No. 20-6113

In the Supreme Court of the United States

JEFFREY WOGENSTAHL,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

When a state court reopens a direct appeal for the limited purpose of considering whether a trial court properly exercised jurisdiction, does a decision confirming that the trial court had jurisdiction constitute a new judgment that lifts 28 U.S.C. §2244(b)'s bar on second or successive petitions?

LIST OF PARTIES

The petitioner is Jeffery Wogenstahl, an inmate at the Chillicothe Correctional Institution.

The respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

The list of related proceedings that appears in Jeffery Wogenstahl's petition for a writ of *certiorari* is incomplete. A complete list of all proceedings in state and federal courts that are directly related to this case appears below:

1. *State v. Wogenstahl*, Case No. B 9206287, Hamilton County Court of Common Pleas (judgments entered March 15, 1993; Nov. 30, 1994).

2. *State v. Wogenstahl*, Case No. C 9300222, Ohio Court of Appeals (judgments entered Nov. 30, 1994; Dec. 23, 1994; May 23, 1995).

3. *State v. Wogenstahl*, Case No. C 9300175, Ohio Court of Appeals (judgment entered Feb. 19, 1999; March 18, 1999).

4. *State v. Wogenstahl*, Case No. C 9700238, Ohio Court of Appeals (judgment entered June 12, 1998).

5. *State v. Wogenstahl*, Case No. C 0300945, Ohio Court of Appeals (judgments entered Nov. 12, 2004; Dec. 8, 2004).

6. *State v. Wogenstahl*, Case No. C 1400683, Ohio Court of Appeals (judgments entered Dec. 23, 2015; Feb. 3, 2016).

7. *State v. Wogenstahl*, Case No. C 1800556, Ohio Court of Appeals (judgment entered Aug. 7, 2019).

8. *State v. Wogenstahl*, Case No. 1995-0042, Ohio Supreme Court (judgments entered March 6, 1996; April 24, 1996; May 4, 2016; July 25, 2017; Dec. 20, 2017; Aug. 1, 2018; Oct. 24, 2018.)

9. *State v. Wogenstahl*, Case No. 1995-1165, Ohio Supreme Court (judgments entered March 6, 1996; April 24, 1996).

10. *State v. Wogenstahl*, Case No. 1998-1146, Ohio Supreme Court (judgments entered Nov. 10, 1998; Dec. 23, 1998).

11. *State v. Wogenstahl*, Case No. 1998-1501, Ohio Supreme Court (judgment entered Oct. 7, 1998).

12. *State v. Wogenstahl*, Case No. 1999-0632, Ohio Supreme Court (judgment entered June 2, 1999).

13. *State v. Wogenstahl*, Case No. 2004-2120, Ohio Supreme Court (judgment entered March 16, 2005).

14. *State v. Wogenstahl*, Case No. 2016-0423, Ohio Supreme Court (judgment entered March 15, 2017).

15. *State v. Wogenstahl*, Case No. 2019-1291, Ohio Supreme Court (judgment entered Nov. 26, 2019).

16. *Wogenstahl v. Mitchell*, Case No. 1:99-cv-843, United States District Court for the Southern District of Ohio (judgment entered Sept. 12, 2007).

17. *Wogenstahl v. Jenkins*, Case No. 1:17-cv-00298, United States District Court for the Southern District of Ohio (judgment entered March 27, 2018).

18. *Wogenstahl v. Shoop*, Case No. 1:19-ccv-403, United States District Court for the Southern District of Ohio (judgment entered Oct. 7, 2019).

19. *Wogenstahl v. Mitchell*, Case No. 07-4285, Sixth Circuit Court of Appeals (judgment entered Feb. 2, 2012).

20. *In re Wogenstahl*, Case No. 18-3287, Sixth Circuit Court of Appeals (judgment entered Sept. 4, 2018).

