No. 20-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES GALEN HANNA,

Petitioner

vs.

TIM SHOOP, Warden

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. When a petition for writ of habeas corpus presents claims that do not constitute an "abuse of the writ," is it a "second or successive" petition under 28 U.S.C. § 2244? *Compare Banister v. Davis*, 590 U.S. ___, ___ (2020) (slip op. at 7)

2. Is a petition for writ of habeas corpus "second or successive" when it presents claims that a petitioner had no fair opportunity to raise in an initial habeas petition? *See Banister v. Davis*, 590 U.S. at ___ (slip op. at 1); *Magwood v. Patterson*, 561 U.S. 320, 343 (2010) (Breyer, J., concurring); *Id*. at 346 (Kennedy, J., dissenting); *Halprin v. Davis*, 589 U.S. ___, ___ (2020) (slip op. at 3) (Statement of Sotomayor, J.)

3. Is petitioner's petition for writ of habeas corpus "second or successive," where it presents claims he had no fair opportunity to raise in his initial petition, where he has not abused the writ, and where it is not his fault that such claims were not raised in his prior application, given initial federal habeas counsel's conflict of interest?

DIRECTLY RELATED CASES

Ohio Court of Appeals:

State v. Hanna, 2001-Ohio-8623 (Ohio App. 12th Dist. Dec. 31, 2001)

Ohio Supreme Court:

State v. Hanna, 95 Ohio St.3d 285 (2002) (May 22, 2002)

United States District Court:

Hanna v. Ishee, S.D. Ohio No. 1:03-cv-801 (Judgment entered Sept. 4, 2009)

United States Court of Appeals:

Hanna v. Ishee, 694 F.3d 596 (6th Cir. 2012) (Sept. 11, 2012)

United States Supreme Court:

Hanna v. Robinson, 571 U.S. 844 (2013) (Oct. 7, 2013)

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The Sixth Circuit order denying Hanna's motion to remand is reported. *In re Hanna*, 987 F.3d 605 (6th Cir. 2021), Pet. App. 1-12. The order of the United States Magistrate concluding that Hanna's petition is not abuse of the writ, but should be considered a "second or successive" habeas petition, and ordering transfer to the court of appeals, is unreported. *Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, ECF No. 17 (Sept. 6, 2019), Pet. App. 13-25. The order of the United States District Judge overruling objections to the Magistrate's order is also unreported. *Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, ECF No. 20, Pet. App. 26-30.

JURISDICTION

The Sixth Circuit entered its order denying remand and relief on February 11, 2021. No petition for rehearing was filed. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254, where this Court has jurisdiction to determine whether a second-in-time habeas petition is actually a "second or successive" habeas petition. *See e.g., Castro v. United States*, 540 U.S. 375, 379-80 (2003). He files this petition in conformity with this Court's March 19, 2020 order granting him 150 days from final judgment to file a petition for writ of certiorari. *See* 589 U.S. ___ (Mar. 19, 2020) (COVID-19 order).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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.
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> (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.
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> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals. (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection. (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion. (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.
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> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT OF THE CASE

I. James Hanna's Trial and Direct Appeal

In 1998, James Galen Hanna was convicted in the Warren County, Ohio, Court of Common Pleas of aggravated murder for the death of Peter Copas, his cellmate at Lebanon Correctional Institution, in Lebanon, Ohio. After a sentencing hearing, the jury recommended a sentence of death, and on November 20, 1998, the judge imposed the death sentence. On direct appeal, the Ohio Supreme Court affirmed Hanna's conviction and death sentence. *State v. Hanna*, 95 Ohio St. 3d 285, 767 N.E.2d 678 (2002). This Court denied certiorari. *Hanna v. Ohio*, 537 U.S. 1036 (2002).

II. State Post-Conviction Proceedings In Which Hanna Was Represented By The Ohio Public Defender

In the meantime, on December 22, 1999, the Office of the Ohio Public Defender filed a post-conviction petition for Hanna in the Warren County Court of Common Pleas. That petition contained fifteen claims.[1] The post-conviction petition did not

[1] Those claims included: (1) Hanna was denied a fair trial and his right to an unbiased jury because Juror Reeves, who sat on the jury, was a convicted felon who should not have been allowed to sit in judgment in this case; (2) the trial court improperly sealed Copas' prison records, which deprived Hanna of a fair sentencing hearing; (3) the prosecution unconstitutionally withheld exculpatory information from Trooper Ertel's report; (4) trial counsel ineffectively failed to question Juror Reeves during *voir dire*; (5) trial counsel ineffectively failed to recognize that Juror Reeves' questionnaire showed that he had received a six month sentence and five years probation for an offense; (6) trial counsel ineffectively failed to re-raise their argument that the prosecution's file be copied and sealed for appellate review, as shown by the affidavit of attorney David Doughten; (7) trial counsel failed to conduct an adequate investigation into their client's background, and failed to present mitigating evidence, specifically evidence from a prison culture expert, such as Steve Martin; (8) trial counsel ineffectively failed to cross-examine prosecution witness Joseph Scurlock about his ability to identify James Hanna's handwriting and to have Scurlock present exculpatory testimony on Hanna's behalf; (9) trial counsel ineffectively failed to investigate and present testimony about the Ohio Department of Rehabilitation and Correction's custody policies for high security inmates, including Policy 111-07; (10) trial counsel ineffectively failed to prepare mitigation witness Kathleen Burch to explain how Hanna's actions were formed by his thirty years of incarceration, leading to his disastrous encounter with the victim; (11) trial counsel ineffectively failed to interview and present mitigating evidence from persons such as Steve Martin, Willard Hanna, Nancy La Duke, Beverly Hanna, Joseph Scurlock, with

contain any claims: (a) that capital sentencing counsel was ineffective for failing to present mitigating evidence from neuroimaging scans including Positron Emission Tomography (PET) and Magnetic Resonance Imaging (MRI) brain scans, to prove that Hanna is brain damaged; or (b) that sentencing counsel was ineffective for failing to present mitigating evidence that Hanna was the victim of severe sexual abuse and complex trauma, which resulted in post-traumatic disorder (PTSD), depression, and borderline personality disorder that affected him at the time of the offense. *See* Pet. for Post-Conviction Relief, Pet. App. 94-139.

In his post-conviction proceedings, Hanna was represented by the Office of the Ohio Public Defender (OPD): David Bodiker, the Ohio Public Defender; Susan Roche, Assistant State Public Defender; and Kathryn Sandford, Assistant State Public Defender. *See* Pet. App. 139 (Bodiker, Roche, and Sandford identified as post-conviction counsel). *See also* Mot. for Discovery and Mem. in Support (same), Pet. App. 141-51. Susan Roche was Hanna's lead counsel. *See* Decl. of Susan M. Roche, Esq., Pet. App. 152-153; Decl. of Kathryn Sandford, Esq., Pet. App. 154.

The trial court dismissed the petition for post-conviction relief, the Ohio Court of Appeals affirmed (*State v. Hanna*, 2001 Ohio App. Lexis 5995, 2001-Ohio-8623 (Dec. 31, 2001)), and the Ohio Supreme Court denied further review. *State v. Hanna*, No. 2002-0286, 2002 Ohio Lexis 1611 (July 3, 2002).

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trial counsel's ineffectiveness being supported by the affidavit of attorney David Doughten; (12) Ohio's post-conviction process is inadequate for the vindication of constitutional rights; (13) electrocution is unconstitutional; (14) the death sentence, including execution by electrocution or lethal injection, is unconstitutional; (15) the cumulative effect of errors alleged by Hanna deprived him of a fair trial and sentencing hearing. *See* Pet. for Post-Conviction Relief, Pet. App. 101-138.

III. Initial Federal Habeas Corpus Proceedings In Which Hanna Was Still Represented By The Ohio Public Defender

Ohio Public Defender David Bodiker and counsel from OPD then filed a petition for writ of habeas corpus for Hanna in the United States District Court for the Southern District of Ohio. *See* Pet. for Writ of Habeas Corpus, *Hanna v. Ishee*, S.D. Ohio No. 1:03-cv-801, Pet. App. 155-205; Pet. App. 196-197 (identifying counsel). Susan Roche, who had been lead post-conviction counsel in the state court proceedings, served as one of Hanna's federal habeas attorneys. *See* Pet. App. 206-210 (motion to substitute as federal habeas counsel and motion to withdraw).

