
No. 26-

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT FOLEY
Petitioner

v.

LAURA PLAPPERT, WARDEN
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The Court recently granted certiorari in *Guerrero v. Johnson*, No. 25-1003, to address in the successive habeas petition context, “[w]hether a claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable when the habeas petitioner could have asserted a claim based on the rule in a prior federal habeas petition” but would have then lost under the existing law. Simply, the Court will address whether a second habeas petition can proceed if the claim’s basis existed beforehand but adverse law meant that without a change in law, the claim would have failed. The instant Petition presents a companion issue regarding whether a second-in-time habeas petition is permissible when information a court deems necessary to make a claim viable, and thus to have any possibility of prevailing, becomes available after the conclusion of the first habeas proceeding.

Rather than apply the Court’s long-standing, workable abuse-of-the-writ doctrine that recognizes a claim is not successive where there is a legitimate excuse for the failure to raise the claim within the first petition, *see Banister v. Davis*, 590 U.S. 504 (2020) & *McCleskey v. Zant*, 499 U.S. 467 (1991), the Sixth Circuit applied its own standard. Specifically, the Sixth Circuit held that a claim is successive unless one of three exclusive situations exist – regardless of the existence of a legitimate reason for not raising the claim earlier. Whether the court could deviate from the abuse-of-the-writ doctrine in this way and whether the Sixth Circuit’s decision conflicts with the Court’s long-standing abuse-of-the-writ doctrine are significant questions warranting review and that give rise to these questions presented:

- 1) Is a second-in-time habeas petition claim not successive if there is a legitimate excuse for the failure to raise the claim within the first petition, under the Court’s long-standing abuse-of-the-writ doctrine (*McCleskey v. Zant*, 499 U.S. 467 (1991), reaffirmed post-AEDPA in *Banister v. Davis*, 590 U.S. 504 (2020)); or, is a non-successive second-in-time habeas petition limited to where a claim: a) challenges a new state-court judgment; b) was unripe when the first petition was filed; or c) was unexhausted and not decided, although raised, within the first petition?
- 2) Does “factual predicate,” and thus ripeness, when determining whether a federal habeas claim is not successive, mean a fact necessary to overcome summary dismissal of an underlying constitutional claim or does the “factual predicate” exist, and thus the claim is ripe, solely because the claim relates to conduct (or lack of conduct) at an early stage of proceedings, even though the fact necessary to overcome summary dismissal did not then exist?

PARTIES TO THE PROCEEDING BELOW

Petitioner here, Movant below, is Robert Foley.

Respondent here, Appellee below, is Laura Plappert, Warden.

RELATED PROCEEDINGS

The proceedings directly related to this Petition are:

In Re Foley, 2026 WL 620452 (6th Cir.);

Foley v. Plappert, No. 6:21-cv-78 (E.D. Ky. 2025, Order, Sept. 29, 2025);

Foley v. Commonwealth, 2020 WL 6390212 (Ky.);

Foley v. Commonwealth, 17 S.W.3d 878 (Ky. 2000)

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Petitioner Robert Foley requests a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit.

CITATIONS TO OPINION BELOW

The United States Court of Appeals’ opinion, *In re Foley*, 2026 WL 620452 (6th Cir.), appears within the Appendix (hereinafter App.) at 1-8. The order denying rehearing appears at App. 9. The United States District Court for the Eastern’s District of Kentucky’s Order transferring one of Foley’s claims to the Sixth Circuit as successive, *Foley v. Plappert*, No. 6:21-cv-78 (E.D. Ky. 2025), appears at App. 10-29. The Kentucky Supreme Court’s opinion related to that claim, *Foley v. Commonwealth*, 2020 WL 6390212 (Ky.), appears at App. 30-46. The Kentucky Supreme Court’s opinion upholding the denial of Foley’s initial post-conviction action, *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 200), appears at App. 47-53.

JURISDICTION

28 U.S.C. §1254(1) provides the Court with jurisdiction to review the United States Court of Appeals for the Sixth Circuit’s March 4, 2026 decision from which certiorari is sought. A timely petition for rehearing was denied on April 30, 2026. The Court extended the time to seek certiorari through, and including, September 27, 2026. This Petition is therefore timely filed.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b)(1) states “[a] claim presented in a second or successive habeas application under section 2254 that was presented in a prior application shall be dismissed.”

28 U.S.C. §2244(b)(2) states:

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.

INTRODUCTION

Robert Foley suffered numerous head injuries during childhood, and additional head injuries prior to the murders for which he was sentenced to death. That is classic mitigation, which routinely results in less than the death penalty. But Foley's jury did not have the opportunity to consider any of this history of head injuries, nor any other mitigation, to determine whether Foley is one of the worst of the worst and thus should be sentenced to death, as trial attorney presented nothing in mitigation.

This resulted in an ineffective assistance of counsel claim in state post-conviction proceedings that was supported by lay evidence of head injuries. Expert testimony regarding the head injuries and Foley's brain damage was not presented because the state courts failed to provide funds for expert assistance. One might therefore think the Kentucky Supreme Court recognized lay evidence of head

injuries as significant mitigation. Not so. The court held that evidence was irrelevant without medical proof, such as an expert's conclusion, of brain damage, and thus denied relief: "Although family members spoke of various head injuries suffered by Foley during childhood, *no medical records were presented to support such testimony*. *Foley v. Commonwealth*, 17 S.W.3d 878, 883 (Ky. 2000), App. 47-53 (emphasis added).

Without obtaining expert funds in federal habeas proceedings, all seemed lost. But Foley had a separate capital habeas case pending in federal court in which funds for a neuropsychological evaluation became available. The results were as expected—Foley suffers from significant brain damage (consistent with his history of head injuries) that impacted his behavior and thus created a nexus with the crime. *Dr. Martell Report*, App. 54-75.

