IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	
Appellee,	Case No. 1995-0042
v.	
JEFFREY WOGENSTAHL,	
Appellant.	**This Is A Capital Case.**

Appellant Jeffrey Wogenstahl's Motion for Rehearing and/or Reconsideration

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Joseph Deters (0012084)
Hamilton County Prosecutor

Philip Cummings (0041797)
Assistant Hamilton County Prosecutor
Counsel of Record

Sean M. Donovan (0086528)
Assistant Hamilton County Prosecutor

Hamilton County Prosecutors Office
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
(513) 946-3100 (Fax)

COUNSEL FOR APPELLEE, STATE OF OHIO

Office of the Ohio Public Defender

Kimberly S. Rigby (0078245)
Supervising Atty., Death Penalty Dept.
Kimberly.Rigby@opd.ohio.gov
Counsel of Record

Richard A. Cline (0001854)
Senior Assistant Public Defender
Death Penalty Department
Richard.Cline@opd.ohio.gov

Jessica Houston (0096485)
Assistant Public Defender, Death Penalty Dept.
Jessica.Houston@opd.ohio.gov

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)

COUNSEL FOR APPELLANT, JEFFREY WOGENSTAHL

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Appellant Jeffrey Wogenstahl requests that this Court rehear his death penalty appeal and/or reconsider its merits ruling of July 25, 2017, affirming both his convictions and death sentence. This request is made pursuant to Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully Submitted,

Office of the Ohio Public Defender

By: /s/ Kimberly S. Rigby
Kimberly S. Rigby (0078245)
Supervising Attorney, Death Penalty Department
Counsel of Record
Kimberly.Rigby@opd.ohio.gov

By: /s/ Richard Cline
Richard A. Cline (0001854)
Senior Assistant Public Defender
Death Penalty Department
Richard.Cline@opd.ohio.gov

By: /s/ Jessica Houston
Jessica Houston (0096485)
Assistant Public Defender, Death Penalty Department
Jessica.Houston@opd.ohio.gov

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)

Counsel for Appellant, Jeffrey Wogenstahl

MEMORANDUM IN SUPPORT

I. Introduction.

This Court should reconsider and/or rehear Jeffrey Wogenstahl's death penalty appeal. After reopening his Direct Appeal, a majority of this Court again upheld Wogenstahl's conviction and sentence. However, Chief Justice O'Connor, joined by Justice O'Neil, dissented and agreed with Wogenstahl that Ohio lacked jurisdiction to try him for aggravated-murder and that his conviction and sentence are void.

II. The State Bears the Burden to Prove Beyond a Reasonable Doubt that Ohio had Jurisdiction to Try this Aggravated-Murder Case and this Court Erred in Improperly Shifting the Burden to Wogenstahl to Prove that the Murder Occurred in Indiana.

This Court improperly shifted the burden of proof to Wogenstahl when it penalized him for "not show[ing] that Ohio does not have jurisdiction" and for failing to "establish that the murder occurred in Indiana." *State v. Wogenstahl*, Slip Opinion No. 2017-Ohio-6873 at ¶¶ 43, 46. The State, and the State alone, bears the burden to prove that Ohio had jurisdiction to try Wogenstahl for aggravated-murder. *State v. Wooldridge*, 2nd Dist. No. 18086, 2000 Ohio App. LEXIS 4639 (Oct. 6, 2000); *State v. Mitchell*, 8th Dist. No. 51609, 1987 Ohio App. LEXIS 7079, *8 (March 5, 1987). The majority of this Court erred when it failed to find and/or rule that Wogenstahl does not have the burden to prove that the murder occurred in Indiana. The majority additionally erred in its conclusion that it could reasonably be determined that the murder ***could*** have occurred in Ohio.

A. The State bears the burden of proof.

In Ohio, according to the statute that controlled at the time of the murder in this case, jurisdiction to prosecute an aggravated-murder charge was established if it was proven beyond a reasonable doubt ***by the State*** that "either the act that causes death, or the physical contact that caused death, or the death itself" occurred in Ohio. R.C. 2901.11(B). Or, in the alternative, the State had to prove, again beyond a reasonable doubt, that "the evidence is insufficient to say with confidence in which state the murder occurred." *Id*. at ¶ 29.

