No. 21-5025

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. This Court Has Jurisdiction To Determine Whether Hanna's Petition Is "Second Or Successive" Within The Meaning Of 28 U.S.C. § 2244(b)(2)

Invoking 28 U.S.C. § 2244(b)(3)(E), Respondent contends that this Court lacks certiorari jurisdiction to review the court of appeals' denial of Hanna's motion to remand and his request to allow adjudication of his second-in-time petition, where the court of appeals concluded that Hanna's petition should be deemed "second or successive." Respondent is incorrect. Section 2244(b)(3)(E) does not apply, because it does not preclude this Court from reviewing on certiorari the question *whether*, in the first place, a habeas corpus petition is "second or successive." In fact, in *Castro v United States*, 540 U.S. 375 (2003), this Court has already rejected Respondent's jurisdictional argument.

Repeals of this Court's jurisdiction "by implication are not favored," and this Court must instead apply a jurisdictional statute like 28 U.S.C. § 2244(b)(3)(E) by its precise terms. *See Felker v. Turpin*, 516 U.S. 651, 660 (1996). By its very terms, § 2244(b)(3)(E) does not remove this Court's certiorari jurisdiction, because it applies *only* to the "grant or denial of an authorization by a court of appeals to file a second or successive application" for habeas relief, which "shall not be the subject of a petition . . . for a writ of certiorari." *Id.* The "subject" of Hanna's petition for writ of certiorari decidedly is not whether the court of appeals appropriately denied an application for a second or successive petition, but whether it properly considered his petition a "second or successive" petition in the first place.

Accordingly, this Court has certiorari jurisdiction, exactly as it did in *Castro v. United States*, 540 U.S. 375 (2003). As in *Castro*, this Court has jurisdiction because the "subject" of Hanna's petition "is not the Court of Appeals' 'denial of an authorization.' It is the lower courts' refusal to recognize that this [habeas application] is his first, not his second. That is a very different question." *Id*. at 380 (citing *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 282–83 (1978) (statute barring court review of lawfulness of agency "emission standard" in criminal case does not bar court review of whether regulation *is* an "emission standard")).

Given *Castro* and the language of 28 U.S.C. § 2244(b)(3)(E), this Court has jurisdiction to review the questions presented by Hanna's petition for writ of certiorari. *See also Magwood v. Patterson*, 561 U.S. 320, 330 (2010) (this Court granted certiorari to "determine whether Magwood's" second-in-time habeas application "is subject to the constraints that § 2244(b) imposes on the review of 'second or successive' habeas applications.").[1]

II. The Record Is Clear That Conflicted Initial Federal Habeas Counsel Did Not Present Hanna's Current Habeas Claims In Hanna's First Federal Habeas Corpus Petition

To claim that Hanna's current petition ought not be heard in habeas, Respondent posits the demonstrably false statement that Hanna presented his

[1] While Hanna filed a motion to remand, the court of appeals also requested that Hanna file a separate application for leave to file a second or successive petition, Hanna respectfully complied with that request, and the court of appeals denied that request. *In re Hanna*, 987 F.3d 605, 611 (6th Cir. 2021); Pet. App. 7. In that application, Hanna asserted that he was entitled to have his petition adjudicated on the merits for the reasons stated in his motion to remand. Hanna seeks review of the court of appeals' denial of his motion to remand (*see id*. ("We DENY Hanna's motion to remand . . . .")), and the court of appeals' conclusion that his petition should be deemed second or successive, which was the basis for the court of appeals' denial of all relief and now the subject of this petition for writ of certiorari. As in *Castro* (and *Magwood*) this Court has jurisdiction to decide such matters.

current claims in his first federal habeas petition. The record speaks for itself and demonstrates that Hanna's initial habeas counsel never presented the claims that Hanna presents now for the first time.

Citing Hanna's initial federal habeas petition (*see* BIO at 11, citing R.1 at 16-19), Respondent incorrectly claims that Hanna's initial habeas counsel raised the very claims Hanna now raises, namely Claim IV.A: "[T]rial 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" (*see* Petition for Writ of Habeas Corpus at 15, 16–28, ¶¶44–80; Pet. App. 48, 49–61); and Claim IV.B: "[T]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." *Id*. at 15, 28–36, ¶¶81–108; Pet App. 48, 61–69.

