No. ______ (CAPITAL CASE)

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

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CARL LINDSEY,
Petitioner,

v.

WARDEN CHARLOTTE JENKINS,
Respondent.

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On Petition for Writ of Certiorari to
The United States Court of Appeals for the Sixth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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No execution date is presently scheduled.


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## CAPITAL CASE: QUESTIONS PRESENTED

I.

Carl Lindsey was convicted of aggravated murder and sentenced to death based on the critical testimony of Kathy Kerr, the lone witness to testify that she saw the victim's wife give Lindsey a gun and saw Lindsey standing near the victim's body. The prosecution, however, withheld evidence that it had granted Kerr testimonial immunity. The Sixth Circuit denied Lindsey a certificate of appealability (COA) on his claim that the withholding of Kerr's immunity deal violated *Brady v. Maryland*, 373 U.S. 83 (1963). The Sixth Circuit's denial of a COA raises the following questions:

a. May a reviewing court find immaterial under *Brady* withheld evidence that impeaches the prosecution's key witness by stating that there was "overwhelming evidence" of the petitioner's guilt, without engaging in a thorough analysis of the impact of the withheld evidence on the witness' credibility and the jury's guilt and sentencing verdicts? *Compare* Pet. for Cert. in *Glossip v. Oklahoma*, U.S. No. 22-6500 (querying whether withheld evidence impeaching key witness was material under *Brady*); Pet. for Cert. in *Glossip v. Oklahoma*, U.S. No. 22-7466 (querying whether reviewing court properly applied *Brady* to withheld evidence that impeaches key witness); Pet. for Cert. in *Johnson v. Alabama*, U.S. No. 22-7337 (same).

b. In denying a COA, did the Sixth Circuit apply an unduly burdensome standard for granting a certificate, and is Lindsey entitled to a COA on his *Brady* claim?

II.

After securing significant evidence of Fetal Alcohol Spectrum Disorder (FASD) that trial counsel failed to investigate or present at sentencing, Carl Lindsey filed a motion to amend his petition for writ of habeas corpus. Because he filed the motion after timely filing a motion to alter or amend judgment under Fed. R. Civ. P. 59(e), *Banister v. Davis*, 590 U.S. ___ (2022) holds that, at the time, there was "no longer a final judgment to appeal from." *Id.* at ___ (slip op. at 3). *Banister* leaves open a question that is the subject of a circuit split:

> When a party seeks leave to amend a petition after timely filing a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), is the party entitled to amend upon satisfying Fed. R. Civ. P. 15's pre-judgment standards, or must the party also satisfy Rule 59's standards for amending a judgment?

## DIRECTLY RELATED CASES

**Ohio Supreme Court**:

*State v. Lindsey*, 721 N.E.2d 995 (Ohio 2000)

**Ohio Court of Appeals**:

*State v. Lindsey*, 12th Dist. Brown No. CA20020202, 2003 Ohio 811 (Feb. 24, 2003)

*State v. Lindsey*, 12th Dist. Brown No. CA20030710, 2004 Ohio 4407 (Aug. 23, 2004)

*State v. Lindsey*, 12th Dist. Brown No. CA202208006, 2023 Ohio 1846 (June 5, 2023)

**United States District Court**:

*Lindsey v. Warden*, S.D. Ohio No. 1:03-cv-702 (Judgment entered Dec. 30, 2020; Opinion and Order entered July 20, 2021)

**United States Court of Appeals**:

*Lindsey v. Jenkins*, 6th Cir. No. 21-3745 (Order entered Sept. 8, 2022; amended order entered Dec. 1, 2022)

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Carl Lindsey respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The order of the Sixth Circuit denying Lindsey's petition for rehearing *en banc* with respect to his application for a certificate of appealability (COA) is unpublished and reproduced as Appendix A, *Lindsey v. Jenkins*, 6th Cir. No. 21-3745 (Order entered February 13, 2023). The order of the Sixth Circuit denying Lindsey's petition for rehearing with respect to his application for a COA is unpublished and reproduced as Appendix B, *Lindsey v. Jenkins*, 6th Cir. No. 21-3745 (Order entered January 10, 2023). The amended order of the Sixth Circuit denying Lindsey's application for a COA is unpublished and reproduced as Appendix C, *Lindsey v. Jenkins*, 6th Cir. No. 21-3745 (Amended Order entered December 1, 2022). The original order of the Sixth Circuit denying Lindsey's application is unpublished and reproduced as Appendix D, *Lindsey v. Jenkins*, 6th Cir. No. 21-3745 (Order entered Sept. 8, 2022).

