) motion is not properly used as a vehicle to re-hash old arguments or to advance positions that could have been argued earlier, but were not." *Gulley v. County of Oakland*, 496 F. App'x 603, 612 (6th Cir. 2012); *see Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008).

We therefore **DENY** the application for a certificate of appealability in part; construe the application for a certificate of appealability in part as a motion for authorization to file a second or successive habeas corpus petition and **DENY** the motion; and **DENY** as moot the motion for judicial notice and the motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3954

JOSEPH T. SHINE-JOHNSON,

Petitioner-Appellant,

v.

DAVID W. GRAY,

Respondent-Appellee.

Before: SUTTON, Chief Judge; CLAY and DAVIS, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon the application by Joseph T. Shine-Johnson for a certificate of appealability. We construe the application in part as a motion for authorization to file a second or successive habeas corpus petition.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability and the construed motion for authorization is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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Filed: October 11, 2024

Mr. Joseph T. Shine-Johnson
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, OH 43950

Re: Case No. 23-3954, *Joseph Shine-Johnson v. David Gray*
Originating Case No.: 2:20-cv-01873

Dear Mr. Shine-Johnson,

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: Ms. Maura O'Neill Jaite

Enclosure

No. 23-3954

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH T. SHINE-JOHNSON,

Petitioner-Appellant,

v.

DAVID W. GRAY, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: SUTTON, Chief Judge; CLAY and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX C

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

JOSEPH SHINE-JOHNSON,	:	
Petitioner,	:	Case No. 2:20-cv-1873
- vs -	:	Chief Judge Algenon L. Marbley Magistrate Judge Michael R. Merz
WARDEN, Belmont Correctional Institution,	:	
Respondent.	:	

OPINION AND ORDER

This habeas corpus case, brought *pro se* by Petitioner Joseph-Shine Johnson, is before the Court on Petitioner's Objections ("Objections," ECF No. 128) to the Magistrate Judge's Supplemental Report and Recommendations (Supp. Report, ECF No. 127) recommending denial of Petitioner's Motions for Reconsideration (ECF Nos. 123, 125).

Filed post-judgment, the Motions for Reconsideration required a recommended disposition from the Magistrate Judge. A litigant who receives an adverse recommendation on a dispositive matter such as a motion under Fed.R.Civ.P. 59(e) is entitled to *de novo* determination of any portion of the recommendation to which substantial objection is made. This Opinion embodies the results of the Court's *de novo* review.

Joseph Shine-Johnson filed his Petition for Writ of Habeas Corpus in this case April 14, 2020 (ECF No. 3). The Court entered judgment dismissing the Petition with prejudice July 6, 2021 (ECF Nos. 96, 97). The Sixth Circuit Court of Appeals denied a certificate of appealability June 27, 2022 (ECF No. 107). The Supreme Court of the United States denied certiorari review February 21, 2023 (ECF No. 119).

Immediately after judgment, Petitioner filed a Motion to Amend the Judgment under Fed.R.Civ.P. 59(e)(ECF No. 98). After that Motion was unsuccessful, Petitioner filed a Motion for Relief from Judgment under Fed.R.Civ.P. 60(b)(ECF No. 110). The Court denied that Motion on May 22, 2023 (ECF No. 122) and Shine-Johnson has not appealed. Instead, he has filed two Motions for Reconsideration and one set of Objections (ECF Nos. 123, 125, 128).

This case has been marked by frequent requests that the Court reconsider decisions already made. The Court understands that it is Petitioner's liberty which is at stake and he cannot be faulted for his fervor in seeking relief, but courts disfavor motions for reconsideration because they consume a court's scarce time for attention to a matter that has already been decided. They are subject to limitations based on that disfavor.

> As a general principle, motions for reconsideration are looked upon with disfavor unless the moving party demonstrates: (1) a manifest error of law; (2) newly discovered evidence which was not available previously to the parties; or (3) intervening authority. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), cert. denied, 476 U.S. 1171, 90 L. Ed. 2d 982 (1986).

Meekison v. Ohio Dep't of Rehabilitation & Correction, 181 F.R.D. 571, 572 (S.D. Ohio 1998)(Marbley, J.).

In his current Objections, Shine-Johnson argues that because the Magistrate Judge withdrew a recommendation to find the Rule 60(b) motion was untimely, all of the Magistrate Judge's prior decisions in the case should be re-examined (ECF No. 128, PageID 7749-51). The Court declines to re-examine those prior decisions.

Shine-Johnson has now clarified that claims one through four of his Motion for Relief from Judgment are made under Fed.R.Civ.P. 60(b)(1) and his fifth claim is made under Fed.R.Civ.P. 60(b)(6)(ECF No. 128, PageID 7752).

Petitioner objects to the Magistrate Judge's conclusion that the Sixth Circuit's denial of a certificate of appealability precludes consideration of the merits of the 60l(b) motion (ECF No. 128, PageID 7753). His claim is that both this Court and the Sixth Circuit were wrong on the certificate of appealability issue because

> The Sixth Circuit[']s denial of a COA in this case created a conflict within the Sixth Circuit amongst the Ohio and Michigan courts. The Sixth Circuit also creates a conflict amongst the Fifth, Seventh, Eighth, Ninth Circuit court of appeals. Several petitioners within the Michigan district courts were granted a COA based on a reasonable jurist dissenting during various stages of direct appeal and discretionary appeal.

Id. The Court cannot evaluate this argument because Petitioner has given no citations to the cases that supposedly embody these conflicts. Petitioner also relies on dissenting opinions in the Ohio Court of Appeals and the Supreme Court of Ohio in his case. But the question on certificate of appealability is not whether some judge believed a petitioner was entitled to relief, but whether a reasonable jurist would disagree with federal district court's disposition of the habeas corpus case, which is a different legal question altogether. In any event, if the Sixth Circuit is wrong on this question, their decision is still binding on this Court.

