

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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JEFFREY WOGENSTAHL,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

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*On Petition for a Writ of  
Certiorari to the Supreme Court of Ohio*

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**PETITION FOR A WRIT OF CERTIORARI**

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## **CAPITAL CASE**

### **QUESTION PRESENTED**

When a state court re-opens direct review in a capital case, does the resultant state court merits decision constitute a “new judgment” pursuant to this Court’s decision in *Magwood v. Patterson*, 561 U.S. 320, 337 (2010) so that the capital petitioner may then pursue habeas review of that “new judgment” pursuant to 28 U.S.C. § 2254?

## **PARTIES TO THE PROCEEDINGS**

Petitioner, Jeffrey Wogenstahl, a death-sentenced Ohio prisoner was the appellant in the United States Court of Appeals for the Sixth Circuit.

Respondent, the Warden, Chillicothe Correctional, was the appellee in the United States Court of Appeals for the Sixth Circuit.

## RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Intermediate Court of Appeals Direct Appeal Opinion: *State of Ohio v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 WL 686898;
2. Ohio Supreme Court Direct Appeal Opinion: *State of Ohio v. Wogenstahl*, 75 Ohio St.3d 344, 1996-Ohio-219, 662 N.E.2d 311 (1996);
3. United States Supreme Court denial of certiorari: *Wogenstahl v. Ohio*, 519 U.S. 895, 117 S. Ct. 240 (1996);
4. District Court First Federal Habeas Decision: *Wogenstahl v. Mitchell*, Case NO. 1:99-cv-843 (S.D. Sept. 12, 2007);
5. Sixth Circuit Court of Appeals First Federal Habeas Decision: *Wogenstahl v. Mitchell*, 668 F.3d 307 (6th Cir. 2012);
6. United States Supreme Court denial of certiorari: *Wogenstahl v. Robinson*, 568 U.S. 902, 133 S. Ct. 311 (2012);
7. Ohio Supreme Court re-opened Direct Appeal Decision: *State of Ohio v. Wogenstahl*, 150 Ohio St.3d 571, 581, 2017-Ohio-6873, 84 N.E.3d 1008;
8. United States Supreme Court denial of certiorari: *Wogenstahl v. Ohio*, 138 S. Ct. 2576 (2018);
9. District Court Second Habeas Decision (transferring case to 6th Circuit): *Wogenstahl v. Jenkins*, Case No. 1:17-cv-298 (S.D. Ohio March 27, 2018);
10. Sixth Circuit Court of Appeals Second Federal Habeas Decision (granting application to file a successive petition): *In re Wogenstahl*, 902 F.3d 621 (6th Cir. 2018);
11. District Court Third Habeas Decision (transferring case to the 6th Circuit): *Wogenstahl v. Shoop*, No. 1:19-cv-00403 (S.D. Ohio Oct. 7, 2019);
12. Sixth Circuit Court of Appeals Third Habeas Decision denying application to file a successive petition): *In re Wogenstahl*, No. 19-4024 (6th Cir. May 12, 2020).

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**DECISION BELOW**

The opinion of the panel of the United States Court of Appeals for the Sixth Circuit (App. A-1) is unreported. *See In re Wogenstahl*, No. 19-4024 (6th Cir. May 12, 2020). The district court's opinion denying petitioner's request to file a second-in-time habeas petition (App. A-8) is unreported. *See Wogenstahl v. Shoop*, No. 1:19-cv-00403 (S.D. Ohio Oct. 7, 2019).

**JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Sixth Circuit issued its May 12, 2020, App. A-1. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed. Order List 589 U.S., March 19, 2020 (extending deadline to file any petition for writ of certiorari to 150 days from the date of the lower court judgment).

## STATUTORY PROVISIONS INVOLVED

Section 2244(b) of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. 2244(b), provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant 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

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(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.

## STATEMENT OF THE CASE AND FACTS

### **A. Introduction.**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires dismissal of “second or successive” federal habeas petitions except in two narrow circumstances. 28 U.S.C. § 2244(b). But before a federal court can determine whether a petitioner has met one of these two exceptions, it must perform the “threshold inquiry into whether an application is second or successive.” *Magwood v. Patterson*, 561 U.S. 320, 337 (2010).