In either scenario, it is the State that carries this burden—not Wogenstahl. In shifting the burden to Wogenstahl to prove that the murder occurred in Indiana, this Court betrayed the fundamental principal of our criminal justice system that the State must prove beyond a reasonable doubt the elements of the offense. A criminal defendant never bears such a burden. The United States Supreme Court is clear that "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *See Patterson v. New York*, 432 U.S. 197, 215 (1977).

As Justice French noted in her concurrence, the question of whether or not jurisdiction is an element of the offense has not been directly addressed by this Court.[1] *Wogenstahl*, 2017-Ohio-6873, at ¶ 51 (French, J., concurring). Obviously, if this Court finds that jurisdiction is an element of the offense (and Wogenstahl would assert that it is), then it is clear that the State has the burden of proof.

[1] As this was not an issue properly before the Court here, and as Wogenstahl has not yet had an opportunity to fully brief the merits of that question, he will not attempt to do so herein. However, he does not waive his right to bring this issue before this Court at another date.

Even without an explicit finding by this Court that jurisdiction is an element of the offense, shifting the burden of proof to the defendant makes little policy sense. This Court has, specifically, "held that venue is an element of the crime that the state must prove beyond a reasonable doubt." *Id.*; *citing State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 1-2, 22. Logic would require that jurisdiction is, too. For instance, forcing the defendant to prove that jurisdiction does or does not lie in a certain state would negate, at times, the State's burden to prove venue. Adopting any other standard for jurisdiction (a prerequisite to venue and, in fact, a prerequisite to indictment of the charges in the case against the defendant) makes no sense.

Moreover, Ohio's intermediate courts of appeals have, in fact, found that in order for the trial court to exercise jurisdiction, the ***State*** has to prove beyond a reasonable doubt that jurisdiction, indeed, lies in Ohio. *See e.g. State v. Neguse*, 71 Ohio App.3d 596, 602, 594 N.E.2d 1116 (10th Dist. 1991). In *Neguse*, the Tenth District Court of Appeals explained:

> The general rule is that if a defendant properly asserts the defense of lack of jurisdiction, the plaintiff has the burden of establishing the court's jurisdiction. **In criminal cases in common pleas court, the court's jurisdiction must be proved beyond a reasonable doubt as an element of the offense** because the validity of any judgment depends upon the court having obtained jurisdiction. This statement is consistent with Crim.R. 12(B)(2), which deems an indictment which fails to establish the jurisdiction of the court void on its face and open to challenge at any time.

Id. at ¶ 29.

Finally, shifting the burden to a criminal defendant to prove or dis-prove jurisdiction is a blatant violation of his constitutional right to due process. Wogenstahl had protected life, liberty, and property interests in not being tried in the State of Ohio without the State first proving beyond a reasonable doubt that the act that caused the victim's death, the physical contact that caused her death, or the death itself occurred in Ohio. These interests are protected as rights under the substantive and procedural elements of the Due Process Clause of the Fourteenth Amendment.

Wogenstahl need "not show that Ohio does not have jurisdiction" by proving, under *any* burden of proof, "that the murder occurred in Indiana." *Id*. To the contrary, the *State* must prove beyond a reasonable doubt, as an element of the offense, that either the injuries causing the death or the death itself occurred in Ohio. Or, in the alternative, the State had to prove, again beyond a reasonable doubt, that "the evidence is insufficient to say with confidence in which state the murder occurred." *See State v. Neguse*, 71 Ohio App.3d at 602.

B. The State failed to meet the burden of proof here.

The ***State*** has not, and cannot, establish that the death itself, or any act that caused the death, or the physical contact that caused the death occurred in Ohio. The State also cannot prove beyond a reasonable doubt that "the evidence is insufficient to say with confidence in which state the murder occurred." As this Court acknowledged, the State failed to prove beyond a reasonable doubt, or pursuant to any standard for that matter, that the murder, or the act causing the murder, occurred in Wogenstahl's apartment. In response to the State's argument that the murder could have happened in Wogenstahl's apartment, the majority held that "[e]ven when viewing the evidence in light most favorable to the prosecution, a rational trier of fact could not have concluded that Amber was killed in Wogenstahl's apartment." *Wogenstahl*, 2017-Ohio-6873 at ¶ 41.

