

In the Supreme Court of the United States

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JEFFREY WOGENSTAHL,

*Petitioner,*

v.

TIM SHOOP, WARDEN,

*Respondent.*

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

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REPLY BRIEF OF THE PETITIONER

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## REPLY OF THE PETITIONER

### **I. Wogenstahl's third-in-time habeas petition is an original action which must be heard in the first instance by the district court.**

Wogenstahl highlights again that the Ohio Supreme Court reopened his direct appeal from the trial court's original death penalty judgment. *State v. Wogenstahl*, 145 Ohio St. 3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. Thereby, the Ohio Supreme Court vacated his execution date to address new, first-in-time issues as to whether the trial court ever had original subject matter jurisdiction to hear his case in the first instance. The Ohio Supreme Court's affirmation of his conviction and sentence was a merit's ruling on the jurisdictional issue in Wogenstahl's reopened direct appeal and constitutes a new judgment. *State v. Wogenstahl*, 150 Ohio St. 3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, at ¶ 47.

Contrary to the court below, whether a trial court has subject matter jurisdiction to convict and sentence an individual to death is not a "singular, narrow issue." *In re Wogenstahl*, No. 19-4024, p. 6 (6th Cir. May 12, 2020). Wogenstahl may have raised a singular issue, but there is perhaps no greater offense to our constitution than the execution of a member of society that has been unconstitutionally convicted and sentenced. And thus, this case presents an "issue of [ ] great magnitude to our constitutional order." Appellee's Brief in Opposition at p. 9. (hereinafter "BIO")

The Warden seeks to have this Court deny Wogenstahl certiorari because "improper awards of habeas corpus are uniquely disruptive to our federalist system." BIO p. 9. The Warden relies on *Richter* to argue that "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 the state sovereignty to a degree matched by few exercises of federal judicial authority.” BIO p. 9, *quoting Harrington v. Richter*, 562 U.S. 86, 103 (2011). The question before this Court is not whether Wogenstahl is *entitled to habeas corpus relief*. The question before this Court is whether Wogenstahl may “pursue habeas review of [a] ‘new judgment’ pursuant to 28 U.S.C. § 2254.” *See* Petition for Writ of Certiorari, Question Presented; *see also Magwood v. Patterson*, 561 U.S. 320 (2010).

## **II. Wogenstahl’s Petition is not a Successive Petition.**

The Warden argues that “[b]ecause 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.” BIO p. 10. Although Wogenstahl believes that he can meet the standard set forth in 28 U.S.C. § 2244, *see infra*, Section III, the reason Wogenstahl did not belabor an argument on that point in the lower court is because the facts were not that of a petitioner requesting leave to file a third/successive petition. *See* BIO p. 8. The facts were that of a petitioner filing a third-in-time petition pursuant to 28 U.S.C. § 2254 asserting new claims that are based upon a new Ohio Supreme Court direct appeal judgment. *See Magwood v. Patterson*, 561 U.S. at 341-42 (“[W]here...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.”). Because this is an original action that follows from a new state court direct appeal judgment, no authorization is necessary. *See Id.*

In its Brief in Opposition, the Warden argues that “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 petition.” (emphasis added) BIO pp. 10-11. The Warden takes the position that *Storey’s* logic allowing for a second petition is inapplicable to the case at hand. *Storey v. Vasbinder*, 657 F.3d 372 (6th Cir. 2001). The Warden argues that in *Storey*, the court reasoned that it would be inequitable to deem petitions filed after the conclusion of a remedial appeal through federal habeas proceedings “second or successive, as that would bar successful habeas petitioners from raising ‘nonfrivolous claims developed in’ their remedial appeals.” BIO p. 11 (*citing Storey*, 657 F.3d at 378). The Warden concludes that the logic set forth in *Storey* “does not apply in cases where the state court reopens the appeal on its own” because there “is nothing inequitable about denying unsuccessful habeas petitioners a second bite at the habeas apple...addressing an issue that could have been, but was not, raised in the original state-court proceedings.” BIO p. 12 (emphasis removed).

Wogenstahl is not an unsuccessful habeas petitioner raising a frivolous claim that was denied in a motion to re-open without further consideration of the merits of the claim. To the contrary, he is a habeas petitioner raising a claim developed on direct appeal that the Ohio Supreme Court necessarily found to be non-frivolous when it reopened the direct appeal, ordered full briefing, held oral argument, and issued a merits decision on whether the trial court had subject matter jurisdiction to try, convict, and sentence Wogenstahl to death. See *Ohio v. Wogenstahl*, 150 Ohio St.3d

571, 2017-Ohio-6873, 84 N.E.3d 1008. If Wogenstahl's claim had been clearly without merit, the Ohio Supreme Court would not have granted leave to reopen his direct appeal and decide the issue on its merits.

Further, the Warden's comment that this Court should deny certiorari, saying Wogenstahl is attempting to take a second bite at the habeas apple because the subject matter jurisdiction issue could have been raised in the original appeal, fails to comprehend the gravity of the issue upon which Wogenstahl sought habeas relief. *See* BIO p. 12. There is perhaps no greater constitutional injustice than to execute a man that has been sentenced to death by a court that lacked jurisdiction to do so.

