No. 23-5109 (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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

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PETITIONER'S REPLY

The Warden's arguments in opposition to Petitioner Carl Lindsey's petition for writ of certiorari lack merit and this Court should reject them. Lindsey's capital case presents substantial questions warranting this Court's review, and his petition should be granted.

I. The Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court when denying Lindsey's request for a certificate of appealability on his *Brady* claim.

Pursuant to Supreme Court Rule 10(c), certiorari is warranted because rather than applying this Court's precedent, the Sixth Circuit improperly applied a heightened materiality standard when denying Lindsey a certificate of appealability (COA) on his claim under *Brady v. Maryland*, 373 U.S. 83 (1963). The Warden attempts to reclassify Lindsey's petition as regarding "the misapplication of a properly stated rule of law," when in fact the opposite is true. (Brief in Opposition ("BIO") at 11 (citing SUP. CT. R. 10).) Rather, the Sixth Circuit's denial of Lindsey's *Brady* claim because the "evidence of Lindsey's guilt was overwhelming," Amended Order, Doc. No. 21-1 at 3, conflicts with this Court's precedents. (*See* Petition for Certiorari ("Pet.") at 12-13 (citing *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).) Intervention is particularly necessary where the Sixth Circuit has already ignored members of this Court's warning to apply appropriate *Brady* standards. *See Chinn v. Shoop*, No. 22-5058, 598 U.S. ___ (2022) (Jackson, J., dissenting from denial of certiorari).

Indeed, as noted in the petition, the issue of whether withheld evidence impeaching the prosecution's key witness was material under *Brady* is currently pending before this Court in *Glossip v. Oklahoma*, U.S. No. 22-6500, *Glossip v. Oklahoma*, U.S. No. 22-7466, and *Johnson v. Alabama*, U.S. No. 22-7337. (Pet. at 16-17.)

The lower courts' failures to properly apply *Brady* in Lindsey's case and these other capital cases, where the prosecution withholds evidence impeaching a key witness, confirms that the issue presented here is a recurring problem on which this Court should grant certiorari. Lindsey requests the Court grant his petition, but in addition, should this Court grant certiorari in *Glossip* or *Johnson*, Lindsey requests that the Court hold Lindsey's petition pending any decision in either of those cases.

The conflict with this Court's precedents seeped into every aspect of the Sixth Circuit's decision. For example, the Sixth Circuit denied relief on the basis that the "veracity" of the witness at issue, Kathy Kerr, "was a question for the trier of fact." COA Order, Doc. No. 18-1 at 5, quoting *State v. Lindsey*, 721 N.E.2d 995, 1001 (Ohio 2000). But that is the whole point. No trier of fact ever analyzed the witness's veracity in light of the suppressed evidence of her grant of immunity. *See Giglio v. United States*, 405 U.S. 150, 154-55 (1972) ("Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."). Accordingly, certiorari is warranted.

A. The Warden's justifications for Sixth Circuit's flawed certificate of appealability analysis are unavailing.

Because the panel analyzed Lindsey's *Brady* claim on the merits, certiorari is warranted because the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," including *Buck v. Davis*, 580 U.S. 100 (2017), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000). While the Sixth Circuit amended its order to include a line about "[j]urists of reason," it adjusted none of its previous merits analysis, in conflict with the cases above. Amended Order, Doc. No. 21-1.

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

The Warden argues that the Sixth Circuit's merits analysis is appropriate for a COA inquiry, which requires "a general assessment of their merits." (BIO at 13 (citing *Miller-El*, 537 U.S. at 336).) In the same paragraph, however, this Court in *Miller-El* held that a COA "inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." 537 U.S. at 336-37 ("When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.") Accordingly, the Warden's assertion that Sixth Circuit's COA analysis and merits analysis "amount to the same thing" only confirms that the appellate

court's decision "conflicts with relevant decisions of this Court." SUP. CT. R. 10(C). (BIO at 13.)

B. A materiality analysis under this Court's precedents mandate relief for Lindsey, particularly for his capital sentence.

