No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CARL LINDSEY,
Petitioner,

v.

WARDEN CHARLOTTE JENKINS,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

Deborah L. Williams,
Federal Public Defender

Julie C. Roberts (MA 688233)
(Supreme Court Bar No. 318897)
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TABLE OF CONTENTS

Page

APPENDIX A

No. 21-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 13, 2023
DEBORAH S. HUNT, Clerk

CARL LINDSEY,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
CHARLOTTE JENKINS, WARDEN,)
)
Respondent-Appellee.)

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

Carl Lindsey petitions for rehearing en banc of this court's order entered on September 8, 2022, denying his application for a certificate of appealability. The petition was initially referred to this panel of three judges. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
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CINCINNATI, OHIO 45202-3988

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Filed: February 13, 2023

Ms. Julie Roberts
Federal Public Defender's Office
Capital Habeas Unit
10 W. Broad Street
Suite 1020
Columbus, OH 43215

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

Dear Ms. Roberts,

The Court issued the enclosed Order today in this case.

Sincerely yours,

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

cc: Mr. Jordan S. Berman
Mr. Charles L. Wille
Ms. Carol A. Wright

Enclosure

APPENDIX B

No. 21-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 10, 2023
DEBORAH S. HUNT, Clerk

CARL LINDSEY,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
CHARLOTTE JENKINS, WARDEN,)
)
Respondent-Appellee.)

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

Carl Lindsey, an Ohio death-row prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability ("COA"). The petition has been referred to the original panel of three judges for an initial determination on the merits of the petition for rehearing. Upon careful consideration, we conclude that we did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, decline to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: January 10, 2023

Ms. Julie Roberts
Federal Public Defender's Office
Capital Habeas Unit
10 W. Broad Street
Suite 1020
Columbus, OH 43215

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

Dear Ms. Roberts,

The Court issued the enclosed Order today in this case.

Sincerely yours,

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

cc: Mr. Jordan S. Berman
Mr. Charles L. Wille
Ms. Carol A. Wright

Enclosure

No. 21-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 1, 2022
DEBORAH S. HUNT, Clerk

CARL LINDSEY,)
)
Petitioner-Appellant,) **AMENDED**
)
v.) **ORDER**
)
CHARLOTTE JENKINS, Warden,)
)
Respondent-Appellee.)

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

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

I.

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

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

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

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

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

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

II.

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

III.

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

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

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

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

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

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

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

IV.

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

V.

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

A.

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

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

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

B.

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

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

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

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

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

VI.

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

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

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

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

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

VII.

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

VIII.

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

IX.

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

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

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

X.

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: December 01, 2022

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

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

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

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

cc: Mr. Richard W. Nagel

Enclosure

APPENDIX D

No. 21-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL LINDSEY,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
CHARLOTTE JENKINS, Warden,)
)
Respondent-Appellee.)

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

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

I.

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

> In the early morning hours of February 10, 1997, appellant, Carl Lindsey, was at Slammers Bar near Mt. Orab along with Kathy Kerr, Kenny Swinford, A.J. Cox, and Joy Hoop, one of the bar owners. According to the testimony at trial, Joy had wanted her husband, Donald Ray "Whitey" Hoop, dead, and that night [Lindsey] told her "he would do him in." Joy then handed a small gun to [Lindsey], and [Lindsey] left the bar. Kathy Kerr also decided to leave the bar at that point, but heard a banging noise. As she left she saw Whitey lying on the ground, covered with blood, and [Lindsey] standing by the door. According to investigators, Whitey had been shot once in the face while seated inside his vehicle. He apparently then left his vehicle and remained in the parking lot where he was shot again in the forehead. Upon seeing Whitey on the ground, Kerr immediately left for her home, which was only a few hundred feet away. [Lindsey] followed her in his pickup truck, and she allowed him into her trailer to take a shower.

> At approximately the same time that these events were occurring, Brown County Deputy Sheriff Buddy Moore was on patrol and passed Slammers Bar. He noticed and was suspicious of a pickup truck in the parking lot and followed it from the bar south to the Kerr residence. A couple minutes later, he received a police dispatch that a shooting had been reported at Slammers and headed back toward the bar. On the way, Moore noticed a car pass him at a high speed going south. When he arrived at Slammers, he found Whitey Hoop's body lying in the parking lot. When backup arrived, Moore instructed a state trooper to go to Kerr's trailer, look for the pickup, and make sure that no one left the premises. Moore also left for Kerr's trailer.
>
> When Moore arrived at the Kerr residence, he found [Lindsey] in the bathroom, soaking his clothes in a tub full of red-tinted water. He also found a box of .22 caliber ammunition on the sink. At that point, Moore took [Lindsey] into custody. Upon a search of the premises, police seized from the Kerr trailer [Lindsey's] wallet, the ammunition, the clothing in the tub, and a .22 caliber Jennings semiautomatic pistol, which they discovered behind the bathroom door. They also found and seized Whitey's wallet, which was in a wastebasket in the bathroom. When discovered, Whitey's wallet was empty, although an acquaintance of Whitey's testified that Whitey habitually carried about $1,000 with him. Police also found $1,257 in [Lindsey's] wallet, although he had been laid off in late December 1996.
>
> The crime laboratory tested the bloodstains on the items seized by police and found the stains on [Lindsey's] jacket, jeans, boot, truck console, steering-wheel cover, driver's seat, driver's-side door, and door handle all to be consistent with Whitey's blood. One of the stains on the Jennings .22 pistol was also consistent with Whitey's blood.

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

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

in postconviction proceedings erred by denying Lindsey discovery and funding for an expert. He later added ten claims attacking Ohio's lethal-injection procedure.

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

II.

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

III.

In Claim 2, Lindsey argues that the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, withheld material evidence that one of the witnesses against him, Kathy Kerr, was promised testimonial immunity before she testified.

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

Reasonable jurists would agree that it is not reasonably probable that the result of either phase of trial would have been different even had the revelation of the promise of testimonial immunity led to Kerr's successful impeachment. The evidence of Lindsey's guilt was overwhelming. Right after the murder, police found him in Kerr's bathroom washing his bloodstained clothes in the tub. A box of .22 caliber ammunition was on the sink. A .22 caliber Jennings semiautomatic pistol was behind the bathroom door. That was the same type of gun that had killed the victim. On it were bloodstains, at least one of which was consistent with the victim's blood. More bloodstains consistent with the victim's blood were on Lindsey's clothes and in Lindsey's truck. And an atomic absorption test on Lindsey's hands was positive, indicating that Lindsey had recently discharged a firearm. All of this was established without Kerr's testimony.

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

victim usually carried a thousand dollars with him, while Lindsey had been laid off more than a month before.

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

Claim 2 is, therefore, without merit.

IV.

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

V.

In Claim 4, Lindsey argues that the trial court failed to ensure that the guilt phase was fair and reliable. Specifically, he alleges that the trial court improperly: (1) admitted the hearsay of

Joy Hoop as statements of a co-conspirator; and (2) qualified the coroner as an expert in blood-spatter analysis. We address each in turn.

A.

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

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

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

statement may be admitted. *Cf. Bourjaily*, 483 U.S. at 176–84. Reasonable judges would not disagree.

B.

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

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

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

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

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

VI.

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

Lindsey argues that, in the guilt phase, the prosecutor (1) suppressed evidence that Kathy Kerr had been induced to testify with a promise of testimonial immunity and other compensation, (2) allowed her perjured testimony to go uncorrected, and (3) secured Lindsey's convictions with a theory of guilt inconsistent with the one the prosecutor would later use to secure the convictions of Joy Hoop. Reasonable jurists would agree that the first two arguments fail for lack of prejudice.

The misconduct, if any, caused no harm in either phase of trial. Reasonable jurists also could not deny that, as to the third argument, no clearly established Supreme Court precedent holds that such prosecutorial conduct is unconstitutional. *See* § 2254(d)(1).

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

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

VII.

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

VIII.

In Claims 11-20, Lindsey argues that Ohio's lethal-injection protocol is unconstitutional. The district court dismissed these claims as noncognizable in § 2254 proceedings. Reasonable jurists would not disagree. Under this circuit's controlling precedent, challenges to the method of execution (rather than the sentence that petitioner *be* executed) are not cognizable in federal habeas corpus proceedings. *In re Campbell*, 874 F.3d 454, 460–67 (6th Cir. 2017) (per curiam). Method-

of-execution claims must proceed under § 1983. *Id.* at 464. That case has been neither overruled nor abrogated. *See also Nance v. Ward*, 142 S. Ct. 2214 (2022).

IX.

Finally, Lindsey argues that the district court erred in denying his postjudgment motion to amend his federal petition by adding five claims. The district court denied amendment because Lindsey failed to show that he could not have raised the claims before the district court entered final judgment. Reasonable jurists would not debate that decision.

A.

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

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

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

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

The district court denied permission to add the new claims: the two Fetal-Alcohol-Spectrum-Disorder claims, because Lindsey failed to show that the claims and the evidence

supporting them could not have been discovered sooner through the exercise of due diligence; and the three plea-deal claims, because he offered no compelling justification for the delay in seeking leave to amend.

"Except in cases where the district court bases its decision on the legal conclusion that an amended complaint could not withstand a motion to dismiss, we review a district court's denial of leave to amend for abuse of discretion." *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). "Under Rule 15, a court may grant permission to amend a complaint 'when justice so requires' and in the normal course will 'freely' do so." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting Fed. R. Civ. P. 15(a)). But it is different once judgment issues. Then, "concerns about finality dilute the otherwise permissive amendment policy of the Civil Rules." *Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.*, 833 F.3d 680, 692 (6th Cir. 2016). "In post-judgment motions to amend, as a result, the Rule 15 and Rule 59 inquiries turn on the same factors." *Leisure Caviar*, 616 F.3d at 616 (internal quotation marks omitted). Thus, a postjudgment Rule 15 motion, too, cannot be used "to raise arguments which could, and should, have been made before judgment issued." *Id.* (citation omitted). And "a court acts within its discretion in denying a postjudgment Rule 15 . . . motion on account of undue delay—including delay resulting from a failure to incorporate previously available evidence." *Id.* (internal quotation marks and alterations omitted). "A claimant who seeks to amend a complaint *after* losing the case must provide a compelling explanation to the district court for granting the motion." *Id.* at 617.

The district court applied the postjudgment Rule 15 standard and denied Lindsey's petition. Lindsey filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), and shortly thereafter, he filed his Rule 15 motion to amend the petition. The sequence is significant in Lindsey's view. He argues that the filing of the Rule 59 motion altered

the standard otherwise applicable to the Rule 15 motion, claiming that "[w]hen a petitioner 'timely submits a Rule 59(e) motion, there is no longer a final judgment to appeal from,'" the case is placed in prejudgment posture, and hence the more-liberal prejudgment standard applies to the Rule 15 motion. (Quoting *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020)).

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

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

But *Banister* also provides that "[t]he filing of a Rule 59(e) motion within the 28-day period suspends the finality of the original judgment *for purposes of an appeal*." *Id.* (emphasis added

and internal quotation marks omitted). A Rule 15 motion is not an appeal, not even when it is a postjudgment Rule 15 motion. By its nature, it is an attempt to change the thing ruled upon—to change the *object* the judgment judged—not to point out errors in the judgment. That does not make the motion a second or successive petition, of course—not, at least, when filed before the district court lost jurisdiction, *see Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016)—but it also does not make the motion an appeal. For these reasons, *Banister* did not abrogate *Leisure Caviar*. Reasonable jurists would not disagree.

B.

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

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

That argument is unpersuasive. First, when dismissed, his case had already been in the district court more than 17 years. Even if convincing, the above explanation would cover only the last five months of that period. Moreover, Lindsey did not have to wait those five months. His argument hinges on the assumption that he had to exhaust in state court before filing in federal court. But in his postjudgment motion to amend the federal petition, he set out this plan he would

follow if amendment were granted. He "would then request the Court stay and hold federal proceedings in abeyance to await the final resolution of his pending petition for post-conviction relief, which seeks to exhaust the claims and evidence Mr. Lindsey now moves to add to his petition." He could have followed the same plan five months earlier: moved to amend the federal petition and, if permission was granted, move to stay and abey.

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

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

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

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

He also argues he could not have raised these claims earlier, because they are based on "newly discovered evidence"—a doctor's diagnosis that he has the disorder and "additional supporting evidence" proving it. But as the district court held, the diagnosis could have been made much earlier. One of Lindsey's own proposed claims is that trial counsel were ineffective for failing to present evidence that he has the disorder. Its "diagnostic criteria" were already well established then. And evidence indicating that he might have the disorder—or, at least, that investigation in that general direction was warranted—was available at the time of trial. That is the very basis of his claim that trial counsel were ineffective: from the available evidence, they should have known *then* to investigate the matter. That was in 1997. More evidence pointing in the same direction existed in 1998. Lindsey's attorneys knew of his family's history with alcohol, including that his mother was a "heavy" drinker during her pregnancies, as this information was included in an expert affidavit he filed with his postconviction petition that year—five years before federal habeas proceedings began. In short, whatever previous counsel failed to do, when habeas counsel filed the initial habeas petition, they were "on notice" *then* that this was a matter to be investigated. Yet Lindsey filed nothing on the matter until almost 17 years later.

Lindsey argues that the continuity of representation by the state public defender's office stayed his hand. He contends that, if these claims were held defaulted, he would have tried to excuse the default by arguing postconviction counsel's ineffectiveness. Even if that argument is

accepted, it provides an excuse only until 2015. Aside from vaguely alluding to "a comprehensive investigation [begun] once the Federal Public Defender's Office became lead counsel," Lindsey still cannot explain a five-year delay.

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

X.

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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Filed: September 08, 2022

Mr. Jordan S. Berman

Ms. Julie Roberts

Mr. Charles L. Wille

Ms. Carol A. Wright

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

Dear Counsel,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Mr. Richard W. Nagel

Enclosure

No mandate to issue

APPENDIX E

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

CARL LINDSEY,

Petitioner,

v.

Case No. 1:03-cv-702
Judge Sarah D. Morrison
Magistrate Judge Elizabeth P. Deavers

WARDEN, Chillicothe Correctional Institution

Respondent.

OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court upon the habeas Petition (ECF No. 9), the Amended Petition (ECF No. 38), the Return of Writ (ECF No. 12), the Traverse (ECF No. 20), and the Third Amended Petition, setting forth lethal injection claims. This matter is also before the Court on Petitioner's Notice of Withdrawal of Grounds for Relief (ECF No. 63), Petitioner's Final Merit Brief (ECF No. 75), Respondent's Merit Brief (ECF No. 80), and Petitioner's Reply (ECF No. 81). This Court has thoroughly reviewed all the remaining claims in this habeas action, and upon said review, finds Petitioner's claims lack merit. Habeas relief is **DENIED** and this action is **DISMISSED**.

I. Factual Background and Procedural History

After a trial by jury in Brown County, Ohio, Petitioner Carl Lindsey was convicted of Aggravated Murder and sentenced to death for the February 10, 1997, murder of Donald Ray "Whitey" Hoop. On direct review, the Ohio Supreme Court set forth the facts and procedural

history of this case:

> In the early morning hours of February 10, 1997, appellant, Carl Lindsey, was at Slammers Bar near Mt. Orab along with Kathy Kerr, Kenny Swinford, A.J. Cox, and Joy Hoop, one of the bar owners. According to the testimony at trial, Joy had wanted her husband, Donald Ray "Whitey" Hoop, dead, and that night appellant told her "he would do him in." Joy then handed a small gun to appellant, and appellant left the bar. Kathy Kerr also decided to leave the bar at that point, but heard a banging noise. As she left she saw Whitey lying on the ground, covered with blood, and appellant standing by the door. According to investigators, Whitey had been shot once in the face while seated inside his vehicle. He apparently then left his vehicle and remained in the parking lot where he was shot again in the forehead. Upon seeing Whitey on the ground, Kerr immediately left for her home, which was only a few hundred feet away. Appellant followed her in his pickup truck, and she allowed him into her trailer to take a shower.
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> At approximately the same time that these events were occurring, Brown County Deputy Sheriff Buddy Moore was on patrol and passed Slammers Bar. He noticed and was suspicious of a pickup truck in the parking lot and followed it from the bar south to the Kerr residence. A couple minutes later, he received a police dispatch that a shooting had been reported at Slammers and headed back toward the bar. On the way, Moore noticed a car pass him at a high speed going south. When he arrived at Slammers, he found Whitey Hoop's body lying in the parking lot. When backup arrived, Moore instructed a state trooper to go to Kerr's trailer, look for the pickup, and make sure that no one left the premises. Moore also left for Kerr's trailer.
>
> When Moore arrived at the Kerr residence, he found appellant in the bathroom, soaking his clothes in a tub full of red-tinted water. He also found a box of .22 caliber ammunition on the sink. At that point, Moore took appellant into custody. Upon a search of the premises, police seized from the Kerr trailer appellant's wallet, the ammunition, the clothing in the tub, and a .22 caliber Jennings semiautomatic pistol, which they discovered behind the bathroom door. They also found and seized Whitey's wallet, which was in a wastebasket in the bathroom. When discovered, Whitey's wallet was empty, although an acquaintance of Whitey's testified that Whitey habitually carried about $1,000 with him. Police also found $1,257 in appellant's wallet, although he had been laid off in late December 1996.
>
> The crime laboratory tested the bloodstains on the items seized by police and found the stains on appellant's jacket, jeans, boot, truck console, steering-wheel cover, driver's seat, driver's-side door, and door handle all to be consistent with Whitey's blood. One of the stains on the Jennings .22 pistol was also consistent with Whitey's blood.

APPENDIX E

> Appellant was indicted on two counts of aggravated murder, one under R.C. 2903.01(A) (prior calculation and design) and one under R.C. 2903.01(B) (felony-murder), each count carrying a death specification for felony–murder (R.C. 2929.04(A)(7)) and the first count also carrying a specification for murder for hire (R.C. 2929.03(A)(2)). He was also indicted on one theft count and two aggravated robbery counts. At the close of the evidence, the trial court granted appellant's Crim.R. 29 motion for judgment of acquittal on the murder-for-hire specification. A jury then found appellant guilty on all counts and all remaining specifications and, after a penalty hearing, recommended death. The trial judge merged the two aggravated murder counts and imposed the death sentence.