The federal habeas corpus petition filed and litigated by OPD counsel included ten claims for relief,[2] and that petition did not include claims that trial counsel ineffectively failed to conduct neuroimaging (*compare* Pet. for Writ of Habeas Corpus, *Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, Pet. App. 48 & 49-61 (new neuroimaging

[2] The first federal habeas petition presented the following claims: (1) Juror Reeves' service on the jury violated Hanna's Sixth and Fourteenth Amendment rights to a fair and impartial jury; (2) the trial court rendered counsel ineffective under the Sixth and Fourteenth Amendments by precluding them from reviewing and using all of Copas' prison records at trial; (3) the prosecution suppressed material, exculpatory evidence, in violation of the Sixth and Fourteenth Amendments; (4) Hanna was denied the effective assistance of counsel because counsel (a) failed to use an expert witness on prison culture, (b) failed to present testimony from James Scurlock, (c) failed to present evidence of criteria for housing Hanna in maximum security, (d) failed to provide Kathleen Burch all relevant documentation about Hanna, and (e) failed to present significant mitigating evidence; (5) Hanna was denied the effective assistance of counsel because counsel (a) failed to determine on *voir dire* whether Juror Reeves was a competent juror, (b) failed to question Reeves about his prison experiences, (c) failed to re-raise their motion that the prosecution's file should be copied and sealed for appellate review, and (d) failed to point out inconsistencies in the testimony of the prosecution's medical experts; (6) in violation of the Fourteenth Amendment, the jury instruction on causation and foreseeability lessened the prosecution's burden of proof; (7) the trial court's failure to instruct when medical malpractice is an independent, intervening cause of death violated the Fifth, Sixth, and Fourteenth Amendments; (8) the trial court denied Hanna his rights under the Sixth, Eighth, and Fourteenth amendments by precluding evidence about the prevalence of shanks in prisons; (9) lethal injection constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments; (10) the cumulative effect of errors at trial violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. *See* Pet. for Writ of Habeas Corpus, Pet. App. 171-195.

claim); Pet. App. 498-500 (declaration of Douglas Scharre, M.D.)), nor did it contain a claim that Hanna was the victim of longstanding sexual abuse and complex trauma, and suffered resulting PTSD, depression, and borderline personality disorder. *Compare id.*, Pet. App. 48 & 61-69 (new severe mental illness claim); Report of Howard Fradkin, Ph.D., Pet. App. 556-613.

The District Court dismissed the habeas petition, *Hanna v. Ishee*, 2009 WL 485487 (S.D. Ohio Feb. 26, 2009), and the Sixth Circuit affirmed, *Hanna v. Ishee*, 694 F.3d 596 (6th Cir. 2012). While proceedings remained pending in the Sixth Circuit, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), which allows the ineffectiveness of post-conviction counsel to provide cause for the procedural default of a substantial ineffective-assistance-of-trial-counsel claim. This Court afterwards denied Hanna's petition for certiorari. *Hanna v. Robinson*, 571 U.S. 844 (2013).

IV. Hanna's Second Federal Habeas Petition Filed By New, Independent Counsel

In later proceedings before the United States District Court, the Magistrate Judge initially denied a motion to appoint new counsel, filed pursuant to the recent decision in *Martinez v. Ryan*. *See Hanna v. Bagley*, S.D. Ohio No. 1:03-cv-801, Order, ECF No. 154, PageID 2889–92. On April 3, 2014, however, on reconsideration and after recommittal by the District Judge, the Magistrate Judge substituted Kathleen McGarry and David Doughten as federal counsel for Hanna. *Hanna v. Bagley*, No. 1:03-cv-801, 2014 WL 1342985 (S.D. Ohio Apr. 3, 2014). Ms. McGarry later moved to withdraw and to have the Office of the Federal Public Defender for the Southern District of Ohio substituted as trial attorney for Hanna. *Hanna v. Bagley*, S.D. Ohio

No. 1:03-cv-801, Motion to Substitute Counsel, ECF No. 169. On August 7, 2018, the District Court granted that motion and substituted the Office of the Federal Public Defender and Allen Bohnert as trial attorney for Hanna. *Id.*, Notation Order, ECF No. 170.

On August 5, 2019, the Office of the Federal Public Defender for the Southern District of Ohio—as sole counsel[3]—then filed in the United States District Court a second-in-time petition for writ of habeas corpus, supported by 23 exhibits. *See* Pet. for Writ of Habeas Corpus, Pet. App. 31-92. In that petition, Hanna alleged for the first time in any court the following four constitutional claims:

> **Claim IV.A –** In violation of the Sixth and Fourteenth Amendments, trial counsel ineffectively failed to secure and present mitigating neuroimaging evidence to the jury, including PET (positron emission tomography) and MRI (magnetic resonance imaging) scans to objectively prove Hanna's brain damage and its effects upon his behavior.
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> **Claim IV.B –** In violation of the Sixth and Fourteenth Amendments, trial counsel ineffectively failed to investigate and present mitigating evidence that numerous predators inflicted horrific sexual abuse upon James Hanna since the time he was a child, that Hanna suffered severe complex trauma, and that as a result, he suffered at the time of the offense the severe mental illnesses of post-traumatic stress (PTSD), depression, and borderline personality disorder.
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> **Claim IV.C** – In violation of the Sixth and Fourteenth Amendments, trial counsel ineffectively failed to investigate and present mitigating proof that James Hanna suffers a serious mental disorder caused by brain damage, including damage in his frontal and temporal lobes.

[3] The Office of the Federal Public Defender filed the petition independently and without the assistance of counsel Doughten, because Mr. Doughten had been a witness employed by OPD attorneys during the state post-conviction proceeding (*see* Pet. App. 211-235), and, from 2007 until the filing of Hanna's new federal petition in 2019, he was a member of the Ohio Public Defender Commission which oversees the operation of OPD. *See* Pet. App. 239, 363.

> **Claim IV.D** – In violation of the Sixth, Eighth, and Fourteenth Amendments, the cumulative effect of the errors alleged in this petition deprived James Hanna of a fair and reliable sentencing hearing, thus entitling him to federal habeas corpus relief.

See Pet. for Writ of Habeas Corpus, *Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, Pet. App. 48-49 (Petition ¶43, identifying Claims IV.A- IV.D).

When pleading his four claims, Hanna fleshed out his allegations in greater detail. For instance, in Claim IV.A (which covers 36 paragraphs and 12 pages), Hanna has claimed that in violation of the Sixth and Fourteenth Amendments, trial counsel failed to secure neuroimaging evidence, including a PET Scan and MRI of Hanna's brain, to establish objective mitigating evidence that Hanna suffers brain damage. *See* Claim IV.A & ¶¶ 44–80, Pet. App. 49–61. Hanna has asserted that counsel was ineffective for failing to secure PET and MRI scans despite being on notice that Hanna suffered brain damage, where Hanna's psychological expert Dr. Kathleen Burch testified that Hanna had brain damage, but the prosecution emphasized that unlike a medical doctor, Burch had not conducted scans or other "scientific tests" to prove such damage. *See id*., at ¶¶ 47-48, Pet. App. 50–53.

Similarly, for example, in Claim IV.B, Hanna alleges that he was the victim of sexual abuse and complex trauma, which led to post-traumatic stress disorder, depression, and borderline personality disorder at the time of the offense. *See* Claim IV.B & ¶¶ 81–108, Pet. App. 61–69. As Hanna alleged, he suffered complex trauma as a child, having been repeatedly sexually assaulted. The traumatic abuse started at age 6 when he was raped by a group of neighborhood boys, then by a "foster father" and another older boy, after which he was repeatedly raped while in juvenile custody

and then in adult prison. *Id*., ¶¶ 88–89, Pet. App. 63–64. In support of this claim, Hanna has presented the expert report of Dr. Howard Fradkin, Ph.D., which, for the first time, discusses the severe sexual abuse and complex trauma that Hanna suffered, which caused Hanna severe mental illness. *See* Report of Howard Fradkin, Ph.D., Pet. App. 556–613.

In his new petition, Hanna also explained that while his petition is numerically a second petition, under the circumstances it is not "second or successive" for purposes of 28 U.S.C. § 2244. His petition does not constitute an "abuse of the writ" because he had no full and fair opportunity to present his new claims previously: During his initial habeas proceedings, he was represented by OPD counsel who labored under a conflict of interest. *See* Pet. for Writ of Habeas Corpus at 2–3 & 41–48, Pet. App. 35–36, 74–81.

Indeed, in his initial federal habeas proceedings, Hanna was represented by Ohio Public Defender David Bodiker, Susan Roche, and other OPD counsel. In state post-conviction proceedings, however, those same counsel also represented Hanna. In Hanna's first federal habeas proceedings, OPD counsel were thus "materially limited" in their ability to raise the claims Hanna now raises now in his second-in-time petition. *See* Pet. for Writ of Habeas Corpus at 42-48, Pet. App. 75-81 (citing Ohio R. Prof. Cond. 1.7 and cases finding conflicts of interest).