Even a quick review of the first federal habeas petition proves the falsity of Respondent's assertions. Nowhere in that first federal petition does one find the words or phrases "neuroimaging" or "MRI" or "PET scan" or "brain damage," which form the predicate of Claim IV.A. Nowhere in that first federal petition are the words or phrases "post traumatic stress disorder" or "complex trauma" or "borderline personality disorder," which form the predicate for Claim IV.B. Nor does one find in

that first petition any reference to psychological evidence such as that contained in the report from Dr. Howard Fradkin, Ph.D., which supports Hanna's current Claim IV.B. *See* Pet. for Writ of Habeas Corpus, ¶¶86-92, Pet. App. 62-65; Report of Howard Fradkin, Ph.D., Pet. App. 556-607. Rather, initial federal habeas counsel raised discrete ineffectiveness claims that were distinctly different from Hanna's new claims. Those earlier claims contained *none* of the mitigating scientific or expert evidence that Hanna alleges and/or presents now for the first time.

Instead, initial federal habeas counsel merely claimed in Claim 4D that trial counsel failed to provide their psychologist "all relevant, available documentation about Petitioner," which prevented the jury from "understand[ing] the prison conditions that produced James Galen Hanna," with Hanna "being prejudiced when the jury never heard a complete analysis of how his psychological makeup was adversely affected by the prison system." *See* Pet. App. 180–81. Claim 4D from the initial habeas petition bears no relation whatsoever to current Claims IV.A and IV.B.

Initial federal habeas counsel also alleged in Claim 4E that trial counsel "failed to investigate and present significant mitigating evidence." But that allegation was limited to an assertion that trial counsel "did not interview or failed to adequately interview family members who were available and would have testified for Petitioner at the time of his capital trial." Pet. App. 182. Initial habeas counsel never asserted (as Hanna does now) that trial counsel failed to present mitigating *neuroimaging evidence* from *MRI and PET scans*, or failed to present expert evidence and proof of horrific sexual abuse and *complex trauma*, which led to the *serious mental illnesses*

of post-traumatic stress disorder (PTSD), depression, and borderline personality disorder at the time of the offense.

Consequently, as Judge Moore properly recognized, Hanna's current claims of counsel's ineffectiveness for failing to investigate and present the mitigating evidence identified here were never presented previously. Predicated on new and different mitigating evidence and theories not contained in the claims raised by conflicted counsel during the first federal habeas proceeding, Claims IV.A and IV.B are indeed new. *In re Hanna*, 987 F.3d at 613 (Moore, J., dissenting); Pet App. 9 ("In short, Hanna's new claim of ineffective assistance of counsel is just that, new."). [2] Respondent's assertion that Hanna has re-presented old claims is untrue, and Respondent's contention that Hanna has abused the writ by raising previously presented claims for a second time thus fails.

III. This Petition Presents An Excellent Vehicle For Addressing The Questions Presented, And Respondent's Remaining Arguments Against Certiorari Are Unavailing

In his brief in opposition, Respondent does not meaningfully contest that certiorari should be granted because: (a) *Banister v. Davis*, 590 U.S. ___ (2020) has left open the questions presented (Pet. 17–20); (b) the decision below conflicts with *Magwood* (Pet. 20–22); (c) this Court has been receiving a steady stream of petitions

[2] Judge Moore's analysis is unquestionably correct, where, for example, this Court's jurisprudence establishes that, to exhaust a claim in state court, a petitioner must exhaust both the facts and the underlying legal theory to be able to be heard in federal habeas. *See e.g.*, *Anderson v, Harless*, 459 U.S. 4 (1982). Initial federal habeas counsel emphasized that both Claims 4D and 4E as alleged in the initial habeas petition *had been raised* in state post-conviction proceedings (*see* Initial Habeas Petition, ¶¶59, 61, Pet. App. 181–82), yet those previously presented claims were not based in either state or federal court on the new neuroimaging and expert evidence that Hanna now pleads and presents here for the first time. This likewise proves that Hanna's current claims are new and were never presented during the initial habeas proceeding.

raising the questions presented (Pet. 22–23); (d) Justice Sotomayor and various judges have questioned the propriety of the standards employed by the lower courts (Pet. 23, 27–29); and (e) Hanna would likely secure relief should this Court grant certiorari, address the questions presented and decide them in accordance with *Banister* and *Magwood*, as well as *Maples v. Thomas*, 565 U.S. 266 (2012) and *Christesen v. Roper*, 574 U.S. 373 (2015) – which confirm initial habeas counsel's conflict of interest. Pet. 34–39. Taking into account each of these considerations and the fact that this a capital case where the exercise of this Court's jurisdiction can ensure fundamental justice, this Court has more than enough reason to grant certiorari, to decide the questions presented, and to reverse the court of appeals.