Where a petitioner has been convicted and sentenced to death by a court that lacked subject matter jurisdiction, and he attempts to correct such error through federal habeas, the same logic set forth in *Storey* allowing for the filing of another petition applies. To conclude otherwise would be inequitable, as it would bar Wogenstahl from raising a "nonfrivolous claim[] developed in" their direct appeal. *Storey*, 657 F.3d at 378 (quoting *Slack v. McDaniel*, 529 U.S. 473, 487 (2000)). Wogenstahl might have raised a single issue, that of subject matter jurisdiction, but it is one of enormous importance. In addition, subject matter jurisdiction can never be waived or forfeited. Thus, the issue is not frivolous, nor waived.

Wogenstahl need only demonstrate that the Ohio Supreme Court's decision in his new direct review constituted a new judgment. He submits to this Court that he has done just that. Meriam Webster defines the word judgment as "a formal decision given by a court." Had the Ohio Supreme Court found the jurisdictional issue to lack

merit and simply denied his motion to reopen, Wogenstahl concedes that those circumstances would not constitute a new judgment. But that is not what happened here. The Ohio Supreme Court granted Wogenstahl's motion to reopen his direct appeal, ordered full briefing, held oral arguments, and issued a "formal decision"—the exact sequence of events which would irrefutably constitute a judgment in the first instance in any other death penalty direct appeal.

Indeed, the Ohio Supreme Court rendered Wogenstahl's original conviction and sentence from 1996 "nonfinal" in the eyes of the law when it reopened Wogenstahl's direct appeal. *See Jimenez v. Quarterman*, 555 U.S. 113, 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."). Then, when the Court reaffirmed the original trial court judgment, the Court thereby created a "new" judgment from which Wogenstahl would ultimately petition the federal district court. Thus, because this was a new direct appeal judgment, *Storey* is persuasive on this issue. *Storey* specifically allows for an original habeas action to be filed from new, direct appeal "judgments." *Id.*

Moreover, the Warden's logic here is faulty. If the requirement to file a timely "second" habeas petition raising the issue of subject matter jurisdiction is that the petitioner must win on the merits of that claim in state court, then there would never be a need to file a second habeas petition, let alone a "timely" one. It is just for situations like Wogenstahl's, where his initial motion to reopen was granted, but he



lost on the merits after full briefing and consideration of the issue, that pursuing habeas relief must be available to correct the clearly erroneous state court judgment.

Therefore, the Warden's argument that Wogenstahl's petition challenging the state court's jurisdiction must be properly filed, and that his petition is not properly filed because he cannot meet any of the exceptions put forth in § 2244(b)(2), effectively means that Wogenstahl can never have federal habeas review on the issue of subject matter jurisdiction unless it was raised in his first habeas petition. To deny Wogenstahl habeas review on whether the trial court had subject matter jurisdiction to convict him of murder and sentence him to death would be a great inequity and is contrary to this Court's precedent. *See Magwood v. Patterson*, 561 U.S. 320 (2010).

### **III. Wogenstahl's Petition meets the standard in 28 U.S.C. § 2244.**

The Warden argues that Wogenstahl's "case does not present a dispute about any of [the] legal principles" set forth in 28 U.S.C. § 2244. BIO p. 8. The Warden further argues that "Wogenstahl does not contend that his petition...comes within one of the statutory exceptions permitting the filing" of his petition. *Id.* As stated above, Wogenstahl did not belabor an argument on that point because the facts are not of a petitioner requesting leave to file a third/successive petition. The facts are that of a petitioner filing a third-in-time petition pursuant to 28 U.S.C. § 2254 asserting new claims that are based upon a new Ohio Supreme Court direct appeal judgment. *See Magwood*, 561 U.S. at 341-42 ("[W]here...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.").

Wogenstahl asserts that he can meet the requirements found in § 2244 because the issue raised in the state court revolved around whether the Ohio courts had subject matter jurisdiction over the homicide offense at issue. Subject matter jurisdiction cannot be waived or forfeited and may be raised at any time. See, e.g., *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.”) (emphasis added). Further, there is nothing in 28 U.S.C. § 2244(b) negating the rule that jurisdictional issues can be raised at any time and cannot be waived. If Congress had intended to prevent jurisdictional issues from being raised at a date after the first, original judgment was litigated in federal habeas, it would have expressly stated as such.

In addition, Wogenstahl can prove that “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.” See 28 U.S.C. § 2244(b)(2)(B)(ii). If the trial court did not have subject matter jurisdiction over the homicide offense, Wogenstahl can, in fact, prove definitively that no reasonable factfinder would have found him guilty of the capital murder in this case. Thus, Wogenstahl can, in the alternative, meet the standard found in 28 U.S.C. § 2244(b).

#### IV. Conclusion.

This Court should grant Petitioner Jeffrey Wogenstahl's petition for writ of certiorari and transfer the case back to the district court to address the merits of the petition in the first instance. In the alternative, this Court should allow this petition to proceed in the district court as a successive petition filed pursuant to 28 U.S.C. § 2244(b). This is a capital case; more process is due, not less. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). This Court should allow this issue to be heard.

Respectfully Submitted,

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