Petitioner argues that treating the circuit court's denial of a certificate of appealability as conclusive would eliminate the function of Rule 60(b). Not so. It is entirely possible that a litigant will present claims in a 60(b) motion on which he or she did not even seek a certificate of appealability. Conversely, treating a circuit court's COA decision as conclusive on the issues actually raised promotes finality, a key aim of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"). "AEDPA aim[s] to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial

resources, and promoting finality." *In re Hill*, ___ F.4th ___, 2023 WL 5493261 at 9 (6th Cir. Aug. 25, 2023), quoting *Banister v. Davis,* 140 S. Ct. 1698 at 1707 (2020).

Petitioner next objects to the Magistrate Judge's conclusion that he was not entitled to discovery of transcripts of the voir dire examination (ECF No. 128, PageID 7758-60). Petitioner references the Supp. Report, ECF No. 127, at PageID 7745-46, but there is no ruling on voir transcripts at that place. The Magistrate Judge declined to order voir dire transcribed and added to the record on February 16, 2021 (ECF No. 64). Petitioner made no objection at the time and his instant objection is therefore untimely.

Shine-Johnson objects to the Magistrate Judge's conclusion, relied on by the Sixth Circuit in denying a certificate of appealability, that he had not shown actual innocence so as to excuse his procedural defaults when the evidence he presented was an Affidavit attesting to the bad character of the decedent in this murder case, Petitioner's father. However, new evidence of the bad character of a victim is not the type of evidence of actual innocence required by *Schlup v. Delo*, 513 U.S. 298, 319 (1995). A court only engages in the weighing of new versus old evidence in actual innocence claims if the new evidence first qualifies under *Schlup,* so Petitioner's objection to the lack of such a weighing process is misplaced.

Petitioner next turns to his claim that character and prior bad acts evidence were improperly admitted against him (Objections, ECF No. 128, PageID 7784-90). "There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell,* 329 F.3d 496, 512 (6th Cir. 2003), noting that the Supreme Court refused to reach the issue in *Estelle v. McGuire*. 502 U.S. 62 (1991).

Shine-Johnson objects that the Magistrate Judge improperly found he had procedurally defaulted Grounds One through Four because Respondent, he asserts, had waived that defense (Objections, ECF No. 128, PageID 7791-94). The Magistrate Judge concluded this was one of the issues on which the Sixth Circuit had decided Shine-Johnson was not entitled to a certificate of appealability (ECF No. 127). The Court agrees that its prior rulings on that issue should not be reconsidered.

Beginning at PageID 7819 under the heading "Application to Reopen," Shine-Johnson revisits his arguments about the chain of custody of his father's shotgun. Here again he asks for extensive reconsideration of prior decisions in that he claims the Magistrate Judge improperly relied on law of the case arguments in finding the Sixth Circuit's COA ruling conclusive on the claims it considered and "[t]he district court in adjudicating this claim held the petitioner to unduly burdensome standard of proof on the prejudice prong of *Strickland*. The Sixth circuit court of appeals actions was [sic] inconsistent with due process." PageID 7819. For the reasons given above, the Magistrate Judge's use of the Sixth Circuit's COA decision is not an error of law. The Court declines to reconsider at this time its application of *Strickland*. And this Court is without authority to hold the Sixth Circuit decision violates due process.

Shine-Johnson next argues the Court has misapplied 28 U.S.C. § 2254(d)(1), (d)(2), and (e)(1), asserting this is a case where the Court can overlook procedural defaults (Objections ECF No. 128, PageID 7833-54). In this section he argues again his claim that the Ohio courts were in error in their interpretation of the Ohio law of self-defense. This Court is, however, bound by state court holdings on state law questions. *Railey v. Webb*, 540 F.3d 393 (6th Cir. 2008), *quoting Bradshaw v. Richey,* 546 U.S. 74, 76 (2005)("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."), *Maldonado v. Wilson*, 416 F.3d 470 (6th Cir.

2005); *Vroman v. Brigano*, 346 F.3d 598 (6th Cir. 2003); *Caldwell v. Russell*, 181 F.3d 731, 735-36 (6th Cir. 1999); *Duffel v. Dutton,* 785 F.2d 131, 133 (6th Cir. 1986). Shine-Johnson's argument that the Tenth District engaged in a subterfuge to avoid a federal question is completely unpersuasive.

Shine-Johnson filed his Motion for Relief from Judgment on September 30, 2022 (ECF No. 110). On January 27, 2023, he sought leave to amend that Motion by adding a claim under *State v. Leyh*, 166 Ohio St.3d 365 (2022)(ECF No. 117). The Magistrate Judge denied the Motion to Amend on grounds it was untimely because it was filed four months after Petitioner's Motion for Relief from Judgment, which the Magistrate Judge had already found to be itself untimely.

The Magistrate Judge has now withdrawn his timeliness conclusion about the underlying 60(b) motion. Shine-Johnson argued the one-year time limit under Fed.R.Civ.P. 60(c) should run from November 17, 2021, the date on which the Court denied Petitioner's Motion to Amend the Judgment under Fed.R.Civ.P. 59(e). In the Supp. Report, the Magistrate Judge accepted that date. However, that would mean the one year under Rule 60(c) expired November 17, 2022. Because Petitioner's Motion to Supplement was not filed until January 27, 2023, it is still untimely if Petitioner's Motion for Relief is properly adjudicated under Fed.R.Civ.P. 60(b)(1). The Supp. Report reiterates this conclusion (ECF No. 127 at PageID 7743).