OPD could not raise the claims which Hanna now raises for the first time, because, to do so, OPD counsel would have had to: (1) admit that OPD failed to raise these substantial claims during post-conviction proceedings; (2) acknowledge that

OPD procedurally defaulted Hanna's claims; and (3) to overcome OPD's defaults and secure review of Hanna's claims, argue that Bodiker (the Ohio Public Defender), Roche, and their firm (the Office of the Ohio Public Defender) had rendered ineffective assistance of counsel. *See Martinez v. Ryan*, 566 U.S. at 11–12.

Given OPD's interest in protecting OPD and OPD's reputation and in not challenging the actions of their boss, themselves, or their colleagues, OPD counsel suffered a conflict and could not properly represent Hanna: Given their responsibilities to third parties or their "own personal interests," they faced a "substantial risk" that "materially limited" their ability "to carry out an appropriate action" for Hanna—namely, presenting Hanna's current claims in federal habeas. Hanna never waived that conflict. *See* Decl. of James Hanna, Pet. App. 630-631.

V. The United States District Court Concluded That Hanna's Petition Was Not An Abuse of the Writ But Concluded That It Should Still Be Deemed A "Second or Successive" Habeas Petition

When considering Hanna's new habeas petition, the federal Magistrate Judge agreed that Hanna's petition does not constitute an "abuse of the writ": "Hanna asserts that his new Petition is not an 'abuse of the writ' because he was prevented from bringing these claims earlier by his counsel's conflicts of interest. *The Court believes that, if the abuse of the writ doctrine still applied, it would be proper to find the instant Petition is not an abuse of the writ*." *Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, Order, ECF No. 17 at 10 (Sept. 6, 2019) (emphasis supplied), Pet. App. 22.

Nevertheless, the Magistrate Judge stated that there is no authority for the proposition "that any petition which would have satisfied the abuse of the writ

doctrine is, by virtue of that fact, not second or successive." *Id*. Rather, the Magistrate Judge concluded that while a petition is not "second or successive" if raising a claim that was not "ripe" during initial habeas proceedings, Hanna's new claims were "ripe" earlier. *Id*. at 10–11, Pet. App. 22–23. The Magistrate Judge recommended that Hanna's petition be transferred to the Sixth Circuit for preauthorization under 28 U.S.C. § 2244. *Id*. at 12–13, Pet. App. 24–25.

Following objections, the District Judge upheld, as not contrary to law, the Magistrate Judge's conclusion that there was no support for the proposition that "a petition which satisfies the abuse of the writ doctrine thereby qualifies as a 'first' petition." *Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, Order, ECF No. 20 at 4, Pet. App. 29. The District Judge thus ordered that the Magistrate Judge's transfer order be given effect. *Id*. at 5, Pet. App. 30.

VI. A Divided Panel Of The Sixth Circuit Denied Hanna's Motion to Remand And Otherwise Denied Relief

In the Sixth Circuit, Hanna filed a motion to remand, maintaining that he could proceed in the District Court on his new petition without authorization from the court of appeals. *See* Mot. to Remand, Pet. App. 632–47. As he asserted, his current petition for writ of habeas corpus is not "second or successive" because he has not "abused the writ," where he had no fair opportunity to present his current claims in his earlier petition, given prior federal habeas counsel's conflict of interest. *See id*.

A divided Sixth Circuit panel denied Hanna's motion to remand, concluding that Hanna's petition is "second or successive," while also concluding that Hanna's petition could not proceed as a "second or successive" petition under 28 U.S.C. § 2244.

See In re Hanna, 987 F.3d 605 (6th Cir. 2021), Pet. App. 1-7. Judge Moore dissented (*id*. at 611–16 (Moore, J, dissenting), Pet. App. 7–12), providing a careful explanation why Hanna has not abused the writ and why his petition is not "second or successive," given initial federal habeas counsel's "plain conflict of interest." *Id*. at 612 (Moore, J., dissenting), Pet. App. 8.

Judge Moore concluded that "Hanna's § 2254 petition – raising a new claim of ineffective assistance of trial counsel that he could not have raised in his earlier petition – though second in time, is not 'second or successive.'" *In re Hanna*, 987 F.3d at 611 (Moore, J., dissenting), Pet. App. 7.[4] She "agree[d]" with Hanna that his "new petition, though second in time, is not second or successive because he could not have raised his new claim of ineffective assistance of trial counsel in his first § 2254 petition, which would have required his counsel to argue their own ineffectiveness under *Martinez* [*v. Ryan*, 566 U.S. 1 (2012)] and *Trevino* [*v. Thaler*, 569 U.S. 413 (2013)], a plain conflict of interest." *In re Hanna*, 987 F.3d at 612 (Moore, J., dissenting), Pet. App. 8.

Judge Moore noted that the "abuse of the writ" doctrine informs whether Hanna's "petition is second or successive or merely second in time." *Id*. at 614 (Moore, J., dissenting), Pet. App. 10. She concluded that Hanna's petition "is not an abuse of

[4] Judge Moore made clear that Hanna's claims are new claims that were never raised previously. Hanna is not "recycling an already litigated claim of ineffective assistance of trial counsel." Pet. App. 9. "Hanna's new petition alleges that his trial counsel was ineffective in failing to obtain and present neuroimaging of Hanna's brain to demonstrate organic defects, and to present evidence of Hanna's mental illnesses. He made no such claim in his first federal petition, which faulted trial counsel's failure to present evidence of prison culture, a prison employee's positive experiences with Hanna, the requirements for placing persons in maximum security prisons, and trial counsel's failure to prepare Hanna's mitigating psychologist to testify to the impact prison life had had on Hanna." *Id*. at 9. "In short, Hanna's new claim of ineffective assistance of counsel is just that, new." *Id*. at 10.

the writ and so is not second or successive," *id*., because Hanna's counsel during his first federal habeas proceedings suffered a conflict of interest that precluded them from alleging their own (or OPD's) ineffectiveness in state postconviction proceedings and raising the claims that Hanna raises now.

Martinez and *Trevino* set forth equitable principles designed to ensure that substantial ineffective-assistance-of-trial-counsel claims are heard in federal court, if such claims were not properly raised during state postconviction proceedings. *In re Hanna*, 987 F.3d at 614 (Moore, J., dissenting), Pet. App. 10. Otherwise, the "right to the effective assistance of counsel," a "bedrock principle in our justice system," would be undermined. *Id*. (citing *Martinez*, 566 U.S. at 12). "[T]he reasoning of *Martinez* and *Trevino* compels the conclusion that Hanna's petition is not an abuse of the writ and so is not second or successive." *Id*. at 614, Pet. App. 10. As Judge Moore explained:

> These principles apply forcefully where the same counsel represents the petitioner in their first federal habeas proceedings as represented them in their state postconviction proceedings. Although the federal petitioner could invoke *Martinez* and *Trevino* to excuse their failure to raise a substantial claim of ineffective assistance of trial counsel in state court, doing so would require counsel to argue that they were themselves ineffective in failure to raise the claim earlier. *See Martinez*, 566 U.S. at 17-18. ***A plain conflict of interest prevents counsel from making such an argument because it would pit the petitioner's interest in vigorously presenting the argument against counsel's interest in preserving their professional reputation, among other things. See Christeson v. Roper*, 574 U.S. 373, 378-79 (2015); *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013) (requiring appointment of independent counsel in federal habeas proceeding to determine availability of any previously defaulted claims under *Martinez*)**.

In re Hanna, 987 F.3d at 614–15 (Moore, J., dissenting), Pet. App. 10–11 (emphasis supplied). A "petitioner is no more able to raise their substantial claim of ineffective

assistance of trial counsel in their first petition—due to counsel's conflict of interest—than they were in their state post-conviction proceeding—due to counsel's ineffectiveness. Thus, if counsel's conflict of interest does not excuse the failure to raise a claim of ineffective assistance of trial counsel in a first petition, 'no court will ever review the prisoner's claims.' *Martinez*, 566 U.S. at 11. The equitable reasoning of *Martinez* and *Trevino* counsels against such a result." *In re Hanna*, 987 F.3d at 615 (Moore, J., dissenting), Pet. App. 11.

