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

JEFFREY A. WOGENSTAHL	**)**	
Petitioner,	**)**	**Case No. 1:17-cv-00298**
vs.	**)**	**JUDGE THOMAS M. ROSE**
CHARLOTTE JENKINS, Warden	**)**	
Respondent.	**)**	**MAGISTRATE MICHAEL R. MERZ**

JEFFREY A. WOGENSTAHL'S
MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 60(b)(6)

Petitioner Jeffrey A. Wogenstahl, pursuant to Fed. R. Civ. P. 60(b)(6), respectfully moves this court to grant him relief from the judgment transferring this case to the Sixth Circuit as a second or successive habeas petition under 28 U.S.C. § 2244. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction.

Jeffrey A. Wogenstahl sits on death row for a crime he did not commit. The Hamilton County Prosecutor's Office withheld a wealth of information from Wogenstahl that would have resulted in his acquittal at trial. The Sixth Circuit Court of Appeals acknowledged this when it found, with this new evidence: "Wogenstahl has made a prima facie showing that he can establish by clear and convincing evidence that no reasonable factfinder would have found him guilty." *In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018)[1].

The Sixth Circuit then incorrectly found, in remanding his petition to this Court, that in order to be granted relief, Wogenstahl would have to meet the extremely high standard found in 28 U.S.C. § 2244. The Sixth Circuit has now acknowledged that this portion of its holding was wrong. *Baugh v. Nagy*, No. 21-1844, 2022 U.S. App. LEXIS 27469 (6th Cir. Sep. 30, 2022). Because that previous holding would create a miscarriage of justice, this Court may grant this Motion for Relief pursuant to Fed. R. Civ. P. 60(b)(6) and consider this Petition as a first-in-time petition under 28 U.S.C. § 2254.

[1] This motion is not challenging the decision of the Sixth Circuit granting permission for Wogenstahl to file a second or successive habeas petition pursuant to 28 U.S.C. § 2244; rather, this motion is solely challenging the order of the District Court transferring the case to the Sixth Circuit, finding that Wogenstahl must meet the successor standard to be granted relief and a new trial. (ECF 30).

II. Statement of the Case.

Wogenstahl was convicted of aggravated murder, burglary, and kidnapping in 1993.

In 1999, Wogenstahl filed a petition for a writ of habeas corpus. Following further discovery and amendments, this Court denied habeas relief, which was affirmed by the Sixth Circuit. *Wogenstahl v. Mitchell*, 668 F.3d 307 (6th Cir. 2012).

On May 3, 2017, Wogenstahl filed a motion to proceed in forma pauperis and a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF 1-4; 7-8). The Magistrate Judge construed this as a second or successive habeas petition to be filed pursuant to 28 U.S.C. § 2244(b) and filed a transfer order to the Sixth Circuit Court of Appeals on May 4, 2017. (ECF 6). Wogenstahl then filed objections to the transfer order (ECF 9), and the Magistrate Judge ordered supplemental briefing. (ECF 18). After the supplemental briefing, the Magistrate Judge filed a supplemental report recommending that the court affirm the transfer order. (ECF 22). Wogenstahl filed objections to the supplemental report on August 2, 2017. (ECF 23). The warden responded to the objections on August 7, 2017. (ECF 25). On August 8, 2017, the Magistrate Judge issued a second supplemental report, again recommending that the court affirm the transfer order. (ECF 26). Wogenstahl filed objections to the second supplemental report on September 1, 2017. This Court overruled Wogenstahl's objections and ordered the case be transferred to the Sixth Circuit on March 27, 2018. (ECF 30).

On April 16, 2018, Wogenstahl filed a corrected application for permission to file a second or successive petition for a writ of habeas corpus in the Sixth Circuit Court of Appeals. (6th Cir. Case No. 18-3287, ECF 8). Wogenstahl also filed a motion to transfer back to the District Court as a section 2254 petition. (6th Cir. Case No. 18-3287, ECF 9).

The Sixth Circuit denied the motion to transfer and granted Wogenstahl's application for

permission to file a second or successive habeas corpus petition under 28 U.S.C. § 2244(b). (ECF 33). This Court stayed the proceedings pending state court litigation. (ECF 34).[2]

III. The Sixth Circuit has now determined that *In re Wogenstahl* was decided incorrectly.

The United State Supreme Court has held that not all second-in-time section 2254 petitions are "second or successive" as applied to section 2244. *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). For instance, in *Panetti*, the Supreme Court held that a second-in-time petition that raises incompetency claims based on *Ford v. Wainwright*, 477 U.S. 399, are subject to the section 2254 standard if the claim was not ripe when the initial petition was filed. *Id*.

