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

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

Jeffery A. Wogenstahl's Merit Brief

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I. Procedural Posture.

On May 3, 2017, Petitioner Jeffrey A. Wogenstahl filed a petition for writ of habeas corpus pursuant to 28 U.S.C § 2254 challenging his 1993 convictions and resulting death sentence. (ECF 1, 7).[1] Wogenstahl had planned to file with his petition, or shortly thereafter, a motion to exempt him from the requirements of 28 U.S.C. § 2244 (b); however before he could file this motion, on May 4, 2017, the Magistrate Judge *sua sponte* ordered that the petition be transferred to the Sixth Circuit. The Magistrate Judge concluded that Wogenstahl's petition was a successor petition as defined in 28 U.S.C. § 2244(b).

On May 16, 2017, Wogenstahl filed Objections to the Magistrate Judge's Order. (ECF 9). On May 17, 2017, the District Court recommitted this case and the underlying matter to the Magistrate Judge. (ECF 10). On May 18, 2017, Wogenstahl asked the Magistrate Judge for additional briefing. (ECF 11). This request was denied without prejudice for failure to comply with S.D. Ohio R. 7.3. (ECF 12). On May 22, 2017, Wogenstahl filed his unopposed motion for additional briefing; said motion was granted on the same date via notation Order. (ECF 16).

II. Introduction.

This is a case where the justice system failed. The prosecution cheated: they suborned perjury and misled the jury and the trial court with unfounded scientific evidence. The State also hid numerous pieces of exculpatory evidence

[1] Wogenstahl's habeas petition was refiled.

that would have made a difference at Wogenstahl's trial, particularly in light of the other errors that are laid-out in Wogenstahl's Habeas Petition and attached exhibits. (*See* ECF 7. 8). The following evidence is non-exhaustive list of what has been uncovered in this case since trial in 1993:

- The prosecution suborned the perjured testimony of Eric Horn, the victim's brother. Horn testified at trial that he'd never seen, nor sold, marijuana; however Horn was picked-up and prosecuted (by the same prosecutor's office) for trafficking in marijuana just months prior to Wogenstahl's trial;

- At trial, Special Agent Douglas Deedrick testified that a hair found in the victim's panties belonged to Wogenstahl. In a letter not written until 2013, the Federal Bureau of Investigation admitted that no scientific basis existed for Special Agent Deedrick's conclusion;

- Both the victim's mother, Peggy Garrett's, and brother, Eric Horn's, memories were improperly refreshed via hypnosis by a Patrolman with the Harrison Police Department;

- The victim 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*";

- The police received reports that the victim's mother may have sold the victim to an individual to whom she owed money for drugs;

- The victim's brother had stated that he hoped the victim was dead and lied about his whereabouts on the evening in question;

- Bruce Wheeler, the State's jailhouse informant, lied when he testified that he did not receive any consideration for his testimony against Wogenstahl;

- Wogenstahl drove a brown sedan at the time of the murder. An eyewitness saw a small red vehicle at the time of the victim's disappearance in the immediate area where her body was found;

- The victim's mother frequently held parties at her residence at which illegal drugs where rampant and the mother permitted the male attendees to inappropriately touch the victim;

- In May 1991, the victim had been attacked by a male (Wogenstahl was incarcerated during that time);

- In the summer prior to her death, an adult male stalked the victim including standing outside her bedroom window;

- The victim's brother, Justin Horn lied to the police concerning his whereabouts at the time of the victim's disappearance and murder;

- The blood found in Wogenstahl's apartment was consistent with his testimony that the source of the blood was his cat;

- The prosecution proceeded on the theory that Wogenstahl abducted the victim from her bed in the early morning hours. However, when her body was found, the victim was wearing her "church clothes" instead of her pajamas.

Wogenstahl's trial counsel also failed in effective advocacy. Trial counsel failed to challenge much of the evidence that was presented at trial. Specifically, had they presented the expert testimony that is presented in the pending habeas petition, that testimony would have completely undermined the State's case at trial. *See* (ECF 8, Exhibit 80 (Report of Harvey G. Shulman,

Ph.D., who criticizes the State's eyewitness accounts presented at trial), 82 (Affidavit of Carl J. Schmidt, M.D., M.P.H., who's opinions contradict the State's entire theory of the case at trial), Exhibit 83 (Report of Gary A. Rini, M.F.S., who found that "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."), and Exhibit 88 (Affidavit of Bob Stinson, Psy.D., J.D., LICDC-CS, ABFP, who spoke to compelling mitigation evidence that was omitted at trial)). (PAGEID# 1033-43, 1144-55).