In his Objections, Shine-Johnson disclaims any reliance on 60(b)(1) for his *Leyh* argument and asserts it is made under Fed.R.Civ.P. 60(b)(6)(ECF No. 128, PageID 7854). Motions under 60(b)(6) are not subject to a strict one-year time limit, but instead must be brought within a "reasonable" time which, according to the circumstances, could be more or less than a year. Fed. R. Civ. P. 60(c)(1); *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009). Judgment was entered

in this case November 17, 2021[1]. *Leyh* was decided February 8, 2022. Thus it was available to Shine-Johnson when he filed his Motion for Relief from Judgment on September 30, 2022, but he did not include his *Leyh* claim or bring it to this Court's attention until four months later when he filed his Motion to Supplement. His excuse is simply that he did not know about *Leyh*. Given the very large volume of Petitioner's filings in this case and their citation of myriad precedents, the Court finds this claim unpersuasive. Nevertheless because Petitioner is not entitled to relief on the merits of his 60(b)(6) *Leyh* claim, the Court will make no ruling on the timeliness of the Motion to Supplement, but proceed to consider the merits.

Relief should be granted under Rule 60(b)(6) only in unusual circumstances where principles of equity mandate relief, *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990), and the district court's discretion under 60(b)(6) is particularly broad. *Johnson v. Dellatifa,* 357 F.3d 539 (6th Cir. 2004); *McDowell v. Dynamics Corp.*, 931 F.2d 380, 383 (6th Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). Judge Watson of this Court recently wrote in a capital case:

> Rule 60(b)(6) is a "catchall" provision that "vests courts with a deep reservoir of equitable power to vacate judgments 'to achieve substantial justice' in the most 'unusual and extreme situations.'" *Zagorski v. Mays*, 907 F.3d 901, 904 (6th Cir. 2018) (quoting *Stokes v. Williams,* 475 F.3d 732, 735 (6th Cir. 2007)). The Sixth Circuit has made clear that Rule 60(b)(6) "applies only in exceptional or extraordinary circumstances where principles of equity mandate relief." *West v. Carpenter,* 790 F .3d 693, 696-97 (6th Cir. 2015) (citing *McGuire v. Warden, Chillicothe Corr. Inst.,* 738 F.3d 741,750 (6th Cir. 2013)). In other words, Rule 60(b)(6) is to be used rarely-especially in habeas corpus. *See Gonzalez v. Crosby,* 545 U.S. 524, 535 (2005).

Hand v. Houk, 2020 U.S. Dist. LEXIS 41511 *3 (S.D. Ohio Mar. 10, 2020)(Watson, J.).

[1] In the sense that, with denial of Petitiomner's Rule 59(e) motion on tht date, the underlying July 6, 2021, judgment became appealable.

A change in decisional law is usually not, by itself, an extraordinary circumstance. *Landrum v. Anderson*, 813 F.3d 330 (6th Cir. 2016); *Wright v. Warden,* 793 F.3d 670 (6th Cir. 2015); *Henness v. Bagley*, 766 F.3d 550 (6th Cir. 2014); *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), citing *Stokes v. Williams,* 475 F.3d 732, 735 (6th Cir. 2007); *Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001).

Leyh embodies a change in the decisional law of Ohio about procedure to be followed in deciding ineffective assistance of appellate counsel claims under Ohio R. App. P. 26(B). Petitioner has argued that *Leyh* does not involve a change in the law, but only a clarification of how Rule 26(B) is to be applied. That distinction undermines his argument rather than supporting it: if a change in decisional law will only rarely constitute an extraordinary circumstance, a clarification of the law is even less extraordinary.

In *Leyh* the Supreme Court of Ohio specified the procedure to be used in deciding ineffective assistance of appellate counsel claims in Ohio courts of appeal. If Petitioner were in a position to file a 26(B) application today[2], he would be entitled as a matter of state law to the process prescribed by *Leyh*. Shine-Johnson attempts to make this into a federal claim by arguing he had a liberty interest in having his ineffective assistance of appellate counsel claim processed as *Leyh* now prescribes, but he offers no supportive authority. Certainly the Ohio Supreme Court did not believe they were deciding a federal constitutional issue in *Leyh*; rather they were prescribing a procedure by which federal claims of ineffective assistance of appellate counsel would be processed. Shine-Johnson argues that virtually every step in the App. R. 26(B) process creates a liberty interest because it is mandatory. No so. None of the procedures mandated by

[2] 26(B) applications must be filed within ninety days of the appellatejudmgnet sought to be reopened; Ohio appellants are limited to one such application.

26(B) as interpreted in *Leyh* prescribes a substantive outcome. Accepting Petitioner's argument would erase the distinction between procedural and substantive law altogether.

Petitioner spends space discussing why his ineffective assistance of appellate counsel claims are not procedurally defaulted (Objections, ECF No. 128, PageID 7862-69). The Magistrate Judge found any procedural default was excused and decided the ineffective assistance of appellate counsel claim on the merits. Shine-Johnson claims this is inadequate. In effect he asserts he is entitled as a matter of federal due process to have 26(B) as interpreted in *Leyh* applied to his case. Petitioner cites no federal case law holding that state court procedures for deciding ineffective assistance of appellate counsel claims are constitutionally mandated. Constitutionalizing *Leyh* would upset certainly hundreds and perhaps thousands of Ohio convictions decided before *Leyh*. The Due process Clause does not sanction that result.

CONCLUSION

Having reviewed *de novo* those portions of the Magistrate Judge's Reports and Recommendations to which objection has been made, the Court overrules the Objections (ECF No. 128) and denies the Motions for Reconsideration (ECF Nos. 123, 125). The Magistrate Judge's Reports and Recommendations (ECF Nos. 124 and 127) are ADOPTED. This case will remain closed on the docket of this Court.