21. *In re Wogenstahl*, Case No. 19-4024, Sixth Circuit Court of Appeals (judgment entered May 12, 2020).

22. *Wogenstahl v. Ohio*, Case No. 96-5388, Supreme Court of the United States (*certiorari* denied Oct. 7, 1996).

23. *Wogenstahl v. Robinson*, Case No. 12-5231, Supreme Court of the United States (*certiorari* denied Oct. 1, 2012).

24. *Wogenstahl v. Ohio*, Case No. 17-8201, Supreme Court of the United States (*certiorari* denied May 29, 2018).

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INTRODUCTION

Jeffrey Wogenstahl, who murdered a ten-year-old girl in the 1990s, claims that the Sixth Circuit erred in deeming his third habeas petition successive under 28 U.S.C. §2244(b). Although his case presents no circuit split or legal question of broad importance, Wogenstahl says this Court should take this case to review the Sixth Circuit's application of well-settled principles to the unique facts of his case. Because this is not a court of error correction, and because the Sixth Circuit did not even err, this Court should deny Wogenstahl's petition.

STATEMENT

1. In 1991, Wogenstahl murdered Amber Garrett, a ten-year-old girl. *State v. Wogenstahl*, 150 Ohio St. 3d 571, 572 (2017). Wogenstahl was friends with Amber's mother, Peggy. One night, Peggy and Wogenstahl saw one another at a bar in Harrison, Ohio, a city in the Cincinnati area. Peggy told Wogenstahl that she left ten-year-old Amber under the supervision of Amber's sixteen-year-old brother, Eric. *Id.* at 573. Following last call, Peggy and her friends left for a Waffle House. Wogenstahl's left for the Garretts' house. *Id.* When he arrived, Wogenstahl told Eric that Peggy needed him at an apartment three blocks away. *Id.* Eric got dressed and left with Wogenstahl, locking the apartment door behind him. *Id.* Wogenstahl dropped Eric off about a block away from the nearby apartment, claiming that he did not want Peggy to see him dropping Eric off. *Id.* Wogenstahl told Eric that he would pick him up around the block. *Id.* Peggy, of course, was not at the apartment. *Id.* And when Eric emerged, Wogenstahl was gone. *Id.*

Eric walked home and arrived to find that the door was unlocked. *Id.* Concerned, he checked on his siblings. *Id.* Amber, he discovered, was not there. *Id.* Unsure about whether Amber had ever been at home that night, or whether she might instead have spent the night at a friend's house, Eric went to bed. *Id.*

Peggy reported Amber missing the next afternoon. *Id.* at 575. Amber's body was discovered three days later in Indiana, just over the Ohio border. *Id.* Someone had thrown her body down the side of a steep embankment, into an overgrown area covered with prickly bushes and weeds. *Id.* Amber had stab wounds on her neck, shoulder, chest, and armpit, and defensive wounds on her forearms. *Id.* She had also suffered blunt-force trauma to her head, consistent with being hit in the head with an automobile jack handle. *Id.* Either the stab wounds or the blunt-force trauma would have been sufficient to cause Amber's death. *Id.*

Forensic experts determined that Amber was not murdered at the site where her body was found. *Id.* The deputy coroner testified that Amber's body was likely carried there because the scratches on her body appeared to have occurred after she was killed and because her bare feet were clean and unscratched—suggesting that she had not walked. *Id.* The location where the murder actually occurred was never identified. *See id.*

2. Numerous witnesses connected Wogenstahl to Amber's murder. Two witnesses stated that they saw Wogenstahl and his car near the location where Amber's body was found. A third witness placed his car there as well. *Id.* at 574. A fourth witness, who worked the night shift at a nearby convenience store, testified

that she saw Wogenstahl driving toward Indiana with a young girl in the car with him and that, later that evening, she saw Wogenstahl return alone. *Id.* at 575. Upon his return, Wogenstahl parked his car near the convenience store's self-serve car wash and came in to buy cigarettes. *Id.* The store employee observed what appeared to be blood and dirt under Wogenstahl's fingernails. *Id.*

A jury convicted Wogenstahl of aggravated murder (with three capital specifications), kidnapping, and aggravated burglary. The trial court sentenced him to death. *Id.* at 576. Wogenstahl appealed the conviction and the sentence, to no avail. *Id.*; *State v. Wogenstahl*, No. C-930222, 1994 Ohio App. LEXIS 5321 (Ohio Ct. App. Nov. 30, 1994); *State v. Wogenstahl*, 75 Ohio St. 3d 344 (1996).