Trial counsel also failed to interview witnesses ahead of trial that would have provided them with information that would have rebutted and impeached the State's witnesses at trial. (*See generally,* ECF 8, Exhibits 13a, 13b, 14 – 33, 35 – 73, 76, 77, 79 – 83, and 86 – 93, PAGEID# 830-88, 916-1002, 1020-23, 1026-1065).

As laid-out below, Wogenstahl's habeas petition is not an abuse of the writ. The petition alleges claims that were not ripe during his initial habeas proceedings. In the alternative, any failure for not bringing any of these claims sooner, does not mandate transfer of this petition, as Wogenstahl can prove both "cause" and "prejudice" to excuse any failures. Again, in the alternative, transfer is not mandated because a fundamental miscarriage of justice has occurred in this case.

III. Wogenstahl Did not Abuse the Writ.

As will be shown below, a numerically second petition is not properly termed a "second or successive" petition to the extent it asserts claims whose predicates arose after the filing of the original petition. *In re. Jones,* 625 F.3d 603, 605 (6th Cir. 2010). *See also, In re Brock,* 2010 U.S. App. LEXIS 27235, *3 (6th Cir. 2010) (remanding claim after finding that petitioner "does not need our authorization to proceed with his claim . . . because it is not clear that he could have raised the claim in his previous habeas petition.").

"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, 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)).

Although Wogenstahl has previously filed a habeas petition, his pending habeas petition should not be evaluated under the rules for a "second or successive" petition. His petition is properly before the District Court as a second-in-time petition, and therefore should not be transferred to the Sixth Circuit, because it asserts claims whose predicates arose after the filing of the first petition. *In re Jones*, 652 F.3d at 605.

A. The Supreme Court has ruled that not every second petition is a successive petition.

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. Quaterman*, 551 U.S. 930, 943-44 (2007) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998)). The Supreme Court "has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgement already challenged in a prior § 2254 application." 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).

Moreover, the Supreme Court has recognized that pragmatic reasons support allowing a petitioner to file certain claims in a second-in-time habeas petition instead of requiring that all claims, even legally premature ones, be brought in the first petition. "'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' or vindicate any other policy or federal habeas law." *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) (brackets

omitted) (quoting *Panetti*, 551 U.S. at 946). It would waste judicial resources if petitioners had to plead, in the initial petition, grounds for relief that had no chance of success, just to have them be dismissed. *See id.* ("[N]o useful purpose would be served by requiring prisoners to file *ex post facto* claims in their initial petition as a matter of course, in order to leave open the chance of reviving their challenges in the event that subsequent changes to the state's parole system create an *ex post facto* violation.").

In *Martinez-Villareal,* the same facts supporting the petitioner's *Ford* claim - his competency to be executed - existed at the time his first petition was filed in 1993. 523 U.S. at 640. Even though the petitioner filed a subsequent petition over four years later - alleging the same facts regarding his competency to be executed - the Supreme Court found the petition was not a second or successive petition under § 2244(b) because the claim raised was newly ripe. *Id.* at 645; *see also Panetti v. Quarterman,* 551 U.S. 930, 946 (2007) (noting that "[i]nstructing 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").

B. The Sixth Circuit has also ruled that not every second petition is a successive petition.

The Sixth Circuit has applied the principles articulated in *Martinez-Villareal* and *Panetti*, explaining that "a numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose predicates arose after the filing of the original petition." *In re Jones,* 652 at

605 (finding petition was not a second-or-successive petition when changes in state law took effect two years after initial habeas petition filed); *see also Storey v. Vasbinder*, 657 F.3d 372, 376 (6th Cir. 2011) (noting that whether a petition is second or successive within the meaning of § 2244(b) does not depend on whether the petitioner had filed a previous application for habeas relief); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) ("The Supreme Court has made clear that not every numerically second petition is 'second or successive' for purposes of AEDPA."); *In re Brock,* No. 092346, 2010 U.S. App. LEXIS 27235, *2 (6th Cir. 2010).

C. The Sixth Circuit Applies an Abuse of the Writ Standard to Determine if a Second Petition Must Satisfy the Requirements Contained in 28 U.S.C. 2244(b).

Instead of a bright line rule where a second petition is automatically a successor petition, the Supreme Court applies the "equitable principles" that "have traditionally governed the substantive law of habeas corpus" to construe AEDPA's provisions. *Holland v. Florida,* 560 U.S. 631, 646 (2010) (internal quotation marks omitted). Consistent with that approach, the Sixth Circuit employs the abuse-of-the-writ doctrine to determine whether a petitioner's numerically second petition raising newly viable claims is a second or successive petition under 28 U.S.C. § 2254(b). *See Bowen*, 436 F.3d at 704; *In re Marsch,* 2006 U.S. App. LEXIS 31720, *6 (6th Cir. 2006); *In re Landrum,* 2017 U.S. App. LEXIS 6035. *4 (6th Cir. 2017).