State v. Lindsey, 87 Ohio St.3d 479, 721 N.E.2d 995 (2000). Joy Hoop, who was tried in a separate and subsequent proceeding, was convicted of two counts of complicity in the commission of the aggravated murder, and was sentenced to a term of life in prison with parole eligibility after serving twenty-five years. *State v. Hoop*, No. CA2000-11-034, 2001 WL 877296, *1 (Ohio App. 12th Dist. Aug. 6, 2011).

After the Ohio Supreme Court affirmed Petitioner's convictions and sentence on direct review, the United States Supreme Court denied Petitioner's Petition for a Writ of Certiorari. *Lindsey v. Ohio*, 531 U.S. 838 (2000). Petitioner filed his original petition for post-conviction relief on September 21, 1998, and an amended petition on April 3, 1999. The trial court denied the post-conviction petition on January 15, 2002, without a hearing. (Appx., ECF No. 152-10, at PAGEID # 8674-8690.) The Twelfth District Court of Appeals affirmed the decision of the trial court and denied post-conviction relief. *State v. Lindsey*, No. CA2002-02-002, 2003 WL 433941 (Ohio App. 12th Dist. Feb. 24, 2003).

On April 30, 1999, Petitioner filed a motion for a new trial in the state trial court, based on a new witness who testified at Joy Hoop's trial that Hoop confessed to firing the second and fatal shot that killed Whitey Hoop. The trial court denied the motion for a new trial on July 15, 2003, and the Twelfth District Court of Appeals affirmed. *State v. Lindsey*, No. CA2003-07-

010, 2004 WL 1877734 (Ohio App. 12th Dist. Aug. 23, 2004).

On October 10, 2003, after exhausting his state court remedies, Petitioner filed the instant Petition for a Writ of Habeas Corpus, raising ten claims for relief. (Petition, ECF No. 9.) On January 13, 2005, Petitioner filed an Amended Petition, removing all references to actual innocence, and abandoning all but sub-part (C) of his First Claim for Relief. (Am. Petition, ECF No. 38.) Additionally, on September 7, 2006, Petitioner filed a Notice of Withdrawal of Grounds for Relief from Habeas Petition, voluntarily withdrawing the claims of ineffective assistance of counsel set forth in his Fifth and Eighth Claims for Relief. (ECF No. 63.) Accordingly, eight claims for relief remain pending before the Court; subpart (C) of Petitioner's First Claim for Relief, and Claims Two, Three, Four, Six, Seven, Nine and Ten remain before the Court for a decision on the merits.

As an additional matter, the Court notes that Petitioner has made several attempts to amend his petition to add claims for relief challenging Ohio's lethal injection protocol. Those proposed claims have been the subject of years of litigation in this Court and will be addressed in the final section of this Opinion and Order.

II. Standards of Review

Because this is a habeas corpus case, provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") that became effective prior to the filing of the instant petition, apply to this case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). 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 this Court 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.

Under § 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, 192-93 (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 legal principle from the decisions of the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case. *Id*. (citing *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007)). A federal habeas court may not find a state adjudication to be "unreasonable" simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams v. Coyle*, 260 F.3d 684, 699 (6th Cir. 2001). Rather, for purposes of 2254(d)(1), "clearly established federal law includes only the holdings of the Supreme Court, excluding any dicta; and, an application of these holdings 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 fair-minded

disagreement.'" *Stojetz*, 892 F.3d at 192-193 (quoting *White v. Woodall*, 572 U.S. 415 (2014)). *See Shinn v. Kayer*, ___ S.Ct ___, 2020 WL 7327827, *3 (U.S. Dec. 14, 2020) ("The prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fair-minded disagreement.'") (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Further, § 2254(d)(2) prohibits a federal court from granting an application for habeas relief on a claim that the state courts adjudicated on the merits unless the state court adjudication of the claim "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)(2). In this regard, § 2254(e)(1) provides that the findings of fact of a state court are presumed to be correct and a petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. The Sixth Circuit recently remarked on the hurdles a petitioner must overcome regarding a state court's factual findings:

> To prove that a state court's factual assessment was 'unreasonable,' a petitioner must show that 'a reasonable factfinder must' disagree with the state court's assessment." *Woods v. Smith*, 660 F. App'x 414, 424 (6th Cir 2016) (quoting *Rice v. Collins*, 546 U.S. 333, 341, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Meeting this standard requires Pollini to do more than show an alternative way to view the facts. *Franklin v. Bradshaw*, 695 F.3d 439, 447-48 (6th Cir. 2012) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.") (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Pollini v. Robey, 981F.3d 486, 497 (6th Cir. 2020). Lastly, this Court's review is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170 (2011).

A state prisoner who seeks a writ of habeas corpus in federal court does not have an

automatic right to appeal a district court's adverse decision unless the court issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c). When a claim has been denied on the merits, a COA may be issued only if the petitioner has made a substantial showing of the denial of a constitutional right. To make such a showing, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Recently, the Sixth Circuit vacated a COA and dismissed an appeal, on the basis that a district court did not appropriately apply the correct standard for granting a COA. *Moody v. United States*, 958 F.3d 485 (6th Cir. 2020). In *Moody*, the Sixth Circuit cautioned that "a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect," and "[t]o put it simply, a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Id*. at 488 (emphasis in original). With respect to a claim that a state court has previously rejected on the merits pursuant to 28 U.S.C. § 2254(d), the Sixth Circuit advised "[f]or that claim to warrant appeal, there must be a substantial argument that the state court's decision was not just wrong but *objectively unreasonable* under the stringent requirements of § 2254(d) (commonly known as 'AEDPA' deference)." *Id*. (emphasis in original).

Keeping these standards of review in mind, the Court has carefully reviewed the Petition, the Amended Petition (as it relates to Petitioner's First Claim for Relief), the state court record, the decisions of the state courts, and the merits briefing of the parties. For the reasons that follow, the Court finds Petitioner is not entitled to relief in this habeas corpus action.

APPENDIX E

III. Petitioner's Claims

First Claim for Relief:

> The evidence used to support Lindsey's convictions and sentences is insufficient.

In subpart C of his First Claim for Relief, as amended, Petitioner argues the evidence of his guilt was legally insufficient to support his convictions and sentence, and the state court findings to the contrary are unreasonable. (ECF No. 38, at PAGEID # 511.) Specifically, Petitioner contends this "was a case of circumstantial evidence, with questionable testimony by incredible witnesses with unclear and undisclosed motives," and the State of Ohio "cannot, and did not, submit the degree of proof that is sufficient to uphold Lindsey's aggravated murder conviction and death sentence." (*Id*. at PAGEID # 516.) The crux of Petitioner's argument is that the State's case hinged on the "patently incredible witness" Kathy Kerr, and "no reasonable juror would have found Lindsey guilty based upon the ever-changing statements of a woman who had unexplained blood on her hands after the murder of Whitey Hoop." (*Id*. at PAGEID # 512.) Initially, Petitioner asserted a claim of actual innocence as part of his First Claim for Relief, but he withdrew that assertion in his Amended Petition, wherein he stated he was amending his first claim "by removing paragraphs 24-38 and any reference to actual innocence." (*Id*. at PAGEID # 511.)

Petitioner raised his insufficient evidence claim on direct appeal, and Respondent does not allege the claim is barred by procedural default. The Ohio Supreme Court decided this claim in conjunction with its discussion of whether the verdicts were against the manifest weight of the evidence, holding:

B. Sufficiency of the Evidence

Appellant argues in his fourteenth proposition that the evidence presented at trial was legally insufficient to support his conviction of aggravated murder. The relevant question in determining the sufficiency of the evidence 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 proven beyond a reasonable doubt." (Emphasis deleted.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573.

Appellant insists that the state failed to prove that he acted with purpose to kill under R.C. 2903.01. Viewing the evidence in the light most favorable to the prosecution, we are convinced that it is sufficient to support that element of the offense. Witnesses testified that after Joy said she wanted Whitey dead, appellant said he would "take care of it" or "do him in." Furthermore, Whitey was shot twice in the head at close range, the second time while he was lying on the ground. As we have repeatedly held, multiple gunshots to a vital area at close range tend to demonstrate purpose to kill. *See State v. Palmer* (1997), 80 Ohio St.3d 543, 562, 687 N.E.2d 685, 702; *State v. Otte* (1996), 74 Ohio St.3d 555, 564, 660 N.E.2d 711, 720. This evidence, taken together, is sufficient to demonstrate appellant's purpose to murder Whitey Hoop.

We similarly reject appellant's second argument, that the state failed to prove appellant's identity as the murderer. Appellant was heard to say he would do Whitey in and was caught right after the shooting in Kerr's bathroom soaking his bloodstained clothes in her tub. Police also discovered in the bathroom Whitey's wallet and a Jennings .22 with a bloodstain on it consistent with Whitey's blood. Lindsey's clothing and truck were also heavily stained with blood consistent with Whitey's blood. Viewing this evidence in a light most favorable to the prosecution, we are convinced that any rational trier of fact could have found beyond a reasonable doubt that appellant committed the aggravated murder. Appellant's fourteenth proposition of law is overruled.

C. Manifest Weight

Appellant's fifteenth proposition of law challenges his conviction for aggravated murder as against the manifest weight of the evidence. In considering a manifest-weight claim, "'[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 547, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219,

> 485 N.E.2d 717, 720–721.
>
> Appellant contends that circumstantial evidence pointed to suspects other than himself and that such evidence outweighed the state's evidence as to appellant's identity. In particular, appellant focuses upon Deputy Sheriff Moore's supposed testimony that an unidentified vehicle was seen leaving the parking lot of Slammers at high speed. In fact, Moore testified only that a vehicle was seen driving at a high speed past him as he returned to the bar, not that it left from Slammers. Appellant also points to the fact that Swinford claimed he left the bar before the shooting but that no one saw him drive away and that no gunshot residue tests were taken from Swinford. Finally he emphasizes that Kathy Kerr was seen to have blood on her but that police failed to sample it.
>
> This evidence by itself is weak and cannot be said to implicate any of the above as the murderer. Moreover, considered in the context of the remaining identity evidence, this case most definitely does not fall into the category of the "exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins, supra*, 78 Ohio St.3d at 387, 678 N.E.2d at 547. Rather, the evidence shows that appellant stated he would kill Whitey, that he was seen standing near his dead body, that police found him shortly after the shooting soaking his bloodstained clothing in a bathroom that also contained Whitey's wallet and the same type of gun that killed Whitey, and that his truck was heavily stained with blood consistent with Whitey's. This evidence persuades us that the jury neither lost its way nor created a manifest miscarriage of justice in convicting appellant of aggravated murder. Appellant's fifteenth proposition of law is overruled.

State v. Lindsey, 87 Ohio St. 3d 479, 482-84 (2000).

An insufficient evidence claim, as opposed to a freestanding claim of actual innocence, states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990) (*en banc*). In order 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. The *Jackson* standard "'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Thompson v. Skipper*, 981 F.3d 476, 479 (6th Cir. 2020) (quoting *Jackson*, 443 U.S. at 324).

In a case such as this, filed after the enactment of the AEDPA, two levels of deference to state court decisions is required:

> In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. 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. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. *See United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). 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. See 28 U.S.C. § 2254(d)(2).

Brown v. Konteh, 567 F.3d 191, 205 (6th Cir. 2009). Thus, on habeas review of a sufficiency of the evidence claim, deference should be given to the trier-of-fact's verdict under *Jackson v. Virginia* and then to the appellate court's consideration of that verdict, as required by the AEDPA. *Tucker v. Palmer*, 541 F.3d 652 (6th Cir. 2008); *accord Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (*en banc*). Stated another way:

> 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, 2 (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.'"

Coleman v. Johnson, 566 U.S. 650, 651 (2012) (*per curiam*) (internal citation omitted). *See also Tackett v. Trierweiler*, 956 F.3d 358, 367 (6th Cir. 2020) (noting in light of *Jackson* and AEDPA's two layers of deference, "a federal court's review of a state court conviction for sufficiency of the evidence is very limited"). In applying the deference that is due, the AEDPA "requires a habeas court to review the actual grounds on which the state court relied." *Thompson*, 981 F.3d at 480 (citing *Wilson v. Sellers*, 584 U.S. ___, 138 S.Ct. 1188, 1191-92 (2018)).

Here, in rejecting Petitioner's sufficiency of the evidence claim on the merits, the Ohio Supreme Court correctly identified *Jackson v. Virginia* as the correct constitutional standard. Accordingly, no basis for habeas relief exists unless the Ohio Supreme Court's decision involved an unreasonable application of *Jackson*, and even then, that application "must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Thompson*, 981 F.3d at 479 (quoting *Smith v. Nagy*, 962 F.3d 192, 199 (6th Cir. 2020)). Petitioner has not cleared this hurdle. In applying *Jackson*, the Ohio Supreme Court cited specific evidence of record from which a reasonable jury could infer that Petitioner acted with the requisite purpose to kill Whitey Hoop. As to his purpose, the Ohio Supreme Court noted that on the night of the murder, and in response to Joy Hoop saying she wanted her husband dead, Petitioner stated he would "take care of it" or "do him in." *Lindsey*, 97 Ohio St. 3d at 483. Shortly thereafter, Petitioner was seen

standing near Whitey Hoop's body. As to Petitioner's intent to kill, Whitey Hoop was shot twice at close range, with both shots to the vital head/face area of his body. Additional evidence strongly implicated Petitioner as the murderer. Law enforcement observed Petitioner's truck leaving the scene of the murder. Petitioner was found a short time later in a nearby residence soaking bloodstained clothes in a bathroom, where the victim's wallet and a gun consistent with the murder weapon were also found. As the Ohio Supreme Court noted, the gun had "a bloodstain on it consistent with Whitey's blood" and "Lindsey's clothing and truck were also heavily stained with blood consistent with Whitey's blood." *Id.* The facts recited by the Ohio Supreme Court are sufficient to support Petitioner's convictions, and Petitioner has not established that the state court's decision was contrary to or an objectively unreasonable application of clearly established federal law. Petitioner's First Claim for Relief is without merit.

Further, the Court finds that reasonable jurists would not find the resolution of Petitioner's sufficiency of the evidence claim to be debatable or wrong. The Court declines to issue a certificate of appealability.

Second Claim for Relief:

> The State of Ohio withheld material exculpatory evidence of witness immunity in violation of Mr. Lindsey's due process rights and allowed perjured testimony at Mr. Lindsey's trial. U.S. CONST. AMENDS. V, VI, XIV.

In his Second Claim for Relief, Petitioner argues the prosecution suppressed material, exculpatory evidence of purported witness immunity and other compensation. (Petition, ECF No. 9-1, at PAGEID # 167.) Specifically, Petitioner claims the state failed to disclose that it had granted key witness Kathy Kerr testimonial immunity and compensated her for her testimony, in

the form of lost wages and a hotel room during the pendency of Petitioner's trial. Petitioner further contends the prosecutor suborned perjury by failing to correct Kerr when she testified that she would "do her time" for testifying falsely before the Grand Jury. (*Id*. at PAGEID # 169.) Respondent acknowledges that Petitioner presented this claim to the state courts during his post-conviction proceedings and the claim is properly before this Court on habeas review.

On appeal from the denial of his petition for post-conviction relief, the Twelfth District Court of Appeals disposed of Petitioner's claim regarding Kerr's testimony in two short paragraphs:

> In appellant's first, second and sixth grounds for relief he argued that "Kerr was induced to testify against [appellant] with a purported grant of testimonial immunity," a state-paid hotel room, and reimbursement of her lost wages during the trial. As a result, appellant argues the prosecutor engaged in misconduct by concealing the impeachment evidence that [he] could have used to reveal the bias of the state's witness.
>
> However, the state did not grant, or attempt to grant any immunity to witness Kerr. See R.C. 2945.44. Kerr's belief that she would be reimbursed for lost wages has not been established as fact, and in any event, would not arise to the level of prosecutorial misconduct. Furthermore, providing a hotel room to Kerr would not be potential impeachment evidence of such magnitude or significance as to provide postconviction relief. Therefore, appellant has alleged no operative facts to indicate that the state concealed impeachment evidence relating to Kerr from the defense.

State v. Lindsey, No. CA2002-02-002, 2003 WL 433941, *5-6 (Ohio App. 12th Dist. Feb. 24, 2003).

In his merit brief in support of the instant habeas petition, Petitioner sets forth two reasons why this Court should question the decision of the Twelfth District Court of Appeals, the last state court to issue a decision on this matter. First, Petitioner argues the decision by the court of appeals "summarily rejected" his claims regarding Kerr, "without any citation to, or discussion of, clearly established federal law on failure to disclose material evidence and

suborned perjury." (ECF No. 75, at PAGEID # 1111.) Secondly, Petitioner contends the state court made incorrect and unreasonable findings of fact by concluding that immunity was not offered to Kerr. According to Petitioner:

> Astonishingly, when presented with Lindsey's Brady and suborned perjury claims, the Ohio[] appellate court made the determination that the state did not grant or attempt to grant any immunity to witness Kerr. The state appellate court ended any analysis of the issue presumptively because once they found there was no immunity, there was an implicit finding that the prosecutor did not fail to disclose evidence and that there was no perjury by Kerr. Clearly, the Ohio court of appeals' finding on this fact was incorrect and was unreasonable. (internal citation omitted).

(*Id*.)

This Court must first decide the appropriate level of deference due to the state appellate court's decision. The Court has reviewed Petitioner's petition for post-conviction relief, his second amended petition for post-conviction relief, and the accompanying exhibits. (Appx., ECF No. 152-8, at PAGEID # 7127; ECF 152-10, at PAGEID # 8544.) Petitioner raised his claims regarding the purported grant of immunity to witness Kerr as his first and second grounds for relief. Petitioner argued:

> The State, through the prosecuting attorney, has a duty to disclose to the defense all evidence favorable to the accused and material to either guilt or punishment. Ohio R. Crim. P. 16; Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972). The State breached its duty and violated Mr. Lindsey's constitutional rights by concealing evidence that Kathy Kerr had been induced to testify by a purported grant of immunity and other valuable consideration, thereby depriving Mr. Lindsey his rights to a fair trial and due process of law and undermining his right to confront the State's witnesses. U.S. Const. amends. V, VI, XIV; Ohio Const., art. §§ 19, 10, 16.

