No. 21-5025

In the Supreme Court of the United States

JAMES GALEN HANNA,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE –EXECUTION SET FOR MAY 18, 2022

QUESTION PRESENTED

Should the Court rely on pre-AEDPA case law to create an exception to 28 U.S.C. §2244(b)'s prohibition on second or successive petitions?

LIST OF PARTIES

The Petitioner is James Hanna, an inmate at the Chillicothe Correctional Institution.

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

LIST OF DIRECTLY RELATED PROCEEDINGS

Hanna's list of directly related proceedings is incomplete. The directly related proceedings should also include the following cases:

Ohio Court of Common Pleas:

State v. Hanna, No. 98CR17677 (Warren Cnty., Mar. 22, 2001)

Ohio Court of Appeals:

State v. Hanna, 2001-Ohio-8623 (Ohio Ct. App. 2001)

Ohio Supreme Court:

State v. Hanna, 96 Ohio St. 3d 1438 (2002)

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INTRODUCTION

James Hanna is looking for a loophole. Except in narrow circumstances, federal courts are forbidden from entertaining second or successive habeas petitions. 28 U.S.C. §2244(b). If a federal court rejects a petitioner's request to file a second or successive petition, the petitioner may not appeal that denial. 28 U.S.C. §2244(b)(3)(E). In this case, the Sixth Circuit denied Hanna's request to file a second or successive petition. This Court has no authority to review that denial. *Id.* Hanna recognizes that. So, instead of challenging the denial of his request to file a second or successive petition, he argues that his petition was not second or successive in the first place. If Hanna is right, then he did not need permission to file his petition and the lower courts erred. Pet.1.

The lower courts did not err. Hanna's petition raised claims that he had already raised—and lost—in a prior petition. *See* Pet.App.4–5. That is the prototypical example of a second or successive petition. *See* §2244(b)(1); *cf. also McClesky v. Zant*, 499 U.S. 467, 482–84 (1991). Hanna's petition is thus a thinly disguised attempt to challenge the denial of authorization to file a second or successive petition—a challenge this Court lacks jurisdiction to entertain. And even if the Court has jurisdiction, Hanna's petition presents no issue worthy of the Court's review: he seeks pure error correction of a case in which the lower court did not err. True, Hanna claims his case presents a circuit split. But the split he identifies does not exist, and it would not be implicated even if it did.

The Court should deny Hanna's petition.

STATEMENT

1. James Hanna, while already serving a life sentence for one aggravated murder, committed another. More specifically, he murdered his cellmate, Peter Copas. *See State v. Hanna*, 95 Ohio St. 3d 285, 286 (2002). Hanna killed Copas in part because Copas had turned off Hanna's television. *Id.* at 286–87. Hanna sharpened a paintbrush handle into a shank and stabbed Copas in the eye. *Id.* Part of the shank penetrated Copas's brain and broke off inside his head. *Id.* With the shank no longer usable, Hanna beat Copas with a padlock-filled sock. *Id.* Hanna beat Copas intermittently for several hours. *See id.* at 288. Copas eventually died of the injuries he sustained. *Id.* Hanna would later express regret that the shank he used had broken so easily; Hanna had hoped to stab even deeper into Copas's brain. *Id.* at 292.

2. Ohio courts convicted Hanna of aggravated murder. *Id.* at 290. During the mitigation phase, Hanna's counsel presented the testimony of Dr. Kathleen Burch. Dr. Burch testified that Hanna suffered from undiagnosed attention deficit disorder, antisocial personality disorder, that portions of his brain were impaired and dysfunctional, and that Hanna had experienced "some organic injury to his brain." *Id.* at 311–12. Dr. Burch also testified that Hanna's family members told her that Hanna, while growing up, had been sexually abused by a neighbor and by one of his foster families. *Id.* at 307, 310. Hanna's trial counsel presented corroborating testimony from Patricia Cutcher, one of Hanna's sisters. Cutcher testified about Hanna's difficult upbringing and confirmed that Hanna had been sexually abused as a child. *Id.* at 307, 309. Neither the jury nor the trial court found the mitigating evidence

sufficiently compelling, however: the jury recommended, and the trial court imposed, a death sentence. *Id* at 290.