When determining whether a second-in-time petition is subject to the requirements of section 2244, the abuse of the writ doctrine applies: "[u]nder 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." *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006), citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991).

The Sixth Circuit held Wogenstahl's second-in-time petition, based on *Brady* violations that were previously unknown to Wogenstahl, constituted claims that were "not unripe" at the time he filed his first petition in 1999. *In re Wogenstahl*, 902 F.3d at 627-28 (6th Cir. 2018). The Sixth Circuit reasoned that the *Brady* violations had occurred, and therefore ripened, when the evidence was suppressed at the trial in 1993, and before the filing of the first petition in 1999, even though

[2] This motion does not affect the substance of the pleadings before this Court, only the standard in which the Court will decide the case once the stay is lifted. Therefore, Wogenstahl asks the Court to rule on this motion without delay despite the current stay.

Wogenstahl was unaware of the State's suppression until 2016. *Id*. Therefore, the second-in-time petition was construed as a second or successive petition under 28 U.S.C. § 2244(b).

However, the Sixth Circuit revisited this analysis in *Baugh v. Nagy*, No. 21-1844, 2022 U.S. App. LEXIS 27469 (6th Cir. Sep. 30, 2022). "Upon further consideration, we respectfully believe that *Wogenstahl* was incorrectly decided." *Id*. at *17. The Sixth Circuit has now determined that it is illogical to hold that a petitioner abuses the writ by bringing previously unknown *Brady* claims in a second-in-time petition. *Id*. at *17-18. It recognized, however, that "as ill-guided as *Wogenstahl* may be, it remains the law of our circuit." *Id.* at *18-19.

United States Supreme Court Justice Sonia Sotomayor agreed that the Sixth Circuit's decision in *Wogenstahl* was erroneous. *Storey v. Lumpkin*, 142 S.Ct. 2576, 2578 (2022) (J. Sotomayor, concurring in denial of certiorari); *see also Bernard v. United States*, 141 S.Ct. 504, 506 (2020) (J. Sotomayor, dissenting from denial of certiorari).

The dissent in *Bernard*, cited by the *Storey* concurrence, emphasized that "*Panetti*'s reasoning applies with full force to *Brady* claims." *Bernard* at 486 (dissenting opinion). When determining whether a pleading is a second or successive petition pursuant to 28 U.S.C. § 2244(b), the Supreme Court has considered the purposes of AEDPA, which are "to further the principles of comity, finality, and federalism." *Panetti* at 2854. As noted by the Sixth Circuit, the decision in *Wogenstahl* does not further AEDPA's purpose of promoting finality – "instead, *Wogenstahl* incentivizes prisoners to bring *Brady* claims without any evidence or else risk having a potential *Brady* claim reviewed under the heightened 'second or successive' standards." *Baugh* at *17.

The Tenth Circuit addressed this issue in *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009). There, the court treated the *Brady* claims in a second-in-time petition as a supplement to the prosecutorial misconduct claims in the initial habeas petition – not as a second or successive

request for habeas relief. *Id*. at 1189. The Tenth Circuit cited unusual circumstances in *Douglas* that permitted relief, while applying the same analysis to *Brady* claims that the Sixth Circuit later adopted in *Baugh*. *Id*. at 1187-88; *see also Baugh* at *16-18.

Like *Baugh*, though a panel may agree that *Brady* violations must be exempt from the section 2244(b)(2) requirements, panels in other circuits have been bound to follow the law of the circuit. *Velez Scott v. United States*, 890 F.3d 1239, 1256-57 (11th Cir. 2018); *Long v. Hooks*, 972 F.3d 442, 485-86 (4th Cir. 2020) (concurring opinion).

In *Velez Scott*, the Eleventh Circuit reluctantly reaffirmed its holding in *Tompkins v. Sec'y, Dep't of Corrections*, 557 F.3d 1257 (11th Cir. 2009), where the court held that a *Brady* claim is not cognizable under a second-in-time section 2254 petition if it does not meet the criteria in section 2244(b)(3)(A). 890 F.3d at 1243. "In our view, Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2, do not allow this." *Id*.