Respondent nevertheless persists that Hanna should be found to have abused the writ, claiming that this Court's jurisprudence provides that a second-in-time petition constitutes an abuse of the writ unless a first petition was dismissed for failure to exhaust, there has been an intervening judgment, or a claim was previously unripe. BIO at 12–13. This argument, however, highlights precisely why this Court should grant certiorari: Respondent has patently overlooked this Court's controlling statements in *Banister* and *Magwood* that Hanna was entitled to one "fair opportunity" to present the claims he now presents – which means that he has *not* abused the writ and his petition *is not* second or successive. To clarify that *Banister* and *Magwood* do indeed provide the operative standards for assessing whether a petition is "second or successive," this Court should grant certiorari, given the conflict between the decision below and *Banister* and *Magwood*. *See* U.S. Sup. Ct. R. 10(c).

Respondent is thus left with weak assertions that there is no circuit split and that Hanna's petition does not implicate the circuit split which Hanna has identified. Once again, Respondent is wrong. Other courts of appeals have been faithful to the "one fair opportunity" requirement or have allowed second petitions to be filed under § 2244(b) so long as the petitioner's claims (like Hanna's) "could not have been raised" in prior proceedings, or the petitioner (like Hanna) did not abuse the writ. *See, e.g.*, *United States v. Barrett*, 178 F.3d 34, 45 (1st Cir. 1999) (stating that a petition is "second or successive" if a claim "could have been raised and properly decided" earlier, while finding the petition to be second or successive); *Urinyi v. United States*, 607 F.3d 318, 320–21 (2d Cir. 2010) (concluding that, to provide Urinyi his "one full opportunity to seek collateral review," his current petition was not second or successive); *In re Torrence*, 828 Fed. Appx. 877, 881–82 (4th Cir. 2020) (finding petition not second or successive); *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (applying "abuse of writ" principles and allowing filing of second-in-time petition containing claim that "could not have been raised" previously); *Stanko v. Davis*, 617 F.3d 1262 (10th Cir. 2010) (assessing whether second-in-time petition was "second or successive" by asking whether the claim "could have been raised in an earlier petition," and finding petitioner's claim to be second or successive). Where these other courts of appeals have articulated and applied such standards to assess whether a petition is "second or successive," their rulings are not *dicta* (as Respondent claims), and such rulings (along with troubling decisions from the Fifth, Ninth, and Eleventh Circuits) do establish a circuit conflict worthy of this Court's resolution.

Finally, Respondent falls flat with his assertion that the court of appeals' decision does not implicate this circuit conflict. The very premise of the court of appeals' conclusion that Hanna's petition was "second or successive" was that Hanna had "not shown that the abuse-of-the-writ doctrine applies," because, in the Sixth Circuit, that doctrine allows consideration of a second petition only in "two scenarios, neither of which is presented here," namely lack of ripeness or failure to exhaust (or following an intervening judgment, a third situation which the majority noted later in its opinion). *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)). Because the foundation of the court of appeals' analysis was its unduly restrictive view of when a second-in-time petition is not an "abuse of the writ," should this Court grant certiorari and articulate and/or apply a more favorable standard for Hanna, the court of appeals' decision will indeed fall, the circuit conflict will be resolved, and Hanna will almost certainly be entitled to relief on the merits.[3]

IV. Conclusion

For these and all the reasons expressed in the petition for writ of certiorari, this Court should grant the petition for writ of certiorari.

[3] Respondent also makes the unsupported assertion that Hanna is somehow asking this Court to create new law and to expand upon this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). BIO at 16. Hanna is merely requesting that this Court require habeas review of claims which Hanna had no fair opportunity to present previously, which will require application of the settled principles of *Martinez*, yet that is something this Court itself has ordered when, as here, *Martinez* applies. *Buck v. Davis*, 580 U.S. ___, ___ (2017) (slip op. at 26).

Respectfully Submitted,

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