(Appx., ECF No. 152-10, at PAGEID # 8564.) There is no question that Petitioner presented the essence of a federal constitutional *Brady* claim to the state courts. In so doing, Petitioner

cited applicable United States Supreme Court precedent and principles. The Twelfth District Court of Appeals, on the other hand, did not seemingly address Petitioner's constitutional claim. The appellate court (and the trial court for that matter), analyzed whether the prosecutor had granted (or could grant) Kerr enforceable transactional immunity under the Ohio immunity statute, set forth as Section 2945.44 of the Ohio Revised Code. Applying only Ohio law, the court of appeals determined the prosecutor had not granted Kerr transactional immunity, something only a court could do. The state court did not address the potential impeachment value of Kerr believing she had immunity, or whether the prosecutor made promises to her regarding any future prosecution arising out of her testimony. By ending the inquiry upon the finding of no official grant of transactional immunity, the state courts bypassed consideration of the substance of Petitioner's *Brady* claim. The state courts did not acknowledge Petitioner included a federal *Brady* claim, nor did they rely on federal law or use language suggesting the materiality of this potential impeachment evidence was considered. Given these circumstances, this Court concludes the Twelfth District Court of Appeals did not address the federal claim Petitioner Lindsey raised post-conviction.

If a state court does not rule on a federal claim before it, federal review of that claim is *de novo* rather than deferential. *Hawkins v. Coyle*, 547 F.3d 540, 546 (6th Cir. 2008) (noting when a prisoner "'properly raised a claim in state court, yet that court did not review the claim's merits, AEDPA deference does not apply, and the federal habeas court reviews legal issues *de novo*'") (quoting *Vazquez v. Jones*, 496 F.3d 564, 569 (6th Cir. 2007)); *Matthews v. Ishee*, 486 F.3d 883 (6th Cir. 2007) (finding where state court denied *Brady* claim exclusively on state law grounds the claim was "fairly presented but not reviewed on the merits by a state court" and thus

"we review the claim *de novo*"); *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003) (stating when there are "no results, let alone reasoning, to which this court can defer . . ., any attempt to determine whether the state court decision was contrary to, or involved an unreasonable application of clearly established Federal law . . . would be futile"). Thus, this Court addresses Petitioner's *Brady* claim regarding the Kerr impeachment material *de novo*.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the State has a duty to disclose exculpatory evidence to the defense under the Due Process Clause. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). With regard to the first element, "the Supreme Court has held that the duty to turn over favorable evidence encompasses impeachment evidence as well as exculpatory evidence." *Eakes v. Sexton*, 592 F. App'x. 422, 427 (6th Cir. 2014) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Evidence is material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *LaMar v. Houk*, 798 F.3d 405, 415 (6th Cir. 2015). A violation is established by showing that the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *VanHook v. Bobby*, 661 F.3d 264, 267 (6th Cir. 2011) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). "The materiality of *Brady* evidence depends almost entirely on the value of the undisclosed evidence relative to the other evidence produced by the state." *Eakes*, 592 F. App'x at 427 (citing *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004)). That is, the materiality

analysis necessarily involves weighing the value of the undisclosed evidence against other evidence produced by the state. *Chinn v. Warden*, 3:02cv512, 2020 WL 2781522, *11 (S.D. Ohio May 29, 2020) (citing *Bethel v. Bobby*, 2:10-CV-391, 2018 WL 1516778, at *2 (S.D. Ohio Mar. 28, 2018) (report and recommendation)). "Where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *United States v. Ramer*, 883 F.3d 659, 672 (6th Cir. 2018) (quoting *Bales v. Bell*, 788 F.3d 568, 574 (6th Cir. 2015)).

The crux of Petitioner's *Brady* claim is that the state made and failed to disclose an agreement with witness Kathy Kerr that she would be granted testimonial immunity regarding her testimony at his trial. Respondent argues the state courts correctly determined the prosecutor did not legally grant or attempt to grant official immunity to Kerr. According to Respondent, under Ohio law, only a court may grant immunity upon a written request by the prosecuting attorney. (ECF No. 80, at PAGEID # 1159) (citing *State v. Tammerino*, No. L-82-345, 1983 Ohio App. Lexis 14904 (6th Dist. Aug. 26, 1983) ("It is important to note that police officers and prosecuting attorneys cannot grant immunity. A grant of immunity must be approved by a judge and must also meet the requirements set forth in R.C. 2945.44.")). Respondent acknowledges that police officers or prosecutors do sometimes promise immunity without first obtaining judicial approval, and in those circumstances, "there is a risk that the statements obtained from the individual are involuntary and inadmissible at trial." *Id.* Respondent notes "the potential harm to the State in eliciting testimony under a false promise of immunity would not have raised itself in Petitioner or his co-conspirators' trials, but would have

become an issue if Kerr had been criminally charged." *Id.* What Respondent does not recognize is that a purported yet unenforceable grant of immunity to Kerr could also be an issue in Petitioner's case, if it was not disclosed to Petitioner. If Kerr believed she was being offered some form of immunity in exchange for her testimony, this fact should have been disclosed to Petitioner's counsel.

Here, a reasonable view of the state court record indicates a strong likelihood that the prosecutor offered Kathy Kerr testimonial immunity. This offer was memorialized in a letter dated July 8, 1997, approximately two months before Petitioner's September, 1997 trial. The letter, attached to Petitioner's post-conviction petition as Exhibit 45B, appears to bear the signature of the prosecuting attorney, Thomas Grennan, and states as follows:

> Re: Grant of Testimonial Immunity
> Dear Ms. Kerr:
> This is to advise you that I, as the Brown County Prosecutor, am hereby granting you testimonial immunity for your truthful testimony and cooperation in the prosecution in the matter of State of Ohio v. Carl Lindsey and State of Ohio vs. Joy Hoop, which resulted in the homicide death of Donald Ray Hoop on February 10, 1997.

(PC Exh. 45B, ECF No. 152-9, at PAGEID # 8122.) Petitioner's trial counsel, Bruce Wallace, swore an Affidavit attesting that he was not made aware of this grant of testimonial immunity prior to the trial. (PC Exh. 13, ECF No. 152-8, at PAGEID # 7529.) In the State's Response to Petitioner's post-conviction petition, the State characterized the issue as follows:

> The State of Ohio did not grant Kathy Kerr immunity from prosecution in exchange for her testimony. The Prosecutor granted Ms. Kerr testimonial immunity. In other words the State would not use anything Ms. Kerr said against her should she be charged with committing a crime.

(ECF No. 152-10, at PAGEID # 8639.)

It is well settled that *Brady* contemplates the disclosure of impeachment information,

including any consideration given for a witness's testimony. The Sixth Circuit has noted:

> The extent to which the rule of *Brady* requires disclosure not just of evidence of formal cooperation agreements, but also evidence of informal communications between the prosecution and a witness, has received significant attention in recent Sixth Circuit case law. In *Bell v. Bell*, the court noted that "[i]t is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under *Brady*." 512 F.3d at 233. However, "[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate." *Id.* (citing *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005)). "*Brady* is not limited to formal plea bargains, immunity deals or other notarized commitments. It applies to 'less formal, unwritten, or tacit agreement[s],' so long as the prosecution offers the witness a benefit in exchange for his cooperation, ... so long in other words as the evidence is 'favorable to the accused.' " *Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009) (quoting *Bell*, 512 F.3d at 233, and *Bagley*, 473 U.S. at 678).
>
> Yet, the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit agreement.

Akrawi v. Booker, 572 F.3d 252, 262-63 (6th Cir. 2009). Although the existence of an informal, or implicit agreement should be disclosed, the failure to do so, without more, is not enough to merit relief. A State's violation of its *Brady* duty of disclosure warrants habeas relief only if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34.

Petitioner has satisfied the first two prongs of the *Brady* inquiry by establishing 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. Petitioner, however, cannot prevail on his *Brady* claim, because he has not established that the evidence was material to the outcome of his trial. Accordingly, this Court cannot conclude Petitioner was prejudiced by the prosecution's conduct in omitting this information. Petitioner's trial counsel subjected witness Kerr to lengthy cross-examination at trial, establishing her history of making

conflicting and untruthful statements to both the investigators and the Grand Jury, as well as her lack of forthrightness. (ECF No. 153-4, at PAGEID # 11330-11348.) There is no reason to believe that disclosure of this additional impeachment evidence would have so altered the jury's assessment of Kerr's credibility as to give rise to a reasonable probability that the outcome of the trial would have been different. Accordingly, the Court finds the undisclosed evidence is "cumulative, and hence not material." *Ramer*, 883 F.3d at 672. *See also Akrawi*, 572 F.3d at 264 (finding that defense counsel's cross examination might have been "*more effective* if evidence if the mutual understanding had been disclosed prior to trial, but only incrementally so") (emphasis in original). It is also important to note that based on the letter from the prosecutor, attached as an exhibit to the post-conviction petition, the prosecutor offered only testimonial immunity to Kerr, not immunity for any involvement in the crime. This appears to have been a limited agreement by the prosecutor not to use Kerr's testimony against her in any subsequent proceedings.

As to Petitioner's argument that the state agreed to pay Kerr for her lost wages, Petitioner has not pointed to evidence of record to support this allegation. "Unsupported assumptions and unfounded speculation" are insufficient to support a *Brady* claim on habeas review. *Hill v. Mitchell*, 842 F.3d 910, 933 (6th Cir. 2016). *See also Brown v. Boyd*, 3:20-CV-00241, 2020 WL 6566012, at *18 (M.D. Tenn. Nov. 9, 2020) ("Allegations that are merely conclusory or which are purely speculative cannot support a *Brady* claim.") (quoting *Burns v. Lafler*, 328 F. Supp. 2d 711, 724 (E.D. Mich. 2004)). This portion of Petitioner's claim also lacks merit, as it is bereft of substance and evidentiary support. Likewise, the Court does not view the fact that the State may have facilitated Kerr's testimony by providing a hotel room during the trial to be

compelling impeachment material. In a death penalty prosecution, the State may choose to secure accommodations for a witness for any number of reasons, including security concerns.

Moreover, "[i]n determining whether 'withheld information was material and therefore prejudicial,' a reviewing court considers "it in light of the evidence available for trial that supports the petitioner's conviction.'" *See Jalowiec v. Bradshaw*, 657 F.3d 293, 305 (6th Cir. 2011) (quoting *Jells v. Mitchell*, 538 F.3d 478, 502 (6th Cir. 2008); *Towns v. Smith*, 395 F.3d 215, 260 (6th Cir. 2005) (same). Here, there was other evidence of Petitioner's guilt. A. J. Cox testified that he saw Joy Hoop with a gun, and heard Petitioner Lindsey say "I'll take care of it." (Trial Tr. at 727-728, 733; ECF No. 153-4, at PAGEID # 11836-11837, 11841.) Shortly before receiving the call about the murder, Brown County Sherriff's Deputy Buddy Moore, on routine patrol, observed Petitioner's truck leave the parking lot of Slammer's Bar. The truck was discovered a short time later at Kathy Kerr's residence, next to the bar. Petitioner was discovered inside this residence, in Kerr's bathroom, soaking his bloodstained clothes. (Trial Tr. 70-79, 530-536; ECF No. 153-4, at PAGEID # 11175-11184, 1638-11644.) A pistol was found behind the bathroom door and Whitey Hoop's wallet was found in the bathroom trashcan. (Trial Tr. 702-712; ECF No. 153-4, at PAGEID # 11810-11820.). Petitioner's truck was examined, and blood consistent with the victim's was found on the door handle and leather steering wheel cover. Swabs of Petitioner's hands indicated the presence of gun shot residue. (Trial Tr. 430-431; ECF No. 153-4, at PAGEID # 430-431.) In sum, Petitioner cannot establish cognizable prejudice sufficient to support his *Brady* claim, even on *de novo* review.

Finally, Petitioner claims the prosecutor suborned perjury by not correcting Kerr when she stated on cross-examination that she would do her time for testifying falsely before the

Grand Jury. (ECF No. 153-4, at PAGEID # 11334.) To prevail on a false-testimony claim in habeas corpus, Petitioner must show "(1) that the prosecution presented false testimony (2) that the prosecution knew was false, and (3) that was material." *Akrawi v. Booker*, 572 F.3d 252, 265 (6th Cir. 2009) (citing *Abdus-Samad v. Bell*, 420 F.3d 614, 625 (6th Cir. 2005)). *See also Burnside v. Rewerts*, No. 19-2074, 2020 WL 5592695, *1 (6th Cir. Apr. 29, 2020) (citing *Akrawi*). "The subject statement must be 'indisputably false' rather than 'merely misleading.'" *Akrawi*, 572 F.3d at 265 (quoting *Abdus-Samad*, 420 F.3d at 625). Petitioner has not satisfied this standard. The statement of Kerr was not indisputably false, as Petitioner has produced no evidence of any agreement exempting Kerr from prosecution for perjury.

To warrant a COA, a petitioner must make a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(2*); see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir. 1997). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 28 U.S.C. § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court is cognizant of this "gatekeeping process for federal habeas appeals," *Moody v. U.S.*, 958 F.3d 485, 488 (6th Cir. 2020), and declines to issue a COA as to this claim. Reasonable jurists would not find debatable or wrong this Court's resolution of Petitioner's *Brady* claim.

Third Claim for Relief:

> The Prosecution used inconsistent theories of prosecution to procure convictions of Mr. Lindsey and Joy Hoop, violating Mr. Lindsey's right to fundamental fairness and due process. U.S. CONST. AM. V, VI, VIII, XIV.

APPENDIX E

A. Two trials, two theories
B. Manipulated evidence at Mr. Lindsey's trial
C. New witness at Joy Hoop's trial

In his Third Claim for Relief, Petitioner challenges the State of Ohio's use of inconsistent theories regarding who fired the fatal shot that killed Whitey Hoop, in the separate prosecutions of Petitioner and co-defendant, Joy Hoop. Specifically, at Hoop's subsequent trial, the State presented a new witness, Thomas Merriman, an acquaintance of Petitioner Lindsey. Merriman testified that Joy Hoop told him Lindsey "didn't finish the job and she had to go out and shoot [Whitey] a second time in the head." (ECF No. 152-9, at PAGEID # 7714-7745.)

Petitioner argues the use of factually contradictory theories violates the principles of due process, as well as the Eighth Amendment. (Petition, ECF No. 9-1, at PAGEID # 172.) According to Petitioner:

> The following theories were consistent at both Mr. Lindsey's and his codefendant's trials: (1) Joy Hoop enlisted Mr. Lindsey to kill her husband when he came to Slammer's bar to pick her up; (2) Whitey Hoop was shot twice in the bar parking lot, with some time passing between the first and second shot; (3) of the two gunshot wounds sustained by the victim, only the second one to his forehead was fatal; (4) the victim was in his vehicle when he sustained the first shot in his cheek; (5) the victim exited his vehicle and ambulated around the parking lot for some period of time; (6) the victim was flat on his back near the bar wall when the second shot was fired at point blank range. (Tr. T.p. 29-41, 813-820; P.C. Exh. 32 at 1047-1082).
>
> But the critical inconsistency was who fired the fatal shot. (Tr. T.p. 31, 834; P.C. Exh. 32 at 1076). Mr. Lindsey allegedly fired the fatal shot at his trial, but at Joy Hoop's trial she was allegedly the principal offender.

(*Id*. at PAGEID # 171.) Petitioner also claims there was a discrepancy or "manipulation" of Kathy Kerr's testimony between the two trials, regarding whether Kerr heard any additional shots as she ran home after seeing Petitioner next to Whitey Hoop's body. (*Id*. at PAGEID # 173.)