Hanna appealed his conviction and sentence. After an intermediate court of appeals affirmed, *see State v. Hanna*, 2001-Ohio-8623 (Ohio Ct. App. 2001), Hanna appealed to the Ohio Supreme Court, *Hanna*, 95 Ohio St. 3d 285. There, Hanna argued that his trial counsel failed to present sufficient mitigation evidence. In other words, Hanna sought relief on an ineffective-assistance-of-counsel claim. Hanna argued that his attorneys, during the mitigation phase, should have presented additional evidence about the abuse that Hanna had suffered as a child. *Hanna*, 95 Ohio St. 3d at 306–07.

The Ohio Supreme Court rejected Hanna's claim. *Id.* at 307. It additionally conducted its own, independent review of Hanna's sentence. As part of that review, the court concluded that Hanna's troubled history as a child, his psychological problems, and his organic brain injury did not require a sentence other than death. The court recognized that Hanna had committed a "senseless, horrific murder." *Id.* at 312. And it noted that Hanna's sentence was proportionate to "death sentences approved for murders by inmates in detention facilities … and for offenders with prior murder convictions." *Id.* at 313 (citations omitted). It thus affirmed the death sentence.

3. Hanna filed a petition for state-postconviction relief even before concluding his direct appeal. Hanna again argued that he had received ineffective assistance of trial counsel. He said that his attorneys should have done much more to prepare for

the mitigation phase of his trial. *See* Postconviction Pet., *Hanna v. Ishee*, No. 1:03-cv-801 ("*Hanna I*"), R.163-3, PageID#4064–77. Most relevant here, Hanna claimed that his trial counsel were ineffective because they failed to present testimony from Hanna's family about the sexual abuse he had suffered as a child. *Id.* at PageID#4075. (This despite the fact that, as noted above, the lawyers *did* present at least some testimony from Hanna's sister about that very issue.) Hanna also claimed that counsel should have prepared Dr. Burch to testify about the brain damage that Hanna had suffered. *Id.* at PageID#4073–76; PageID#4287–92. Specifically, Hanna argued that his counsel should have asked Dr. Burch to testify about how the combination of Hanna's brain damage and the prison environment contributed to Hanna's attack on Copas. *See* PageID#4289–92.

The postconviction court rejected Hanna's petition. It held that Hanna had failed to allege facts sufficient to support a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The court determined that trial counsel's choice of mitigation strategy did not constitute ineffective assistance. Order, *Hanna I*, R.163-4, PageID#4720. Neither did trial counsel's investigation of Hanna's childhood and background. *Id.* at PageID#4721. A state appellate court affirmed the denial of postconviction relief. *State v. Hanna*, 2001-Ohio-8623 (Ohio Ct. App. 2001). The Ohio Supreme Court denied review. *State v. Hanna*, 96 Ohio St. 3d 1438 (2002).

4. Hanna filed his first federal petition for a writ of habeas corpus in 2003. Pet. for Writ of Habeas Corpus, *Hanna I*, R.10. That petition raised ten claims for

relief, including a claim that Hanna received ineffective assistance during the mitigation phase of his trial. *Id.* Hanna offered several reasons why he believed that his trial counsel had been ineffective. He claimed that his counsel had not presented sufficient evidence about the way his behavior was molded by the combination of his psychological makeup and thirty years' imprisonment. *Id.* at 16–17. Hanna further claimed that his lawyers had not presented enough evidence about the sexual abuse he suffered as a child. *Id.* at 17–18.

A magistrate judge recommended denying Hanna's petition, Report and Recommendation, *Hanna I*, R.126, and the District Court accepted that recommendation, Order, *Hanna I*, R.132. Significantly, the District Court *did not* hold that Hanna had procedurally defaulted any of his ineffective-assistance claims. *See* Report and Recommendation, *Hanna I*, R.126 at 44. Instead, the District Court rejected Hanna's claims on the merits. *See id.* at 44–63.

Despite ruling against Hanna, the District Court granted a certificate of appealability on a handful of claims, including his claim that counsel was ineffective for failing to conduct a more-detailed investigation of his childhood. *See* Report and Recommendation, *Hanna I*, R.140 at 14; Order, *Hanna I*, R.144. The Sixth Circuit affirmed the denial of Hanna's petition. *Hanna v. Ishee*, 694 F.3d 596, 601 (6th Cir. 2012). Hanna failed to brief, and thus abandoned, any argument that counsel was ineffective for failing to present additional testimony from his siblings. *Id.* at 605 n.2. And the ineffective-assistance theories that Hanna *did* brief fared no better. *Id.* at 617–19. For example, the Sixth Circuit rejected Hanna's argument that trial counsel

provided ineffective assistance by failing to prepare Dr. Burch to testify about how the prison environment, combined with Hanna's "organic neurological defects and troubled childhood," influenced Hanna's decision to murder a cellmate. *Id.* at 617. The court held that Hanna's claim amounted to an argument that his trial counsel "should have pursued a different mitigation strategy." *Id.* at 618. The benefits of the theory that Hanna proposed, however, were cumulative of other trial testimony and "simply too speculative to prove prejudice under *Strickland*'s and AEDPA's combined doubly high standard for relief." *Id.* at 619.

