No.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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ANITA HOLLINS, PETITIONER

*v.*

WARDEN SHELBIE SMITH, RESPONDENT

---

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

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**APPENDIX TO**
**PETITION FOR A WRIT OF CERTIORARI**
**VOLUME ONE**

---

Anita Hollins, Pro se
101788
*Marysville Correctional Institution*
*1479 Collins Avenue*
*Marysville, Ohio 43040*

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**NOT RECOMMENDED FOR PUBLICATION**

No. 24-3023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



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| ANITA HOLLINS, | ) | |
| | ) | |
| Petitioner-Appellant, | ) | |
| | ) | ON APPEAL FROM THE UNITED |
| v. | ) | STATES DISTRICT COURT FOR |
| | ) | THE NORTHERN DISTRICT OF |
| WARDEN SHELBIE SMITH, | ) | OHIO |
| | ) | |
| Respondent-Appellee. | ) | |

ORDER

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

Anita Hollins, an Ohio prisoner, appeals the district court's judgment denying her petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because the Ohio Court of Appeals's rejection of her inconsistent-verdicts claim was reasonable, we affirm.

In 2018, a jury convicted Hollins of three counts of aggravated felony murder, one count of murder, six counts of aggravated robbery, seven counts of kidnapping, two counts of aggravated burglary, and three counts of felonious assault. She was acquitted of several other counts, which included firearm specifications for all the charges. The trial court imposed an effective term of life imprisonment. The Ohio Court of Appeals affirmed. *State v. Hollins*, No. 107642, 2020 WL 5250391 (Ohio Ct. App. Sept. 3, 2020), *perm. app. denied*, 159 N.E.3d 287 (Ohio 2020).

Hollins was convicted under an aiding-and-abetting theory. In 2015, Hollins was involved in an altercation at the Cooley Lounge, during which she was struck in the head with a beer bottle. In October 2016, Hollins drove three gunmen—Nigel Brunson, Dana Thomas, and Dwayne

Sims—to the Cooley Lounge and waited in the car with her two children and another individual, Garry Lake. The three gunmen entered the bar and initially posed as customers and ordered a drink, but they soon drew their weapons and began assaulting and robbing the patrons. The bartender was forced to the rear of the bar, where she was shot by two of the gunmen and killed. Lake testified that, upon returning to the car, Thomas said he had to shoot the bartender because she had seen his face, Brunson laughed about having to "finish her off," and Hollins responded, "that's what she get," before driving them away. Two of the gunmen were linked to the crimes by DNA evidence from the drink they had shared, as well as by surveillance footage, the discovery of the stolen items near the homes of Brunson, Sims, and Lake, and cellphone geo-location data. *Id.* at *2-3.

In 2021, Hollins filed this § 2254 petition. She claimed, as she did on direct appeal, that (1) her due-process rights were violated because the jury returned inconsistent verdicts by acquitting her of all the firearm specifications but convicting her of several crimes that required the use of a firearm as an essential element; (2) her convictions were supported by insufficient evidence; and (3) her right to confront a witness against her was violated when she was not allowed to cross-examine Lake using a prior statement he made to his attorney due to attorney-client privilege. A magistrate judge recommended granting relief on Claim (1) and denying relief on Claims (2) and (3). Upon review, the district court adopted the report and recommendation for Claims (2) and (3), but it rejected the magistrate judge's recommendation on Claim (1). The district court concluded that clearly established federal law as determined by the Supreme Court does not prohibit inconsistent verdicts and that the magistrate judge's reliance on *United States v. Randolph*, 794 F.3d 602 (6th Cir. 2015), was misplaced.

On appeal, Hollins raises only her inconsistent-verdict claim concerning her three aggravated felony-murder convictions under Ohio Revised Code § 2903.01(B), which were premised on her aggravated robbery, aggravated burglary, and kidnapping offenses. She argues that the Supreme Court's decision in *Dunn v. United States*, 284 U.S. 390, 393 (1932), holding that inconsistent verdicts are permissible, was wrongly decided, and that the Supreme Court's decision in *United States v. Powell*, 469 U.S. 57, 64-65 (1984), though seemingly affirming the

principle that inconsistent verdicts are permissible, actually recognized the flawed reasoning of *Dunn* and instead allowed the inconsistent verdicts to stand based solely on its "supervisory power" over federal criminal procedure. Thus, according to Hollins, *Dunn* and *Powell* do not apply in habeas review or to her convictions and, because her convictions are inconsistent with the jury's decision to acquit her of the firearm specifications, they must be vacated as violating double-jeopardy principles.

We review the district court's decision de novo. *See Stermer v. Warren*, 959 F.3d 704, 720 (6th Cir. 2020). Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court "shall not" grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless" the state court decision either (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The Ohio Court of Appeals rejected Hollins's inconsistent-verdict claim, determining that inconsistent verdicts within a single indictment are permissible and that, in any case, a not-guilty verdict on a firearm specification is not "a fatal inconsistency with a guilty verdict for the principal charge." *Hollins*, 2020 WL 5250391, at *3-5. We find no fault in the district court's conclusion that this was not contrary to or an unreasonable application of clearly established federal law as announced by the Supreme Court.

The Supreme Court cases closest on point are the aforementioned *Dunn* and *Powell*. In *Dunn*, the Supreme Court considered a case in which a defendant was convicted of maintaining a common nuisance by keeping a place for the sale of intoxicating liquor, but he was acquitted of possessing and selling intoxicating liquor. *Dunn*, 284 U.S. at 391-92. The Supreme Court noted the inconsistency in the verdicts, but it concluded that "[c]onsistency in the verdict is not necessary" because an acquittal as to one count was not res judicata as to the other. *Id.* at 393. It also noted that the verdict may have been the result of a compromise or a mistake on the part of the jury. *Id.* at 394. The Supreme Court again considered the question of inconsistent verdicts in *Powell*, noting that *Dunn*'s statement that, in the case of separately tried indictments, an acquittal

in one could not be res judicata in the other, could "no longer be accepted" in light of cases thereafter. *Powell*, 469 U.S. at 64 (citing *Sealfon v. United States*, 332 U.S. 575 (1948), and *Ashe v. Swenson*, 397 U.S. 436 (1970)). It nonetheless concluded that "the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata." *Id.* The Supreme Court stated that inconsistent verdicts are not necessarily a windfall to the government and may be the result of mistake, compromise, or lenity on the part of the jury and the government would have no recourse to correct any such result. The Supreme Court therefore recognized that such a decision by the jury to convict on one but not the other is part of its "historic function" of checking the executive and that inconsistent-verdict claims should therefore not be reviewable in the ordinary course. *Id.* at 65-66. These cases do not support the conclusion that the Ohio Court of Appeals made a decision that is contrary to federal law as announced by the Supreme Court by finding the inconsistent verdicts permissible. *See, e.g.*, *Mapes v. Coyle*, 171 F.3d 408, 419-20 (6th Cir. 1999) (rejecting a challenge to a guilty verdict for aggravated murder that was allegedly inconsistent with two not-guilty verdicts on death-penalty specifications because "*Powell* teaches that the inconsistent verdicts are viewed completely separately, and that no conclusion may be drawn from comparing the two").

Hollins challenges this assessment, pointing to the fact that the Supreme Court based its decision in *Powell* on its "supervisory powers over the federal criminal process," rather than any constitutional principle. 469 U.S. at 65. But even if she were correct that the *Powell* decision should be limited to federal criminal procedure, she still does not show that the Ohio Court of Appeals analysis amounted to an unreasonable application of Supreme Court precedent. She cites numerous cases that generally show the importance of double-jeopardy principles and that an acquittal should be given preclusive effect over future prosecutions. *See, e.g.*, *Yeager v. United States*, 557 U.S. 110, 119 (2009) (reaffirming that an acquittal on a particular issue in a prior trial is preclusive in a later trial); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (noting that an acquittal cannot be reviewed without placing a defendant twice in jeopardy). The Double Jeopardy Clause protects an individual from being prosecuted twice for the same offense. *See United States v. Willis*, 981 F.3d 511, 514 (6th Cir. 2020). But in this case, Hollins was never

put twice in jeopardy, as the inconsistent verdicts here all occurred in the same trial. Put simply, Hollins does not establish that the Ohio Court of Appeals's decision was contrary to or an unreasonable application of federal law. Accordingly, the district court correctly denied relief.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX A

No. 24-3023



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANITA HOLLINS,

Petitioner-Appellant,

v.

WARDEN SHELBIE SMITH,

Respondent-Appellee.

ORDER

**BEFORE:** BOGGS, NORRIS, and MOORE, 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, Clerk

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 25, 2024

Mr. John Yackshaw Wood
Law Office
12614 Britton Drive
Cleveland, OH 44120-1011

Re: Case No. 24-3023, *Anita Hollins v. Shelbie Smith*
Originating Case No.: 1:21-cv-02338

Dear Mr. Wood,

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. Stephanie Lynn Watson

Enclosure

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**ANITA HOLLINS,**

**Petitioner,**

**v.**

**Case No. 1:21-cv-2338**
**Judge Sarah D. Morrison**
**Magistrate Judge Jonathan D. Greenberg**

**SHELBIE SMITH, WARDEN, DAYTON CORRECTIONAL INSTITUTION,**

**Respondent.**

## OPINION AND ORDER

Petitioner Anita Hollins is serving a life sentence for aiding and abetting the commission of aggravated murder, murder, aggravated robbery, aggravated burglary, felonious assault, and kidnapping. In the instant Petition for a Writ of Habeas Corpus, Ms. Hollins asserts that her constitutional rights were violated during her state court proceedings. (ECF No. 1.) In particular, she argues that the jury's verdicts were impermissibly inconsistent (Claim One), that there was insufficient evidence to support her convictions (Claim Two), and that she was wrongly denied the right to cross-examine a witness (Claim Three). On October 27, 2022, the Magistrate Judge issued a Report and Recommendation recommending that the Petition be granted as to some of the inconsistent verdicts claim but denied in all other respects. (R&R, ECF No. 9.) Both Ms. Hollins and Respondent Warden Shelbie Smith filed timely objections. (ECF Nos. 10, 11.)

After conducting a *de novo* review, the Court concludes that none of Ms. Hollins's claims meet the stringent requirements for granting federal habeas relief. Accordingly, Ms. Hollins's Objections (ECF No. 10) are **OVERRULED** and the Warden's Objections (ECF No. 11) are **SUSTAINED**. The R&R is **REJECTED** insofar as it recommends granting relief on Claim One, but is **ADOPTED** and **AFFIRMED** in all other respects. The Petition is **DENIED** and the action is **DISMISSED**. A certificate of appealability is **GRANTED** as to Claim One.

## I. BACKGROUND

The Magistrate Judge laid out the facts and procedural history of this case in the R&R. (R&R, PAGEID # 3602–05.) While the Court incorporates that summary by reference, it also reiterates the most relevant points here.

The State's evidence presented at trial established the following: In 2015, Ms. Hollins was attacked and hit over the head with a beer bottle while visiting Cooley Lounge, a Cleveland-area bar. *State v. Hollins*, No. 107642, 2020 WL 5250391, at *2 (Ohio. Ct. App. Sept. 3, 2020). In the words of the trial court, Ms. Hollins then "orchestrated a plan of attack on [Cooley Lounge] and everyone in it" as a form of "revenge." (Sentencing Trans., ECF No. 7-3, PAGEID # 3527.) Ms. Hollins put her plan in motion by asking a friend to share Cooley Lounge employees' work schedules. *Hollins*, 2020 WL 5250391, at *2. Then, on October 24, 2016, Ms. Hollins drove herself and three others (co-defendants in the State criminal action) to a location near the Lounge. *Id.* at *2. While Ms. Hollins waited in the car, the others entered the Lounge, produced weapons, assaulted several patrons, and killed

bartender Melissa Brinker. *Id.* They returned to the car and informed Ms. Hollins that Ms. Brinker had been killed. *Id.* at *3. Ms. Hollins responded, "that's what she get," and drove away. *Id.* Ms. Hollins was later confronted by a co-defendant who believed Ms. Hollins had misled him when she previously represented that there were no security cameras at the bar. *Id.*

For her role in the attack, Ms. Hollins was indicted on twenty-seven counts of aggravated murder, murder, aggravated robbery, aggravated burglary, felonious assault, and kidnapping. (ECF No. 6-1, PAGEID # 97–118.) A firearm specification was attached to each count, charging that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense." (*Id.*, citing Ohio Rev. Code §§ 2941.141(A), 2941.145(A)). The State pursued the charges and specifications against Ms. Hollins under a theory of aiding and abetting, which required proof that Ms. Hollins "supported, assisted, encouraged, cooperated with, advised, or incited the principal [offender] in the commission of the crime, and that [Ms. Hollins] shared the criminal intent of the principal." *State v. Johnson,* 754 N.E.2d 796, 797 (syllabus) (Ohio 2001). (*See also* ECF No. 7-3, PAGEID # 3430 ("The State is not submitting to you that [Ms. Hollins] is the principal offender in this case . . . She is an aider and abettor, all right? And under the law in the State of Ohio, if you aid and abet the principal offender in the commission of the crime, you are just as guilty as if you are the principal offender[.]").)

Ms. Hollins stood trial and the jury returned a split verdict. (ECF No. 6-1, PAGEID # 120–21.) She was acquitted of all firearm specifications, one count of aggravated murder (Count 1), and one count of aggravated robbery (Count 24). (*Id.*) She was found guilty on three counts of aggravated murder (Counts 2, 3, and 4); one count of murder (Count 27); six counts of aggravated robbery (Counts 5, 6, 12, 15, 18, and 21); seven counts of kidnapping (Counts 7, 8, 13, 16, 19, 22, and 25); two counts of aggravated burglary (Counts 9 and 10); and three counts of felonious assault (Counts 11, 14, and 17).[1] The trial court entered judgment on the convictions and imposed a sentence of life in prison. (*Id.*, PAGEID # 122–25.)

Ms. Hollins appealed the verdict on several grounds, including the three presented here. (*Id.*, PAGEID # 140–97.) Ohio's Eighth District Court of Appeals rejected her arguments and affirmed the jury's verdict. *Hollins*, 2020 WL 5250391. The Ohio Supreme Court denied review. *State v. Hollins*, 159 N.E.3d 287 (table) (Ohio 2020).

Ms. Hollins then filed the instant Petition, alleging that the state proceedings violated her constitutional rights. (Petition, ECF No. 1.) The Petition was referred to the Magistrate Judge, who recommended that the Court grant the Petition in part and deny it in part. Both parties filed timely objections to the R&R.

[1] The remaining counts (Counts 20, 23, and 26) were nolled. *See* Ohio Rev. Code § 2941.31.

## II. STANDARD OF REVIEW

The Court reviews *de novo* those portions of the R&R to which the parties objected. *See* 28 U.S.C. § 636(b)(1). After review, the Court "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") applies to this case. The AEDPA limits the circumstances under which a federal court may grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in a state court proceeding. Specifically, the AEDPA directs courts not to grant a writ unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Section 2254(d)(1) circumscribes a federal court's review of claimed legal errors, while § 2254(d)(2) places restrictions on a federal court's review of claimed factual errors. Only § 2254(d)(1) is at issue in this case.

As the Sixth Circuit recently explained, a petitioner "must show two basic things" to be entitled to habeas relief for a state court's legal error. *Fields v. Jordan,* 86 F.4th 218, 231 (6th Cir. 2023) (*en banc*). First, she "must identify a 'clearly established' principle of 'Federal law' that the 'Supreme Court' has pronounced." *Id.*

(quoting 28 U.S.C. § 2254(d)(1)). A petitioner may "seek relief based on just one source: 'Supreme Court' decisions." *Id.* She may not rely on circuit court decisions. *Id.* And she "may not sidestep the lack of Supreme Court precedent on a legal issue by raising the level of generality at which [she] describe[s] the Court's holdings on other issues." *Id.* (internal quotation and citation omitted).

Second, a petitioner "must show that a state court's denial of relief was 'contrary to' or an 'unreasonable application' of [that] holding." *Id.* (quoting 28 U.S.C. § 2254(d)(1)). "A state court's adjudication of a claim is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts.'" *Stojetz v. Ishee*, 892 F.3d 175, 192 (6th Cir. 2018) (quoting *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014)). A state court decision involves an "unreasonable application" of Supreme Court precedent if the "'state court identifies the correct governing legal principle from the decisions of the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case.'" *Id.* (quoting *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007)). A federal court may not find a state adjudication to be "unreasonable" simply because the state court applied clearly established federal law erroneously or incorrectly. *Williams v. Coyle*, 260 F.3d 684, 699 (6th Cir. 2001) (quoting *Williams v. Taylor*, 529 U.S. 263, 411 (2000)). Rather, for purposes of § 2254(d)(1), an application of a Supreme Court holding "is 'unreasonable' only if the petitioner shows that the state court's ruling

'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Stojetz*, 892 F.3d at 192 (quoting *White v. Woodall*, 572 U.S. 415, 419–20 (2014)).

## III. PETITIONER'S CLAIMS

With those standards in mind, and after careful review of the law and the record, the Court concludes that Ms. Hollins falls outside the narrow eligibility for habeas relief. The Court discusses each of her claims in turn.

### A. Claim One: Inconsistent Verdicts

In Claim One, Ms. Hollins asserts that the jury violated her due process rights by returning inconsistent verdicts. (ECF No. 10, PAGEID # 3641.) That claim fails because Ms. Hollins has not identified any "clearly established" Supreme Court precedent holding that a jury cannot reach inconsistent verdicts. *See Fields,* 86 F.4th at 226 (finding that failure to identify applicable Supreme Court precedent "dooms [petitioner's] claims").

#### 1. Background

Ms. Hollins was convicted of aiding and abetting several offenses that require, as an essential element, use of a firearm. Those "Essential Element Offenses" are aggravated robbery (Counts 5, 12, 15, 18, and 21); aggravated burglary (Count 10); and felonious assault (Counts 14 and 17).[2] But, as Ms. Hollins

[2] As charged, each Essential Element Offense required the use of a "deadly weapon," which the indictment specified as a firearm. *See* Ohio Rev. Code §§ 2911.01(A)(1) (aggravated robbery); 2911.11(A)(2) (aggravated burglary); 2903.11(A)(2) (felonious assault). The Magistrate Judge did not identify felonious assault as an Essential Element Offense, despite its deadly weapon requirement.

points out, the jury acquitted her of all firearm specifications. Ms. Hollins argues that those acquittals represent the jury's "direct determination . . . that [she] was unaware of and in no way participated in the firearm." (ECF No. 10, PAGEID # 3646.) In her view, the specification acquittals negate the firearm element of each Essential Element Offense conviction. (*Id.*) She contends that, by affirming the verdict in spite of that fact, the state courts violated her constitutional right to have a jury find her guilty of each element of an offense beyond a reasonable doubt. (*Id.*, PAGEID # 3641.)

**2. The Magistrate Judge's Report and Recommendation**

The Magistrate Judge agreed with this reasoning and recommended granting the Petition as to the Essential Element Offenses, except the felonious assault counts. (R&R, PAGEID # 3621.)

First, the Magistrate Judge laid out existing federal law on inconsistent verdicts, quoting extensively from *United States v. Randolph*, 794 F.3d 602 (6th Cir. 2015). (*Id.*, PAGEID # 3616–20.) In *Randolph*, the Sixth Circuit vacated a federal conviction on direct appeal because a jury inconsistently answered questions about the essential elements of a single offense on a special verdict form. *Randolph*, 794 F.3d at 606, 608.