The Warden argues that, even under the correct standard, "no reasonable jurist would conclude that the State's promise of testimonial immunity was material under *Brady*" by asserting that "[m]uch of the State's evidence had nothing to do with Kerr's testimony." (BIO at 11.)

First, this is again the wrong analysis—by only referencing what other evidence exists, and not the importance the prosecution placed on Kerr's testimony, there is no real discussion of whether the suppression of evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, citing *Bagley*, 473 U.S. at 678. As the Supreme Court explained in *Kyles*, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." 514 U.S. at 434.

Here, the prosecution candidly admitted in closing argument that Kerr was central to their case, which they described as mostly "circumstantial." Trial Tr. at 810, R. 153-5, PageID 11921. The most critical piece of "direct" evidence came from Kerr: the prosecution emphasized that it was Kerr – and Kerr alone – who "says I saw her [Hoop] hand him [Lindsey] a gun," which Kerr claimed was small and

black. *Id*. at 11926. Kerr was the only witness to claim that "she saw the gun," *id*. at 11928, and the prosecution argued, "There is no evidence that refutes what Kathy says." *Id*. at 11989. As the prosecutor went on to explain at the co-defendant's subsequent trial: "Who knows the most but Kathy Kerr?" Hoop Trial Tr., PC Ex. 33, ROW App., R. 152-9, PageID 7931.

Second, the Warden's argument that much of the State's evidence has nothing to do with Kerr is simply false. The Warden's first item in support is that "[t]he police caught Lindsey covered in Whitey's blood shortly after the crime, with Whitey's wallet and the murder weapon nearby." (BIO at 11.) The Warden neglects to specify that "nearby" in fact means *in Kerr's residence*, while she was present. *Lindsey*, 721 N.E.2d at 1000 (listing items "police seized from the Kerr trailer"). At the very least, the import of any of this evidence, and whether it could be tied to Lindsey or Kerr, depended on the latter's testimony.

In fact, the Warden undercuts her entire argument—that Kerr's testimony was not material—by writing a statement of facts dependent on Kerr's veracity. For example, the Warden asserts in the first paragraph that Lindsey was interested in having the victim killed because "he was romantically involved with Joy Hoop." (BIO at 2.) But Kerr is the only witness to claim that the pair had been "affectionate towards each other." Trial Tr. at 192, R. 153-4, PageID 11297. Even the Warden's first line, that "a group of conspirators met to discuss a murder" (BIO at 2), relied on "the testimony of Kathy Kerr, which was sufficient to set forth a prima facie showing of conspiracy." *Lindsey*, 721 N.E.2d at 1001.

Kerr was the only witness to testify that she saw Joy Hoop give Lindsey a gun. Kerr was the only witness to place Lindsey standing outside the bar by Whitey's body. Kerr was the only witness to testify that Lindsey brought the victim's wallet and money into her home. The notion that such a witness is not material to the case defies credulity.

The Warden fails to even mention that, as noted in the petition, the state trial judge in this case had already concluded that Kerr's inconsistent statements were "material for either guilt or innocence of the defendant in this case and as evidence favorable to the defendant." (Pet. at 15-16 (citing Trial Tr. at 6, R. 153-3, PageID 10442) (referring to Kerr as "significant prosecution fact witness.").)

Third, the Warden's singular focus on evidence of guilt also fails to engage with the material effect of the suppressed evidence on Lindsey's death sentence. The Sixth Circuit similarly failed to recognize sentencing implications. Amended Order, Doc. No. 21-1 at 3.

The Warden's argument that Lindsey and Joy Hoop could both be principal offenders under Ohio law, for example, fails to discuss the mitigation potential if Lindsey did not fire the second, fatal shot. (BIO at 14.) Kerr was the State's only witness linking Lindsey to that shot. Trial Tr. at 31, R. 153-4, PageID 11136. If a juror discounts Kerr's testimony based on her lack of credibility, there is no evidence linking Lindsey to the fatal shot.