Abuse of the writ occurs when "'a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application,

in the hope of being granted two hearings rather than one…'" *Bowen*, 436 F.3d at 704 (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)). A subsequent petition is subject to § 2244(b) when it raises a claim that could have been raised in the initial petition but was not, "either due to deliberate abandonment or inexcusable neglect." *Id.* (citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

The Supreme Court in *McCleskey* laid-out a two-part test for abuse of the writ: "First, the subsequent petition must allege a new ground, factual or otherwise. Second, the applicant must satisfy the judge that he did not deliberately withhold the ground earlier or 'otherwise abuse the writ.'" *McCleskey*, 499 U.S. at 486.

If the government carries its burden to demonstrate that the petition is "successive," the burden to disprove abuse then shifts to petitioner. *McCleskey,* 499 U.S. at 494. As the Supreme Court stated in *McCleskey*:

> To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard.

Id.

D. Wogenstahl's Petition Does Not Constitute an Abuse of the Writ.

Courts conduct a claim by claim analysis when assessing whether a second petition satisfies 28 U.S.C. 2244(b). *In re Bowling,* 2007 U.S. App. LEXIS 30397, *7-*10 (6th Cir. 1997). In that case, the petitioner raised five

claims for relief in his later petition. *Id.* The Court determined that three of the five claims were not subject to the § 2244(b) conditions. *Id.* at * 10.

Wogenstahl's petition contains four claims for relief. This Court should assess each claim independently for purposes of assessing the applicability of § 2244(B).

1. Wogenstahl's claims were not ripe at the time his first habeas petition was filed.

The filing of Wogenstahl's pending petition was prompted by documents that he received in the course of litigation *after* the completion of his initial habeas petition. He pursued Freedom of Information Act requests as well as state public records requests. The latter resulted in a mandamus action being filed in the Ohio Supreme Court which the parties resolved after court ordered mediation. *See State ex rel. Office of the Ohio Public Defender v. Harrison Police Dept.,* Ohio Supreme Court Case No. 16-0410 ("post federal habeas litigation"). It was not until the Harrison Police Department allowed counsel (as a result of that post federal habeas litigation) to view and copy the entire police file in this case that the following claims for relief, and the evidence supporting them, became available and/or ripe. Wogenstahl is not required to anticipate or assume that the State of Ohio or its agents are illegally withholding exculpatory evidence. Wogenstahl's petition was filed within one year of obtaining these documents.

This is not abuse of the writ, since (1) Wogenstahl's subsequent, pending petition alleges new grounds for relief and (2) Wogenstahl did not deliberately

withhold these grounds. Wogenstahl was prevented from raising these claims, and the facts that they rely upon, sooner because of the prosecution's deliberate withholding of this evidence until May, 2016, when the prosecution was *finally* forced to give Wogenstahl the evidence now pled.

a. First Claim for Relief, ¶¶*84 - 235*

The prosecution failed to provide trial counsel with exculpatory, material information. The prosecution has a constitutional obligation to disclose evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83, 86 (1963); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A rule declaring "'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668 (2004). Constitutional error results "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Wogenstahl supported the first claim for relief with Exhibits 1 - 79, 81, 86, and 87. He initially obtained the following exhibits (i.e. *Brady* evidence) in his post federal habeas litigation: **Exhibits 13a, 13b, 14 – 33, 35 – 73, 76, 77, 79, 81, 86, and 87**. This *Brady* evidence was only finally turned over to Wogenstahl when the State was forced (through litigation in the Ohio Supreme Court) to allow Wogenstahl to view and copy the entire police file. This did not occur until May 3, 2016, well after Wogenstahl's first habeas had concluded. Thus, the claims now raised were not ripe before that date, since Wogenstahl

had no way, and no duty, to obtain this exculpatory information. *See* ECF 9, PAGEID 1176-83.