Based on these results, Foley returned to state court and argued this new evidence (neuropsychological test results and resulting expert conclusion detailed within the expert's report) allowed Foley to proceed with his trial counsel ineffectiveness claim, particularly since the court previously held medical proof of brain damage is necessary for evidence of head injuries to be relevant as mitigation. With the state court having so ruled, it was surprising that the Kentucky Supreme Court subsequently refused to consider the uncontradicted previously non-existent evidence of Dr. Martell's test results, conclusions, and resulting report that was of the nature of what the court held previously was necessary for head injuries evidence to be relevant *Foley v. Commonwealth*, 2020 WL 6390212, *4 (Ky.).

Resultingly, Foley lost in state court initially because he was not given the funds to obtain expert evidence of brain damage that the court ruled was necessary to make head injuries relevant as mitigation, only for the Kentucky Supreme Court to subsequently turn around and say head injuries evidence is relevant itself but not then revisit its prior ruling stating the opposite at a time when the expert evidence (Dr. Martell's testing and conclusions) did not exist. *Id.*

Foley therefore filed a new federal habeas petition asserting his claim was, under the circumstances, an initial habeas claim.

Disregarding this Court's longstanding abuse-of-the-writ doctrine, announced in *McCleskey v. Zant*, 499 U.S. 467 (1991), the Sixth Circuit applied its own newly concocted list of three limited situations that make a habeas claim not successive:

One, when a second petition raises a claim that challenges a new state-court judgment—that is, not the one challenged in the first petition—the petition is not ‘second or successive.’ *Two*, a second petition containing a claim—whether presented or not in the first petition—that would have been unripe at the time of the filing of the first petition is not ‘second or successive.’ And *three*, when a second petition contains a claim that, though raised in the first petition, was unexhausted at that time and not decided on the merits, the petition is not ‘second or successive.’

In re Foley, 2026 WL 620452, at *3 (6th Cir. Mar. 4, 2026), App. 4 (quoting *In re Hill*, 81 F.4th 560, 568 (6th Cir. 2023) (en banc)). In so holding, the Sixth Circuit ruled, for purposes of determining whether a habeas claim is successive, that the factual predicate of any ineffective assistance of counsel claim is counsel's actions or inactions and thus the claim is ripe as of the time of trial, regardless of whether the

factual basis for the claim, and the information a court requires be presented as part of the claim, existed at the time of trial counsel's action. *Id.* App. 4-8.

The Sixth Circuit's ruling in Foley's case has a significant impact. For Foley it means that, without the Court's intervention, no court will ever consider his claim with the information the Kentucky Supreme Court held was required for that type of claim, as that evidence did not exist at the time of Foley's first state post-conviction action. The ruling also has a significant adverse impact as to the rule of law because it means an ineffective assistance of counsel claim presented in a second habeas petition will always be successive regardless of when the factual predicate for the claim comes into existence. For those who fall within the Sixth Circuit's jurisdiction, this means some constitutional claims could never be presented in federal habeas proceedings, at least not in a way for which relief could ever possibly be available. And, if allowed to stand, the Court's abuse-of-the-writ doctrine will practically no longer exist within the Sixth Circuit, even though only the court can overturn its own precedent, which it has not.

Resultingly, practitioners and pro se litigants would need to raise every potential habeas claim in a first habeas petition regardless of whether the law and facts then support the claim because the failure to do so would likely mean the claim could not be raised subsequently if the claim ultimately becomes viable. That would wreak havoc on the lower courts by overburdening the courts with a massive influx of additional habeas claims that would slow down the federal court's ability to

resolve seemingly every case before it while, which would delay finality when one of AEDPA's goals was to speed up federal habeas litigation.

Leaving the Sixth Circuit's ruling in place should therefore not be an option. Foley's case cries out for certiorari to reiterate the Court's supremacy, to reiterate that only the Court can overrule its precedent, and to make clear yet again that the abuse-of-the-writ doctrine, which the Court reaffirmed only a few years ago in *Banister v. Davis*, 590 U.S. 504 (2020), after laying it out in *McCleskey*, remains the sole basis for determining if a habeas claim is successive. That is, is there a legitimate basis for the failure to raise the claim earlier? Nothing more and nothing less. Foley's case also calls out for certiorari to ensure significant constitutional claims have a means to be presented once within a habeas petition filed in the jurisdiction of the Sixth Circuit when such claims could be raised in seemingly all other jurisdictions. And Foley's case calls out for certiorari to correct the injustice Foley suffered, and so the Court can eliminate the resulting delays in the resolution of federal habeas and other cases that would otherwise result if the Sixth Circuit's decision and its newly created standard that bear no resemblance to the abuse-of-the-writ standard, and operates more as an exclusive checklist, is allowed to stand.

STATEMENT OF THE CASE¹

Mitigation is a hallmark of a death penalty trial, and abuse and head injuries has always been a critical component of that. Yet, Foley's trial attorney presented nothing at the penalty phase. Resultingly unsurprising, the jury sentenced Foley to death and did so without knowing Foley endured significant head injuries and suffered brain damage, which impacted his behavior.

Upon direct appeal affirmance, Foley pursued state post-conviction relief and unsuccessfully sought funding. Without funding, he was forced to rely upon only lay evidence regarding numerous head injuries with the implication that it caused brain damage. However, the Kentucky Supreme Court rejected the claim by ruling that evidence of head injuries is irrelevant as mitigation unless there is medical proof, such as expert testimony, of brain damage. *Foley*, 17 S.W.3d at 883, App. 48. Without funding for an expert, Foley lacked a mechanism to develop and present such testimony, and therefore, was, for reasons completely beyond his control, denied the opportunity to present what the Kentucky Supreme held was a necessary component of a trial counsel ineffectiveness claim.