Judge Moore thus concluded that a numerically second petition is not "second or successive" if a petitioner was prevented from raising a new ineffective-assistance claim, because initial federal counsel suffered a conflict of interest:

> Hanna has persuaded me that a § 2254 petition is not second or successive where it raises a new claim of ineffective assistance of trial counsel, and where, due to the petitioner having been represented by the same counsel in his state postconviction and § 2254 proceedings, a conflict of interest prevented the petitioner from raising that claim in an earlier petition.

In re Hanna, 987 F.3d at 615 (Moore, J., dissenting), Pet. App. 11.

"That rule," Judge Moore stated, "favors a remand here." *Id.* "Susan Roche served as lead counsel for Hanna's state postconviction proceedings and then continued to represent Hanna when he filed his first § 2254 petition. A conflict of interest would have prevented Roche from raising a new claim of ineffective assistance of trial counsel in Hanna's first § 2254 petition because it would have implicated her own ineffectiveness in failing to raise the claim in Hanna's state postconviction proceedings. *See Christesen*, 574 U.S. at 378-79; *Juniper*, 737 F.3d at 290. Although other attorneys from the Ohio Public Defender's office were involved

in Hanna's first § 2254 petition, Roche's conflict of interest would be imputed to them under the circumstances." *In re Hanna*, 987 F.3d at 615 (Moore, J., dissenting), Pet. App. 11. Judge Moore also agreed that Hanna never waived this conflict during his first habeas proceedings, since conflicted counsel only acknowledged the conflict *after* Hanna's initial habeas proceedings concluded. *Id*. at 615 n. 2, Pet. App. 11 n. 2.[5]

A majority of the court of appeals panel, however, denied Hanna's motion to remand and concluded that he may not litigate his petition in District Court. First, the majority stated that the "abuse-of-the-writ doctrine is no help to Hanna because he raises claims that were presented in the prior petition." *In re Hanna*, 987 F.3d at 608, Pet. App. 4. That conclusion, however, is belied by the record, which speaks for itself, and which establishes, as Judge Moore stated, that Hanna's new claims are "just that, new." *In re Hanna*, 987 F.3d at 613 (Moore, J., dissenting). Pet. App. 9.[6]

The panel majority further decided that, given its assertion that Hanna's claims were already presented and adjudicated in initial habeas corpus proceedings, his current petition must be dismissed under 28 U.S.C. § 2244(b)(1). *In re Hanna*, 987

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[5] Hanna, Judge Moore explained, never "acquiesced to continued representation by the Ohio Public Defender with an awareness of the conflict of interest. There is no indication in the record that Hanna was aware of the conflict until the Supreme Court decided *Martinez* and *Trevino* and Hanna requested new counsel in the district court." *In re Hanna*, 987 F.3d at 615–16 n. 2 (Moore, J., dissenting), Pet. App. 11–12.

[6] The panel majority properly recognized that Hanna's petition "raises four claims, all alleging that counsel ineffectively assisted Hanna in the penalty phase: (A) counsel failed to present neuroimaging evidence; (B) counsel failed to present mitigating evidence that Hanna suffered from severe mental illnesses at the time of the offense (post-traumatic stress disorder, major depression, and borderline personality disorder) caused by severe sexual abuse and complex trauma; (C) counsel failed to present mitigating evidence that Hanna has, and had at the time of the offense, a serious mental disorder caused by brain damage; and counsel's errors combined, deprived Hanna of effective assistance in the penalty phase and of a fair and reliable sentencing hearing." *In re Hanna*, 987 F.3d at 607, Pet. App. 3.

F.3d at 608, Pet. App. 4. In addition, the panel majority concluded that Hanna does not meet the requirements of 28 U.S.C. § 2244(b)(2) for filing a second or successive petition. *In re Hanna*, 987 F.3d at 609, Pet. App. 5.

Assuming Hanna's claims were not already presented and adjudicated in initial habeas proceedings, the panel majority stated that Hanna "has not shown that the abuse-of-the-writ doctrine applies." *Id.* In doing so, the panel majority concluded that a second-in-time petition does not constitute an "abuse of the writ" and is not "second or successive" in only two situations:

> '[T]his not second-or-successive exception is generally restricted to two scenarios,' neither of which is present here. *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (per curiam). Those scenarios are when (1) the claim was not ripe when the earlier petition was filed and (2) where the earlier petition was dismissed for failure to exhaust. *Id.* The habeas statute's limits on second or successive habeas petitions also do not apply to challenges to intervening judgments. *Magwood* [*v. Patterson*], 561 U.S. at 323–24. There is no intervening judgment in this case.

In re Hanna, 987 F.3d at 609, Pet. App. 5.

The panel majority further stated that Hanna had not shown that initial habeas counsel suffered a conflict of interest, positing that OPD's conflict of interest was "merely hypothetical" and that Hanna had not shown any prejudice from habeas counsel not raising the new claims presented in his current petition. *Id.* at 610, Pet. App. 6. The panel majority also stated that Hanna and the dissent had cited "no case where we have found that mere continuity of counsel constitutes a conflict of interest entitling a petitioner to file a second or successive petition under the abuse-of-the-writ doctrine." *Id.* at 609–10, Pet. App. 5–6.

The panel majority also asserted that: OPD's alleged conflict of interest was "rejected by the district court in his initial habeas case"; there was no indication OPD counsel in federal court "harbored any concern that their representation of Hanna was compromised by personal interest"; and Hanna's assertion that he was not informed about the conflict of interest until "after the conclusion of his first habeas is also unavailing," because he should be considered bound by initial habeas counsel's entry of appearance to provide continuity of counsel. *Id*., Pet. App. 6.

Even so, the panel majority failed to recognize that: Hanna himself was never informed of, and never waived, any conflict of interest (*see* Decl. of James Hanna, Pet. App. 630-631); the Magistrate Judge ultimately reconsidered and appointed new counsel because of the asserted conflict of interest (*Hanna v. Bagley*, 2014 WL 1342985 (S.D. Ohio Apr. 3, 2014)); and the Magistrate Judge later concluded that Hanna's new petition *does not constitute an abuse of the writ*, in light of Hanna's argument that OPD suffered a conflict of interest. *See Hanna v. Shoop*, S.D. Ohio No. 3:19-cv-231, ECF No. 17 (Sept. 6, 2019), Pet. App. 22.[7]

REASONS FOR GRANTING THE WRIT

I. This Petition Presents An Issue Left Unresolved By *Banister v. Davis*, 590 U.S. ___ (2020), And *Banister* Confirms That Hanna's Habeas Petition Is Not "Second or Successive"

In the opening sentence in *Banister v. Davis*, 590 U.S. ___ (2020), this Court emphasized that "A state prisoner is entitled to *one fair opportunity* to seek federal

[7] The panel majority later concluded that Hanna had not shown his entitlement to relief on the merits of his claims. *In re Hanna*, 987 F.3d at 611, Pet. App. 7. Of course, any such discussion is pure *dicta*, because the panel's holding was that Hanna's petition cannot be considered on its merits.

habeas relief from his conviction." *Id.* at ___ (slip op. at 1) (emphasis supplied). Starting from that premise and focusing on this Court's "abuse of the writ" jurisprudence and the purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA), *Banister* concluded that a motion to alter or amend judgment under Fed. R. Civ. P. 59(e) is not a "second or successive" habeas petition. *Banister*, 590 U.S. at ___ (slip op. at 7-12).

As *Banister* explained, "The phrase 'second or successive application,' . . . is a 'term of art' which 'is not self-defining,'" and thus, "In addressing what qualifies as second or successive, this Court has looked for guidance in two main places." *Id.* at ___ (slip op. at 6). The first is "historical habeas doctrine and practice," which employs the "abuse of the writ" doctrine. *Id.* at ___ (slip op. at 6-7). Under *Banister*, if a second habeas petition is not abusive, it almost certainly cannot be "second or successive":

> The phrase 'second or successive application,' we have explained, is 'given substance in our prior habeas corpus cases,' including those 'predating [AEDPA's] enactment.' *Slack*, 529 U. S., at 486; *Panetti*, 551 U. S., at 944; see *id.,* at 943 (stating that the phrase 'takes its full meaning from our case law'). In particular, we have asked whether a type of later-in-time filing would have 'constituted an abuse of the writ, as that concept is explained in our [pre-AEDPA] cases.' *Id.*, at 947. ***If so, it is successive; if not, likely not***.

Banister, 590 U.S. at ___ (slip op. at 7) (emphasis supplied). Also evaluating "AEDPA's own purposes" as a second interpretive source (*id.*), this Court concluded that a Rule 59(e) motion is not a "second or successive" habeas petition. *Id.* at ___ (slip op. at 7-12).