The concurrence in *Long v. Hooks* emphasizes the wrongfulness of rewarding the State for constitutional violations. 972 F.3d 442 at 471. It also notes that "this situation creates incentives for any state actors withholding material evidence to violate the petitioner's other constitutional rights, if subtly. After all, if they succeed in prompting the petitioner to file an initial habeas petition, they position themselves to better defend against any later habeas claims in the event the suppressed evidence is ever uncovered." *Id*. at 488.

Likewise, *In re Wogenstahl* "rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his convictions on other grounds." *Storey*, 142 S.Ct. at 2578, citing *Bernard* at 486. "Under this rule, prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Id*., citing *Bernard* at 487.

IV. Pursuant to *Baugh v. Nagy*, Wogenstahl's petition should be considered first in time.

The nature of a *Brady* claim is that the defendant cannot access exculpatory evidence suppressed by the State. Due to the strict statute of limitations in AEDPA, an initial habeas petition must be filed within one year of the conclusion of direct review. 28 U.S.C. § 2244(d)(1). "So, unless the petitioner becomes aware of the suppressed evidence shortly after trial, his claim will be subjected to higher standards—through no fault of his own." *Long v. Hooks*, 972 F.3d at 487 (concurring opinion). "Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Panetti*, 551 U.S. at 946, citing *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (*per curiam*).

a. A *Brady* claim ripens when a petitioner discovers the evidence suppressed by the State.

Panetti held that a petition is not second or successive if it raises a claim that was not ripe upon filing of the initial petition. 551 U.S. 930 at 945-47. The Sixth Circuit defined a claim as ripe if "the events giving rise to the claim had not yet occurred." *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017), citing *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010). Because the *Brady* violation occurred at the time of trial, the court held that Wogenstahl's *Brady* claims were ripe when Wogenstahl filed his initial habeas petition, and his second-in-time petition must be subject to the section 2244 standard. *In re Wogenstahl*, 902 F.3d at 627.

The Sixth Circuit reinforced this "ripeness" position in *In re Keith*, No. 18-3544, 2018 WL 8807240 (6th Cir. Oct. 26, 2018). There, the Sixth Circuit was presented with a successively filed petition asserting a *Brady* violation. In finding the new petition to be second or successive under 28 U.S.C. § 2244, the Sixth Circuit explained, "[t]his Court recently held that *Brady* claims become ripe when the alleged violations occurred, even if the petitioner was unaware of the *Brady*

violations at the time he filed his previous habeas petition." *Id*. at *2 (citing *Wogenstahl*, 621 F.3d at 627-28).

This interpretation of ripeness is impractical. By definition, a petitioner is unaware of a potential *Brady* claim until discovering the evidence suppressed by the State. "[D]isclosure or awareness of the suppressed evidence or false testimony in question is a necessary predicate for a *Brady*-type claim—a meritorious *Brady*-type claim simply cannot be brought prior to some form of disclosure—and thus such a claim is unripe until the disclosure occurs." *In re Jackson*, 12 F.4th 604, 615 (6th Cir. 2021) (Moore, J., concurring).

The implication of upholding the Sixth Circuit's current definition of "ripeness" will prompt frivolous litigation, resulting in a waste of judicial resources. If the claim ripens at the time the evidence is suppressed, generally at trial, then petitioners would have to file potentially frivolous and/or unsupported claims continually in both state and federal courts to ensure that if *Brady* evidence is ever uncovered, it may be presented in an original petition. "This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id. at* 613, citing *Panetti*, 551 U.S. at 943.

Additionally, maintaining this rationale "reward[s] investigators or prosecutors who engage in the unconstitutional suppression of evidence with a 'win'—that is, the continued incarceration of a person whose trial was fundamentally unfair (and unconstitutional)." *Id.* at 614 (concurring opinion), citing *Long*, 972 F.3d at 486 (concurring opinion); *see also Bernard,* 141 S.Ct. at 506. "Congress could not have intended to create such a perverse incentive structure with AEDPA." *Id.*

The logical definition of ripeness for a *Brady* claim would be to determine that the event giving rise to the claim is the discovery of the suppressed evidence.

As it stands, the Circuit's "ripeness" position rewards state actors for suppressing evidence, encourages petitioners to raise *Brady* claims on direct appeal and in every forum thereafter, along with seeking standard discovery in order to discover and preserve the claim and to support further litigation, and places a fundamentally unfair burden on petitioners raising legitimate *Brady* claims discovered after the conclusion of initial habeas review.

b. Wogenstahl's claim ripened when he discovered the evidence suppressed by the State.