Nor were funds provided through Foley's federal habeas proceedings in this case. Foley also had a separate conviction and death sentence for a different crime

¹ Foley's presents a question of law regarding how a court determines whether a second-in-time habeas claim is successive or not and how a court determines the factual predicate of a claim and thus when a claim becomes ripe. Those are legal questions, neither of which turn on the facts of the crimes for which Foley was convicted and sentenced to death. Thus, he does not discuss the facts of the crime.

in another county. When that case subsequently reached federal habeas proceedings, funds for a neuropsychological evaluation finally became available. Dr. Martell therefore evaluated Foley, administered standardized neuropsychological tests, scored those tests, and produced a report explaining the results of that testing, concluding that Foley suffered from substantial neuropsychological deficits consistent with frontal lobe damage (brain damage) (Dr. Martell Report, App. 67-74),² just as Foley expected throughout proceedings in this case at a time when funds for the expert assistance were not available.

Armed with Dr. Martell's report, Foley returned to state court, arguing Dr. Martell's testing, the results of those tests, and his resulting conclusions as detailed within his report was a previously non-existent factual predicate – evidence that necessitated review of Foley's trial counsel ineffectiveness claim for the failure to adequately develop and present mitigation. The Kentucky Supreme Court ruled the information could not be reviewed because Foley presented an ineffective assistance claim in a prior post-conviction action without that information. *Foley*, 2020 WL 6390212 (Ky.). It ruled so despite noting whether review of Dr. Martell's conclusions shall be permitted is a "somewhat close call" and despite having previously upheld

² Specifically, Dr. Martel reported that: "He [Foley] exhibits multiple areas of impairment in frontal lobe executive functioning, including evidence of:

- impaired auditory attention,
- supramodal perseveration,
- deficits in self-monitoring and behavioral control,
- problems adapting to changing problem situations,
- impaired problem-solving and abstract reasoning, and
- diminished cognitive flexibility."

the denial of expert funding and the rejection of the ineffectiveness claim under the auspice that there was no medical proof of brain damage and thus the lay evidence of head injuries was irrelevant. *Id.* at *4.

Promptly returning to federal habeas proceedings with a new habeas petition, Foley relied upon the abuse-of-the-writ doctrine to argue the Petition, and claims therein, were not successive because there was a legitimate excuse for the failure to present the claim and because Dr. Martell's testing, results, and conclusions detailed within his report was the factual predicate of the claim that, under the circumstances, could not have been developed earlier. The district court and the Sixth Circuit rejected that argument, with the latter doing so based on its own checklist of exclusive situations that make a claim not successive. *In re Foley*, 2026 WL 620452 (6th Cir.). A rehearing en banc petition was denied. This Petition for a Writ of Certiorari follows.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Upon the conclusion of state court proceedings regarding Dr. Martell's testing, the test results, and his resulting expert conclusions detailed within his report, Foley promptly filed a second-in-time habeas petition raising a trial counsel ineffectiveness claim for the failure to investigate, develop, and present expert testimony, namely that from a neuropsychologist, as to Foley's brain damage.³ Therein, Foley relied on the Court's long-standing abuse-of-the-writ doctrine to

³ Foley also presented an additional claim not at issue here because that claim remains before the district court after it held that claim is not successive.

argue the Petition was not successive because there was a legitimate excuse for the failure to present the claim, and specifically Dr. Martell's information, in the first habeas petition. That was first, trial counsel's failure to conduct any mitigation investigation and his resulting failure to present any mitigation, and second, the denial of funds in post-conviction proceedings to retain the expert services trial counsel should have retained and to thus present the expert information discussed herein. Foley also argued Dr. Martell's information was the factual predicate for the claim because, particularly under the prior state court ruling rejecting the relevance of any non-medically proven evidence of brain damage or head injuries, Dr. Martell's information was the link necessary to make Foley's claim whole and to give him any possibility that the claim could prevail.

Despite Foley's argument explaining why the habeas claim was not successive, the district court transferred the claim to the Sixth Circuit to determine whether to grant authorization to file a successive habeas petition. Consistent with the Sixth Circuit's practice, Foley filed a motion to re-transfer to the district court as an initial habeas claim. Within the motion (and within his reply to the Warden's response), Foley continued to argue Dr. Martell's information is the factual predicate for the claim and thus made the claim ripe now instead of earlier. That is, the factual predicate did not exist when Foley first litigated a penalty phase ineffective assistance claim. He maintained that the denial of prior expert funding prevented Dr. Martell's information from being developed earlier and thus provides a legitimate excuse for the failure to present the claim in a prior habeas petition.

That is all the abuse-of-the-write doctrine requires, as Foley explained, and thus, he argued the claim was not successive.

Addressing the Sixth Circuit's precedent of *In re Hill*, 81 F.4th 560 (6th Cir. 2023), Foley argued that decision's list of three situations as the only situations that are not successive is irreconcilable with the Court's abuse-of-the-writ doctrine – the governing exclusive mean for determining if a habeas claim is successive – that the Court recently reiterated, in *Banister*, remains applicable post-AEDPA. Accordingly, Foley argued that *Hill* should not be followed, and that even if it is, because the factual predicate here (Dr. Martel's testing, resulting conclusions, and resulting report) did not previously exist, the claim is not successive. The Sixth Circuit, however, applied *Hill* and ruled that facts necessary to meet the pleading requirement for a claim, or to make the claim whole to the point where one could have even a scintilla of a possibility of obtaining relief, is not what constitutes a factual predicate. Instead, to the Sixth Circuit, the factual predicate for an ineffectiveness claim is counsel's harmful actions or inactions, *at the trial stage*. *In re Foley*, 2026 WL 620452 (6th Cir.), App. 5-8.

