
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**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Nos. 25-5887/5892

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Mar 4, 2026

KELLY L. STEPHENS, Clerk

In re: ROBERT CARL FOLEY,

Movant.

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)O R D E R

Before: SUTTON, Chief Judge; BATCHELDER and WHITE, Circuit Judges.

Second or successive petitions for a writ of habeas corpus under 28 U.S.C. § 2254 are generally forbidden. *See* 28 U.S.C. § 2244(b)(1)-(2). But not all second-in-time petitions are successive in the § 2244(b) sense. *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). If the second petition falls under an exception to the “second or successive” definition, the petition is not successive. But if it falls under no exception, the second petition *is* successive. That, ultimately, is what now defeats Kentucky death-row prisoner Robert Carl Foley’s motion to remand.

Foley wished to accuse trial counsel of providing ineffective assistance by failing to present certain neuropsychological evidence in mitigation. Foley had already filed one § 2254 petition and lost, however. He therefore tried bringing his claim via two separate vehicles: a motion for relief from judgment, *see* Fed. R. Civ. P. 60(b), and a second § 2254 petition raising two claims, an ineffective assistance of counsel claim and a claim premised on access to the courts. But the district court determined that the Rule 60(b) motion was really a successive § 2254 petition. Such petitions may not be filed without this court’s permission, 28 U.S.C. § 2244(b)(3)(A). Therefore, the district court transferred the Rule 60(b) motion here as well as the ineffective assistance of counsel claim in the § 2254 petition. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). The Rule 60(b) motion is here under case number 25-5887, the second § 2254 petition under

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25-5892. The district court retains jurisdiction of the access-to-courts claim, and it is not at issue in the present appeal.

Foley admits he cannot meet the § 2244(b) requirements for filing a successive petition and so does not request permission to do so in either case. He also agrees to the dismissal of the Rule 60(b) appeal (No. 25-5887). It will be dismissed.

Foley takes a different tack, however, in the second § 2254 petition case (No. 25-5892). He argues that he does not need this court's permission to file the petition because it is not successive. Hence he seeks a remand to the district court. But the petition is successive. We deny remand.

Background

Foley was convicted by jury of two murders and given a death sentence for each. He sought relief via direct appeal, *Foley v. Commonwealth*, 942 S.W.2d 876 (Ky. 1996), *as amended* (Ky. Dec. 2 and 9, 1996) *then modified on denial of reh'g* (Ky. Apr. 24, 1997), *cert. denied*, 522 U.S. 893 (1997), postconviction proceedings, *Foley v. Commonwealth* (*Foley* (PC 1)), 17 S.W.3d 878 (Ky. 2000), *as modified on denial of reh'g* (Ky. June 15, 2000), *overruled in part by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005), *overruled in part by Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008), *as corrected* (Ky. Jan. 25, 2008), and a § 2254 petition, *Foley v. Parker* (*Foley* (FH 1)), 488 F.3d 377 (6th Cir. 2007), *reh'g and reh'g en banc denied* (6th Cir. Oct. 11, 2007), *cert. denied, sub nom., Foley v. Simpson*, 553 U.S. 1068 (2008), losing each time.

In his original § 2254 petition, Foley had raised a claim that trial counsel was ineffective in not calling certain lay witnesses to testify in the penalty phase. *See Foley* (FH 1), 488 F.3d at 382-83. Among the information that could have been provided was that Foley had suffered head injuries. *Id.* at 383. Both state and federal courts rejected this claim, *Foley* (PC 1), 17 S.W.3d at 883-85; *Foley* (FH 1), 488 F.3d at 383, the state supreme court specifically writing of the head-injuries aspect: “[T]he implication [is] that there was some sort of brain damage.” *Foley* (PC 1), 17 S.W.3d at 883. But the state court—and, later, this court—noted that substantiation of that implication was missing. *Id.* (“never substantiated by any medical record”); *Foley* (FH 1),

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488 F.3d at 383 (Foley has “never come forward with evidence of . . . mental problems”; “no medical records to substantiate these [head-injury] claims or to prove that Foley was mentally impaired at the time of his crimes”).

Some time after we denied his original § 2254 petition, Foley obtained the services of mental-health expert Daniel A. Martell, Ph.D., A.B.P.P., who conducted a forensic neuropsychological examination of him. Returning to district court with the results, Foley filed a Rule 60(b) motion “seek[ing] relief from his conviction and sentence on the basis of the newly discovered evidence of his severe brain damage.” The district court stayed proceedings while he exhausted the claim in state court. That done, *Foley v. Commonwealth*, No. 2019-SC-0182-MR, 2020 WL 6390212 (Ky. Oct. 29, 2020) (holding the various means by which he tried to raise the claim in state court procedurally barred), he returned to federal court again and filed an amended Rule 60(b) motion.

He also filed a second § 2254 petition, raising two claims. One was an access-to-courts claim. The other—the one now at issue—accused trial counsel of penalty-phase ineffectiveness. Specifically, the claim argued this:

[T]rial counsel failed to investigate, develop, and present, as mitigation, evidence of Foley’s brain damage, to wit, retain, or otherwise obtain, the services of a neuropsychologist (or similar expert), have neuropsychological testing and evaluation performed, and thereby obtain and present to the jury the results of the testing and proof of brain damage that he could have obtained if he had the testing performed. [Neuropsychologist claim.]

(Bolding deleted.)

Holding that both the Rule 60(b) motion and the neuropsychologist claim were in effect successive petitions, the district court transferred them here for authorization to file. The access-to-courts claim, however, the district court found not successive and so retained jurisdiction.

As noted, Foley admits he cannot meet the § 2244(b) requirements for filing a successive petition and so does not request permission to do so in either of the two cases now before us. He also agrees to the dismissal of the Rule 60(b) case.

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6th Cir. No. 25-5892:
The Second § 2254 Petition

In this case, Foley argues that his second § 2254 petition is not successive. But it is.

True, not all second-in-time petitions are “second or successive” in the § 2244(b) sense. *Panetti*, 551 U.S. at 944. Courts “defining ‘second or successive’ generally apply abuse of the writ decisions.” *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998)). “Under the abuse of the writ doctrine, a numerically second petition is ‘second’ when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect.” *Id.* (citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). If the new petition is abusive, it “is successive; if not, likely not.” *Banister v. Davis*, 590 U.S. 504, 512 (2020).