3. After being convicted, Wogenstahl filed a flurry of motions—almost all of which were eventually denied. *See* Pet.App.A-2. Among other things, Ohio courts denied several attempts by Wogenstahl to reopen his direct appeal, as well as several attempts to seek a new trial. *Id.*

Wogenstahl additionally decided to seek relief in federal court. In 1999, he filed the first of three petitions for a writ of habeas corpus. Pet.App.A-2. The District Court allowed him to conduct discovery and permitted him to file an amended petition in 2003. The amended petition was then held in abeyance while Wogenstahl exhausted his state-court remedies. Pet.App.A-2–A-3. The District Court eventually denied Wogenstahl's first petition, the Sixth Circuit affirmed, *Wogenstahl v. Mitchell*, 668 F.3d 307 (6th Cir. 2012), and this Court denied Wogenstahl's *certiorari* petition, *Wogenstahl v. Robinson*, 568 U.S. 902 (2012).

Wogenstahl filed a second habeas petition in 2018. That petition challenged the very same judgment as Wogenstahl's first habeas petition. Petitions that challenge the same judgment as an earlier petition are "second or successive," and federal law generally bars the filing of such petitions. 28 U.S.C. §2244(b)(2). But federal law permits circuit courts to authorize second or successive petitions in narrow circumstances. For example, courts need not dismiss a second or successive petition if its "factual predicate … could not have been discovered previously through the exercise of due diligence." §2244(b)(2)(B)(i). In addition, courts may permit a second or successive petition if "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." §2244(b)(2)(B)(ii). Wogenstahl claimed his second petition—which raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), alleged prosecutorial misconduct, argued for ineffective assistance, and asserted that cumulative errors resulted in a due-process violation—met that standard. *Wogenstahl*, 902 F.3d 621, 626 (6th Cir. 2018). The Sixth Circuit, over the dissent of Judge Gibbons, agreed that he made at least a *prima facie* case for coming within these exceptions. *Id.* at 629-630. It thus allowed his case to proceed. That case remains pending. *See* Pet.App.A-3, A-7 n.1.

4. Before Wogenstahl filed his second federal habeas petition, he successfully obtained permission from the Ohio Supreme Court to reopen his direct appeal for the purpose of challenging the jurisdiction of the court that originally convicted him.

State v. Wogenstahl, 145 Ohio St. 3d 1455 (2016). Wogenstahl claimed that, because there was no evidence he murdered Amber in Ohio rather than in Indiana, the trial court lacked jurisdiction over his case. *See State v. Wogenstahl*, 150 Ohio St.3d 571 (2017). Reasoning that challenges to a court's jurisdiction can be raised at any time, the Ohio Supreme Court reopened Wogenstahl's direct appeal for the limited purpose of considering his jurisdictional argument. *See id.* at 576.

The Ohio Supreme Court ultimately rejected Wogenstahl's jurisdictional challenge and affirmed his convictions and sentence. *Id.* at 581. It held that there was insufficient evidence to demonstrate whether Amber was murdered in Ohio or in Indiana. *Id.* at 577, 581. Faced with an inability to determine precisely where the murder occurred, the Ohio Supreme Court turned to Ohio Rev. Code §2901.11(D). That statute gives Ohio courts jurisdiction if it "cannot reasonably be determined" where a crime, or an element of a crime, took place. *Id.* at 577. Relying on that statute, and the fact that the evidence did not conclusively establish that Wogenstahl murdered Amber in Indiana, the Ohio Supreme Court held that the trial court properly exercised jurisdiction over the aggravated-murder charge. *Id.* at 581. Because it found that the trial court had jurisdiction, the Ohio Supreme Court concluded it was unnecessary to consider Wogenstahl's remaining claims, which were based on the assumption that jurisdiction was lacking. *Id.* at 572.