Because the factual basis for this claim for relief was not available at the time of his initial habeas proceedings, this specific *Brady* claim could not have been raised in his initial habeas proceedings, and therefore this claim is not second or successive. *See Bowling*, 2007 U.S. App. LEXIS 30397 at *7-10; *Bowen,* 436 F.3d at 704. Filing of this ground for relief is not an abuse of the writ.

b. Second Claim for Relief, ¶¶*236 - 328*

The prosecution knowingly adduced false testimony, failed to correct prosecution witness testimony the prosecutor knew to be false, and engaged in inaccurate argument. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and violates the Fourteenth Amendment. *Giglio v. United States,* 405 U.S. 150, 153 (1972); *United States v. Agurs*, 427 U.S. 97, 103 (1975).

Wogenstahl supported this claim for relief with Exhibits 1 - 79, 81, 86, and 87. He initially obtained the following exhibits in his post federal habeas litigation: **Exhibits 13a, 13b, 14 – 33, 35 – 73, 76, 77, 79, 81, 86, and 87**. Because the factual basis for this claim for relief was not available at the time of his initial habeas petition proceedings, it could not have been raised in his initial habeas proceedings, and therefore this claim is not second or successive. *See Bowling*, 2007 U.S. App. LEXIS 30397 at *7-10; *Bowen,* 436 F.3d at 704. Filing of this ground for relief is not an abuse of the writ.

c. Third Claim for Relief, ¶¶329 - 390

Wogenstahl was denied the right to effective assistance of counsel in all phases of his trial. A defendant is denied the effective assistance of counsel if counsel's performance was deficient and the defendant was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Wogenstahl supported this claim for relief with Exhibits 13a – 83 and 86 – 95. He initially obtained the following exhibits in his post federal habeas litigation: **Exhibits 13a, 13b, 14 – 33, 35 – 73, 76, 77, 79 – 83, and 86 - 93**. Because a determinative amount[2] of evidence establishing the factual basis for this claim for relief was not previously available at the time of the initial habeas proceedings, this claim could not have been credibly raised in those proceedings, and therefore this claim is not second or successive. *See Bowling*, 2007 U.S. App. LEXIS 30397 at *7-10; *Bowen,* 436 F.3d at 704. Filing of this ground for relief is not an abuse of the writ.

d. Fourth Claim for Relief, ¶¶391 – 398

To the extent that the individual errors identified in Wogenstahl's habeas petition do not warrant the granting of habeas relief, the combined prejudice of two or more of the claims warrant the granting of relief. *See Taylor v. Kentucky*, 436 U.S. 478, 487-88 & n. 15 (1978)(deciding cumulative effect of error violated

[2] Some of the evidence that is pled as *Brady/Giglio* evidence in the First and Second Claims for Relief is alternatively pled in the Third Ground for Relief. If this Court deems that any of this *Brady/Giglio* evidence could have been, or should have been, acquired by trial counsel, then trial counsel was ineffective for failing to do so.

due process); and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)(consideration of prosecutorial misconduct in context of entire trial).[3]

The First, Second, and Third Claims for Relief are dependent on facts and exhibits not previously available during the prior habeas proceedings. For example, the claims raised in Claims 1(C), 2(F), and 3(A) were specifically premised upon a letter that Wogenstahl did not receive from, and was not written by, the FBI until August, 2013, almost one year *after* the United States Supreme Court denied his petition for certiorari from his first habeas petition. Wogenstahl cannot be faulted for not bringing these new claims any earlier: "[i]n short, a claim is 'unripe' when the events giving rise to it have not yet occurred." *See In re Jones*, 652 F.3d at 605-06; *see also In re Crowe*, 2013 U.S. App. LEXIS 26407, at *4 (6th Cir. 2013) (same); see also *In re Owens*, 525 F.App'x 287, 290 (6th Cir. 2013) (same).

Consequently, this claim for relief also could not have been raised in the prior habeas proceedings and is not an abuse of the writ.

2. Failure to raise these claims sooner should be excused because Wogenstahl can demonstrate cause and prejudice.

In the alternative, for any evidence that this Court deems was available prior to this current filing, Wogenstahl submits that prior to the United States Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012)

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[3] Wogenstahl recognizes that the Sixth Circuit has held that cumulative error cannot be the basis for granting relief pursuant 28 U.S.C. § 2254(d). *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). However, the Supreme Court has yet to address that issue in the context of § 2254(d). In addition, should this Court grant relief on two or more *procedurally defaulted* claims, the holding in *Lorraine* will be inapplicable.

and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), there was no procedural mechanism for Wogenstahl to obtain relief, even assuming he arguably had some of the evidence that he now asks this Court to consider. Thus, Wogenstahl can demonstrate "cause and prejudice" for any failure to raise these claims sooner. *McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991).