Next, the Magistrate Judge turned to the verdicts in Ms. Hollins's case. The R&R explained that a firearm was an essential element of aggravated robbery and

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That is further addressed in response to Ms. Hollins's objection. *See infra,* Part III.A.4.c.

aggravated burglary. (R&R, PAGEID # 3621.) It further explained that, to convict Ms. Hollins on the firearm specifications, the jury needed to conclude

> beyond a reasonable doubt that the defendant had a firearm on or about [her] person or under [] her control while committing the offense and displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the offense.

(*Id.* (quoting ECF No. 7-3, PAGEID # 3360–61.))

Finally, relying on the holding in *Randolph* and the requirements of state law, the Magistrate Judge concluded that Ms. Hollins's convictions for aggravated robbery and aggravated burglary were impermissibly inconsistent with acquittal on the firearm specifications because "[w]here, as here, 'a jury's special verdict finding negates an essential element of the offense, the defendant must be acquitted[.]'" (*Id.* (quoting *Randolph*, 794 F.3d at 620.)) The R&R thus recommended granting the Petition to that extent and ordering a judgment of acquittal as to Counts 5, 10, 12, 15, 18, and 21. (*Id.*) It further recommended denying relief on Claim One as to the remaining counts because "a firearm was not an essential element" of those offenses. (*Id.*, PAGEID # 3621–23.)

### 3. Objections to the Report and Recommendation

Both parties object to the Magistrate Judge's recommendation as to Claim One. While Ms. Hollins largely agrees with the application of *Randolph*, she argues that the Magistrate Judge should have recommended relief on the felonious assault convictions (Counts 14 and 17) as Essential Element Offenses, and that the acquittals on the firearm specifications undermined all of her convictions because a firearm was used to commit all of the offenses. (ECF No. 10.) The Warden contends

that *Randolph* is not clearly established federal law for the purpose of granting habeas relief, and that the verdicts are not impermissibly inconsistent under existing Supreme Court precedent. (ECF No. 11.)

**4. Discussion**

**a) Clearly established federal law does not prohibit inconsistent verdicts.**

Claim One fails because Ms. Hollins has not identified any principle of clearly established federal law that prohibits inconsistent verdicts. It bears repeating that, in a habeas petition, "prisoners [can] seek relief based on just one source: 'Supreme Court' decisions." *Fields,* 86 F.4th at 231 (citing 28 U.S.C. § 2254(d)(1)). Here, Ms. Hollins has not pointed to, and the Court has not identified, a single Supreme Court holding that supports her claim.

On the contrary, the Supreme Court has repeatedly made clear that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris v. Rivera,* 454 U.S. 339, 345 (1981). This notion has become known as *Dunn-Powell.* In *Dunn v. United States,* a prohibition-era case, the defendant was found guilty of keeping liquor for sale but acquitted of possessing and selling liquor. 284 U.S. 390, 391–92 (1932). Dunn argued that his conviction ought to be overturned because the verdicts were inconsistent. *Id.* at 392. The Court rejected his argument, holding that "[c]onsistency in the verdict is not necessary." *Id.* at 393. The Court went on to say that apparently inconsistent verdicts "may have been the result of compromise, or of a mistake on the part of the jury" but that they nevertheless "cannot be upset by speculation or inquiry into such matters." *Id.* at 394.

Fifty years later, in *United States v. Powell*, the defendant was convicted of using a telephone to facilitate the possession and distribution of cocaine but acquitted of conspiring to distribute or possess cocaine. 469 U.S. 57, 59–60 (1984). Powell argued that the verdicts were inconsistent and warranted reversal because "proof that she had conspired to possess cocaine . . . was an element of each of the telephone facilitation counts." *Id.* at 60. Again, the Supreme Court disagreed, holding that inconsistent verdicts were not a ground for relief—"even verdicts that acquit on a predicate offense while convicting on the compound offense." *Id.* at 65. The Court expanded on the good reason for letting "inconsistent" verdicts stand:

> [I]nconsistent verdicts . . . should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.

*Id.*

The Sixth Circuit has applied *Dunn-Powell* in habeas petitions like Ms. Hollins's—that is, petitions challenging Ohio convictions that are arguably inconsistent with acquittal on an accompanying specification. In *Mapes v. Coyle,* the defendant challenged his conviction for aggravated murder because he had been acquitted on two specifications. 171 F.3d 408, 419–20 (6th Cir. 1999). Mapes contended that his acquittal on the specifications was "logically inconsistent" with the jury's guilty verdict on aggravated murder. *Id.* at 419. He argued that "if the state court judgment is allowed to stand, [he] will have been convicted of aggravated

murder although the jury found one of the essential elements lacking." *Id.* The Sixth Circuit held that the argument was foreclosed by *Powell*, reiterating the Supreme Court's conclusion that "inconsistent verdicts are viewed completely separately, and that no conclusion may be drawn from comparing the two." *Id.* at 420. *See also Freeman v. Lebanon Corr. Inst. Superintendent,* No. 98-3784, 1999 WL 801573, at *2 (6th Cir. Sept. 28, 1999) (affirming dismissal of a habeas petition in part because "mere inconsistency in a jury's verdict [between a principal offense and specification] does not warrant habeas corpus relief").

District courts have also applied *Dunn-Powell* to deny habeas relief where there was an apparent inconsistency involving a specification under Ohio law. Most on point is *Davis v. Morgan,* where the petitioner was convicted of aggravated robbery but acquitted of attached firearm specifications. No. 5:15-CV-586, 2016 WL 3950812 (N.D. Ohio May 26, 2016), *report and recommendation adopted,* 2016 WL 3903177 (N.D. Ohio July 19, 2016). The *Davis* court concluded that the purported inconsistency was not cognizable on federal habeas review. *Id.* at *5*; see also Beach v. Moore,* No. 3:06-CV-478, 2007 WL 1567669, at *16 (N.D. Ohio May 24, 2007) (rejecting argument based on an inconsistency between verdicts on aggravated murder and firearm specification); *Bolton v. Harris*, No. 1:18-CV-1164, 2021 WL 1930239, at *28–29 (N.D. Ohio April 7, 2021), *report and recommendation adopted,* 2021 WL 1929117 (same, as to weapons on disability offense and firearm specification).

APPENDIX B

These cases illustrate that clearly established federal law takes no offense to inconsistent verdicts on a principal offense and specification. As the Supreme Court has explained: "Consistency in the verdict is not necessary." *Dunn*, 284 U.S. at 393. The state court did not act unreasonably, then, in failing to vacate Ms. Hollins's convictions on the Essential Element Offenses.[3]

**b) *United States v. Randolph* is distinguishable.**

Both Ms. Hollins and the Magistrate Judge rely heavily on *United States v. Randolph*, 794 F.3d at 602, in arriving at the opposite conclusion. That reliance is misplaced for three reasons.

First, and most importantly, *Randolph* was issued by the Sixth Circuit—not the Supreme Court. Very recently, the Sixth Circuit itself reiterated that a habeas petitioner can "seek relief based on just one source: 'Supreme Court' decisions." *Fields*, 86 F.4th at 231 (quoting 28 U.S.C. § 2254(d)(1)); *see also Kernan v. Cuero*, 583 U.S. 1, 8 (2017) ("[C]ircuit precedent does not constitute 'clearly established

[3] What's more, it is not clear that the jury's verdicts here were inconsistent as a matter of state law. *See, e.g., State v. Arnold*, No. C-220253, 2023 WL 3485506, at *7 (Ohio Ct. App. May 17, 2023) (finding that "[a]n accomplice can be found guilty of felonious assault . . . even without being convicted of a gun specification, if the principal was responsible for using or discharging a weapon, and the accomplice aided and abetted the principal in their crime.") (collecting cases); *cf. State v. Ross*, No. 22096, 2008 WL 1112627, at *4–5 (Ohio Ct. App. April 11, 2008) ("It is well-established by courts in Ohio that 'a finding of guilty on a principal charge but not guilty on a specification attached to the charge does not render the verdict inconsistent and thus invalidate the guilty verdict on the principal charge, at least where legally sufficient evidence supports the guilty verdict on the principal charge.'") (internal citation omitted).

Federal law, as determined by the Supreme Court.'") (further citation omitted). Relying solely on *Randolph* dooms Ms. Hollins's first claim. *Fields*, 86 F.4th at 226.

Second, the verdict reviewed in *Randolph* is distinguishable from the verdict at issue here. In *Randolph*, the jury completed a special verdict form. 794 F.3d at 607. The jury first indicated that the defendant was guilty of a drug trafficking conspiracy charge. *Id.* The form then asked the jury to determine the amount of drugs "involved in the conspiracy"—to which it responded "None." *Id.* The Sixth Circuit reviewed Dunn, Powell, and other precedent on inconsistent verdicts. *Id.*, at 609–11. But the court did not view the special verdict form as "inconsistent verdicts"—instead, it saw "an internal inconsistency in the same count, as it relates to the same defendant, in the same verdict." *Id.* at 610–11. The court vacated the conviction because the jury's response on the special verdict form negated an essential element of the same offense. *Id.* at 613.

Finally, even if Ms. Hollins and the Magistrate Judge were correct that *Randolph* should apply, the AEDPA mandates that this Court defer to the state court's decision. Under the AEDPA, "[i]t is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court decision was erroneous . . . [r]ather, [the state court's decision] must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (internal quotation marks omitted). In Ms. Hollins's case, the state court specifically rejected *Randolph*'s application, and found that any inconsistency between the principal offense convictions and specification acquittals was permissible. *Hollins*, 2020 WL

5250391, at *5. Because the state court's decision was not objectively unreasonable, the AEDPA mandates that this Court defer to it.

In sum, the Magistrate Judge's R&R is **REJECTED** in so far as it recommends granting relief on Counts 5, 10, 12, 15, 18, and 21. It is **ADOPTED** in all other respects as to Claim One.

**c) Ms. Hollins's Objections are Unpersuasive.**

Ms. Hollins makes two arguments in favor of the contrary result. Neither is persuasive. First, Ms. Hollins argues that the Magistrate Judge should have extended his logic to the two felonious assault convictions. (ECF No. 10, PAGEID # 3642–43.) While the Court agrees that the R&R erred by not treating felonious assault as Essential Element Offenses, the error is of no moment because the Court has rejected that portion of the R&R. Second, Ms. Hollins argues that the jury's finding on the firearm specifications undermined all of her convictions because a firearm was used to commit the offenses. (*Id.*, PAGEID # 3643–47.) But the Court has also rejected that underlying line of reasoning. At bottom, clearly established federal law does not impose a duty on a state court to vacate a conviction that is arguably inconsistent with an acquittal on an attached firearm specification. Ms. Hollins, then, cannot show that the state court's decision to affirm the jury's verdicts was contrary to or an unreasonable application of federal law.

**d) Certificate of Appealability**

Although this Court will not grant the relief, Claim One could warrant further consideration on appeal. A petitioner challenging a state conviction in

federal habeas may not appeal a district court's denial of relief without a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1). To receive a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). A substantial showing "means 'showing that reasonable jurists could debate whether' relief should have been granted." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (holding that a COA should be granted when "jurists of reason could disagree with the district court's resolution of [petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further"). The Sixth Circuit has stressed that "a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect." *Moody*, 958 F.3d at 488. In other words, "a certificate is improper if any outcome-determinative issue is not reasonably debatable." *Id.*

Here, reasonable jurists could differ—and have—on whether Ms. Hollins is entitled to any relief on Claim One. *Cf. Powell*, 469 U.S. at 69 n.8 ("Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other."). Accordingly, the Court **GRANTS** Ms. Hollins a COA as to Claim One.

### B. Claim Two: Sufficiency of the Evidence

Ms. Hollins next contends that there is insufficient evidence to support her convictions and objects to the Magistrate Judge's contrary conclusion. (ECF No. 10, PAGEID # 3648–50.) Ms. Hollins advances two arguments in support of her sufficiency objection. First, she argues that there was insufficient evidence to prove that she had the purpose to aid and abet the killing of Ms. Brinker. Second, she contends that her acquittal on all firearm specifications shows that there was insufficient evidence to prove that she had knowledge of a firearm, which is an essential element of numerous offenses. The Warden responds that the sufficiency challenge is a reiteration of the inconsistent-verdicts challenge and is thus non-cognizable on habeas review. (ECF No. 11, PAGEID # 3660, 3667.) The Warden further argues that deference should apply to the state court's sufficiency determination. (*Id.*, PAGEID # 3667–75.)

An insufficient-evidence challenge states a claim under the Fourteenth Amendment's Due Process Clause. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *In re Winship*, 397 U.S. 358, 359 (1970); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990) (*en banc*). For a conviction to be constitutionally sound, every element of the crime must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

*Jackson*, 443 U.S. at 319 (internal citation omitted). *See also Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000). This standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16.

Because this case is governed by the AEDPA, the state court's sufficiency decisions are entitled to two levels of deference:

> First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable.

*Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009) (internal citations omitted) (emphasis in original). Thus, in reviewing the sufficiency of the evidence, a federal habeas court must give deference to the jury's verdict (under *Jackson v. Virginia*) and then to the appellate court's evaluation of that verdict (under the AEDPA). *Id.* Stated another way:

> First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could

> have agreed with the jury. And second, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.

*Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (*per curiam*) (internal quotations and citations omitted). *See also Thomas v. Stephenson*, 898 F.3d 693, 698 (6th Cir. 2018) (noting in light of *Jackson* and the AEDPA that a federal court's "review of a state-court conviction for sufficiency of the evidence is very limited").

Ms. Hollins's first argument—that there is insufficient evidence that she purposely aided and abetted the aggravated murder of Ms. Brinker—cannot overcome the two levels of deference that this Court must apply. Because the state court properly applied the *Jackson* standard in reviewing whether the evidence was sufficient to support the jury's verdict, Ms. Hollins must show that the state court's finding of sufficient evidence was "objectively unreasonable." *Coleman*, 566 U.S. at 651. Ms. Hollins cannot make that showing.

Consider first the "substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16. To be convicted of aiding and abetting aggravated murder, Ms. Hollins must have "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the" murder and she must have "shared the criminal intent of the principal." *Johnson*, 754 N.E.2d at 801. In other words, Ms. Hollins must have acted with the purpose to kill Ms. Brinker. *See* Ohio Rev. Code. § 2903.01(B). That purpose can be inferred if a

homicide occurred during the commission of an aggravated robbery and Ms. Hollins entered into a

> common design with others to commit armed robbery by the use of force, violence, and a deadly weapon, and all the participants [were] aware that an inherently dangerous instrumentality [was] to be employed to accomplish the felonious purpose[.]

*Hollins,* 2020 WL 5250391, at *8 (collecting cases).

Evaluating the evidence introduced at trial in view of those substantive requirements, a rational jury could have concluded that Ms. Hollins shared the purpose of killing Ms. Brinker. Ms. Hollins had been assaulted at Cooley Lounge, and there was evidence that she instigated and planned the events that led to Ms. Brinker's death as a form of revenge. She was with the principal offenders on the night of the murder, drove them to a location near the Lounge, waited for them to return, and then drove them away. One witness testified that after Ms. Hollins learned of Ms. Brinker's death, Ms. Hollins said "That's what she get." Viewing the evidence in the light most favorable to the prosecution, as the Court must, a jury could have rationally concluded that Ms. Hollins aided and abetted Ms. Brinker's purposeful killing.

Ms. Hollins next argues that there was insufficient evidence to support a conviction for any offense involving a firearm, because the jury acquitted her of all firearm specifications. (ECF No. 10, PAGEID # 3648.) But "inconsistent does not mean unconstitutional, even when 'presented as an insufficient evidence argument.'" *Jones v. Lazaroff,* No. 1:14-CV-2549, 2016 WL 93520, at *2 (N.D. Ohio Jan. 8, 2016) (quoting *Powell,* 469 U.S. at 68). Further, Ohio law allows a jury to

conclude that Ms. Hollins did not personally know about or possess the firearm, while still finding that she aided and abetted offenses that required a firearm as an essential element. *See State v. Kimble,* No. 06-MA-190, 2008 WL 852074, at *7–8 (Ohio Ct. App. Mar. 17, 2008) (explaining that a defendant could be convicted of aiding and abetting a crime which requires use of a firearm "even though [the defendant was] unarmed and had no knowledge that the firearm was being used").

Ms. Hollins has not established that the state court's decision on sufficiency of the evidence was objectively unreasonable. Claim Two thus fails.

The Court **ADOPTS** the R&R as to Claim Two and **OVERRULES** Ms. Hollins's Objections. Reasonable jurists could not debate that conclusion, so the Court denies a COA as to Claim Two.

### C. Claim Three: Sixth Amendment Violation

Finally, in Claim Three, Ms. Hollins argues that the trial court violated her rights by denying her the opportunity to question her co-defendant Gary Lake about a statement he made to his attorney. The statement was inadvertently recorded, but purportedly made it "clear Lake was making false/inaccurate statements related to Anita Hollins for his own benefit." (ECF No. 1, PAGEID # 9.) Ms. Hollins contends that the state court's refusal to allow questioning about Mr. Lake's statement violated her Sixth Amendment and due process rights because "Lake was permitted to give testimony against her, known to be false and she was not permitted to cross-examine him." (ECF No. 10, PAGEID # 3650–54.)

The Magistrate Judge determined that there was no constitutional violation. (R&R, PAGEID # 3635.) The Magistrate Judge further concluded that any such violation would have been harmless and thus would not warrant relief. (*Id.*, PAGEID # 3637.) Ms. Hollins objects to those conclusions on three fronts. First, she asserts that there was a Sixth Amendment and due process violation. (ECF No. 10, PAGEID # 3650–51.) She further argues that the violation prejudiced her trial. (*Id.*, PAGEID # 3651–53.) Finally, she disagrees with the state court's determination that Mr. Lake's testimony was protected by the attorney-client privilege. (*Id.*, PAGEID # 3650–51.)

After reviewing Ms. Hollins's Objections, the Court **ADOPTS** the R&R's conclusion that the Third Claim is meritless. Ms. Hollins has not carried her burden of identifying clearly established federal law that guarantees a "cross-examination that is effective in whatever way, and to whatever extent [she] might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

**1. Constitutional Violation**

In her first argument, Ms. Hollins asserts that there was a constitutional violation. To be sure, the Sixth Amendment affords a defendant the right to cross-examine witnesses. U.S. Const. amend. VI; *Van Arsdall*, 475 U.S. at 678 (explaining that "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination") (internal quotation marks, citations, and alterations omitted). And a court's exclusion of relevant evidence can violate the proponent's due process rights—but *only if* the exclusion "offends some principle of

justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (internal quotation and citation omitted). On the other hand, a defendant's right to introduce evidence is not "unfettered"—indeed, he may be prevented from putting on evidence "that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois,* 484 U.S. 400, 410 (1988). *See also Van Arsdall*, 475 U.S. at 679 (noting that trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on [] cross-examination"). In short, the Sixth Amendment "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).

The state trial court did not violate clearly established Federal law when it limited Ms. Hollins's cross-examination of Mr. Lake. To this Court's knowledge, the Supreme Court has not declared a winner when a defendant's Sixth Amendment right comes up against a witness's attorney-client privilege. *See Murdoch v. Castro*, 609 F.3d 983, 993 (9th Cir. 2010) (denying habeas relief in part because "no Supreme Court case has directly addressed the potential conflict between state-law attorney-client privilege and the Confrontation Clause"). What's more, the trial court did not forbid Ms. Hollins from cross-examining Mr. Lake—it simply limited questioning of him about privileged communications. The court did not violate Ms. Hollins's rights in doing so.