Indeed, the State itself produced evidence that Lindsey did not fire the fatal shot, when presenting testimony at Joy Hoop's trial that she killed Whitey Hoop

because Lindsey "didn't finish the job." Hoop Trial Tr., PC Ex. 32, ROW App., R. 152-7, PageID 7914-15.[1]

If the jury had known about the immunity deal, and thus assigned less weight to Kerr's testimony, a single juror could have doubted whether Lindsey was really seen standing next to the victim's body after firing the fatal shot. (Pet. at 15 (noting that, according to jurors, this was already a close case for death).) Accordingly, there is a "reasonable likelihood" the evidence could have "affected the judgment of the jury." *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) (quotation marks omitted).

Finally, the Warden posits that the undisclosed evidence is of little value because "Lindsey's defense at trial focused on Kerr's credibility in various ways." (BIO at 12.) This admission, however, only clarifies that the undisclosed evidence would have been consistent with the stated defense at trial:

> It makes little sense to argue that because [the defendant] tried to impeach [the key witness] and failed, any further impeachment evidence would be useless. It is more likely that [the defendant] may have failed to impeach [the key witness] because the most damning impeachment evidence in fact was withheld by the government.

Robinson v. Mills, 592 F.3d 730, 737 (6th Cir. 2010) (quotation omitted).

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[1] The Warden repeatedly mentions that Hoop and Kerr's hands did not test positive for gunshot residue. (BIO 5, 11, 15 (citing Trial Tr. at 431-32, R. 153-4, PageID 11539–40).) The Warden fails to mention that the forensic chemist who conducted the test then conceded that he couldn't "make a conclusion as to whether" Hoop or Kerr handled or fired a firearm. (*Id.* at PageID 11540.)

The defense's strategy centered on undermining Kerr's credibility. At trial, they argued that the prosecution's entire case was a "house of cards," with "the foundation of that house of cards being the credibility of Kathy Kerr," but "Kathy Kerr is a liar." Trial Tr. at 846, R. 153-5, PageID 11957. (*See* Pet. at 8, 13-14.)

Kerr's suppressed immunity deal, in addition to being important impeachment information, would have also been the linchpin to explain to the jury *why* her testimony changed at trial, for example by testifying for the first time that she saw Joy Hoop hand Lindsey a gun. To get the jury to believe Kerr's new-and-improved story at trial, the prosecution repeatedly claimed that she changed her story simply because she was "scared" of "Carl and Joy." Trial Tr. at 58-59, R. 153-4, PageID 11926, 11927, 11928, 11943; *see also id.* at 218-19, PageID 11323-24; *id.* at 244-45, PageID 11349-50. During redirect, the prosecutor asked Kerr, "And what made you finally tell the truth--" before quickly adding "I'll withdraw that." Trial Tr. at 244, R. 153-4, PageID 11349. Due to the suppression of Kerr's immunity deal, the jury never learned that Kerr received a substantial incentive to testify for the State and to change her story, yet again.

The withheld evidence shows that Kerr changed her story to place the gun in Lindsey's hand *because she was given immunity*, which: (a) gave her an incentive to impress the prosecution, and (b) allowed her to exculpate herself fully from any criminal liability for her actions, precisely because she believed nothing she said at trial – including any lies against Lindsey – could be used against her. Kerr certainly could have faced prison time for her actions, where, as noted above, physical

evidence – the victim's wallet and a gun – was found at her house. *See id.* at 11895, 11934, 11952-53. Because the Sixth Circuit failed to engage in this analysis, this Court should grant certiorari.

II. The Sixth Circuit's misapplication of a higher standard to post-judgment motions to amend conflicts with this Court's decision in *Banister v. Davis* and with other U.S. courts of appeal.

A. This Court should remand for a proper analysis under Rule 15 for the first time, rather than relying on the Warden's flawed analysis.