The decision of the district court denying Lindsey's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 is unpublished and available at *Lindsey v. Warden*, No. 1:03-cv-702, 2020 WL 7769816 (S.D. Ohio Dec. 30, 2020) (R. 159), and reproduced as Appendix E. The decision of the district court denying Lindsey's Motion to Alter or Amend the Judgment and Alter or Make Additional Findings and to Reconsider Denial of Certificate of Appealability (COA), and Motion for Leave to

Amend his Petition is unpublished and available at *Lindsey v. Warden*, No. 1:03-cv-702, 2021 WL 304663 (S.D. Ohio July 20, 2021) (R. 172), and reproduced as Appendix F.

## JURISDICTIONAL STATEMENT

In this petition, Lindsey seeks review of the Sixth Circuit's amended order denying his application for a COA in his capital case. Following this denial, the Sixth Circuit denied his petition for rehearing *en banc* on February 13, 2023. The time for filing Lindsey's petition for certiorari was extended to July 13, 2023, by order of Justice Kavanaugh on May 11, 2023, No. 22A988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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.

The Sixth Amendment to the United States Constitution provides:

> 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.

The Eighth Amendment to the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> 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.

Section 2253 of Title 28 of the United States Code provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ

> of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## STATEMENT OF THE CASE

A Brown County, Ohio jury convicted Carl Lindsey of aggravated murder in 1997, and the court sentenced him to death. The Ohio Supreme Court affirmed his convictions and death sentence on direct appeal. *State v. Lindsey*, 721 N.E.2d 995 (Ohio 2000). Lindsey later learned that the State concealed favorable evidence and raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), in his post-conviction proceedings. Through the course of his investigation, Lindsey also obtained new evidence that previously went uninvestigated due to ineffective assistance of counsel, and he attempted to amend his federal habeas petition to raise claims predicated on this newly discovered evidence.

### I. The State suppressed the immunity deal offered to their key witness.

In the early morning hours of February 10, 1997, Joy Hoop proposed killing her husband "Whitey" to a group of patrons she was serving at Slammer's Bar, who included Kathy Kerr, Carl Lindsey, Kenny Swinford, and A.J. Cox. *See State v. Lindsey*, 721 N.E.2d 995, 999 (Ohio 2000). Lindsey, heavily intoxicated on alcohol and other drugs, and vulnerable to the influence of others given his brain damage from Fetal Alcohol Syndrome Disorder (FASD), followed Joy Hoop's lead. The other patrons left but Joy Hoop, Lindsey, and Kerr remained at the bar after closing.

Whitey Hoop was confronted in the parking lot of Slammer's Bar and at least one, non-fatal shot was fired as he sat in his truck. *Id.* As indicated by the blood spatter across the parking lot, an altercation ensued before a second, fatal shot was fired. The State filed capital murder charges against both Lindsey and Joy Hoop. At Lindsey's trial, the State argued that Lindsey fired the second, fatal shot. At Joy Hoop's subsequent trial, however, the State argued that Joy Hoop fired the second, fatal shot. Hoop Trial Tr., PC Ex. 32, ROW App., R. 152-7, PageID 7914-15. At the Hoop trial, the State presented a new witness for the first time, Thomas Merriman, who testified that Hoop told him she fired the final shot because Lindsey "didn't finish the job." *Id.* at PageID 6710-12. At both trials, Kathy Kerr, the only other person present at the time of the offense, played a central role.

The State, however, suppressed evidence that Kerr, their key witness, had been granted testimonial immunity. Prior to testifying at Lindsey's trial, the prosecutor provided a letter to Kerr granting her testimonial immunity in exchange "for your truthful testimony and cooperation." Immunity Letter, PC Ex. 45B, ROW App., R. 152-9, PageID 8122. The prosecutor "believed that by offering [the immunity] she would be truthful with us and not fearful of some incrimination by us as a result of her being truthful." Grennan Dep., R. 67-1, PageID 866, 872. Believing she had this immunity, Kerr testified for the State with a version inconsistent with her previous statements to police, which provided key details needed to secure Lindsey's conviction and death sentence.