5. Having again failed to obtain relief in state court, Wogenstahl attempted to file a *third* petition for a writ of habeas corpus in federal court. In that petition—which is the one relevant to this case—Wogenstahl sought to challenge the Ohio

Supreme Court's conclusion that the trial court properly exercised jurisdiction. And, although the Ohio Supreme Court had held that Wogenstahl failed to raise any constitutional challenge to the Ohio statute on which that court based its decision, *see id.* at 583 (French, J. concurring), Wogenstahl also asserted that the statute violated his Fourteenth Amendment right to due process, Petition, R.1-1, PageID# 120–24.

Wogenstahl did not seek permission from the Sixth Circuit before filing his third habeas petition. The District Court therefore issued a show-cause order, requiring Wogenstahl to explain why the case should not be transferred to the Sixth Circuit for the purpose of determining whether Wogenstahl would be permitted to file a second or successive petition. Show Cause Order, R.5. Wogenstahl in response asserted that his third petition *was not* second or successive because it was his first petition to challenge the Ohio Supreme Court's decision confirming that the trial court had jurisdiction. Pet.App.A-9. The District Court rejected Wogenstahl's argument and transferred the case. Pet.App.A-11. To do otherwise, the District Court wrote, would open the door to additional habeas petitions whenever a state court rejected an effort, no matter how frivolous, to challenge a state court's jurisdiction. *See* Pet.App.A-10.

The Sixth Circuit unanimously deemed Wogenstahl's third petition successive, denied Wogenstahl's motion to transfer the case back to the District Court, and declined to grant him permission to file the successive petition. Pet.App.A-6–A-7. Wogenstahl's third petition, the unanimous court held, was successive because it

challenged the very same judgment Wogenstahl already challenged in his first and second petitions: the one resulting in his original conviction and sentence. Pet.App.A-6. The Ohio Supreme Court's decision confirming that the trial court had jurisdiction did not constitute a "new" judgment for purposes of §2244. *Id.* Because Wogenstahl had argued only that the Ohio Supreme Court's decision was a new judgment—he made no effort to show that his petition satisfied an exception under which a second or successive petition would be permitted, *see* §2244(b)—the Sixth Circuit denied permission to file his petition.

REASONS FOR DENYING CERTIORARI

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) generally prohibits those in state custody from filing "second or successive" habeas petitions. 28 U.S.C. §2244(b)(2). A petition is "second or successive" *only if* it challenges the same state-court judgment as an earlier petition; a second-in-time petition challenging a *different* judgment is not "second or successive" for purposes of AEDPA. *Magwood v. Patterson*, 561 U.S. 320, 332–33 (2010); *accord King v. Morgan*, 807 F.3d 154, 157, 159 (6th Cir 2015). If a petition is second or successive, a petitioner may file it only after first obtaining permission from the relevant circuit court of appeals. Section 2244(b)(2) lays out the narrow circumstances in which permission may be granted. It provides:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 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.

This case does not present a dispute about any of these legal principles. To the contrary, the Warden and Wogenstahl agree that a petition is "second or successive" only if it challenges the same judgment as an earlier petition. And Wogenstahl does not contend that his petition, if it is successive, comes within one of the statutory exceptions permitting the filing of such a petition. *See* §2244(b)(2). The *only* dispute in this case involves whether the Sixth Circuit properly applied these principles to the facts of Wogenstahl's case. Did it, in other words, correctly determine that the third petition, despite taking issue with the Ohio Supreme Court's jurisdictional determination in Wogenstahl's delayed appeal, challenged the same judgment as Wogenstahl's first two habeas petitions?

