No. 19-4024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: JEFFREY WOGENSTAHL,

Movant.

O R D E R

Before: COLE, Chief Judge, MOORE and GIBBONS, Circuit Judges.

Jeffrey A. Wogenstahl, an Ohio death row inmate represented by counsel, filed a third-in-time habeas corpus petition in the district court, which construed the filing as a successive petition requiring prior authorization from a court of appeals and transferred the action to this court. *See* 28 U.S.C. § 2244(b)(3)(A); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Wogenstahl has filed a corrected application for permission to file a successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. Wogenstahl has also filed a motion to transfer this action back to the district court. Tim Shoop, an Ohio warden proceeding through counsel, has filed a response opposing Wogenstahl's application and motion. Wogenstahl has filed a reply.

A jury convicted Wogenstahl of aggravated murder, kidnapping, and aggravated burglary. The trial court sentenced Wogenstahl to death. Wogenstahl's convictions and sentence were affirmed on direct appeal. *State v. Wogenstahl*, No. C-930222, 1994 WL 686898 (Ohio Ct. App. Nov. 30, 1994), *aff'd*, 662 N.E.2d 311 (Ohio 1996).

During the direct appeal, Wogenstahl filed a pro se application to reopen his appeal. The application was dismissed for a lack of jurisdiction. *State v. Wogenstahl*, 662 N.E.2d 16 (Ohio 1996).

In September 1996, Wogenstahl filed a petition for post-conviction relief, which the trial court denied. The Ohio Court of Appeals affirmed the decision. *State v. Wogenstahl*, No. C-970238, 1998 WL 306561 (Ohio Ct. App. June 12, 1998) (unpublished). The Ohio Supreme Court declined review. *State v. Wogenstahl*, 700 N.E.2d 332 (Ohio 1998) (table).

In January 1998, Wogenstahl sought leave for permission to file a motion for a new trial. The trial court denied the motion. The Ohio Court of Appeals affirmed the decision. *State v. Wogenstahl*, No. C-980175, 1999 WL 79052 (Ohio Ct. App. Feb. 19, 1999) (unpublished). The Ohio Supreme Court declined review. *State v. Wogenstahl*, 710 N.E.2d 716 (Ohio 1999) (table).

In March 1998, Wogenstahl, acting pro se, unsuccessfully filed a delayed application to reopen his direct appeal. *State v. Wogenstahl*, 700 N.E.2d 1254 (Ohio 1998) (per curiam).

In September 2003, Wogenstahl filed another motion for a new trial. The trial court denied the motion. The Ohio Court of Appeals affirmed the decision. *State v. Wogenstahl*, 970 N.E.2d 447 (Ohio Ct. App. 2004). The Ohio Supreme Court declined review. *State v. Wogenstahl*, 824 N.E.2d 93 (Ohio 2005) (table).

In January 2014, Wogenstahl again sought leave to file a new trial motion. The trial court denied the request. The Ohio Court of Appeals affirmed the decision. *State v. Wogenstahl*, No. C-140683, 2015 WL 9392744 (Ohio Ct. App. Dec. 23, 2015). The Ohio Supreme Court declined review. *State v. Wogenstahl*, 71 N.E.3d 301 (Ohio 2017) (table).

In October 2015, Wogenstahl filed an application to reopen his direct appeal, challenging the trial court's jurisdiction to adjudicate the aggravated murder charge. The Ohio Supreme Court permitted the appeal and held that the trial court had jurisdiction under Ohio Revised Code § 2901.11(D). *State v. Wogenstahl*, 84 N.E.3d 1008 (Ohio 2017).

Wogenstahl filed his initial habeas petition in October 1999. The district court permitted discovery. Wogenstahl filed an amended petition in June 2003. The district court held the case in

abeyance, which permitted Wogenstahl to exhaust state court remedies. After the case was reopened, the district court conducted an evidentiary hearing and denied the petition. We affirmed the decision. *Wogenstahl v. Mitchell*, 668 F.3d 307 (6th Cir. 2012).