IT IS SO ORDERED.

ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATED: October 30, 2023

APPENDIX D

This appendix "D" contains several cases that are in conflict with the substance of court's rulings on Shine-Johnson COA request for the denial of his 60(b) Motion not heard on the merits and also includes cases that are in conflict with the substance of the 60(b) merits that plainly show this case was decided on flawed procedural grounds and is inconsistent with due process, and why the COA for the 60(b) should have been granted.

Case	Argument in support Granting COA	Disposition
Conflict Cases on 60(B) Abuse of Discretion		
a. 60(b) Exception to finality		
Buck v. Davis, 580 U.S. 100, at 126	Whole purpose" of Rule 60(b) "is to make an exception to finality."	Reversed
Gonzalez v. Crosby, 545 U.S. 524, 529-533, (2005).	Appeal to the virtues of finality. . . .standing alone, is unpersuasive in regards to Rule 60(b); Habeas petitioners who have already sought and obtained appellate review of their habeas denials are nonetheless entitled to rely on Rule 60(b) motions in seeking to correct "some defect in the integrity of the federal habeas proceedings.	Affirmed on other grounds
Kemp v. United States, 596 U.S. 528	within a reasonable time," and, at most, one year after the entry of the order under review.	Affirmed on other grounds
GenCorp, Inc v. Olin Corporation, 477 F.3d 368, id at 372 (6th Cir. 2007).	*After an appeal has been lost,* Civil Rule 60(b) gives losing parties additional, narrow grounds for vacating the judgment.	Affirmed on other grounds
United Student Aid Funds, 130 S. Ct. at 1376.	Rule 60(b) provides an exception to judgment finality when warranted by the equities and the interests of justice.	Affirmed on other grounds
Ritter v. Smith, 811 F.2d 1398,1402 (11th Cir.)	Finality not enough to overcome 60(b)	60(b) granted

Ungar v. PLO, 599 F.3d 79, 2010 U.S. App. LEXIS 6156, (1st Cir.)	Finality "standing alone, is unpersuasive in the interpretation of a provision Rule 60(b) whose whole purpose is to make an exception to finality"	Reversed
Mandala v. NTT Data, Inc., 88 F.4th 353, (2d Cir.2023).	Finality "standing alone, is unpersuasive in the interpretation of a provision Rule 60(b) whose whole purpose is to make an exception to finality"	Reversed
Johnson v. Spencer, 950 F.3d 680, (10th Cir. 2020).	Finality "standing alone, is unpersuasive in the interpretation of a provision Rule 60(b) whose whole purpose is to make an exception to finality"	Reversed denial of 60(b)
Haynes v. Davis, 733 Fed. Appx. 766, (5th Cir.)	Recognized the Supreme Court's rejection of the notion that finality is the overriding concern when assessing Rule 60(b) motions in habeas cases.	Denied on other grounds
Ruiz v. Quarterman, 504 F.3d 523, 532 (5th Cir. 2007)	The Supreme Court's rejected of the notion that finality is the overriding concern when assessing Rule 60(b) motions in habeas cases.	Reversed
Bynoe v. Baca, 966 F.3d 972,985, 2020 U.S. App. LEXIS 23343 (9th Cir.)	State's interest in finality "deserves little weight.	Reversed
Phelps v. Alameida, 569 F.3d 1120, 1140 (9th Cir. 2009)	A central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard.	Reversed
FTC v. Ross, 74 F.4th 186 (4th Cir.)	To be sure, Rule 60(b) allows district courts to reopen a judgment post-direct appeal in "a limited set of circumstances," and itis meant to "make an exception to finality."	Affirmed on other grounds
Novoa v. Minjarez (In re Novoa), 690 Fed. Appx. 223 (5th Cir.)	Rule 60(b) provides an exception to finality.	Affirmed on other grounds
Lee Mem. Hosp. v. Becerra, 10 F.4th 859 (District of Columbia)	As the Supreme Court has explained, "Rule 60(b) . . . provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances.	Affirmed on other grounds
Johnson v. Hudson, 421 F. App'x 568, 572 (6th Cir. 2011).	Habeas petitioners who have already sought and obtained appellate review of their habeas denials are nonetheless entitled to rely on Rule 60(b) motions in seeking to correct "some defect in the integrity of the federal habeas proceedings	Reversed
b. Single judge COA determination		

Non-binding / Law of the case doctrine		
Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)	As a general principle, the law-of-the-case doctrine precludes reconsideration of issues that were expressly or impliedly decided at an earlier stage of the same case by the same or a superior court.	
Keahey v. Marquis, 978 F.3d 474, 481 (6th Cir. 2020)	It does not apply to a certificate of appealability, which screens out claims "unworthy of judicial time and attention," ensures "that frivolous claims are not assigned to merits panels," and identifies only questions that warrant the resources deployed for full-briefing and argument.	Affirmed on other grounds
Griffin v. Sec'y, Fla. Dep't of Corr., 787 F.3d 1086, 1095 (11th Cir. 2015)	The single Judge deciding the COA does not make binding legal determinations.	Denied on Other grounds
Gonzalez v. Thaler, 565 U.S. 134, 145, (2012)	It does not apply to a certificate of appealability, which screens out claims "unworthy of judicial time and attention," ensures "that frivolous claims are not assigned to merits panels," and identifies only questions that warrant the resources deployed for full-briefing and argument.	Affirmed on other grounds
United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994)	In spite of the law-of-the-case doctrine, a lower court may reopen an issue already ruled upon by a controlling authority in limited circumstances, including where that authority has taken "a subsequent contrary view of the law.	Reversed
Burley v. Gagacki, 834 F.3d 606, 618 (6th Cir. 2016)	Application of the law-of-the-case doctrine has been historically limited to fully briefed "questions necessarily decided" in an earlier appeal.	Affirmed on other grounds
Conflict cases on Legal Error to support 60(B)(1) misapplication of procedural default doctrine...		
Whether Cause and prejudice was met		
Reed v. Ross, 468 U.S. 1, 10, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984).	Novel constitutional question.	Won Habeas
Engle v. *Isaac*, 456 U.S., at 128-129	May not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in federal court; similarly, a defense attorney may not use the prospect of federal habeas corpus	Reversed