Applying abuse of the writ principles, “the Supreme Court has carved out three circumstances when a petition is second in time but isn’t ‘second or successive.’” *In re Hill*, 81 F.4th 560, 568 (6th Cir. 2023) (en banc). *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.’” *Id.* (citing *Magwood v. Patterson*, 561 U.S. 320, 339 (2010)). *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.’” *Id.* (citing *Panetti*, 551 U.S. at 943-45, and *Martinez-Villareal*, 523 U.S. at 643). 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.’” *Id.* at 568-69 (citing *Slack v. McDaniel*, 529 U.S. 473, 486-87 (2000)).

Foley’s neuropsychologist claim fits none of these circumstances. Take them one at a time. For all three, we will assume, without deciding, that Foley’s claim is new.

New state-court judgment. Foley admits “that situation does not apply here.” His second petition challenges the same state-court judgment his first petition challenged—the one sentencing him to death.

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Ripeness. For § 2244(b) purposes, “[a] claim is unripe when ‘the events giving rise to the claim had not yet occurred.’” *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017) (quoting *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010)). But a claim is ripe when the factual predicate underlying the claim “ha[s] already occurred.” *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). And when judging the ripeness of an ineffectiveness claim, what has already occurred includes the negative: what counsel did *not* do. *See id.* (ineffectiveness claim was ripe when Wogenstahl filed his first petition); *id.* at 629 n.4 (ineffectiveness alleged was that counsel failed to discover certain evidence).

The neuropsychologist claim was ripe at the time of the first petition and had been ever since the trial. That was when trial counsel did not present evidence of brain damage.

Foley disagrees: The claim was not ripe until Dr. Martell issued his report. *That* was the factual predicate, according to Foley. And it did not exist when he filed the first petition. Hence his new petition, raising that allegedly newly ripe claim, is not successive.

Foley’s argument depends on the definition of “factual predicate” found in *Ayers v. Ohio Department of Rehabilitation and Correction*, 113 F.4th 665 (6th Cir. 2024), *cert. denied*, 145 S. Ct. 1632 (2025). *Ayers*, which was addressing the term “factual predicate” as it is used in the one-year limitations statute for habeas petitions, 28 U.S.C. § 2244(d), observed that there was general court agreement on the definition: “[A] factual predicate consists only of the ‘vital facts’ underlying the claim.” 113 F.4th at 670 (quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012)). “A fact is ‘vital’ if it is required for the habeas petition to overcome sua sponte dismissal.” *Id.* (again quoting *Rivas*, 687 F.3d at 535). And for an ineffective-assistance-of-counsel claim to avoid sua sponte dismissal, the habeas petition must allege facts showing both counsel’s deficient performance and the resulting prejudice. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Using this definition, *Ayers* held that the expert report that Kayla Jean Ayers relied on provided the factual predicate for her ineffectiveness claim because the report “provides facts supporting the claim’s merits such that a court would not dismiss it sua sponte.” *Id.* at 671. Moreover, “[i]n similar contexts, we have treated a witness’s words and the document containing

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those words as the same.” *Id.* at 671. Hence the report both provided the factual predicate and *was* the factual predicate.

Foley argues that Dr. Martell’s report (and the test results and expert conclusions detailed therein) is the “factual predicate” for his claim. We disagree. “Context is key to meaning.” *United States v. Hill*, 963 F.3d 528, 530 (6th Cir. 2020); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Read in context, *Ayers* was not determining whether the claim *Ayers* brought had been ripe earlier and whether the claim was thus “second or successive” for § 2244(b) purposes. *Ayers* was determining whether her federal habeas petition satisfied the statute of limitations, § 2244(d). So far as relevant, she needed to have filed within one year of “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). It was in that context that the court gave its vital-facts definition for “factual predicate.” *Ayers*, 113 F.4th at 669.

Ripeness, by contrast, is determined by looking to the events giving rise to the claim. *In re Jones*, 652 F.3d at 605. In *In re Jones*, the petitioner raised an ex post facto challenge to the “cumulative effect of amendments to Michigan’s parole system,” the last of which occurred “two years after Jones’s initial habeas petition was filed.” *Id.* That claim, we said, “was unripe when his initial petition was filed—the events giving rise to the claim had not yet occurred,” and the claim thus was not second or successive for § 2244(b) purposes. *Id.* In contrast to the parole challenge Jones raised, which was unripe at the time he filed his initial petition, he also raised a second-in-time claim that his jury had not been drawn from a fair cross-section of the community. *Id.* at 604. He alleged not merely the existence of “practices that systematically excluded African-Americans from the jury pool at his trial,” but that court officials concealed those practices. *Id.* at 606. Yet this court held that, at the time of Jones’s first § 2254 petition, that claim *was* already ripe, “as it challenges events that occurred at his trial.” *Id.*

Because claims can and often will ripen long before their “vital facts” could have been discovered, *Ayers* does not apply. *In re Wogenstahl* demonstrates the distinction between ripeness and the existence of “vital facts.” 902 F.3d 621. There, we held that a petitioner’s *Brady* claim

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challenged pre-trial events and thus ripened for § 2244(b) purposes before his first petition. *Id.* at 627-28. But we went on to grant permission to file a second or successive petition, reasoning that because the petitioner may not have been able to discover the vital facts supporting the *Brady* claim until long after the trial, he could potentially satisfy § 2244(d)'s time bar. *Id.* at 629. Because § 2244(d) cases like *Ayers* do not speak to ripeness, they do not apply.

But put aside the fact that both *In re Jones* and *In re Wogenstahl* address the meaning of “factual predicate” in the context of § 2244(b), not § 2244(d). Even then, another flaw in Foley’s argument remains. Both those cases came before *Ayers*. For *Ayers* to have substituted different ripeness requirements, it would have to have overruled those earlier cases. That it could not do. *Gist v. Sec’y of Health & Human Servs.*, 736 F.2d 352, 357-58 (6th Cir. 1984).

Foley’s proposed ineffective-assistance claim concerning the failure to secure a neuropsychologist is like the jury claim raised in *In re Jones* or the ineffective-assistance claim raised in *In re Wogenstahl*: It challenges events that occurred at or even before his trial. *See In re Jones*, 652 F.3d at 606. It thus was already ripe when Foley filed the first petition.