Hanna filed a petition for a writ of *certiorari*. This Court denied it. *Hanna v. Robinson*, 571 U.S. 844 (2013).

5. After the Court denied his *certiorari* petition, Hanna filed a motion seeking new habeas counsel. *See* Motion, *Hanna I*, R.152. Hanna argued that he needed new counsel because of this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012)—a decision that issued after Hanna filed his first petition for a writ of habeas corpus, but before the Sixth Circuit affirmed the denial of that petition. *See* Order Denying Mot. to Appoint New Counsel, *Hanna I*, R.154, PageID#2889–90. The Court in *Martinez* reaffirmed that, as a general matter, there is no right to effective counsel in state-postconviction proceedings. 566 U.S. at 8–9. But it held that, if state-postconviction proceedings provide the only avenue to raise an ineffective-assistance-of-*trial*-counsel claim, then a habeas petitioner may point to state-postconviction counsel's ineffectiveness (or the absence of postconviction counsel) as cause to excuse an otherwise-defaulted ineffective-assistance-of-trial-counsel claim. *Id.* at 9.

Hanna argued that he was entitled to new habeas counsel in light of *Martinez*. *See* Order Denying Mot. to Appoint New Counsel, *Hanna I*, R.154, PageID#2889–90. The Ohio Public Defender's office had represented him in his state-postconviction proceedings *and* in his first habeas proceeding. According to Hanna, representatives of the Ohio Public Defender could not be expected to argue that their office had provided ineffective assistance. That, Hanna claimed, meant that he been deprived of an opportunity to take advantage of *Martinez*'s new rule. *Id.* After initially denying Hanna's request, *id.*, the District Court eventually reconsidered and appointed new counsel to represent Hanna, Order, *Hanna I*, R.158, PageID#2921; Order, *Hanna I*, R.162, PageID#2927.

Hanna's new counsel filed a second petition for a writ of habeas corpus. Pet., *Hanna v. Shoop*, 3:19-cv-231 ("*Hanna II*"), R.1. In his second petition, Hanna asserted four claims for relief. *Id.* at PageID#18–19. Three of his claims alleged ineffective assistance of trial counsel, while the other alleged that cumulative errors deprived him of a fair sentencing hearing. *Id.* The trouble for Hanna was 28 U.S.C. §2244(b), which allows the filing of "second or successive" petitions *only* in very narrow circumstances and *only* with permission of an appellate court. The District Court concluded that Hanna's petition was a second or successive petition, and thus transferred Hanna's petition to the Sixth Circuit. Transfer Order, *Hanna II*, R.17, PageID#716–28. Hanna, in turn, filed a motion to remand, arguing that his second habeas petition was *not* a second or successive petition as that term is used in §2244. Mot. to Remand, *In re Hanna*, No. 19-3881, Doc.8-1. According to Hanna, "a second-

in-time petition is a 'second or successive' petition only if it constitutes an 'abuse of the writ.'" Pet.App.4. And his petition, Hanna said, was not an abuse of the writ.

Because Hanna's argument rested on the abuse-of-the-writ doctrine, it is important to pause and say something about that doctrine. Before Congress adopted AEDPA, the abuse-of-the-writ doctrine "define[d] the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McCleskey v. Zant*, 499 U.S. 467, 470 (1991). Under that doctrine, a federal court could dismiss a second or successive habeas petition if: (1) the petition did not allege a new ground for relief, or (2) the new grounds for relief that the petition *did* allege could have been raised in an earlier petition. *Id.* at 486–87, 489–90. Hanna argued that he could not have raised his ineffective-assistance claims earlier; according to him, his prior counsel's alleged conflict meant that his second-in-time petition was his first chance to assert that he had received ineffective assistance of *state-postconviction* counsel. Mot. to Remand, *In re Hanna*, No. 19-3881, Doc.8-1 at 11–14. Thus, Hanna said, his petition was not an abuse of the writ and so not second or successive.