That means for all ineffective assistance of counsel claims, the factual predicate will always come into existence no later than the trial (or guilty plea if the defendant pled guilty) and therefore the only time an ineffective assistance of trial counsel claim could be presented through a non-successive habeas petition is if there was a new judgment (which truly means it is being presented for the first time since the entry of the new judgment renders the prior judgment a nullity); or

the claim was presented in the first petition as an unexhausted claim and not then decided on the merits. Of course, that would not be possible where the facts supporting the claim, such as Dr. Martell's information here, did not, and could not, then exist. So, for that type of claim, under the Sixth Circuit's own rule, it could never be presented through federal habeas unless it satisfies the requirements for filing a successive petition. And, for penalty phase claims that do not go to eligibility for the death penalty, that could never occur because a statute limits such claims to ones relating to the underlying offense.

Foley pointed all of this out within a petition for rehearing en banc in which he asked the en banc Sixth Circuit to overrule *Hill* and to abandon its wrongheaded checklist approach to determinations of what is not successive. Therein, Foley explained that only the Court can overrule its precedent, the Court has not done so as to abuse-of-the-writ doctrine, and thus the Sixth Circuit remained bound to follow the abuse-of-the-writ doctrine exactly as the Court articulated the doctrine, with the more specific limitations (exclusive checklist) the Sixth Circuit began applying in *Hill*. Foley also explained therein how the panel and district court were wrong in determining Foley's claim is successive and wrong in how they defined, and applied, what constitutes a factual predicate and thus when a claim became ripe.

In all regards, Foley presented to the court below the issue and questions he presents here, and the Sixth Circuit directly addressed those matters. The Questions Presented are therefore squarely and properly before the Court. It is so

squarely before the Court that it would be unsurprising if the Warden files a Brief in Support of the Petition for a Writ of Certiorari to ask the Court to clarify the definition, and application of, the abuse-of-the-writ doctrine, or even the continued validity of the doctrine. This is particularly so since the Warden (through the Kentucky Attorney General's Office) has recently been arguing in Sixth Circuit cases that the Court abandoned the abuse-of-the-writ doctrine, without saying it was doing so, in *Rivers v. Guerero*, 605 U.S. 443 (2025).⁴ While that means there is a compelling reason for the Warden to agree that certiorari should be granted, even if the Warden does not do so, the questions presented were squarely developed below and are appropriate for the Court's review now.

REASONS FOR GRANTING THE WRIT

This Court should review the Sixth Circuit's abandonment of the Court's binding abuse-of-the-writ doctrine, particularly since the Sixth Circuit's definition of factual predicate means many claims could never be presented through the Great Writ of federal habeas corpus and, inconsistent with AEDPA's goals, would overburden the courts because claims refuted by law would have to be raised in case the law subsequently changes.

In *Guerrero v. Johnson*, No. 25-1003, the Court granted certiorari and will soon hold oral argument to address, in the successive habeas petition context, “[w]hether a claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable when the habeas petitioner could have asserted a claim based on the rule in a prior

⁴ In addition to Foley's case, counsel of record is aware the Warden has so argued in at least one other case: *Bowling v. Plappert*, No. 12-6301 (6th Cir., R.128).

federal habeas petition” but would not have succeeded under the law as it existed at that time. Put another way, the Court will address whether a second habeas petition can proceed if the basis for the claim existed beforehand but adverse law meant that until the law changed, the claim would have failed. Foley’s habeas petition presents the companion situation to the new rule of constitutional law – a fact that did not previously exist that makes a claim viable when the claim was not viable beforehand and thus would have necessarily lost prior to the existence of the fact. In other words, Foley’s Petition gives the Court the opportunity to decide, alongside or after *Guerrero*, whether a second-in-time habeas petition is permissible when information a court deems necessary to make a claim viable, becomes available after the conclusion of the first habeas proceeding. The answer would be yes, if one applies the Court’s long-standing abuse-of-the-writ doctrine that remains consistent with AEDPA and that requires holding a claim is not successive when there is a legitimate excuse for failing to raise a claim in the first petition.

More than thirty years ago, the Court created the abuse-of-the-writ-doctrine as the sole basis for determining if a second-in-time federal habeas claim is an initial habeas claim or a successive claim. *McCleskey v. Zant*, 499 U.S. 467 (1991). Over time, the doctrine proved to be a sensible way to balance the availability of the Great Writ with finality in a straightforward way that did not create a wrath of second-in-time habeas petitions that delayed finality. The Court has faithfully followed that doctrine, continuing to do so post-AEDPA. As the Court noted in *Banister*, 590 U.S. at 515-16, the doctrine remains consistent with AEDPA and

nothing within the legislative history of the doctrine indicated Congress intended to eliminate the doctrine. That has been the state of the law in this area for years. Federal courts of appeals faithfully followed the doctrine, as it must. That all changed recently and seemingly out of nowhere.

The United States Court of Appeals for the Sixth Circuit suddenly stopped doing so, choosing instead to focus on what situations the Court has expressly addressed and concluded only those situations are not successive (new judgment, claim raised in first habeas petition that was not ripe at the time of the first petition). *In re Foley*, 2026 WL 620452, App. 4. The Sixth Circuit then determined that for claims other than, for example competency to be executed, ripeness occurs when the trial takes place. *Id.* at *3, App. 5-6. Because trial counsel's actions or inactions always form the basis for an ineffectiveness assistance of counsel claim, the court held the factual predicate of the claim, and thus when the claim became ripe, is either the trial or before trial because that is when counsel acted or did not act. *Id.* That also applies, under the Sixth Circuit's standard, for any claim that relates in any way to an event at trial, which is virtually all claims.

Although the Sixth Circuit paid lip-service to the abuse-of-the-writ doctrine and expressed its concocted exclusive checklist way of determining if a claim is successive merely applies that doctrine, it bares nearly no resemblance to the doctrine and goes well beyond it. The consequences of allowing the Sixth Circuit's decision, and thus its own standard, to remain is significant and broad reaching.

First, as the Court is well-aware, only the Court can overturn its own precedent; lower courts are bound to follow existing Supreme Court precedent even if it appears a subsequent decision may have taken a different approach. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 237 (1997). That is important to the hierarchy of our judicial system under which the Court reigns Supreme. Allowing the Sixth Circuit’s exclusive checklist of when a habeas claim is not successive to remain flaunts the Court’s authority and signals the lower courts can conclude the Court’s precedent is no longer valid and thereby choose to disregard it. The Court should reiterate resoundingly that is not so.