Kerr's testimony was "powerfully incriminating," as it "expressly implicated" Lindsey in the crime. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987) (quotation marks omitted). After Kerr made no assertion in her initial police statement or grand jury testimony that she saw a gun, Trial Tr., R. 153-4, PageID 11332, Kerr changed her testimony at Lindsey's trial to claim that she saw Hoop give Lindsey "a little black gun." *Id.* at PageID 11302. While defense counsel called attention to this inconsistency during cross-examination, *id.* at PageID 11332, they were deprived of the impeaching evidence explaining *why* Kerr would change her statements to now fit the prosecution's theory of the case at trial—namely, her grant of immunity.

Kerr was also the only witness placing Lindsey in the parking lot standing near the victim's body. *Id.* at PageID 11303. She testified that after Lindsey left the bar, she and Joy Hoop remained inside. Kerr testified that she heard a banging on the door, unlocked and opened it, and then saw "Whitey laying on the ground and Carl standing by the door." *Id.* at PageID 11305-06. Kerr then confirmed that she saw Whitey laying on the ground, covered in blood. *Id.* at PageID 11306. Kerr then went home.

Kerr's involvement didn't stop there. After leaving the bar, Lindsey drove across the street to Kerr's residence, where Kerr "voluntarily" allowed Lindsey into her home to shower and change into clean clothes. Trial Tr. Vol. III at 15-16, 63, R. 153-1, PageID 9759. A short time later, police arrested Lindsey at Kerr's home, where they found a gun, bullets, and the victim's wallet. Throughout the investigation, police viewed Kerr as a key witness and interviewed her multiple times, resulting in numerous inconsistent statements as her story changed. Trial Tr. Vol. VI at 5-6, R. 153-3, PageID 10441. In addition to taking statements, police tested Kerr for gunshot residue and took her fingerprints. Trial Tr. Vol. IX at 552-

53, R. 153-4, PageID 11660-61. The State then relied on Kerr's testimony before the Grand Jury. While Joy Hoop and Lindsey remained primary suspects, Kerr, and her version of events, became a key focus for the investigation as well.

Kerr then played a central role at trial. The search of Kerr's home was the subject of a pre-trial motion to suppress. Trial Tr. Vol. III at 4-6, R. 153-1, PageID 9700-702. The jurors participated in a viewing of Kerr's residence, including entering her home. Trial Tr. Vol. VIII at 2-4, R. 153-4, PageID 11107-09. The State relied directly on Kerr's testimony that *she* did not bring the handgun, ammunition, or wallet into her own home, to infer that Lindsey was solely responsible for the robbery and placement of these items. *Id.* at 209, PageID 11314. Notably, the State presented Kerr as their *only witness* linking Lindsey to the second, fatal shot. *Id.* at 31, PageID 11136.

The prosecution then emphasized during closing argument that it was Kerr – and Kerr alone – who "says I saw her [Hoop] hand him [Lindsey] a gun," which Kerr claimed was small and black. *Id*. at 11926. Kerr was the only witness to claim that "she saw the gun" (*id*. at 11928), and the prosecution argued that "[t]here is no evidence that refutes what Kathy says." *Id*. at 11989.

In sum, Kerr was the only witness present before, during, and after the offense. As the prosecutor explained at the co-defendant's subsequent trial: "Who knows the most but Kathy Kerr?" Hoop Trial Tr., PC Ex. 33, ROW App., R. 152-9, PageID 7931. Kerr, and her credib`1`/ility, thus played a crucial role in the proceedings.

The defense's strategy centered on undermining Kerr's credibility. Starting in opening statements, the defense brought Kerr's inconsistent statements to the jury's attention. Trial Tr. Vol. VIII at 58-59, R. 153-4, PageID 11163-64 ("The evidence will show you that each one of [Kerr's statements] tells a different story…The evidence will show you that she's been coached…."). Defense counsel also sought to highlight these inconsistent statements during cross examination. *Id.* at 225-48, PageID 11330-53. To rehabilitate Kerr, the State allowed her to testify that she changed her story because she feared "Carl and Joy." *Id.* at 218-19, PageID 11323-24; *id.* at 244-45, PageID 11349-50.

Even worse, the prosecutor then actively aided concealment of the grant of immunity on redirect examination by withdrawing a question that would have disclosed the grant. The prosecutor asked Kerr, "And what made you finally tell the truth--" before quickly adding "I'll withdraw that." Trial Tr. Vol. VIII at 244, R. 153-4, PageID 11349. Due to the suppression of Kerr's immunity deal, the jury never learned that Kerr received a substantial incentive to testify for the State and to change her story, yet again.