On May 3, 2017, Wogenstahl filed a motion to proceed in forma pauperis accompanied by several attached documents, including a second-in-time habeas petition. The magistrate judge construed the motion as a successive petition and issued an order transferring the action to this court; the order was stayed until the time to appeal to the district court had elapsed. On May 8, 2017, Wogenstahl filed his second-in-time habeas petition. On March 27, 2018, the district court transferred the petition to this court. On April 16, 2018, Wogenstahl filed a corrected application for permission to file a second or successive petition. He also filed a motion to transfer the case back to the district court. The warden opposed both the application and the motion. We denied the transfer motion and granted Wogenstahl permission to file his second-in-time petition. *In re Wogenstahl*, 902 F.3d 621 (6th Cir. 2018). Litigation related to that petition remains pending before both the district court and the state post-conviction court. *See Wogenstahl v. Warden*, 17-cv-298 (S.D. Ohio); *State v. Wogenstahl*, No. B-9206287 (Hamilton Cty. Court of Common Pleas).

On May 28, 2019, Wogenstahl filed a motion to proceed in forma pauperis, to which he attached a successive habeas petition. The magistrate judge issued a show-cause order requiring Wogenstahl to explain why the petition should not be construed as a successive petition and transferred to this court. Wogenstahl filed his petition. In response to the show-cause order, Wogenstahl explained that the Ohio Supreme Court's decision denying his challenge to the trial court's judgment constituted a new judgment. The warden submitted that Wogenstahl's numerically third petition attacked the same state-court judgment as the first petition. The magistrate judge issued the transfer order but delayed its effectiveness until the time to file an appeal to the district court had expired. Wogenstahl filed objections. The warden filed a response in opposition. The magistrate judge issued a supplemental report recommending that the order be allowed to take effect. Wogenstahl filed objections. The warden filed a response in opposition. The district court overruled the objections and transferred the case.

On November 4, 2019, Wogenstahl filed a corrected motion for leave to file a second or successive petition. Wogenstahl also filed a motion to transfer this case to the district court. The warden filed a response opposing the application and the motion. Wogenstahl filed a reply.

This case does not raise any issues concerning the propriety of retroactively applying the gate-keeping provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to any pre-AEDPA conduct, as Wogenstahl's initial petition was filed after AEDPA's effective date of April 24, 1996. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994); *In re Sonshine*, 132 F.3d 1133, 1135 (6th Cir. 1997).

An application for permission from this court to file a second or successive habeas petition must not involve a claim that has been raised in a prior petition. 28 U.S.C. § 2244(b)(1). A new claim will nevertheless be dismissed unless:

> (A) the application shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
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> (ii) 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.

28 U.S.C. § 2244(b)(2). The applicant must make a prima facie showing that the application satisfies the statutory requirements. 28 U.S.C. § 2244(b)(3)(C); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010). "[A] prima facie showing means sufficient allegations of fact combined with some documentation that would warrant fuller exploration in the district court." *In re Campbell*, 874 F.3d 454, 459 (6th Cir. 2017) (per curiam) (citing *Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009)).

"[N]ot all second-in-time petitions are 'second or successive.'" *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). "[A] numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose

predicates arose after the filing of the original petition." *Jones*, 652 F.3d at 605. To determine whether a petition is second or successive, the abuse of the writ standard is applied. *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) (collecting cases). "Under the abuse of the writ doctrine, a numerically second petition is 'second' when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect." *Id*. (citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). Additionally, "the phrase 'second or successive' 'must be interpreted with respect to the judgment challenged.'" *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017) (quoting *Magwood v. Patterson*, 561 U.S. 320, 332-33 (2010)). That is, a petition is not "second or successive" if it is the initial challenge to a specific state court judgment, *id*. (citing *In re Stansell*, 828 F.3d 412, 415 (6th Cir. 2016)), or asserts a ground for relief that was not ripe at the time the initial petition was filed. *Id*. (citing *Panetti*, 551 U.S. at 945-47).