Second, the abuse-of-the-writ doctrine, as laid out by the Court, remains the only standard for determining whether a claim is successive or not. It is not an exclusive checklist of the only situations where a claim would not be successive. It is a general standard that requires finding a claim not successive where the petitioner “has a legitimate excuse for failing to raise a claim at the appropriate time.” *McClesky*, 499 U.S. at 490. The Sixth Circuit’s purported application of that standard cannot be reconciled with the long-standing abuse-of-the-writ doctrine. Certiorari should therefore also be granted to reconcile this conflict and to bring the Sixth Circuit back in line with the Court’s precedent.

Third, maintaining the abuse-of-the-writ doctrine, instead of the Sixth Circuit’s draconian exclusive checklist standard is important for two reasons that underscore the magnitude of the Sixth Circuit’s decision and the ripple effects that will occur if it is allowed to stand. Essentially, unless there is a new judgment or a

claim like incompetency to be executed, the Sixth Circuit's standard means habeas counsel will have to raise every imaginable claim that the law or facts do not yet support (while noting the adverse law or lack of facts) because the failure to do so will mean the claim will, under the Sixth Circuit standard, always be ruled successive and barred from review if first raised in a second-in-time habeas petition.

This is particularly so because claims related to the appropriateness of the penalty but not eligibility for the death penalty are statutorily excluded from the availability of a successive petition (see 28 U.S.C. § 2244(b)(2)) and thus claims in which the facts necessary for the claim did not exist when the first petition was filed but that relate to conduct that occurred during (or before) trial could never be raised through the Great Writ.

Plenty of people will therefore lose their life or serve lengthy sentences, at great expense to the government as the incarceration rate grows, if the Sixth Circuit's own exclusive checklist standard is allowed to remain. And the federal courts will become overburdened by the massive number of additional habeas claims that may not have current support in the facts or law but theoretically might in the future if the law changes or additional facts come into existence. Such theoretical claims would suddenly now have to be raised within the first habeas petition, consequently delaying resolution of a federal habeas petition and thus the finality that AEDPA attempted to expedite. In addition, it would have the ripple effect of delaying resolution of other criminal and civil matters in federal court

because the judges are bogged down with more enormous federal habeas petitions. The consequences are therefore quite far-reaching and worthy of the Court's time.

Admittedly, the Court has had a small number of prior opportunities to address the Sixth's Circuit's new-found exclusive checklist standard that is incompatible with the Court's ruling. Since then, the matter continues to arise within the Sixth Circuit. Without the Court's intervention, that will continue with no change because the Sixth Circuit's exclusive checklist comes from a previous en banc Sixth Circuit decision. With the issue continuing to occur, now is the time for the Court's intervention, and Foley's case provides an ideal vehicle for the Court to address the matter.

The Kentucky Supreme Court recognized it was a somewhat close call whether Foley's federal constitutional claim was based on newly discovered evidence and thus should be allowed to proceed. *Foley*, 2020 WL 6390212 at *4. Upon the state court's rejection of the claim, Foley filed a new federal habeas petition that asserted the claim was an initial claim, not a successive claim, as the factual predicate (not to Foley's fault) did not come into existence until after the first petition was resolved. The district court transferred the claim to the Sixth Circuit, which applied its new standard for determining whether a claim is successive and held the claim was successive, even though, under *McCleskey*, Foley had a legitimate excuse for not raising his claim earlier.

Foley was denied funding for expert assistance at all stages of proceedings and thus could not have an expert evaluate him, administer tests, and, as a result,

conclude to a reasonable degree of certainty that Foley suffered brain damage—evidence and a medical conclusion the state court held was necessary for evidence of head injuries to ever be relevant as mitigation. Yet, when Foley was finally able to obtain that evidence through funding granted in his other case for a separate crime, the courts refused to consider that evidence and refused to consider Foley’s claim because it was not presented during previous habeas litigation even though the information was unavailable through no fault of Foley. Resultingly, this crucial information that is the type that routinely results in less than the death penalty and that calls into question the reliability of Foley’s death sentence, has not been considered. In turn, that undermines the integrity of (and public’s trust in) the death penalty.

All of this makes Foley’s case an ideal vehicle through which to address the important questions this Petition presents, which would enable the Court to answer a companion question to that on which certiorari was granted in *Guerrero*.

A. Certiorari should be granted to address the Sixth Circuit’s standard for determining whether a habeas claim is successive, particularly since that standard conflicts with the Court’s abuse-of-the-writ doctrine.

As we all know, the Court’s precedent binds lower courts. That is so even if it appears a subsequent decision overruled prior precedent, as the Court’s precedent can be considered overruled only if the Court expressly overrules it. *Khan*, 522 U.S. at 20; *Felton*, 521 U.S. at 237. So, Warden Plappert’s position in cases before the Sixth Circuit that *Rivers* eliminated the abuse-of-the-writ doctrine cannot be correct

because *Rivers* never stated it was overruling *McCleskey*, *Banister*, or the abuse-of-the-writ doctrine more generally. Instead, those cases and the doctrine remain the exclusive standard for determining if a claim is successive.

The question therefore becomes whether the Sixth Circuit applied the abuse-of-the-writ doctrine, or a its own concocted standard that is inconsistent with that doctrine. The abuse-of-the-writ doctrine is a simple, but broad, doctrine for which a second-in-time habeas petition is not successive if there is a legitimate excuse for the claim not being raised in the first petition. *McCleskey*, 499 U.S. at 490-91. It is that simple.

