

**NO. 19-4024**

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

**IN RE JEFFREY WOGENSTAHL  
MOVANT.**

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**REPLY TO WARDEN’S MEMORANDUM IN OPPOSITION TO  
WOGENSTAHL’S CORRECTED ORIGINAL PETITION AND MOTION  
TO TRANSFER CASE TO FEDERAL DISTRICT COURT AS INITIAL  
HABEAS PETITION**

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Petitioner-Appellant Jeffrey Wogenstahl replies to the Warden’s Memorandum in Opposition to Wogenstahl’s Corrected Second In Time Petition and Motion to Transfer Case to Federal District Court as Initial Habeas Petition. The reasons argued in reply are cited in the attached Memorandum in Support.

Respectfully submitted,

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**Memorandum in Support**

**I. Statement of the Case and Facts.**

Wogenstahl highlights again that the Ohio Supreme Court re-opened his direct appeal from the trial court's original death-penalty judgment. *State v. Wogenstahl*, 2016-Ohio-2807, 145 Ohio St. 3d 1455, 49 N.E.3d 318. Thereby, the Ohio Supreme Court vacated his execution date to address new, first-in-time issues as to whether the trial court ever had original subject-matter jurisdiction to hear his case in the first instance. The Ohio Supreme Court's affirmation of his conviction and sentence was a merits-ruling on the jurisdictional issue in Wogenstahl's re-opened direct appeal. *State v. Wogenstahl*, 2017-Ohio-6873, 150 Ohio St. 3d 571, 581, 84 N.E.3d 1008.

## **II. Wogenstahl's Petition is not a Successive Petition.**

The Warden argues that Wogenstahl “makes no reasoned argument that his third-petition should be authorized as a properly filed successive petition...” (Doc. 11, pg. 3). Although Wogenstahl believes that he can meet the standard in 28 U.S.C. § 2244, the reason Wogenstahl did not belabor an argument on that point is because the facts before this Court are not of a petitioner requesting leave to file a third/successive petition. Because this is an original action that follows from a new state court direct appeal judgment, no authorization is necessary. *See Id.*

The Warden next fails to address the fact that Wogenstahl's Petition arises from a new “‘state-court judgment’ that has not ‘already [been] challenged in a prior § 2254 application,’” and “that [such a]petition is not second or successive” under 28 U.S.C. § 2244(b). *Magwood v. Patterson*, 561 U.S. 320, 342 (2010) (Breyer, J., concurring). Although Wogenstahl was ultimately unsuccessful in his state court litigation, the Ohio Supreme Court granted his motion to re-open his direct appeal in order to consider the first-in-time issue of whether the trial court had subject matter jurisdiction over the homicide offense. In considering the first-in-time issue and affirming the original sentence based upon the jurisdictional question, the Ohio Supreme Court's merits-decision created a new original judgment, from which Wogenstahl did not need authority to bring to the district court in a 28 U.S.C. § 2254 action.

Indeed, the Ohio Supreme Court rendered Wogenstahl's original conviction and sentence from 1996 "nonfinal" in the eyes of the law when it re-opened Wogenstahl's direct appeal. *See Jimenez v. Quarterman*, 555 U.S. 113, fn4 (2009) ("where a state court has in fact reopened direct review, the conviction is rendered nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal."). Then, when the Court re-affirmed the original trial court judgment, the Court thereby created a "new" judgment from which Wogenstahl would ultimately petition the federal district court. Thus, because this was a new direct appeal judgment, *Storey v. Vasbinder*, 657 F.3d 372, 376 (6th Cir. 2011), is persuasive, if not controlling, on this issue. *Storey* specifically allows for an original habeas action to be filed from new, ***direct appeal*** "judgments." *Id.*

Moreover, if the requirement to file a timely "second" habeas petition is that the petitioner must win on the merits of the claim in state court, then there would never be a need to file a second habeas petition, let alone a "timely" one. It is just for situations like Wogenstahl's, where his initial motion to reopen was granted, but he lost on the merits after complete briefing and consideration of the issue, that habeas relief is due to correct the clearly erroneous state court judgment. Therefore, the Warden's argument that petitioners could, *ad infinitum*, repeatedly file habeas petitions after the denial of collateral attack motions, rings hollow. Wogenstahl was not merely "unsuccessful" in his state court litigation to overturn his conviction; the

Ohio Supreme Court ***granted*** his original motion. The Ohio Supreme Court then gave Wogenstahl a merits-ruling on the issue of whether the state trial court had original jurisdiction to hear the case, as compelling evidence exists that it did not. If Wogenstahl's claim had been clearly without merit, the Ohio Supreme Court would not have granted leave to re-open his direct appeal and decide the issue on its merits.

### **III. Wogenstahl's Petition meets the standard in 28 U.S.C. § 2244.**

In the alternative, Wogenstahl can meet the requirements found in 28 U.S.C. § 2244 because the issues raised in the state court all revolved around whether the Ohio courts had subject matter jurisdiction over the homicide offense at issue. As Wogenstahl argued in Section II.B.4. of his Motion to Transfer (Doc. 10, p.15), subject matter jurisdiction cannot be waived or forfeited and may be raised at any time. *See, e.g., United States v. Cotton*, 535 U.S. 625, 630 (2002) (“subject matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.”). Further, there is nothing in 28 U.S.C. § 2244(b) negating the rule that jurisdictional issues can be raised at any time and cannot be waived. If Congress had intended to prevent jurisdictional issues from being raised at a date after the first, original judgment was litigated in federal habeas, it would have expressly stated as such.

In addition, Wogenstahl can prove that “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to

establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” *See* 28 U.S.C. § 2244(b)(2)(B)(ii). If the trial court did not have subject-matter jurisdiction over the homicide offense, Wogenstahl can, in fact, prove definitively that no reasonable factfinder would have found him guilty of the capital murder in this case. Thus, Wogenstahl can meet the standard found in 28 U.S.C. § 2244(b).

#### **IV. Conclusion.**

Wogenstahl’s instant habeas petition is an original action which must be heard by the district court, in the first instance. Thus, this Court should transfer the case back to the district court to address the merits of the petition in the first instance. In the alternative, this Court should allow this petition to proceed in the district court as a successive petition filed pursuant to 28 U.S.C. § 2244(b). This is a capital case; more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). This Court should allow this issue to be heard.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on November 14, 2019, a copy of the foregoing was forwarded to all parties via the courts electronic system.

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