APPENDIX E

Petitioner presented this inconsistent theories claim to the state courts in both his post-conviction proceedings and in a motion for a new trial. In connection with the post-conviction proceedings, the trial court rejected Petitioner's claim, making lengthy findings of fact:

> As to the Third Ground for Relief, which alleges inconsistent theories of prosecution in the Carl Lindsey and Joy Hoop trials, pertaining to Kathy Kerr's testimony in the Hoop trial that she may have heard gun shots on her way home after leaving the Slammer's bar, and further as developed by the testimony of Thomas Merriman regarding certain alleged admissions to him by Joy Hoop as to a second gun being involved and Joy Hoop's telling him that she fired the fatal shot, this Court once again finds no entitlement to post-conviction relief on behalf of the Petitioner Lindsey.
>
> At the [Hoop] trial, Mr. Thomas Merriman apparently was found or came forward, and provided an alternative possibility that Joy Hoop may have fired the fatal shot. Mr. Merriman was arguably not a very credible witness in the first instance, and the jury in Hoop may have accordingly discounted this alternate testimony-theory presented through Mr. Merriman. Merriman admitted he was "burnt out" and a drug addict. He also identified in the courtroom a female Assistant Prosecuting Attorney as being the Defendant Joy Hoop. Additionally, he was an admitted long time friend of Carl Lindsey. As to his credibility, the jury must reasonably have asked the following query: "Why would Joy Hoop confide in someone she didn't really know all that well, and even ostensibly admit to that casual acquaintance the commission of a murder?" Additionally, Merriman was unknown to the State as a witness in Lindsey. It is further significant that the State's prosecution of Joy Hoop was not as a principal offender but as compliciter. Thus, while Merriman's testimony was offered by the State, it has all the appearances of having been "thrown in" because Mr. Merriman had been discovered.
>
> Regarding Kathy Kerr's "variant" testimony regarding possibly hearing shots on the way home in Hoop, and not having so testified regarding such shots in the Lindsey trial, Ms. Kerr stated in Hoop regarding the shots "I'm not certain." It was brought out in regard to Ms. Kerr that her story had changed from statement to statement, and from time to time. It was for the jury to assess her credibility, as one of the pieces of the puzzle presented by the State. This Court cannot say that the outcome of Mr. Lindsey's trial would have been different had Ms. Kerr testified at Lindsey as she subsequently did at Hoop. In any event, Ms. Hoop was not charged as a principal offender, and this testimony was in some respects superfluous. In the testimony of Dr. Timothy McKinley, the Brown County Coroner, the first shot to Whitey Hoop occurred in the vehicle, and this first shot was to the mouth/cheek area and was not fatal, unless Hoop bled out which would take approximately one to one and one-half hours at the minimum. Dr. McKinley's testimony was further that Whitey Hoop would have been able to and

in fact did continue to move around/struggle etc., as indicated by the blood on the ground in the parking lot and the blood on the wall of the building above Whitey Hoop's body. The second shot to the forehead was the fatal shot, and would have put Whitey Hoop down immediately, would have been almost instantaneously fatal, and would have rendered Whitey Hoop unconscious immediately. Accordingly, Whitey was from the testimony of Dr. McKinley laying flat when the second shot was fired, due to the blood flowing back over the forehead, as occasioned by the gravity pull. At the Lindsey trial Dr. McKinley opined, that the fatal shot occurred with Whitey on the ground. At the Hoop trial, Dr. McKinely said that it was "possible" that Whitey may have been standing up, since it would take a few seconds for the blood to stop flowing and that Whitey may have fallen and the blood would have begun flowing downward over the forehead after he fell from a shot in a standing position. If Whitey Hoop were standing, Joy Hoop would not have been the shooter, since Kathy Kerr testified she saw Whitey on the ground and bloody, with the Defendant Lindsey nearby. Likewise, even if Whitey Hoop were on the ground when the fatal shot was fired, the other evidence of Whitey being on the ground when Kathy Kerr came out and Lindsey standing nearby would essentially eliminate Joy Hoop as the shooter, since the first shot would not have put Whitey on the ground, and only the second fatal shot would have put him on the ground. Since he was already on the ground, prior to Joy Hoop exiting the Slammer's Bar, the only reasonable conclusion is that the Defendant Lindsey fired the second and fatal shot. Dr. McKinley further admitted during the Hoop trial that if Whitey Hoop was shot while standing, regarding the fatal shot in the forehead, that he would "probably" be on the ground in three seconds, and that as to whether Whitey was standing or flat on the ground when shot the second time that "it could be either way". Dr. McKinley also testified that there were no specific areas, or notation of injuries, that would have accounted for Whitey being on the ground, thus leaving to the conclusion that Whitey was on the ground when Kathy Kerr exited, and before Joy Hoop exited, by reason of having been shot the second and fatal time by the Defendant Lindsey.

There is also credible testimony/evidence in the Lindsey trial which was presented to the jury as to Lindsey being the principal offender, including Whitey's wallet being in the bathroom at Kathy Kerr's with the Defendant Lindsey, the bloodstained clothes present in the tub in the same bathroom, the .22 caliber pistol with bloodstain consistent with Whitey Hoop's blood, and in the same bathroom with the Defendant Lindsey bullets in a box that were consistent in class characteristics with the spent shells involved in the shooting and killing of Whitey Hoop. Thus, the decedent's wallet, the bloodstained clothing, the same type of pistol utilized with the decedent's blood, and bullets with consistent class characteristic all support the jury's finding of Lindsey as the principal offender.

(Appx., ECF No. 152-10, at PAGEID # 8674-8690.)

Petitioner appealed the trial court's denial of post-conviction relief and the Twelfth

APPENDIX E

District Court of Appeals affirmed, finding in relevant part:

> Appellant argues in his third and fifth grounds for relief that the state presented two different theories of the crime in the trials of appellant and co-defendant, Joy Hoop. Appellant argues "the evidence adduced at Joy Hoop's trial coupled with the record in [appellant's] case lead to the inescapable conclusion that appellant is actually innocent of the crime for which he was sentenced to death."
>
> However, the "State's presentation of varying theories in different cases involving individual defendants does not rise to the crest of violating basic tenets and consideration of due process." *State v. Cohen* (Apr. 29, 1988), Lake App. No. 12-011, at *17. Therefore, we find nothing in the record that would lead us to conclude that the prosecutor engaged in any misconduct that deprived appellant of a fair trial. Also, there were no operative facts set forth to demonstrate that the presentation of a different theory of the crime in the trial of the co-defendant, Joy Hoop, prejudiced appellant.

State v. Lindsey, No. CA2002-02-002, 2003 WL 433941, *7 (Ohio App. 12th Dist. Feb. 24, 2003).

The state courts also considered the inconsistent theories issue in connection with Petitioner's motion for a new trial. The trial court denied the motion, and the court of appeals affirmed. After setting forth a detailed recitation of the facts, the court of appeals determined:

> On May 29, 1997, Joy Hoop was indicted on four counts alleging her participation in aggravated murder, with two death penalty specifications. The first specification charged that the aggravated murder was a murder for hire (R.C. 2929.04[A][2]). The second specification charged that the aggravated murder was done during the commission of or in flight from the commission of an aggravated robbery, and that appellant was the principal offender or that the aggravated murder was committed with prior calculation and design (R.C. 2929.04[A][7]).
>
> Hoop filed a motion seeking to require that the state choose between the alternative allegations in the second specification. The trial court granted the motion and the state chose to proceed on the alternative that the aggravated murder was committed during the commission of or in flight from the commission of an aggravated robbery and with prior calculation and design. That part of the specification which alleged that appellant [Hoop] was the principal offender was dismissed.
>
> At Hoop's trial, the state elicited testimony from Thomas Merriman, an acquaintance of appellant. He testified that Hoop told h[im] that appellant "didn't

finish the job and she had to go out and shoot [Whitey] a second time in the head." Based on this testimony, appellant filed a motion for a new trial. He alleged that the witness and his testimony was not disclosed to him, or known by him, at the time of his trial, and in fact did not become known to him until the conclusion of Hoop's trial. He argued that the testimony contradicts his conviction with a specification that he was the principal offender, and that he is thus entitled to a new trial.

The trial court denied the motion, concluding that the newly discovered evidence did not disclose a strong possibility that the result of a new trial would likely be different. He appeals raising one assignment of error in which he alleges that the trial court erred in denying his motion for a new trial.

In order to be granted a new trial on the basis of newly-discovered evidence, the defendant must show that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

"Where the case has been tried to a jury, the task for the trial judge is to determine whether it is likely that the jury would have reached a different verdict if it had considered the newly discovered evidence." *Dayton v. Martin* (1987), 43 Ohio App.3d 87, 90, 539 N.E.2d 646. "The task of the reviewing court is then to determine whether the trial judge abused its discretion in making this determination." *Id.* Likewise, "the decision on whether the motion warrants a hearing also lies within the trial court's discretion." *State v. Smith* (1986), 30 Ohio App.3d 138, 139, 506 N.E.2d 1205. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 158, 404 N.E.2d 144. "When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court." *State v. Morton*, Summit App. No. 21047, 2002–Ohio–6458, at ¶ 42, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748, 1993–Ohio–122.

We note that the trial court properly found that the newly-discovered evidence met the second and third criteria under *Petro* as Merriman's statements were not discovered until Hoop's trial, several months after appellant's trial. However, "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense." *State v. Agurs* (1976), 427 U.S. 104, 109–110, 96 S.Ct. 2392. Where there is "no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."

APPENDIX E

Id. at 112–113; *State v. Baker* (Oct. 15, 2001), Clinton App. No. CA2000–08–018.

> In the present matter, there is no reasonable doubt regarding appellant's guilt, even considering the new evidence. Appellant was overheard saying he would kill Whitey. He was followed from the scene of the crime by a police officer, and was later found soaking blood stained clothes in a bathtub. Police found Whitey's wallet, the murder weapon and ammunition nearby. Bloodstains consistent with the victim's blood were found on appellant's clothing and in his truck. Evidence further indicated that he had recently fired a gun. At trial, appellant never raised the defense that he now posits, that he did not fire the fatal shot but instead abandoned his attempt to kill Whitey after firing once.
>
> Considering this same evidence on appeal of the denial of appellant's petition for postconviction relief, this court stated: "the State's presentation of varying theories in different cases involving individual defendants does not rise to the crest of violating basic tenets and consideration of due process. * * * [T]here were no operative facts set forth to demonstrate that the presentation of a different theory of the crime in the trial of the co-defendant, Joy Hoop, prejudiced appellant." *State v. Lindsey*, Brown App. No. CA2002–02–002, 2003–Ohio–811, ¶ 33–34 (citations omitted).
>
> Reviewing this same evidence with regard to appellant's motion for a new trial leads to the same conclusion. Appellant has failed to present evidence disclosing a strong probability that the result of a new trial, if granted, would be different. We therefore conclude that the trial court did not abuse its discretion by denying the motion for a new trial without a hearing. The assignment of error is overruled.

State v. Lindsey, No. CA2003-07-010, 2004 WL 1877734, *2-4 (Ohio App. 12th Dist. Aug. 23, 2004). This decision constitutes the last reasoned state court decision on this issue.

The Warden's merit brief sets forth two arguments as to why this Court should deny Petitioner's Third Claim for Relief. First, Respondent asserts that even if the state presented contradictory testimony between the two trials, "the United States Supreme Court has never held that the Due Process Clause precludes the state from pursuing separate prosecutions for the same crime under contradictory theories or inconsistent factual premises at trial," and therefore "Petitioner cannot demonstrate that the decisions of the Ohio courts were contrary to or an unreasonable application of clearly established Supreme Court precedent." (Brief, ECF No. 80,

at PAGEID # 1168.) Secondly, Respondent argues the State did not proceed with two separate theories regarding the actual shooter, because Petitioner Lindsey was charged as the principal offender in the case, and Joy Hoop was charged under theories of conspiracy and complicity. (*Id*. at PAGEID # 1166.) This Court agrees.

Indisputably, Petitioner's habeas claims are governed by the AEDPA, and therefore relief is available only if the decision of the Ohio Court of Appeals was contrary to or 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). The United States Supreme Court has never held that the use of inconsistent theories of prosecution raises a due process violation. Thus, even if the State of Ohio presented inconsistent theories about who fired the fatal shot, habeas relief is denied, as there is no clearly established federal law supporting Petitioner's inconsistent theories claim. *Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Thomas, J., concurring) ("This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."). *See also Stumpf v. Robinson*, 722 F.3d 739, 751 (6th Cir. 2013) (en banc) ("A criminal defendant has the right to a fair proceeding in front of an impartial factfinder based on reliable evidence. He does not have the right to prevent a prosecutor from arguing a justifiable inference from a complete evidentiary record, even if the prosecutor has argued for a different inference from the then-complete evidentiary record in another case."); *Blalock v. Wilson*, 320 F. App'x 396, 418 n.26 (6th Cir. 2009) (there is no "clearly established Supreme Court . . . precedent showing that such a prosecutorial strategy would violate a defendant's due process rights"); *Melton v. Klee*, No. 11-14634, 2019 WL 1315723, at *8-10 (E.D. Mich. Mar. 22, 2019) ("There is no clearly established federal law

supporting Petitioner's inconsistent theories claim."). In sum, it cannot be said that the state court's denial of this claim was contrary to, or an unreasonable application of clearly established Supreme Court precedent, where there is no clearly established federal law on this issue. Habeas relief is denied on this basis.

Additionally, it is well established that in the absence of some underlying constitutional violation, a federal habeas court may not review a state court's denial of a motion for a new trial based on newly discovered evidence. *Pudelski v. Wilson*, 576 F.3d 595, 611 (6th Cir. 2009). In conducting this limited constitutional review, the Court owes considerable deference to the extensive factual findings of the state courts and Petitioner has presented no evidence that those determinations were unreasonable or wrong within the strict confines of the AEDPA. Petitioner Lindsey was charged as the principal offender and the state courts determined the evidence of his guilt was overwhelming. Three witnesses testified at his trial that he willingly agreed to kill Whitey Hoop shortly before the murder. When Kathy Kerr exited the bar, Whitey Hoop was on the ground and Petitioner Lindsey was standing nearby. A Sherriff's deputy observed Petitioner leave the scene of the murder and head to the Kerr residence a short distance away. When Petitioner was found there shortly after the murder, he was soaking his blood-stained clothes, was in possession of a firearm consistent with the murder weapon, and Whitey Hoop's empty wallet was in the trash can. Blood consistent with the victim's was found in Petitioner's truck. The fact that the state presented a new witness at Joy Hoop's trial, who provided questionable testimony in the form of an alleged statement by Hoop, does not negate the overwhelming evidence of Petitioner's guilt, nor does it call into question whether Petitioner fired the initial shot into Whitey Hoop's face.

APPENDIX E

Under Ohio law, an aider and abetter is treated the same as a principal offender, "so long as the aiding and abetting is done with the specific intent to cause death." *Bradshaw v. Stumpf*, 545 U.S. 175, 184 (2005) (relying on *In re Washington*, 81 Ohio St.3d 337, 691 N.E.2d 285, 286-87 (1998)). Consistent with this, the state argued during closing arguments in Hoop's trial that the evidence was uncertain as to whether Hoop or Lindsey fired the fatal shot, and that for purposes of convicting Joy Hoop, it did not matter. (ECF No. 152-9, at PAGEID # 7874-7936.) The prosecution always maintained that Petitioner Lindsey agreed to kill Whitey Hoop at the request of Joy Hoop, and that Petitioner shot Whitey Hoop in the face. The testimony of the new witness, if believed, did not negate Petitioner's liability for the crime. As the Twelfth District Court of Appeals determined, "there is no doubt regarding appellant's guilt, even considering the new evidence." *Lindsey*, 2004 WL 1877734, *4. Furthermore, the Court notes that Petitioner has failed to offer proof of any deliberate attempt to deceive the court or the jury, or effort by the prosecutor to keep the factfinder from making an informed decision. Petitioner's Third Claim for Relief is DENIED.

In the absence of clearly established federal law on this issue, the Court cannot conclude that a certificate of appealability is warranted on Petitioner's Third Claim for Relief.

Fourth Claim for Relief:

> The trial court failed to ensure that the culpability phase of Mr. Lindsey's capital trial was constitutionally fair and reliable.

In his Fourth Claim for Relief, Petitioner argues the trial court improperly admitted hearsay evidence under Ohio's co-conspirator exception. (Petition, ECF No. 9-1, at PAGEID # 175-178.) Initially, Petitioner also alleged the trial court erroneously overruled his objections to the qualifications of the Brown County Coroner and gave an erroneous instruction regarding the

definition of "purpose." (*Id*. at PAGEID # 178-180.) In his Traverse, Petitioner withdrew the allegations concerning the trial court's instruction on purpose, ECF No. 20, at PAGEID # 375, and stated the allegations concerning the coroner's qualifications were addressed in connection with his Fifth Claim for Relief, which has also been withdrawn. (*Id*. at PAGEID # 375; ECF No. 63.) Thus, only the allegations regarding the co-conspirator statements remain as part of Petitioner's Fourth Claim for Relief.

Petitioner claims the trial court improperly admitted hearsay statements of co-defendant Joy Hoop under Ohio's co-conspirator exception, Ohio Evidence Rule 801(D)(2)(e), through the testimony of witnesses Kenny Swinford, A.J. Cox and Kathy Kerr. Petitioner asserts the statements were not admissible under Ohio's co-conspirator exception, because "the prosecution failed to first establish a prima facie case of conspiracy, necessary for the introduction of co-conspirator statements under Ohio Evid. R. 801(D)(2)(e)." (ECF No. 75, at PAGEID # 1122.) Petitioner contends the erroneous admission of this hearsay evidence had a "substantial and injurious effect" on the jury's verdict, because the hearsay provided the jury with a motive for the murder and bolstered the prosecution's theory of murder-for-hire. (*Id*. at PAGEID # 1127.) According to Petitioner, "[m]otive strongly influences a jury, which the prosecutor well knew as he relied upon these statements repeatedly in closing argument. With full use of hearsay statements, he was able to perpetuate that scenario even though the murder-for-hire charge had been dismissed and there was no charge of conspiracy." (*Id*.) Petitioner argues the admission of these statements violated his rights under the Confrontation Clause and his due process rights to a fundamentally fair trial. (Petition, ECF No, 9-1, at PAGEID # 176.) Respondent counters that Petitioner's arguments regarding Swinford's testimony are defaulted, because Petitioner

failed to object at trial and the Ohio Supreme Court enforced that default, reviewing the testimony only for plain error. (ECF No. 12, at PAGEID # 294.)

On direct appeal, the Ohio Supreme Court determined the co-conspirator statements were properly admitted, and that prima facie evidence of a conspiracy existed regardless of the fact that the murder-for-hire specification was dismissed:

> In his thirteenth proposition of law, appellant contests the trial court's admission of certain witnesses' testimony. He argues first that the trial court erred by admitting the hearsay statements of Joy Hoop, appellant's alleged co-conspirator, without a proper foundation under the co-conspirator exception in Evid.R. 801(D)(2)(e). Specifically, appellant challenges the testimony of witness A.J. Cox that, after laying a knife on the bar, Joy said: "If that ain't good enough, this right here should take care of it, I got this." The witness did not see what "this" was but heard a sound like a heavy, metallic object.
>
> Evid.R. 801(D)(2)(e) provides: "A statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Under this rule, the * * * statement of a co-conspirator is not admissible until "the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof." *State v. Carter* (1995), 72 Ohio St.3d 545, 550, 651 N.E.2d 965, 972.
>
> Appellant argues that the trial court improperly admitted the testimony of Cox before a prima facie case of conspiracy had been made. At the time Cox's testimony was admitted, however, the state had presented the testimony of Kathy Kerr, which was sufficient to set forth a prima facie showing of conspiracy. The offense of conspiracy is defined in R.C. 2923.01 as the agreement to accomplish a particular unlawful object, coupled with an overt act in furtherance thereof, whether remuneration is offered or not. Kerr testified that appellant and Joy were romantically involved, that while discussing Whitey, appellant told Joy "he would do him in," and that she saw Joy give appellant a gun. From this testimony it is reasonable to conclude that a conspiracy existed to kill Whitey and that the transfer of the gun was an overt act in furtherance thereof. We are unpersuaded by appellant's contention that Kerr's impeachment on cross-examination undermines the conspiracy evidence, as Kerr's veracity was a question for the trier of fact.
>
> Nor do we agree with appellant's next argument. Appellant contends that because the trial court dismissed the murder-for-hire specification, the state could not have demonstrated the existence of a conspiracy. Conspiracy, however, is not the equivalent of murder for hire. Rather, under R.C. 2929.04(A)(2), murder for hire requires proof of an additional element not contained in the offense of conspiracy, specifically, that the murder "was committed for hire." Because the

> state failed to present any evidence of compensation, the murder-for-hire specification was dismissed. But, as set forth in the statute, a conspiracy may exist without regard to whether remuneration is offered. Accordingly, a lack of evidence as to compensation has no bearing on the existence of the conspiracy. Appellant's argument is therefore without merit.
>
> Appellant next contends that the trial court erred in allowing the testimony of witness Kenny Swinford. Appellant disagrees with the admission of Swinford's statement that he participated in a conversation with Joy Hoop, Kathy Kerr, and a third person whose identity he did not know. Appellant contends that because Swinford never identified appellant as the unknown man, his testimony about that conversation was inadmissible. Similarly, appellant argues that Swinford improperly testified to what "they" were saying without identifying the individuals speaking.
>
> Appellant, however, failed to object on either of these grounds at trial and therefore waived all but plain error. See *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916, 925. Plain error consists of an obvious error or defect in the trial proceedings that affects a substantial right. Crim.R. 52(B). Under this standard, reversal is warranted only if the outcome of the trial clearly would have been different absent the error. *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. Upon review of Swinford's testimony in the plain error context, we are unpersuaded that the outcome would have been different had Swinford not testified. Accordingly, appellant's thirteenth proposition of law is overruled.