In addition to attacking her credibility, the defense alluded to Kerr's involvement in the offense. The defense presented Kerr as a potential suspect, arguing a "possibility that the subjects Joy Hoop and Kathy Kerr could have discharged the firearm…." Trial Tr. Vol. VIII at 45, R. 153-4, PageID 11150. The defense argued that the gunshot residue on Lindsey's hands "may be from handling the gun in Kathy Kerr's bathroom after the crime had been committed." *Id.* at 47, PageID 11152. On cross-examination, the defense emphasized that police failed to collect Kerr's clothes as evidence or obtain a sample of the blood on her before she wiped it off. *Id.* at 246-48, PageID 11351-53.

Lindsey argued first in state court, then in his federal habeas petition, that the suppression of Kerr's immunity deal violated *Brady v. Maryland,* 373 U.S. 83 (1963). When considering the merits of Lindsey's *Brady* claim on de novo review, the district court correctly found that "there was an agreement regarding testimonial immunity, the agreement was likely not disclosed to the defense, and that agreement could have been used for impeachment purposes." Opinion and Order at 20, R. 159, PageID 12325. Indeed, Lindsey's trial counsel attested that he was not aware the prosecutor had granted Kerr immunity and was not provided a copy of the prosecutor's letter granting Kerr immunity. Wallace Dep., R. 66-1, PageID 772-73; *see also* ROW App., R. 152-8, PageID 7529.

The district court, and the Sixth Circuit panel, however, failed to grant a COA on this claim, finding the suppression of evidence immaterial. The Sixth Circuit held that "it is not reasonably probable that the result of either phase of trial would have been different even had the revelation of the promise of testimonial immunity led to Kerr's successful impeachment" on the basis that the "evidence of Lindsey's guilt was overwhelming." Amended Order, Doc. No. 21-1 at 3.

## II. Lindsey sought to amend with newly discovered evidence of brain damage and prior counsel's failure to timely communicate a plea offer.

After discovering new evidence during habeas proceedings, Lindsey filed a post-conviction petition seeking to exhaust claims in state court. Just three months after filing exhibits supporting the petition in state court, Lindsey moved to amend his federal habeas petition. In between these two events, however, the district court denied Lindsey's habeas petition.

Accordingly, Lindsey timely filed a motion under Fed. R. Civ. P. 59(e), followed by a motion to amend his habeas petition with claims based on newly discovered evidence. Motion, R. 163, PageID 12469.

Lindsey sought to amend to add a claim that trial counsel performed deficiently, and to his prejudice, when they failed to investigate and present evidence that he suffers brain damage due to having Fetal Alcohol Spectrum Disorder (FASD). He also argued that imposing a death sentence on a person with FASD is unconstitutional under the Eighth and Fourteenth Amendments. Lindsey further sought to allege that his counsel rendered ineffective assistance for their failure to timely communicate a plea offer from the prosecutor's office. Lindsey also presented claims that his death sentence is unconstitutional due to the prosecutor's repeated withdrawal of offers of a life sentence as well as his trial counsel's failure to object to imposition of the death penalty after the prosecutor agreed that a life sentence was appropriate.

Under Fed. R. Civ. P. 15(a)(2), when a petitioner seeks leave to amend, "The court should freely give leave when justice so requires." Rather than applying Rule 15's liberal standard, the district court denied leave to amend on the basis that Lindsey failed to meet the higher burden to reopen the judgment under Rule 59.

Opinion, R. 172, PageID 12678. The Sixth Circuit denied a COA, concluding that a higher standard for amendment applies to a post-judgment motion to amend. COA Order, Doc. No. 21-1 at 9, citing *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir. 2010).

## REASONS FOR GRANTING THE WRIT

### I. The Sixth Circuit improperly applied a more stringent materiality standard when denying a COA on Lindsey's *Brady* claim.

The Sixth Circuit has a pattern of misapplying the *Brady* materiality standard in capital cases. *See Chinn v. Shoop*, No. 22-5058, 598 U.S. ___ (2022) (Jackson, J., dissenting from denial of certiorari). Here, the Sixth Circuit has misapplied federal precedent once again; therefore, it is appropriate and necessary for this Court to intervene.