The Sixth Circuit, in a *per curiam* order joined by Judges Siler and Clay, denied Hanna's motion and denied him permission to file a second or successive petition. Pet.App.3. The court held that, in Hanna's previous appeal, it had "specifically rejected Hanna's claim that he was deprived of effective assistance in mitigation because his counsel failed to present a psychologist to testify as to how organic neurological defects and a troubled childhood, in combination with lifelong incarceration,

contributed to the aggravated murder" of Copas. Pet.App.3. Hanna's petition, in other words, did exactly what §2244 prohibits: it presented a claim that had been presented in a prior petition. Pet.App.4–5; *see also* §2244(b)(1). The Sixth Circuit rejected Hanna's argument that, because his petition was not an abuse of the writ, it was therefore not second or successive. The court apparently recognized that Hanna's petition *was* an abuse of the writ, since Hanna had already raised the ineffective-assistance claims in his first petition. *See* Pet.App.4. The court also held that, "even if" Hanna's petition "was not an abuse of the writ," Pet.App.7, he had not made any of the showings necessary to justify the filing of a second or successive petition. Pet.App.5–6. Finally, the Sixth Circuit held that Hanna's underlying claims of ineffective assistance lacked merit. There was no evidence that either his postconviction counsel *or* his trial counsel provided him with constitutionally inadequate assistance. *See* Pet.App.6–7.

Judge Moore dissented. She embraced Hanna's view that petitions must be barred by the abuse-of-the-writ doctrine in order to qualify as second or successive. She would have deemed Hanna's petition non-abusive. And, on that basis, she would have held the petition not to be second or successive. Pet.App.10–11.

REASONS FOR DENYING THE WRIT

Hanna's habeas petition is a second or successive petition. This Court lacks jurisdiction to review the lower courts' refusals to permit the filing of that petition. 28 U.S.C. §2244(b)(3)(E). Hanna attempts to avoid §2244's jurisdictional bar by arguing that he is appealing the characterization of his petition as a second or successive petition, *not* the Sixth Circuit's decision denying him permission to file that

petition. That is not a question worthy of this Court's review: the question does not implicate a circuit split, nor does it bear any other features of a case deserving of this Court's attention.

1. Habeas petitioners get one bite at the apple; they may file only one habeas petition and they must include in that petition all available grounds for relief. *See* 28 U.S.C. §2244(a). "A claim presented in a second or successive habeas corpus application … that was presented in a prior application shall be dismissed." §2244(b)(1). And the same is *generally* true of not-previously-raised claims.

But as the qualifier "generally" suggests, the second rule comes with exceptions. "A claim presented in a second or successive habeas corpus application … *that was not presented* in a prior application" must be dismissed *except* in two situations. §2244(b)(2) (emphasis added). The first occurs when the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." §2244(b)(2)(A). The second arises when the new claims rest on a factual predicate that "could not have been discovered previously through the exercise of due diligence" and that, if proven, would establish by clear and convincing evidence that "no reasonable factfinder would have found the applicant guilty of the underlying offense." §2244(b)(2)(B).

Even if a second habeas petition contains one of the two types of claims authorized by §2244(b)(2), a habeas petitioner must still obtain permission before filing. §2244(b)(3)(A). Permission will be granted only if the petitioner "makes a prima facie showing that the application" qualifies for review under either of these two narrow

exceptions. §2244(b)(3)(C). An appellate court's decision to grant or deny permission to file a second habeas petition is not subject to further review; its decision "shall not be the subject of a petition for rehearing or for a writ of certiorari." §2244(b)(3)(E).

Hanna seeks to do what §2244(b) prohibits. Remember, Hanna argues at this stage that his trial counsel provided ineffective assistance during the mitigation phase of his capital trial. Pet., *Hanna II*, R.1, PageID#18–19. He had already raised, and lost, the very same claim in his first habeas petition. *See Hanna v. Ishee*, 694 F.3d 596, 617–19 (6th Cir. 2012). As the Sixth Circuit held when it denied Hanna permission to file a second or successive petition, it had "previously rejected Hanna's claims that his counsel were ineffective" for failing to present evidence of his brain damage and history of sexual abuse. Pet.App.4. As such, the Sixth Circuit correctly concluded that Hanna's claim *had to be* dismissed under §2244(b)(1).