In contrast, following its own recent precedent, the Sixth Circuit held in *Foley*'s case that it no longer matters if one has a legitimate excuse for the failure to present a claim within the first habeas petition, which is all the abuse-of-the-writ doctrine considers. Instead, the Sixth Circuit held that one could have a legitimate excuse for the failure to raise a claim earlier but the claim will still be considered successive if none of the following exists: a) a new judgment; b) the claim was unripe (factual predicate, which, to the Sixth Circuit focuses on the actor instead of the fact necessary to support the claim, did not yet exist) at the time of the first habeas petition, such as competency to be executed; and, c) the claim was presented in the first habeas petition but was unexhausted at that time and thus not decided then. *In re Foley*, 2026 WL 620452, App. 4-8. "The highly generalized standard for evaluating claims . . . bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here." *Parker v. Matthews*, 567 U.S. 37, 49 (2012). As

was so, when the Court criticized the Sixth Circuit for applying its precedent in the place of controlling Supreme Court precedent, *id.* at 48-49, the Sixth Circuit's ruling here, applied its own precedent that differs significantly from the broad standard the Court adopted in *McCleskey* and routinely applied ever since. Only the Court can overturn its own precedent. In short, the elaborate exclusive checklist test the Sixth Circuit undertook to eliminate claims that depend on factual predicates that, through no fault of a petitioner, did not exist during first habeas proceedings, essentially overrules *McCleskey* even though it is not within the province of the Sixth Circuit to do so.

The Court created the abuse-of-the-writ doctrine, which is based on “equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions,” and has consistently applied, and required lower courts to apply, the doctrine as the exclusive means for determining if a habeas claim is successive. *McCleskey*, 499 U.S. at 489. As the Court held, an abuse of the writ occurs through deliberate abandonment of a claim or inexcusable neglect. *Id.* at 489-90. To determine what constitutes either, the Court borrowed from its procedural default law. *Id.* at 490, 493. Specifically, the Court made clear the inquiry is limited to whether a petitioner “has a legitimate excuse for failing to raise a claim at the appropriate time.” *Id.* at 490. Said differently, under “more than two decades of Supreme Court precedent . . . a second-in-time habeas petition is not second or successive when the petitioner could not have ‘receive[d] an adjudication

of his claim’ when he filed his earlier petition.” *Hill*, 81 F.4th at 583 (Clay, J., dissenting) (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)).

With this backdrop, Congress adopted the AEDPA and modified §2244(b) to address what the abuse-of-the-writ doctrine did not deal with—the limits that should be placed on successive habeas petitions once it has been determined through the abuse of the writ doctrine that a subsequent petition is successive.

28 U.S.C. §2244(b) codified what was already law—a claim presented in a second habeas petition that had already been decided in a prior petition must be denied. Without then changing the long-standing abuse-of -the-writ doctrine that furthered AEDPA’s core interest in limiting interference with state court judgments and furthering finality, Congress, through this statute, placed the first limits on when an already determined successive habeas petition shall be allowed to proceed. Specifically, §2244(b)(2) states:

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.

An initial habeas petition is mentioned nowhere therein. Nor does anything therein discuss how to determine whether a petition is initial or successive. Thus, the plain language makes clear these heightened requirements must be satisfied *only* if the application is successive; if the petition is second-in-time, but not successive, these requirements do not apply. Nothing within §2244(b)(2), or anywhere else within AEDPA changed the standard enunciated decades earlier in *McCleskey* for determining whether a habeas claim is successive.

That §2244(b) has no impact on the continued applicability of the abuse of the writ doctrine as the sole means to determine whether a petition is successive also makes perfect sense in the context of AEDPA's purpose. There was no reason for Congress, which is presumed to have been well-aware of the abuse of the writ doctrine, to have changed it. By then, the doctrine had already been serving effectively for years the core principle of streamlining habeas and furthering both finality and the State's ability to enforce its own judgments. Rather than mess with that, Congress, through §2244(b) dealt with, as the statute's plain language made clear, how to limit the adjudication of habeas petition claims that had already passed through the gateway known as the abuse-of-the-writ doctrine. As such, §2244(b) has no application in determining whether a petition is successive or not.

The Court made this clear in *Banister* by recognizing the abuse of the writ doctrine and §2244(b) apply to different matters, and by holding the abuse of the writ doctrine remains, post-AEDPA/§2244(b), the sole means to determine whether a habeas petition is successive. As this Court noted, "[w]hen Congress 'intends to

effect a change’ in existing law—in particular, a holding of this Court—it usually provides a clear statement of that objective. AEDPA offers no such indication that Congress meant to change the historical practice” of how a court determines if a habeas petition is initial or successive, as opposed to just imposing additional restrictions on whether a successive habeas petition shall be allowed to proceed. *Banister*, 590 U.S. at 515 (internal citation omitted). As such, AEDPA (§2244(b)) “did not redefine what qualifies as a successive petition.” *Id.*

Thus, even now, to determine whether a petition is initial or successive, a court shall determine only “whether a type of later-in-time filing would have ‘constituted an abuse of the writ, as that concept is explained in [the Court’s] [pre-AEDPA] cases.’” *Id.* at 512 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007)). “If so, it is successive; if not, likely not.” *Id.* So, it remains that if a petitioner “has a legitimate excuse for failing to raise a claim at the appropriate time,” the petition is not successive. *McCleskey*, 499 U.S. at 490. That is all a court may consider when determining if a petition is initial or successive. Anything more, or different, disregards *Banister* and improperly narrows the abuse of the writ doctrine in a way that conflicts with both precedent and AEDPA’s purpose. Yet, the Sixth Circuit did exactly that.