It was impossible for Wogenstahl to have raised these claims in his first habeas corpus petition in 1999. Until 2016, the State concealed the wealth of information that established a prima facie showing that the victim's mother and brother were potentially complicit in her disappearance. *In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018).

Pursuant to the panel's current ruling, the illogical result would require Wogenstahl to divine the existence of exculpatory evidence which the State had a duty to provide, and assert this claim in his initial petition, as well as locate the evidence hidden in a police department, which was only to be revealed upon threat of writ of mandamus. *See State ex rel. Office of the Ohio Public Defender v. Harrison Police Dept.*, Ohio Supreme Court Case No. 16-0410. This is plainly unreasonable.

The Sixth Circuit, en banc, has stated: "[w]here a prisoner can show that the state purposefully withheld exculpatory evidence, that prisoner should not be forced to bear the burden of section 2244, which is meant to protect against the prisoner himself withholding such information or intentionally prolonging the litigation." *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000) (en banc). This reasoning should apply equally herein, where the State purposefully withheld this *Brady* evidence for approximately 25 years.

Without revisiting the panel's decision, Wogenstahl must surmount the "almost insurmountable obstacles" set by 28 U.S.C. § 2244 due to the State's deliberate suppression of exculpatory evidence. *Douglas*, 560 F.3d at 1192-93. Through no fault of his own, the State's failure to turn over this evidence, until a change in public records law and a writ of mandamus by the Ohio Supreme Court, results in a higher burden for Wogenstahl. This is patently unfair.

V. Rule 60(b) is the proper avenue for relief.

Rule 60(b) applies to habeas corpus cases. *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). Rule 60(b)(6) allows reopening when there is any reason justifying relief other than the specific circumstances in Rules 60(b)(1)-(5). *Id*. at 528-29. Rule 60(b)(6) is available only in "extraordinary circumstances." *Id*. at 535.

"Extraordinary circumstances" has not been defined by the Sixth Circuit but may include "'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Mitchell v. Genovese*, 974 F.3d 638, 651 (6th Cir. 2020), citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988).

"A change in decisional law is *usually* not, by itself, an extraordinary circumstance meriting Rule 60(b)(6) relief." *Moore v. Mitchell*, 848 F.3d 774, 776 (6th Cir. 2017) (emphasis added), citing *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014). The decision to grant relief is "a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007), citing *Blue Diamond Coal Co. v. Trustees of United Mine Workers of America Combined Benefit Fund*, 249 F.3d 519, 529 (6th Cir. 2001).

a. There are extraordinary circumstances here because there is substantial risk of injustice to Wogenstahl and the public's confidence in the judicial process will be undermined if the decision stands.

Here, there is substantial risk of injustice to Wogenstahl. He faces death at the hands of the State. Forcing Wogenstahl to meet the enormously high standard of 28 U.S.C. § 2244 when he could not possibly have discovered evidence that the State concealed would allow the State "to profit from its own egregious conduct." *Douglas*, 560 F.3d at 1192-93.

The public confidence in the judicial process is also negatively affected when the State attempts to execute a person based on an unfair trial where the State hid exculpatory evidence and knowingly elicited false testimony to secure a conviction. *See Long v. Hooks*, 972 F.3d at 471 (concurring opinion) ("[F]or every innocent man behind bars due to mistaken identity, a guilty one remains free...public confidence in the judicial system falters, making it more difficult for law enforcement to do their jobs—and weakening our democracy.").

Finally, requiring petitioners to raise *Brady* claims on direct appeal and in every forum thereafter, along with seeking standard discovery in order to discover and preserve the claim and to support further litigation is not only impractical and a waste of judicial resources, but it also undermines the public's confidence in the judicial process. The public cannot have confidence in a system that encourages frivolous litigation to protect against something that may never, and often will not, crystalize into a claim.

b. Finality is not impacted by granting this motion.

AEDPA's purpose of finality would not be impacted by the granting of this motion. Wogenstahl has already been granted permission by the Sixth Circuit to file a second or successive habeas petition; granting this motion would merely alter the standard for relief that Wogenstahl must meet.

In addition, any grant of relief in this motion would be narrowly tailored to adjusting the standard in which Wogenstahl's alleged *Brady* claims are to be decided. This would not disturb the standard as to any other claims raised within his pending habeas petition.

c. The decision is clearly erroneous and would work a manifest injustice.