Exhaustion. Foley argues that his neuropsychologist claim would have been unexhausted had he raised it in his first petition, so the claim is not successive when raised in his second. His reasoning is as follows. He starts with established law: “[W]hen 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 Hill*, 81 F.4th at 568-69. Then he extrapolates: “Logically, a claim that would have been unexhausted if presented in the first habeas petition but not included therein would *also* not be considered successive if raised in a subsequent habeas petition.” (Emphasis added.)

That is not the law. Look at the careful phrasing of the very quotation Foley relies on. The exception for previously unexhausted claims applies to “a claim that, *though raised in the first petition*, was unexhausted at that time and not decided on the merits.” *Id.* at 569 (emphasis added). Consider another quotation from the same page: “If it’s a new claim, we ask whether it was either unripe or *ruled* unexhausted at the time of the first habeas filing.” *Id.* (emphasis added).

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Recall the abuse of the writ doctrine: “[A] numerically second petition is ‘second’ when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect.” *In re Bowen*, 436 F.3d at 704. If, the first time around, a claim was unraised *because* unexhausted, that would fall under the heading “deliberate abandonment.” Otherwise, petitioners could file petition after petition just by raising claims that had not before been exhausted in state court. This may be why the Supreme Court “indicated” this about mixed petitions: “[I]t would still be an ‘abuse of the writ’ if a petitioner chose to proceed in federal court with his exhausted claims rather than return to state court with the unexhausted ones, but then later chose to file another federal petition raising the newly exhausted claims.” *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (discussing *Slack*, 529 U.S. at 486-87).

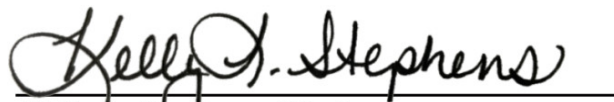
If the neuropsychologist claim is new, then it was not raised in the first petition. The exhaustion exception, therefore, would not apply. And if the claim is not new, § 2244 simply classifies it a second or successive petition. *Hill*, 81 F.4th at 569.

None of the exceptions applies. Foley’s second petition (so far as the neuropsychologist claim is concerned) is successive.

Conclusion

Foley’s motion to remand is **DENIED**. Both these cases are **DISMISSED**.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

Nos. 25-5887/5892

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Apr 30, 2026 KELLY L. STEPHENS, Clerk

In re: ROBERT CARL FOLEY,

Movant.

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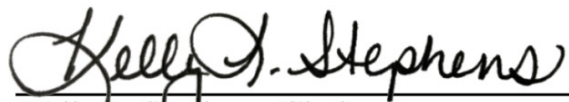
O R D E R

BEFORE: SUTTON, Chief Judge; BATCHELDER and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

ROBERT CARL FOLEY,	)	
	)	
Petitioner,	)	
	)	No. 6:21-cv-78-REW
v.	)	No. 6:00-cv-552-REW
	)	
LAURA PLAPPERT, WARDEN,	)	
	)	ORDER
Respondent.	)	
	*** ***)	

After prior unsuccessful passes with the Kentucky Supreme Court and the Sixth Circuit, Robert Carl Foley, convicted for murder in 1993 and sentenced to death, again petitions for a writ of habeas corpus, seeking relief from the death sentence. *See Foley v. Plappert*, No. 6:21-cv-78 (E.D. Ky.), DE 1.¹ As grounds, Foley asserts that his trial counsel was constitutionally ineffective in failing to present mitigating evidence concerning his traumatic brain injuries, now allegedly confirmed by an expert report prepared in 2018. *See id.* at DE 1, at 19. Foley additionally claims that Kentucky state courts deprived him of his constitutional rights to court access, due process, and “one full and fair opportunity to present a federal constitutional claim” by denying him the funds necessary to retain an expert to examine his brain damage and also resisting later merits consideration when Foley generated expert proof. *See id.* at DE 1 at 50. In a parallel case, Foley moves for relief from the denial of his original federal habeas petition under FED. R. CIV. P. 60(b). *See Foley v. Plappert*, No. 6:00-cv-552 (E.D. Ky.), DE 161, DE 206. Respondent Warden Laura Plappert moves in both cases for the Court to transfer Foley’s claims to the Sixth Circuit for a

¹ Foley faces Kentucky capital convictions in a separate case for separate murders; that matter also is before the Court on habeas consideration. *See Foley v. Hart*, No. 5:17-cv-471(E.D. Ky.).

determination of whether they are second or successive, and thus, subject to 28 U.S.C. § 2244(b)'s habeas gatekeeping requirements. *See Plappert*, No. 6:21-cv-78 at DE 13; *Plappert*, No. 6:00-cv-552 at DE 211. In Foley's second-in-time petition for a writ of habeas corpus, his ineffective assistance of counsel claim is "second or successive" under § 2244(b). However, his due process access claim, though second in time, is not also second or successive. Accordingly, the Court **GRANTS** in part and **DENIES** in part DE 13 in *Plappert*, No. 6:21-cv-78. Next, because Foley's 60(b) motion only raises ineffective assistance of counsel and continues to attack the same state judgment, the Court likewise treats the overlapping claim as second or successive and **GRANTS** DE 211 in *Plappert*, No. 6:00-cv-552.

I. Background

Foley shot and killed two brothers, Rodney and Lynn Vaughn, following a dispute in August 1991. *See Foley v. Parker*, 488 F.3d 377, 381 (6th Cir. 2007). That led a Laurel Circuit Court jury to convict Foley of the two murders and impose two death sentences in 1993. *See Foley v. Commonwealth*, 942 S.W.2d 876, 879 (Ky. 1996). Foley appealed the convictions, arguing structural errors and evidentiary issues. *See id.* at 880–90. The Kentucky Supreme Court rejected those arguments and upheld the convictions and death sentences. *See id.* at 890. The United States Supreme Court denied certiorari. *See Foley v. Kentucky*, 118 S. Ct. 234 (mem) (1997).