“The term ‘second or successive’ is a habeas ‘term of art,’ ” *id.* at 344 (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)), and it “must be interpreted *with respect to the judgment challenged*,” *id.* at 333 (emphasis added). This Court held in *Magwood* that “where . . . there is a ‘new judgment intervening between the two habeas petitions,’ an application challenging the resulting new judgment is not ‘second or successive’ at all.” 561 U.S. at 341–42 (citation omitted) (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007)). Here, Wogenstahl’s petition was properly before the district court as a second-in-time petition pursuant to 28 U.S.C. § 2254, because it asserted claims that are based upon a new Ohio Supreme Court direct appeal judgment.

### **B. Factual and Procedural Background.**

#### **1. Trial and Direct Appeal.**

In 1993, despite the fact that the homicide offense occurred in Indiana, Petitioner Jeffrey Wogenstahl was tried and convicted in Hamilton County, Ohio of aggravated murder and attendant crimes and sentenced to death. On direct appeal,

the First District Court of Appeals and the Ohio Supreme Court affirmed both his convictions and sentence. *State of Ohio v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 WL 686898; *State of Ohio v. Wogenstahl*, 75 Ohio St.3d 344, 1996-Ohio-219, 662 N.E.2d 311 (1996).

## **2. Federal Habeas.**

Wogenstahl previously unsuccessfully sought federal habeas relief. *Wogenstahl v. Mitchell*, 668 F.3d 307 (6th Cir. 2012); *cert denied* at *Wogenstahl v. Robinson*, 568 U.S. 902 (2012). In his habeas petition, Wogenstahl did not raise the issue that Ohio lacked jurisdiction over the homicide offense.

## **3. Re-opened direct review in the Ohio Supreme Court.**

On October 09, 2015, because a challenge to subject matter jurisdiction may be raised at any time, Wogenstahl filed with the Supreme Court of Ohio a motion to re-open his direct appeal contending that the trial court lacked jurisdiction because the murder did not take place in the State of Ohio. *State of Ohio v. Wogenstahl*, Ohio Supreme Court Case No. 1995-0042.

On May 04, 2016, the Supreme Court of Ohio granted Wogenstahl's motion to re-open his direct appeal. *State of Ohio v. Wogenstahl*, 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. In that same order, the state court stayed Wogenstahl's pending execution date. Wogenstahl raised three Propositions of Law.

The Ohio Supreme Court conducted oral argument on April 04, 2017. During oral argument, Justice French, *sua sponte*, raised the issue of the constitutionality of Ohio Revised Code ("R.C.") § 2901.11(D). When questioned by Justice O'Neill of the

Ohio Supreme Court as to whether she wanted the Court to consider the constitutionality of the statute as written in 1991, Attorney Rigby answered in the affirmative. *See Oral Argument*, held 04/04/17.

On July 25, 2017, the Ohio Supreme Court affirmed Wogenstahl's conviction and sentence holding "that Ohio had jurisdiction over the aggravated-murder charge." *State of Ohio v. Wogenstahl*, 150 Ohio St.3d 571, 581, 84 N.E.3d 1008 (2017). Justice French concurred in that decision, finding "There is at least a colorable argument that the conclusive presumption of jurisdiction in R.C. § 2901.11(D) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Wogenstahl*, 150 Ohio St.3d at 583 (French, J., concurring).

Wogenstahl filed a motion for rehearing and/or reconsideration on August 04, 2017. The Ohio Supreme Court denied rehearing and/or reconsideration on December 20, 2017. 12/20/17 Case Announcements, 2017-Ohio-9111.

Wogenstahl filed a Petition for Writ of Certiorari in this Court on March 20, 2018. That Petition was denied on May 29, 2018. *Wogenstahl v. Ohio*, 138 S.Ct. 2576 (2018).