**2. Prejudice**

Even if there were a constitutional error, relief would still not be warranted. On habeas review, a petitioner must show that a Sixth Amendment error resulted in "actual prejudice" to obtain relief, which requires "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala,* 576 U.S. 257, 267–68 (2015) (internal quotation and citations omitted). Because ample other evidence supports Ms. Hollins's conviction, any error caused by the trial court's failure to allow cross-examination on Mr. Lake's privileged communication was harmless.

Ms. Hollins argues that she has shown actual prejudice, citing *James v. Illinois,* 493 U.S. 307 (1990). (ECF No. 10, PAGEID # 3651–53.) In *James*, the Supreme Court determined that evidence obtained in violation of the Fourth Amendment could not be used by the prosecution to impeach a defense witness. 493 U.S. at 319–20. Here, however, Ms. Hollins' makes an argument under the Sixth Amendment, not the Fourth. She is not permitted to "sidestep the lack of Supreme Court precedent on a legal issue by raising the 'level of generality' at which [she] describes the Court's holdings on other issues." *Fields,* 86 F.4th at 232. For that reason, *James* is unpersuasive.

**3. Applicability of the Attorney Client Privilege**

Finally, Ms. Hollins argues that the state court incorrectly determined that the attorney-client privilege applied to Mr. Lake's testimony. (ECF No. 10, PAGEID # 3651.) But that issue is not cognizable on federal habeas review. *See Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988) (articulating "the clearly established rule

that errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding"). *Cf. Sanborn v. Parker*, 629 F.3d 554, 575 (6th Cir. 2010) (noting that "a violation of the attorney-client privilege is not *itself* a 'violation [ ] of the United States Constitution or its laws and treaties,' as is required by § 2254 before we may issue habeas on a given claim").

Claim Three is also unsuccessful. The Court **ADOPTS** the Magistrate Judge's R&R as to Claim Three and **OVERRULES** Ms. Hollins' objections. Reasonable jurists could not debate that conclusion, so the Court denies a COA.

## IV. CONCLUSION

For the reasons set forth above, Ms. Hollins's Objections (ECF No. 10) are **OVERRULED** and the Warden's Objections (ECF No. 11) are **SUSTAINED**. The R&R is **REJECTED** as to Claim One insofar as it recommends directing acquittal on Counts 5, 10, 12, 15, 18, and 21. It is **ADOPTED** and **AFFIRMED** in all other respects. The Petition is **DENIED** as to all Claims and the action is **DISMISSED**. Nonetheless, the Court **GRANTS** a certificate of appealability as to Claim One.

**IT IS SO ORDERED.**

/s/ Sarah D. Morrison
**SARAH D. MORRISON**
**UNITED STATES DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| ANITA HOLLINS,<br><br>Plaintiff,<br><br>vs.<br><br>WARDEN SHELBIE SMITH,<br><br>Defendant. | ) | CASE NO. 1:21-CV-02338-CEF<br><br>JUDGE CHARLES ESQUE FLEMING<br>UNITED STATES DISTRICT JUDGE<br><br>MAGISTRATE JUDGE<br>JONATHAN D. GREENBERG<br><br>**REPORT & RECOMMENDATION** |

This matter is before the magistrate judge pursuant to Local Rule 72.2. Before the Court is the Petition of Anita Hollins ("Hollins" or "Petitioner"), for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Hollins is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to journal entry of sentence in the case *State v. Hollins*, Cuyahoga Court of Common Pleas Case No. CR-17-616120-E. For the following reasons, the undersigned recommends that the Petition be GRANTED IN PART AND DENIED IN PART.

## I. Summary of Facts

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, factual determinations made by state courts are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012); *Montgomery v. Bobby*, 654 F.3d 668, 701 (6th Cir. 2011). The state appellate court summarized the facts underlying Hollins' conviction as follows:

> {¶ 3} Hollins, together with Dana Thomas ("Thomas"), Dwayne Sims ("Sims"), Nigel Brunson ("Brunson"), and Garry Lake ("Lake"), were indicted for aggravated murder, murder, aggravated robbery, kidnapping, felonious assault, and aggravated burglary in connection with the October 24, 2016 killing of Cooley



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Lounge bartender Melissa Brinker ("Brinker"), and the robbery of patrons at the bar. As is relevant herein, Hollins was charged with aggravated murder in violation of R.C. 2903.01(A), three counts of aggravated murder in violation of R.C. 2903.01(B), six counts of aggravated robbery in violation of R.C. 2911.01(A)(1), aggravated robbery in violation of R.C. 2911.01(A)(3), kidnapping in violation of R.C. 2905.01(A)(3), six counts of kidnapping in violation of R.C. 2905.01(A)(2), aggravated burglary in violation of R.C. 2911.11(A)(1), aggravated burglary in violation of R.C. 2911.11(A)(2), felonious assault in violation of R.C. 2903.11(A)(1), five counts of felonious assault in violation of R.C. 2903.11(A)(2), and murder in violation of R.C. 2903.02(B), all with one-year and three-year firearm specifications.

{¶ 4} Lake subsequently entered into a plea agreement with the state that included the requirement that he testify at trial. Thomas waived a jury trial, asking the court to decide the charges against him. The charges against the remaining defendants, Hollins, Brunson, and Sims, proceeded to trial in June 2018. As the matter commenced, Hollins moved to introduce evidence of statements made by Lake, with his attorney and investigator, that unbeknownst to Lake's counsel, were recorded during a break in a meeting with the police. Hollins argued that the statements were exculpatory as to her and were also admissible under the crime-fraud exception to the attorney-client privilege. In opposition, the state maintained that the statements were privileged and that the content did not show evidence of a crime or fraud. After reviewing the recording and suppression hearing testimony from Lake, his trial counsel, and Cleveland Police Detective Kathleen Carlin ("Det. Carlin"), the trial court ruled that the statements remained privileged and could not be used to cross-examine Lake.

{¶ 5} Proceeding to the trial on the merits, the evidence presented by the state indicated that in December 2015, Hollins and her then-boyfriend, Marcus Williams ("Williams") were involved in an argument at the Cooley Lounge. As the fight escalated, Hollins was struck in the head with a beer bottle and required medical attention. Hollins accused bartender Jane Svec ("Svec") of setting up the incident, and Hollins was banned from the bar after that incident. The individuals who struck Hollins were charged with felonies. Svec testified at their trial, and the assailants were subsequently acquitted.

{¶ 6} By the fall of 2016, Hollins was dating Brunson. Brunson, Sims, and Thomas were friends, and Lake and Thomas were raised together. Approximately one week before the murder, Holly Smith ("Smith"), a friend of Hollins, received a Facebook post asking who was working at Cooley Lounge. Smith did not know who posted the question but believed it might have been Hollins. Additionally, Svec changed her work schedule shortly before this posting.

{¶ 7} On the night of October 24, 2016, Lake needed a ride home from a party. Hollins picked him up. Brunson, Thomas, Sims, and Hollins's two children were in the car. Lake testified that he fell asleep during the car ride. When he awoke, Hollins had parked the car at a playground in the area of West 132nd Street in

Cleveland, in the vicinity of the Cooley Lounge. Brunson, Thomas, and Sims were no longer in the car.

{¶ 8} Meanwhile, Patrick Lorden ("Lorden"), Melissa Morton ("Morton"), James Fox ("Fox"), and Thomas Bernard ("Bernard") were patrons at the bar, and Brinker was bartending. Patron Thomas Platt, a.k.a. "Andy," was assisting Brinker by emptying the garbage and performing other tasks in exchange for free drinks. The evidence presented at trial indicated that two other individuals subsequently entered the bar, sat together, and ordered a drink. The two requested a cup to share it, and both men drank from the cup. A third man entered the bar. He later threw the cup away, the cup that the other two men drank from, placing it in a receptacle that Andy had recently emptied. The third man joined the first two men at the bar. All three men suddenly produced weapons. The men began robbing and assaulting the patrons. Morton attempted to call the police, but one of the assailants pistol-whipped her. During the attack, Brinker was forced to the rear of the bar and shot by one of the men who requested a drink. The other man who requested a drink also went to this area and shot her.

{¶ 9} After the gunmen fled, the patrons discovered Brinker dead in the back of the bar. The police subsequently retrieved video surveillance evidence and also retrieved the cup that the men drank from before the attack. DNA analysis of the cup established two profiles. Analysis showed that Thomas is 4.44 million times more likely than a coincidental match to an unrelated African-American, and Brunson is 130 million times more likely than a coincidental match to an unrelated African-American person. Police also linked Sims to the attack.

{¶ 10} According to Lake, when the three men returned to Hollins's car, Thomas said that he had to shoot the bartender in the face because she saw him. Brunson laughed about having to "finish her off," and Hollins said "that's what she get," before driving them away from the scene.

{¶ 11} Police recovered .380- and .45-caliber casings from this area. Lorden's partially burned wallet and Brinker's partially burned purse were recovered from East 80th Street in Cleveland, near the homes of Brunson, Sims, and Lake.

{¶ 12} Cell phone records indicated that Hollins and Brunson were together at approximately 11:15 p.m., prior to the murder. Thomas's phone was also in this same area. Brunson's phone made three calls to the Cooley Lounge, ostensibly to conceal the identity of the caller from the recipient of the call. By 11:38 p.m., cell phone location data shows Thomas, Brunson, and Sims near the Cooley Lounge.

{¶ 13} After the attack, Thomas confronted Hollins and said that she told him that there were no cameras at the bar. At that point, Hollins said that she was going to sue them civilly in connection with the December 2015 incident when she was attacked.

> {¶ 14} The state also presented evidence that prior to trial, Hollins had a conversation with Williams in which she discusses "blow[ing] down on" Smith prior to her testimony, and Williams later responds that "blew down on her like you told me to." According to Det. Carlin, this phrase conveys a threat or intimidation short of physical violence.
>
> {¶ 15} Hollins was acquitted of aggravated murder in violation of R.C. 2903.01(A), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), and all firearm specifications, but she was convicted of all remaining charges. The court merged numerous convictions and Hollins was sentenced to life without parole and various concurrent terms.[]

*State v. Hollins*, 2020-Ohio-4290, 2020 WL 5250391, at **1-3 (Ohio Ct. App. Sept. 3, 2020) (footnote omitted).

## II. Procedural History

### A. Trial Court Proceedings

On April 25, 2017, the Cuyahoga County Grand Jury indicted Hollins on the following charges: one count of aggravated murder in violation of O.R.C. § 2903.01(A), (Count 1); three counts of aggravated murder in violation of O.R.C. § 2903.01(B) (Counts 2, 3, and 4); six counts of aggravated robbery in violation of O.R.C. § 2911.01(A)(1) (Counts 5, 12, 15, 18, 21, and 24); one count of aggravated robbery in violation of O.R.C. § 2911.01(A)(3) (Count 6); kidnapping in violation of O.R.C. § 2905.01(A)(3) (Count 7); six counts of kidnapping in violation of O.R.C. § 2905.01(A)(2) (Counts 8, 13, 16, 19, 22, and 25); aggravated burglary in violation of O.R.C. § 2911.11(A)(1) (Count 9); aggravated burglary in violation of O.R.C. § 2911.11(A)(2) (Count 10); felonious assault in violation of O.R.C. § 2903.11(A)(1) (Count 11); five counts of felonious assault in violation of O.R.C. § 2903.11(A)(2) (Counts 14, 17, 20, 23, and 26); and one count of murder in violation of O.R.C. § 2903.02(B) (Count 27), all with one-year and three-year firearm specifications. (Doc. No. 6-1, Ex. 1.) Hollins entered pleas of not guilty to the charges. (Doc. No. 6-1, Ex. 2.)



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The case proceeded to jury trial on June 12, 2018. (Doc. No. 7-1.) On July 3, 2018, the jury returned its verdict, finding Hollins guilty on Counts 2-19, 21, 22 25 and 27, not guilty on Counts 1 and 24, and not guilty on all firearm specifications. (Doc. No. 6-1, Ex. 3, 13.) Counts 20, 23, and 26 were nolled. (*Id.*)

On August 24, 2018, the state trial court held a sentencing hearing. (Doc. No. 6-1, Ex. 4.)[1] The trial court found Counts 2, 3, 4, 7-11, and 27 merged for sentencing purposes, and the State elected to proceed with sentencing on Count 2 (Aggravated Murder). (*Id.*) The trial court sentenced Hollins to life in prison without parole on Count 2. (*Id.*) The trial court sentenced Hollins to seven years in prison on Count 5, seven years in prison on Count 12, six years in prison on Count 14, seven years in prison on Count 15, two years in prison on Count 17, seven years in prison on Count 18, seven years in prison on Count 21, and seven years in prison on Count 25, all to run concurrent with the sentence on Count 2. (*Id.*)

**B. Direct Appeal**

Hollins, through counsel, filed a timely notice of appeal to the Eighth District Court of Appeals. (Doc. No. 6-1, Ex. 5.) In her appellate brief, Hollins raised the following assignments of error:

> I. The trial court erred when it accepted jury verdicts with internal inconsistencies within the same counts for complicity requiring that this reviewing court must enter an acquittal for inconsistent verdicts in each count of the indictment where Appellant was found guilty of aiding and abetting the underlying offense but not guilty of aiding and abetting the firearm specifications. This Court must reconsider its prior holdings regarding inconsistent verdicts based upon applicable changes to the law and also upon the issue of a complicity conviction.
>
> II. Appellant was denied a fair trial and due process of law and the trial court erred when it failed to grant Appellant's request for a mistrial by reasoning that if it did not grant the mistrial a new trial would be ordered on appeal when counsel for co-defendant Brunson stated in his closing argument that non-testifying co-defendant Dwayne Sims entered a plea mid-trial in direct conflict with the trial court's prior curative instruction given to the jury.

[1] The state appellate court *sua sponte* remanded the case to the trial court for a *nunc pro tunc* correction to the judgment entry of sentence to address clerical errors regarding Counts 20 and 28. (Doc. No. 6-1, Ex. 13.)



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III. Appellant's convictions must be vacated where she was not found guilty of each and every element of the offenses charged where the jury verdict form(s) fail to indicate the offenses took place in Cuyahoga County, Ohio or otherwise indicate any finding as to venue.

IV. Appellant's convictions were not supported by sufficient evidence.

V. Appellant's convictions were aginst [sic] the manifest weight of the evidence.

VI. The trial court erred when it prohibited Appellant from using fraudulent statements of Gary Lake where he was encouraged to lie to cross-examine him for purposes of impeachment.

VII. Appellant's trial counsel was ineffective by failing to directly appeal the trial courts [sic] suppression of fraud and statements of Gary Lake from being introduced at trial as privileged communications.

VIII. Appellant's trial counsel was ineffective in requesting a single instruction on aiding and abetting be inserted before Count One and for failing to have Appellant evaluated for her mental health.

(Doc. No. 6-1, Ex. 6.) The State filed a brief in response. (Doc. No. 6-1, Ex. 7.)

On September 3, 2020, the state appellate court affirmed Hollins' convictions. (Doc. No. 6-1, Ex. 8.) *See also State v. Hollins*, 2020-Ohio-4290, 2020 WL 5250391, at *1.

On October 8, 2020, Hollins, through counsel, filed a timely Notice of Appeal with the Supreme Court of Ohio. (Doc. No. 6-1, Ex. 9.) In her Memorandum in Support of Jurisdiction, Hollins raised the following Propositions of Law:

I. Where a defendant is convicted of an offense resulting in the death or injury of another by gunshot or requiring as an element of the offense the use or possession of a firearm/deadly weapon a finding of not guilty on an accompanying one and three year firearm specification results in a jury verdict that when read in its entirety failed to prove an essential element of the charge/offense beyond a reasonable doubt and requires an acquittal be entered on the predicate offense due to inconsistent verdicts.

II. Appellant's convictions were not supported by the evidence and unjustly resulted in a life sentence being imposed where here [sic] convictions stemmed from death by gunshot wound or otherwise the possession of a firearm and Appellant was found not guilty of all firearm specifications.

III. A criminal defendant is constitutionally entitled to confront a witness against her and Appellant was denied that right by precluding Appellant from questioning or



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impeaching witness Lake on cross-examination with fraudulent/false statements that were not privileged or, if privileged, could not act to bar Appellant's confrontation rights.

(Doc. No. 6-1, Ex. 10.) The State filed a waiver of memorandum in response. (Doc. No. 6-1, Ex. 11.)

On December 15, 2020, the Supreme Court of Ohio declined to accept jurisdiction of the appeal pursuant to S.Ct. Prac.R. 7.08(B)(4). (Doc. No. 6-1, Ex. 12.)

**C. Federal Habeas Petition**

On December 13, 2021, Hollins, through counsel, filed a Petition for Writ of Habeas Corpus in this Court and asserted the following grounds for relief:

**GROUND ONE**: Internal inconsistent verdicts (same count), Found not guilty of firearm specification but guilty of underlying offenses which were committed via shooting from firearm, complicity; violation(s) of due process, jury finding guilt beyond a reasonable doubt on all elements (sufficiency), double jeopardy/collateral estoppel, Fifth, Sixth and Fourteenth Amendments. Right to be acquitted where jury special verdict finding negates an essential element of an offense charged.

**Supporting Facts**: On or about April 25, 2017, co-defendants were alleged to have gone into the Cooley Lounge and committed several offenses through threat of firearm. The most serious was the murder of a victim bartender who was shot and killed by a co-defendant. The offense was committed with the element of shooting from/possessing a firearm. Anita Hollins was not in the bar but was charged under a theory of complicity/aiding and abetting. After a jury trial Hollins was convicted of several offenses which were required to be committed by using a firearm. She was found not guilty of all firearm specifications and aiding and abetting all firearm specifications. The jury questions confirmed it knew complicity applied to the specifications.

**GROUND TWO**: Anita Hollins' convictions were not supported by the evidence and unjustly resulted in imposition of a life sentence where her conviction(s) stemmed from murder via gunshot/possession of firearm and she was founf [sic] not guilty of possessing/fireing [sic] a firearm. Violation of Due process, manifest injustice, foreknowledge of firearm, sufficient evidence, Rosemund v. United States, Sixth Amendment.

**Supporting Facts**: Anita Hollins was convicted of all offenses as an aider and abetter. The offenses were required to be committed, as indicted or as an element thereof, by the use of a firearm which Hollins did not possess but could only be found guilty of as an aider and abetter. Nevertheless, the jury was not instructed



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> that to be convicted as an aider and abetter related to a firearm the state of Ohio was required to prove that Hollins had advanced knowledge that one of the cohorts would be armed. Here, there was no such knowledge set forth. The instructions did not require the jury to find the necessary knowledge that Hollins had prior knowledge that a firearm would be used by another. Anita Hollins was a [sic] best in the vehicle, she never went into the bar or had any idea what was to happen therein.

**GROUND THREE**: Violation of Constitutional right to compel, cross-examine and impeach witness (Lake), false statements, due process, Fifth, Sixth and Fourteenth Amendments, confrontation clause.

> **Supporting Facts:** The state of Ohio called witness Lake to testify knowing he would be making false statements. There was a recording of an interview between witness Lake and his attorney durring [sic] a break from his proffer statement where it was clear Lake was making false/inaccurate statements related to Anita Hollins for his own benefit. Durring [sic] Lake's testimony against Hollins she was precluded from using his prior statements on cross-examination to impeach or otherwise to question Lake precluding her from permissibly confronting the witness against her. Lake's claim of attorney-client privilege cannot take priority to Constitutional rights of defendant, Hollins. [sic]

(Doc. No. 1.)

On March 5, 2022, Warden Shelbie Smith ("Respondent") filed the Return of Writ. (Doc. No. 6.) Hollins filed a Traverse on April 6, 2022. (Doc. No. 8.)