Following the denial, Foley pursued state court post-conviction proceedings. He began with a Kentucky Rule of Criminal Procedure (RCr) 11.42 Motion to Vacate his sentence, challenging, among numerous grounds, his trial counsel's effectiveness in failing to present mitigating evidence and declining to request a mental competency hearing. *See Foley v. Commonwealth*, 17 S.W.3d 878, 883-86 (Ky. 2000). The trial court denied the motion, and the Kentucky Supreme Court affirmed. *See id.* at 883, 890. A cert denial followed. *See Foley v.*

Kentucky, 121 S. Ct. 663 (mem) (2000). A post-appeal motion for a new trial in state court also proved unsuccessful for Foley. *See Foley v. Commonwealth*, No. 2002-SC-0222-TG, 2003 WL 21993756, at *3 (Ky. Aug. 21, 2003).

Then came Foley's initial federal habeas litigation. Foley began with a § 2254 petition in the Eastern District of Kentucky. *See Parker*, 488 F.3d at 382. There, Foley renewed many of his RCr 11.42 claims, arguing, as relevant here, that he was "denied effective assistance of counsel because his trial counsel failed to fully investigate his background and did not produce any mitigating evidence during the penalty phase of his trial." *See id.* The district court roundly rejected Foley's claims, though it issued a certificate of appealability (COA) for some. *See id.* at 382. The Sixth Circuit followed suit, rejecting each of Foley's claims and specifically concluding that the Kentucky Supreme Court's denial of Foley's ineffective assistance of counsel claims was "neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court." *See id.* at 384.

Foley persisted. Several years later, he moved in his first-in-time § 2254 petition for relief from judgment under Rule 60(b), to appoint counsel, and for funds to retain experts in anticipation of state clemency proceedings. *See Foley v. White*, 835 F.3d 561, 563 (6th Cir. 2016). The district court denied the motions, finding that the court had already reached the merits of Foley's ineffective assistance claims and that an expert neuropsychological exam was not reasonably necessary. *See Foley v. White*, No. 6:00-552, 2013 WL 375185, at *11 (E.D. Ky. Jan. 30, 2013); *Foley v. White*, No. 6:00-cv-552, 2013 WL 990828, at *8 (E.D. Ky. Mar. 12, 2013). The Sixth Circuit affirmed the district court's denial of funds, finding that Foley's "background and criminal history suggest that he is violent, not mentally impaired." *See White*, 835 F.3d at 564.

Foley eventually did receive an evaluation. The Eastern District of Pennsylvania’s Capital Habeas Unit, appointed to represent Foley in the unrelated and pending habeas matter, retained a neuropsychologist to test and report on Foley’s mental health. *See Plappert*, No. 6:21-cv-78 at DE 6-1. The report—a twenty-two-page evaluation of Foley’s life, medical history, and mental functioning—generally concluded that Foley has “neuropsychological impairments involving his frontal lobe and executive functioning and his memory functioning[.]” *See id.* at DE 6-1 at 1. Dr. Martell, who did the testing in 2018, opined that Foley “appears to suffer from progressive chronic traumatic encephalopathy.” *See id.* at DE 6-1 at 21.

With the new report in hand, Foley filed a bevy of motions in Laurel Circuit Court, all seeking generally to vacate his death sentences in light of the findings. *See Foley v. Commonwealth*, No. 2019-SC-0182-MR, 2020 WL 6390212, at *2 (Ky. Oct. 29, 2020). The circuit court denied every motion, and the Kentucky Supreme Court affirmed. *See id.* at 2–7. The Kentucky Supreme Court held, in line with the circuit court, that Foley’s report—though created in 2018 and based on new testing—addressed a history of head injuries that was first raised “over 20 years ago in his initial state postconviction proceeding.” *See id.* at 4. Essentially, the Supreme Court assessed whether the 2018 report could yield relief under various state mechanisms, including Kentucky Rule of Civil Procedure (CR) 60.02 and 60.03, RCr 10.02, and/or RCr 11.42. Based on analyses particular to those rules and the record, the high court affirmed the trial court’s relief denial. *See id.* at 7. The affirmance reflected the state procedural requirements, the fact that mitigation based on head injuries had been a theme Foley articulated for decades, and the Supreme Court’s detailed assessment of the interplay between the actions of post-conviction counsel and the potential renewal of RCr 11.42 claims against trial counsel. Ultimately, when addressing whether post-conviction counsel’s failure to pursue funds for a psychological expert and to raise

the issue would open the door for a renewed claim against trial counsel, the Supreme Court responded in the negative, holding that post-conviction counsel’s strategic choices about what theories to pursue and what funds to seek “provided constitutionally adequate assistance.” *See id.*

That brings the Court to this pair of motions. Foley filed a second-in-time habeas petition on May 4, 2021, raising two claims. *See Plappert*, No. 6:21-cv-78 at DE 1. First, he asserts that he “was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to investigate, develop, and present, as mitigation, evidence of Foley’s brain damage” *See id.* at DE 1, at 19. He also claims that Kentucky courts impeded his “constitutional right of access to the courts, federal due process rights, and constitutional right to one full and fair opportunity to present a federal constitutional claim” by first, in 2000, “rul[ing] that Foley’s claim failed because of the lack of substantiation of brain damage,” then, in 2020, “refus[ing] to consider the substantive merits of Foley’s claim” in a later proceeding once the psychological report—the missing brain-damage link—was available and presented. *See id.* at DE 1 at 53.

Foley raises a similar ineffective assistance claim in his original habeas petition, except in the form of a Rule 60(b) motion for relief from judgment. *See Plappert*, No. 6:00-cv-552 at DE 161, DE 206. He argues that the Court should reopen the judgment in his first-in-time habeas petition because the new report “substantiates the claim that Mr. Foley was mentally impaired at the time of his crimes, which in turn establishes that he suffered prejudice from trial counsel’s failure to investigate and present mitigating mental health evidence.” *See id.* at DE 206 at 17.

Respondent Warden Laura Plappert, before answering on the merits, moved for the Court to transfer the second-in-time petition (No. 6:21-cv-78) and the 60(b) motion (No. 6:00-cv-552) to the Sixth Circuit for a determination of whether each qualifies as a “second or successive” habeas application under 28 U.S.C. § 2244. *See Plappert*, No. 6:21-cv-78 at DE 13. Plappert argues that

Foley’s ineffective assistance claim was ripe at the time of his initial federal habeas petition and that his second-in-time claim fails to meet § 2244(b)’s gatekeeping requirements. *See id.* at DE 13 at 5–14. If so, says Plappert, the Sixth Circuit must first authorize the claims before this Court can consider them. Foley responded in opposition, claiming that neither claim is “second or successive” and denying any need for Sixth Circuit authorization. *See id.* at DE 14. Plappert replied. *See id.* at DE 15. The parties further briefed a sur-reply round. *See id.* at DE 16-18. The matter is now ripe for review. The Rule 60(b) avenue includes like briefing. *See Plappert*, No. 6:00-cv-552 at DE 211-212.