Banister is significant here, for it recognizes an equivalence between "abusive" and "second or successive" petitions. *Id.* at ___ (slip op. at 7). In fact, this is the very

point Hanna argued below in seeking a remand to the District Court: Because his petition is not abusive (as found by the Magistrate Judge), his petition *is not* "second or successive." *See* Mot. to Remand at 5-14, Pet. App. 636-645. Otherwise, Hanna will be denied one full and fair adjudication of viable constitutional claims—even though he is not at fault, and his actions are not abusive. *Id*. *Compare Bernard v. United States*, 592 U.S. ___, ___ (2021) (Sotomayor, J., dissenting) (slip op. at 4) (petitioners should not be barred from raising claims in a second-in-time petition when not presented earlier "[t]hrough no fault of their own").

Nevertheless, *Banister*'s contingent language—"if not [abusive], likely not [second-or-successive]"—leaves open the question whether a non-abusive petition like Hanna's could be "second or successive." Because this question remains open after *Banister*, this Court should grant review here to decide that question.

Using *Banister*'s framework, this Court should grant review and conclude that Hanna's current petition is not "second or successive." First, Hanna's petition does not constitute an "abuse of the writ," because he had no opportunity to raise his claims in his initial petition, given federal habeas counsel's conflict of interest, as Judge Moore recognized. *See In re Hanna*, 987 F.3d at 614–16, Pet. App. 10–12. Second, as *Banister* itself recognizes, AEDPA's purpose is to ensure that "[a] state prisoner" be given "one fair opportunity to seek federal habeas relief from his conviction." *Banister*, 590 U.S. at ___ (slip op. at 1). This Court should conclude, therefore, that "Congress would [not] have viewed [Hanna's petition] as successive." *Id*. at ___ (slip op. at 7).

And indeed, because Ohio Public Defender David Bodiker and Susan Roche represented Hanna in state post-conviction proceedings, and because Bodiker and Roche were also counsel for Hanna in federal court, Bodiker, Roche, and all their OPD colleagues had a conflict of interest which precluded them from raising the claims Hanna now raises. *See* Pet. for Writ of Habeas Corpus at 42-48, Pet. App. 75-81. During federal habeas proceedings, no one from OPD was positioned, ethically, to challenge the state court performance of either their boss (Mr. Bodiker) or any of their colleagues, especially Ms. Roche, who could not challenge her own state court performance. *See* Pet. for Writ of Habeas Corpus at 2–3 & 41–48, Pet. App. 35–36, 74–81; Mot. to Remand at 5–7, Pet App. 636–38.

II. The Decision Below Conflicts With *Magwood v. Patterson*, 561 U.S. 320 (2010) And Seven Justices' Acknowledgment In *Magwood* That A Second Challenge To A Judgment Is Not "Second or Successive" If The Petitioner Had No Fair Opportunity To Raise A Claim Previously

While *Banister* emphasizes that Hanna is entitled to "one fair opportunity" to challenge his conviction and sentence in habeas, so does *Magwood v. Patterson*, 561 U.S. 320 (2010), which held that because Magwood's petition was filed after an intervening state court judgment, his habeas petition was not "second or successive."

Magwood recounted the respondent's argument that a habeas petitioner "is entitled to one, but only one, full and fair opportunity to wage a collateral attack." *Id.* at 331. In his concurring opinion, Justice Breyer (joined by Justices Stevens and Sotomayor) also emphasized that if a petitioner had "no fair opportunity" to raise a claim in a prior petition, a subsequent petition *is not* "second or successive":

> Of course, as the dissent correctly states, if Magwood were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti* [*v. Quarterman*, 551 U.S. 930 (2007)]'s holding that an 'application' containing a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not a 'second or successive' application.

Id. at 343 (Breyer, J., concurring). In dissent, Justice Kennedy (joined by the Chief Justice, Justice Ginsburg, and Justice Alito) agreed that "[I]f the petitioner had no fair opportunity to raise the claim in the prior application, a subsequent application raising that claim is not 'second or successive.'" *Id.* at 346 (Kennedy, J., dissenting).

Seven Justices in *Magwood* thus expressly stated that unless a petitioner had a "fair opportunity" to raise a claim in a prior petition, a subsequent petition is not an abuse-of-the-writ and is not "second or successive." Justice Breyer stated this as being the "holding" of *Panetti v. Quarterman*, 551 U.S. 930 (2007), in which the petitioner raised his competency-to-be-executed claim in his second petition, filed when execution was imminent. *See Magwood*, 561 U.S. at 343 (Breyer, J., concurring); *see also Bernard v. United States*, 592 U.S. at ___ n. 3 (Sotomayor, J., dissenting) (slip op. at 4 n. 3) (Justice Breyer's *Magwood* opinion concluded that "*Panetti*'s holding [is] that an application containing a claim that the petitioner had no fair opportunity to raise in his first habeas petition is not a second or successive application.").

The *Magwood* opinions thus presaged *Banister*'s opening sentence that "A state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction." *Banister*, 590 U.S. at ___ (slip op. at 1). The *Magwood* opinions, like *Banister*, confirm that James Hanna's petition is not "second or successive," because Hanna was represented by conflicted counsel during his initial habeas proceedings.

Accordingly, just as this Court should grant certiorari in light of *Banister*, the Court should grant certiorari because the divided decision below conflicts with the rule articulated in the *Magwood* opinions: Unless a petitioner had a "fair opportunity" to raise a claim in a prior petition, a habeas petition is not "second or successive." *See also Halprin v. Davis*, 589 U.S. ___, ___ (2020) (slip op. at 3) (Statement of Sotomayor, J.) (acknowledging "potent argument[]" from *Panetti* and *Magwood* that a petitioner's habeas petition was not "second or successive" because he never "had a full and fair opportunity to raise [his] claim in" a prior application).

III. The Decision Below Highlights A Circuit Split Involving Divergent Standards About What Constitutes A "Second or Successive" Habeas Petition

This Court should also grant certiorari because this petition highlights a recurring issue on which the lower courts apply divergent standards for identifying a "second or successive" petition. Justice Sotomayor and other lower court judges have questioned whether those standards are correct.

A. This Court Has Received A Steady Stream Of Petitions Seeking Clarification Whether A Petition Is "Second Or Successive" When The Petitioner Could Not Have Raised A Claim In An Initial Collateral Attack

In recent terms, this Court has received a steady stream of petitions querying when a second-in-time habeas petition (or motion to vacate sentence) is "second or successive." Just this term, in *Bernard v. United States*, U.S. No. 20-6570, this Court faced the question whether a petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963) was "second or successive" when he lacked the factual basis for his claim when he filed his first collateral attack, because the government failed to disclose

exculpatory evidence. *See* Pet. for Cert. in *Bernard v. United States*, O.T. 2020, No. 20-6570. Months earlier, this Court was confronted with a similar issue in *Halprin v. Davis*, U.S. No. 19-6156, which involved a petitioner who was tried before an allegedly biased judge—something which the petitioner could not have foreseen and was unaware of at the time of his first collateral attack. *See* Pet. for Cert. in *Halprin v. Davis*, O.T. 2019, No. 19-6516.

During the prior term, this Court was confronted with similar issues in both *Scott v. United States*, U.S. No. 18-6783, and *Jimenez v. Jones*, U.S. No. 18-7020. In those cases, panels of the Eleventh Circuit concluded that a movant's second collateral attack was "second or successive," even when predicated on exculpatory evidence not available to the petitioner until after his first collateral challenge concluded. *See* Pet. for Cert. in *Scott v United States*, O.T. 2018, No. 18-6783; Pet. for Cert. in *Jimenez v. Jones*, O.T. 2018, No. 18-7020.

The question when a second-in-time petition is not "second or successive" is thus recurring, and in need of this Court's resolution. This is especially true where the issue has arisen in different circuits, including the Fifth and Eleventh Circuits and (in this case) the Sixth Circuit, and where the circuits apply divergent standards that have been questioned by circuit judges and at least one Justice of this Court.

B. The Lower Courts Apply Divergent Standards And Circuit Judges And Justice Sotomayor Have Questioned The Use Of Such Standards

The need for this Court to clarify the standard governing what constitutes a "second or successive" habeas petition (or motion to vacate sentence) is highlighted

by the differing standards applied the circuits, as well as concerns raised by lower court judges and Justice Sotomayor about those standards.