Following the denial of certiorari, Wogenstahl filed Defendant's Motion to Re-open His Direct Appeal to Challenge the Constitutionality of Ohio Revised Code § 2901.11(D) as Written in 1991. The Ohio Supreme Court denied this Motion, with Justice French again dissenting, stating that she would have granted the Motion to Re-open. 10/24/2018 Case Announcements, 2018-Ohio-4288. On that same date, the

Ohio Supreme Court ruled that Wogenstahl's stay of execution shall stay in effect pending additional litigation, including all appeals. *Id.*

**4. Second Habeas Petition based on undisclosed *Brady* evidence.**

In the meantime, Wogenstahl uncovered a host of exculpatory evidence that had been withheld by the State. As such, he filed a Second Petition for Writ of Habeas Corpus asserting that he could not have previously raised the claims identified therein because almost all of the facts on which he relied were unavailable during initial habeas proceedings. *Wogenstahl v. Jenkins*, Case No. 1:17-cv-298 (S.D. Ohio filed May 03, 2017). After briefing and objections, the district court overruled Wogenstahl's objections and transferred Wogenstahl's petition to the Sixth Circuit Court of Appeals. (ECF 30, *Wogenstahl v. Jenkins*, Case No. 1:17-cv-298 (S.D. Ohio filed March 27, 2018)).

Wogenstahl filed a corrected application for permission to file a second or successive habeas corpus petition in the Sixth Circuit Court of Appeals along with a motion to transfer the case to the district court. *In re: Jeffrey Wogenstahl*, Case No. 18-3287, filed April 16, 2018. On September 04, 2018, the Court of Appeals denied Wogenstahl's motion to transfer but granted Wogenstahl's application to file a second or successive habeas petition, finding 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 621, 629 (6th Cir. 2018).

**5. Third Habeas Petition based on Ohio's lack of subject matter jurisdiction over the homicide offense.**

On May 28, 2019, Wogenstahl filed a Motion for Leave to Proceed In Forma Pauperis and a timely Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *Wogenstahl v. Warden*, Case No. 1:19-cv-403 (N.D. Ohio filed May 28, 2019). This Petition contained three new claims, all of which were based upon the claims filed and adjudicated as part of Wogenstahl's re-opened direct appeal in the Ohio Supreme Court. Following that filing, the district court ordered that Wogenstahl show cause why the case should not be transferred to the Sixth Circuit Court of Appeals. (ECF 5, *Id.*). After briefing, on July 30, 2019, the Magistrate Judge filed a Transfer Order. (ECF 11, *Id.*). After objections and supplemental objections, the district court then filed a Decision and Order Adopting Report and Recommendations and Overruling Objections to Transfer Order. (ECF 20, *Id.*).

The case was docketed in the Sixth Circuit Court of Appeals on October 21, 2019. *In re: Jeffrey Wogenstahl*, Case No. 19-4024, filed November 4, 2019. The Court of Appeals directed Wogenstahl to file a corrected second or successive habeas motion by November 4, 2019. Wogenstahl filed his corrected second or successive habeas on November 4, 2019. (ECF 9, *Id.*). On May 12, 2020, the Sixth Circuit Court of Appeals found that Wogenstahl's petition "attacks the same judgment as his initial petition did." *In re Wogenstahl*, No. 19-4024, p. 5 (6th Cir. May 12, 2020). Therefore, that court found that Wogenstahl's petition was successive. That court also found that Wogenstahl had not met the requirements to file a successive petition pursuant to 28 U.S.C. § 2244(b). (*Id.*)

Wogenstahl now seeks certiorari so that he may pursue, pursuant to 28 U.S.C. § 2254, habeas review of the Ohio Supreme Court’s new direct appeal judgment.

## REASON FOR GRANTING THE WRIT

**When a state court re-opens direct review in a capital case, the resultant state court merits decision constitutes a “new judgment” pursuant to this Court’s decision in *Magwood v. Patterson*, 561 U.S. 320, 337 (2010); therefore, a capital petitioner may pursue habeas review of that “new judgment” pursuant to 28 U.S.C. § 2254.**

In *Magwood*, this Court determined that a federal habeas petition based on a new judgment was not “second or successive.” 561 U.S. at 341-42. A new judgment was entered in Wogenstahl’s case, and thus his petition *challenging that very judgment* is not second or successive within the meaning of 28 U.S.C. § 2244(b). The decision of the Sixth Circuit below was incorrect. This Court should grant the writ.