The Warden attempts to circumvent the Sixth Circuit's use of an improperly heightened standard for a post-judgment motion to amend by asserting that Lindsey's request to amend "was unjustified by any conceivable standard." (BIO at 16.) The Warden then undertakes her own analysis under Fed. R. Civ. P. 15(a) to support this conclusion.

However, no court has conducted any such analysis. Rather, the Sixth Circuit—following the district court—applied a heightened standard to the amendment, requiring Lindsey to offer a "compelling justification for the delay in seeking leave to amend" under Fed. R. Civ. P. 59. Amended Order, Doc. No. 21-1 at 8. Accordingly, no Court has evaluated the amendment under the "modest" requirements under Rule 15. (Pet.App. A-104). If Rule 15 applies, then the case needs to be remanded for the district court to apply the proper standard.

In any event, the Warden's first-time analysis is deeply flawed. For example, the Warden relies heavily on the *Foman* factors, but forgets the proper starting point: whether "the underlying facts or circumstances relied upon by a plaintiff may

be a proper subject of relief" such that Lindsey "ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The Warden fails to grapple with, or even mention, the issues with allowing Lindsey to be sentenced to death in a case where his attorneys failed to investigate and present to the jury clear evidence of brain damage. *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (finding trial counsel ineffective for failing to find, among other things, evidence of Fetal Alcohol Spectrum Disorder in 1988); *Penry v. Lynaugh*, 492 U.S. 302, 307, 319, 328 (1989); *Porter v. McCollum*, 558 U.S. 30, 40 (2009).

In addition, the Warden fails to explain any "undue prejudice" to the State of allowing continuing litigation, where, as here, these issues are still being litigated in state court. (BIO at 18.) *State v. Lindsey*, No. CA2022-08-006, 2023 WL 3807844 (Ohio Ct. App. June 5, 2023) (remanding the same issues to the state trial court for further analysis). Instead, the Warden advances for the first time an argument that Lindsey most prove "factual innocence" before a court can grant habeas relief. (BIO at 19.) As the Warden never mentioned such an argument in the Sixth Circuit or district court, this Court cannot consider it now.[2] *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived.");

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[2] In any event, such a limitation on habeas relief "contravenes centuries of habeas practice, is inconsistent with any textualist approach to statutory interpretation, and mistakes orphaned policy interests for law." En Banc Brief for Amicus Curiae Federal Habeas Scholars in Support of Neither Party, p. 2, *Crawford v. Cain*, 5th Cir. No. 20-61019 (Aug. 9, 2023.) The only case the Warden cites in support is *Brown v. Davenport*, 596 U.S. ___ (2022). (BIO at 19.) Even that case involved a constitutional claim that did not turn on innocence, yet this Court never suggested that relief should be denied on that basis. *Davenport*, 596 U.S. ___ (slip op. at 3-4).

see United States v. Jones, 565 U.S. 400, 413 (2012) (holding argument is "forfeited" where "[t]he Government did not raise it below and the D.C. Circuit therefore did not address it"); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999) (where respondent failed to raise an argument below but advanced it "for the first time in his Brief in Opposition to Certiorari in this Court . . . [w]e decline to address the argument at this late stage"); *see also Flowers v. Mississippi*, 588 U.S. ___ (2019) (slip op. at 10) (Thomas, J., dissenting) (party waived argument not raised below).

Lindsey has acted in good faith; the new evidence is compelling; and he has not acted for purposes of delay. The Warden does not allege that Lindsey has acted in bad faith or with dilatory motive, and presents no argument of prejudice other than a generalized interest in finality. (*See* BIO at 18.) Lindsey timely and promptly filed his claims in state court to exhaust under 28 U.S.C. § 2254(b)(1)(A). While the Warden faults Lindsey for not seeking a stay or to amend his habeas petition after filing in state court (BIO 6, 9, 18), the approximate two-month delay between that filing and this Court's denial of his habeas petition on December 30, 2020 does not constitute undue delay, bad faith, or dilatory motive. Therefore, the district court may conclude that amendment is proper, upon applying the correct legal standard.