State v. Lindsey, 87 Ohio St. 3d 479, 481-82 (2000).

As an initial matter, the Court notes that on direct appeal, as his thirteenth proposition of law, Petitioner raised a purely state law claim regarding the hearsay statements. Petitioner argued the statements at issue did not meet the additional admissibility safeguards established by state law:

> Case law has established that before any co-conspirator statements can be admitted, the State must independently prove a conspiracy existed. State v. Carter (1995), 72 Ohio St.3d 545, 651 N.E.2d 965. In this respect, the Ohio Rule differs from the Federal Rule, which does not require independent proof of a conspiracy prior to admission of the statements. Independent proof of a conspiracy must be made by a *prima facie* showing.

(Appx., ECF No. 152-7, at PAGEID # 6875.) Petitioner's entire proposition of law was couched in terms of state evidentiary law, with no citation to federal case law or reference to the

United States Constitution. Petitioner made no reference to the Confrontation Clause, or even due process. Likewise, the Ohio Supreme Court resolved the merits of the claim on purely state law grounds.

In order to satisfy the exhaustion requirement in habeas corpus, a petitioner must fairly present the substance of his federal constitutional claim to the state courts. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Although the fair presentment requirement is a rule of comity, not jurisdiction, *see Castille v. Peoples,* 489 U.S. 346, 349 (1989); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999), it is rooted in principles of comity and federalism designed to allow state courts the opportunity to correct the State's alleged violation of a federal constitutional right that threatens to invalidate a state criminal judgment. A petitioner fairly presents the "substance of his federal habeas corpus claim" when the state courts are afforded sufficient notice and a fair opportunity to apply controlling legal principles to the facts bearing upon the constitutional claim. *Harless*, 459 U.S. at 6. Although a certain degree of tinkering is permissible, a petitioner does not fairly present a claim if he presents an issue to the state courts under one legal theory and set of facts, and then presents the issue to the federal courts under a different legal theory or a different set of facts. *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). Rather, he must present to the federal court essentially the same facts and legal theories that were considered and rejected by the state courts. *See Lott v. Coyle*, 261 F.3d 594, 607 (6th Cir. 2001). The Sixth Circuit has held that a petitioner fairly presents his federal claim to the state courts in one of four ways: (1) relying on federal cases employing constitutional analysis; (2) relying on state cases that employ federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms

sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts that are well within the mainstream of constitutional law. *Whiting v. Burt*, 395 F.3d 602, 613 (6th Cir. 2005) (quoting *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). Where the petitioner did not present the federal claim but instead presented a purely a state-law claim, the federal claim is not exhausted. When any attempt now to return to state court to exhaust the federal issue would fail as untimely or as barred by *res judicata*, the federal claim is procedurally defaulted.

The Court finds Petitioner failed to fairly present his Fourth Claim for Relief to the state courts as a federal constitutional claim. The Court notes, however, that Respondent did not raise this particular procedural default defense. Nevertheless, this Court is within its authority to reject this claim on the basis of procedural default *sua sponte*. In *Sheppard v. Bagley*, 604 F. Supp. 2d 1003 (S.D. Ohio 2009), *aff'd*, 657 F.3d 338 (6th Cir. 2011), the district court noted that although it may be "unusual" for a habeas court to raise a procedural default *sua sponte*, it may be "particularly appropriate to do so where the petitioner explicitly argued in the state courts that state law provided him with more protections tha[n] the corresponding federal law, and where he rested his state claims exclusively on state law." *Id*. at 1010. Here, as in *Sheppard*, "[b]y arguing that state law afforded him greater protection than federal law, . . . Petitioner actually deprived rather than provided the state courts an opportunity to remedy the constitutional violation that Petitioner allege[s] in his habeas petition." *Sheppard*, 604 F. Supp. 2d at 1009. *See also Ahmed v. Houk*, No. 2:07-CV-658, 2014 WL 2709765 (S.D. Ohio June 16, 2014) (Report and Recommendation noting the court had "been reluctant to raise the defense *sua sponte* except in cases where an expressly defederalized claim was presented to the state

courts"), *report and recommendation adopted*, *Ahmed v. Houk*, No. 2:07-CV-658, 2020 WL 5629622 (S.D. Ohio Sept. 21, 2020).

To be sure, the concern with raising procedural default *sua sponte*, is that Petitioner has not had an opportunity to respond. *See, e.g.*, *Howard v. Bouchard*, 405 F.3d 459 (6th Cir. 2005) ("The main concern with raising procedural default *sua sponte* is that a petitioner not be disadvantaged without having had an opportunity to respond.") (citing *Lorraine v. Coyle*, 291 F.3d 416, 426 (6th Cir. 2002)). That concern is not present here, because even if this claim was not defaulted, it plainly lacks merit. "To the extent Petitioner argues that this testimony was improperly admitted hearsay or was not properly authenticated, those are state law claims and not cognizable on federal habeas review." *Lash v. Sheldon*, 1:19-CV-1616, 2020 WL 6712165, at *18–19 (N.D. Ohio Oct. 20, 2020), *report and recommendation adopted*, *Lash v. Turner*, 1:19-CV-1616, 2020 WL 6702051 (N.D. Ohio Nov. 13, 2020). *See also Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012) (generally, "alleged errors in evidentiary rulings by state courts are not cognizable in federal habeas review"); *Smith v. Jones*, 326 F. App'x 324, 330 (6th Cir. 2009) (claim that trial court improperly admitted statements under a hearsay exception is a state evidentiary law issue not cognizable on federal habeas review); *Graves v. Romanowski*, No. 2:07-10463, 2008 WL 362990, *5 (E.D. Mich. Feb. 11, 2008) (finding a petitioner's claim that the trial court violated his right to a fair trial by admitting recorded telephone conversations under a co-conspirator exception to the state's hearsay rules raised only a non-cognizable issue of state law). It is only when an evidentiary ruling is so fundamentally unfair that it rises to the level of a due-process violation is it cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Bey v. Bagley*, 400 F.3d 514, 522 (6th Cir. 2007).

APPENDIX E

Petitioner argues the admission of Joy Hoop's statements, through the testimony of witnesses Swinford, Cox and Kerr, violated his Sixth Amendment Confrontation Clause rights. *Crawford v. Washington*, 541 U.S. 36 (2004) does not apply here, because Crawford was not decided until 2004, and the Ohio Supreme Court rendered the last state judgment on the merits of this claim in 2000. *Crawford* does not apply retroactively on collateral review. *Whorton v. Bockting*, 549 U.S. 406, 409 (2007). The then governing law was *Ohio v. Roberts*, 448 U.S. 56 (1980), which required as a matter of Confrontation Clause law that, as to an unavailable declarant, hearsay could be admitted if it bore particularized guarantees of trustworthiness or fell within a firmly-rooted hearsay exception. 549 U.S. at 412. Here, the Ohio Supreme Court concluded that the evidence was sufficient to prove the existence of a conspiracy so as to permit the introduction of the Hoop statements as an exception to the hearsay rule. What is or is not hearsay in a state court trial is governed by state law. To the extent Petitioner contends the Hoop statements were hearsay, this Court must defer to the Ohio Supreme Court's factual determination that the State laid a proper foundation such that the challenged statements constituted declarations of a co-conspirator, and were, therefore, admissible as non-hearsay under Evid. R. 801(D)(2). The decision of the Ohio Supreme Court is not contrary to clearly established federal law as it existed at the time of Petitioner's convictions and appeal.

For the foregoing reasons, the Court hereby denies Petitioner's Fourth Claim for Relief. Because two independent reasons exist for denying relief on this claim, the Court finds that a certificate of appealability shall not issue.

Sixth Claim for Relief:

> Egregious prosecutorial misconduct at both the culpability and mitigation phase violated Mr. Lindsey's right to due process, a fair

> trial, and the effective assistance of counsel. U.S. CONST. AMENDS V, VI, VIII, XIV.

In his Sixth Claim for relief, Petitioner complains of "egregious prosecutorial misconduct" at both phases of his trial. With respect to the guilt phase of his trial, Petitioner repeats his complaints regarding suppressed impeachment evidence, the use of perjured testimony from Kathy Kerr, and the state's use of inconsistent theories of prosecution. As to the penalty phase of his trial, Petitioner contends the prosecutor argued improper aggravating circumstances during closing argument. Finally, Petitioner argues the cumulative effect of prosecutorial misconduct throughout his trial warrants habeas relief. (Petition, ECF No. 9-2, at PAGEID # 189-196.)

Respondent argues that Petitioner's guilt phase arguments of prosecutorial misconduct lack merit, and for the reasons discussed in connection with Petitioner's Second and Third Claims for Relief, this Court agrees. With respect to Petitioner's argument that the prosecutor improperly argued the nature and circumstances of the offense during the penalty phase closing argument, Respondent contends this allegation is procedurally defaulted because Petitioner failed to object at trial, and as a result of that waiver, the Ohio Supreme Court reviewed the claim only for plain error. Finally, Respondent asserts Petitioner has never presented his cumulative effect argument regarding prosecutorial misconduct to the state courts. (Return, ECF No. 12, at PAGEID # 304-305.) Respondent is equally correct regarding these defaults.

Petitioner raised his argument challenging the prosecutor's penalty phase closing argument on direct appeal as his first proposition of law. The Ohio Supreme Court found the claim waived due to Petitioner's failure to object at trial, and reviewed the claim only for plain error:

APPENDIX E

Appellant's first proposition of law concerns the prosecutor's conduct in the penalty phase of the trial. Appellant challenges the following statements made by the prosecutor:

> (1) "I guess that they said he grew up in a bad home, although it improved with his grandparents; he was gone from the home for a period of time; and he has an alcohol problem. *Do they outweigh what he did?*"
>
> (2) "We have Al Nehus here. I'm not sure what he said other than he's been a good prisoner. I don't see how that in any way mitigates *what he's done in this case, how that mitigates murdering somebody coldbloodedly in the course of a robbery, and that's what this is about.*"
>
> (3) "There is nothing that has been presented to you that *outweighs what he did to Whitey Hoop, nothing. * * * [T]he circumstances of the offense itself outweigh those mitigating factors that have been presented here today.*"
>
> (4) "[W]hat you have to go back and decide is whether the Defendant's having taken a gun during the course of a robbery, held it to Mr. Hoop's face, pulled the trigger once, struggled with him, taking his wallet, and then place that gun to his forehead an eighth of an inch away or closer and pulled that trigger ending his life, whether that outweighs the fact that he didn't come from a perfect home. That's the issue which you have to decide."

As appellant argues, portions of the above comments improperly suggested that the nature and circumstances of the offense were to be viewed by the jury as aggravating circumstances. R.C. 2929.04(B) allows the nature and circumstances of the offense to be involved in the weighing of aggravating circumstances against mitigating factors only on the side of mitigation. *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 356, 662 N.E.2d 311, 322. As we explained in *Wogenstahl*, "the 'aggravating circumstances' against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt." "[I]t is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are 'aggravating circumstances.'" *Id.*

Appellant, however, failed to object to the prosecutor's comments at the time they were made. Accordingly, appellant waived any error except to the extent it constitutes plain error. Viewed in this context, the prosecutor's remarks did not

> alter the outcome of the trial and therefore did not rise to the level of plain error.
>
> Nor do we believe that the prosecutor's misstatement of the burden of proof in the weighing process constituted plain error. The prosecutor did ask whether the mitigating factors outweighed what appellant did, improperly suggesting that the defense had the burden of showing that mitigating factors outweighed the aggravating circumstances. See *State v. Bey* (1999), 85 Ohio St.3d 487, 495–496, 709 N.E.2d 484, 494. But this misstatement occurred only twice in the context of various other times throughout his argument where he presented the correct standard.
>
> Furthermore, the trial court correctly instructed the jury on both of these issues. As a result, any confusion caused by the prosecutor's misstatements was cured. See *id.* Appellant's first proposition of law is overruled.

Lindsey, 87 Ohio St. 3d at 485-486 (emphasis in original).

The procedural default doctrine relied on by Respondent, is described by the Supreme Court as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). A petitioner may not raise in federal habeas corpus a federal constitutional claim he could not raise in state court because of a procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). "Absent cause and prejudice, 'a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review.'" *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000) (quoting *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996)). "[A] federal court may not review federal claims that were procedurally defaulted in state court – that is, claims that the state court

denied based on an adequate and independent state procedural rule." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). Once the court determines that a state procedural rule was not complied with and the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Theriot v. Vashaw*, ___ F.3d ___, No. 20-1029, 2020 WL 7379397, *2 (6th Cir. Dec. 16, 2020); *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); accord, *Hartman v. Bagley*, 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002).

Applying that analysis, the Court finds that Ohio has a relevant procedural rule, requiring a contemporaneous objection to trial court error; parties must preserve errors for appeal by calling them to the attention of the trial court at a time when the error could have been avoided or corrected. *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus; *see also State v. Mason*, 82 Ohio St. 3d 144, 162 (1998). In this case, the Ohio Supreme Court enforced that rule by reviewing Petitioner's penalty phase claim of prosecutorial misconduct under the plain error standard. An Ohio appellate court's review for plain error is enforcement, not waiver, of a procedural default, such as a failure to make a contemporaneous objection at trial. *Neil v. Forshey*, No. 20-3491, 2020 WL 6498732, at *4 (6th Cir. Oct. 30, 2020) (noting that "plain error review constitutes enforcement of the contemporaneous objection rule"). *See also Wogenstahl v. Mitchell*, 668 F.3d 307, 337 (6th Cir. 2012); *Jells v. Mitchell*, 538 F.3d 478, 511 (6th Cir. 2008); *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006). The Sixth Circuit has repeatedly held that Ohio's contemporaneous objection rule is an adequate and independent basis of state court decision. *Wogenstahl*, 668 F.3d at 334 (6th Cir. 2012) (citing *Keith v.*

Mitchell, 455 F.3d 662, 673 (6th Cir. 2006)); *Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011); *Smith v. Bradshaw*, 591 F.3d 517, 522 (6th Cir. 2010). Although a procedural default can be excused by an adequate showing of cause and prejudice, Petitioner proffers no excusing cause, instead arguing that this Court can consider even defaulted claims of prosecutorial misconduct as part of a cumulative error review of the actions of the prosecutor. What is lacking, however, is any supporting case law to that effect. The Court finds Petitioner's penalty phase prosecutorial misconduct claim procedurally defaulted.

In the alternative, Petitioner's claim is also without merit. It is well settled that "[t]o grant habeas relief based on prosecutorial misconduct that does not violate a specific guarantee under the bill of Rights, the misconduct must be so egregious as to deny the Petitioner due process." *Lorraine v. Coyle*, 291 F.3d 416, 439 (6th Cir. 2002) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974)). A reviewing court must first determine whether prosecutorial misconduct occurred, and if so, whether the misconduct was prejudicial. In so doing, the reviewing court should consider the challenged remarks within the context of the entire trial to determine whether any improper remarks were prejudicial. *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008). It bears reminding, with respect to prosecutorial misconduct claims, that the "[p]etitioner's burden on habeas review is quite a substantial one." *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000). Even misconduct that is universally condemned does not warrant habeas corpus relief unless the misconduct was so flagrant and egregious as to deny the petitioner a fundamentally fair trial. *Donnelly*, 416 U.S. at 643-54. Finally, prosecutorial misconduct during the penalty phase of a capital trial may be "cured by appellate reweighing." *LaMar v. Houk*, 798 F.3d 405, 431 (6th Cir. 2015) (finding that "all the alleged

prosecutorial misconduct during the penalty phase was cured when the Ohio Supreme Court independently reweighed aggravation and mitigation") (citing *Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006)); *Trimble v. Bobby*, 804 F.3d 767, 783 (6th Cir. 2015) ("While we independently believe that any prosecutorial misconduct did not tip the scales against Trimble during the penalty phase, the Ohio Supreme Court's decision to reweigh the aggravating and mitigating factors definitively cures any potential error from the alleged prosecutorial misconduct.").

In a death penalty case, the state has some leeway to refer to the facts and circumstances of the crime to dispel the mitigating circumstances. However, assuming, as the Ohio Supreme Court did, that the argument of the prosecutor concerning the facts and circumstances of the crime was improper, the trial court properly instructed the jurors regarding the aggravating circumstance they could consider and the weighing process. The trial court's complete charge, ECF No. 153-5, at PAGEID # 12192-12208, was a correct statement of the law and mitigated any misstatements by the prosecutor. Additionally, the Ohio Supreme Court cured any error by conducting a thorough and independent reweighing of the aggravating and mitigating factors, finding "the aggravating circumstance of aggravated robbery conclusively outweighed the mitigating factors." *State v. Lindsey*, 87 Ohio St. 3d 479, 491-492 (2000). Finally, consideration of a non-statutory aggravating circumstance, even if contrary to state law, does not violate the United States Constitution. *Nields v. Bradshaw*, 482 F.3d 442, 451 (6th Cir. 2007), *quoting Smith v. Mitchell*, 348 F.3d 177, 210 (6th Cir. 2003). This sub-claim is without merit.