### A. Relevant law.

As both the Sixth Circuit Court of Appeals as well as this Court have found, “A district court has jurisdiction to consider numerically second petitions that are not ‘second or successive’ petitions within the meaning of 28 U.S.C. § 2244(b) and needs no authorization from [the Sixth Circuit] to consider them when they are filed in the district court.” *In re Smith*, 690 F.3d 809 (6th Cir. 2012) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642 (1998) (holding “no need for [Petitioner] to apply for authorization to file a second or successive petition” from court of appeals because petition not successive)).

The statutory phrase “second or successive” is a term of art in the habeas context, not a mere chronological description, and a habeas petition filed second in

time is not automatically successive within the meaning of § 2244. *See Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007) (citing *Stewart v. Martinez-Villareal*, 523 U.S. at 643). This Court “has declined to interpret ‘second or successive’ as referring to all § 2254 applications filed second or successively in time.” Because, as this Court explained, adhering to such a “mere formality” would “benefit no party.” *Panetti*, 551 U.S. at 947. *See also Magwood v. Patterson*, 561 U.S. 320, 331-32 (2010) (“Although Congress did not define the phrase ‘second or successive,’ as used to modify ‘habeas corpus application under section § 2254,’ it is well settled that the phrase does not simply refer to all § 2254 applications filed second or successively in time.”) (citation, brackets, and some internal quotation marks omitted).

Important to this case, in *Magwood*, this Court further concluded that where a habeas petition is the “first petition to address a new ‘state-court judgment’ that has not ‘already [been] challenged in a prior § 2254 application,’” that petition is not “second or successive” under 28 U.S.C. § 2244(b). 561 U.S. 320, 343 (Breyer, J., concurring).

**2. Argument: Wogenstahl’s newly filed Petition contains claims that are based on a new state court judgment.**

Although Wogenstahl previously filed two habeas petitions, this newly filed petition should not have been evaluated under the rules for a “second or successive” petition. The petition was properly before the district court as a second-in-time petition pursuant to 28 U.S.C. § 2254, because it asserted claims that are based upon a new Ohio Supreme Court direct appeal judgment. *See Magwood v. Patterson*, 561 U.S. 320 (2010); *Storey v. Vasbinder*, 657 F.3d 372, 376 (6th Cir. 2011).

Following the adjudication of his first habeas petition, Wogenstahl subsequently received – from the Ohio’s highest court – a new direct appeal judgment.<sup>1</sup> *Wogenstahl*, 150 Ohio St. 3d 571, 581. Thus, following this Court’s decision in *Magwood*, Wogenstahl must now be allowed to file a new first petition to challenge that new state court judgment. 561 U.S. 320, 343 (Breyer, J., concurring) (A “first petition to address a new ‘state-court judgment’ that has not ‘already [been] challenged in a prior § 2254 application.’” is not “second or successive” under 28 U.S.C. § 2244(b).)

Moreover, it should make no difference that Wogenstahl’s new judgment is a new direct appeal judgment, instead of a new sentence. In *Storey*, the Sixth Circuit Court of Appeals explained why it believed that this Court’s holding in *Magwood* should apply to new direct appeal “judgments.” 657 F.3d 372, 378. And that analysis makes sense. Thus, although Wogenstahl’s procedural posture differs slightly from the petitioners in *Magwood* or *Storey*, the legal analysis is the same.

The facts of *Storey* are instructive. *Storey* filed his initial federal habeas petition in 2001; in 2003, the federal district court ordered that *Storey* be granted a new direct appeal. *Id.* at 376. *Storey* returned to state court for his new direct appeal. That new direct appeal was denied, and the original judgment was affirmed. *Id.*

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<sup>1</sup> When the Ohio Supreme Court granted Petitioner Wogenstahl’s Motion to Re-Open and stayed his execution, the court did that knowing that a new execution date would need to be set following the court’s adjudication of the new judgment on the direct appeal.