The Sixth Circuit's denial of Lindsey's *Brady* claim because the "evidence of Lindsey's guilt was overwhelming," Amended Order, Doc. No. 21-1 at 3, conflicts with this Court's precedents. As Justices Jackson and Sotomayor have explained, there is a "relatively low burden that is 'materiality for purposes of *Brady*…." *Chinn*, 598 U.S. at ___ (slip op. at 1) (Jackson, J., dissenting). "To prove prejudice under…*Brady*…a defendant must show a 'reasonable probability' of a different outcome," which "is a qualitatively lesser standard" than a standard requiring a defendant to show that it is "more likely than not" that suppressed evidence would have changed the outcome. *Id.*, 598 U.S. at ___ (slip op. at 1, 2) (Jackson, J., dissenting), citing *Kyles v. Whitley*, 514 U.S. 419 (1995). The Sixth Circuit failed once again to properly apply this standard.

Contrary to the Sixth Circuit's reasoning, evidence of Lindsey's guilt does not negate the value of Kerr as a witness nor the materiality of her suppressed immunity deal. As the Supreme Court explained in *Kyles*, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." 514 U.S. at 434. *See also Jamison v. Collins*, 291 F.3d 380, 385, 389-91 (6th Cir. 2002) (holding that even without conclusive evidence of innocence, suppressed evidence "directly applicable to the most damaging testimony" is material).

Members of this Court recently recognized that "[t]he requirement that the withheld evidence must speak to or rule out the defendant's participation in order for it to be favorable is wholly foreign to our case law." *Brown v. Louisiana*, No. 22-77, 598 U.S. ___ (2023) (Jackson, J., dissenting from denial of certiorari) (slip op. at 3). To show evidence is favorable, the evidence need only have "some value." And evidence has value if it "tends to… impeach a witness, *ibid.*, or might reduce the potential penalty." *Id.* (slip op. at 2).

Materiality is based on the likelihood that the trial outcome would have been different if the suppressed evidence had been properly disclosed. *Kyles*, 514 U.S. at 433. In *Kyles*, this Court explained that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434; *see also United States v. Bagley*, 473 U.S. 667, 678 (1985). A "reasonable probability" of a different result is when the suppression of evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, citing *Bagley*, 473 U.S. at 678. This materiality threshold is lowered even further when viewed through the COA standard, where the courts merely consider whether jurists of reason could disagree about whether the materiality standard was met. *See Buck*, 580 U.S. at 115; *see also* § II, below.

Pursuant to Supreme Court Rule 10(c), certiorari is warranted because rather than applying this Court's precedent, the Sixth Circuit improperly applied a heightened *Brady* materiality standard when denying Lindsey a COA on his claim. Given Kerr's role in this case, and the importance of her credibility, reasonable jurists could debate whether Lindsey's conviction and death sentence are "worthy of confidence" in light of the suppression of Kerr's immunity deal.

Kerr's participation in the crime created an incentive for her to shift the blame elsewhere. *See Fulcher v. Motley*, 444 F.3d 791, 809 (6th Cir. 2006); *Stallings v. Bobby*, 464 F.3d 576, 583 (6th Cir. 2006). Indeed, her immunity deal gave her "powerful incentive to testify favorably" for the prosecution in order to secure Lindsey's conviction and death sentence. *Hayes v. Brown*, 399 F.3d 972, 987 (9th Cir. 2005); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972). The State relied on Kerr as the key witness to connect the dots for its theory of the case. As the defense argued, the prosecution's entire case was a "house of cards," with "the foundation of that house of cards being the credibility of Kathy Kerr," but "Kathy Kerr is a liar." Trial Tr., R. 153-5, PageID at 11957.

The withheld impeachment evidence creates a "reasonable probability" of a different result. *Kyles*, 514 U.S. at 434. It would have provided Lindsey irrefutable proof as to why Kerr was lying about him, and why she couldn't be believed. The withheld evidence would have been the last breath to blow down the "house of cards" of Kerr's credibility, and with it, the case against Lindsey.

First, reasonable jurists could debate whether there is a reasonable probability of a different outcome at the guilt phase in this case. If a juror discounts Kerr's testimony based on her lack of credibility, there is no evidence linking Lindsey to the second, fatal shot. Only Kerr testified that Lindsey was seen standing next to the victim's body on the ground. But as argued by the State at Joy Hoop's trial, Joy could have been the one to fire the second, fatal shot. ROW App. Vol. 9, R. 152-9, PageID 7914-15. Indeed, six months later at Joy Hoop's trial, the State presented a witness who testified that Joy Hoop said Lindsey "didn't finish the job and [Joy] had to go out and shoot [Whitey] a second time in the head." *State v. Lindsey*, No. CA2003-07-010, 2004 Ohio 4407 (Ohio Ct. App. Aug. 23, 2004). Given that the jury then convicted Joy Hoop of conspiracy to commit aggravated murder, there is a reasonable probability a factfinder would have reached a different outcome at the guilt phase in Lindsey's trial if Kerr's statements positioning Lindsey as the principal offender were discredited.