II. Standard

Federal habeas law is no friend of successive habeas petitions. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2855 (2007) (“In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA’s ‘second or successive’ bar.”). Section 2244(b) establishes strict—often fatal—prerequisites for filing “second or successive” habeas petitions. *See id.* A claim within a second or successive petition “shall” be dismissed if it was “presented in a prior application[.]” § 2244(b)(1). And even if not earlier presented, the claim must still be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. § 2244(b)(2); *Gonzalez v. Crosby*, 125 S. Ct. 2641, 2646 (2005).

Before tackling those gatekeeping provisions, though, a reviewing court must first address whether the claim is “second or successive” as § 2244 uses the adjective. The statute leaves the phrase undefined, so courts have filled in the gaps on this “term of art.” *See Magwood v. Patterson*, 130 S. Ct. 2788, 2797 (2010).

Not all second-in-time petitions are “second or successive,” but exceptions are rare. *See Panetti*, 127 S. Ct. at 2853. As relevant here, a second-in-time petition is not “second or successive” where (1) ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition, or (2) a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims, and in doing so, never passed on the merits. *See In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017); *In re Hill*, 81 F.4th 560, 570 (6th Cir. 2023) (“[W]e ask whether that claim was unripe or unexhausted at the time he filed his first habeas petition.”), *cert. denied sub nom., Hill v. Shoop*, 144 S. Ct. 2531 (2024). Pertinent to Foley’s current motions, a claim is unripe when “the events giving rise to the claim had not yet occurred.” *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010); *see also In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017) (“[A] habeas claim is second or successive if it was ripe for review when the first habeas petition was filed.”).

Importantly, that initial determination is jurisdictional for federal district courts. *See Burton v. Stewart*, 127 S. Ct. 793, 796 (2007). Because second or successive petitions require appellate authorization, the applicable circuit court has original jurisdiction to consider the question. *See Franklin v. Jenkins*, 839 F.3d 465, 473 (6th Cir. 2016). So, if the district court determines that a habeas petition is second or successive, the determination divests that court of its jurisdiction and requires that the matter be transferred. *See Keith v. Bobby*, 618 F.3d 594, 599–600 (6th Cir. 2010) (“‘§ 2244(b)(3) allocates subject matter jurisdiction to the court of appeals, rather than the district court, in the first instance, over a second or successive habeas petition.’ As a result, the determination of whether a petition is ‘second or successive’ is actually a determination as to whether this court has original subject-matter jurisdiction over the petition.”) (internal citation omitted). Naturally, then, the district court, if lacking jurisdiction, may go no further in the § 2244 analysis absent appellate authorization.

Hill lays this sometimes-convoluted analysis out in a clear sequence. *See Hill*, 81 F.4th at 569. The Court first asks whether the petition challenges an old judgment or a new judgment. *See id.* The petition is not second or successive if it challenges a new judgment, and so, the Court may address the merits in that instance. *See id.* If the petition challenges the original state judgment, the next question is whether the petition presents new or old claims. *See id.* A new claim is not a second or successive petition if it was either unripe or ruled unexhausted at the time of the first habeas petition, whereas an old claim that was presented in the first petition is second or successive. *See id.* The Court assesses Foley’s claims accordingly.

III. Analysis²

Foley’s second-in-time petition offers two reasons why his death sentences are unconstitutional: first, because his trial counsel failed to procure and present evidence of Foley’s brain damage at sentencing, and second, because Kentucky state courts violated Foley’s federal due process rights by effectively foreclosing, through rulings culminating in 2020, his ability to present and argue mitigating evidence of brain damage. *See Plappert*, No. 6:21-cv-78 at DE 1 at 21, 50. The Court addresses each claim in turn, and in line with *Hill*’s framework.

a. Ineffective Assistance Claim

Foley’s ineffective assistance claim is, in the Court’s view, second or successive. The claim’s substance—that Foley’s trial counsel ineffectively handled the presentation of mitigating evidence during the sentencing phase—has remained unchanged since the beginning of Foley’s

² As an initial matter, Foley challenges the state court judgment imposing his death sentences. *See Plappert*, No. 6:21-cv-78 at DE 1 at 53 (requesting that the Court “issue a writ of habeas corpus to have Foley brought before it, to the end that he may be discharged from [the] unconstitutional death sentence he is serving in this case”). In contrast to *Magwood* and its progeny, there is no intervening state court judgment between Foley’s two habeas petitions. *See Magwood*, 130 S. Ct. at 2796-98.

habeas proceedings. In fact, Foley has at every habeas step—state or federal—raised his counsel’s alleged deficient performance, relative to mitigation proof, as a justification for setting his death sentences aside. The matter has been adjudicated by both federal and state courts, with each definitively holding that Foley’s counsel was not constitutionally deficient. *See, e.g., Foley*, 17 S.W.3d at 883 (“[Foley] asserts that evidence was available to trial counsel which would have proved relevant mitigation in the penalty phase of the trial, but his attorney did not conduct an adequate investigation of the available mitigating evidence and presented no evidence in mitigation.”); *Parker*, 488 F.3d at 382 (“Foley claims he was denied effective assistance of counsel because his trial counsel failed to fully investigate his background and did not produce any mitigating evidence during the penalty phase of his trial.”); *White*, 2013 WL 375185, at *11 (“[T]he Court analyzed Foley’s claim of ineffective-assistance-of-counsel on this issue. The record is thorough in describing the courts’ reasoning in concluding that Foley’s trial counsel did not provide him with unconstitutional ineffective assistance . . .”).