This motion should not be barred by law of the case doctrine. The Sixth Circuit Court of Appeals has stated three reasons to reconsider a ruling: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Moore v. Mitchell*, 848 F.3d at 776.

As examined above, there is a manifest injustice to Wogenstahl as the State attempts to execute him, despite the *Brady* and *Napue* violations present in his case.

d. This is a death penalty case; death is different.

Death penalty cases must be afforded special considerations: "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). "[W]here the state is prepared to take a man's life," courts must "apply a heightened concern for fairness." *Douglas*, 560 F.3d at 1194.

e. When considering all the facts, Wogenstahl must be granted relief.

The Sixth Circuit has already decided that "Wogenstahl has made a prima facie showing that he can establish by clear and convincing evidence that no reasonable factfinder would have found him guilty." *In re Wogenstahl*, 902 F.3d at 629.

Voluminous evidence calls Wogenstahl's conviction into question:

- Upon reviewing the case, a crime scene expert and forensic pathologist both concluded that the forensic evidence in this case completely contradicts the prosecution's theory of the case at trial. According to these experts, Wogenstahl did not kill Amber in his car (as the State claimed at trial); he also did not kill her in his apartment or in some other undisclosed location

because he could not have transported her in his car after she was already injured. (ECF 8, pp. 1033-1043).

- The State argued at trial that the lack of physical evidence found in Wogenstahl's apartment and on Wogenstahl's jacket was due to bleach. (Tr. 2461). A crime scene expert concluded that "bleach will not prevent scientists from locating blood." (ECF 8, pp. 1037-43).

- The substances that presumptively tested positive for "blood" found in Wogenstahl's apartment were consistent with his testimony that the source of this "blood" was his cat. (Tr. 2294; ECF 8, pp. 997-1002, 1037-1043).

- An eyewitness ID expert would have testified that the eyewitness accounts of Kathy Roth, Brian Noel, and Vicki Mozena were flawed and should have been challenged. (ECF 8, pp. 1028-30).

- Both Peggy Garrett and Eric Horn had their memories improperly influenced via hypnosis by a Patrolman with the Harrison Police Department. (ECF 8, pp. 830-34, 887).

- Amber kept a diary in which she wrote the following concerning her life and her mother: "I hate myself. I hate my life. I hate my classmates...Sometimes I just feel like running away or killing myself...*Just yesterday before I came to school my mom beat me she was punching me in the back. She just would not stop.*" (ECF 8, pp. 842-45).

- Harrison police received reports that Peggy Garrett may have sold Amber for sex to an individual to whom she owed money for drugs. (ECF 8, pp. 966-968; *see also* ECF 8, pp. 957, 969-70).

- Eric Horn stated that he hoped Amber was dead and lied about his whereabouts on the evening in question. A polygraph examiner found that Eric was deceptive on several questions concerning Amber's disappearance and murder. (ECF 8, pp. 875-79, 883-86).

- Eric perjured himself when he stated under oath that he had never done, nor dealt, illegal drugs. This was a clear lie, since he had very recently—within a month of Wogenstahl's trial—been adjudicated as delinquent for trafficking marijuana by the same prosecutor's office. (ECF 8, pp. 888-905).

- Bruce Wheeler, the State's jailhouse informant, lied when he testified that he did not receive any consideration for his testimony in this case. He, in fact, did receive consideration; he only recently admitted this fact to Wogenstahl's investigator. (ECF 8, pp. 917-43).

- At the time Amber disappeared, an eyewitness saw a red car in the immediate area where police later discovered Amber's body. Wogenstahl drove a brown sedan at the time. (ECF 8, p. 992).

- Several reports indicated that Amber had been raped or sexually assaulted, and, as a result, received sexual abuse counseling. During the summer prior to her murder, there was also a

report that Amber was stalked by a man who stared at her through her bedroom window. The reports occurred before Wogenstahl moved to Harrison. (ECF 8, pp. 947-56, 969-70).

- Peggy Garrett frequently held parties at her residence at which illegal drugs where rampant and the mother permitted the male attendees to inappropriately touch Amber. (ECF 8, pp. 949-56).

- Amber's oldest brother, Justin Horn, lied to the police concerning his whereabouts at the time of Amber's disappearance and murder. (ECF 8, pp. 1031-32).

- The prosecution alleged that Wogenstahl abducted Amber from her bed on a Sunday in the early morning hours. However, the police found Amber's body clad in her church clothes, not her pajamas. Amanda Beard, a friend of Amber's from school, also spotted Amber alive at 4:00 pm on the day of Amber's disappearance. (ECF 8, pp. 984-85, 989).