In 2006, Storey returned to federal court and filed a new habeas petition. That petition included several claims from the 2001 petition, but also raised several new claims. *Id.* The district court concluded that because the 2006 petition raised new claims, it would be deemed a second or successive petition within the meaning of 28 U.S.C. § 2244(b). Storey filed a motion for reconsideration and ultimately the court denied the petition on the merits. *Id.* Storey then appealed to the Sixth Circuit Court of Appeals.

Based upon these facts, the Sixth Circuit Court of Appeals concluded that the 2006 petition was not second or successive and proceeded to consider the merits of all the claims raised. *Id.* at 378. That court reasoned that because Storey was granted a new appeal based upon ineffective assistance of appellate counsel with respect to the first direct appeal, that “such 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. *See In re Goddard*, 170 F.3d 435, 437 (4th Cir. 1999).” *Id.* at 377. The Court of Appeals went on: “[A] petition filed after a remedial appeal, ordered in response to an earlier petition, is not second or successive within the meaning of § 2244(b) – even if it includes claims that could have been included, but were not, in the first petition.” *Id.* at 378.

In this case, Wogenstahl filed with the Ohio Supreme Court a Motion to Re-open his Direct Appeal. On May 04, 2016, the Ohio Supreme Court re-opened the direct review of Wogenstahl’s case to consider specific issues relating to Ohio’s subject matter jurisdiction over the homicide offense in this case. According to Webster’s

dictionary, the plain meaning of the word re-opening is the following: “to take up again” or “to resume discussion or consideration of.” So, by re-opening Wogenstahl’s direct appeal case, the Ohio Supreme Court “took up again” and “resumed discussion of” Wogenstahl’s original direct appeal. This ruling made it so that Wogenstahl’s conviction and sentence were rendered “nonfinal” in the eyes of the law while that the appeal was pending. *See Jimenez v. Quartermann*, 555 U.S. 113, 120, 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.”).

After a full round of briefing and hearing oral argument, the Ohio Supreme Court affirmed the original judgment in Wogenstahl’s case. *Wogenstahl*, 150 Ohio St. 3d at 581. Wogenstahl’s “new [direct] appeal, standing alone, serves to ‘reset’ the ‘counter’ of his applications to zero.” *See Storey*, 657 F.3d at 377; *citing In re Williams*, 444 F.3d 233, 235 (4th Cir. 2006). Following the Ohio Supreme Court’s decision and the denial of Wogenstahl’s motion for reconsideration, Wogenstahl then sought certiorari from this Court. Thus, Wogenstahl’s direct review only concluded on May 29, 2018 when this Court denied certiorari on the claims at issue. *Wogenstahl*, 138 S. Ct. 2576.

As this Court is keenly aware, following the conclusion of direct review, Wogenstahl then had one year to file his habeas petition. As 28 U.S.C. § 2244(d) (emphasis added) states in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) ***the date on which the judgment became final by the conclusion of direct review*** or the expiration of the time for seeking such review...

Wogenstahl filed his habeas petition in the district court on May 28, 2019.

Thus, Wogenstahl timely filed his habeas petition within the 1-year statute of limitations as required by 28 U.S.C. § 2244(d)(1)(A). Pursuant to a straight-forward reading of the statute, Wogenstahl complied with the relevant deadlines and deserves habeas review at this time. *See also Jimenez*, 555 U.S. at 120, at fn4 (“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.”).<sup>2</sup>

Had Wogenstahl’s Motion to Re-open been frivolous, or even not well-taken, the Ohio Supreme Court would have denied that motion. Wogenstahl admits that – in that instance – he could not petition the federal court for further review, i.e. *Storey* and *Magwood* would not apply to his case. *See Id.*, citing *Beard v. Banks*, 542 U.S. 406, 412 (2004) (the *possibility* that a state court may re-open direct review “does not render convictions and sentences that are no longer subject to direct review nonfinal.”). But, contrary to the findings by the lower court, that is not what happened here. Wogenstahl’s case is a far cry from the situation in *Banks* and the hypotheticals set out by the lower courts. Instead, the Ohio Supreme Court granted Wogenstahl’s