Second, reasonable jurists could also debate whether the suppressed evidence has a reasonable probability of changing the outcome at the penalty phase. In Ohio, a single juror can prevent the death sentence. And this was already a close case for death. *See*, *e.g.,* Michael Hess Aff. RE: Juror Beth Aubry Interview, PC Ex. 23, ROW App., R. 152-8, PageID 7576. If the jury had known about the immunity deal, and thus assigned less weight to Kerr's testimony, a single juror could have doubted whether Lindsey accepted a weapon from Joy Hoop in agreement and whether Lindsey was really seen standing next to the victim's body. Without Kerr's statements directly incriminating Lindsey, the nature and circumstances of the offense become more mitigating, and there is a reasonable probability of a different sentencing outcome. Here, there is a "reasonable likelihood" the evidence could have "affected the judgment of the jury." *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) (internal quotation marks omitted).

In concluding that there was no *Brady* violation, the Sixth Circuit relied on the Ohio Supreme Court's holding that "Kerr's veracity was a question for the trier of fact." COA Order, Doc. No. 18-1 at 5, quoting *State v. Lindsey*, 721 N.E.2d 995, 1001 (Ohio 2000). This does not mean, as the panel concludes, that Kerr's testimonial immunity did not need to be disclosed. Rather, the Ohio Supreme Court's statement leads to the exact opposite conclusion: because Kerr's veracity had to be decided by the trier of fact, the evidence of her testimonial immunity needed to be disclosed for it to make an informed decision.

Moreover, the state trial judge in this case had already concluded that Kerr's prior inconsistent statements were material under *Brady*. Entry as to Def.'s Mot. for Disclosure of Favorable Evidence, ROW App., R. 152-4, PageID 4996. In ordering that Kerr's statements be made available to the defense, the trial judge explicitly found Kerr to be a "significant prosecution fact witness[]" and that her statements were "substantial" in nature. *Id.*; Trial Tr. Vol. VI at 6, R. 153-3, PageID 10442. The trial judge explained that Kerr's inconsistent statements were "material for either guilt or innocence of the defendant in this case and as evidence favorable to the defendant." Trial Tr. Vol. VI at 6, R. 153-3, PageID 10442. In a written order, the trial judge reiterated that Kerr's statements "constitute evidence favorable" under *Brady* "as evidence which is material to either guilt or punishment." Entry as to Def.'s Mot. for Disclosure of Favorable Evidence, ROW App., R. 152-4, PageID 4996-97. Given the centrality of Kerr's testimony and her own involvement in the offense, Kerr's immunity deal, like her inconsistent statements, was also material.

Kerr's self-serving statements should have been subject to the utmost scrutiny – but because of the State's suppression of evidence, they were not. Had the jury heard all the suppressed evidence and thus doubted Kerr's veracity, there is a reasonable probability that the outcome would have been different at trial and sentencing. Certainly, reasonable jurists could debate whether the suppression of Kerr's immunity deal "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

Notably, the issue of whether withheld evidence impeaching the prosecution's key witness was material under *Brady* is currently pending before this Court in

*Glossip v. Oklahoma*, U.S. No. 22-6500 (seeking relief from Oklahoma courts requiring "a defendant to demonstrate by clear and convincing evidence that no reasonable fact finder would have returned a guilty verdict to obtain relief for a violation of *Brady*"), *Glossip v. Oklahoma*, U.S. No. 22-7466 (alleging that petitioner's *Brady* claim—regarding suppressed evidence of a key witness' bipolar disorder—creates a conflict between Oklahoma courts and the Tenth Circuit Court of Appeals), and *Johnson v. Alabama*, U.S. No. 22-7337 (alleging that Alabama courts misapplied *Brady* suppression standards in a capital case regarding evidence that the key witness was hoping for a reward). The lower courts' failures to properly apply *Brady* in Lindsey's case and these other capital cases, where the prosecution withholds evidence impeaching a key witness, confirms that the issue presented here is a recurring problem on which this Court should grant certiorari. Lindsey requests the Court grant his petition, but in addition, should this Court grant certiorari in *Glossip* or *Johnson*, Lindsey requests that the Court hold Lindsey's petition pending any decision in either of those cases.