## III. Review on the Merits

### A. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 337 (1997). The relevant provisions of AEDPA state:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or



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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

Clearly established federal law is to be determined by the holdings (as opposed to the dicta) of the United States Supreme Court. *See Parker v. Matthews*, 567 U.S. 37, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012); *Renico v Lett*, 559 U.S. 766, 130 S.Ct. 1855, 1865-1866 (2010); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Shimel v. Warren,* 838 F.3d 685, 695 (6th Cir. 2016); *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir.2005). Indeed, the Supreme Court has indicated that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court." *Parker*, 567 U.S. at 48-49; *Howes v. Walker*, 567 U.S. 901, 132 S.Ct. 2741, 183 L.Ed.2d 612 (2012). *See also Lopez v. Smith*, —— U.S. ——, 135 S.Ct. 1, 4, 190 L.Ed.2d 1 (2014) (per curiam) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'" (quoting *Marshall v. Rodgers*, 569 U.S. 58, 133 S.Ct. 1446, 1450, 185 L.Ed.2d 540 (2013))).

A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. at 413. By contrast, a state court's decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id. See also Shimel*, 838 F.3d at 695. However, a federal district court may not find a state court's decision unreasonable "simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly."



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*Williams v. Taylor,* 529 U.S. at 411. Rather, a federal district court must determine whether the state court's decision constituted an objectively unreasonable application of federal law. *Id.* at 410-12. "This standard generally requires that federal courts defer to state-court decisions." *Strickland v. Pitcher*, 162 F. App'x 511, 516 (6th Cir. 2006) (citing *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

In *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's decision," relief is precluded under the AEDPA. *Id.* at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[ ] the reasonableness question as a test of its confidence in the result it would reach under *de novo* review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 785. The Court noted that Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Id.* (internal quotation marks omitted). Therefore, a petitioner "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786–87. This is a very high standard, which the Supreme Court readily acknowledged. *See id.* at 786 ("If this standard is difficult to meet, that is because it is meant to be.")

**1. Ground One**

In Ground One, Hollins asserts a variety of constitutional violations stemming from what she describes as "internal inconsistent verdicts (same count)" as a result of being found "not guilty of firearm specification but guilty of underlying offenses which were committed via shooting from firearm." (Doc. No. 1 at 6.)

In response, Respondent asserts that to the extent Hollins argues the state appellate court "misapplied or erred in its interpretation of Ohio law in overruling his [sic] direct appeal," such a claim is non-cognizable on federal habeas review and this Court "is bound by, and must defer to, to [sic] state appellate court's ruling on any such state-law issues." (Doc. No. 6 at 11.) Respondent argues that Hollins' argument regarding the unconstitutionality of "allegedly inconsistent verdicts" was "definitively rejected by the United States Supreme Court" in *Dunn v. United States*, 284 U.S. 390, 393 (1932), which was later "reaffirmed in *United States v. Powell*, 469 U.S. 57, 66 (1984)." (*Id.* at 12-13.) Respondent maintains the state appellate court identified the applicable United States Supreme Court precedent "and reasonably rejected" Hollins' inconsistent verdict claim. (*Id.* at 13.) Therefore, Hollins cannot prevail on this claim. (*Id.* at 17-18.)

In reply, Hollins argues:

> Petitioner's first claim is that she was found guilty under an inconsistent jury verdict within the same count where she was found guilty of aiding and abetting murder by firearm but not guilty by special verdict therein of adding and abetting the possession or firing of the actual firearm. The inconsistent verdicts are within the same count of the indictment and not separate counts which could be separately charged and required that the court enter an acquittal on her behalf as the jury findings created an internal impossibility. The same claim is also presented to all of Petitioner's convictions which required a firearm be used under the facts set forth and otherwise as an element of the underlying offense where Petitioner was found not guilty of aiding and abetting on all associated firearm specifications making special findings of fact related to her possession or use of a firearm contained separately within each count. Continued detention of Petitioner violates several rights guaranteed her by the Constitution of the United States of America, violates her right to Due Process of law, a fair proceeding, protection against double jeopardy/collateral estoppel, her right to be acquitted where a special jury finding negates and/or makes void an essential element of the offense, her right against cruel and unusual punishment guaranteed by the Eighth Amendment and otherwise her rights afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and otherwise.

(Doc. No. 8 at 11.) Relying on the Sixth Circuit's decision in *United States v. Randolph*, 794 F.3d 602, 612-13 (6th Cir. 2015), Hollins asserts that the jury's findings on the firearm specifications negated an essential element of the offenses charged in the same count, which "is only open to one interpretation: that



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the prosecution failed to prove [her] guilty of the charged offense beyond a reasonable doubt." (*Id.* at 11-12.) Hollins argues that she must therefore be acquitted and released. (*Id.* at 12-13, 25.)

Hollins raised an inconsistent verdict claim to both the state appellate court and the Supreme Court of Ohio. (Doc. No. 6-1, Ex. 6, 10.) The state appellate court considered this claim on the merits and rejected it as follows:

> {¶ 16} In the first assigned error, Hollins argues that the acquittals for aiding and abetting on the firearm specifications creates a fatal inconsistency with her convictions for aiding and abetting on the principal offenses. In support of this assigned error, Hollins cites *United States v. Randolph*, 794 F.3d 602 (6th Cir. 2015), *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990), and *State v. Capp*, 8th Dist. Cuyahoga No. 102919, 2016-Ohio-295.
>
> {¶ 17} "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Lovejoy*, 79 Ohio St. 3d 440, 1997-Ohio-371, 683 N.E.2d 1112, paragraph one of the syllabus.
>
> {¶ 18} In *State v. Perryman*, 49 Ohio St.2d 14, 25-26, 358 N.E.2d 1040 (1976), the jury found the accused guilty of aggravated murder and aggravated robbery, but found the accused not guilty of a specification involving aggravated robbery. In rejecting the claim of a fatal inconsistency, the Ohio Supreme Court stated:
>
> > The sentence was not based on an alleged inconsistency. The guilty verdict for count one reflects the jury's determination that appellant was guilty of the felony-murder. The determinations rendered as to the respective specifications cannot change that finding of guilty. Furthermore, as indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge[.]
>
> *Id.* at 26.
>
> {¶ 19} Later, in *Koss*, the appellant argued the jury's guilty verdict of voluntary manslaughter was inconsistent with the not guilty attendant firearm specification, and the Ohio Supreme Court concluded the verdicts were inconsistent. *Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970.



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{¶ 20} However, appellate courts, including this court, have followed the rationale in *Perryman. See State v. Amey*, 2018-Ohio-4207, 120 N.E.3d 503 (8th Dist.). This court stated:

> Amey relies on *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990), in support of his inconsistent-verdicts argument. In that case, the Ohio Supreme Court held that an acquittal on a gun specification but the finding of guilt on the principal offense of voluntary manslaughter for causing the death of a victim with the firearm were inconsistent, and therefore, the voluntary manslaughter conviction was reversed. There was no legal authority or analysis in support of the conclusion reached in that case. *Koss*, in fact, contradicted the Ohio Supreme Court's earlier conclusion on inconsistency between the principal charge and the associated specification. *State v. Perryman*, 49 Ohio St.2d 14, 25-26, 358 N.E.2d 1040, paragraph 3 of the syllabus (1976) ("Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid.").
>
> Although some courts valued *Koss* based on recency, that support has faded. *State v. Given*, 7th Dist. Mahoning No. 15 MA 0108, 2016-Ohio-4746, ¶ 73-75, citing *Perryman* (noting the conflict created by *Koss* and deeming the decision in *Koss* to be of limited value); *see also State v. Lee*, 1st Dist. Hamilton No. C-160294, 2017-Ohio-7377, ¶ 43; *State v. Ayers*, 10th Dist. Franklin No. 13AP-18, 2013-Ohio-5601, ¶ 24. It may be time to consider *Koss* as nothing more than an outlier; however, any such conclusion would be outside the scope of this appeal.

*Id.* at ¶ 17-18.

{¶ 21} Moreover, this court has consistently held that a not guilty verdict on firearm specifications does not present a fatal inconsistency with a guilty verdict for the principal charge. *See, e.g., State v. Jackson*, 8th Dist. Cuyahoga No. 105541, 2018-Ohio-2131, ¶ 8; *State v. Williams*, 8th Dist. Cuyahoga No. 95796, 2011-Ohio-5483; *State v. Hardware*, 8th Dist. Cuyahoga No. 93639, 2010-Ohio-4346, ¶ 17, citing *State v. Fair*, 8th Dist. Cuyahoga No. 89653, 2008-Ohio-930; *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375. As this court explained in *Fair*, "[i]t is entirely proper for the jury to find appellant guilty of aggravated robbery without a firearm specification." *Id.* at ¶ 26.

{¶ 22} Other courts have also reached the same conclusion and applied *Perryman. See State v. Smith*, 2d Dist. Montgomery No. 26116, 2015-Ohio-1328, ¶ 17; *Ayers*, 2013-Ohio-5601, ¶ 24 ("[A]ppellate courts have limited the precedential impact of the *Koss* decision to cases involving voluntary manslaughter."); *State v. Davis*, 6th Dist. Lucas No. L-00-1143, 2002-Ohio-3046, ¶ 29; *State v. Glenn*, 1st Dist. Hamilton No. C-090205, 2011-Ohio-829, ¶ 70; *State v. Ortega*, 2d Dist.



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Montgomery No. 22056, 2008-Ohio-1164, ¶ 17; *State v. Robinson*, 6th Dist. Lucas No. L-02-1314, 2005-Ohio-324, ¶ 42.

{¶ 23} Hollins insists, however, that her convictions on the principal charges must be reversed due to the acquittals of the specifications in light of language in *Capp* describing firearm specifications as a "sentencing enhancement." *Id.*, 2016-Ohio-295, ¶ 27. However, in *Capp*, the defendant was convicted of one of the firearm specifications; the core issue is whether the conviction for the specification could be supported on a theory of aiding and abetting. As this court made clear, the sentence was enhanced due to the specification. *Id.* This case does not render the specification and the principal charge the same charge for purposes of conducting the inconsistency analysis. Moreover, this court rejected this same argument in *Robinson,* explaining:

> Robinson argues that based upon the Ohio Supreme Court's holding in *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, [stating that completely dependent upon, the existence of the underlying criminal charge] a firearm specification is considered dependent on the underlying charge, and thus the two should be considered the same count. This court, however, has consistently rejected this argument. * * *.
>
> Here, the evidence supported the felony murder, felonious assault, and the discharge of a firearm on or near a prohibited place, the court instructed on the specifications independently and separately, and the convictions on these counts were not dependent upon a finding on the specifications. Accordingly, consistent with this court's precedent, we overrule the tenth assignment of error.

*Robinson*, 2013-Ohio-4375, ¶ 102-103.

{¶ 24} Here, it is not inconsistent for the jury to conclude that Hollins participated in the offenses for which she was convicted, and also conclude that she did not possess the firearm. *Accord Smith*, 2015-Ohio-1328, ¶ 17; *Ayers*, 2013-Ohio-5601, ¶ 17 *State v. Ortega*, 2d Dist. Montgomery No. 22056, 2008-Ohio-1164, ¶ 17-20; *State v. Robinson*, 6th Dist. Lucas No. L-02-1314, 2005-Ohio-324, ¶ 42.

{¶ 25} Similarly, *Randolph* is inapposite. In that case in which the jury verdict determined both that the defendant engaged in drug conspiracy yet found that "none of the charged drugs were "involved in" the conspiracy." *Id.*, 794 F.3d at 607. In vacating this conviction, the court remarked that because the jury found that none of the charged drugs were "involved in" the conspiracy, it necessarily followed that Randolph could not be guilty of the charged conspiracy. *Id.* at 611.

{¶ 26} Here, however, the acquittal is not inconsistent with the jury's finding that Hollins aided and abetted the commission of the aggravated murder and other offenses. It is entirely consistent for the jury to conclude both that Hollins aided and abetted in the murder but did not possess the firearm. The evidence indicated



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> that Hollins put the plan in motion following the unsuccessful prosecution of her assailants during the prior attack at the Cooley Lounge, that she drove them to the bar, led them to believe there were no cameras, waited for them nearby and drove them from the scene, but did not personally possess the firearms.
>
> {¶ 27} In accordance with all of the foregoing, the first assigned error lacks merit.

*State v. Hollins*, 2020-Ohio-4290, 2020 WL 5250391, at **3-5.

To the extent Hollins argues the state courts misapplied or erred in interpreting Supreme Court of Ohio precedent, it is well established that, in conducting habeas review, "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). As such, the Supreme Court has explained "it is not the province of a federal habeas court to reexamine state-court decisions on state-law questions." *Id.* at 67-68. *See also Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007); *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). Stated another way, a state court's interpretation of state law is binding upon a federal habeas court. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005); *Bibbs v. Bunting*, 1:16-cv-02069, 2017 WL 4083558, at *15 (N.D. Ohio May 17, 2017). *See also Thompson v. Williams*, 685 F. Supp. 2d 712, 721 (N.D. Ohio 2010) (stating "a federal court may not second-guess a state court's interpretation of its own procedural rules.") (citing *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir.1988)). "Federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 765, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). *See also Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law.")

In *Randolph*, the Sixth Circuit explained the Supreme Court's precedent regarding inconsistent verdicts:

> Our analysis begins with an explanation of inconsistent verdicts. The Supreme Court first opined on inconsistent verdicts in *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932). In *Dunn,* the defendant was indicted on three counts: (1) maintaining a common nuisance by keeping for sale at a specified place



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intoxicating liquor; (2) unlawful possession of intoxicating liquor; and (3) unlawful sale of such liquor. *Id.* at 391, 52 S.Ct. 189. He was convicted of the first count, but acquitted on counts two and three. *Id.* at 391–92, 52 S.Ct. 189. The defendant argued that his conviction of count one should be overturned because it was inconsistent with being acquitted of counts two and three. *Id.* at 392, 52 S.Ct. 189. But the Court rejected the defendant's argument, explaining that "[c]onsistency in the verdict is not necessary." *Id.* at 393, 52 S.Ct. 189. The Court held that, where separate counts charge separate crimes in a single indictment, the separate counts are treated the same as separate indictments separately tried. *Id.* The Court recognized that a "verdict may have been the result of compromise, or of a mistake on the part of the jury," but that "verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 394, 52 S.Ct. 189.

The *Dunn* holding was applied in *United States v. Dotterweich,* where a verdict in a joint trial that found the president of a corporation guilty, while simultaneously finding the corporation not guilty, was found to be permissible. 320 U.S. 277, 278–79, 64 S.Ct. 134, 88 L.Ed. 48 (1943). The Court, citing *Dunn,* explained: "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." *Id.* And again *Dunn* was applied in the Court's decision in *Harris v. Rivera,* where the defendant unsuccessfully challenged his conviction of robbery and related offenses on the grounds that a co-defendant was acquitted of the same offenses after a joint bench trial. 454 U.S. 339, 340, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981). The Court reasoned, "[e]ven assuming that this acquittal was logically inconsistent with the conviction of respondent, respondent, who was found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground to complain that [a co-defendant] was acquitted." *Id.* at 348, 102 S.Ct. 460.

The Court revisited *Dunn* in *United States v. Powell,* 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). In *Powell,* the defendant was indicted by a grand jury on 15 counts of violations of federal law related to her involvement in a drug distribution operation. *Id.* at 59, 105 S.Ct. 471. The defendant was convicted of using the telephone in "committing and in causing and facilitating" the "conspiracy to possess with intent to distribute and possession with the intent to distribute cocaine," but acquitted of conspiring with others to knowingly and intentionally possess with intent to distribute cocaine and possession of a specific quantity of cocaine with intent to distribute it. *Id.* at 59–60, 105 S.Ct. 471. She argued that she was entitled to reversal of the telephone facilitation convictions because the verdicts were inconsistent. *Id.* at 60, 105 S.Ct. 471. Specifically, she averred that "proof that she had conspired to possess cocaine with intent to distribute, or had so possessed cocaine, was an element of each of the telephone facilitation counts; since she had been acquitted of these offenses ..., [she] argued that the telephone convictions were not consistent with those acquittals." *Id.* The Court rejected this argument, upholding the defendant's convictions.

In rejecting the defendant's argument in *Powell,* the Court explained that inconsistent verdicts do not necessarily mean a windfall for the government. *Id.* at 65, 105 S.Ct. 471. Indeed, "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* The Court continued:

> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course ... For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest.

*Id.* A defendant is protected against jury irrationality, the Court explained, by "the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67, 105 S.Ct. 471.

Applying the above precedents, we have repeatedly recognized the proposition that inconsistent verdicts in a criminal case generally are not reviewable. *United States v. Smith,* 749 F.3d 465, 498 (6th Cir.2014). This, however, is not a hard-and-fast rule. There are two exceptions. First, where jury verdicts "are marked by such inconsistency as to indicate arbitrariness or irrationality," we have opined that "relief may be warranted." *United States v. Lawrence,* 555 F.3d 254, 263 (6th Cir.2009). Second, in a situation "where a guilty verdict on one count necessarily excludes a finding of guilt on another," i.e. a "mutually exclusive" verdict, this court can review the defendant's challenge to the verdict. *United States v. Ruiz,* 386 Fed.Appx. 530, 533 (6th Cir.2010) (citing *Powell,* 469 U.S. at 69, n. 8, 105 S.Ct. 471); *see also United States v. Ashraf,* 628 F.3d 813, 823–24 (6th Cir.2011) (recognizing two exceptions to general rule that inconsistent verdicts are not reviewable).

794 F.3d at 609-11. The Sixth Circuit then turned its attention to Randolph's case:

> Against this backdrop, we turn to our situation, which is different. Here, we are not dealing with inconsistent verdicts. Instead, we have an internal inconsistency in the same count, as it relates to the same defendant, in the same verdict. We have not addressed this situation, but one of our sister circuits has.
>
> In *United States v. Shippley*, the defendant was charged in a federal drug conspiracy under 21 U.S.C. § 846. 690 F.3d 1192, 1193 (10th Cir.2012). At the end of trial, the jury returned a general verdict finding the defendant guilty of the conspiracy charge. *Id.* However, in response to the court's special interrogatories, the jury indicated that the defendant "had not conspired to distribute *any* of the drugs listed in the indictment. In effect, the jury both convicted *and* acquitted [the



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defendant] of the charged conspiracy." *Id.* (emphasis in original). Faced with this dilemma, the district court ordered the jury to deliberate further, instructing the jury that " '[y]our ostensible verdict of guilty as to the crime of conspiracy as charged in Count One of the Indictment is inherently inconsistent with your answers to the Special Questions.' " *Id.* The district court gave the jury three options: (1) reconsider its answers to the special interrogatories if it wanted to render a guilty verdict; (2) reconsider its answer in the general verdict form if it wished to render a verdict of not guilty; or (3) stand on its existing verdict. *Id.* at 1193–94. The result: an unambiguous guilty verdict finding the defendant guilty of conspiring to distribute 500 grams or more of cocaine. *Id.* at 1194.