As the Sixth Circuit explained in *Moore v. Carlton*, 74 F.3d 689 (6th Cir. 1996):

> Generally, a petitioner must show both cause and actual prejudice to excuse abuse of the writ, *McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991), which is essentially the same standard as "cause and prejudice" for excusing procedural defaults under *Wainwright v. Sykes*, 433 U.S. 72 (1977). *McCleskey*, 499 U.S. at 493. To fulfill the "cause" requirement, Moore must show "some objective factor external to the defense impeded counsel's efforts" to raise the claim in the earlier federal petition. *Id.* Then, he had to show 'actual prejudice' resulting from the errors of which he complains. *Id.* at 494 (citation omitted).

Moore, 74 F.3d at 691.

a. Cause and Prejudice under Martinez v. Ryan.

In *Martinez*, the Supreme Court ruled, for the first time, that a habeas petitioner who demonstrates that he was denied the effective assistance of initial-review state post-conviction counsel has established cause to excuse the procedural default of a claim of ineffective assistance of trial counsel:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 132 S.Ct. at 1320.

The petitioner must demonstrate deficient performance and prejudice arising from the deficient performance under the usual standards set out in *Strickland v. Washington*, 466 U.S. 668, 669 (1984). Furthermore, the petitioner must demonstrate that his claim is substantial, "which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at 1318-19. In addition, while *Martinez* only dealt with claims of ineffective assistance of trial counsel, the logic of the ruling extends to other types of claims, including the suppression of favorable evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *See Martinez*, 132 S.Ct. at 1321 (Scalia, J., dissenting).

b. Martinez applies to Ohio's post-conviction framework.

Martinez is applicable to Ohio's post-conviction framework. The Sixth Circuit has not yet definitively decided whether the *Martinez/Trevino* exception applies to Ohio petitioners. However, the Supreme Court's holding in *Trevino v. Thaler* leads to the inescapable conclusion that the *Martinez/Trevino* exception applies to Ohio petitioners. 133 S. Ct. 1911, 1921 (2013). In *Trevino*, the Supreme Court held that the rule of *Martinez* will apply if the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal[.]" *Trevino*, 133 S. Ct. at 1921. Ohio's state procedural framework is set-up exactly this way.

Ohio's procedural framework clearly directs that state post-conviction proceedings outlined in Ohio Rev. Code § 2953.21 *et seq*. are the preferred, if not exclusive, means for raising claims of the denial of the effective assistance of counsel that are dependent on evidence *dehors* the record. The standard practice dictated by years of court rulings is that claims of ineffective assistance of trial counsel dependent on evidence *dehors* the record must be litigated in post-conviction. *See State v. Smith*, 477 N.E.2d 1128, 1131 (1985) (When an Ohio post-conviction claim cannot fairly be decided without resort to evidence outside the record, *res judicata* cannot be a bar in state court.); *State v. Cole*, 443 N.E.2d 169, 171 (1982) (same); *see also White v. Mitchell*, 431 F.3d 517, 526-27 (6th Cir. 2005), *cert. denied*, 549 U.S. 1047 (2006); *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001); *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005).

It is also clear that Ohio's procedural framework fails to provide a meaningful opportunity to litigate, on direct appeal, claims of ineffective assistance of counsel dependent on evidence *dehors* the record of trial. This is especially true in death penalty cases where the record is voluminous and the need to investigate evidence *dehors* the record is great. Raising a claim of ineffective assistance of trial counsel requires a new lawyer, the ability to investigate outside of the trial court record, and sufficient time to develop the claim. *Trevino*, 133 S. Ct. at 1921. However, under Ohio law, a pre-appeal motion for a new trial claiming ineffective assistance of counsel must generally

be filed within fourteen days of the verdict. Ohio. R. Crim. P. 33(B); Ohio. R. App. P. 4(B)(3).

Fourteen days is not even enough time to get a copy of the trial transcript, much less conduct an adequate mitigation or fact investigation in a capital case. Furthermore, the framework under Texas law that the Supreme Court found inadequate in *Trevino* allowed thirty days for a pre-appeal motion for a new trial. *Trevino*, 133 S.Ct. at 1918. Ohio's framework does not even allow for half as long as the Texas framework. An adequate capital post-conviction investigation simply cannot be conducted in two weeks. The current prevailing professional norms for collateral counsel are reflected by the A.B.A. *Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases* (2003), Guideline 10.15.1, reprinted in 31 Hofstra. L. Rev. 913, 1079; *c.f. Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The A.B.A. Guidelines require capital post-conviction counsel to expend "enormous amounts of time, energy, and knowledge" in representing the petitioner. Commentary to Guideline 10.15.1, reprinted in 31 Hofstra. L. Rev. 913, 1085 (2003). With respect to investigation and preparation, the prevailing professional norms place a heavy burden on collateral counsel, requiring initial review post-conviction counsel to conduct two parallel tracks of investigation: one involving reinvestigation of the underlying case and one involving the client's life history for potential mitigation. *Id.* at 1085-86. As a result, *Trevino* indicates that *Martinez* clearly applies to Ohio.