In *Hill*, which the panel relied on for the elaborate multi-step exclusive checklist test to determine if Foley’s claim is successive, the Sixth Circuit, sitting en banc, acknowledged the existence of the abuse-of-the-writ doctrine, but misunderstood *Banister* to have *created a new requirement to determine if a habeas*

*petition is successive. It interpreted Banister to mean a petition can be considered not successive only if the petition is neither an abuse of the writ nor undermines AEDPA's purpose. Hill, 81 F.4th at 568.*⁵

Because of this error, the Sixth Circuit did not utilize the simple abuse of the writ standard of whether the petitioner had a legitimate excuse for the failure to include the claim within the first petition. Instead, it noted incorrectly the Supreme Court has identified “three circumstances when a petition is second in time but isn’t second or successive”: when a second petition (1) “raises a claim that challenges a new state-court judgment;” (2) contains a claim “that would have been unripe at the time of the filing of the first petition;” or (3) “contains a claim that, though raised in the first petition, was unexhausted at that time and not decided on the merits.” *Id.* at 568-69. Summing it up, the Sixth Circuit held, “[w]hen a second-in-time petition raises a new claim purporting to question the previously challenged judgment, the new claim was neither unripe nor unexhausted the first go-around, and the petitioner nevertheless failed to raise the claim, it is ‘second or successive.’” *Id.* at 569.

Holding those are the only three situations in which a claim presented in a second petition is not successive, the court disregarded the governing abuse-of-the-writ doctrine in favor of an exclusive checklist by which a court of appeals could

⁵ The Court has not hesitated to reverse the denial of federal habeas relief where a federal court of appeals incorrectly interpreted the Court’s precedent to have modified or added to a general governing legal standard. *See Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

simply checks off boxes to determine whether a petition is successive or not. In doing so, the Sixth Circuit eliminated from second-in-time habeas petitions all claims where the petitioner had a “legitimate excuse for the failure to include the claim within the first petition” that do not also satisfy one of the three situations the Sixth Circuit laid out within the exclusive checklist it created on its own.

Because *Hill* was an en banc decision, the Sixth Circuit is unlikely to address the matter again anytime soon and thus is unlikely to correct its own en banc error. Instead, *Hill* continues to bind the entire Sixth Circuit and thus has been applied a numerous times with drastic implications for many litigants that will continue if this Court does not intervene.

That is despite the reality that nowhere within *Banister*, or anywhere else, has the Court said there are only three circumstances in which a second habeas petition is not successive. To the contrary, as the Court made clear in *Banister*, it makes no difference the type of claim raised or the circumstances surrounding it, other than whether the petitioner had a legitimate excuse for his or her failure to present the claim previously. If the petitioner did, the claim must be allowed to proceed as an initial habeas petition claim regardless of whether the claim was unripe when the first petition was filed, and regardless of whether the claim was unexhausted at the time of the first petition. Anything different disregards the abuse-of-the-writ doctrine, conflicts with *Banister*, and undermines AEDPA’s purpose.

As this demonstrates, there is at least a substantial question as to whether the elaborate multi-step test the Sixth Circuit applied conflicts with the abuse-of-the-writ doctrine and value in the Court reasserting that the Court's precedent is overruled only if the Court expressly states it is. Certiorari should be granted to directly address these matters, and as will be explained below, to also address how the Sixth Circuit defined factual predicate for the purpose of ripeness. As we have seen, without the Court's intervention, the Sixth Circuit has, and will continue to, apply its newfound, unsupported, self-created test/exclusive checklist in direct contradiction of this court's admonition in *Matthews*. The necessary implications of allowing the Sixth Circuit's to devise its own test for determining if a habeas claim is successive will have dire consequences if allowed to remain the law. Certiorari should be granted to determine to address this.

B. Certiorari should be granted to address how the Sixth Circuit defined factual predicate for the purpose of determining ripeness in the context of whether a habeas claim is successive.

The Court will soon hold oral argument in *Guerrero v. Johnson*, No. 25-1003, to address in the successive habeas petition context, “[w]hether a claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable when the habeas petitioner could have asserted a claim based on the rule in a prior federal habeas petition” but would not have succeeded under the law as it existed at that time. Put another way, the Court will address whether a second habeas petition can proceed if the basis for the claim existed beforehand but adverse law meant that until the law changed, the

claim would have failed. That leaves open the same question in the context of a factual, not legal, situation. That is, whether a claim is not successive when the fact necessary to support the claim did not exist at the time of the first habeas petition. This Petition gives the Court the opportunity to answer this important companion question to *Guerrero* and thus to resolve both aspects of the matter now.

At its core, the question is a simple one: does the factual predicate for an ineffective assistance of counsel claim, and thus when such a claim becomes ripe for purposes of whether there is a legitimate excuse for the failure to present the claim earlier, automatically occur at the trial stage because all such actions relate to counsel's actions or inactions at trial (as the Sixth Circuit held in *Foley's* case), or does it become ripe only when that necessary factual information came into existence? Under the abuse-of-the-writ doctrine, the answer should be that it becomes ripe when the necessary factual information comes into existence, which can be determined from the perspective that a factual predicate of a claim is the information that makes the claim viable or, if the factual predicate of a claim existed beforehand, the claim still does not become ripe until additional information exists that makes the claim viable since being whole in the sense of viability is necessary for a claim to have a chance at prevailing.

This would be consistent with the Court's long-standing abuse-of-the-writ doctrine that permits a second-in-time habeas petition or claim when there is a legitimate excuse for failing to raise a claim in the first petition. Ruling a claim is ripe because the claim relates to trial counsel's actions or inactions even where the

fact necessary to support the claim does not yet exist, as the Sixth Circuit held, is incompatible with the abuse-of-the-writ doctrine. Resultingly, the difference in this regard can easily be the difference between whether a petitioner has access to habeas review for an otherwise legitimate claim or not, and ultimately whether a habeas petitioner prevails on the merits.

The matter is a companion question to that in *Guerrero*, which, together, would allow the Court to decide both the legal and factual prong components of the following question: if the basis on which a claim could prevail (law), or the way the claim could be presented (factual basis), did not exist at the time of the first habeas claim, can the claim subsequently be presented as an initial (not successive) habeas claim when subsequent events occur that provide a basis on which the previously futile claim could now succeed? Certiorari should be granted to resolve that issue, particularly considering, as will be discussed in the next section, the ramifications of leaving in place the Sixth Circuit's decision.