	relief as a hedge against the strategic risks he takes in his client's defense in state court.	
Wainwright v. *Sykes*, 433 U.S. 72 (1977).See *id.*, at 89, 91-94.	May not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in federal court; similarly, a defense attorney may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court.	Reversed
Slagle v. Bagley, 457 F.3d 501, 514 (6th Cir.2006)	Did not identify with specificity the procedural default.	Procedural default did not apply
Baze v. Parker, 371 F.3d 310, 320 (6th Cir. 2004)	Did not identify with specificity the procedural default.	Procedural default did not apply
Manning v. Foster, 224 F.3d 1129,1135 (9th Cir. 2000)	We do not attribute an attorney's errors to the client where the attorney is acting only on her or his own behalf, and does not actually represent the client.	Cause and prejudice was met
Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994)	Declining to attribute an attorney's unauthorized self-interested actions in post-conviction proceedings to the petitioner.	Cause and prejudice was met
Maples v. Thomas, 565 U.S. at 282–84, 287–88.	if the default occurred at a state post-conviction proceeding [discretionary review]. The ineffective assistance rationale is applicable only in limited circumstances; the "agency law" rationale is *not* subject to similar limitations.	Reversed
Divine Tower Int'l Corp. v. Kegler, Brown, Hill & Ritter Co., L.P.A., 2007 U.S. Dist. LEXIS 65078	It is well established that an attorney owes a duty of loyalty to his client. This duty encompasses an obligation to defer to the clients wishes on major litigation decisions	Was not acting as his Agent.
Jennings v. Purkett, 7 F.3d 779,782 (8th Cir. 1993)	Divided loyalties of petitioner's counsel can supply cause for procedural default.	Reversed
Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994)	Divided loyalties of petitioner's counsel can supply cause for procedural default.	Reversed
Bennecke v. Ins. Co., 105 U.S. 355, 360.	If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud.	Not attributed to his Client
Baldayaque v. United States, 338 F.3d 145, 154	When an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with the agent's misdeeds.'	Reversed

Nat'l Union Fire Ins. Co. v. Bonnanzio, 91 F.3d 296, 303 (2d Cir. 1996)	When an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with the agent's misdeeds.'	Reversed
James v. Kentucky, 466 U.S. at 351	procedural default doctrine thus does not apply if the petitioner made a good faith effort to comply with state rules.	Reversed
Douglas v. Alabama, 380 U.S. 415, 422	procedural default doctrine thus does not apply if the petitioner made a good faith effort to comply with state rules.	Reversed
Failure to assert/Waiver		
Caldwell v. Mississippi, 472 U.S. 320, 327, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985)	If a state court does not expressly rely on a procedural deficiency, then a federal court may conduct habeas review.	Reversed in Part and Remanded
Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006)	"a federal court has the authority to resurrect only forfeited defenses..	Affirmed on other grounds
Scott v. Collins, 286 F.3d 923 (6th Cir. 2002)	Improperly asserted procedural defense.	Reversed
Slagle v. Bagley, 457 F.3d 501, 514. (6th Cir.2006)	Federal review is not barred because the State appellate court is unclear because it failed to specify exactly the number of statements not objected to, and the court did not identify the statements to which it referred.	Waived procedural argument
Baze v. Parker, 371 F.3d 310, 320 (6th Cir. 2004)	If a state court does not expressly rely on a procedural deficiency, then a federal court may conduct habeas review.	Affirmed on other grounds
Maupin v. Smith, 785 F.2d 135,138 (6th Cir. 1986).	When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court ***must*** go through a ***complicated*** [four-prong] analysis.	Affirmed on other grounds
Scott v. Collins, 286 F.3d 923, 927-28 (6th Cir. 2002).	The state may waive a defense by not asserting it.	Reversed
Kontrick v. *Ryan*, 540 U.S. 443, 458, n. 13, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)	A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve.	Affirmed on Forfeiture

Wood v. Milyard, 566 U.S. 463, 132 S. Ct. 1826, 182 L. Ed. 2d 733.	Although our decision in *Granberry* v. *Greer*, 481 U.S. 129, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987), did not expressly distinguish between forfeited and waived defenses, we made clear in *Day* v. *McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006),	Reversed
a. Conflict on Actual Innocence		
United States, v. Bagley, 473 U.S. at 676.	Evidence is material if it might have been used to impeach a government witness, because "if disclosed and used effectively, it may make the difference between conviction and acquittal."	Reversed
Giglio v. United States, 405 U.S. 150 at 15	That evidence is material if it might have been used to impeach a government witness, because "if disclosed and used effectively, it may make the difference between conviction and acquittal.	Reversed
Napue v. Illinois, 360 U.S. 264, 269 (1959)	The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence	Reversed
Kyles v. Whitley, 514 U.S. 419 at 444	The effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before.	Reversed
United States v. *Agurs*, 427 U.S. 97 at 112-113, n. 21.	If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.	Reversed
United States v. Payne, 63 F.3d 1200, 1210 (2d Cir. 1995)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Affirmed on other Grounds
United States v. Orena, 145 F.3d 551, 1998 U.S. App. LEXIS 11501 (2d Cir.1998)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Reversed
United States v. Petrillo, 821 F.2d 85, 90 (2d Cir.1987)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Affirmed on Other Grounds
United States v. Avellino, 136 F.3d 249, 256 (2nd Cir. 1998)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Affirmed on Other Grounds
Keith v. Bobby, 551 F.3d 555, 558 (6th Cir. 2009)	differentiating between habeas petitions premised on mere impeachment evidence, and petitions based on "new evidence that . . . directly contradicted the government's case in chief"	Denied on other grounds