The Court should not grant *certiorari* to decide that question for two reasons. *First*, it presents a factbound request for error correction. *Second*, the Sixth Circuit did not err in deeming Wogenstahl's third petition successive.

I. Wogenstahl seeks error correction only.

Even assuming the Sixth Circuit erred in deeming Wogenstahl's petition successive, its error would not justify space on this Court's discretionary docket. This Court generally grants *certiorari* only in cases presenting important legal questions

on which the federal circuit courts or the States' high courts are split. *See* Rule 10; *Robinson v. Dep't of Educ.*, 140 S. Ct. 1440, 1442 (2020) (Thomas, J., dissenting from denial of *certiorari*). Thus, the Court nearly always declines to resolve "fact-bound" disputes of relevance only to the parties. *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). This is precisely such a case. Wogenstahl does not allege a circuit split or identify any legal dispute that would be of significance beyond this case. And the facts of his case are unique indeed. The second-or-successive issue arises here *only* because: (1) the murder occurred at an uncertain location on the border between two States; (2) the jurisdictional issue was not resolved in direct proceedings; and (3) the jurisdictional issue was resolved in a reopened appeal filed years after the criminal defendant first sought habeas relief. That unique combination of circumstances is unlikely to arise with any frequency.

True, the Court does sometimes resolve factbound disputes involving improper *awards* of habeas corpus. But improper awards of habeas corpus are uniquely disruptive to our federalist system. As this Court recognized in *Harrington v. Richter*, 562 U.S. 86 (2011), habeas relief disrupts "the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* at 103 (citation omitted). This case presents no issue of such great magnitude to our constitutional order.

II. The Sixth Circuit correctly concluded that Wogenstahl's third petition was "successive" under §2244(b)(2).

The biggest problem with Wogenstahl's plea for error correction is the absence of any error in the Sixth Circuit's decision. That court correctly held that Wogenstahl's third habeas petition is successive and barred by §2244(b).

Again, a petition is "second or successive," for purposes of §2244(b)(2), only if it challenges the same judgment as an earlier habeas petition. *Magwood*, 561 U.S. at 332–33. "A judgment of conviction includes both the adjudication of guilt and the sentence." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Magwood*, 561 U.S. at 352 (Kennedy, J., dissenting). Here, Wogenstahl's third habeas petition attacks the very same murder conviction and sentence as his first two habeas petitions. It therefore attacks the same judgment, and the Sixth Circuit properly deemed it successive. Because Wogenstahl's case does not fit any of the circumstances in which a successive petition is allowed, §2244(b)(2), the Sixth Circuit properly refused to permit him to file his third habeas petition.

Wogenstahl responds with three contrary arguments, none of which is persuasive.

First, Wogenstahl argues that the Supreme Court of Ohio made his judgment nonfinal when it reopened the appeal. Pet.12–13. That, however, is irrelevant. It is perhaps true that the Supreme Court of Ohio's reopening of Wogenstahl's appeal made his judgment nonfinal once more. *See* 28 U.S.C. §2244(d)(1)(A); *Jimenez v. Quarterman*, 555 U.S. 113, 120–21 & n.4 (2009); Pet.12–13. But because the court did not alter the judgment in the reopened appeal, Wogenstahl remains in custody

under the same judgment he challenged in his first and second habeas petitions. His third petition attacks that same "judgment," and is thus successive.

Second, Wogenstahl says that the panel contradicted its own court's precedent. In the Sixth Circuit, Wogenstahl says, second habeas petitions filed after a remedial appeal—in other words, a state-court appeal ordered by a federal habeas court—are not deemed second or successive. *See Storey v. Vasbinder*, 657 F.3d 372, 377–78 (6th Cir. 2001)). And, he says, that is true even if the remedial appeal does not disrupt the underlying judgment. *Id.* According to Wogenstahl, the same logic should apply when a state court reopens an appeal on its own instead of doing so in response to an order by a federal court. Pet.10–11.