1. The Sixth Circuit Concluded That A Second-In-Time Petition Is Not "Second Or Successive" Only If A Claim Previously Was Not Ripe Or An Earlier Petition Was Dismissed For Nonexhaustion

The panel here concluded that the "second-or-successive exception is generally restricted to two scenarios," namely "when (1) the claim was not ripe when the earlier petition was filed and (2) where the earlier petition was dismissed for failure to exhaust." *In re Hanna*, 987 F.3d at 609, Pet. App. 5 (citing *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (per curiam)). In doing so, however, the Sixth Circuit ignored the "one fair opportunity" language articulated by *Banister* and *Magwood*. This, despite Hanna's argument that his petition is not "second or successive" because he did not abuse the writ and had no full or fair opportunity to litigate his claims in his first petition. *See, e.g.*, Mot. to Remand at 1, 2, 9, 10 & n.1, 12, Pet. App. 632, 633, 640, 641 n.1 (citing *Panetti* and Justice Kennedy's "no fair opportunity" language in *Magwood*), 643; Pet. for Writ of Habeas Corpus at 2–3 & 41–48, Pet. App. 35–36, 74–81.

2. The Fifth Circuit Applies A Standard Similar To That of the Sixth Circuit, And Justice Sotomayor Has Criticized Fifth Circuit Decisions Concluding That Second-In-Time Petitions Were "Second or Successive"

a. *In re Halprin*, 788 Fed. Appx. 941 (5th Cir. 2019) (per curiam) and *United States v. Bernard*, 820 Fed. Appx. 309 (5th Cir. 2020) (per curiam)

In *In re Halprin*, 788 Fed. Appx. 941 (5th Cir. 2019) (per curiam), the petitioner was tried and sentenced to death in 2003. Later, in 2018, Halprin (who is Jewish)

first learned that the trial judge had expressed "racist and anti-Semitic views (among others)" and had even "used anti-Semitic language to describe Halprin." *Id*. at 942. Having been "unaware of any bigotry on the part of" the trial judge when he filed his initial petition for writ of habeas corpus, Halprin filed a second habeas petition, asserting that his new petition was not "second or successive" under 28 U.S.C. § 2244, because the judge's bigotry was unknown at the time of the first petition.

Like the panel below (Pet. App. 5), the Fifth Circuit concluded that in "only two situations, neither applicable here," is a second-in-time petition not "second or successive." *Halprin*, 788 Fed. Appx. at 943. "The first is where ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition, such as a request for relief on a *Ford*-based incompetency claim." *Id*., citing *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017), *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Panetti v. Quarterman*, 551 U.S. 930, 944–45 (2007). "The second is where a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims and in doing so never passed on the merits." *Halprin*, 788 Fed. Appx. at 943, citing *In re Coley*, and *Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000).

Quoting a prior panel decision in *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998), *Halprin* went on to note that "Our precedent is clear that 'a later petition is successive when it: 1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ.'" *Halprin*, 788 Fed. Appx. at 943. Nevertheless, the Fifth Circuit concluded that Halprin's petition was "second or successive" because Halprin claimed

that the judge "was bigoted all along," and "[t]hus, the claim was ripe in 2003, even if unknown to Halprin at the time," in contrast to the non-ripe *Ford* claims raised in *Martinez-Villareal* and *Panetti*. *Id*. The Fifth Circuit held that, so long as a claim was "ripe" at the time of a first collateral attack, it is "second or successive" when presented in a later petition—"even if unknown to [the petitioner] at the time." *Id*.

In *United States v. Bernard*, 820 Fed. Appx. 309 (5th Cir. 2020) (per curiam), the Fifth Circuit confronted a similar issue in the context of a second-in-time motion under 28 U.S.C. § 2255, raising claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959). Bernard maintained that "the district court erred in construing his § 2255 motion as a successive petition because the facts underlying his *Brady* and *Napue* claims could not have been discovered at the time Bernard filed his initial petition." *Bernard*, 820 Fed. Appx. at 309.

The Fifth Circuit held that "claims based on a *factual* predicate not previously discoverable are successive." *Id*. (citing *Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009)). "In other words," the Fifth Circuit stated, "if a prisoner's later-in-time petition raises a new claim based on evidence that the prisoner alleges was undiscoverable at the time of his earlier petition, the petition is successive. Bernard's motion does just that and is therefore successive." *Bernard*, 820 Fed. Appx. at 309. "Whether or not Bernard could have discovered those facts goes to whether he meets the requirements for filing a successive petition, not whether his motion is successive to begin with." *Id*. at 311.

The Fifth Circuit also concluded that this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), did not require a different result. The court stated that Panetti's incompetency-to-be-executed claim "had not ripened until after the disposition of his first petition" and Panetti's "second petition was not successive because the factual predicate for the prisoner's claim (his mental state at the time of execution) could not have existed when the prisoner filed his first petition, years before his scheduled execution." *Bernard*, 820 Fed. Appx. at 310–11 (citing *Panetti*, 551 U.S. at 944–45).

b. Justice Sotomayor's Concerns With *Halprin* and *Bernard*

Justice Sotomayor has expressed significant concerns about the Fifth Circuit's decisions in *Halprin* and *Bernard*. Halprin, she noted, has a "potent argument[]," "[d]rawing on *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Magwood v. Patterson*, 561 U.S. 320 (2010)" that "his federal habeas claim cannot count as 'second or successive' under § 2244(b) because he never 'had a full and fair opportunity to raise the claim in [his] prior application.'" *Halprin v. Davis*, 589 U.S. at ___ (Statement of Sotomayor, J.) (slip op. at 4). This accords with *Banister*'s "fair opportunity" language, which was also set forth in *Magwood*'s concurring and dissenting opinions.

In *Bernard*, Justice Sotomayor questioned the fairness of Bernard never having "had the opportunity to test the merits of" his false testimony and withheld evidence claims, because prosecutorial misconduct was concealed until after the conclusion of his first collateral attack. *Bernard v. United States*, 592 U.S. at ___ (Sotomayor, J., dissenting) (slip op. at 1). As she queried:

> How exactly was Bernard supposed to have raised a *Brady* claim more than a decade ago when he brought his first habeas petition, given that he was unaware of the evidence the Government concealed from him?

Id. (slip op. at 5). Quoting *Panetti*, Justice Sotomayor questioned whether Congress really intended such a result through application of 28 U.S.C. § 2244. *Bernard v. United States*, 592 U.S. at ___ (Sotomayor, J., dissenting) (slip op. at 5). Bernard, she indicated, had been unfairly denied review of his claim "through no fault of [his] own." *Id*. at ___ (slip op. at 4). She further stated that the Fifth Circuit's ruling suffered the same "fatal flaws" as rulings in other circuits finding that a second-in-time petition is "second or successive" even when the petitioner lacked evidence to support a claim when s/he filed an initial petition. *Id*. at ___ n. 4 (slip op. at 5 n. 4) (citing cases).

3. The Eleventh Circuit's Decision in *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018)

The Eleventh Circuit addressed a similar issue in *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018). There, the court interpreted *Magwood* and *Panetti*, noting that this Court found Panetti's *Ford* claim raised in a second petition was not "second or successive" because Panetti did not have "a full and fair opportunity to raise" his claim in an earlier petition:

> Since a *Ford* claim considers a petitioner's mental state at the time of proposed execution and Panetti's first § 2254 petition was filed well before that time, Panetti did not have a full and fair opportunity to raise that claim—that is, the claim did not ripen—until after his first § 2254 petition was resolved. *See Panetti*, 551 U.S. at 947. For that reason, the Court found no abuse of the writ. *Id.*

Scott v. United States, 890 F.3d at 1249.

Scott initially raised a *Brady* claim in a second-in-time petition because the *Brady* evidence was undisclosed when he filed his first federal habeas petition. *Id.* at

1253. The Eleventh Circuit applied *Panetti*'s principles to Scott's *Brady* claim, and concluded that the claim ought not be considered "second or successive." *Id.* The panel reasoned that Scott "enjoyed no 'full and fair opportunity' to bring the claim earlier," *id.*, and that preventing him from raising the claim in a second petition would undermine habeas practice as well as principles of finality. *Id*. at 1249–52.

Despite asserting that the "full and fair opportunity" standard was the operative standard, the Eleventh Circuit panel nevertheless concluded that it was bound by a prior panel decision in *Tompkins v. Secretary*, 557 F.3d 1257 (11th Cir. 2009) (per curiam). The *Scott* panel explained that *Tompkins* was wrongly decided in light of *Panetti*, but that *Tompkins* nevertheless required it to conclude that Scott's claim must be considered "second or successive." *See Scott*, 890 F.3d at 1253–58. *See also Bernard v. United States*, 592 U.S. at ___ n. 4 (Sotomayor, J., dissenting) (slip op. at 5 n. 4) (asserting error in Eleventh Circuit's decision in *Tompkins*).