The State also failed to prove beyond a reasonable that either the murder, or the act causing the murder, occurred *anywhere else* in Ohio. Neither did the State prove beyond a reasonable doubt, that "the evidence is insufficient to say with confidence in which state the murder occurred." *Id*. at ¶ 29. The facts are clearly not "insufficient to say with confidence" where the murder occurred. The State presented and argued at trial facts that can only establish one scenario—Amber was alive when she was taken from her house in Ohio, and she was murdered in Indiana, in a place

within close proximity to where her body was later discovered. *See* Section III, *infra*. The majority's far-reaching speculation as to how this murder could have happened in Ohio must fail.

The State had a burden, and they did not meet it. Because the State failed to meet its burden, the trial court lacked subject matter jurisdiction, and "[w]ithout jurisdiction the [trial] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, **the only function remaining to the court is that of announcing the fact and dismissing the cause**." *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), quoting *Ex parte McCardle*, 74 U.S. 506 (1869) (emphasis added).

Therefore, the State has failed to meet its burden of proof, and Wogenstahl's conviction and sentence must be overturned.

III. The Timeline Established by the Evidence Proven at Trial Makes it Impossible to Conclude that the Act that Caused the Death, the Physical Contact that Caused the Death, or the Death Itself Occurred ***Anywhere*** in Ohio.

As stated above, the ***State*** has not, and cannot, establish that the death itself, or any act that caused the death, or the physical contact that caused the death occurred in Ohio.

In circumstances where the evidence is insufficient to establish with confidence where the murder occurred, according to R.C. 2901.11(D), it may be presumed that the offense occurred in Ohio. The evidence in this case, however, is more than reasonably sufficient to conclude that the relevant acts occurred in Indiana and that ***none*** of the relevant acts necessary to establish jurisdiction occurred in Ohio. This Court erred in its conclusion that it could reasonably be determined that the murder ***could*** have occurred in Ohio. There is no evidence to support this conclusion. The only evidence that exists, in fact, proves the opposite—that the murder ***did*** occur

in Indiana.[2] "Based on the record, it is not reasonably ambiguous where the fatal injuries or death occurred. The evidence points to Indiana", and therefore, "the statutory presumption in R.C. 2901.11(D) permitting Ohio to exercise jurisdiction over Wogenstahl's aggravated-murder charge does not apply" and his conviction and sentence must be vacated. *Wogenstahl*, 2017-Ohio-6873, at ¶¶ 55, 71 (O'Connor, C.J., dissenting).

The timeline established at trial by the State's own evidence not only makes it impossible for "a rational trier of fact [to conclude] that Amber was killed in Wogenstahl's apartment," it also "makes it impossible for a rational trier of fact to conclude that she was killed *anywhere* in Ohio." *Id*. at ¶ 41; *also* O'Connor, C.J., dissenting *Id.* at ¶ 56. Further, the State has put forth no credible evidence to show that either the act that caused the death or the physical contact that caused the death occurred in Ohio. The timeline and the forensic evidence, or lack thereof, in Wogenstahl's apartment and car speak to the contrary.

In addressing the evidence offered by the State to support its theory that the murder occurred in Wogenstahl's apartment, this Court expressly found that "the evidence does not support the state's theory that Amber was murdered in Wogenstahl's apartment." *Id*. at ¶¶ 30-1. After reviewing all of this evidence, the majority then correctly concluded that "[e]ven viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could not have concluded that Amber was killed in Wogenstahl's apartment." *Id*. at ¶ 41.

Thus, the majority utterly disregarded the State's asserted theory in its brief, and in turn, the sole evidence it submitted in an attempt to prove beyond a reasonable doubt that Wogenstahl committed the homicide Ohio. At that point, this Court should have stopped its inquiry because

[2] Although Wogenstahl stands by his argument that he does not bear the burden of proof, he also believes that the facts demonstrate that the murder, in fact, did occur in Indiana.

there has not been, and cannot be based on the facts at issue, a finding by this Court that the State proved beyond a reasonable doubt that either the act that caused the death or the physical contact that caused the death occurred in Ohio. But it did not.