Because Hanna already litigated the ineffective-assistance claim in his first habeas petition, §2244(b)(2) and its narrow exceptions permitting second or successive petitions are irrelevant—those exceptions apply only to not-yet-litigated claims. But even if subsection (b)(2) applied, it would not help Hanna. His claim does not rely on "a new rule of constitutional law," §2244(b)(2)(A), or on a previously undiscoverable factual predicate, §2244(b)(2)(B). Thus, his case does not fit the narrow exceptions in which second or successive petitions are allowed.

In sum, because federal courts (including this one) lack jurisdiction to review the denial of applications to file a second or successive petition, this Court has no

jurisdiction to review the Sixth Circuit's order denying Hanna permission to file a second or successive petition. §2244(b)(3)(E)

2. Hanna knows that he cannot challenge the denial of his application to file a second or successive petition. So he claims not to challenge that denial. Instead, he seeks review of the question whether his second-in-time habeas petition *was in fact* second or successive. Hanna claims that the circuits disagree about what constitutes a second or successive petition. He is wrong. But even if he were right, his case would not implicate the circuit split. Because this case presents no circuit split, Hanna seeks factbound error correction. And because the Sixth Circuit did not err, this Court should deny Hanna's *certiorari* petition.

a. Not every second-in-time petition is a second or successive petition. *See Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000). Accordingly, this Court may review whether an appellate court properly characterized a habeas petition as second or successive. *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 323–24 (2010).

This Court has identified three circumstances in which a second-in-time petition does not qualify as a second or successive petition for purposes of §2244(b). *First*, a second-in-time petition is not "second or successive" if the federal courts dismissed the first petition for failure to exhaust state-court remedies. *Slack*, 529 U.S. at 485–86. *Second*, a second-in-time petition is not second or successive if it challenges a new, intervening state-court judgment. *Magwood*, 561 U.S. at 341–42. *Finally*, a second-in-time petition is not second or successive with respect to claims that were

unripe at the time that the first petition was filed. *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998).

Hanna's case does not fit any of these exceptions and he does not argue otherwise. So if there are no additional exceptions applicable to this case, the Sixth Circuit correctly disposed of Hanna's case. But Hanna claims that there is one such exception. According to him, the First, Second, Fourth, Eighth, and Tenth Circuits—but not the Sixth—have held that petitions are not "second or successive" whenever they do not constitute an "abuse of the writ." *See* Pet.30–31. And Hanna claims that, because his second-in-time petition is not an abuse of the writ, it is not "second or successive" under this fourth exception.

Hanna is incorrect. There is no non-abuse-of-the-writ exception to §2244(b)'s prohibition on second or successive petitions. And none of the circuits to which Hanna points have recognized one. Begin with the First Circuit's decision in *United States v. Barrett*, 178 F.3d 34 (1st Cir. 1999) (cited at Pet.30). The First Circuit held that a petition qualified as an impermissible second or successive petition because it would have constituted an abuse of the writ under pre-AEDPA doctrine. *Id.* at 45. It held that "the phrase 'second or successive'" captures, *at a minimum*, all second-in-time petitions that would have qualified as an abuse of the writ. *Id.* As this description shows, *Barrett* held that qualifying as an abuse of the writ is a sufficient condition for qualifying as a "second or successive" petition, *not* a necessary condition. Hanna thus inverts *Barrett*'s holding when he describes the case as holding that a habeas petition is second or successive "only if it constitutes an 'abuse of the writ.'" Pet.30.

Now consider the Tenth Circuit's decision in *Stanko v. Davis*, 617 F.3d 1262 (2010) (cited at Pet.32–33). In that case, the Tenth Circuit did not interpret the phrase "second or successive" as it appears in §2244(b). *Id.* at 1264–65; *see also id.* at 1265 n.2. Instead, it held that §2244's limitations on second or successive petitions *do not apply* to petitions filed under a different statutory provision, 28 U.S.C. §2241. It then applied pre-AEDPA precedent to a federal prisoner's §2241 habeas petition—precedent that, as noted above, defined "second or successive" petitions to include petitions that qualified as abuses of the writ. *Id.* at 1267; 1269 n.5. That decision is of no relevance in a case like this one, which everyone agrees implicates §2244(b).