On appeal, the defendant challenged the district court's procedure in allowing the jury to deliberate further. Relying on *Powell* and *Dotterweich*, the defendant argued that the district court should have entered a verdict of acquittal after receiving the inconsistent general verdict and special interrogatory answers. *Id.* Requiring the jury to deliberate further, the defendant argued, violated his Fifth Amendment right to due process and Sixth Amendment right to a jury trial. *Id.* Distinguishing the facts from *Powell* and *Dotterweich,* the Tenth Circuit explained:

> In our case, it wasn't just logically incongruous to enter the jury's verdict, it was metaphysically impossible. *Powell* and *Dotterweich* involved logical inconsistencies *between counts* and *between defendants*. However illogical, the verdicts in those cases could be given full effect. This case, by contrast, involves an inconsistency on the *same count with the same defendant*—an inconsistency that simply could not have been given full effect. Something had to give in our case that didn't have to give in these other cases. To enter an acquittal, the district court would have needed to disregard the fact that the jury expressly found [the defendant] guilty. To enter a guilty verdict, the court would have needed to overlook the special verdict findings that [the defendant] did not conspire to distribute any of the drugs at issue in the case. And nothing in *Powell* or *Dotterweich* speaks either explicitly or implicitly about what a court's to do in these circumstances, let alone suggests the district court committed an error of constitutional magnitude (or otherwise) in proceeding as it did in this case.

*Id.* at 1195–96 (emphasis in original).

We agree with *Shippley* that *Powell* and *Dotterweich* are different than the situation at hand and do not control the analysis. Here, unlike the situations in *Powell, Dotterweich* and the inconsistent verdict line of cases, the jury's verdict, when read in its entirety, reveals that the government failed to prove an essential element of the charged drug conspiracy. For the jury to find Randolph guilty of the drug conspiracy, an essential element the government was required to prove beyond a reasonable doubt was that the drugs charged in the indictment were "involved in" the conspiracy. As explained, the final jury instructions asked the jury to "mark none on the appropriate special verdict form" if "you unanimously

find that a particular controlled substance was not involved in the offense." Because the jury found that none of the charged drugs were "involved in" the conspiracy, it follows that Randolph cannot be guilty of the charged conspiracy. He is entitled to a judgment of acquittal.

It is well-established that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged." *United States v. Gaudin,* 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Where a jury's special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense. *See United States v. Lucarelli,* 476 F.Supp.2d 163, 167 (D.Conn.2007) (acquitting defendant of securities fraud charges where jury, in special interrogatories, found that defendant did not act with specific intent, despite finding defendant guilty in general verdict); *see also State v. Goins,* 151 Wash.2d 728, 92 P.3d 181, 189–90 (2004) (en banc) (Sanders, J., dissenting). To allow a retrial when the government fails to prove an essential element of the charge beyond a reasonable doubt violates the Double Jeopardy Clause of the Fifth Amendment, which states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Here, the jury's special verdict found that the drugs "involved in" the conspiracy were "none." This unanimous finding negates an essential element of the charged drug conspiracy and is only susceptible to one interpretation: the government failed to prove Randolph guilty of the charged drug conspiracy beyond a reasonable doubt.

To the extent that dicta in *Shippley* suggests that the appropriate remedy in this situation is a remand for a new trial, we disagree. 690 F.3d at 1196 ("To enter *any* verdict when the jury first returned, the district court would have had to choose to "gore" one side or the other—just what *Powell* suggests courts should *not* do."). As *Shippley* recognized, inconsistences in the same count as to the same defendant are different than *Powell* where the inconsistency is between counts. Where the inconsistency is between counts, we do not know which count the jury erred in deciding—the acquittal or the conviction. But in our situation, where the inconsistency is in the same count as to the same defendant, if we allow the government "another opportunity to subject [Randolph] to 'factfinding proceedings going to guilt or innocence,' hoping this time for a less ambiguous result," "[t]hat would be a classic instance of impermissible double jeopardy." *United States v. Fernandez,* 722 F.3d 1, 39 (1st Cir.2013). Indeed, one jury has already determined that the amount of drugs "involved in" the purported drug conspiracy were "none." To allow a different jury to reconsider this finding is double jeopardy.

For these reasons, we reverse Randolph's judgment of conviction of Count One and remand to the district court for entry of a judgment of acquittal.[]

*United States v. Randolph*, 794 F.3d at 611-13 (footnote omitted).



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As the trial court instructed the jury, a firearm was an essential element of the crime with respect to aggravated robbery as set forth in Counts 5, 12, 15, 18, 21, and 24[2] and aggravated burglary as set forth in Count 10. (Doc. No. 7-3 at 873-74, 895-96.) The trial court instructed the jury regarding the firearm specifications for Counts 5, 12, 15, 18, 21, and 24:

> If your verdict is guilty, you will separately decide whether the State proved beyond a reasonable doubt that the defendant had a firearm on or about his or her person or under his or her control while committing the offense of aggravated robbery. . . If your verdict is guilty, you will separately decide whether the State proved beyond a reasonable doubt that the defendant had a firearm on or about his person or under his or her control while committing the offense and displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the offense.

(*Id.* at 878-79.) The trial court issued a similar instruction regarding the firearm specification for aggravated burglary as charged in Count 10. (*Id.* at 897-98.)

As the Sixth Circuit emphasized in *Randolph*, "It is well-established that '[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged.'" 794 F.3d at 612 (quoting *United States v. Gaudin,* 515 U.S. 506, 511 (1995)). Where, as here, "a jury's special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense." *Id.* (citations omitted). Therefore, with respect to Hollins' convictions for Counts 5, 10, 12, 15, 18, and 21, the state appellate court's determination resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Hollins is therefore entitled to acquittal on these charges.

However, with respect to the remaining charges for which Hollins was convicted, including aggravated robbery in violation of O.R.C. § 2911.01(A)(3), a firearm was not an essential element of the crimes. (Doc. No. 7-3 at 858-873, 879-895, 898-908.) Therefore, this case is more like the Sixth Circuit's

[2] The jury found Hollins not guilty on Count 24. (Doc. No. 6-1, Ex. 3.)



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decision in *United States v. Alvarado-Linares*, where defendant Reyna-Ozuna was found guilty of RICO conspiracy but not guilty regarding RICO conspiracy involving murder, not guilty of the VICAR murder at a gas station, and not guilty of a § 924(j) charge regarding use of firearm in relation to a violent crime causing the death of another. 698 F. App'x 969, 976. Reyna-Ozuna argued "it was inconsistent to find him guilty of the § 924(c) count for aiding or abetting the use or carrying of a firearm in relation to a crime of violence while acquitting him as to RICO conspiracy involving murder and finding he did not brandish the firearm or cause a death" where the "only identified predicate violent crime was the VICAR murder or which he was acquitted," and the "jury found him not responsible for the death resulting from the murder" when he was acquitted on the § 924(j) charge. *Id.* According to Reyna-Ozuna, "in the absence of some other predicate violent crime, his a § 924(c) conviction is a logical impossibility and creates an inconsistency internal to one count." *Id.* at 976-77.

The Sixth Circuit explained as follows:

> In general, inconsistent verdicts as between counts are not grounds for relief because a reviewing court can never know "whose ox has been gored." *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). If a mistake has occurred and the verdicts do not actually reflect the jury's true opinions, it cannot be known whether the jury erred by unintentionally convicting on one of the two counts or by failing to convict on one of the two counts. *See Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932) ("The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." (citation omitted)). Further, given the shield preventing analysis of juror deliberations, it can never be known whether the jury, in fact, purposefully engaged in jury nullification as to the acquitted count. *See Powell*, 469 U.S. at 66–67, 105 S.Ct. 471. In short, where a jury's act of lenity can explain a purported inconsistency, no relief is available. *Id.*
>
> Reyna-Ozuna's case, however, involves a twist. It may, in fact, be a mislabeling of this issue to discuss it in terms of an internally inconsistent verdict. What he specifically alleges is an inconsistency between an underlying offense serving as a contemporaneous predicate, and a compound offense that depends upon the jury's conclusions as to the facts of the predicate. Regardless, what matters is not the presence of an arguable inconsistency; what matters is the sufficiency of the

> evidence to support the *actual count of conviction*. Here, that evidence is sufficient.
>
> A similar situation was present in *Powell*, where the Court rejected the theory of relief for inconsistent verdicts. The Court held firmly that an acquittal on one count could be deemed an act of lenity and stated that independent review for sufficient evidence looking at the facts rather than the outcomes ensured adequate protection. There, the Court stated:
>
> > [R]espondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful.
>
> *Powell*, 469 U.S. at 68, 105 S.Ct. 471.[7]
>
> Applying this standard, we conclude there was more than sufficient evidence to convict Reyna-Ozuna of a violation of 18 U.S.C. § 924(c). The alleged internal inconsistency is not inherent; it may be explained as a matter of lenity or jury nullification, and therefore, relief is unavailable.

*Id.* at 977-78. As Hollins raises a separate sufficiency of the evidence claim in Ground Two, the Court shall address sufficiency of the evidence to support her convictions on Counts 2-4, 6-9, 11, 13-14, 16-17, 19, 22, 25, and 27 below.

For all of the foregoing reasons, the undersigned recommends the Court GRANT IN PART and DENY IN PART Ground One. Hollins is entitled to a judgment of acquittal on Counts 5, 10, 12, 15, 18, and 21. However, the undersigned recommends Ground One be denied in all other respects.



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**2. Ground Two**

In Ground Two, Hollins challenges the sufficiency of the evidence to support her convictions, as "her conviction(s) stemmed from murder via gunshot/possession of firearm and she was founf [sic] not guilty of possessing/fireing [sic] a firearm." (Doc. No. 1 at 8.)

Respondent argues that the "crux" of Grounds One and Two "is that, because [Hollins] was not physically present in the bar where the murder occurred, (but only drove her co-defendants to the bar) and because she was found not guilty of the firearm specifications attached to the crimes for which she was convicted, the State failed to sufficiently prove that she was guilty of the crimes for which she is now convicted." (Doc. No. 6 at 11.) Respondent cites to *Jones v. Lazaroff*, Case No. 1:14 CV 2549, 2016 WL 93520 (N.D. Ohio Jan. 8, 2016) for the proposition that an inconsistent verdict claim, packaged as a sufficiency of the evidence claim, is non-cognizable on habeas review. (*Id.*) In the alternative, Respondent argues Hollins fails "to demonstrate that the state court's decision finding sufficient evidence on the independent charge of aggravated murder was contrary to, or an unreasonable application of, clearly established Supreme Court precedent." (*Id.* at 18-19.)

In reply, Hollins argues "there was no instruction that in order to be convicted as an aider and abettor on the firearm that the state of Ohio was required to prove Petitioner had advance knowledge that one of the cohorts would be armed and would use a firearm in the commission of the offense as required by law,"[3] and that "[n]o such advanced knowledge was provided by any fact set froth [sic] by the state of Ohio." (Doc. No. 8 at 37.) Hollins challenges that there was sufficient evidence that she shared in the purpose to kill, that she was the getaway driver, and that she had knowledge of the firearms or what would

[3] Although not addressed by Respondent, Hollins did not raise the issue of failure to issue an instruction on prior knowledge of the firearm on direct appeal to the state appellate court and the Supreme Court of Ohio (Doc. No. 6-1, Ex. 6, 10), and therefore this portion of Ground Two is procedurally defaulted. Hollins shows no cause and prejudice, or new, reliable evidence of actual innocence, to excuse the procedural default.



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take place inside the bar. (*Id.* at 38-39.) Hollins asserts the state appellate court's determination that she "participated in the crimes and shared criminal intent in light of her actions and statements before and after the shooting and that she aided and abetted in the planning of the offense with common design to commit the offenses with weapons and that the murder occurred during the planned offense and was a natural and probable consequence" was "in direct conflict with the facts." (*Id.* at 39.) Hollins incorporates her argument that the jury found her "not guilty of aiding and abetting the use of or even possession of the firearm which was an essential element of the offense." (*Id.* at 39-40.) Hollins argues that the not guilty finding on the firearm specifications for aggravated robbery, aggravated burglary, felonious assault, and kidnapping with serious physical harm "indicates a lack of evidence" in support of her convictions on these counts as well.[4] (*Id.* at 40.)

Hollins raised a sufficiency of the evidence claim to both the state appellate court and the Supreme Court of Ohio. (Doc. No. 6-1, Ex. 6, 10.) The state appellate court considered this claim on the merits and rejected it as follows:

> {¶ 40} In the fourth assigned error, Hollins argues that there is insufficient evidence to support her convictions for aiding and abetting in the offenses of aggravated murder, aggravated robbery, kidnapping, aggravated burglary, felonious assault, or murder, because the evidence established only that she drove others to the Cooley Lounge. Hollins states that she did not engage in a plan manifesting the purpose to kill, and the evidence indicated that it was only during the offenses that Brinker learned the identity of the assailants so they shot her.
>
> {¶ 41} A sufficiency challenge requires a court to determine whether the state has met its burden of production at trial and to consider not the credibility of the evidence but whether, if credible, the evidence presented would support a conviction. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259,

[4] Having found inconsistent verdicts on the aggravated robbery and aggravated burglary charges set forth in Counts 5, 10, 12, 15, 18, and 21, and recommending Hollins be acquitted on these charges, the undersigned does not address sufficiency of the evidence on these charges. *See Randolph*, 794 F.3d at 613 n.1.



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574 N.E.2d 492 (1991), paragraph two of the syllabus following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 42} "A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal." *State v. Langford*, 8th Dist. Cuyahoga No. 83301, 2004-Ohio-3733, ¶ 20, citing *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796. "A defendant may 'aid' or 'abet' another in the commission of an offense by his words, gestures, deeds, or actions." *Capp*, 2016-Ohio-295, at ¶ 25. However, "the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner*, 69 Ohio St.2d 267, 269, 431 N.E.2d 1025 (1982). "Mere association with the principal offender * * * is [also] insufficient to establish complicity." *State v. Hoston*, 8th Dist. Cuyahoga No. 102730, 2015-Ohio-5422, at ¶ 13, citing *State v. Doumbas*, 8th Dist. Cuyahoga No. 100777, 2015-Ohio-3026. The surrounding facts and circumstances can be used to determine a defendant's intent. *Johnson* at 245, 754 N.E.2d 796. "Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed." *Id.* Acts which aided or abetted another include those which "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime * * *." *Id.*

{¶ 43} Aggravated murder under R.C. 2903.01(B) provides, in relevant part, that "[n]o person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit * * * aggravated burglary * * *." R.C. 2903.01(B). Pursuant to R.C. 2901.22(A):

> A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature.

{¶ 44} Where a defendant enters into a common design with others to commit armed robbery by the use of force, violence, and a deadly weapon, and all the participants are aware that an inherently dangerous instrumentality is to be employed to accomplish the felonious purpose, a homicide that occurs during the commission of the felony is a natural and probable consequence of the common plan that is presumed to have been intended. *State v. Thomas*, 2015-Ohio-4932, ¶ 46, 50 N.E.3d 967 (5th Dist.), citing *State v. Jester*, 32 Ohio St.3d 147, 153, 512 N.E.2d 962 (1987). *See also State v. Clark*, 55 Ohio St.2d 257, 379 N.E. 2d 597 (1978); *State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, ¶ 143; *State v. Johnson*, 8th Dist. Cuyahoga No. 60402, 1992 Ohio App. LEXIS 1752, 1992 WL 67110 (Apr. 2, 1992). *Accord Capp*, 2016-Ohio-295, at ¶ 31.



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{¶ 45} In this matter, there was sufficient evidence to demonstrate that a Hollins entered into a common design with others to commit armed robbery by the use of force, violence, and a deadly weapon, and all the participants are aware that an inherently dangerous instrumentality is to be employed to accomplish the felonious purpose. Additionally, a homicide occurred during the commission of the planned offenses and it was a natural and probable consequence of the common plan that is presumed to have been intended. Here, the record shows that in December 2015, Hollins was attacked and injured during a fight at the Cooley Lounge. She accused Svec of setting up the attack. The assailants were acquitted in a trial during which Svec testified. After that, there is some evidence from Smith that Hollins may have inquired about who was working at the bar. Hollins contacted Williams to "blow down" to Smith prior to her testimony during the instant trial. Svec changed her work schedule shortly before the murders. Hollins was with Brunson, Thomas, and Sims immediately prior to the murders. She drove Brunson, Thomas, and Sims to the bar. Brunson made calls to the bar in which he attempted to conceal the number from which he was calling. Hollins remained parked nearby while the assailants were inside the bar, then drove them from the scene. Brunson, Thomas, and Sims attacked and robbed the patrons. Thomas shot Brinker, then Brunson shot her in the face. Upon learning that Thomas shot the bartender and that Brunson "finished her off," Hollins said, "that's what she get." After the murders, Thomas confronted Hollins about her prior claim that there were no cameras at the bar.

{¶ 46} Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offenses proven beyond a reasonable doubt. From the evidence presented, a jury could reasonably conclude that Hollins participated in the crimes at issue and shared criminal intent in light of her actions and statements both before and after the shooting. Given the state's evidence, a jury could reasonably conclude that she aided and abetted in the planning and commission of the offenses. The jury could conclude that she entered into a common design with others to commit the offenses which involved weapons, and that the murder occurred during the commission of the planned offense and was a natural and probable consequence of the common plan. *Accord Capp*; *State v. Holbrook*, 6th Dist. Huron No. 14-H-003, 2015-Ohio-4780, ¶ 56-58 (The evidence showed that defendant aided the codefendant by driving him to the location where the codefendant hit the victim in the head with a crowbar after a social media war.).

{¶ 47} The fourth assigned error is without merit.

*State v. Hollins*, 2020-Ohio-4290, 2020 WL 5250391, at **7-9. Similarly, in addressing Hollins' manifest weight of the evidence claim, the state appellate court further found as follows:

{¶ 48} In the fifth assigned error, Hollins argues that her convictions are against the manifest weight of the evidence. She argues that although there is evidence that



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she drove the others to the bar, she did not know what was going to happen, and Brinker was killed only after she saw Thompson's face during the robbery.

{¶ 49} "[W]eight of the evidence involves the inclination of the greater amount of credible evidence." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Weight of the evidence concerns "the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387, 678 N.E.2d 541. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶ 50} Here, the record indicates that Hollins's attackers were acquitted during the December 2015 attack at the Cooley Lounge. Hollins blamed Svec for the incident. Prior to the murders, Smith believed that Hollins attempted to determine who was working at the bar. Hollins and Williams communicated about contacting Smith prior to trial. Hollins drove the assailants to the bar and waited at a nearby park. Upon learning the bartender was killed, Hollins said, "that's what she get." Thomas subsequently confronted Hollins about her prior claim that there were no cameras at the bar, and she stated that she was going to file a civil action against the bar. Cell phone data showed that the assailants were together before during and after the offenses.

{¶ 51} In this matter, we cannot say that in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. A reasonable factfinder could conclude that Hollins planned the offenses after her assailants were acquitted and that she aided and abetted in the commission of the offenses. The convictions are not against the manifest weight of the evidence.

{¶ 52} The fifth assignment of error is without merit.

*Id.* at *9.

The Due Process Clause of the Fourteenth Amendment requires that a criminal conviction be supported by proof beyond a reasonable doubt with respect to every fact necessary to constitute the offense charged. *In re Winship*, 397 U.S. 358, 363–64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard for determining if a conviction is supported by sufficient evidence is "whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the



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essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In making such a determination, a district court may not substitute its own determination of guilt or innocence for that of the factfinder, nor may it weigh the credibility of witnesses. *Id. See also Walker v. Engle*, 703 F.2d 959, 970 (6th Cir. 1983). Moreover, federal courts are required to give deference to factual determinations made in state court and "[a]ny conflicting inferences arising from the record ... should be resolved in favor of the prosecution." *Heinish v. Tate*, 1993 WL 460782, at *3 (6th Cir. 1993) (citing *Walker*, 703 F.3d at 969–70.) *See also Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (the deference owed to the trier of fact limits the nature of constitutional sufficiency review.)