Instead, the majority of this Court continued its analysis with respect to the evidence that Wogenstahl offered to support his position that Ohio lacked subject matter jurisdiction. In doing so, the majority of this Court repeatedly engaged in improper speculation and relied upon facts not contained in the record to find that Wogenstahl "has not shown that Ohio does not have jurisdiction" because "[t]he evidence does not establish that the murder occurred in Indiana." *Id.* at ¶¶ 43, 46. As noted *supra*, Wogenstahl need not prove that the murder occurred in Indiana. The State, and the State alone, bears the burden of proof. The State has failed to carry that burden.

As Justice O'Connor addressed in her dissent, the majority of this Court engaged in improper speculation and relied upon non-record "evidence" in reaching its conclusion that there is proof beyond a reasonable doubt that the murder *could have* occurred in Ohio. The majority erred in speculating that Amber could have suffered the fatal injuries earlier than 3:15 a.m., the time when Amber was seen alive and moving in the front seat of Wogenstahl's car ***in Indiana***.

> If Wogenstahl inflicted the fatal injuries in Ohio earlier than 3:15 a.m., then he took only *five minutes* to drive from where he dropped Eric off near Beard's apartment (which he did at 3:10 a.m.) to the Garretts' home, break in, abduct Amber, inflict the fatal injuries, then drive with Amber to the Indiana side of State Street (where he was seen driving past with Amber at 3:15 a.m.).
>
> But there is no *evidence* that his hypothetical scenario occurred. …

Id. at ¶¶ 66-7 (O'Connor, C.J., dissenting). In discounting Wogenstahl's argument, the majority addressed two points. First, the majority stated that "although the Indiana side of State Street itself does not enter Ohio, there are side streets that intersect State Street that do lead into Ohio, and Wogenstahl ***could have*** turned down one of them before returning to Indiana." *Id*. ¶ at 43 (emphasis added). Yet, this Court offers no ***record evidence*** to support that Wogenstahl ***did*** turn

down one of these side streets. There was no testimony at trial to support this hypothetical. Nor has there ever been any legitimate ***evidence*** offered by the State since the conclusion of Wogenstahl's trial to support this theory. That's because it is just a guess and nothing more. A guess that was not presented by the State until after this Court reopened Wogenstahl's direct appeal. By engaging in improper speculation, a majority of this Court found that Amber ***could have*** been either fatally injured or died in Ohio even though the "prosecution's timeline makes it a virtual impossibility that Wogenstahl had time for a side trip by turning East...". *Id*. at ¶ 69. The majority's decision was unreasonable, in light of the ***facts***.

The majority goes on to say that "more importantly, R.C. 2901.11(B) would allow Ohio to assert jurisdiction if the victim's death occurred in Ohio *or* if the fatal act occurred in Ohio, even if death ultimately occurred in another jurisdiction." *Id*. at ¶ 43. In support, the majority again speculates about hypothetical possibilities that ***could*** have occurred. "The UDF employee's testimony may establish that Amber was alive at 3:15, but it does not show that she was unharmed. The fatal injuries ***may have been*** inflicted earlier." *Id*. (original emphasis removed) (emphasis added). The evidence simply does not support this:

> But there is no *evidence* that this hypothetical scenario occurred. Investigators found no blood in Amber's home, and the blood found in Wogenstahl's apartment did not indicate Amber as the source. The UDF employee did not testify that the girl in the car was bloody or appeared to be in distress. And the only blood evidence found in the car–a spot measuring 1/25 the size of a dime on the rear, driver-side interior door handle–was inconclusive and may have been as much as ten years old.

Id. at ¶ 67 (Justice O'Connor dissenting) (footnote removed). The prosecution's timeline does not allow for the possibility that Amber could have suffered the fatal blows or that the death itself occurred in Ohio.

There is no record evidence to support *any* of the hypothetical guesses advanced by the Court's majority. All of the evidence established at trial points to Indiana and thus, Ohio never

had jurisdiction to try Wogenstahl for aggravated-murder. Further, off the record evidence that trial counsel could have, and should have, obtained at the time of the trial directly rebuts this speculation. *See* Exhibits 1, 2, and 3, attached to Wogenstahl's Motion to Supplement the Record on Direct Appeal, filed *instanter* with this Motion.

IV. The Court Erroneously Ignored Wogenstahl's Arguments in Propositions of Law Nos. II and III.

Wogenstahl will not repeat his arguments as made in his second and third propositions of law, however he incorporates those arguments by reference as if fully rewritten, herein.