The Court hereby denies Petitioner's Sixth Claim for relief. Because reasonable jurists

would not find the Court's resolution of this claim to be debatable or wrong, and two independent reasons exist to deny the claim, the Court declines to issue a COA.

Seventh Claim for Relief:

> The trial court failed to ensure that the mitigation phase of Mr. Lindsey's capital trial was constitutionally fair and reliable.

In his Seventh Claim for Relief, Petitioner argues the actions of the trial court during the penalty phase of his trial denied him a fair trial. According to Petitioner, the trial court erred by readmitting all of the guilt phase evidence during the penalty phase, by sustaining the prosecutor's objection to testimony from Petitioner's wife that Petitioner did not like himself when he abused drugs, and by refusing to provide additional instruction to the jury in response to a question regarding the definition of the aggravating circumstances. Respondent acknowledges that each of these separate issues were raised on direct appeal to the Ohio Supreme Court, were considered by that court on the merits, and are properly before this Court on habeas review. Petitioner also asserts that the prosecutor improperly argued non-statutory aggravating factors during closing arguments, but that claim was resolved in the previous section of this Opinion and Order resolving Petitioner's Sixth Claim for Relief.

A. Improperly Admitted Guilt Phase Evidence

Petitioner asserts that at the outset of the mitigation phase, the trial court permitted the prosecution to admit all evidence from the guilt phase of the proceedings, over the objection of the defense. (Petition, ECF No. 9-2, at PAGEID # 197.) The trial court gave the jury a limiting instruction regarding this evidence, instructing the jury to consider "only those exhibits and only that evidence presented at the trial phase which are relevant to the specific aggravating circumstance for which the Defendant was found guilty." (ECF No. 153-5, at PAGEID #

12197, 12194-12195.) The Ohio Supreme Court reviewed this claim, finding the trial court erred by readmitting all of the evidence, but determining Petitioner did not suffer prejudice as a result of the error:

> In his sixth proposition of law, appellant takes issue with the trial court's admission of all the guilt-phase evidence into the penalty phase of the proceedings. Specifically in contention is the trial court's failure to determine which of the guilt-phase evidence was relevant to the penalty phase. Instead of making that determination, the court instructed the jury to consider only that evidence relevant to the specific aggravating circumstance at issue.
>
> While R.C. 2929.03(D)(1) permits the reintroduction of much or all of the guilt-phase evidence during the penalty phase, it does not relieve the trial court of its duty to determine the evidence relevant for consideration. See *State v. Getsy* (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866, 887. In *Getsy*, we held that the trial court's admission of all the evidence from the trial phase—with an instruction to the jury to consider "all the evidence, including exhibits presented in the first phase of this trial which you deem to be relevant"—was error. *Id.* As we explained there, it is the trial court's responsibility, during the penalty phase, to identify and admit only the evidence relevant to that phase. Under the same reasoning, the trial court's admission here of all the guilt-phase evidence with a similar instruction to the jury was also error. In so doing, the trial court improperly delegated to the jury the court's duty to determine the evidence relevant to the penalty phase.
>
> As in *Getsy*, however, the admission of the specific evidence challenged as prejudicial and irrelevant did not prejudice the outcome of the trial. Here, appellant points to bloody photographs of the victim, the bloodstains in appellant's vehicle, and the bloodstains on the premises of Slammer's bar as irrelevant and prejudicial to appellant. These items, however, were relevant to the aggravated robbery, the aggravating circumstance of which appellant was found guilty, as they demonstrated the element of serious physical harm to the victim. R.C. 2911.01(A)(3), R.C. 2929.03(D)(1). While the trial court should have exercised its responsibility to determine the relevance of the evidence admitted, the evidence contested was neither irrelevant nor prejudicial to the penalty phase. Accordingly, we overrule appellant's sixth proposition of law.

State v. Lindsey, 87 Ohio St. 3d at 484-485. The Ohio Supreme Court determined that much of the evidence of which Petitioner complains, was relevant to the aggravating circumstance of aggravated robbery. This determination is not contrary to nor an unreasonable application of

federal law. Although Ohio law may limit the evidence that may be considered in aggravation, federal law has no such requirement, apart from considerations of fundamental fairness. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.") "The question is whether the allegedly improper evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.'" *Kansas v. Carr*, 577 U.S. 108, 109 (2016) (quoting *Romano*, 512 U.S. at 12). Petitioner has made no such showing. *See also Cowans v. Bagley*, 624 F.Supp.2d 709, 813 (S.D. Ohio 2008) (finding trial court's readmission in the penalty phase of all culpability phase evidence insufficient to warrant habeas relief, and noting the absence of any clearly established Supreme Court precedent on the issue).

B. Objection to Pamela Lindsey's Testimony

Petitioner complains that the trial court improperly limited the mitigation phase testimony of Pamela Lindsey, Petitioner's wife. (Traverse, ECF No. 20, at PAGEID # 393-394.) Specifically, Petitioner alleges that Mrs. Lindsey was not permitted to testify that Petitioner did not like himself when he was using drugs. The Ohio Supreme Court rejected this claim on the merits, finding any error harmless because the evidence was cumulative:

> In his fourth proposition of law, appellant challenges the trial court's exclusion of a statement made by appellant's wife. During that portion of her testimony, appellant's wife was discussing appellant's disappointment with himself about his substance-abuse problem. When asked how she knew he was disappointed, she responded: "Because he said that he did not like himself like that." The trial court sustained the state's objection to this statement without providing a basis for the exclusion, but both parties assume it was on hearsay grounds.
>
> Appellant argues that this information was crucial to his defense and

> therefore it was error to exclude it. Even assuming that the exclusion was error, however, it was harmless. Appellant's wife had already testified that appellant "was disappointed in himself" when he resumed his substance abuse. The further statement that he "said that he did not like himself like that" was cumulative and added nothing additional to the defense's point. Appellant's fourth proposition of law is overruled.

Lindsey, 87 Ohio St. 3d at 484. The finding by the Ohio Supreme Court that the additional testimony was cumulative is a finding of fact entitled to deference by this Court. Moreover, "[t]he Sixth Circuit has consistently recognized the United States Supreme Court's reluctance, even in light of its cases holding that the sentencer in a capital case cannot be precluded from considering or giving effect to relevant mitigating evidence, to hold that the Eighth Amendment forbids a state court from applying state evidentiary rules or exercising discretion in limiting the introduction of evidence as irrelevant or unduly prejudicial." *Sheppard v. Bagley*, 604 F. Supp. 2d 1003, 1018 (S.D. Ohio 2009). *See also Scott v. Houk*, No. 4:07cv0753, 2011 WL 5838195, *28 (N.D Ohio Nov. 18, 2011) (noting "the Supreme Court overtly has held that the issue of the admissibility of evidence in capital sentencing trials is one reserved specifically to a state's rules of evidence"). This sub-claim is plainly without merit.

C. Failure to Answer Jury Question

Finally, Petitioner argues that during the penalty phase deliberations, the jurors sent a question to the trial court, requesting clarification regarding the aggravating circumstance. The Ohio Supreme Court considered and rejected this claim on the merits:

> Appellant's fifth proposition of law also challenges the trial court's instructions to the jury. Specifically, appellant argues that the court erred when it refused to provide further oral instruction to the jury upon request. During deliberations, the jury asked, "When weighing the mitigating evidence versus the aggravating circumstances, what are the aggravating circumstances? Is it solely the aggravated robbery or the combination of the aggravated robbery and the aggravated murder?'

> Rather than instructing the jury orally on this point, the trial court referred the jury to the written instructions that contained the court's original instruction on that issue:
>
> > It would be improper for you to weigh in this balance against the mitigating factors the aggravated murder itself as an aggravating circumstance. This is because the sentencing laws of Ohio have already incorporated consideration of the commission of the aggravated murder itself in setting the sentence now available to you. In other words, the sentences you are to consider have already been increased beyond that which would have been imposed for the aggravated murder itself due to the presence of the aggravating circumstance in this case.
>
> Appellant contends that the trial court had a duty to reinstruct the jury based upon that question. However, as we held in *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965, paragraph one of the syllabus, "[w]here, during the course of its deliberations, a jury requests further instruction, or clarification of an instruction previously given, a trial court has discretion to determine its response to that request." In *Carter* we concluded that the trial court acted within the scope of its discretion when it referred the jury to a written copy of the instructions rather than giving further oral instructions. *Id.* at 553.
>
> The same conclusion is warranted here. The trial judge referred the jury to the written instructions, which clearly and comprehensively answered the question. Even appellant admits that this instruction was a good statement of the law. Accordingly, the trial court's decision to refer the jury to that instruction rather than giving further oral instruction was appropriate and within the scope of its discretion. Appellant's fifth proposition of law is overruled.

Lindsey, 87 Ohio St. 3d at 487-488. The Ohio Supreme Court found no abuse of discretion in the trial court's handling of the jury's question. Additionally, the Ohio Supreme Court determined the trial court's written instructions, to which the jury was directed, were a correct statement of Ohio law, and Petitioner makes no argument to the contrary. To challenge a legally accurate jury instruction, Petitioner must show that the instruction was ambiguous and there was a reasonable likelihood that the jury applied the instruction in a way that violated the United States Constitution. *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009). This,

Petitioner has not done. *See Rashad v. Lafler*, 675 F.3d 564, 569 (6th Cir. 2012) ("Generally speaking, a state court's interpretation of the propriety of a jury instruction under state law does not entitle a habeas claimant to relief.")

For the foregoing reasons, the Court finds Petitioner's Seventh Claim for Relief lacks merit. Because this claim relates primarily to issues of state law, the Court finds a certificate of appealability is not warranted. Reasonable jurists would not find the Court's resolution of this claim for relief to be debatable or wrong.

Ninth Claim for Relief:

> The trial court violated Mr. Lindsey's due process rights when it denied Mr. Lindsey's post-conviction petition without first affording him the opportunity to conduct discovery and funding for an expert.

In his Ninth Claim for Relief, Petitioner argues the trial court violated his right to due process by denying his petition for post-conviction relief without affording him the opportunity to conduct discovery and funding for an expert. Petitioner alleges specifically that the trial court erred by denying his request for access to the prosecutor's complete files related to the prosecutions of both Petitioner and Joy Hoop. He further asserts the trial court erred in denying his request for funding to employ a neuropsychological expert.

Respondent acknowledges that Petitioner raised a general challenge to the adequacy of Ohio's post-conviction process in his appeal of the trial court's decision denying post-conviction relief, and that this claim is not procedurally defaulted. (Return, ECF No. 12, at PAGEID # 316.) Respondent argues, however, that the claim is not cognizable in federal habeas corpus and should be dismissed on that basis.

The Sixth Circuit has consistently held that challenges to Ohio's post-conviction process

are not a proper basis for habeas corpus relief. *Leonard v. Warden*, 846 F.3d 832, 854-55 (6th Cir. 2017) ("This Court has held that 'habeas corpus cannot be used to mount challenges to a state's scheme of post-conviction relief.'"). *See also Cornwell v. Bradshaw*, 559 F.3d 398, 411 (6th Cir. 2009) (holding petitioner's claim that state court improperly denied him an evidentiary hearing is not cognizable in habeas corpus proceedings). As noted by the Sixth Circuit in *Leonard v. Warden*:

> More to the point, in the absence of Supreme Court precedent evaluating the constitutional adequacy of state post-conviction review proceedings, Leonard cannot establish the necessary precondition for issuance of the writ – namely, that the decision of the Ohio Court of Appeals, which clearly evaluated the merits of his claim, 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'

Leonard, 846 F.3d at 855.

Because Petitioner's Ninth Claim for Relief is not cognizable in these habeas proceedings, the Court hereby denies relief on this claim and declines to issue a COA.

Tenth Claim for Relief:

> The cumulative effects of the errors and omissions presented in this habeas petition constitute constitutional violations that merit relief.

Petitioner sets forth a claim of cumulative error as his Tenth Claim for Relief. Specifically, Petitioner argues "[p]rosecutorial misconduct, the ineffectiveness of counsel, and court errors, considered in context with each other, compel the conclusion that the state courts unreasonably applied federal constitutional principles in determining that Mr. Lindsey's conviction and death sentence were the result of a fair and reliable process." (Traverse, ECF No. 20, at PAGEID # 431.) The Warden contends this claim is both procedurally defaulted and not cognizable in habeas corpus. (Return of Writ, ECF No. 12, at PAGEID # 317.) This Court

agrees.

To be sure, "'federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits,'" as it may sometimes be "more economical for the habeas court to simply review the merits of the petitioner's claims." *Cowan v. Huss*, No. 2:19-11917, 2020 WL 6286265, *8 (E.D. Mich. Oct. 27, 2020) (quoting *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003)). Generally, cumulative error is not a basis for habeas corpus relief, even in a capital case. *See Webster v. Horton*, 795 F. App'x 322, 327-28 (6th Cir. 2019) ("Webster argued that the trial court's cumulative errors entitled him to habeas relief. As stated by the district court, such claims of cumulated trial errors are not cognizable under § 2254.") *See also Moreland v. Bradshaw*, 699 F.3d 908, 931 (6th Cir. 2012) ("'[P]ost-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief.'") (quoting *Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010)); *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) ("Finally, Sheppard argues that the cumulative effect of these errors rendered his trial fundamentally unfair. Post-AEDPA, that claim is not cognizable."); *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) ("[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue."); *Burnside v. Rewerts*, No. 19-2074, 2020 WL 5592695, *2 (6th Cir. Apr. 29, 2020) (noting that post-AEDPA, a cumulative error claim is not cognizable in a federal habeas petition). Furthermore, even if this claim were cognizable, there is no error to cumulate, as each of Petitioner's claims for relief lack merit, or have been withdrawn by Petitioner.

The Court hereby **DENIES** Petitioner's Tenth Claim for Relief, and because reasonable

jurists would not find this decision debatable or wrong, the Court will not issue a COA.

IV. Lethal Injection Claims

As a final matter, it appears Petitioner still has lethal injection claims remaining. For the past eight years, Petitioner has made multiple attempts to amend his habeas petition to add claims challenging the constitutionality of Ohio's lethal injection method of execution. On March 8, 2012, Petitioner sought leave to amend his Petition to add claims Eleven and Twelve, in order to assert a challenge to Ohio's lethal injection execution protocol. (ECF No. 90.) The Court granted that motion on July 5, 2012 (ECF No. 94), and Petitioner filed his Second Amended Petition adding those two claims on August 3, 2012. (ECF No. 95.) On April 20, 2015, Petitioner filed a Third Amended Petition, replacing his two general method-of-execution claims with ten detailed method-of-execution claims that essentially mirrored claims being litigated in a separate 42 U.S.C. § 1983 action captioned *In re: Ohio Execution Protocol Litigation*, Case No. 2:11-cv-1016. (ECF No. 123.) No additional amendments were permitted. This Court last denied Petitioner leave to amend in an Opinion and Order dated September 27, 2018, ECF No. 154, finding amendment would be futile in light of *In re: Campbell*, 874 F.3d 454 (6th Cir. 2017). *Campbell* held that claims attacking the constitutionality of Ohio's lethal injection protocol were not cognizable in habeas corpus. *Id*. at 467. *See also In re Smith*, 806 F. App'x 426 (6th Cir. 2020) (finding "*Campbell* controls" and "is the law of this Circuit"); *Bays v. Warden*, 807 F. App'x 481, 482 (6th Cir. 2020) (discussing the Sixth Circuit's evolving position regarding the proper "procedural vehicle" for lethal injection claims and finding "this court's precedent in *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), forecloses Bay's argument that his lethal injection claims are cognizable in habeas rather

than as a claim under 42 U.S.C. § 1983").

To the extent that Petitioner has lethal injection method of execution claims remaining, the Court finds those claims non-cognizable in federal habeas corpus. The Court hereby **DISMISSES** Petitioner's lethal injection claims, set forth in his Third Amended Petition as claims Eleven through Twenty, and **DENIES** Petitioner a certificate of appealability.

V. Conclusion

For the foregoing reasons, the Court **DENIES** Petitioner's habeas corpus Petition. The Court hereby **DISMISSES** this action. The Court **DENIES** a certificate of appealability on all claims.

IT IS SO ORDERED.

/s Sarah D. Morrison
SARAH D. MORRISON
United States District Judge

APPENDIX F

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

CARL LINDSEY,

Petitioner,

v.

Case No. 1:03-cv-702
Judge Sarah D. Morrison
Magistrate Judge Elizabeth P. Deavers

WARDEN, Chillicothe Correctional Institution

Respondent.

OPINION AND ORDER

This capital habeas corpus case is before the Court on Petitioner's Motion to Alter or Amend the Judgment and Alter or Make Additional Findings and to Reconsider Denial of COA. (ECF No. 162.) Respondent filed a Memorandum in Opposition (ECF No. 166) and Petitioner has replied. (ECF No. 170.) Also before the Court is Petitioner's post-judgment Motion for Leave to Amend his Petition to add five new claims for relief (ECF No. 163.), to which Respondent filed a Memorandum in Opposition (ECF No. 167) and Petitioner has replied. (ECF No. 171.)