C. Denying certiorari would have significant negative consequences for achieving AEDPA's goals, the rule of law, and the interests of justice.

AEDPA's clear goal was to advance finality of federal habeas proceedings and to streamline the process for the conclusion of federal habeas proceedings by, in part, limiting when second habeas petitions and claims that are successive could proceed. In doing so, Congress made no change to the Court's sound abuse-of-the-writ doctrine that had, by then, been on-the-books for many years. Resultingly, it has remained that a claim can be presented in a second-in-time habeas petition

without having to meet the strict requirements for filing a successive habeas petition if there was a legitimate excuse for the failure to present the claim in the first habeas petition. *McCleskey*, 499 U.S. at 490.

A legitimate excuse exists if governing law already foreclosed the claim but changes in the petitioner's favor after resolution of the first petition make the previously nonviable claim now viable. After all, an attorney has an obligation to acknowledge adverse law and to not present a claim refuted by law unless counsel has a strong argument that law should be overturned. That is also true where, through no fault of a petitioner, the facts that support the claim did not exist at the time of the first habeas petition or could not have been developed then but would go towards the appropriateness of the penalty instead of just guilt or innocence. After all, counsel must have an existing good faith basis to present a claim and thus a legitimate excuse exists when an attorney follows his or her ethical mandate by not presenting a claim that would be unsupported by existing law or available facts.

When a change in law, or a previously unavailable factual development occurs, that could not have been reasonably anticipated at the time of the first habeas petition, and where such change or previously non-existent evidence supports habeas relief, the *McCleskey* abuse-of-the-writ doctrine should govern, allowing for a second-in-time petition. But under the Sixth Circuit's new exclusive checklist basis for determining if a claim is successive, attorneys now have to present such an unsupported claim anyway in order to protect a client's rights and note therein that the claim is not currently supported by the law or by facts (which,

depends on the nature of the claim) but is being presented anyway because Sixth Circuit precedent makes doing so necessary in case of a subsequent change in law or the possibility that non-existent factual support will later come into existence.

When the law changes to make a claim viable that was not so before, there would appear to be a legitimate excuse for the failure to have raised the claim earlier, which is the matter the Court will address in *Guerrero*. The same is so when the fact necessary for a claim does not yet exist or cannot be developed, for reasons beyond petitioner's control, making Foley's Petition the perfect companion case to *Guerrero*. The Sixth Circuit's ruling in Foley's case, and the Sixth Circuit precedent Foley's panel relied upon, does not accommodate for that. Instead, it held all such claims are successive if not presented within the first habeas petition and then considered an unexhausted claim. The ultimate result is that some claims could never be presented in federal court, thereby eliminating federal habeas corpus entirely for those types of claims, while a massive number of claims the law currently refutes would have to be included in future habeas petitions. Both would lead to dire consequences.

Because 28 U.S.C. §2244 prohibits second habeas petition claims where the factual basis of the claim does not go towards actual innocence of the offense or eligibility for the death penalty, claims that demonstrate a constitutional violation at the penalty phase and are based on facts not available at the time of the first petition would never be reviewed. That would undermine confidence in the reliability of the criminal justice system and could leave a significant number of

people serving lengthy sentences, even death sentences, that they should not be serving.

For claims where the facts exist but the law is adverse, under the Sixth Circuit's precedent, those claims would be reviewable only if presented in the first habeas petition. Ordinarily, attorneys would not do so and would instead raise those claims in the future in the rare situations where the law changes to make the claims viable (see *Guerrero*). The Sixth Circuit has now made that untenable.

For federal habeas cases in locations that fall within the jurisdiction of the Sixth Circuit, habeas petitioners must now present every conceivable claim, which includes those refuted by law and those for which no factual basis presently exists. That will make already lengthy habeas petitions massive in size. In turn, it will take significantly longer for district courts to decide federal habeas petitions, which will only delay the finality that AEDPA sought to expedite. And the time and resources federal courts will have to devote to habeas claims presented solely because of the Sixth Circuit's ruling will take away time that could be spent on other cases and thus significantly delay the resolution of all cases pending in the federal courts. All of this is against the backdrop that the Sixth Circuit has deviated from the *McCleskey* abuse-of-the-writ doctrine even though only the Court can modify, or overturn, its own precedent, which it has not in this context. The rule of law and the Court's Supremacy is therefore also at issue.

All of this demonstrates the consequences of leaving the Sixth Circuit's ruling in place, at least without granting certiorari to directly address the Sixth Circuit's

ruling that will otherwise have significant, long-lasting unintended consequences that are inconsistent with both AEDPA's purpose and the Court's precedent.

D. Foley's case presents an ideal vehicle for the Court to address the questions presented.

No procedural impediments to review exist, and the basis for the Sixth Circuit's ruling is clear. It interpreted when a second-in-time habeas claim is not successive in a particular way that raises significant questions both as to its workability and whether it conflicts with the Court's abuse-of-the-writ doctrine. It was this interpretation that was the sole basis for the Sixth Circuit holding that Foley's habeas claim was successive and thus could not proceed. The conflict between that and the abuse-of-the-writ doctrine was argued to the Sixth Circuit, as was the explanation as to how the factual basis for Foley's claim could not have been developed, and presented, within his first federal habeas petition. That would make the claim non-successive under the abuse-of-the-writ doctrine. Yet, the Sixth Circuit held the claim was successive anyway. The resolution of how to determine whether a claim is successive or not is therefore dispositive of whether Foley's habeas claim can proceed. Resultingly, the issue before the Court is clear, directly presented with no impediment to review, and dispositive of the outcome here. That makes Foley's case the appropriate case through which to finally resolve the important questions presented.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Alternatively, the Court should “hold” the Petition pending its decision in *Guerrero*.

Respectfully submitted,

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