Consistent with these principles, the Supreme Court has emphasized that habeas courts must review sufficiency of the evidence claims with "double deference:"

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, 'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.' *Cavazos v. Smith*, 565 U.S. 1, ——, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (*per curiam*). And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. 766, ——, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

*Coleman v. Johnson*, 566 U.S. 650, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978 (2012). Under this standard, "we cannot rely simply upon our own personal conceptions of what evidentiary showings would be sufficient to convince us of the petitioner's guilt," nor can "[w]e ... inquire whether any rational trier of fact would conclude that petitioner ... is guilty of the offenses with which he is charged." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). Rather, a habeas court must confine its review to determining whether the state court "was unreasonable in its conclusion that a rational trier of fact could find

[petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial." *Id.* (emphasis in original) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009)).

Upon careful review of the trial transcript, the Court finds the state appellate court reasonably determined Hollins' convictions on Counts 2-4, 6-9, 11, 13-14, 16-17, 19, 22, 25, and 27 were supported by sufficient evidence. In resolving Hollins' sufficiency of the evidence claim, the state appellate court accurately summarized the evidence and correctly identified the applicable law. As the state appellate court noted, there was evidence Hollins put the plan in motion after the acquittal of her assailants for the assault she suffered at the Cooley Lounge (Doc. No. 7-2 at 853, 861, 963-65; Doc. No. 7-3 at 322-25, 329) and that she may have inquired as to who was working at the bar. (Doc. No. 7-2 at 980-81.) Hollins was with Brunson, Thomas, and Sims the night of the murder and she drove them to the bar. (Doc. No. 7-3 at 373-74, 428-32.) There was evidence Hollins led the others to believe there were no cameras (Doc. No. 7-3 at 460-62) and waited for them nearby and drove them from the scene (Doc. No. 7-3 at 373-74, 440-46). In addition, Garry Lake testified that once the others had returned to the car, Thomas stated Brinker saw his face and so he had to shoot her and Brunson said he finished Brinker while laughing, to which Hollins replied, laughing, "She hit me in the head with a bottle. That's what she get." (Doc. No. 7-3 at 444-47.)

It is not for this Court to weigh evidence or determine credibility. *See Jackson*, 443 U.S. at 317-19; *Coleman*, 566 U.S. at 651. While Hollins interprets evidence in a light most favorable to her, that is not the standard – the Court must view the evidence in a light most favorable to the prosecution. *Jackson*, 443 U.S. at 319.

Under the "doubly deferential" standard, the Court cannot say the state court "was unreasonable in its conclusion that a rational trier of fact could find [petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial." *Brown v. Konteh*, 567 F.3d at 205.

Accordingly, it is recommended the Court find Ground Two lacks merit.



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### 3. Ground Three

In Ground Three, Hollins alleges violations of her right to compel, cross-examine, and impeach witness Garry Lake in violation of the Fifth, Sixth, and Fourteenth Amendments. (Doc. No. 1 at 9.) Hollins argues that the State called Lake knowing he would make false statements. (*Id.*) Hollins states a discussion between Lake and his attorney occurred during a break from Lake's proffer statement to the State "where it was clear Lake was making false/inaccurate statements related to Anita Hollins for his own benefit." (*Id.*) The trial court did not allow Hollins' counsel to use Lake's prior statements made during the break to his attorney on cross-examination to impeach or otherwise question Lake, which Hollins insists violated her right to confront a witness against her. (*Id.*) Hollins asserts Lake's attorney-client privilege claim cannot trump her constitutional rights. (*Id.*)

Respondent argues that this claim is a non-cognizable claim regarding state evidentiary law, not a Confrontation Clause claim. (Doc. No. 6 at 26, 28.) Respondent notes counsel cross-examined Lake "extensively," and "Hollins is simply unhappy that Lake claimed attorney-client privilege over certain statements he made while conversing with his defense attorney that were inadvertently recorded and provided to Hollins in discovery." (*Id.* at 27-28.) Respondent asserts that to the extent Hollins presents a cognizable federal claim, the state appellate court's determination is entitled to AEDPA deference. (*Id.* at 26.) Respondent argues a criminal defendant's right to present evidence on his behalf is not absolute and "does not automatically trump state evidentiary rules." (*Id.* at 29.)

In reply, Hollins cites to *United States v. Nixon*, 418 U.S. 683 (1974), for the proposition that where it was "known false statements would be made" by Lake, her "constitutional rights must prevail over evidentiary privileges of the witness." (Doc. No. 8 at 46.) Hollins argues the communications were not privileged and that Lake "voluntarily waived any attorney-client privilege which might have existed" by "making a proffer, providing evidence and agreeing to testify for his own benefit." (*Id.* at 57.)



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Hollins raised claims regarding her inability to cross-examine Lake to both the state appellate court and the Supreme Court of Ohio.[5] (Doc. No. 6-1, Ex. 6, 10.) The state appellate court considered this claim on the merits and rejected it as follows:

> {¶ 53} In the sixth assigned error, Hollins argues that the trial court erred in concluding that she could not cross-examine Lake regarding his statements to his trial attorney and his investigator that were recorded, unbeknownst to his attorney, during a break in a meeting with the homicide detectives. Hollins maintains that they are exculpatory to her. She also claims that these statements were made in furtherance of a fraud so they come within the crime-fraud exception to the attorney-client privilege and could have been used for impeachment of Lake.
>
> {¶ 54} As an initial matter we note that R.C. 2317.02(A) provides that an attorney "shall not testify * * * concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client." Waiver involves the client's relinquishment of the protections of R.C. 2713.02(A) once they have attached. Further, Ohio recognizes the crime-fraud exception to prevent concealment of attorney or client wrongdoing. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 3. The court explained that the privilege does not attach in a situation where the advice sought by the client and conveyed by the attorney relates to some future unlawful or fraudulent transaction. Advice sought and rendered in this regard is not worthy of protection, and the principles upon which the attorney-client privilege is founded do not dictate otherwise. *Id.* at ¶ 27. In *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 385, 1998-Ohio-290, 700 N.E.2d 12, the court explained:
>
> > A party invoking the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud. *United States v. Jacobs* (C.A. 2, 1997), 117 F.3d 82, 87. The mere fact that communications may be related to a crime is insufficient to overcome the attorney-client privilege. Id. at 88, quoting *United States v. White* (C.A.D.C. 1989), 281 U.S. App. D.C. 39, 887 F.2d 267, 271.
>
> *Id.* at 384.
>
> {¶ 55} "Once there is a showing of a factual basis, the decision whether to engage in an in camera review of the evidence lies in the discretion of the * * * court." *Id.*

[5] The Court notes that in her brief to the state appellate court, Hollins characterized the claim as trial court error and invoked her right to confrontation under the Sixth Amendment and her rights under *Brady*, while before the Supreme Court of Ohio Hollins presented this claim strictly as a constitutional issue. (Doc. No. 6-1, Ex. 6, 10.)



APPENDIX C

> {¶ 56} Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
>
> {¶ 57} In this matter, as to waiver, Det. Carlin testified that she learned through Lake's attorney that he wanted to make a statement and that he would be able to make identification of four individuals. To Hollins, this constituted a waiver of the privilege. Lake's counsel, on the other hand, stated that he informed Det. Carlin only that Lake wanted to proffer according to his knowledge, thereby leaving the attorney-client privilege intact. He also stated that that he requested the break and asked the detectives to leave the room because he "didn't feel my client was clearly explaining[.]" After the detectives left the room, he did not know that they were being recorded. The trial court also heard from Lake about the circumstances of his photo identification of suspects. Lake stated that he told his attorney the names and that he told "them" the names, but this statement lacks clarity in terms of time and who "them" was. The state strongly opposed the motion and stated that the conversation involved a "back and forth" "about a prior discussion" and information Lake had previously provided to the attorney. The court stated that it reviewed the tape and had its own conclusion and opinion about what it shows. The court concluded that the facts were insufficient to show that Lake had waived his attorney-client privilege prior to the inadvertent recording. The court ruled that prior to his recorded statement, Lake spoke with his attorney and gave information that was not yet to be divulged until the official statement. We find no abuse of discretion. The privilege belongs to Lake. There is nothing in the record from which we can conclude that it was waived or otherwise vitiated.
>
> {¶ 58} This assigned error lacks merit.

*State v. Hollins*, 2020-Ohio-4290, 2020 WL 5250391, at **9-10.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused, applicable to the States by way of the Fourteenth Amendment, "to be confronted with the witnesses against him." U.S. Const. Amend. VI. As the United States Supreme Court has explained, "the right of confrontation 'means more than being allowed to confront the witness physically.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). *See also Blackston v. Rapelje*, 780 F.3d 340, 349 (6th Cir. 2015). Rather, "'[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" *Id.* at 315–316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original). "In general,



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challenges to the credibility of witnesses will occur through cross-examination because 'cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Blackston*, 780 F.3d at 349 (quoting *Davis*, 415 U.S. at 316).

However, the Confrontation Clause does not preclude a trial judge from placing limits on cross-examination. *See Van Arsdall*, 475 U.S. at 679 ("It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness."). *See also Weissert v. Palmer*, 699 F. App'x 534, 539 (6th Cir. 2017); *Gerald v. Warden, Ross Correctional Inst.*, No. 1:15-cv-493, 2017 WL 2303672, at * 21 (S.D. Ohio Feb. 27, 2017). "On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679. *See also Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) ("'The accused does not have an unfettered right to offer [evidence] that is incompetent, *privileged*, or otherwise inadmissible under standard rules of evidence.'") (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)) (emphasis added). Indeed, as the Supreme Court has explained, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (per curiam) (emphasis in original). *See also Van Arsdall*, 475 U.S. at 679.

A violation of the Confrontation Clause does not warrant automatic reversal but rather is subject to harmless-error analysis. *See Van Arsdall*, 475 U.S. at 681-682; *Blackston*, 780 F.3d at 359; *McCarley v. Kelly*, 801 F.3d 652, 665 (6th Cir. 2015). The Supreme Court recently explained the contours of harmless error analysis, as follows:

> The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman [v. California]*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 [1967]: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24, 87 S.Ct. 824.
>
> In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht [v. Abrahamson]*, 507 U.S. [619], 637, 113 S.Ct. 1710 [1993] (quoting *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)). Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht, supra*, at 637, 113 S.Ct. 1710 (internal quotation marks omitted). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman*, 525 U.S. 141, 146, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998) (per curiam ).

*Davis v. Ayala*, – U.S. –, 135 S.Ct. 2187, 2198, 192 L.Ed.2d 323 (2015). *See also Blackston*, 780 F.3d at 359 ("In the context of federal habeas corpus, a constitutional error will warrant relief only if the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'"); *McCarley,* 801 F.3d at 665 ("*Brecht* requires a Confrontation Clause violation to have a 'substantial and injurious effect or influence in determining the jury's verdict' before it merits reversal on collateral review.").

As noted above, "a state court decision is not unreasonable if 'fairminded jurists could disagree' on its correctness.'" *Ayala*, 135 S.Ct. at 2199 (quoting *Richter*, 562 U.S. at 101). A habeas petitioner, therefore, must show that "the state court's decision to reject his claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103).

Hollins has not shown that the state appellate court's decision was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts. First, as



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Respondent asserts and which Hollins does not deny, Hollins' counsel engaged in a thorough cross-examination of Lake at trial. (Doc. No. 7-3 at 516-550, 575-82.) Hollins devotes a considerable portion of her actual argument to attorney-client privilege under Ohio law and whether Lake's statements were privileged. (Doc. No. 8 at 56-59.) As a general matter, the admissibility of evidence is a state law issue, and not cognizable on habeas corpus review. *See, e.g., Milone v. Camp,* 22 F.3d 693, 702 (7th Cir. 1994); *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993); *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). However, as the Sixth Circuit explained, "[w]hen an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). This is a narrow exception, and requires that an alleged violation meet a rigorous standard: "Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they 'offend [ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S.37, 43 (1996)). Although Hollins invokes the Due Process clause in her claim, she makes no argument that any evidentiary error rose to such a level. (Doc. No. 8.)

Furthermore, although Hollins asserts the State "must not be permitted to elicit testimony from a co-defendant against Petitioner, a co-defendant at her trial, which it knows is false or might possibly be false" (*id.* at 59), the State contested that the privileged communication was exculpatory and disputed Hollins' interpretation of the privileged conversation. (Doc. No. 7-1 at 651-55.) The trial court held an extensive hearing on the issue, which involved an in-camera review of the privileged conversation at issue, examination of Lake's attorney, and argument by counsel. (Doc. No. 7-1 at 645-71, 902-29, 949-1022.) As the state appellate court noted, the trial court found the facts failed to establish waiver of the attorney-client privilege, and the state appellate court found no error on appeal. *State v. Hollins*, 2020-



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Ohio-4290, 2020 WL 5250391, at **9-10. Hollins has not pointed to any decision by the Supreme Court in a case with materially indistinguishable facts that reached a different conclusion, nor has she pointed to clear and convincing evidence that the state appellate court made a clear error of fact. *Battiste v. Miller*, Case No. 1:17-cv-128, 2019 WL 6221477, at *22 (N.D. Ohio July 8, 2019)

Even if a Sixth Amendment violation occurred, any error was harmless. While Lake was an important prosecution witness, a review of the trial transcript shows the State presented other evidence of Hollins' guilt. Therefore, Hollins cannot show that her inability to cross-examine Lake on the privileged communication had a substantial and injurious effect or influence in determining the jury's verdict.

## IV. Conclusion

For all the reasons set forth above, it is recommended that the Petition be GRANTED IN PART with respect to Hollins' convictions for aggravated robbery as set forth in Counts 5, 12, 15, 18, and 21 and aggravated burglary as set forth in Count 10. The undersigned recommends the Petition be DENIED in all other respects.

Date: October 27, 2022

*s/ Jonathan Greenberg*
Jonathan D. Greenberg
United States Magistrate Judge

**OBJECTIONS**

**Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after being served with a copy of this document. Failure to file objections within the specified time may forfeit the right to appeal the District Court's order. *Berkshire v. Beauvais*, 928 F.3d 520, 530-31 (6th Cir. 2019).**



APPENDIX C

No.

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**IN THE SUPREME COURT OF THE UNITED STATES**

---

ANITA HOLLINS, PETITIONER

*v.*

WARDEN SHELBIE SMITH, RESPONDENT

---

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

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**APPENDIX TO**
**PETITION FOR A WRIT OF CERTIORARI**
**VOLUME TWO**

---

Anita Hollins, Pro se
191788
*Marysville Correctional Institution*
*1479 Collins Avenue*
*Marysville, Ohio 43040*

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**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Kelly L. Stephens
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 25, 2024

Mr. John Yackshaw Wood
Law Office
12614 Britton Drive
Cleveland, OH 44120-1011

Re: Case No. 24-3023, *Anita Hollins v. Shelbie Smith*
Originating Case No.: 1:21-cv-02338

Dear Mr. Wood,

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. Stephanie Lynn Watson

Enclosure

APPENDIX D

No. 24-3023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



ANITA HOLLINS,

Petitioner-Appellant,

v.

WARDEN SHELBIE SMITH,

Respondent-Appellee.

ORDER

**BEFORE:** BOGGS, NORRIS, and MOORE, 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

SEP 08 2020

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107642

v. :

ANITA HOLLINS, :

Defendant-Appellant. :

---

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** September 3, 2020

---

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-616120-E

---

***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Daniel Cleary and Katherine Mullin, Assistant Prosecuting Attorneys, *for appellee.*

The Law Office of Jaye M. Schlachet and Eric M. Levy, *for appellant.*

CR17616120-E 114347176

APPENDIX E

PATRICIA ANN BLACKMON, P.J.:

**{¶ 1}** Defendant-appellant, Anita Hollins, appeals from her convictions for aggravated murder and other offenses. She assigns the following errors for our review:

I. The trial court erred when it accepted jury verdicts with internal inconsistencies within the same counts for complicity requiring that this reviewing court must enter an acquittal for inconsistent verdicts in each count of the indictment where [Hollins] was found guilty of aiding and abetting the underlying offense but not guilty of aiding and abetting the firearm specifications. This court must reconsider its prior holdings regarding inconsistent verdicts based upon applicable changes to the law and also upon the issue of a complicit conviction.

II. [Hollins] was denied a fair trial and due process of law and the trial court erred when it failed to grant [her] request for a mistrial by reasoning that if it did not grant the mistrial a new trial would be ordered on appeal when counsel for [a] co-defendant * * * stated in his closing argument that non-testifying co-defendant * * * entered a plea mid-trial in direct conflict with the trial court's prior curative instruction given to the jury.

III. [Hollins's] convictions must be vacated where she was not found guilty of each and every element of the offenses charged where the jury verdict form(s) fail to indicate the offenses took place in Cuyahoga County, Ohio or otherwise indicate any finding as to venue.

IV. [Hollins's] convictions were not supported by sufficient evidence.

V. [Hollins's] convictions were against the manifest weight of the evidence.

VI. The trial court erred when it prohibited [Hollins] from using fraudulent statements of [a co-defendant] where he was encouraged to lie [in order] to cross-examine him for purposes of impeachment.

VII. [Hollins's] trial counsel was ineffective in failing to directly appeal the trial court's suppression of fraud and statements of [a co-defendant] from being introduced at trial as privileged communications.

VIII. [Hollins's] trial counsel was ineffective in requesting a single instruction on aiding and abetting be inserted before count one and for failing to have [Hollins] evaluated for her mental health.

**{¶ 2}** Having reviewed the record and the pertinent law, we affirm the decision of the trial court.

**{¶ 3}** Hollins, together with Dana Thomas ("Thomas"), Dwayne Sims ("Sims"), Nigel Brunson ("Brunson"), and Garry Lake ("Lake"), were indicted for aggravated murder, murder, aggravated robbery, kidnapping, felonious assault, and aggravated burglary in connection with the October 24, 2016 killing of Cooley Lounge bartender Melissa Brinker ("Brinker"), and the robbery of patrons at the bar. As is relevant herein, Hollins was charged with aggravated murder in violation of R.C. 2903.01(A), three counts of aggravated murder in violation of R.C. 2903.01(B), six counts of aggravated robbery in violation of R.C. 2911.01(A)(1), aggravated robbery in violation of R.C. 2911.01(A)(3), kidnapping in violation of R.C. 2905.01(A)(3), six counts of kidnapping in violation of R.C. 2905.01(A)(2), aggravated burglary in violation of R.C. 2911.11(A)(1), aggravated burglary in violation of R.C. 2911.11(A)(2), felonious assault in violation of R.C. 2903.11(A)(1), five counts of felonious assault in violation of R.C. 2903.11(A)(2), and murder in violation of R.C. 2903.02(B), all with one-year and three-year firearm specifications.

**{¶ 4}** Lake subsequently entered into a plea agreement with the state that included the requirement that he testify at trial. Thomas waived a jury trial, asking

the court to decide the charges against him. The charges against the remaining defendants, Hollins, Brunson, and Sims, proceeded to trial in June 2018. As the matter commenced, Hollins moved to introduce evidence of statements made by Lake, with his attorney and investigator, that unbeknownst to Lake's counsel, were recorded during a break in a meeting with the police. Hollins argued that the statements were exculpatory as to her and were also admissible under the crime-fraud exception to the attorney-client privilege. In opposition, the state maintained that the statements were privileged and that the content did not show evidence of a crime or fraud. After reviewing the recording and suppression hearing testimony from Lake, his trial counsel, and Cleveland Police Detective Kathleen Carlin ("Det. Carlin"), the trial court ruled that the statements remained privileged and could not be used to cross-examine Lake.