## II. The Sixth Circuit analyzed Lindsey's *Brady* claim in a manner conflicting with this Court's COA standard.

The Sixth Circuit's imposition of an incorrect COA standard improperly cut short the federal appellate review process in this capital case. Lindsey easily meets the COA standard—"a substantial showing of the denial of a constitutional right"—for his claim under *Brady*. 28 U.S.C. § 2253(c)(2).

Pursuant to Supreme Court Rule 10(c), certiorari is warranted because the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," including *Buck v. Davis*, 580 U.S. 100 (2017), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000). "At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 580 U.S. at 115 (internal quotation marks omitted). Indeed, a petitioner is not even required to prove "that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338. Further, in cases where the death penalty is at issue, courts have recognized that any doubts regarding the propriety of a COA must be resolved in the petitioner's favor. *See, e.g.*, *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008).

At issue is merely whether the claim deserves encouragement to proceed further, not the ultimate merits. The Sixth Circuit failed to apply this standard when initially denying a COA on Lindsey's *Brady* claim by holding: "Claim 2, therefore, is without merit." COA Order, Doc. No. 18-1 at 5. Lindsey filed a petition for rehearing, requesting that the panel apply the proper COA standard. Petition, Doc. No. 20-1. In an amended order, the Sixth Circuit stated the proper COA standard, but failed to adjust the previous analysis, on the merits, which led to their conclusion. Amended Order, Doc. No. 21-1. That the Sixth Circuit believes the claim will fail on the merits is not sufficient to deny a COA because "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

Because the Sixth Circuit conducted a merits inquiry, rather than a COA inquiry, in a manner that "conflicts with relevant decisions of this Court," certiorari is warranted under Supreme Court Rule 10(c).

## III. Review is warranted where the Sixth Circuit's application of a higher standard to post-judgment motions to amend conflicts with this Court's decision in *Banister v. Davis* and is the subject of a circuit split.

### A. The Sixth Circuit's decision conflicts with this Court's holding in *Banister*.

*Banister v. Davis* makes clear that when a petitioner "timely submits a Rule 59(e) motion, there is no longer a final judgment to appeal from." 590 U.S. ___, ___ (2020) (slip. op. at 3). Once a Rule 59 motion is filed, a case is in a pre-judgment posture, such that Rule 15 alone should apply to a motion to amend.

The Sixth Circuit concluded that *Banister* does not apply because it "did not concern a Rule 15 motion" and that "[a] Rule 15 motion is not an appeal, not even when it is a postjudgment Rule 15 motion." COA Order, Doc. No. 21-1 at 9-10.

The question is not, as the Sixth Circuit concluded, whether *Banister* specifically addresses Rule 15 motions. Rather, the issue is whether a final judgment exists after a petitioner "timely submits a Rule 59(e) motion." *Banister*, (slip. op. at 3). Certiorari should be granted, because the Sixth Circuit has decided an important federal question in a way that conflicts with this Court's holding in *Banister*. *See* SUP. CT. R. 10(c).

### B. There is a circuit split over whether to apply a higher standard to post-judgment motions to amend.

Review on a writ of certiorari should also be granted because the appropriate standard for post-judgment amendments is the subject of a circuit split. *See* SUP. CT. R. 10(a).

On the one hand, the Third, Fourth, Fifth, and Eleventh Circuits have applied Rule 15's liberal amendment standard to motions to amend filed after judgment. *See*, *e.g.*, *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 231 (3d Cir. 2011) ("[W]e believe that the appropriate manner to dispose of this issue is to consider the [Rule 59(e) and Rule 15(a)] motions together and determine what outcome is permitted by consideration of the Rule 15(a) factors."); *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc) ("a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or futility"); *Sheffler v. Americold Realty Trust*, No. 22-11789, 2023 WL 3918491, at *2 (11th Cir. June 9, 2023) (agreeing with plaintiffs that "our earliest binding precedent provides that the 'same' liberal amendment standard also applies to a Rule 59(e) motion seeking leave to file an amended complaint"); *DeGruy v. Wade*, 586 F. App'x 652, 655 (5th Cir. 2014) ("Where a district court has entered a judgment on the pleadings and the plaintiff moves under Rule 59(e) to vacate the judgment and amend the complaint, the court should analyze the motion under the Rule 15(a) standard."); *but see U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006) ("Fed.R.Civ.P. 15(a) has no application once the district court has dismissed the complaint and entered final judgment for the defendant…. Post-judgment, the plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6).”); *Ahmed v. Dragovich*, 297 F.3d 201, 207-08 (3d Cir. 2002) (holding that “the liberality of [Rule 15] is no longer applicable once judgment has been entered. At that stage, it is Rules 59 and 60 that govern the opening of final judgments.”).