I. Introduction

After a trial by jury in Brown County, Ohio, Petitioner Carl Lindsey was convicted and sentenced to death for the murder of Donald Ray "Whitey" Hoop. On October 10, 2003, and after exhausting his state court remedies, Petitioner filed a Petition for Writ of Habeas Corpus. On December 30, 2020 and following years of amendments to the Petition as well as the withdrawal of certain claims, this Court issued an Opinion and Order denying relief

on Petitioner's remaining claims and dismissing this action. (ECF No. 159.) Petitioner now moves under Federal Civil Rule 59(e) to alter or amend the judgment. Petitioner contends the Court erred in denying his claims and urges the Court to reconsider the denial of a certificate of appealability as to each of his claims. Petitioner also makes a simultaneous attempt to amend his habeas petition. Specifically, Petitioner seeks leave to file a Fourth Amended Petition to add five new claims for relief, based on what he characterizes as newly discovered evidence. Petitioner proposes to add Grounds Twenty-One and Twenty-Two, arguing that newly discovered evidence indicates he has Fetal Alcohol Syndrome Disorder ("FASD") and he was denied the effective assistance of counsel based on trial counsel's failure to investigate whether Petitioner had FASD "despite the presence of red flags." (ECF No. 163, at PAGEID # 12471.) Petitioner also moves to add Grounds Twenty-Three through Twenty-Five based on "newly developed evidence that Mr. Lindsey's trial, appellate, and post-conviction counsel rendered ineffective assistance by failing to timely communicate multiple plea offers from the Brown County Prosecutor's Office, and that Mr. Lindsey's death sentence is unconstitutional as a result." (*Id*. at PAGEID # 12471-72.) The Court will address Petitioner's motions in turn.

II. Rule 59(e) Motion, ECF No. 162

Rule 59(e) of the Federal Rules of Civil Procedure "enables a district court to 'rectify its own mistakes in the period immediately following' its decision." *Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020) (quoting *White v. New Hampshire Dep't of Emp't Sec*., 455 U.S. 445, 450 (1982)). The motion is a "one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, before taking a single appeal." *Id*. at 1710. To grant a

motion filed under Rule 59(e), there must be "'(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Clark v. United States*, 764 F.3d 653, 661 (6th Cir. 2014) (quoting *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010)). "[A] prisoner may invoke ... [R]ule [59(e)] only to request 'reconsideration of matters properly encompassed in the challenged judgment,'" and "Courts will not entertain arguments that could have been but were not raised before the just-issued decision." *Banister*, 140 S.Ct. at 1708 (quoting *White*, 455 U.S. at 451). It is well settled that Rule 59(e) should not be used to "reargue a case on the merits or to reargue issues already presented," *Whitehead v. Bowen*, 301 F. App'x 484, 489 (6th Cir. 2008), or to "merely restyle or rehash the initial issues." *Hawkins v. Bruce*, No. 3:20-cv-686, 2021 WL 2677684, *1 (W.D. Ky. June 29, 2021).

In his Rule 59(e) motion, Petitioner asks the Court to alter or amend the judgment with respect to his Second Ground for Relief (*Brady* claim), Sub-claim 2 of his Fourth Ground for Relief (coroner's qualifications as an expert), and his Sixth Ground for Relief (prosecutorial misconduct). (ECF No. 162, at PAGEID # 12367.) Petitioner urges the Court to reconsider the denial of a Certificate of Appealability ("COA") as to his Third Ground for Relief (inconsistent theories of prosecution), certain sub-claims contained within his Seventh Ground for Relief (exclusion of mitigating evidence), and his Ninth Ground for Relief (denial of post-conviction petition without discovery or an expert). (*Id*. at 12368.)

Although a Rule 59(e) motion is not an opportunity to effectively reargue a case, *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008), this is precisely what Petitioner

has done. Petitioner's Rule 59(e) motion comprises One Hundred Four (104) pages and mostly restyles and rehashes arguments set forth in prior briefing. Because it is not the proper function of a Rule 59(e) motion to seek reconsideration of arguments already considered and rejected, this Court will not address every argument Petitioner attempts to reassert.

A. Second Ground for Relief: *Brady* Claim

With respect to his Second Ground for Relief, Petitioner argues the Court's judgment embodies a clear error of law, because the Court applied an incorrect, and more stringent standard for assessing the materiality of evidence suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (ECF No. 162, at PAGEID # 12387.) According to Petitioner, "[t]o satisfy the materiality requirement under *Brady*, a petitioner need only show that "the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.'" (*Id*.) (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)). Petitioner argues the Court improperly determined that the undisclosed impeachment evidence was cumulative, erred by conducting a sufficiency of the evidence inquiry by considering the trial record as a whole, and failed to consider the totality of the undisclosed evidence cumulatively. (*Id*. at PAGEID # 12377-95.)

In this Court's prior Opinion and Order, the Court determined that Petitioner's *Brady* claim was entitled to *de novo* review. (ECF No. 159, at PAGEID # 12321-22.) In undertaking that task, the Court carefully considered Petitioner's arguments that the State failed to disclose impeachment material regarding State witness Kathy Kerr. That material included an unsubstantiated allegation that the State paid Kerr for lost wages incurred due

to her testimony and provided Kerr hotel accommodations during the trial. The material also included a letter from the Brown County Prosecuting Attorney addressed to Kerr and advising Kerr that she would have *testimonial* immunity. The letter appears to represent a limited agreement not to use Kerr's truthful *trial testimony* against her in any subsequent proceedings.

In rejecting Petitioner's claim, this Court applied the correct legal standard for determining materiality: evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (ECF No. 159, at PAGEID # 12322, 12325, 12326) (citing *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995)). The Court reviewed the entire trial record to determine whether, in the absence of the impeachment material, Petitioner received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Although this inquiry necessarily involves a consideration of all relevant evidence, this Court is mindful that it must not "conflate materiality with the sufficiency-of-the-evidence inquiry." *Phillips v. Valentine*, 826 Fed. App'x 447, 460 (6th Cir. 2020) (citing *Kyles*, 514 U.S. at 434-45).

Petitioner faults the Court for considering the complete trial record, including other evidence corroborating Kerr's testimony and linking Petitioner to the crime, as well as defense counsel's thorough cross-examination of Kerr, in making the materiality determination. The undisclosed evidence at issue in this case is impeachment material. In *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir. 2011), *as amended* (Nov. 23, 2011), the Sixth Circuit recognized the need to view the materiality of impeachment material in the context

of the entire trial:

> Almost all of the undisclosed information identified by Jalowiec has potential impeachment value; it is not directly exculpatory. Exculpatory evidence is not inherently more valuable, because the *Brady* materiality prong is not a sufficiency-of-the-evidence test, but there are relevant distinctions between impeachment and exculpatory evidence for *Brady* purposes. For instance, "[w]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *Robinson v. Mills,* 592 F.3d 730, 736 (6th Cir. 2010) (internal quotation marks omitted).
>
> Defense counsel thoroughly cross-examined several of the prosecution witnesses who are the subjects of *Brady* impeachment evidence in this case. Weaknesses and inconsistencies in the prosecution's case were exposed. The jury was well aware that most of the prosecution witnesses were not model citizens and many were under the influence of intoxicants at the time of the events they testified about. The undisclosed evidence Jalowiec relies on could have been used to further impugn the credibility of some witnesses, but most of the potentially impeaching evidence was of marginal significance. It could hardly have been used to undermine the prosecution's core showing of Jalowiec's guilt.
>
> The ultimate question is whether there is a reasonable probability that the disclosure of such evidence, cumulatively, would have put the whole case in such a different light as to undermine confidence in the verdict. Evidence withheld by the prosecution "must be evaluated in the context of the entire record." *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "If there is no reasonable doubt about guilt whether or not the additional evi[de]nce is considered, there is no justification for a new trial." *Id.* at 112–13, 96 S.Ct. 2392. Because the evidence as a whole reflects that most of the trial witnesses were thoroughly and effectively cross-examined, the undisclosed impeachment evidence would have been of marginal value to Jalowiec. It follows that Jalowiec has failed to establish a reasonable probability that the outcome of the case would have been different, even if all the additional impeachment evidence had been disclosed to the defense.

657 F.3d at 313.

> The crux of Petitioner's *Brady* claim involves the purported grant of testimonial

immunity to witness Kerr. Without evidentiary support, Petitioner attempts to characterize the testimonial immunity as a "reward" that "had been held out to [Kerr] in exchange for her cooperation." (ECF No. 162, at PAGEID # 12385-86.) This characterization overstates the nature of any agreement between the prosecution and witness Kerr. Kerr did not receive an obvious benefit from her testimony – there is no evidence that the State agreed not to prosecute Kerr for any involvement in the murder. Rather, the prosecutor agreed not to use her truthful trial testimony against her at any future proceedings. There is a substantial difference between transactional immunity, where an individual is immune from prosecution for a crime, and the testimonial immunity at issue here. Moreover, the Sixth Circuit has instructed that any assessment of the impeachment value of an immunity agreement must consider whether the witness provided self-incriminating testimony. In *Jalowiec*, state's witness Joann Fike testified that she loaned her car, which was subsequently used in a murder, to her nephew who then loaned the car to Jalowiec. 657 F.3d at 309. Fike was granted transactional immunity in exchange for her cooperation with the murder investigation. *Id*. The Sixth Circuit agreed that the impeachment material should have been disclosed to Jalowiec, but determined the evidence was not material for purposes of *Brady*. With respect to the grant of transactional immunity to Fike, the Sixth Circuit held:

> We also find no error in the district court's determination that evidence that Fike was granted transactional immunity in exchange for her cooperation with the investigation of Lally's death was not material for purposes of *Brady.* Again, the grant of immunity should have been disclosed, but inasmuch as Fike did not reveal any self-incriminating information, the impeachment value of the immunity agreement was minimal. *See Marshall v. Hendricks,* 307 F.3d 36, 56 (3d Cir. 2002) (recognizing that "the impeachment value of

> the immunity agreement is inextricably tied to the self-incriminating evidence that was provided after the immunity agreement was executed.")

657 F.3d at 309.

Here, as in *Jalowiec*, the value of any purported grant of immunity was minimal, as Kerr did not reveal self-incriminating evidence about the murder. To the extent she admitted to testifying falsely and making prior inconsistent statements, the testimonial immunity at issue did not definitively absolve her from future prosecution.

This Court also determined that Petitioner's trial counsel subjected Kerr to lengthy cross-examination at trial, establishing her history of making conflicting and untruthful statements to both the investigators and the Grand Jury. Although the grant of limited, testimonial immunity should have been disclosed, there is no reasonable probability of a different result had the evidence been disclosed. *Akrawi v. Booker*, 572 F.3d 252, 262-63 (6th Cir. 2009) (disclosure of mutual agreement between witness and prosecution might have made defense counsel's cross-examination "more effective" but "only incrementally so"); *see also Davis v. Gross*, No. 18-5406, 2018 WL 8138536 (6th Cir. Sept. 10. 2018) (no entitlement to relief where petitioner "alleged, at most, that she had been deprived of cumulative impeachment evidence").

Finally, Petitioner contends the Court erred by considering the impeachment material piecemeal, as opposed to cumulatively. In *Kyles*, the Supreme Court cautioned against "dismissing particular items of evidence as immaterial and [] suggesting that cumulative materiality was not the touchstone." 514 U.S. at 440. *See also Hughbanks v. Hudson*, -- F. 4th --, 2021 WL 2521591, *5 (6th Cir. June 21, 2021) ("Importantly, a court

must consider the materiality of withheld evidence . . . only by evaluating the evidence collectively not item by item.") (internal quotations omitted). However, this Court's review and discussion of each of Petitioner's specific allegations of *Brady* material does not equate to piecemeal consideration of the evidence for the purpose of determining materiality. The Court considered the immunity issue, which is consistent with Petitioner's primary focus in his briefing on this aspect of his *Brady* claim. With respect to the allegations concerning the State's payment of lost wages, the Court determined Petitioner failed to point to any evidence of record supporting that unsubstantiated allegation. As the Court noted, allegations that are merely conclusory, or which are purely speculative, cannot support a *Brady* claim. *See Hill v. Mitchell*, 842 F.3d 910, 933 (6th Cir. 2016); *see also Hughbanks*, 2021 WL 2521591, at *5 (discounting certain allegations of *Brady* material where petitioner "has not demonstrated that the police withheld any evidence"). This Court reviewed all of the arguments and evidence offered by Petitioner, and determined then, as it does now, that Petitioner cannot satisfy the materiality component of a successful *Brady* claim. The undisclosed impeachment material, considered cumulatively, does not undermine confidence in Petitioner's trial or sentencing proceeding. The Court's resolution of Petitioner's Second Ground for Relief did not involve a clear error of law, and reasonable jurists would not find the Court's resolution of this claim to be debatable or wrong.

B. Sub-Claim 2 of the Fourth Ground for Relief: Coroner's Qualifications

Petitioner argues this Court erred by concluding he abandoned or withdrew sub-claim 2 of his Fourth Ground for Relief, wherein he asserts a claim of trial court error for overruling objections to the qualifications of the Brown County Coroner, Timothy

McKinley, M.D. (ECF No. 162, at PAGEID # 12397.) In the Traverse, Petitioner stated the allegations concerning the coroner's qualifications were set forth in his Fifth Ground for Relief, which he subsequently withdrew in its entirety. In his merits brief, filed after withdrawing the Fifth Ground for Relief, Petitioner did not address sub-claim 2 of his Fourth Ground for Relief. Petitioner now argues he never withdrew or abandoned the sub-claim, and this Court erred by failing to consider it. (*Id*.)

Respondent argues this Court correctly determined that Petitioner withdrew sub-claim 2, because Petitioner withdrew his Fifth Ground for Relief containing the factual basis for the sub-claim, and also in light of Petitioner's failure to reference the sub-claim in his merits briefing. (ECF No. 166, at PAGEID # 12594.) Alternatively, Respondent argues the sub-claim is defaulted, because Petitioner did not present this claim of trial court error regarding the coroner's qualifications on direct appeal. (*Id*.) Even if the claim is not defaulted, Respondent argues, it is "patently meritless" because "[a] state court's evidentiary ruling warrants federal habeas relief only where the ruling 'renders the proceedings so fundamentally unfair as to deprive the petitioner of due process.'" (*Id*.) (*citing Broom v. Mitchell*, 441 F.3d 392, 406 (6th Cir. 2006)).

In his Reply, Petitioner argues this claim of trial court error for overruling objections to Dr. McKinley's qualifications is not defaulted. According to Petitioner, this claim was properly raised during his state post-conviction proceedings and supported with evidence *de hors* the record, in the form of transcripts of Dr. McKinley's testimony at the subsequent trial of Petitioner's co-defendant, Joy Hoop. As support for this argument, Petitioner directs the Court's attention to three paragraphs of his post-conviction petition,

wherein Dr. McKinley's qualifications are discussed. (ECF No. 170, at PAGEID # 12625.)

Initially, a claim of trial court error for overruling a defense objection to the qualifications of an expert witness seems to be a claim appearing on the face of the trial record that should have been raised on direct appeal. The propriety of a trial court's evidentiary ruling is best judged in view of the evidence before the trial court at the time the decision was made, not by supplementing the objection after the fact with argument and evidence not raised during the trial. However, assuming such a claim could ever be supported with evidence outside the trial record, this Court cannot conclude that Petitioner actually raised a claim of trial court error regarding the coroner's qualifications during his post-conviction proceedings. This Court has reviewed the quoted paragraphs from Petitioner's post-conviction petition and notes that those paragraphs are contained as part of the introductory paragraphs setting forth the Statement of Facts. (ECF No. 152-8, at PAGEID # 7141-43, 7171). More specifically, the quoted paragraphs are set forth in Section II(B)(2)(b) of the Statement of Facts and are part of the factual summation supporting Petitioner's separate claim of inconsistent theories of prosecution. The paragraphs Petitioner cites are not part of any claims of trial court error, and certainly are not contained within a freestanding claim challenging the trial court's handling of objections to the coroner's qualifications.

It is well settled that for a claim to be properly presented, both the factual and legal basis of the claim must be presented to the state court. *See Nian v. Warden*, *N. Cent. Corr. Inst.*, 994 F.3d 746, 751 (6th Cir. 2021) ("Fair presentation requires that the state courts be given the opportunity to see both the factual and legal basis for each claim.") (*citing*

Wagner v. Smith, 581 F.3d 410, 414-15 (6th Cir. 2009)). Moreover, "the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Williams v. Bagley*, 380 F.3d 932, 969 (6th Cir. 2004). *See also McClain v. Kelly*, 631 F. App'x 422, 439 (6th Cir. 2015) ("To constitute fair presentation, the state courts must have had 'a fair opportunity to apply controlling legal principles to the facts bearing upon the petitioner's constitutional claim,' and it is not sufficient merely 'that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.'") (*quoting Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Here, Petitioner did not fairly present his claim regarding the qualifications of the coroner to the state courts as a claim of trial court error.

In sum, further review of sub-claim 2 of Petitioner's Fourth Ground for Relief and the state court record reveals that the claim, even if not abandoned, is not properly before the Court for a consideration on the merits because it was not fairly presented to the state courts and is procedurally defaulted.

Reasonable jurists would not debate whether the Court's procedural ruling is correct. Therefore, the Court declines to issue a certificate of appealability as to sub-claim 2 of Petitioner's Fourth Ground for Relief.

C. Sixth Ground for Relief: Prosecutorial Misconduct

With respect to his Sixth Ground for Relief, Petitioner argues this Court committed a clear error of law by failing to set forth controlling legal principles applicable to claims of prosecutorial misconduct, and by failing to consider the cumulative effect of his allegations of misconduct. According to Petitioner, "[t]he Court's decision should be altered and

amended to remedy this error and to prevent a manifest injustice for failing to meaningfully and cumulatively consider the prosecutor's misconduct in the context of the entire trial." (ECF No. 162, at PAGEID # 12405.)

The scope of federal habeas corpus review of a claim of prosecutorial misconduct is quite narrow. Prosecutorial misconduct forms the basis for habeas relief only if the conduct was so egregious as to render the entire trial fundamentally unfair, based on the totality of the circumstances. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974). Here, the allegations underlying Petitioner's guilt phase prosecutorial misconduct claim directly correspond to the *Brady* claim set forth in his Second Ground for Relief, and the inconsistent theories of prosecution claim set forth in his Third Ground for Relief. The Court considered and rejected those underlying claims, and subsequently determined that because Petitioner failed to establish any underlying constitutional error, his prosecutorial misconduct claim also lacked merit. Petitioner received a fair trial. Each instance of alleged misconduct was either meritless or harmless, and the allegations standing alone or considered together fail to satisfy the stringent requirements for a successful prosecutorial misconduct claim on habeas review. Petitioner has failed to demonstrate that prosecutorial misconduct was "so pronounced and persistent that it permeated[d] the entire atmosphere of the trial." *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Further, the Court finds Petitioner's argument that the Court failed to set forth prevailing legal principles to be disingenuous. The Court considered Petitioner's allegations of guilt phase and penalty phase misconduct within the same section of the Opinion and Order, and cited *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002), and

Lamar v. Houk, 798 F.3d 405 (6th Cir. 2015). (ECF No. 159, at PAGEID # 12349.)