United States v. Robinson, 583 F.3d 1265, (10th Cir. 2009)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Reversed
United States v. Bartko, 728 F.3d 327, (4th Cir. 2013)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Affirmed on other grounds
United States v. Pridgen, 518 F.3d 87, (1st Cir. 2008)	Impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime."	Affirmed on other grounds
Gandarela v. Johnson, 286 F.3d 1080. (9th Cir. 2001)	New evidence that undermines the credibility of the prosecution's case *may* alone suffice to get an otherwise barred petitioner through the *Schlup* gateway.	Denied
Carriger v. Stewart, 132 F.3d at 478 (9th Cir. 1997)	Impeachment evidence, by itself, can demonstrate actual innocence, where it gives rise to "sufficient doubt about the validity of [the] conviction."	Reversed
Sistrunk v. Armenakis, 292 F.3d 669,678-677.	Impeachment evidence, by itself, can demonstrate actual innocence, where it gives rise to "sufficient doubt about the validity of [the] conviction."	Denied
Munchinski v. Wilson, 694 F.3d 308, 335 (3d Cir. 2012).	Mere impeachment evidence is generally not sufficient to show actual innocence by clear and convincing evidence.	Granted
b. Fair Presentation		
Picard v. Connor, 404 U.S. 270,277 (1971);	Opportunity to see both the factual and legal basis for each claim.	Reversed
Humphrey v. Cady, 405 U.S. 504, 516 n.18 (1972)	Opportunity to see both the factual and legal basis for each claim.	Reversed
O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).	Opportunity to see both the factual and legal basis for each claim.	Reversed on failure to Exhaust
Nian v. Warden, N. Cent. Corr. Inst., 994 F.3d 746 (6th Cir 2021)	Used a statement evocative of language that we articulated in prior Sixth Circuit cases	Fairly presented; Reversed
Slaughter v. Parker, 450 F.3d 224, 236 (6th Cir. 2006)	But "[t]his does not mean that the applicant must recite 'chapter and verse' of constitutional law."	Reversed om other grounds
Franklin v. Rose, 811 F.2d 322. (6th Cir. 1987)	The substance of a federal habeas corpus claim must first be presented to the state courts	Affirmed

Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982)	Holding that "reliance on state cases employing constitutional analysis in like fact situations" fairly presents the federal claim.	Fairly presented; Reversed
Fulcher v. Motley, 444 F.3d 791, 798 (6th Cir. 2006)	A prosecutorial misconduct Claim is in the mainstream of fair trial and due process claim.	Fairly presented; Reversed
United States v. Leon, 534 F.2d 667, 678, (6th Cir. 1976)	A prosecutorial misconduct Claim is in the mainstream of fair trial and due process claim.	Fairly presented; Reversed
Houston v. Waller 420 Fed. Appx 501, 510 (6th Cir. 2011)	A prosecutorial misconduct Claim is in the mainstream of fair trial and due process claim.	Fairly presented; Habeas Granted
West v. Bell, 550 F.3d 542,564 (6th Cir. 2008)	We held that a claim was fairly presented when the petitioner used phrasing that was similar to language used in prior Sixth Circuit case law.	Fairly Presented
Scarpa v. Dubois, 38 F.3d 1, 1994 U.S. App. LEXIS 29035 (1st Cir. 1994)	As a general rule, presenting a state-law claim that is functionally identical to a federal-law claim suffices to effectuate fair presentment of the latter claim.	Reversed
McCandless v. Vaughn, 172 F.3d 255, 1999 U.S. App. LEXIS 5750 (3d Cir. 1999)	Allegation of a pattern of facts that is well within the mainstream of constitutional litigation.	Reversed
Jones v. Sussex I State Prison, 591 F.3d 707, 2010 U.S. App. LEXIS 952 (4th Cir., 2010)	Alerted the state courts to the federal nature of his claim when he used clear language,	Reversed
Walberg v. Israel, 766 F.2d 1071, 1985 U.S. App. LEXIS 20274 (7th Cir. 1985)	State cases applying constitutional analysis or making reference to the Constitution" fairly presents the federal claim.	Reversed
Purnell v. Missouri Dep't of Corrections, 753 F.2d 703,707 1985 U.S. App. LEXIS 28034 (8th Cir. 1985)	The court reversed the judgment that dismissed the habeas corpus petition and remanded with instructions for the district court to accept the state's waiver of exhaustion and consider the petition on its merits.	Reversed
McCracken v. Frank, 1993 U.S. App. LEXIS 2012 (9th Cir. 1993)	Alaska Supreme Court had a full and fair opportunity to address the substance of McCracken's claim that his conviction violates federal equal protection guarantees.	Reversed
In re Joint Cty. Ditch No. 1, 122 Ohio St. 226, 231-232, 171 N.E. 103 (1930).	It has long been held if the imposition of the burden of proof upon [a defendant] is a substantial interference with the exercise of that right, it is a denial of a substantial right guaranteed by the Constitution.	Reversed