On the other hand, the First, Second,[1] Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits require a petitioner to obtain relief under Rule 59 or 60 first before considering the motion to amend under Rule 15. *See, e.g.*, *City of Miami Fire Fighters' & Police Officers' Ret. Tr. v. CVS Health Corp.*, 46 F.4th 22 (1st Cir. 2022); *Leisure Caviar, LLC*, 616 F.3d at 616; *O'Brien v. Vill. of Lincolnshire*, 955 F.3d 616, 629 (7th Cir. 2020); *In re SuperValu, Inc.*, 925 F.3d 955, 961 (8th Cir. 2019); *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996); *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

Because of the circuit split, this Court should grant review on this issue of exceptional importance, especially in a capital case. Moreover, the fact that courts have reached divergent conclusions underscores that the proper standard is debatable among reasonable jurists and therefore worthy of a COA.

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[1] The Second Circuit is less clear about whether a post-judgment motion must satisfy not only Rule 15 standards, but also standards for reconsidering or reopening a judgment. *See Williams v. Citigroup, Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) (rejecting “the proposition that the liberal spirit of Rule 15 necessarily dissolves as soon as final judgment is entered” but holding that “Rule 15's liberality must be tempered by considerations of finality”) (internal citation omitted).

Alternatively, reasonable jurists could debate whether Lindsey could also meet the heavier burden under Rule 59, because the claims he seeks to amend are based on newly discovered evidence that was not previously available at the time of his trial or when he filed his original petition. Lindsey could not have discovered the new evidence in his case earlier due to ineffective assistance of counsel. Special consideration should be given to the fact that this is a capital case, particularly where Lindsey's amended claims directly call into question whether his death sentence can be constitutionally imposed. *See Williams v. Stirling*, 914 F.3d 302, 318 (4th Cir. 2019) (finding a reasonable probability that the jury would have voted for life had they been presented evidence about FASD). Lindsey should not be penalized simply because he sought to exhaust his claims in state court in accordance with § 2254(b)(1)(A) before moving to amend in federal court. At an absolute minimum, this issue deserves "encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

### C. The Sixth Circuit's decision creates a circuit split by rejecting an amended petition solely based on delay.

When denying a COA on this issue, the Sixth Circuit concluded that reasonable jurists would not debate that "Lindsey failed to show that he could not have raised the claims before the district court entered final judgment." COA Order, Doc. No. 21-1 at 7-8. The district court, and then the Sixth Circuit, both narrowly focused on delay in filing the motion to amend. *Id.* at 10-12. In doing so, the Sixth Circuit did not mention any prejudice to the Warden, nor address any other factors under Rule 15, including bad faith or dilatory motive.

The Sixth Circuit's decision conflicts with other federal court decisions because "delay by itself is normally an insufficient reason to deny a motion for leave to amend. Delay must be coupled with some other reason. Typically, that reason…is prejudice to the non-moving party." *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 793 (7th Cir. 2004) (citation omitted); *see also Geness v. Cox*, 902 F.3d 344, 364 (3d Cir. 2018); *Moore-El v. Luebbers*, 446 F.3d 890, 902 (8th Cir. 2006); *Mayeaux v. Louisiana Health Service and Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004) ("[W]e know that delay alone is an insufficient basis for denial of leave to amend: The delay must be *undue,* i.e., it must prejudice the nonmoving party or impose unwarranted burdens on the court.") (emphasis original); *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) (noting that they "have previously reversed the denial of a motion for leave to amend where the district court did not provide a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party, or futility of the amendment"). Even the Sixth Circuit has held in other cases that "[d]elay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading." *Moore v. City of Paducah*, 790 F.2d 557, 561 (6th Cir. 1986).

Because the Sixth Circuit's decision denying a COA on the motion-to-amend issue is "in conflict with the decision of another United States court of appeals on the same important matter," review should be granted. *See* SUP. CT. R. 10(a).

## CONCLUSION

For the foregoing reasons, Lindsey respectfully requests that this Court grant the petition for writ of certiorari. The Court should conclude that Lindsey is entitled to a COA and remand for further proceedings. *See, e.g., Buck*, 580 U.S. at 127-28.

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