This Court should apply *Banister v. Davis*, 590 U.S. ___ (2020), to resolve the circuit conflict, because it matters here, in this capital case. *See, e.g.*, *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008) (recognizing that, in capital cases, any doubts regarding the propriety of a COA must be resolved in the petitioner's favor). Alternatively, reasonable jurists could debate whether Lindsey also meets

the heavier burden under Rule 59, because the claims he seeks to amend are based on newly discovered evidence not previously available at the time of his trial or when he filed his original petition.

Accordingly, there is still an important federal question that this Court needs to resolve. This Court should grant certiorari to clarify the proper standard for post-judgment motions to amend and to ensure that the lower courts apply that proper standard here.

B. The Warden's attempts to limit this Court's opinion in *Banister* or downplay the circuit split are unavailing.

While Respondent contests Lindsey's interpretation of the language of *Banister*, there is no question that this Court stated that once a party (like Lindsey) files a Rule 59 motion, there is "no longer a final judgment to appeal from." 590 U.S. ___ (slip op. at 3). Thus there is no distinction between a Rule 15 motion filed before judgment and a Rule 15 motion filed post-judgment after a Rule 59 motion. In both cases, the request to amend is made before an actual "final judgment," and thus subject to normal pre-judgment standards.

Banister thus counsels in favor of requiring the application of only Rule 15 (not both Rule 59 and Rule 15) to a post-amendment motion to amend filed after a Rule 59 motion. The district court erred by applying Rule 59 to refuse to allow Lindsey to amend, when it should have applied Rule 15's more modest standards. As a result, the decision conflicts with *Banister*, warranting a grant of certiorari.

In addition, there is a well-entrenched circuit split that this Court needs to resolve. (*See* Pet. at 20-21.) Notably, within the past month, the Fifth Circuit

reaffirmed its alignment on the more amendment-friendly side of the split, concluding that, post-judgment, a plaintiff was entitled to amend her complaint under Rule 15 alone. *Calhoun v. Collier*, ---F.4th ---, 2023 WL 5602359, *4 (5th Cir. Aug. 30, 2023). This recent decision confirms that Lindsey's petition presents a recurring issue that this Court needs to resolve – one that, if resolved in Lindsey's favor, would enable him to amend his petition under Rule 15 (as in *Calhoun*). Indeed, while some circuits may require vacating the judgment prior to amendment, the determination if vacatur is warranted does not necessarily turn on the requirements of Rule 59 or 60. Instead, the court may consider the post-judgment motion to amend under Rule 15. *See, e.g., Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011) (holding that "to determine whether vacatur is warranted . . . the court need only ask whether the amendment should be granted.").

Finally, the Sixth Circuit's decision also conflicts with other federal court decisions because "delay by itself is normally an insufficient reason to deny a motion for leave to amend. Delay must be coupled with some other reason. Typically, that reason…is prejudice to the non-moving party." (Pet. at 23 (citing *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 793 (7th Cir. 2004) (citation omitted) and collecting cases.)

The Warden argues that the Sixth Circuit did not deny leave due to delay alone, but due to "*undue* delay" and prejudice. (BIO at 24-25 (emphasis original to Warden).) Neither is true. First, the Warden repeatedly asserts that there was

undue delay because "Lindsey already had three previous chances to amend his petition." (*Id*. at 24.) The Sixth Circuit noted these previous amendments but did not cite them as a basis for its denial. (Pet.App. A-12.) In any event, the only amendments since 2005 addressed the changing lethal injection protocols in Ohio, not new evidence in Lindsey's case itself. 2nd Am. Habeas Petition, R. 95, PageID 1337-46; 3rd Am. Habeas Petition, R. 123, PageID 1694-772. Second, as the Warden acknowledges, the Sixth Circuit "did not explicitly discuss prejudice[.]" (*Id.* at 25.) If the Sixth Circuit felt that there was any prejudice to the Warden, or bad faith or dilatory motive, it could have said so. It did not. (Pet.App. A-15-16.)

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

CONCLUSION

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

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