Clemmons v. Delo, 124 F.3d 944,948-949	Although *Brady* claim was omitted from counsel's brief on appeal of denial of state post-conviction relief, petitioner himself "fairly presented" claim to state supreme court by filing *pro se* motion containing claim and stating that counsel omitted it against client's wishes.	Procedural Default did not apply
Engle v. *Isaac*, 456 U.S., at 128-129	May not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in federal court; similarly, a defense attorney may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court.	Reversed
Wainwright v. *Sykes*, 433 U.S. 72 (1977).See *id.*, at 89, 91-94.	May not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in federal court; similarly, a defense attorney may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court.	Reversed and dismissed
Reed v. Ross, 468 U.S. 1,14 (1984).	Defense counsel may not make a tactical decision to forgo a procedural opportunity in state court, such as an opportunity to object at trial or to raise an issue on appeal, and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court on habeas corpus review; procedural defaults of this nature are inexcusable and cannot qualify as "cause" for purposes of federal habeas corpus review.	Reversed
Vasquez v. Hillery, 474 U.S. 254, 260, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)	addressing merits of claim after determining that additional facts did not change substance of claim addressed by California Supreme Court	Affirmed Habeas Granted
Wells v. Maass, 28 F.3d 1005,1008–09 & n.1 (9th Cir. 1994)	Although prisoner presented only "summary treatment" of claims to state supreme court, claims nonetheless were adequately exhausted because they were raised in intermediate appellate court, which "addressed the questions in its decision in a manner sufficient to put a reviewing court on notice of the specific federal claims	Reversed
Kelly v. Small, 315 F.3d 1063, 1067 (9th Cir.), *cert. denied*, 538 U.S. 1042 (2003)	Although prisoner presented only "summary treatment" of claims to state supreme court, claims nonetheless were adequately exhausted because they were raised in intermediate appellate court, which "addressed the questions in its decision in a manner sufficient to put a reviewing court on notice of the specific federal claims	Reversed
Pope v. Netherland, 113 F.3d 1364, 1368 (4th Cir.), *cert.*	[I]t is not necessary to cite 'book and verse on the federal constitution' so long as the constitutional substance of the claim is evident.	Reversed for other reasons

denied, 521 U.S. 1140 (1997)		
Rittenhouse v. Battles, 263 F.3d 689,696 (7th Cir. 2001)	Did not refer to a single federal or state case addressing a criminal defendant's due process rights	Affirmed on other grounds
Robinson v. Schriro, 595 F.3d 1086,1102–03 (9th Cir.), *cert. denied*, 562 U.S. 1037 (2010)	"We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts.	Reversed
Sweeney v. Carter, 361 F.3d 327, 332–33 (7th Cir.), *cert. denied*, 543 U.S. 1020 (2004)	Petitioner may reformulate her claims so long as the substance of the claim remains the same	Affirmed on other grounds
a. Conflict on Merits determination vs. procedural ruling in regards to fair presentation.		
Bonilla v. Hurley, 370 F.3d 494,497 (6th Cir.)	A delayed appeal is a procedural ruling, ***"not a ruling on the merits"*** and does not fairly present his claims.	Affirmed
Clemmons v. Delo, 124 F.3d 944,948,Fn.4	Clemmons did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme court that was not raised by attorney; was denied leave because of a procedural ruling.	No procedural default, Habeas granted
Greene v Fisher, 565 U. S., at 40, 132 S. Ct. 38, 181 L. Ed. 2d 336;	The denial instead, usually represents "a decision by the state supreme court not to hear the appeal that is, not to decide at all."	Affirmed on other grounds
Ylst v. *Nunnemaker*, 501 U. S. 797, 805-806, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)	The discretionary denial of review on direct appeal by the California Supreme Court is not even a 'judgment.'	Reversed
Brown v. Davenport, 142 S. Ct. 1510, 1529	The denial instead, usually represents "a decision by the state supreme court not to hear the appeal that is, not to decide at all."	Reversed
State v. Davis, 119 Ohio St. 3d 422, 427.	the Ohio Supreme Court to accept ***any*** case for review shall not be considered a statement of opinion as to ***the merits*** of the law stated by the trial or appellate court from which review is sought."	Reversed

Williamson v. Rubich, 171 Ohio St. 253, 168 N.E.2d 876 (1960)	The Ohio Supreme Court to accept ***any*** case for review shall not be considered a statement of opinion as to ***the merits*** of the law stated by the trial or appellate court from which review is sought."	Improvidently accepted
Conflict cases on Misapplication of AEDPA		
Marshall v. Rodgers, 569 U.S. 58, 62 (2013)	The lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law	Reversed
Panetti v. Quarterman, 551 U.S. at 953,	The court held that "the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."	Reversed
Carey v. Musladin, 549 U.S. 70, 81 (2006)	The court held that "the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."	Reversed on other grounds
White v. Woodall, 572 U.S. at 427	This is not to say that § 2254(d)(1) requires an "'identical factual pattern before a legal rule must be applied."' ... To the contrary, state courts must reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case.	Reversed on other grounds
Parker v. Matthews, 567 U.S. 37, 48, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012)	A circuit court "err[s] by consulting its own precedents, rather than those of [the Supreme] Court, in assessing the reasonableness of the [state court] decision."	Reversed on other grounds
Shirley v. Tegels, 61 F.4th 542, 2023 U.S. App. LEXIS 5534, 2023 WL 2396951 (7th Cir. 2023)	Section 2254(d)(1) "does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.	Denial of Habeas affirmed
Gaona v. Brown, 68 F.4th 1043, (6th Cir. 2023)	A circuit court "err[s] by consulting its own precedents, rather than those of [the Supreme] Court, in assessing the reasonableness of the [state court] decision."	Affirmed on other grounds
Taylor v. Withrow, 288 F.3d 846 (6th Cir. 2002)	Clearly established law under the Act encompasses more than just bright-line rules laid down by the Court. It also clearly includes legal principles and standards enunciated in the Court's decisions.	Reversed on other grounds
In re Joint Cty. Ditch No. 1, 122 Ohio St. 226, 231-232, 171 N.E. 103 (1930).	It has long been held if the imposition of the burden of proof upon [a defendant] is a substantial interference with the exercise of that right, it is a denial of a substantial right guaranteed by the Constitution.	Reversed