- Donald and Mellisa Ellis affied that on November 24, 1991, in the early morning hours, they saw Peggy Garrett with an unknown male at the Ohio Waffle House. Peggy was "running her fingers through her hair saying 'oh my god, oh my god. Fuck. What are we gonna do? Fuck. Fuck. Fuck.' She was saying this over and over. Peggy had tears in her eyes." (Hamilton Cnty. Court of Common Pleas Case No. B 9206287, Second Amendment to Successive Post Conviction Petition, pp. 11-18, July 27, 2021).

- In early 2013, twenty years after Wogenstahl's trial, the U.S. Department of Justice admitted that FBI Agent Deedrick's testimony in this case "exceeded the limits of science." Agent Deedrick had compared a pubic hair improbably found during a visual examination of Amber's underwear, after the underwear had previously been microscopically examined and found to contain no hair evidence (tr. 1197-98), with a sample of Wogenstahl's known pubic hair. Agent Deedrick then wrongly testified that these pubic hairs were a "match." Agent Deedrick's testimony was the only direct evidence linking Wogenstahl to Amber. A juror from Wogenstahl's trial later signed an affidavit stating that it was this testimony from FBI Agent Deedrick that convinced her to vote to convict Wogenstahl of killing Amber. (ECF 8, pp. 1051-1170).

- One of the jurors who sat on Wogenstahl's jury stated that the "evidence in the first phase was not overwhelming." That same juror stated that information concerning alternate suspects "definitely would have caused reasonable doubt on [her] part." (ECF 8, pp. 1022-23; *see also* ECF 8, pp. 949-956, 1026-27).

- Crime scene expert and former police officer Gary Rini, M.F.S., stated, "In my nearly forty years of experience in law enforcement and forensic investigation, it is my opinion that the investigation of this case was so deficient in its thoroughness and adherence to established procedures of professional competence that it rates in the ***top 10% of the most troublesome cases that I have reviewed, or personally have been involved with***, since I began my law enforcement career in 1975. (ECF 8, pp. 1037-43) (emphasis added).

Considering all these facts, this decision must be reversed to ensure justice is done.

VI. The Sixth Circuit may grant relief to Wogenstahl.

Assuming arguendo this Court does not believe it has the power to grant relief and instead transfers this motion to Wogenstahl's panel in the Sixth Circuit, Wogenstahl is still due relief in this regard.

In *Baugh v. Nagy*, the Sixth Circuit acknowledges that *In re Wogenstahl* is the law of the circuit. No. 21-1844, 2022 U.S. App. LEXIS 27469 at *19. "A panel of this Court cannot overrule the decision of *another* panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Salmi v. Secy. of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (emphasis added). However, it also follows that because Wogenstahl's panel remains unchanged, it may modify its prior decision.

Similarly, the Sixth Circuit Rules provide that "[p]ublished panel opinions are binding on *later* panels. A published opinion is overruled only by the court en banc." 6 Cir. R. 32.1(b) (emphasis added). Thus, again, it follows that the panel that decided *In re Wogenstahl* may revise its own decision.

Additionally, the Sixth Circuit Rules also allow the court to suspend any provision of these rules for good cause. 6 Cir. R. 2.

The panel's modification of *In re Wogenstahl* is the only way for Wogenstahl to obtain relief. 28 U.S.C. § 2244(a)(3)(E) prohibits appeal, petition for rehearing, or petition for a writ of certiorari from a grant of a successive habeas petition. The Sixth Circuit has recognized that Wogenstahl's habeas petition should be considered pursuant to the 28 U.S.C. § 2254 standard, and it would be an injustice to submit Wogenstahl to the higher standard of section 2244. Certainly, this constitutes good cause that would allow the Sixth Circuit to revise its decision.

Should this Court determine that this motion is proper for the Sixth Circuit and transfer it as such, Wogenstahl respectfully requests additional briefing on this issue.

VII. Conclusion.

The Sixth Circuit, a Justice of the United States Supreme Court, and other Circuit Courts of Appeal agree that *In re Wogenstahl* was decided incorrectly. This Court should reverse the judgment transferring the case to the Sixth Circuit and apply the 28 U.S.C. § 2254 standard to Wogenstahl's habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2023, a copy of the foregoing was forwarded to all parties via the courts electronic system.

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