The thing that has changed since the courts last addressed Foley’s ineffective assistance claim is the new report by Dr. Martell. The report may expand Foley’s basis for believing his trial counsel to be deficient, but it does not change the substance of the claim, nor, critically, its (in context) factual predicate—the two pertinent questions for identifying a second or successive petition. First, the substance of the claim remains the same as it always has: Foley objects to his trial counsel’s handling of the mitigation stage of his sentencing. Granted, the particulars for the argument have varied over the years, *compare Foley*, 17 S.W.3d at 883, *with White*, 2013 WL 375185, at *11, but the substance of the claim, prejudicial ineffectiveness in sentencing mitigation, has not transformed simply because Foley now adds newly created proof of mitigation stemming from head injury history. That’s what matters for § 2244 purposes. *See Franklin*, 839 F.3d at 475

(“[B]ecause the new evidence of Franklin’s attorneys’ ineffectiveness in no way alters the gravamen of his previous claim, his instant claim is simply a new variation on an old claim that he raised in his first petition.”).

The Warden’s focus is on prior claim substance and ripeness. The ripeness query turns on an extant factual predicate at the first-in-time petition. The factual predicate, at that step, is the claim’s basis, and, under *In re Hill*, if the basis occurs at trial, then the predicate existed at trial. *See Hill*, 81 F.4th at 571 (“Hill could have made his due-process bite-mark challenge in his first petition because the events giving rise to the claim—the introduction of bite-mark testimony at trial—had occurred at the time of the first petition. In other words, just like Jones’s jury-selection claim, Hill’s bite-mark claim is based on ‘events that occurred at his trial.’”); *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018) (defining a claim as unripe “if ‘the events giving rise to the claim had not yet occurred’ when the petitioner filed his original habeas petition” and labeling events occurring at trial, including defense counsel ineffectiveness, as “predicates underlying” the current claim that “had already occurred when he filed his [first] petition”). In turn, where the factual predicate existed at trial, it necessarily follows that the corresponding claim was indeed ripe at the filing of the first-in-time petition. *See Wogenstahl*, 902 F.3d at 627.

Regardless of how Foley substantiates the claim, his counsel’s alleged ineffectiveness and Foley’s cognitive status at the time of the murders occurred well before he ever made his way to federal court. Per *In re Hill*, any alleged ineffectiveness challenge was ripe when Foley filed his first federal habeas petition, as the basis for the claim factually occurred at trial during the sentencing phase (where counsel eschewed mitigation). Indeed, as the Warden recounts, Foley raised the same variety of failure to mitigate claims, including claims based on proof of head injuries, throughout the state and federal post-conviction litigation, thereby undercutting the

position that the claim is only now ripe. That Foley later discovered further support for the claim, in the form of a report coming twenty-seven years after the murders, does not jeopardize ripeness.

Foley fervently opposes this result, arguing that the factual predicate for his claim is the preparation of the expert report itself, not trial counsel's ineffective sentencing performance. *See Plappert*, No. 6:21-cv-78 at DE 1 at 17. But the expert report is not itself an independent factual basis for a claim—it is additional support for Foley's substantive legal challenge to his counsel's effectiveness, one rooted in the events (or non-events) of trial. New evidence (which the report is) substantiating previously litigated claims does not make for a "new" habeas claim—it makes for a second or successive petition subject to § 2244 gatekeeping. The successiveness cases are clear on this front. *See In re Hanna*, 987 F.3d 605, 608 (6th Cir. 2021) ("That Hanna seeks to supplement with new evidence his claims that counsel were ineffective at the penalty phase of trial for failing to properly present evidence of his organic brain damage and sexual abuse would be representing already presented claims.") (internal quotations omitted); *Moreland v. Robinson*, 813 F.3d 315, 325 (6th Cir. 2016) ("Moreland seeks to supplement with new evidence his claims that his jury waiver was not knowing, voluntary, and intelligent and that his trial counsel were ineffective when they failed to obtain an expert to challenge the State's blood evidence. However, by doing so, he would be representing already presented claims."); *Franklin*, 839 F.3d at 475 ("Then, as now, Franklin relied on the same 'nucleus of operative facts,' . . . namely, that his trial attorneys should have requested a new competency hearing upon witnessing his bizarre behavior at the time of his trial. The fact that he now offers more evidence in support of that ultimate conclusion does not change matters[.]").

This result serves the finality interests Congress instilled in AEDPA. If Foley's suggested approach governed, a petitioner could simply hop over the habeas gate anytime he procured a new

expert report, doctor's examination, or other medical opinion that trial counsel could have presented in favor of mitigation. That threatens AEDPA's insistence on timely finality to state court judgments and renders § 2244(b)(1) "nugatory." *Franklin*, 839 F.3d at 475; *see also Williams v. Taylor*, 120 S. Ct. 1479, 1490 (2000) (noting that Congress enacted AEDPA to "further the principles of comity, finality, and federalism."); *Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006) (explaining that AEDPA seeks "finality to state court judgments within a reasonable time").

Foley submits that the claim is not second or successive because he "was unable to obtain" the present testing at sentencing and thus "neither had the results nor the resulting expert conclusions." *See Plappert*, No. 6:21-cv-78 at DE 14 at 6. This ignores the fact that, if Foley's inferences from the report are to be believed, Foley's head trauma and sequelae existed at the time of his crimes and convictions. *See id.* at DE 6-1 at 7-8.³ In fact, that's the essence of Foley's argument: that his trial counsel failed to discover and present evidence of his head injuries during the sentencing phase of his trial. If the injuries existed at the time of conviction, how, then, was the claim not ripe at the time of Foley's initial habeas petition? *See id.* at DE 14 at 6-7. Foley, of course, personally experienced and knew of physical head trauma, and by the time of the first petition, post-conviction counsel put on proof that included head injury as a missed mitigation theme by trial counsel.

Foley offers funding as the impediment, contending that he procured the report "when funds finally became available[.]" *See id.* at DE 14 at 6. Foley did not seek such funds for trial or for his first habeas round. The Kentucky Supreme Court approved as effective post-conviction counsel's decisions to forgo the issue and pursuit of testing in its 2020 treatment. *See Foley*, 2020

³ It does not seem, in the Court's review, that Dr. Martell actually opines about Foley's status in 1991, when he murdered the Vaughn brothers.