Conflict Cases On Granting COA on State Habeas petitions Where State Appellate court were divided on the merits of Constitutional Question		
Slagle v. Bagley, 457 F.3d 501, 514	Prosecutorial misconduct not precluded for procedural default	C.O.A Granted
United States v. Boyd, 640 F.3d 657, 669 (6th Cir. 2011)	We review claims of prosecutorial misconduct that were objected to in the trial court de novo.	Reviewed Claim on the merits
United States v. Henry, 545 F.3d 367, 376 (6th Cir. 2008)	We review prosecutorial statements that were not objected to in the trial court for plain error.	Reviewed claim on the merits
United States v. Green, 305 F.3d 422, 429 (6th Cir. 2002).	Allegations of prosecutorial misconduct contain mixed questions of law and fact that we usually review de novo.	
Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011)	A district court could deny a certificate of appealability on the issue that divided the state court *only* in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate.	C.O.A. Granted
Davidson v. Skipper, 2022 U.S. Dist. LEXIS 160310.	The fact that Judge Gleicher would have granted reconsideration from the Michigan Court of Appeals' decision to affirm the conviction shows that jurists of reason could decide Petitioner's claim differently or that the issues deserve encouragement to proceed further.	C.O.A. Granted
Rhoades v. Davis, 852 F.3d 422,429 (5th Cir. 2017)	When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.	C.O.A. Granted
Williams v. Baumer, 2011 U.S. Dist. LEXIS 111601	The fact that three Michigan Supreme Court justices would have reversed petitioner's conviction based on the joinder of these two separate drug cases shows that jurists of reason could decide the issues raised in this petition differently or that the issues deserve encouragement to proceed further.	C.O.A. Granted
Smith v. Winn, 2017 U.S. Dist. LEXIS 82742 (reported)	The fact that Judge Gleicher in the Michigan Court of Appeals and Justices Kelly, Bernstein, and McCormack in the Michigan Supreme Court would have reversed petitioner's conviction on the ground that trial counsel was ineffective for failing to present an alibi defense shows that jurists of reason could decide petitioner's claim differently or that it deserves encouragement to proceed further.	C.O.A. Granted

APPENDIX D

Robinson v. Stegall, 157 F. Supp. 2d 802, 820, fn. 7 & 824 (E.D. Mich. 2001)	The fact that Judge Gleicher in the Michigan Court of Appeals and Justices Kelly, Bernstein, and McCormack in the Michigan Supreme Court would have reversed petitioner's conviction on the ground that trial counsel was ineffective for failing to present an alibi defense shows that jurists of reason could decide petitioner's claim differently or that it deserves encouragement to proceed further.	C.O.A. Granted
Frazier v. Bell, 2013 U.S. Dist. LEXIS 156483	The fact that Judge Stephens would have granted petitioner leave to appeal his conviction shows that jurists of reason could decide the issues raised in this petition differently or that the issues deserve encouragement to proceed further	C.O.A. Granted
Galvan v. Stewart, 2016 U.S. Dist. LEXIS 35907	The fact that Judge Shapiro would have reversed petitioner's first-degree felony murder conviction based on the sufficiency of the evidence shows that jurists of reason could decide the sufficiency of evidence claim differently or that it deserves encouragement to proceed further.	C.O.A. Granted
McMullan v. Booker, 2012 U.S. Dist. LEXIS 23603	The fact that one Michigan Court of Appeals judge and two Michigan Supreme Court justices would have reversed petitioner's conviction based on the trial court's failure to instruct on the lesser included offense of involuntary manslaughter shows that jurists of reason could decide the issues raised in this petition differently or that the issues deserve encouragement to proceed further.	C.O.A. Granted
Metcalfe v. Howard, 2022 U.S. Dist. LEXIS 61217.	The fact that three Michigan Supreme Court justices dissented in the *Plunkett* case, coupled with Judge Shapiro's suggestion in this case that the rationale behind *Plunkett* was unsound and should be reconsidered, shows that jurists of reason could decide petitioner's sufficiency of evidence differently or that the issues deserve encouragement to proceed further.	C.O.A. Granted
Widmer v. Warden, 2023 U.S. Dist. LEXIS 230874, (S.D. Ohio December 29, 2023)	Because the petitioner had Supreme Court of Ohio justices dissented when denying certiorari of the direct and post-conviction appellate court decisions...Widmer has demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further.	C.O.A. Granted
Lee v. Warden, 2019 U.S. Dist. LEXIS 46041, 2019 WL 1292313 (S.D. Ga. 2019)	"When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.	C.O.A. Granted

Pierce v. Brown, 2022 U.S. Dist. LEXIS 102155, 2022 WL 2064653 (S.D. Ind. 2022)	When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.	C.O.A. Granted
O'Quinn v. Atchison, 2014 U.S. Dist. LEXIS 47545, 2014 WL 1365455 (S.D. Ill. April 7, 2014)	When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine. A district court could deny a certificate of appealability on the issue that divided the state court only in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate	C.O.A. Granted