4. The First, Second, Fourth, Eighth, Ninth, and Tenth Circuits Apply Varying Standards About What Constitutes A "Second or Successive" Petition

While the Fifth, Sixth, and Eleventh Circuits have limited the situations in which a second-in-time petition is not "second or successive," other circuits (including the First, Second, Fourth, Eighth, and Tenth Circuits) have articulated and applied more lenient standards. Those standards more accurately reflect the core principle that a petitioner must be given one fair opportunity to litigate a claim in a first petition, or else be allowed to file a second petition. The Ninth Circuit, however, has applied a more rigid standard, similar to those applied by the Fifth, Sixth, and Eleventh Circuits.

As the First Circuit explained in *United States v. Barrett*, 178 F.3d 34 (1st Cir. 1999), a second-in-time petition should be considered "second or successive" only if it constitutes an "abuse of the writ." That is, a habeas claim is second or successive only if the claim "could have been properly raised and decided" in a prior application:

> We do not purport to define the full scope of the phrase 'second or successive.' However, as a general matter, if a petition falls under the modified *res judicata* rule known as the abuse of the writ doctrine—because, for example, it raises a claim that could have been properly raised and decided in a previous § 2255 petition—it also falls within the definition of 'second or successive.'

Barrett, 178 F.3d at 45. This "abuse of the writ"/"could have been properly raised" standard certainly permits a petitioner to be heard on a second petition when his or her claim was not reasonably available at the time of a first petition.

Similarly, the Second Circuit has recognized that the AEDPA "ensures every prisoner one full opportunity to seek collateral review." *Urinyi v. United States*, 607 F.3d 318, 320 (2d Cir. 2010) (quoting *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.)). Having invoked the language of "one full opportunity" similar to *Banister*'s "one fair opportunity" standard—the standard articulated in Justice Breyer's concurrence and Justice Kennedy's dissent in *Magwood*—the Second Circuit applies a standard consistent with *Banister* and *Magwood*. That stands in conflict with the more unforgiving standards applied by the Fifth, Sixth, and Eleventh Circuits.

The Fourth Circuit, too, applies the "abuse of the writ" standard, contrary to the approaches taken in the Fifth, Sixth, and Eleventh Circuits. In *In re Torrence*, 828 Fed. Appx. 877, 881–82 (4th Cir. 2020), the Fourth Circuit concluded that where

a claim was not presented in a first habeas petition, the claim presented in a "second-in-time petition is not 'second or successive' within the meaning of § 2244(b)(3)" when the Court is "satisfied that [a petitioner] has not abused the writ." The Fourth Circuit, therefore, equates "second or successive" petitions with those petitions that constitute an abuse of the writ.

Likewise, the Eighth Circuit frames its applicable test as being "guided by abuse of the writ principles." *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003) (en banc). The Eighth Circuit's standard requires an assessment whether the petitioner's claim is a claim "that had not arisen at the time of [his] previous petition." *Id*. at 1023. The Eighth Circuit in *Singleton* ultimately concluded that the petition was not "second or successive," "because [Singleton's] claim did not arise until" after his first habeas proceedings concluded, and thus, "the claim could not have been raised earlier." *Id*.

Singleton indicates that in the Eighth Circuit, a petition is not successive if the petitioner's claim either "could not have been raised" or otherwise "had not arisen" at the time of the first proceeding. Again, this appears more in line with the decisions of the First, Second, and Fourth Circuits, while appearing faithful to the *Banister* "one fair opportunity" test. *Compare Crawford v. Minnesota*, 698 F.3d 1086 (8th Cir. 2012) (without citing *en banc* decision in *Singleton*, finding petition to be "second or successive" where it also concluded that evidence was not "material," and rejecting petitioner's argument that petition was not "second or successive" because

prosecutors withheld information from him and he thus could not have discovered his claim until after his first petition was filed).

In *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018), however, the Ninth Circuit concluded that, even when a petitioner lacked knowledge of withheld evidence when he filed his first habeas petition, his claim was still "second or successive," because the factual predicate "existed at the time of the first habeas petition." *Id*. at 668 (citing *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015)). The Ninth Circuit based this conclusion on its interpretation of 28 U.S.C. § 2244's text, as well as its views of *Panetti* and *Magwood*. *Brown*, 889 F.3d at 669–71. When interpreting *Panetti* and *Magwood*, however, the Ninth Circuit focused its "second or successive" analysis on whether the claim was "ripe" at the time of a first petition. *Id.* Notably, however, the court did not mention the "fair opportunity" language used throughout *Magwood* (or later in *Banister*). *See id*. Having unduly narrowed its analytical focus, the court held that Brown's petition was second or successive, even though "Brown was completely in the dark" about the existence of his claim (and the facts supporting it) when he filed his initial petition. *Id*. at 672.

Finally, in *Stanko v. Davis*, 617 F.3d 1262 (10th Cir. 2010), the Tenth Circuit recognized that § 2244 "could be read to bar *any* second or subsequent habeas petition" which could "include . . . even those [claims] that could not have been raised in a previous petition." *Id*. at 1270. The court concluded that in enacting § 2244, "Congress merely intended to bring within the statutory bar new claims that historically would have been barred as an abuse of the writ." *Id*. The Tenth Circuit

thus concluded that Stanko's petition would be "second or successive" as an abuse of the writ only if "a second or subsequent petition *raises a claim that could have been raised in an earlier petition*," at which point the petitioner would have to "establish that the omission was not the result of inexcusable neglect." *Id.* at 1271 (emphasis supplied). Applying this standard, the court found Stanko's petition to be "second or successive." *Id.* at 1272.

C. The Circuits' Conflicting Standards And Justice Sotomayor's Concerns Underline The Need For This Court To Address This Recurring Issue

In sum, the Fifth, Sixth, Ninth, and Eleventh Circuits have concluded that a second-in-time habeas corpus petition is "second or successive" under § 2244 even when a petitioner lacked a fair opportunity to raise a claim during an initial collateral attack. Those courts have, *inter alia*, concluded that a petition is not second or successive only if the claim was not "ripe" during initial proceedings, even if the petitioner had no basis or ability to raise the claim in those earlier proceedings. As Justice Sotomayor and judges on the Eleventh Circuit have noted, however, such conclusions are troubling and do not fully account for this Court's decisions in *Panetti* and *Magwood* (nor *Banister*, for that matter). On the other hand, the First, Second, Fourth, Eighth, and Tenth Circuits are more accommodating to petitioners who, through no fault of their own, had no fair opportunity to properly raise a claim in an initial federal habeas petition. Those courts have generally characterized "second or successive" petitions as only those petitions that constitute an "abuse of the writ."

One cannot be confident that Congress intended the extremely harsh outcome that precludes a petitioner from proceeding on a second petition when s/he lacked a fair opportunity to present a claim in an initial petition. Congress also would not have intended to blame a habeas petitioner for not raising a claim in an initial petition when the fault for not raising a claim lies with someone else—particularly when someone else's malfeasance or nonfeasance prevented the petitioner from raising a claim earlier. In *Halprin*, it was a biased judge who acted improperly. In *Bernard*, *Scott*, and *Brown*, the prosecutor acted improperly. In this case, it was federal habeas counsel who—through no fault of Hanna's—suffered a disqualifying conflict of interest. *See also Towery v. Ryan*, 673 F.3d 933 (9th Cir. 2012) (denying relief after assuming an attorney's breach of loyalty in initial federal habeas proceedings would avoid application of "second or successive" bar).

Given the ongoing conflict in the lower courts about the standard for identifying when a numerically second petition is not "second or successive," as well as good reasons to doubt the correctness and fairness of the standards applied by the lower courts, this Court should grant certiorari to decide what standard determines whether a second-in-time petition is "second or successive" within the meaning of 28 U.S.C. § 2244. *See* U.S. Sup.Ct. R. 10(a).

IV. The Decision Below Is Wrong And Will Result In A Manifest Injustice In This Capital Case

Below, Judge Moore got it right, and the panel majority "got it wrong." *Bernard v. United States*, 592 U.S. at ___ (Sotomayor, J., dissenting) (slip op. at 4). "Through

no fault of [his] own," *id.*, Hanna lost any opportunity to have viable claims reviewed in federal habeas simply because his federal habeas counsel had a conflict of interest.