**{¶ 5}** Proceeding to the trial on the merits, the evidence presented by the state indicated that in December 2015, Hollins and her then-boyfriend, Marcus Williams ("Williams") were involved in an argument at the Cooley Lounge. As the fight escalated, Hollins was struck in the head with a beer bottle and required medical attention. Hollins accused bartender Jane Svec ("Svec") of setting up the incident, and Hollins was banned from the bar after that incident. The individuals who struck Hollins were charged with felonies. Svec testified at their trial, and the assailants were subsequently acquitted.

**{¶ 6}** By the fall of 2016, Hollins was dating Brunson. Brunson, Sims, and Thomas were friends, and Lake and Thomas were raised together. Approximately

one week before the murder, Holly Smith ("Smith"), a friend of Hollins, received a Facebook post asking who was working at Cooley Lounge. Smith did not know who posted the question but believed it might have been Hollins. Additionally, Svec changed her work schedule shortly before this posting.

{¶ 7} On the night of October 24, 2016, Lake needed a ride home from a party. Hollins picked him up. Brunson, Thomas, Sims, and Hollins's two children were in the car. Lake testified that he fell asleep during the car ride. When he awoke, Hollins had parked the car at a playground in the area of West 132nd Street in Cleveland, in the vicinity of the Cooley Lounge. Brunson, Thomas, and Sims were no longer in the car.

{¶ 8} Meanwhile, Patrick Lorden ("Lorden"), Melissa Morton ("Morton"), James Fox ("Fox"), and Thomas Bernard ("Bernard") were patrons at the bar, and Brinker was bartending. Patron Thomas Platt, a.k.a. "Andy," was assisting Brinker by emptying the garbage and performing other tasks in exchange for free drinks. The evidence presented at trial indicated that two other individuals subsequently entered the bar, sat together, and ordered a drink. The two requested a cup to share it, and both men drank from the cup. A third man entered the bar. He later threw the cup away, the cup that the other two men drank from, placing it in a receptacle that Andy had recently emptied. The third man joined the first two men at the bar. All three men suddenly produced weapons. The men began robbing and assaulting the patrons. Morton attempted to call the police, but one of the assailants pistol-whipped her. During the attack, Brinker was forced to the rear of the bar and shot

by one of the men who requested a drink. The other man who requested a drink also went to this area and shot her.

**{¶ 9}** After the gunmen fled, the patrons discovered Brinker dead in the back of the bar. The police subsequently retrieved video surveillance evidence and also retrieved the cup that the men drank from before the attack. DNA analysis of the cup established two profiles. Analysis showed that Thomas is 4.44 million times more likely than a coincidental match to an unrelated African-American, and Brunson is 130 million times more likely than a coincidental match to an unrelated African-American person. Police also linked Sims to the attack.

**{¶ 10}** According to Lake, when the three men returned to Hollins's car, Thomas said that he had to shoot the bartender in the face because she saw him. Brunson laughed about having to "finish her off," and Hollins said "that's what she get," before driving them away from the scene.

**{¶ 11}** Police recovered .380- and .45-caliber casings from this area. Lorden's partially burned wallet and Brinker's partially burned purse were recovered from East 80th Street in Cleveland, near the homes of Brunson, Sims, and Lake.

**{¶ 12}** Cell phone records indicated that Hollins and Brunson were together at approximately 11:15 p.m., prior to the murder. Thomas's phone was also in this same area. Brunson's phone made three *67 calls to the Cooley Lounge, ostensibly to conceal the identity of the caller from the recipient of the call. By 11:38 p.m., cell phone location data shows Thomas, Brunson, and Sims near the Cooley Lounge.

**{¶ 13}** After the attack, Thomas confronted Hollins and said that she told him that there were no cameras at the bar. At that point, Hollins said that she was going to sue them civilly in connection with the December 2015 incident when she was attacked.

**{¶ 14}** The state also presented evidence that prior to trial, Hollins had a conversation with Williams in which she discusses "blow[ing] down on" Smith prior to her testimony, and Williams later responds that "blew down on her like you told me to." According to Det. Carlin, this phrase conveys a threat or intimidation short of physical violence.

**{¶ 15}** Hollins was acquitted of aggravated murder in violation of R.C. 2903.01(A), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), and all firearm specifications, but she was convicted of all remaining charges. The court merged numerous convictions and Hollins was sentenced to life without parole and various concurrent terms.[1]

**Inconsistent Verdicts**

**{¶ 16}** In the first assigned error, Hollins argues that the acquittals for aiding and abetting on the firearm specifications creates a fatal inconsistency with her convictions for aiding and abetting on the principal offenses. In support of this

[1] Lake pled guilty to and was sentenced to two years in prison; Thomas was found guilty of aggravated murder and other offenses and was sentenced to life without parole and other concurrent terms; Sims pled guilty to two counts of aggravated robbery with three-year firearm specifications and was sentenced to a total of 17 years of imprisonment; Brunson was found guilty of aggravated murder and other offenses and was sentenced to life without parole and other concurrent and consecutive terms.

assigned error, Hollins cites *United States v. Randolph*, 794 F.3d 602 (6th Cir.2015), *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990), and *State v. Capp*, 8th Dist. Cuyahoga No. 102919, 2016-Ohio-295.

**{¶ 17}** "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Lovejoy*, 79 Ohio St. 3d 440, 1997-Ohio-371, 683 N.E.2d 1112, paragraph one of the syllabus.

**{¶ 18}** In *State v. Perryman*, 49 Ohio St.2d 14, 25-26, 358 N.E.2d 1040 (1976), the jury found the accused guilty of aggravated murder and aggravated robbery, but found the accused not guilty of a specification involving aggravated robbery. In rejecting the claim of a fatal inconsistency, the Ohio Supreme Court stated:

> The sentence was not based on an alleged inconsistency. The guilty verdict for count one reflects the jury's determination that appellant was guilty of the felony-murder. The determinations rendered as to the respective specifications cannot change that finding of guilty. Furthermore, as indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge

*Id.* at 26.

**{¶ 19}** Later, in *Koss*, the appellant argued the jury's guilty verdict of voluntary manslaughter was inconsistent with the not guilty attendant firearm

specification, and the Ohio Supreme Court concluded the verdicts were inconsistent. *Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970.

**{¶ 20}** However, appellate courts, including this court, have followed the rationale in *Perryman*. *See State v. Amey*, 2018-Ohio-4207, 120 N.E.3d 503 (8th Dist.). This court stated:

> Amey relies on *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990), in support of his inconsistent-verdicts argument. In that case, the Ohio Supreme Court held that an acquittal on a gun specification but the finding of guilt on the principal offense of voluntary manslaughter for causing the death of a victim with the firearm were inconsistent, and therefore, the voluntary manslaughter conviction was reversed. There was no legal authority or analysis in support of the conclusion reached in that case. *Koss*, in fact, contradicted the Ohio Supreme Court's earlier conclusion on inconsistency between the principal charge and the associated specification. *State v. Perryman*, 49 Ohio St.2d 14, 25-26, 358 N.E.2d 1040, paragraph 3 of the syllabus (1976) ("Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid.").
>
> Although some courts valued *Koss* based on recency, that support has faded. *State v. Given*, 7th Dist. Mahoning No. 15 MA 0108, 2016-Ohio-4746, ¶ 73-75, citing *Perryman* (noting the conflict created by *Koss* and deeming the decision in *Koss* to be of limited value); *see also State v. Lee*, 1st Dist. Hamilton No. C-160294, 2017-Ohio-7377, ¶ 43; *State v. Ayers*, 10th Dist. Franklin No. 13AP-18, 2013-Ohio-3601, ¶ 24. It may be time to consider *Koss* as nothing more than an outlier; however, any such conclusion would be outside the scope of this appeal.

*Id.* at ¶ 17 -18.

**{¶ 21}** Moreover, this court has consistently held that a not guilty verdict on firearm specifications does not present a fatal inconsistency with a guilty verdict for the principal charge. *See, e.g., State v. Jackson*, 8th Dist. Cuyahoga No. 105541, 2018-Ohio-2131, ¶ 8; *State v. Williams*, 8th Dist. Cuyahoga No. 95796, 2011-Ohio-

5483; *State v. Hardware*, 8th Dist. Cuyahoga No. 93639, 2010-Ohio-4346, ¶ 17, citing *State v. Fair*, 8th Dist. Cuyahoga No. 89653, 2008-Ohio-930; *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375. As this court explained in *Fair*, "[i]t is entirely proper for the jury to find appellant guilty of aggravated robbery without a firearm specification." *Id.* at ¶ 26.

**{¶ 22}** Other courts have also reached the same conclusion and applied *Perryman*. *See State v. Smith*, 2d Dist. Montgomery No. 26116, 2015-Ohio-1328, ¶ 17; *Ayers*, 2013-Ohio-5601, ¶ 24 ("[A]ppellate courts have limited the precedential impact of the *Koss* decision to cases involving voluntary manslaughter."); *State v. Davis*, 6th Dist. Lucas No. L-00-1143, 2002-Ohio-3046, ¶ 29; *State v. Glenn*, 1st Dist. Hamilton No. C-090205, 2011-Ohio-829, ¶ 70; *State v. Ortega*, 2d Dist. Montgomery No. 22056, 2008-Ohio-1164, ¶ 17; *State v. Robinson*, 6th Dist. Lucas No. L-02-1314, 2005-Ohio-324, ¶ 42.

**{¶ 23}** Hollins insists, however, that her convictions on the principal charges must be reversed due to the acquittals of the specifications in light of language in *Capp* describing firearm specifications as a "sentencing enhancement." *Id.*, 2016-Ohio-295, ¶ 27. However, in *Capp*, the defendant was convicted of one of the firearm specifications; the core issue is whether the conviction for the specification could be supported on a theory of aiding and abetting. As this court made clear, the sentence was enhanced due to the specification. *Id.* This case does not render the specification and the principal charge the same charge for purposes

of conducting the inconsistency analysis. Moreover, this court rejected this same argument in *Robinson*, explaining:

> Robinson argues that based upon the Ohio Supreme Court's holding in *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, [stating that completely dependent upon, the existence of the underlying criminal charge] a firearm specification is considered dependent on the underlying charge, and thus the two should be considered the same count. This court, however, has consistently rejected this argument. * * *.
>
> Here, the evidence supported the felony murder, felonious assault, and the discharge of a firearm on or near a prohibited place, the court instructed on the specifications independently and separately, and the convictions on these counts were not dependent upon a finding on the specifications. Accordingly, consistent with this court's precedent, we overrule the tenth assignment of error.

*Robinson*, 2013-Ohio-4375, ¶ 102-103.

**{¶ 24}** Here, it is not inconsistent for the jury to conclude that Hollins participated in the offenses for which she was convicted, and also conclude that she did not possess the firearm. *Accord Smith*, 2015-Ohio-1328, ¶ 17; *Ayers*, 2013-Ohio-5601, ¶ 17 *State v. Ortega*, 2d Dist. Montgomery No. 22056, 2008-Ohio-1164, ¶ 17-20; *State v. Robinson*, 6th Dist. Lucas No. L-02-1314, 2005-Ohio-324, ¶ 42.

**{¶ 25}** Similarly, *Randolph* is inapposite. In that case in which the jury verdict determined both that the defendant engaged in drug conspiracy yet found that none of the charged drugs were "involved in" the conspiracy." *Id.*, 794 F.3d at 607. In vacating this conviction, the court remarked that because the jury found that none of the charged drugs were "involved in" the conspiracy, it necessarily followed that Randolph could not be guilty of the charged conspiracy. *Id.* at 611.

**{¶ 26}** Here, however, the acquittal is not inconsistent with the jury's finding that Hollins aided and abetted the commission of the aggravated murder and other offenses. It is entirely consistent for the jury to conclude both that Hollins aided and abetted in the murder but did not possess the firearm. The evidence indicated that Hollins put the plan in motion following the unsuccessful prosecution of her assailants during the prior attack at the Cooley Lounge, that she drove them to the bar, led them to believe there were no cameras, waited for them nearby and drove them from the scene, but did not personally possess the firearms.

**{¶ 27}** In accordance with all of the foregoing, the first assigned error lacks merit.

**Motion for a Mistrial**

**{¶ 28}** In the second assigned error, Hollins argues that the trial court erred and deprived her of due process of law when it denied her motion for a mistrial after Brunson's counsel informed the jury during his closing argument that Sims had entered into a plea agreement.

**{¶ 29}** A mistrial can be declared only when the ends of justice require it, and a fair trial is no longer possible. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). We review the decisions regarding mistrials for an abuse of discretion. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). A mistrial should be granted only where the party seeking it demonstrates that he or she suffered material prejudice so that a fair trial is no longer possible. *Franklin*.

**{¶ 30}** In *State v. Davis*, 10th Dist. Franklin No. 18 Ap-921, 2019-Ohio-4692, the court considered this same argument that Hollins now raises and held the court did not abuse its discretion in light of its subsequent curative instruction. "Curative instructions are presumed to be an effective way to remedy errors that occur during trial." *Id.* at ¶ 34, quoting *State v. Brown*, 10th Dist. Franklin No. 15AP-935, 2016-Ohio-7944, ¶ 21, citing *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749.

**{¶ 31}** Here, the record indicates that, earlier in the record, i.e., the time that Sims actually exited the case, the trial court instructed the jury as follows:

> Members of the jury, I am withdrawing from your consideration the case against Dwayne Sims. That case has been disposed of and is no longer before you for decision. You are to deliberate in this case only concerning the complaints pending against Nigel Brunson and Anita Hollins. You are not to speculate about why the case against Dwayne Sims has been withdrawn from your consideration, and it is not to influence your verdicts concerning Nigel Brunson and/or Anita Hollins in any way.
>
> Your responsibility now is to decide the charges that remain pending against Nigel Brunson and Anita Hollins based solely on the evidence against him and her.

**{¶ 32}** Later, after counsel for Brunson referenced Sims and the plea during his closing argument, the trial court gave a curative instruction. The court stated, "Ladies and gentlemen of the jury, you are to wholly disregard the last statement that was made by Mr. Williams with regard to a co-defendant."

**{¶ 33}** In accordance with the foregoing, we conclude that the trial court did not err in denying the motion for a mistrial. The court's two instructions to the jury, including the instruction when Sims exited the case and the instruction following

Brunson's counsel's remark were sufficient to ameliorate any risk of prejudice to Hollins. *Accord Davis*, 2019-Ohio-4692, ¶ 29-35.

**{¶ 34}** This assignment of error is without merit.

## Venue

**{¶ 35}** In the third assigned error, Hollins argues that the state failed to establish that the offenses occurred in Cuyahoga County.

**{¶ 36}** The state must prove that venue is proper beyond a reasonable doubt. *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 19; quoting *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983). "Evidence of proper venue must be presented in order to sustain a conviction for an offense." *Hampton* at ¶ 20. However, it is not essential that the venue of the crime be proved in express terms, provided it is established by all the facts and circumstances beyond a reasonable doubt that the crime was committed in the county and state as alleged in the indictment or criminal affidavit. *State v. Gribble*, 24 Ohio St.2d 85, 263 N.E.2d 904 (1970), paragraph two of the syllabus; *State v. Vrona*, 47 Ohio App.3d 145, 150, 547 N.E.2d 1189 (9th Dist.1988); *State v. Shedwick*, 10th Dist. Franklin No. 11AP-709, 2012-Ohio-2270, ¶ 37.

**{¶ 37}** In this matter, the evidence indicated that the offenses occurred within Cleveland's first police district, in the area of Cooley Avenue and West 130th Street. The state also presented evidence that this area is within Cuyahoga County, Ohio. Moreover, all of the instructions for the offenses included the following provision, "you must find beyond a reasonable doubt that on or about the 24th day

of October, 2016 and in Cuyahoga County, Ohio, the defendants did * * *." Thus, insofar as the offenses occurred in Cuyahoga County and the defendants were convicted of the offenses, the facts and circumstances established venue herein.

**{¶ 38}** Insofar as Hollins complains that the verdict forms to not reference venue or require a finding as to venue, the record does not reveal an objection. Moreover, the court in *Shedwick*, rejected the same challenge to the verdict forms and stated:

> In this case, the jury verdict forms for the aggravated robbery and aggravated burglary charges contained language specifying that the jury found appellant guilty of each count as it was charged in the indictment. Each count of the indictment specified that the charged crime occurred in Franklin County. Moreover, the jury instructions directed the jurors that, in order to find appellant guilty of the charged crimes, they must find beyond a reasonable doubt that the crimes were committed in Franklin County. The language of the verdict forms, which were signed by all members of the jury, along with the language used in the indictment, establishes that the jury found that the crimes were committed in Franklin County. Thus, there was no error with respect to venue in the jury verdict forms.

*Id.*, 2012-Ohio-2270 at ¶ 44. *Accord State v. Hendrix*, 11th Dist. Lake No. 2011-L-043, 2012-Ohio-2832, ¶ 99.

**{¶ 39}** Similarly, in this case, each count of the indictment charged that the offenses occurred in Cuyahoga County, and the court's instructions to the jury informed them that the state alleged that the offenses occurred in Cuyahoga County. We find no prejudicial error in connection with the verdict forms.

## Sufficiency of the Evidence

**{¶ 40}** In the fourth assigned error, Hollins argues that there is insufficient evidence to support her convictions for aiding and abetting in the offenses of aggravated murder, aggravated robbery, kidnapping, aggravated burglary, felonious assault, or murder, because the evidence established only that she drove others to the Cooley Lounge. Hollins states that she did not engage in a plan manifesting the purpose to kill, and the evidence indicated that it was only during the offenses that Brinker learned the identity of the assailants so they shot her.

**{¶ 41}** A sufficiency challenge requires a court to determine whether the state has met its burden of production at trial and to consider not the credibility of the evidence but whether, if credible, the evidence presented would support a conviction. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

**{¶ 42}** "A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal." *State v. Langford*, 8th Dist. Cuyahoga No. 83301, 2004-Ohio-3733, ¶ 20, citing *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796. "A defendant may 'aid' or 'abet'

another in the commission of an offense by his words, gestures, deeds, or actions." *Capp*, 2016-Ohio-295, at ¶ 25. However, "the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner*, 69 Ohio St.2d 267, 269, 431 N.E.2d 1025 (1982). "Mere association with the principal offender * * * is [also] insufficient to establish complicity." *State v. Hoston*, 8th Dist. Cuyahoga No. 102730, 2015-Ohio-5422, at ¶ 13, citing *State v. Doumbas*, 8th Dist. Cuyahoga No. 100777, 2015-Ohio-3026. The surrounding facts and circumstances can be used to determine a defendant's intent. *Johnson* at 245. "Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed." *Id.* Acts which aided or abetted another include those which "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime * * *." *Id.*

**{¶ 43}** Aggravated murder under R.C. 2903.01(B) provides, in relevant part, that "[n]o person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit * * * aggravated burglary * * *." R.C. 2903.01(B). Pursuant to R.C. 2901.22(A):

> A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature.

**{¶ 44}** Where a defendant enters into a common design with others to commit armed robbery by the use of force, violence, and a deadly weapon, and all the participants are aware that an inherently dangerous instrumentality is to be employed to accomplish the felonious purpose, a homicide that occurs during the commission of the felony is a natural and probable consequence of the common plan that is presumed to have been intended. *State v. Thomas*, 2015-Ohio-4932, ¶ 46, 50 N.E.3d 967 (5th Dist.), citing *State v. Jester*, 32 Ohio St.3d 147, 153, 512 N.E.2d 962 (1987). *See also State v. Clark*, 55 Ohio St.2d 257, 378 N.E. 2d 597 (1978); *State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, ¶ 143; *State v. Johnson*, 8th Dist. Cuyahoga No. 60402, 1992 Ohio App. LEXIS 1752 (Apr. 2, 1992). *Accord Capp*, 2016-Ohio-295, at ¶ 31.