Wogenstahl's third-in-time petition attacks the same judgment as his initial petition did. He therefore needs prior authorization before filing it in district court. *Burton v. Stewart*, 549 U.S. 147, 152-53 (2007). Wogenstahl asserts, however, that this numerically third petition is not successive because he seeks review of a new judgment, that is, the Ohio Supreme Court opinion that denied his challenge to the trial court's jurisdiction to adjudicate the aggravated murder charge. While petitions based on "new judgments" are not successive petitions, *Magwood*, 561 U.S. at 332-33, the Ohio Supreme Court opinion Wogenstahl claims is a new judgment is substantively different from the "new judgments" that entitle an inmate to a new habeas petition.

Generally, a habeas petition based on a state appellate court decision where the petitioner's case was reopened for direct review does not constitute a successive petition. *Storey v. Vasbinder*, 657 F.3d 372, 378 (6th Cir. 2011). That is because the state appellate court decision resulting from a reopened direct review is a "new judgment." *Id.*; *see also Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009) (holding that a previously final Texas judgment became nonfinal when the Texas Court of Appeals reopened the inmate's direct appeal). The cases espousing these rules involved plenary direct appellate review; that is, a new direct appeal where the defendant was permitted to raise any

perceived error in the trial court proceedings, just as he was in the first direct review. *Jimenez*, 555 U.S. at 116 (noting that Jimenez was afforded "an out-of-time appeal . . . so that he [could], with the aid of counsel, obtain a meaningful appeal" (quoting *Ex Parte Jimenez*, No. 74,433 (Tex. Crim. App. Sept. 25, 2002) (per curiam)); *Storey*, 657 F.3d at 376 (noting that the Michigan Court of Appeals considered and rejected all ten of Storey's claims).

Direct review was reopened in those cases because the first direct review was deficient. Storey's direct review was marred by ineffective counsel. 657 F.3d at 377. Jimenez's direct appeal was dismissed after his attorney filed an *Anders* brief and notification of Jimenez's right to file a pro se appellate brief was sent to the wrong prison. 555 U.S. at 115-16. Consideration of habeas petitions arising from reopened direct appeals was necessary, we explained, because "a petitioner should be given the same clean slate with respect to habeas review as a defendant whose counsel did not 'bungle[]' his first direct appeal." *Storey*. 657 F.3d at 377 (alteration in original).

That is not the situation here. Although it is true that the Ohio Supreme Court granted Wogenstahl's motion to "reopen [his] direct appeal," *State v. Wogenstahl*, 49 N.E.3d 318 (Ohio 2016) (table), it did so only to consider a single, narrow issue: "[d]id the [Ohio] trial court have jurisdiction over Wogenstahl's aggravated-murder charge?" *State v. Wogenstahl*, 84 N.E.3d 1008, 1009 (Ohio 2017). Unlike in *Storey* or *Jimenez*, Wogenstahl's first direct appeal suffered no deficiencies and his reopened direct appeal was not intended to provide a full, plenary appeal of his conviction. Instead, the Ohio Supreme Court explained that it granted Wogenstahl's motion only "[b]ecause a challenge to subject-matter jurisdiction . . . may be raised at any time." *Id.* at 1012. Wogenstahl received a clean slate from which to seek habeas review of his conviction. Indeed, he has already sought habeas review of that conviction twice. This petition is successive.

Rather than attempt to satisfy the statutory requirements to obtain permission to file a successive petition, Wogenstahl argues that his challenge to the trial court's subject-matter jurisdiction can be raised at any time and cannot be waived or forfeited. That argument is an insufficient basis to grant relief under 28 U.S.C. § 2244(b).

Wogenstahl's application for permission to file a successive habeas corpus petition is **DENIED**. Wogenstahl's motion to transfer is also **DENIED**.[1]

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[1] That said, we acknowledge that Wogenstahl has raised certain claims related to subject-matter jurisdiction in state post-conviction court, where Wogenstahl is now proceeding in light of the successive petition we authorized last year. *See* App. R. 9 at 9 n.2 (noting "claims Fifty-Two through Fifty-Five" of Wogenstahl's "[p]ending . . . second Post-conviction petition before the Honorable Judge Dinkelacker of the Hamilton County Court of Common Pleas"); *see also* 17-cv-298, R.36-2 (Second State Post-Conviction Petition) (Page ID #1675–86). Today's ruling should in no way be taken as opining on the merits of those still-pending claims.