Finally, Petitioner attempts to offer cause to excuse the default of several claims of penalty phase prosecutorial misconduct. In the context of Rule 59(e), "Courts will not entertain arguments that could have been but were not raised before the just-issued decision." *Banister v. Davis*, 140 S.Ct 1698, 1702 (2020). *See also McFarlane v. Warden*, No. 2:18-cv-1377, 2019 WL 3501531, *1 (S.D. Oh. Aug. 1, 2019) ("Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment."). Nevertheless, this Court previously conducted an alternative merits review of the defaulted claims, determining the claims also lacked merit. Petitioner's Rule 59(e) motion as it relates to his Sixth Ground for Relief is denied.

D. Denial of Certificate of Appealability

Finally, Petitioner argues the Court should reconsider the denial of a certificate of appealability as to his Third, Seventh, and Ninth Grounds for Relief, as well as his lethal injection claims. This Court is not persuaded. "[T]he standards for a certificate are no mere technicality," and a district court shall not grant a COA "unless every independent reason to deny the claim is reasonably debatable." *Moody v. United States*, 958 F.3d 485, 493 (6th Cir. 2020). Because the Court is of the opinion that there is no substantial reason to think the denial of relief is incorrect, the Court again concludes Petitioner has not met the standard for granting a COA as to any of his claims.

III. Post-Judgment Motion to File a Fourth Amended Petition

Despite the entry of final judgment in this matter, Petitioner filed a motion for leave to file a Fourth Amended Petition to assert five new claims for relief.

Typically, a motion to amend a habeas corpus petition is, per 28 U.S.C. § 2242, subject to the same standards which apply generally to motions to amend under Fed. R. Civ. P. 15(a). The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc., – the leave sought should, as the rules require, be "freely given."

371 U.S. at 182; *see also Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997) (citing *Foman* standard). A motion to amend filed after final judgment has been entered, however, is not typical.

A post-judgment motion to amend the petition is not considered a second or successive habeas petition "if the district court has not lost jurisdiction of the original habeas petition to the court of appeals, and there is still time to appeal." *Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016). In *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010), the Sixth Circuit set forth the procedure for considering motions to amend filed after the entry of final judgment. The Sixth Circuit concluded that a party "must shoulder a heavier burden" to amend after an adverse judgment, and rather than "meeting only the modest requirements of Rule 15, the claimant must meet the requirements for reopening a case established by Rules 59 or 60." *Id*. The Sixth Court explained:

> Rule 15 requests to amend the complaint are frequently filed and, generally speaking, freely allowed. But when a Rule 15 motion comes after a judgment against the plaintiff, that is a different story. Courts in that setting must consider the competing interest of protecting the finality of judgments and the expeditious termination of litigation. If a permissive amendment policy applied after adverse judgments, plaintiffs could use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decision. That would sidestep the narrow grounds for obtaining post-judgment relief under Rules 59 and 60, make the finality of judgments an interim concept and risk turning Rules 59 and 60 into nullities.

Id. at 615-16. *See also Clark v. United States*, 764 F.3d 653, 661 (6th Cir. 2014) (quoting *Leisure Caviar*). The Sixth Circuit concluded that when faced with a post-judgment motion to amend, the Rule 15 and Rule 59 inquiries must turn on the same factors, and if a petitioner cannot meet the requirements of Rule 59 to reopen the judgment, the petitioner cannot amend the petition. *Id*. Of the "heavier burden" applicable to requests to amend after an adverse judgment, the Sixth Circuit instructed:

> In addition to the *Foman* factors of undue delay, bad faith, dilatory motive, undue prejudice, and the futility of the proposed amendment, post-judgment requests to amend require that the district court 'also take into consideration the competing interest of protecting the finality of judgments and the expeditious termination of litigation. This latter inquiry includes asking whether the claimant has made a 'compelling explanation' for failing to seek leave to amend prior to the entry of judgment.

Pond v. Haas, 674 F. App'x 466, 473 (6th Cir. 2016) (quoting *Leisure Caviar*, 616 F.3d at 617) (internal citations omitted).

Petitioner cites the recent Supreme Court decision in *Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020), for the proposition that the mere *filing* of the Rule 59(e) motion places the case in a pre-judgment posture so the Court should apply the more lenient Rule 15 standards to allow his amendment. (ECF No. 163, at PAGEID #12472.) He argues the Sixth

Circuit case law requiring a more stringent standard for post-judgment motions to amend pre-dates *Banister*, but he concedes "a district court judge recently favorably cited to *Leisure Caviar, LLC* for the proposition that if moving to amend after judgment, the petitioner must meet the higher Rule 59(e) standards." (*Id*. at PAGEID #12474) (citing *Epps v. Lindner*, No. 1:19cv968, 2020 WL 7585605, *3 (S.D. Ohio Dec. 22, 2020)).

Petitioner's argument is unpersuasive. *Banister*, a habeas case, addressed whether a Rule 59(e) motion constituted a second or successive habeas petition subject to the strictures of 28 U.S.C. § 2244(b). 140 S.Ct. at 1702. In finding that the Rule 59(e) motion was not a second or successive petition, *Banister* did not address post-judgment motions to amend a habeas petition, and did nothing to broaden the scope of matters to be considered in a Rule 59(e) motion, noting:

> [A] petitioner may invoke the rule only to request reconsideration of matters properly encompassed in the challenged judgment. *White*, 455 U.S. at 451. And "reconsideration" means just that: Courts will not entertain arguments that could have been but were not raised before the just-issued decision.

Id. at 1702. Because *Banister* did not concern a post-judgment motion to amend, the *Leisure Caviar* standard applying a "heavier burden" is still binding on this Court. *See Johnston v. Dir. Bureau of Prisons*, No. 20-5659 (6th Cir. Dec. 11, 2020) (citing *Leisure Caviar*, after *Banister*, and noting that "a party seeking to amend after the judgment faces a heavier burden and must meet the requirements for reopening a case established by Federal Rule of Civil Procedure 59 or 60") (internal quotations omitted).

A. Claims Pertaining to Fetal Alcohol Syndrome Disorder

Petitioner seeks to add the following two claims regarding his late diagnosis of

FASD:

> Twenty-First Ground for Relief: Ineffective assistance of counsel for failure to investigate and present evidence of Lindsey's FASD.
>
> Twenty-Second Ground for Relief: Allowing the death penalty for people with FASD violates the prohibition against cruel and unusual punishment and the equal protection clause.

(ECF No. 163-1, at PAGEID # 12494.) With respect to his claim of ineffective assistance of trial counsel, Petitioner argues that trial counsel performed deficiently because the diagnostic criteria for FASD was well established in 1997, yet counsel "failed to investigate or obtain an evaluation for FASD, despite the fact that Lindsey's mother abused alcohol during her pregnancies, including her pregnancy with Lindsey." (*Id*. at PAGEID # 12496.) Petitioner also cites certain "facial characteristics" which he argues are "clear markers for FASD." (ECF No. 163-1, at PAGEID # 12497.) According to Petitioner, "[d]ue to ineffective assistance of trial and post-conviction counsel, as well as the trial court's denial of expert funding during post-conviction proceedings, Mr. Lindsey did not previously possess the evidence supporting the new claims he seeks to amend into his petition." (ECF No. 163, at PAGEID # 12475.) To satisfy the prejudice element of his ineffective assistance claim, Petitioner points to newly discovered evidence obtained after an evaluation by Dr. Julian Davies, MD. Dr. Davies prepared a report on September 22, 2020, opining that Petitioner suffers FASD:

> Medical Opinion
>
> It is my opinion to a reasonable degree of medical certainty that Mr. Lindsey has Sentinel Physical Findings / Neurobehavioral Disorder / Alcohol Exposed using the University of Washington 4-Digit Code criteria, which is a Fetal Alcohol Spectrum Disorder. This describes a pattern of physical features and

> brain dysfunction associated with prenatal alcohol exposure. This disorder was likely compounded by severe childhood adversity and early-onset substance abuse.
>
> Mr. Lindsey is also very close to the Centers for Disease Control Definition of Fetal Alcohol Syndrome (FAS): he meets the CDC criteria for facial features, brain impairments, and alcohol exposure, but we lack historical growth measurements that might demonstrate low weight and/or height.

(ECF No. 163-2, at PAGEID # 12529.) In diagnosing Petitioner with a FASD, Dr. Davis notes that Petitioner does not have a CDC diagnosis of Fetal Alcohol Syndrome, but "is close." (*Id*. at PAGEID # 12549.)

Petitioner argues that leave to amend is warranted here as he "diligently filed his claims in state court based on newly discovered evidence." (ECF No. 163, at PAGEID #12488.) Petitioner notes that state court counsel for Petitioner filed a post-conviction petition on July 22, 2020, seeking to raise the new claims. (ECF No. 163, at PAGEID # 12489) (referencing *State v. Lindsey*, Nos. 1997-2015, 1997-2064 (Brown Cty. Ct. Com. Pl.)). Petitioner contends that "[g]iven the Court's December 30, 2020 decision, it is clear counsel should have worked faster, but they have not engaged in dilatory tactics or in bad faith for failing to do so." (*Id*. at PAGEID # 12489.)

The Court finds that Petitioner has not established that he could not have reasonably raised the new claims pertaining to FASD prior to this Court's entry of final judgment. Petitioner argues that in 1997, his trial counsel were constitutionally deficient for failing to identify FASD as an issue in his case. What is missing is why it took over twenty years to explore this claim. "A claim belatedly pursued is not newly discovered," *United States v. Seago*, 930 F.2d 482, 490 (6th Cir. 1991), and here, Petitioner has not

established that this claim could not have been discovered sooner through the exercise of due diligence. Habeas counsel have been "on notice" of the same information Petitioner faults trial counsel for not investigating. The fact that Petitioner's mother drank excessively during her pregnancies was documented as far back as 1997-1998, during Petitioner's trial and post-conviction proceedings. The state court record filed in this case contains the September 17, 1998, Affidavit of Dr. Sharon Pearson, PSY.D. Dr. Pearson's Affidavit referenced the fact that Petitioner's mother "reportedly drank heavily during all of her pregnancies." (ECF No. 152-8, at PAGEID # 7547.) Paragraph 44 states:

> Conclusion: The one consistent factor in Mr. Lindsey's life has been alcohol and substances of abuse, from his grandparents' and his parents' alcoholism*, his mothers' heavy drinking during her pregnancies and the probable resulting birth defects in her children*, to his own, rapid development of addiction problems, to his dichotomous "good guy-bad guy" behavior based on his chemical use, the significant use of alcohol and drugs by his siblings and his wife. All of his significant or primary relationships have been tainted by the effects of alcohol and/or drugs.

(ECF No. 152-8, at PAGEID # 7556.) Although Petitioner's diagnosis of FASD was not known until his recent evaluation by Dr. Davis, the circumstances suggesting this as a potential claim have been knowable since at least the time of Petitioner's trial and post-conviction proceedings. Petitioner offers no compelling basis for adding the claims at this stage of the proceedings, after final judgment has been entered.

B. Claims regarding plea offers

Petitioner seeks leave to add the following three claims regarding the State's purported plea offers:

> Twenty-Third Ground for Relief: Appellate counsel rendered ineffective assistance by failing to communicate a plea offer in violation of the Fifth,

> Sixth, Eighth and Fourteenth Amendments.
>
> Twenty-Fourth Ground for Relief: Lindsey's death sentence violates the Constitution under the Sixth, Eighth, and Fourteenth Amendments because the prosecution pursued the death penalty after independently determining that a life-sentence was appropriate.
>
> Twenty-Fifth Ground for Relief: Lindsey was denied effective assistance of counsel for trial counsel's failure to object to the withdrawal of the plea offers.

(ECF No. 163-1, at PAGEID # 12513-25.) The gist of Petitioner's claims is that the Brown County Prosecutor made certain plea offers and then withdrew those offers before Petitioner was able to accept. According to Petitioner, Thomas Grennan, the Brown County Prosecutor at the time of trial, sought to offer Petitioner a sentence less than death on "multiple occasions." (ECF No. 163, at PAGEID # 12483.) Petitioner argues he "decided to accept" but "by the time this was communicated to Prosecutor Grennan – just a few days later – the deal was off the table." (*Id*.) Petitioner asserts that his appellate and post-conviction counsel also performed unreasonably by failing to communicate an additional plea offer after his trial and sentencing. According to Petitioner, "Prosecutor Grennan made this offer to appellate counsel following Mr. Lindsey's trial but prior to the trial of his co-defendant, Joy Hoop. Mr. Lindsey's counsel in his post-conviction proceedings, which were pending at the time, were also aware of the offer." (*Id*. at PAGEID # 12483-84.)

Citing *Martinez v. Ryan*, 566 U.S. 1 (2012), Petitioner states his new claims regarding the plea offers "were not raised or litigated in his initial habeas petition or subsequent amended petitions because post-conviction counsel remained as lead counsel throughout his habeas proceedings and suffered a conflict of interest regarding their own ineffectiveness." (ECF No. 171, at PAGEID # 12654.) According to Petitioner:

> Mr. Lindsey raises claims based on newly discovered evidence uncovered during the course of a comprehensive investigation once the Federal Public Defender's Office became lead counsel. The new claims also could not have been raised until prior counsel withdrew as lead counsel due to their ongoing conflict of interest in raising their own ineffectiveness. Mr. Lindsey thoroughly investigated the case, consulted with the necessary experts, and then timely filed a post-conviction petition in state court in order to exhaust the claims and evidence.

(*Id*. at PAGEID # 12654.) The Court finds Petitioner's arguments unpersuasive.

First, Petitioner makes conclusory statements that his plea agreement claims could not have been raised previously because post-conviction counsel could not have been expected to raise their own ineffectiveness, but he does not provide details or evidence to support this position. Specifically, Petitioner does not identify the attorneys who represented him in both post-conviction and habeas. It appears that Attorney Laney Hawkins served as lead counsel for Petitioner during his post-conviction proceedings. (ECF No. 163-7, at PAGEID # 12567.) Attorney Hawkins worked as an Assistant Ohio Public Defender from May 1997 until approximately April 2001. (*Id*.) A review of the Court's docket in this matter establishes that Petitioner has been represented by several attorneys in this habeas proceeding. On September 29, 2003, and while this case was in its infancy, Attorneys Siobhan Clovis and Wendi Dotson, both of the Ohio Public Defender's Office, filed a motion to be appointed as counsel for Petitioner. (ECF No. 4.) Assistant State Public Defender Dotson indicated that she had represented Petitioner during a portion of his state court post-conviction proceedings. (*Id*. at PAGEID # 66.) On March 9, 2004, Assistant Ohio Public Defender Pamela Prude-Smithers replaced Attorney Clovis as lead counsel. (ECF No. 24.) On October 5, 2005, Petitioner filed a motion to substitute Melissa J. Callais for

Attorney Wendi Dotson, the attorney who had previously assisted Petitioner during his post-conviction proceedings, because Attorney Dotson was no longer employed by the Office of the Ohio Public Defender. (ECF No. 49.)

On September 30, 2008, Petitioner filed a motion to appoint the Federal Public Defender for the Southern District of Ohio as co-counsel, based on Attorney Callais's new employment as an Assistant Public Defender in the Capital Habeas Unit of the Federal Public Defender's Office. (ECF No. 82.) On October 12, 2012, Attorney Carol Wright, a then Assistant Federal Public Defender for the Southern District of Ohio, took over the role as co-counsel for Petitioner. (ECF No. 99.) Finally, on June 13, 2015, Attorney Wright and the Office of the Federal Public Defender, filed a "Notice of Substitution of Lead Counsel," that Attorney Wright replaced Attorney Prude-Smithers as lead counsel. This substitution concluded the Ohio Public Defender's representation of Petitioner. (ECF No. 126.)

In short, although the Office of the Ohio Public Defender represented Petitioner in both his state court post-conviction proceedings and the instant habeas action, the docket reflects that going back to 2007, the Office of the Federal Public Defender assisted the Ohio Public Defender in representing Petitioner. At minimum, counsel could have filed for leave to amend any time after June 3, 2015, when the Office of the Federal Public Defender assumed sole responsibility for representing Petitioner in these habeas proceedings. After that effective date, Petitioner sought leave to amend his petition three times, yet never sought to add claims challenging the circumstances of the withdrawn plea offers or claims pertaining to FASD. (ECF No. 131, 135, 144.) Petitioner has made no attempt to explain why he did not seek to amend his petition to add these claims in the more than five years since

the Ohio Public Defender's Office concluded their representation.

For the foregoing reasons, the Court **DENIES** Petitioner's motion to file a Fourth Amended Petition, post-judgment. As discussed in the prior section of this Opinion and Order, Petitioner has not met the Rule 59(e) requirements for reopening his case, with the exception of the Court's limited reconsideration of one sub-claim that was deemed abandoned by the Court, and which is ultimately procedurally defaulted. Petitioner has not demonstrated the existence of newly discovered evidence that was not previously available and has not offered a compelling justification for the delay in seeking leave to amend.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Petitioner's motion to alter or amend the judgment, ECF No. 162. The Court **GRANTS** Petitioner's motion as it relates to sub-claim 2 of Petitioner's Fourth Ground for Relief for the limited purpose of determining that sub-claim 2 is procedurally defaulted and not properly before the Court for a consideration on the merits. The Court **DENIES** Petitioner's Motion to Alter or Amend the Judgment as to all other grounds and the denial of a certificate of appealability. Furthermore, the Court **DENIES** Petitioner's motion to file a Fourth Amended Petition, ECF No. 163.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
United States District Judge