**{¶ 45}** In this matter, there was sufficient evidence to demonstrate that a Hollins entered into a common design with others to commit armed robbery by the use of force, violence, and a deadly weapon, and all the participants are aware that an inherently dangerous instrumentality is to be employed to accomplish the felonious purpose. Additionally, a homicide occurred during the commission of the planned offenses and it was a natural and probable consequence of the common plan that is presumed to have been intended. Here, the record shows that in December 2015, Hollins was attacked and injured during a fight at the Cooley Lounge. She accused Svec of setting up the attack. The assailants were acquitted in a trial during which Svec testified. After that, there is some evidence from Smith that Hollins may have inquired about who was working at the bar. Hollins contacted

Williams to "blow down" to Smith prior to her testimony during the instant trial. Svec changed her work schedule shortly before the murders. Hollins was with Brunson, Thomas, and Sims immediately prior to the murders. She drove Brunson, Thomas, and Sims to the bar. Brunson made calls to the bar in which he attempted to conceal the number from which he was calling. Hollins remained parked nearby while the assailants were inside the bar, then drove them from the scene. Brunson, Thomas, and Sims attacked and robbed the patrons. Thomas shot Brinker, then Brunson shot her in the face. Upon learning that Thomas shot the bartender and that Brunson "finished her off," Hollins said, "that's what she get." After the murders, Thomas confronted Hollins about her prior claim that there were no cameras at the bar.

**{¶ 46}** Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offenses proven beyond a reasonable doubt. From the evidence presented, a jury could reasonably conclude that Hollins participated in the crimes at issue and shared criminal intent in light of her actions and statements both before and after the shooting. Given the state's evidence, a jury could reasonably conclude that she aided and abetted in the planning and commission of the offenses. The jury could conclude that she entered into a common design with others to commit the offenses which involved weapons, and that the murder occurred during the commission of the planned offense and was a natural and probable consequence of the common plan. *Accord Capp*; *State v. Holbrook*, 6th Dist. Huron No. 14-H-003, 2015-Ohio-4780, ¶ 56-58 (The

evidence showed that defendant aided the codefendant by driving him to the location where the codefendant hit the victim in the head with a crowbar after a social media war.).

**{¶ 47}** The fourth assigned error is without merit.

**Manifest Weight of the Evidence**

**{¶ 48}** In the fifth assigned error, Hollins argues that her convictions are against the manifest weight of the evidence. She argues that although there is evidence that she drove the others to the bar, she did not know what was going to happen, and Brinker was killed only after she saw Thompson's face during the robbery.

**{¶ 49}** "[W]eight of the evidence involves the inclination of the greater amount of credible evidence." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Weight of the evidence concerns "the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

**{¶ 50}** Here, the record indicates that Hollins's attackers were acquitted during the December 2015 attack at the Cooley Lounge. Hollins blamed Svec for the

incident. Prior to the murders, Smith believed that Hollins attempted to determine who was working at the bar. Hollins and Williams communicated about contacting Smith prior to trial. Hollins drove the assailants to the bar and waited at a nearby park. Upon learning the bartender was killed, Hollins said, "that's what she get." Thomas subsequently confronted Hollins about her prior claim that there were no cameras at the bar, and she stated that she was going to file a civil action against the bar. Cell phone data showed that the assailants were together before during and after the offenses.

**{¶ 51}** In this matter, we cannot say that in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. A reasonable factfinder could conclude that Hollins planned the offenses after her assailants were acquitted and that she aided and abetted in the commission of the offenses. The convictions are not against the manifest weight of the evidence

**{¶ 52}** The fifth assignment of error is without merit.

**Statements Made During Break in Lake's Meeting with Police**

**{¶ 53}** In the sixth assigned error, Hollins argues that the trial court erred in concluding that she could not cross-examine Lake regarding his statements to his trial attorney and his investigator that were recorded, unbeknownst to his attorney, during a break in a meeting with the homicide detectives. Hollins maintains that they are exculpatory to her. She also claims that these statements were made in

furtherance of a fraud so they come within the crime-fraud exception to the attorney-client privilege and could have been used for impeachment of Lake.

**{¶ 54}** As an initial matter we note that R.C. 2317.02(A) provides that an attorney "shall not testify * * * concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client." Waiver involves the client's relinquishment of the protections of R.C. 2713.02(A) once they have attached. Further, Ohio recognizes the crime-fraud exception to prevent concealment of attorney or client wrongdoing. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 3. The court explained that the privilege does not attach in a situation where the advice sought by the client and conveyed by the attorney relates to some future unlawful or fraudulent transaction. Advice sought and rendered in this regard is not worthy of protection, and the principles upon which the attorney-client privilege is founded do not dictate otherwise. *Id.* at ¶ 27. In *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 385, 1998-Ohio-290, 700 N.E.2d 12, the court explained:

> A party invoking the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud. *United States v. Jacobs* (C.A.2, 1997), 117 F.3d 82, 87. The mere fact that communications may be related to a crime is insufficient to overcome the attorney-client privilege. Id. at 88, quoting *United States v. White* (C.A.D.C.1989), 281 U.S. App. D.C. 39, 887 F.2d 267, 271.

*Id.* at 384.

{¶ 55} "Once there is a showing of a factual basis, the decision whether to engage in an in camera review of the evidence lies in the discretion of the * * * court." *Id.*

{¶ 56} Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

{¶ 57} In this matter, as to waiver, Det. Carlin testified that she learned through Lake's attorney that he wanted to make a statement and that he would be able to make identification of four individuals. To Hollins, this constituted a waiver of the privilege. Lake's counsel, on the other hand, stated that he informed Det. Carlin only that Lake wanted to proffer according to his knowledge, thereby leaving the attorney-client privilege intact. He also stated that that he requested the break and asked the detectives to leave the room because he "didn't feel my client was clearly explaining[.]" After the detectives left the room, he did not know that they were being recorded. The trial court also heard from Lake about the circumstances of his photo identification of suspects. Lake stated that he told his attorney the names and that he told "them" the names, but this statement lacks clarity in terms of time and who "them" was. The state strongly opposed the motion and stated that the conversation involved a "back and forth" "about a prior discussion" and information Lake had previously provided to the attorney. The court stated that it reviewed the tape and had its own conclusion and opinion about what it shows. The

court concluded that the facts were insufficient to show that Lake had waived his attorney-client privilege prior to the inadvertent recording. The court ruled that prior to his recorded statement, Lake spoke with his attorney and gave information that was not yet to be divulged until the official statement. We find no abuse of discretion. The privilege belongs to Lake. There is nothing in the record from which we can conclude that it was waived or otherwise vitiated.

**{¶ 58}** This assigned error lacks merit.

**Ineffective Assistance of Counsel**

**{¶ 59}** In the seventh assigned error, Hollins argues that her trial counsel was ineffective for failing to take an interlocutory appeal from the trial court's ruling forbidding the cross-examination of Lake on statements made between Lake, his attorney, and investigator during a break in their meeting with police.

**{¶ 60}** In order to establish a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, a defendant must also demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley* at paragraph three of the syllabus.

**{¶ 61}** Here, this court determined that no error occurred in connection with the court's ruling denying Hollins request to cross-examine Lake about the statements Lake, his counsel and investigator made during the break in the meeting with police. Accordingly, a claim of ineffective assistance of counsel based upon the failure to take an interlocutory appeal on this ruling must likewise fail. *See State v. Henderson*, 39 Ohio St.3d. 33, 528 N.E.2d 1237 (1989).

**{¶ 62}** The seventh assigned error is without merit.

**Ineffective Assistance as to Charge and Competency / Sanity**

**{¶ 63}** In the eighth assigned error, Hollins that her trial attorney provided ineffective assistance of counsel by requesting a single aiding and abetting instruction for Count 1, aggravated murder in violation of R.C. 2903.01(B). She also argues that her trial counsel was ineffective for failing to request sanity and competency evaluations because the PSI prepared in this matter indicates that she "reported that she was diagnosed with Bipolar, Depression, PTSD, Schizophrenia, and Anxiety" and was taking medication while in jail.

**1. Aiding and Abetting Instruction**

**{¶ 64}** Hollins argues that her trial counsel was ineffective in requesting a single instruction on aiding and abetting was given prior to the instructions on Count 1 and was not repeated throughout the charge. She also complains that in instructing the jury on felony murder in violation of R.C. 2903.01(B), the court did not clearly advise the jury that it was required to find that she had purpose to cause the murder of Hollins and not just the purpose to engage in the underlying felony.

**{¶ 65}** Generally, "[i]n examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.'" *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 115, quoting *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995), quoting *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990). Whether the jury instructions correctly state the law is a question that is reviewed de novo. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 135.

**{¶ 66}** Turning to the first argument raised herein, this court has approved giving a single aiding and abetting instruction with instructions on other principal offenses. *See State v. Crump*, 8th Dist. Cuyahoga No. 107460, 2019-Ohio-2219, ¶ 53, citing *State v. Singleton*, 8th Dist. Cuyahoga No. 98301, 2013-Ohio-1440, ¶ 23.

**{¶ 67}** With regard to the second argument raised herein, R.C. 2903.01(B) defines aggravated murder as follows:

> [N]o person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

**{¶ 68}** Purpose is defined in R.C. 2901.22(A) as follows:

> A person acts purposely when it is his specific intention to cause a certain result, or when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to

accomplish thereby, it is his specific intention to engage in conduct of that nature.

**{¶ 69}** Purpose to kill is required in order to establish the offense of aggravated murder. *State v. Phillips*, 74 Ohio St.3d 72, 100, 656 N.E.2d 643 (1995). The complicity statute, R.C. 2923.03(A)(2), provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall aid or abet another in committing the offense." "A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal." *State v. Langford*, 8th Dist. Cuyahoga No. 83301, 2004-Ohio-3733, ¶ 20, citing Johnson, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796.

**{¶ 70}** In this matter, the jury instructions provided:

> The defendants, Nigel J. Brunson and Anita Hollins, are charged with aggravated murder in violation of Revised Code section 2903.01(B) in Counts 2, 3, and 4 of the indictment.
>
> Before you can find one or more of the defendants guilty, you must find beyond a reasonable doubt that on or about the 24th day of October, 2016 and in Cuyahoga County, Ohio, the defendants did purposely cause the death of Melissa A. Brinker while committing or attempting to commit or while fleeing immediately after committing or attempting to commit the offense of aggravated robbery in Count 2, kidnapping in Count 3, and aggravated burglary in Count 4.
>
> The terms purpose and cause have been previously defined, [as follows:]
>
> To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to that person unless they express it to others or indicate it by their conduct.

> The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the means, or weapon used, and all the other facts and circumstances in evidence.
>
> You may infer a purpose to cause the death of another when the natural or probable consequence of the defendant's act is to produce death in light of all the surrounding circumstances. Such circumstances include the weapon used and its capability to destroy life.
>
> If you find that the calculated to destroy life, you may but are not required to infer the purpose to cause death from the use of the weapon whether an inference is made rests entirely with you.

**{¶ 71}** In *State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, the court held that this same instruction did not relieve the state of its burden of proving that the defendant had a purpose or specific intent to cause the victim's death. *Accord State v. Lollis*, 9th Dist. Summit No. 26607, 2014-Ohio-684, ¶ 21; *State v. Randleman*, 9th Dist. Lorain No. 17CA011179, 2019-Ohio-3221. We likewise conclude that this instruction in the instant case on aggravated murder, when read in conjunction with the charge on aiding and abetting, was not improper and did not erroneously relieve the state of its duty to prove Hollins's purpose to kill beyond a reasonable doubt.

**{¶ 72}** In accordance with the foregoing, the first portion of the eighth assignment of error is without merit.

**2. No Sanity of Competency Evaluations**

**{¶ 73}** Hollins next argues that her trial counsel was ineffective in failing to seek sanity and competency evaluations in this matter because during her pretrial investigation report, she stated that she had been seeing a psychiatrist, she indicated that she suffered from bipolar, depression, post-traumatic stress disorder,

schizophrenia, anxiety, and also reported prior suicide attempts. She was prescribed medication while in jail.

**{¶ 74}** A person who "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense" may not stand trial. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 155, citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). "Fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial." *Id.*, citing *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995).

**{¶ 75}** An adult defendant is presumed competent to stand trial:

> A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial * * *.

R.C. 2945.37 (G); *Berry* at 360.

**{¶ 76}** The defense bears the burden of production to rebut the presumption of competence. *State v. Williams*, 23 Ohio St.3d 16, 19, 490 N.E.2d 906 (1986).

**{¶ 77}** Under R.C. 2945.37(B), a trial court must hold a hearing on the issue of a defendant's competency if the issue is raised prior to trial. *State v. Jirousek*, 8th Dist. Cuyahoga No. 99641, 2013-Ohio-4796, ¶ 10. If the issue of competency is raised after the trial has commenced, however, the court shall hold a hearing on the

issue "only for good cause shown or on the court's own motion." *Id.* The decision to order an evaluation is a matter within the discretion of the trial court. *State v. Thomas*, 97 Ohio St.3d 309, 315, 2002-Ohio-6624, 779 N.E.2d 1017, citing *State v. Rahman*, 23 Ohio St.3d 146, 156, 492 N.E.2d 401 (1986); *State v. Pennington*, 100964, 2014-Ohio-5426, ¶ 26. "[F]ailure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency." *State v. Macon*, 8th Dist. Cuyahoga No. 96618, 2012-Ohio-1828, ¶ 35, citing *State v. Bock*, 28 Ohio St.3d 108 at 110, 502 N.E.2d 1016 (1986).

**{¶ 78}** A defendant has a constitutional right to a competency hearing only when there is sufficient "indicia of incompetence" to alert the court that an inquiry is needed to ensure a fair trial. *Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433. Considerations in this regard might include supplemental medical reports, specific references by defense counsel to irrational behavior, and the defendant's demeanor during trial. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 15, citing *State v. Chapin*, 67 Ohio St.2d 437, 424 N.E.2d 317 (1981).

> The right to a hearing rises to the level of a constitutional guarantee when the record contains sufficient 'indicia of incompetency' to necessitate inquiry to ensure the defendant's right to a fair trial. Objective indications such as medical reports, specific references by defense counsel to irrational behavior, or the defendant's demeanor during trial are all relevant in determining whether good cause was shown after the trial had begun.

*State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 37 (internal citation omitted).

**{¶ 79}** In this matter, we find no error in the trial court failing to hold a competency hearing after trial had commenced. The record does not contain indicia of incompetency. There is no evidence that Hollins was incapable of understanding the proceedings or of assisting counsel in her defense. At no time did her experienced trial counsel mention any irrational behavior, nor suggest that she was incompetent. As to the claimed diagnoses, Hollins had no information about where she had been evaluated, diagnosed, or treated, and no information about the medication she had previously received. She also had a significant offense history and involvement in a civil matter involving the improper transfer of real estate, and there is no indication that she was incapable of understanding the charges against her or unable to assist in her defense. We find no error in the trial court failing to hold a competency hearing after obtaining the PSI prior to sentencing. *Accord State v. Harris*, 8th Dist. Cuyahoga No. 102124, 2015-Ohio-5409

**{¶ 80}** Moreover, as to the claimed medication and diagnoses, we note that although Hollins was on Buspar and Visparil while in jail, the "fact that a defendant is taking antidepressant medication or prescribed psychotropic drugs does not negate his competence to stand trial." *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 71. Furthermore, a defendant is not presumed to be incompetent solely because he is receiving or has received treatment for mental illness. The mere fact that appellant was taking these medications does not necessarily render him incompetent. R.C. 2945.37(F); *Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 ("A defendant may be emotionally disturbed or even psychotic and

still be capable of understanding the charges against him and of assisting counsel."). As to the remainder of the information, Hollins could not remember who when or where she was diagnosed, could not name her treatment provider, or describe the services she received. We conclude that counsel was not ineffective for failing to seek a competency or sanity evaluation. *Accord State v. Price*, 8th Dist. Cuyahoga No. 100981, 2015-Ohio-411.

**{¶ 81}** The eighth assigned error lacks merit.

**{¶ 82}** Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FILED AND JOURNALIZED
PER APP.R. 22(C)

SEP 03 2020

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Gregg Mercix Deputy

Patricia Ann Blackmon
PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
RAYMOND C. HEADEN, J., CONCUR

# FEDERAL CONSTITUTIONAL AMENDMENTS

## FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects,[a] against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

## FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TRACKING NUMBER
7022 3330 0000 4123 0107

We attempted to deliver your item at 3:21 pm on February 18, 2025 in CLEVELAND, OH 44120 and a notice was left because an authorized recipient was not available. You may arrange redelivery by using the Schedule a Redelivery feature on this page or may pick up the item at the Post Office indicated on the notice beginning February 19, 2025. If this item is unclaimed by March 5, 2025 then it will be returned to sender.

**Get More Out of USPS Tracking:**

**USPS Tracking Plus®**

CLEVELAND, OH 44120
February 18, 2025, 3:21 pm
"NO-KNOCK" MAIL DELIVERY OF SIGNATURE - REQUIRED MAIL

February 17, 2025
3 DAYS IN CLEVELAND

CLEVELAND OH DISTRIBUTION CENTER
February 15, 2025, 3:27 pm

YOUNGSTOWN OH DISTRIBUTION CENTER
February 15, 2025, 1:02 am
8 DAYS IN GAITHERSBURG

GAITHERSBURG MD DISTRIBUTION CENTER
February 6, 2025, 10:19 pm

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**What Do USPS Tracking Statuses Mean? (https://faq.usps.com/s/article/Where-is-my-package)**

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YOUNGSTOWN OH DISTRIBUTION CENTER
February 15, 2025, 1:02 am

GAITHERSBURG MD DISTRIBUTION CENTER
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APPENDIX G

**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, DC 20543-0001**

December 6, 2024

Anita Hollins
#101788
Dayton Correctional Institution
4104 Germantown Pike
Dayton, OH 45417

RE: Hollins v. Smith
USAP6 No. 24-3023

Dear Ms. Hollins:

The above-entitled petition for writ of certiorari was postmarked November 26, 2024 and received December 4, 2024. The papers are returned for the following reason(s):

You cannot seek review of a state and federal case under the same petition. To the extent the petition intends to seek review of the order dated September 5, 2024 for which a timely rehearing was denied on October 25, 2024 by the Sixth Circuit Court of Appeals in case No. 24-3023, then the statement of jurisdiction must reflect this only. To the extent you intend to seek review of a state case, you must file a separate petition. Rule 14.1.

It appears two versions of the opinions below and statement of jurisdiction were filed. Please resubmit only one version of the opinions below and the statement of jurisdiction in compliance with Rule 14.1.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

APPENDIX G

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:

Angela Jimenez
(202) 479-3392

Enclosures
cc: John Wood

APPENDIX G

John Wood
12614 Britton Drive
Cleveland, OH 44120

APPENDIX G

Jan 16, 2025

To whom it may concern,

My name is Anita Hollins # 10:788 and I have not been receiving mail here at Dayton Correctional Institution. The court made a mailing on Dec 6, 2024 and early Jan 2025 and neither was received. I'm asking that the court mail it to an alternate address please address it to John Wood Esq. 12614 Britton drive Cleveland, Ohio 44120. Phone # 216 673-4122 Email address KayakmanJd@Hotmail.com please leave a message at the phone number that I placed in this letter once this letter is received by the courts.

Sincerely,
Anita Hollins
Anita Hollins



APPENDIX G

APPENDIX G

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543-0001

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

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