If Wogenstahl were right that the Sixth Circuit below contradicted binding circuit precedent in a non-binding order, that would be all the more reason *not* to hear his case: the Sixth Circuit would already have the rule he wants, and this case would present merely a one-off misapplication. In any event, Wogenstahl is wrong. *Storey* does indeed allow petitioners who win a remedial appeal through federal habeas proceedings to file another habeas petition once that appeal is concluded, *even if* the remedial appeal does not alter the conviction or the sentence. *Storey*, 657 F.3d at 377–78. But *Storey*'s allowance for a second petition in these circumstances rests on equitable considerations unique to the context of remedial appeals ordered by federal courts. The Sixth Circuit explained that it would be inequitable to deem such petitions second or successive, as that would bar successful habeas petitioners from raising "nonfrivolous claims developed in" their remedial appeals. *Storey*, 657

F.3d at 378 (quoting *Slack v. McDaniel*, 529 U.S. 473, 487 (2000)). That logic does not apply in cases where the state court reopens the appeal on its own. There is nothing inequitable about denying *unsuccessful* habeas petitioners a second bite at the habeas apple based on a re-opened state-court appeal addressing an issue that could have been, but was not, raised in the original state-court proceedings. This case involves the latter scenario.

Finally, Wogenstahl argues that subject-matter jurisdiction can be raised at any time. Thus, he says, he can raise his habeas challenge to the state court's jurisdiction at any time. Pet.15–16. The conclusion does not follow. It is true, both in Ohio courts and federal courts, that subject-matter jurisdiction cannot be waived or forfeited. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009); *Pratts v. Hurley*, 102 Ohio St. 3d 81, 83 (2004). But a federal habeas petition challenging a state court's jurisdiction still must be properly filed. And a second or successive petition is *not* properly filed unless it qualifies for an exception under §2244(b)(2). Wogenstahl's petition is successive and does not qualify for any exception.

III. Wogenstahl's request that the Court grant, vacate, and remand for reconsideration of his case in light of *Magwood* is improper.

Wogenstahl asks this Court, in the alternative, to "grant, vacate, and remand for reconsideration … in light of *Magwood*." The Court should reject that request. The Court sometimes grants, vacates, and reverses cases for reconsideration in light of an intervening case. *See, e.g.*, *Heidari v. Barr*, No. 20-140, 2020 U.S. LEXIS 5507, at *1 (Nov. 16, 2020). It makes little sense to remand for consideration of *Magwood v. Patterson*, 561 U.S. 320, however, as that case was decided about a

decade ago, meaning the Sixth Circuit already made its ruling in light of *Magwood*. A remand is especially unwarranted because *Magwood* has no bearing on this case. *Magwood* held that a second-in-time habeas petition challenging an *altered* judgment—there, an alteration to a sentence—is not second or successive. *Id.* at 326, 342. That principle is not the subject of any dispute in this case, because the Supreme Court of Ohio *did not* alter Wogenstahl's conviction or sentence. Thus, there is no reason to think a remand for a greater discussion of *Magwood* would accomplish anything.

To the extent Wogenstahl means to seek a summary reversal, the Court should reject his request. As the previous section showed, the Sixth Circuit's decision below was *at least* arguably correct. That defeats any request for a summary reversal, as "the strong medicine of a summary disposition" is reserved for circumstances "in which … the decision below is clearly in error." *Tharpe v. Sellers*, 138 S. Ct. 545, 551 (2018) (Thomas, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *accord Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (citation omitted).

CONCLUSION

The Court should deny Wogenstahl's petition for writ of *certiorari* as well as his request that the Court vacate the Sixth Circuit's decision and remand for further proceedings.

Respectfully submitted,

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