WL 6390212, at *6. Practically, it may be that economic circumstances prevented Foley from obtaining the report earlier. But that does not affect ripeness—an inquiry based on prompt challenge to the facts giving rise to a claim. *See Tibbetts*, 869 F.3d at 407 (claim must be filed “as soon as [it] is ripe” to avoid second or successive bar) (quoting *Panetti*, 127 S. Ct. at 2845). Foley, based on his own report, claims to have suffered from head injuries at the time of the murders. That, in combination with his counsel’s failure to investigate and present mitigating evidence at trial, gave rise to the claim, not Foley’s capacity to fund his preferred testing. The predicate thus occurred at and in the context of trial. *See Florez-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016) (cautioning courts to be “careful to distinguish genuinely unripe claims (where the factual predicate that gives rise to the claim has not yet occurred) from those in which the petitioner merely has some excuse for failing to raise the claim in his initial petition (such as when newly discovered evidence supports a claim that the petitioner received ineffective assistance of counsel)”) (citing *United States v. Obeid*, 707 F.3d 898, 902 (7th Cir. 2013)).

The Court does see the tension reflected in the panel ruling from *Ayers v. Ohio Dep’t of Rehab. & Correction*, 113 F.4th 665 (6th Cir. 2024). That case applied the term “factual predicate” in the limitations context to a new expert report, which supplied the basis for a timely initial habeas application under § 2244(d)(1)(D). *See id.* at 670-71. The terminology is the same, but the ripeness inquiry is a different and its own context, as the panel decision on remand from *In re Hill* made clear. *See In re Hill*, 2025 WL 903150 (6th Cir. March 25, 2025). In distinguishing the § 2244 steps, and the ripeness versus successiveness permission gating, the panel stated:

For the purpose of a ripeness inquiry, the question is whether the events giving rise to the claim—that is, the act Hill complains of—had already occurred. For the purpose of the § 2244(b)(2)(B) inquiry, however, the “factual predicate” is discovered not merely when the harm is done, but when the facts that make the harm clear are discovered.

See id. at 5 (quoting *Wogenstahl*, 902 F.3d at 628). Such is the distinguishing circumstance here, in the Court’s view. The act Foley complains of, ultimately, is his trial lawyer’s failure to put on medical proof of mitigating brain damage. That act (or, inaction) happened at trial. Clarity of alleged harm may rest on Dr. Martell, but the claim was ripe at the time of his initial habeas petition and so the application here is second or successive.

The matter properly is first for the Circuit. The Court **GRANTS** DE 13 in No. 6:21-cv-78 as to Foley’s first claim and transfers that claim to the Sixth Circuit.

b. Access to Courts Claim

Foley next seeks relief in his second-in-time petition based on the Kentucky courts’ supposed violation of Foley’s due process rights. *See Plappert*, No. 6:21-cv-78 at DE 1 at 50. Foley essentially argues that, by establishing processes for challenging purportedly unconstitutional convictions or sentences, Kentucky created an interest in post-conviction proceedings protected by the Due Process Clause. He continues that the Kentucky courts deprived him of this due process right by denying him access to expert funds to assess his brain damage, then declining to consider the merits of the claim once he retained funding to procure expert psychological testing. *See id.* Foley phrases this “catch-22” as the state a) requiring proof of brain damage, b) denying Foley funds to obtain assistance, and c) refusing to consider the proof when Foley gathered it in Dr. Martell’s 2018 report. He criticizes this as “the state courts have erected a barrier to Foley’s claim ever being resolved, despite the overwhelming, compelling, and irrefutable evidence in support of his ineffectiveness claim[.]” *See id.* at DE 1 at 4.

Hyperbole aside, the Court notes but has many questions about this theory. The state did not, as far as the Court can discern, deny a request for funding of the type described either at trial or in the first RCr 11.42 round. Further, Kentucky’s first RCr 11.42 denial, on the head injury

theory, simply noted the irrelevance of lay proof suggesting a medical tether. *See Foley*, 17 S.W.3d at 885-86. Later, in round two, Kentucky sorted counsel's post-conviction conduct, under *Strickland v. Washington*, 466 U.S. 668 (1984), in assessing effectiveness. *See Foley*, 2020 WL 6390212 at *5-6. It applied the procedural tests and standards implicated in the particular context. Finally, and again, the Court has read Dr. Martell's views and will not, at this point, accept the adjectives Foley uses in describing the report's impact. However, none of these points are ready for analysis.

Notably, the Warden does not raise a ripeness challenge as to this claim in her transfer motion. *See Plappert*, No. 6:21-cv-78 at DE 13 at 10–12. Rather, she urges that, regardless of ripeness, this claim does not satisfy § 2244(b)'s gatekeeping requirements of reasonable diligence or actual innocence. *See id.* at DE 13 at 11.

The cart comes before the horse on that argument. Plappert's instant motion asks the Court to rule on the *jurisdictional* question of whether Foley's petition is second or successive. That question, the cases make clear, must be answered prior to, and separately from, the processing question of whether a claim clears § 2244(b)(2). *See Moreland*, 813 F.3d at 325 ("Rather than denying Moreland's motions [on § 2244(b)(2) grounds], the district court should have transferred those motions here for processing as requests for permission to present claims in a second or successive habeas petition."); *Campbell v. Myers*, No. 17-6335, 2018 WL 2221883, at *1 (6th Cir. Apr. 9, 2018) (holding that because the motion was a second or successive habeas petition, "the district court should have transferred the motion to this court for certification").

Plappert, then, asks the Court to skip over the critical initial question whether Foley's access to courts claim is second or successive. Facing only a motion to transfer and being compelled to address jurisdictional issues "prior to reaching the merits," *Nair v. Oakland Cnty.*

Cnty. Mental Health Auth., 443 F.3d 469, 475 (6th Cir. 2006), the Court will not jump steps. Rather, the sole question, at this stage, is whether the petition is second or successive.

Harkening back to *Hill*'s framework, the first question is whether the petition challenges a new judgment or the original judgment. *See Hill*, 81 F.4th at 569. There's no suggestion of a new judgment in this case. While Foley challenges the individual state court orders that supposedly amounted to a due process violation, those orders are not "judgments" for habeas purposes. *See Magwood*, 130 S. Ct. at 2797 (judgment refers only to the judgment "authorizing the prisoner's confinement"). Thus, by necessity, Foley challenges the judgment at issue in his initial habeas petition.