Hanna's remaining cases do not help him either. *Urinyi v. United States*, 607 F.3d 318, 319 (2d Cir. 2010) (*per curiam*) (cited at Pet.30); *In re Torrence*, 828 F. App'x 877, 880–82 (4th Cir. 2020) (*per curiam*) (cited at Pet.30–31); *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (cited at Pet.31). None of these three decisions—only two of which are precedential—holds that a second-in-time petition must be an abuse of the writ to qualify as second or successive. In *Urinyi*, the Second Circuit held, consistent with *Magwood*, that a second-in-time habeas petition is not second or successive if it challenges a new judgment rendered *after* the filing of the first petition. 607 F.3d at 619. The Fourth Circuit in *Torrence*, in a decision consistent with *Slack* and *Martinez-Villareal*, held that a petition was not second or successive where the petitioner's first petition was dismissed for failure to exhaust state remedies. 828 Fed. App'x at 880–82 (citing *Slack*, 529 U.S.at 478). Similarly, the Eighth Circuit in *Singleton* applied *Martinez-Villareal* and held that a petition was not second or

successive where the petitioner's new claim was not ripe at the time the petitioner filed his first petition. *Singleton*, 319 F.3d at 1023 (citing *Martinez-Villareal*, 523 U.S. at 643–45). True enough, each of these cases discussed pre-AEDPA precedent and the abuse-of-the-writ doctrine. *See*, *e.g.*, *id*. But as that discussion had no bearing on the resolution of these cases, it constitutes, at most, non-binding *dicta*. And even the *dicta* does not suggest that a petition qualifies as second or successive *only if* it constitutes an abuse of the writ.

b. Even if the circuit split that Hanna imagines were real, his case would not implicate that split. That is because, as the Sixth Circuit held, Hanna's second habeas petition *was* abusive and *would* have been barred by the abuse-of-the-writ doctrine if that doctrine applied. *See* Pet.App.4, 7. The threshold question under the abuse-of-the-writ doctrine was whether a subsequent petition for a writ of habeas corpus alleged a ground for relief that had not been adjudicated in prior petition. *McCleskey*, 499 U.S. at 486. Hanna's second petition did not allege a new ground for relief and therefore qualified as an abuse of the writ. In any event, Hanna has not challenged the Sixth Circuit's determination that his petition qualifies as an abuse of the writ. As such, he has forfeited any argument on that front. And given that forfeiture, the outcome of his claimed circuit split has no bearing on his case.

Hanna seems to think that the *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S Ct. 1911 (2013), somehow bear on the abuse-of-the-writ doctrine. They do not. Under the procedural default doctrine, federal habeas petitioners *generally* cannot raise claims that state courts rejected "based on an adequate and

independent state procedural rule." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). But there is an exception: federal courts will forgive the procedural default if the petitioner can show "'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Id.* at 2064–65 (citation omitted). *Martinez* and *Trevino* hold that the ineffectiveness of state-postconviction counsel can serve as "cause" for excusing a procedurally defaulted claim. *See Martinez*, 566 U.S. at 8–11 (distinguishing *Coleman v. Thompson*, 501 U.S. 722 (1991)). The cases have nothing at all to do with the abuse-of-the-writ doctrine. So what Hanna seeks is an extension of *Martinez* and *Trevino*—he wants this Court to hold that courts may ignore §2244's bar on second or successive petitions whenever the counsel in the first-in-time federal habeas petition labored under a conflict. *See also* Pet.App.10–11 (Moore, J., dissenting). That is a non-starter. It is one thing for the Court to create an exception to a judge-made doctrine, which is what the procedural-default doctrine is. It is quite another to make an exception to a *statutory prohibition* on hearing certain cases, which is what §2244's prohibition on second or successive petitions is. The latter entails a legislative act of the sort that courts have no authority to take. And in any event, this Court has stressed that *Martinez* and *Trevino* recognize a "narrow, 'equitable'" exception to the procedural default doctrine—an exception so narrow that it may not be extended any further even in its application to that very doctrine. *Davila*, 137 S. Ct. at 2065 (quoting *Martinez*, 566 U.S. at 16). That precludes extending *Martinez* and *Trevino* so that they create exceptions in altogether new contexts, like the abuse-of-the-writ doctrine.

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In sum, Hanna seeks factbound error correction in a case where the Sixth Circuit did not err. This Court should deny his petition for a writ of *certiorari*.

CONCLUSION

The Court should deny Hanna's petition for a writ of *certiorari*.

Respectfully submitted,

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