In addition, Ohio's Post Conviction Procedures Statute states: "Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section *is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case* . . . ." Ohio Rev. Code 2953.21(J)(emphasis added). Thus "Ohio Rev. Code Ann. § 2953.21(K), the state's post-conviction statute, provides the exclusive remedy for collaterally attacking a criminal conviction." *Hanna v. Ishee*, 694 F.3d 596, 613 (6th Cir. 2012). The Ohio Legislature designated Ohio's post-conviction procedures as the "exclusive remedy" for collaterally challenging the constitutional validity of a conviction and sentence. It is not just the preferable method, but the exclusive method. Because it is the exclusive method for collaterally challenging the constitutional validity of a conviction or sentence, Ohio's system is the same as the Arizona system addressed in *Martinez* and the holdings of *Martinez* fully apply to Ohio cases.

Suggesting that death row prisoners have the option of ignoring the clear language of the Ohio Rev. Code § 2953.21(J), making post-conviction procedures the exclusive remedy for challenging constitutional violations, and employing the less effective and less appropriate vehicle of a motion for a new trial to vindicate constitutional rights, is illogical and impractical. Such a suggestion ignores the reality of the practice in Ohio where all prisoners employ the post-conviction procedures to collaterally challenge their convictions and sentences, as the statutes mandate.

c. Wogenstahl's grounds meets the "cause and prejudice" standard.

Assuming that the Court finds that at least some of the evidence attached to Wogenstahl's Habeas Petition was available at the time of post-conviction (particularly evidence in Wogenstahl's *Third Claim for Relief,* ¶¶*329 – 390*), "cause" is satisfied by post-conviction counsel's failure to raise these meritorious claims in Wogenstahl's original post-conviction petition. *See* Exhibit 1 to this Brief (Affidavit of post-conviction counsel Joseph Edwards: "there simply was not enough time to do everything that needed to be done . . . I do not recall hiring a psychologist, a forensic pathologist, a crime scene expert, or an eyewitness ID expert, nor do I remember having the funds to hire such experts."); *see also* Exhibit 2 to this Brief (Affidavit of federal habeas counsel Gregory Meyers: "I strongly advised [John Gideon, Wogenstahl's appellate post-conviction counsel and federal habeas counsel,] to withdraw from representing Wogenstahl and any other capital client. I based these comments to Gideon both on his utter abdication of duty to Wogenstahl, and what I knew from his past . . .).

Wherever the blame and "cause" lies, it most certainly was not Wogenstahl's fault that he was kept in the dark as to these meritorious claims. How could he have hired the requisite experts as an indigent defendant? How could he have conducted the necessary investigation, or made the necessary public records requests? Or, how could he have interviewed the necessary witnesses from his prison cell? Simply put, he could not. Post-conviction counsel, on the other hand, could have done these things; they just did not.

Post-conviction counsel should have pursued these issues. By not doing so, they failed their client.

"Prejudice" is established by the discussion in Wogenstahl's *Third Claim for Relief,* ¶¶*329 – 390* of his habeas petition (ECF 7) and the attached exhibits upon which that claim relies (*see* ECF 8), which lay out how Wogenstahl's constitutional rights were violated by blatant ineffective assistance of trial counsel. (*See also*, Section III(D)(3), *infra*).

d. Wogenstahl must be afforded an evidentiary hearing to prove cause under Martinez.

In the alternative, assuming this Court does not find cause and prejudice has been sufficiently established on the evidence now in the record, Wogenstahl requests that this Court order an evidentiary hearing so that he can present additional evidence in order to demonstrate cause and prejudice. Wogensthal is entitled to a hearing to show cause under *Martinez. See, e.g.*, *Hill v. Glebe*, No. 15-35458, 2016 U.S. App. LEXIS 10922 (9th Cir. 2016) ("To prove cause, petitioners must be afforded an evidentiary hearing to develop a proper factual record" where petitioners claim their "state habeas counsel was ineffective in not properly raising [a] trial ineffective assistance claim" under *Martinez)* (citing *Detrich v. Ryan*, 740 F.3d 1237, 1246-48 (9th Cir. 2013) (*en banc*) and *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (*en banc*). *See also Grimes v. Superintendent Graterford SCI*, No. 14-1146, 619 F. App'x 146, 149 (3d Cir. July 22, 2015) (holding an evidentiary hearing was required to establish factual record before district court could determine if procedural

default excused via *Martinez/Trevino* arguments); *Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (holding that a district court "is authorized under 28 U.S.C. § 2254(e)(2) and required under *Trevino* to 'hold an evidentiary hearing on the claim[s]'" when a petitioner has alleged *Martinez*-based arguments to excuse a procedural default).