Notwithstanding the finding by the majority of this Court, as to Proposition of Law No. I, that the murder *possibly could have* occurred in Ohio, Proposition of Law No. II (i.e. Wogenstahl's trial counsel's ineffectiveness) is still a live, undecided claim before this Court. Wogenstahl's counsel, indeed, could still be found to be ineffective for failing to raise this claim, and sufficiently support it, at the time of trial. Had Wogenstahl's trial counsel raised this issue before or during trial, they could have presented additional evidence or adduced further testimony that the murder necessarily occurred in Indiana.

Particularly if the majority's decision is allowed to stand—a decision that improperly shifts that burden of proof to Wogenstahl to "establish that the murder occurred in Indiana" (*Wogenstahl*, 2017-Ohio-6873 at ¶ 46)—then Wogenstahl's current counsel should have the opportunity to present off the record evidence to demonstrate why the hypothetical theories advanced by the majority opinion are unsupported by the facts and, in turn, how trial counsel could have rebutted those same claims. *See* Exhibits to Motion to Supplement the Record, filed *instanter* with this Motion: Exhibit 1 (affidavit of Carl J. Schmidt, M.D, M.P.H. (finding that "to a reasonable degree of medical certainty . . . the victim in this case was killed outside of the car seen in the pictured. . . . "); Exhibit 2 (affidavit of Gary A. Rini, M.F.S. (the State's contention that the victim was

murdered elsewhere, or in Wogenstahl's car, which was then used to transport the victim to the scene, is not supported by the physical evidence in the car, at the scene or on the victim.") and Exhibit 3 (two affidavits of Bruce Wheeler that would challenge his credibility by admitting that he received consideration for his testimony in Wogenstahl's case)).[3] Additional briefing is requested at this time on Proposition of Law No. II.

V. Conclusion.

The State has put forth *zero* credible evidence to support any theory that the murder or the fatal blow occurred in Ohio. Just as this Court did in *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, Wogenstahl's conviction and sentence should be vacated due to the State's failure to prove beyond a reasonable doubt that Ohio had jurisdiction to try him for aggravated-murder. In *Yarbrough*, this Court found that there was no dispute as to where the physical act that led to the victims' death, as well as where the death itself, occurred. *Yarbrough*, 104 Ohio St.3d 1. The "jurisdictional error in this case bears a remarkable resemblance to the one [] unanimously corrected in" *Yarbrough*. *Wogenstahl*, 2017-Ohio-6873, at ¶55 (O'Connor, C.J., dissenting). As Chief Justice O'Connor accurately notes in her dissent, "Wogenstahl's remaining conviction for kidnapping and aggravated burglary, crimes that the state did demonstrate occurred in Ohio, would not be disturbed…" and that because "double jeopardy would not bar his retrial in Indiana… Wogenstahl will not be able to escape the jurisdiction of the Indiana courts." *Id*. at ¶¶71-2.

[3] These 3 Exhibits were filed as attachments to Wogenstahl's Motion to Supplement the Record, which was filed *instanter* with the Motion.

Wogenstahl respectfully requests that this Court reconsider its decision to uphold his conviction and sentence and find that Ohio, for the reasons stated above, lacked jurisdiction to try him for aggravated-murder.

Respectfully Submitted,

Office of the Ohio Public Defender

By: /s/ Kimberly S. Rigby
Kimberly S. Rigby (0078245)
Supervising Attorney, Death Penalty Department
Counsel of Record
Kimberly.Rigby@opd.ohio.gov

By: /s/ Richard Cline
Richard A. Cline (0001854)
Senior Assistant Public Defender
Death Penalty Department
Richard.Cline@opd.ohio.gov

By: /s/ Jessica Houston
Jessica Houston (0096485)
Assistant Public Defender, Death Penalty Department
Jessica.Houston@opd.ohio.gov

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)

Counsel for Appellant, Jeffrey Wogenstahl

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, I served a copy of the foregoing **Appellant Jeffrey Wogenstahl's Motion for Rehearing and/or Reconsideration** via ordinary U.S. Mail, postage prepaid, upon counsel for the State of Ohio at his address of record, to wit:

Hamilton County Prosecutors Office
Attn.: Phil Cummings, Asst. Pros.
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

By: /s/ Kimberly S. Rigby
Kimberly S. Rigby (0078245)
Counsel for Appellant