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<sup>2</sup> Wogenstahl acknowledges that *Jimenez* dealt with an untimely direct appeal that occurred during the pendency of the petitioner’s state post-conviction proceedings, and, thus, prior to the filing of petitioner’s first habeas petition. Wogenstahl is in a peculiar position where his appeal was, instead, reopened by the Ohio Supreme Court after the conclusion of his first habeas proceedings. Still, the ruling of *Jimenez* is, and should be, applicable to this case, as Wogenstahl’s direct review was “re-opened” and “nonfinal” until the Ohio Supreme Court concluded its review of the jurisdictional issues raised therein.

motion and re-opened his original direct appeal case. *See* Ohio Supreme Court Docket, Case Number 1995-0042.

In further support of this argument, the Ohio Supreme Court treated this case as it would any other capital direct appeal. That court allowed full briefing followed by oral argument. Oral argument was thirty minutes per side, as is directed in a death penalty direct appeal case. *See* S.Ct.Prac.R. 17.05(A)(1) (“(1) In death-penalty appeals of right filed pursuant to S.Ct.Prac.R. 11.01 [Institution of Death Penalty Appeal of Right], thirty minutes shall be allotted to each side for oral argument.”). The Ohio Supreme Court then issued a new direct appeal opinion, affirming Wogenstahl’s conviction and death sentence. *Wogenstahl*, 150 Ohio St. 3d 571, 581.

Wogenstahl is in the same position as Storey was. The sole difference between Wogenstahl’s and Storey’s cases is *how* the petitioners each received his new direct appeal – Storey from the federal district court, Wogenstahl from the Ohio Supreme Court. But it should not matter which court granted each petitioner’s new direct appeal. In both, the result is the same – a new state court ***direct appeal judgment***. Thus, as Storey did, and as to the jurisdictional issue that he raised, Wogenstahl should have been able to seek habeas relief in the first instance pursuant to 28 U.S.C. § 2254.

Wogenstahl is also not attempting to expand *Storey* or *Magwood* to some unworkable rule, as the State of Ohio alleged below. Wogenstahl is merely relying on these cases for what they say. Wogenstahl’s petition was based on a “new direct appeal judgment,” and, thus, because his direct review was not final until the

conclusion of his re-opened direct appeal, Wogenstahl is now due habeas review of that judgment pursuant to 28 U.S.C. § 2254.<sup>3</sup>

In addition, if this Court does not believe that its decision in *Magwood* governs here, then this Court should accept certiorari of this case to explain and/or expand its decision in *Magwood* to situations like this where petitioners are seeking relief from a new state direct appeal judgment. Granting certiorari would also allow this Court to clarify the scope and meaning of *Magwood* in a context where the stakes are someone's life. Only this Court can make clear that the Court of Appeal's decision violates *Magwood*, 2244(b), and common sense. This Court should grant the writ and order that the district court reinstate this case and Wogenstahl's petition as a timely filed Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

### **C. Subject matter jurisdiction can be raised at any time.**

In addition, the claims raised in Wogenstahl's newly filed petition claim that the trial court lacked jurisdiction over the homicide offense in this case. As this Court has made abundantly clear, subject matter jurisdiction cannot be waived or forfeited and may be raised at any time. *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."); *accord, Henderson, ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). "It has long been established that federal habeas corpus relief is available when a conviction is

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<sup>3</sup> Wogenstahl is only seeking to raise his new claims that were pled in the Ohio Supreme Court and were not previously raised in his prior two petitions before the district court.

void for want of jurisdiction in the trial court.” *Rhode v. Olk-Long*, 84 F.3d 284, 287 (8th Cir. 1996), citing *Keizo v. Henry*, 211 U.S. 146, 148 (1908) and *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 375 (1879).

## CONCLUSION

For the foregoing reasons, Petitioner Jeffrey Wogenstahl respectfully requests this Court grant his petition for writ of certiorari. Alternatively, this Court should grant, vacate, and remand for reconsideration of Wogenstahl’s case in light of *Magwood*.

Respectfully Submitted,

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