Thus, Wogenstahl requests an evidentiary hearing for those claims where he relies on cause and prejudice under *Martinez* to excuse any alleged failures on his part.

3. Failure to raise these claims sooner must be excused because this case presents a fundamental miscarriage of justice.

In the alternative, Wogenstahl's actual innocence of the murder of Amber Garrett can operate as a pathway for gaining habeas merits review of claims that could not otherwise be considered. *McClesky*, 499 U.S. at 494-95 ("[T]he failure to earlier raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice—the conviction of an innocent person—would result from a failure to entertain the claim.") The Supreme Court has recognized this "actual innocence" exception to allow a merits review of the evidence when justice requires it. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *House v. Bell*, 547 U.S. 518 (2006) (discussing *Schlup* standard). *Schlup* cautioned that, "The consideration in federal habeas proceedings of a broader array of evidence does not modify the essential meaning of 'innocence.' The *Carrier* standard reflects the proposition, firmly established in our legal system, that ***the line between***

innocence and guilt is drawn with reference to a reasonable doubt." 513 U.S. at 328 (emphasis added). Thus, in order to make a showing that a fundamental miscarriage of justice has occurred, a petitioner must be able to demonstrate that no reasonable juror would have found guilty of the indicted offenses in this case.

The Supreme Court has laid out what is necessary to make such a showing: "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. All of these are at play in this case.

The State has claimed a multitude of times during Wogenstahl's previous litigation that there is a "mountain of evidence" that convicted him and sent him to death row. But, that "mountain of evidence" was a mirage, as the State cheated and withheld numerous documents from Wogenstahl and his counsel at trial, to build its mountain. At this point, after considering the evidence now pled in Wogenstahl's pending habeas petition, each and every aspect of the State's case becomes flawed and unbelievable. The forensic evidence does not add up, the witnesses lose all sense of credibility, and the prosecution's case is exposed for what it is: false.

The testimony of Special Agent Douglas Deedrick as to the hair evidence was the single most damning piece of physical evidence presented by the State at trial. (ECF 8, Ex. 77, PAGEID#1022-23). Only in 2013 was it learned by

Wogenstahl that the forensic hair comparison testimony, was, in fact, *both* false and misleading. (ECF 8, Ex. 87, PAGEID# 1051-143). With a glaring lack of forensic and physical evidence, the prosecutors' were left to suborn the perjured testimony of the victim's half-brother, Eric Horn, to discredit Wogenstahl. (ECF 8, Ex. 34, PAGEID# 888-916). Besides that, the testimony of the State's other key lay witness—Peggy Garrett—has been exposed as dishonest as well. Not only was Peggy Garrett a viable suspect in this homicide (for instance, she was heard stating that she had really "fucked up" because she had sold Amber for fifteen hundred dollars) (ECF 8, Ex. 56, PAGEID# 971); but both her, and her son's memories, were illegitimately[4] hypnotically refreshed. (ECF 8, Ex. 13a, PAGEID# 803-31). In the documents that Wogenstahl has now obtained, alternate suspects abounded. None of these documents were turned over to Wogenstahl at trial, and none of these suspects were sufficiently explored by the Harrison Police Department. (ECF 8, *see e.g.* Exs. 17-20, 42-47 PAGEID# 842-49, 948-61); Wogenstahl also recently learned that the jailhouse informant, Bruce Wheeler, perjured himself when he claimed that he received nothing in exchange for his testimony against Wogenstahl. (ECF 8, Ex. 35, PAGEID# 917-43).

If the above were not bad enough, other documents, also withheld from Wogenstahl, demonstrate several other inconsistencies in the evidence: Eric

[4] There is no scientific basis for its admissibility. Moreover, there are also questions surrounding the suggestiveness of the session since a police officer from the Harrison Police Department was the one who hypnotized both Peggy and Eric. The notes of this session also impeached—in pertinent part—both witnesses' testimony at trial.