Simple fairness dictates that Hanna be permitted to have his petition adjudicated on the merits, because: (1) Hanna's initial habeas counsel did not raise the very claims Hanna raises now, in which he asserts that counsel ineffectively failed to present: (a) mitigating evidence from brain scans; and (b) mitigating evidence of terrible sexual abuse, complex trauma, and resulting PTSD, depression, and borderline personality disorder; (2) initial federal habeas counsel with the Ohio Public Defender (OPD) labored under a conflict of interest that prevented them from raising such claims and asserting OPD's own ineffectiveness during post-conviction proceedings, especially where counsel Roche represented Hanna in both state and federal proceedings (with her disqualification being imputed to all OPD counsel); and thus (3) Hanna is not at fault, and he has not abused the writ.

"In these circumstances, no just system would" close the courthouse doors to Hanna. *Maples v. Thomas*, 565 U.S. 266, 271 (2012). In fact, in *Christesen v. Roper*, 574 U.S. 373, 378 (2015), this Court recognized that federal habeas counsel suffers a conflict of interest if "advancing . . . a claim would have required [counsel] to denigrate their own performance." This Court similarly recognized an impermissible conflict of interest—leaving a petitioner's interests unprotected by counsel—if counsel's actions would be "contrary to their client's interest," or if counsel's actions "served their own professional and reputational interests" rather than the client's interests. *Id.* at 379. That is the exact situation here: To properly represent Hanna, Mr. Bodiker and his

assistants would have had to "denigrate their own performance" in state court, and OPD counsel had "professional and reputational interests" in not alleging their boss' or colleagues' or their own failures in state court. *Id*. It is only now that Hanna has new counsel, unencumbered by those conflicts, that Hanna could adequately raise and litigate his current claims for the first time.

This Court's decision in *Maples v. Thomas*, 565 U.S. 266 (2012), likewise supports Hanna's position. *Maples* concluded that when a firm's attorneys failed to properly represent a capital petitioner in state proceedings, the entire firm suffered a conflict of interest in federal court. *Id.* at 285 n.8. The Court reasoned that "the firm's interest in avoiding damage to its own reputation" during its representation of the client in federal habeas proceedings "was at odds with" petitioner's arguments for securing relief. *Id. Maples*, like *Christeson*, confirms that Hanna was unfairly burdened by conflicted counsel during his initial habeas proceedings.

Judge Moore therefore properly recognized that, as in *Christeson*, Hanna labored with conflicted counsel, and he cannot be said to have abused the writ. Consequently, his petition cannot fairly be considered "second or successive," given his lack of fair opportunity to raise the claims he now presents. Rather, Hanna "was blameless." *Maples*, 565 U.S. at 271. This Court should thus grant certiorari, lest Hanna be denied a fair opportunity to have his claims *ever* heard by any court. *See In re Hanna*, 987 F.3d at 616 (Moore, J., dissenting), Pet. App. 12. *Compare Bernard v. United States*, 592 U.S. at ___ (Sotomayor, J., dissenting) (slip op. at 4–5). This Court granted certiorari and relief in *Christeson* to ensure that, if Christeson had a viable

claim in federal court, federal habeas counsel's conflict of interest would not impede his ability to secure relief. *See Christeson*, 574 U.S. 373 (2015). The same reasoning applies here, counseling this Court to grant certiorari.

V. This Petition Presents An Excellent Vehicle For Deciding The Questions Presented

Finally, this petition provides an excellent vehicle for addressing the questions presented. The questions presented were cleanly presented below: In both the District Court and the Sixth Circuit, Hanna argued that his petition was not "second or successive" because he has not abused the writ, and, during his first habeas proceedings, he had no full and fair opportunity to raise the claims he raises in his current petition. *See, e.g.*, Pet. for Writ of Habeas Corpus at 2–3 & 41–48, Pet. App. 35–36, 74–81; Mot. to Remand, Pet. App. 632–47.

In addition, Hanna would secure adjudication of his petition should this Court rule either (a) that his petition is not "second or successive," or (b) that a petition is not "second or successive" if a petitioner had "no fair opportunity" to raise a claim previously or has not abused the writ. Because the United States Magistrate has already concluded that Hanna has not abused the writ (*See* Magistrate's Order, Pet. App. 22), Hanna would ultimately be entitled to have his petition adjudicated in federal court.

Also, should Hanna have his petition adjudicated on the merits, he would likely secure habeas corpus relief. First, he would overcome any default of his new claims, because he has "cause" under *Martinez* and *Trevino*. *See Martinez*, 566 U.S. at 11–12; *Trevino*, 569 U.S. at 423. Indeed, Hanna's underlying ineffectiveness claims are

substantial, and post-conviction counsel was ineffective: OPD counsel never considered his new claims and had no strategic reason for not raising them in state post-conviction proceedings. *See* Decl. of Susan Roche, Esq., Pet. App. 152–53.

Second, Hanna has a strong likelihood of securing relief on the merits of his ineffectiveness claims. As Hanna has pleaded and ultimately can prove, trial counsel's performance was deficient, because trial counsel was aware of Hanna's head trauma, neurological problems, and issues of abuse, but failed to secure neuroimaging to scientifically prove brain damage. While on notice of Hanna's traumatic history, counsel also failed to fully investigate Hanna's trauma history to show the extent of the abuse he suffered, and his resulting PTSD and depression. *See e.g.*, Pet. for Writ of Habeas Corpus ¶¶ 49–56, 94–101, Pet. App. 53–54, 65–67.

Hanna will also be able to establish resulting prejudice, because, in Ohio, a life sentence must be imposed if only one juror votes for life. *State v. Mundt*, 115 Ohio St.3d 22, 43 (2007). There is a reasonable probability that "one juror would have struck a different balance" and voted for life, *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)), had the jury considered: (a) mitigating neuroimaging evidence showing brain damage that affected his behavior (as Hanna has pleaded and can prove) and (b) mitigating evidence of mental illness caused by complex trauma, as supported by neuroimaging reports and the report of Howard Fradkin, Ph.D. *See e.g.*, Pet. App. 54–56, Pet. App. 558–615 (Fradkin report). Indeed, "evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available." *Littlejohn v. Trammell*, 704 F.3d 817, 864-66 (10th Cir. 2013) (granting habeas corpus relief where

at least one juror would have supported a life sentence had trial counsel presented mitigating evidence that petitioner "suffered from an organic brain injury that could adversely affect his behavior.").[8]

Thus, this Court's review of the question whether Hanna's petition is "second or successive" is an appropriate exercise of this Court's jurisdiction. As in *Magwood*, this Court's review would not be a mere academic exercise, and it would ultimately allow Hanna to secure relief on his claims. *Compare Magwood v. Culliver*, 558 U.S. 1023 (2009) (granting certiorari to address whether petition was "second or successive") *with Magwood v. Warden*, 664 F.3d 1340 (11th Cir. 2011) (granting relief after this Court held that Magwood's petition was not "second or successive").

Finally, Hanna's petition more cleanly presents the "second or successive" question compared to recent petitions that required consideration of additional issues beyond the question whether a petition was "second or successive." Critically, unlike the prisoners whose petitions were accompanied by applications for stay of execution, Hanna does not face an impending execution date. *Compare Bernard v. United States*, 592 U.S. ___ (2020) (denying certiorari and application for stay); *Jimenez v. Jones*, 586 U.S. ___ (2018) (same). Because Hanna does not face an imminent execution date

[8] After the District Court refused to consider Hanna's habeas petition, Hanna established in other proceedings that a PET scan of his brain shows that he has brain dysfunction consistent with PTSD and depression, with damage to his limbic system (notably the amygdala), which causes "emotional dysregulation, hypervigilance, and overreaction to perceived threat" such as a "heightened anger response." *See In re Ohio Execution Protocol Litig.*, S.D. Ohio No. 2:11-cv-1016, ECF No. 2950-1 (Report of Andrew Newberg, M.D). Such proof of brain damage, if presented to the jury, would have been highly mitigating and led to imposition of a life sentence, because it would have provided a compelling explanation for Hanna's aggressive behavior toward the victim.

and does not present an application for a stay, his petition presents a better vehicle for the Court to consider the questions presented.[9]

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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[9] Governor Mike DeWine has stated that executions by lethal injection cannot go forward in Ohio, and lawmakers must choose a new method of execution before any executions could proceed. Julie Carr Smyth, et al., *Ohio governor: Lethal Injection no longer execution option*, https://apnews.com/article/legislature-ohio-coronavirus-pandemic-mike-dewine-executions-97f154261542613ae6922444d77341d4d3b40 (Dec. 8, 2020). Governor DeWine earlier reprieved Hanna's 2019 execution date, and in 2020, he reprieved any possible execution until May 18, 2022.