Horn was a suspect during the investigation and failed a polygraph after the crime (ECF 8, Exs. 28-29, PAGEID# 875-83); the victim's other brother, Justin, lied about his whereabouts on the evening that Amber disappeared (ECF 8, Ex. 14, 81, PAGEID# 835, 1031); eyewitnesses not used at trial saw several other suspect vehicles in the area of the victim's residence, and where the body was recovered in Indiana (ECF 8, Exs. 65-72, PAGEID# 986-94); when her body was discovered, Amber was not found in her nightshirt, but, instead, she was found in her "church clothes" (ECF 8, Exs.61-64, PAGEID# 981-85); Michele Hunt's prior statements never mentioned her seeing Wogenstahl's car at the Waffle House on the morning in question (ECF 8, Exs. 38-39, PAGEID# 944-45); and Wogenstahl's cat indeed had a chipped tooth and scabbed tail and could have been the explanation for the "blood" found in Wogenstahl's bathroom (ECF 8, Ex. 73, PAGEID# 997). The list goes on.

That leaves the testifying eyewitnesses and the small speck of blood found in Wogenstahl's car. Any blood found in Wogenstahl's apartment that the State attempted to link to Amber's death was never, and cannot be, connected to the homicide. (ECF 8, Ex. 74, PAGEID #1003-13). In fact, the only definitive testing done on the blood found in the apartment excluded Amber Garrett as the contributor. (*Id.*) Had trial counsel been at all effective, this evidence too could have been, and should have been, challenged. The entire theory of the State's case is undercut by the experts now presented to this Court.

Eyewitness identification expert Harvey Shulman, Ph.D., pointed out various factors that would have negatively affected the identifications made by Vicki Mozena, Kathy Roth, and Brian Noel. (ECF 8, Ex. 80, PAGEID# 1028-29). He also indicated that the rate of "false identification" is unknown, but is thought to be at least 20 to 50%, and may be as high as 80% in certain cases. *Id.*

Moreover, as Dr. Carl Schmidt has found "To a reasonable degree of medical certainty, my opinion is that the injuries could not have been inflicted in the vehicle shown in the pictures. . . . The injuries were likely inflicted while the body, and the head, were lying on an irregular surface, such as the ground outside." (ECF 8, Ex. 82, PAGEID# 1033-36). And as police practices and crime scene expert Gary Rini has added: "Due to the lack of the volume of blood one would expect inside a closed space (such as a vehicle) that would have been generated from the victim's injuries, and due to the lack of any transfer evidence of the murder weapon onto the interior of the vehicle, it is highly unlikely that the victim was killed or transported in the suspect's vehicle." Rini concluded in finding, "My informed opinion is that the victim was killed very close to the dump site, then dragged (as indicated by Dr. Schmidt's description of the drag marks present on the victim), and placed where she was discovered." (ECF 8, Ex. 83, PAGEID# 1037-43).

Even at the time of trial, one of Wogenstahl's jurors, Carmen Pittman, stated, "I did not think the evidence in the first phase was overwhelming. . . . what convinced me of Jeff's guilt was the hair evidence." (ECF 8, Ex. 77,

PAGEID# 1022-23). Juror Pittman added that "Information about Eric Horn's drug selling would have had an effect on my decision to convict. . . Information about a strange man who stood outside Amber's window and Amber's journal entries about being attacked by someone a few months before her murder would have cause[d] reasonable doubt on my part." (*Id.*)

Given all the evidence now unearthed in Wogenstahl's case (*See* ECF 7, 8), no reasonable juror would have found Wogenstahl guilty beyond a reasonable doubt of the murder of Amber Garrett. Thus, assuming this petition is found to be "successive," Wogenstahl did not abuse the writ because he has proven that "a fundamental miscarriage of justice" has occurred in his case. And, such a fundamental miscarriage of justice may excuse any alleged failures to bring these claims sooner.

IV. Conclusion

The jury that convicted Jeff Wogenstahl in 1993 was not given all of the evidence. In fact, some of the evidence that they were given was misleading and false. Wogenstahl deserves a new trial, in front of a new jury, that can hear *all* of the evidence surrounding this case and crime, not just the evidence that the State cherry-picked for them to hear. In the end, there is a reasonable probability that, had all the facts—the newly-discovered evidence and the subject of Wogenstahl's pending Habeas Petition—been disclosed to the defense, the result of Wogenstahl's trial would have been different.

Wogenstahl requests that the Magistrate Judge revisit his previous decision transferring Wogenstahl's petition to the Sixth Circuit. Wogenstahl's

habeas petition is a second-in-time petition properly brought before the District Court

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 5, 2017, a copy of Jeffery A. Wogenstahl's Merit Brief was forwarded to all parties via the courts electronic system.

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