Foley's due process claim, never earlier presented, also is new. *See Hill*, 81 F.4th at 569 (tasking courts with addressing whether a habeas claim is new or old). Foley did not raise the claim in his first habeas petition. And he could not have. After all, the alleged constitutional defect in Foley's state proceedings—the Kentucky Supreme Court's ultimate refusal to consider his head injury arguments, with bolstered proof—did not occur until after Foley filed the first petition.

That dovetails with ripeness—the final step in the second or successive analysis. *See id.* The alleged due process violation could not have been raised at the time Foley filed his initial petition because, if Foley's claim is accurate, the constitutional deprivation had not occurred yet. Foley argues that a combination of Kentucky Supreme Court decisions—the denial of his initial claims for lack of head injury evidence, the later denial of funds to retain an expert, and finally the court's refusal to consider his head injury claims, once completed—all combined to create a due process violation. That theory depends on each of the three pieces, the last of which fell into place in 2020 when the Kentucky Supreme Court affirmed the trial court's denial of Foley's multi-

approach motion based on the expert report. *See Foley*, 2020 WL 6390212, at *3. Thus, the factual predicate for the argument—the Kentucky Supreme Court’s denial—did not exist when Foley first filed his habeas petition in 2000. Because the “events giving rise to the claim” happened after Foley filed his first petition, the claim was not ripe the first go-round. *See Jones*, 652 F.3d at 605.

Presented with a new claim that was unripe at the time of Foley’s initial habeas petition, the claim does not qualify as a second or successive application. *See Hill*, 81 F.4th at 568 (“[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.’”). Accordingly, the new claim need not survive § 2244(b), and the Court retains jurisdiction to consider it.⁴

c. Rule 60(b) Motion

In his initial federal habeas case, Foley moves for relief from judgment of the Court’s denial of the initial petition on the same ineffective assistance grounds raised in his second-in-time petition. *See Plappert*, No. 6:00-cv-552 at DE 206. The motion relies entirely on Dr. Martell’s expert report, claiming that no court has fully addressed the prejudice arising from “counsel’s failures to adequately investigate and present mitigating mental health evidence.” *See id.* at DE 206 at 12.⁵ The Warden’s motion to transfer also applies to this motion. *See Plappert*, No. 6:21-cv-78 at DE 13; *see also Plappert*, No. 6:00-cv-552 at DE 211.

⁴ The Court properly segregates analysis by claim, as the Circuit instructs. *See In re Bowling*, 2007 WL 4943732 (6th Cir. 2007), at *2 (“We ‘consider each claim independently in deciding whether it is ‘second or successive’ under AEDPA.’”)(citation omitted); *Jones*, 652 F.3d at 605 (analyzing and disposing of claims separately under rubric).

⁵ Foley does not raise the access to courts claim from his second-in-time habeas petition as an independent ground for relief in the 60(b) motion. Rather, he uses similar logic to argue that extraordinary circumstances warrant the Court reopening judgment. *See Plappert*, No. 6:00-cv-552 at DE 206 at 18–19. His chief ground for relief is, as it has long been, ineffective assistance of counsel. *See id.* at DE 206 at 13–17.

Rule 60(b) allows a civil litigant to seek relief from a final judgment under limited circumstances. *See* FED. R. CIV. P. 60(b). AEDPA does not “expressly circumscribe the operation of Rule 60(b).” *Gonzales*, 125 S. Ct. at 2646. But the statute does indirectly limit Rule 60(b)’s operation in the habeas context: “[T]he effect of AEDPA is that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only to the extent that [it is] not inconsistent with applicable federal statutory provisions and rules.” *Franklin*, 839 F.3d at 472 (citing *Gonzalez*, 125 S. Ct. at 2646) (internal quotations omitted).

That limitation includes § 2244’s “second or successive” filing restrictions. A petitioner’s Rule 60(b) motion is a “second or successive” habeas application when it “seeks vindication of” or “advances” one or more “claims.” *Post v. Bradshaw*, 422 F.3d 419, 424 (6th Cir. 2005). For example, a habeas Rule 60(b) motion advances a claim when the petitioner “seeks to present ‘new evidence in support of a claim already litigated[,]’” *Moreland*, 813 F.3d at 322 (quoting *Gonzalez*, 125 S. Ct. at 2646), or “attacks the federal court’s previous resolution of a claim on the merits.” *In re West*, 103 F.4th 417, 420 (6th Cir. 2024) (internal quotations omitted). By contrast, “when [a] motion ‘merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar[,]’” the motion does not implicate § 2244’s second or successive bar. *Post*, 422 F.3d at 424 (quoting *Gonzalez*, 125 S. Ct. at 2648 n.4).

Foley’s 60(b) motion obviously advances a claim, so it qualifies as a second or successive petition requiring appellate authorization. In essence, as in his second-in-time petition, Foley seeks to reopen his original habeas petition to present new evidence of his trial counsel’s ineffectiveness, now in the form of an expert report documenting Foley’s history of head injuries:

Unbeknownst to this Court and to the Sixth Circuit, and to no fault of Mr. Foley, Foley did then suffer from brain damage and the proof of that now exists. It turns out that Mr. Foley's background does contain the kind of shocking and tragic circumstances that were present in *Wiggins*, and thus the court's prior findings cannot stand in light of the new evidence of Mr. Foley's severe brain damage contained in Dr. Martell's report. This evidence substantiates the claim that Mr. Foley was mentally impaired at the time of his crimes, which in turn establishes that he suffered prejudice from trial counsel's failure to investigate and present mitigating mental health evidence.

See Plappert, No.6:00-cv-552 at DE 206 at 17.

The characterization of the motion as a claim follows the result in several cases in the Circuit where a habeas petitioner sought to use new evidence, through the vehicle of a Rule 60(b) motion, to litigate claims already included in prior habeas proceedings. Just as in *Franklin*, “[Foley] seeks a new opportunity to argue that claim with new evidence that apparently reveals his trial attorneys’ alleged ineffectiveness.” *Franklin*, 839 F.3d at 473; *see also Post*, 422 F.3d at 425 (“Post seeks discovery that might provide new evidence that he could present in support of claims previously denied, and his theory of ‘inexcusable neglect’ constitutes an attack based on his [] counsel’s omissions.”). And similar to *Smith*, where the petitioner sought, through a Rule 60(b) motion, to present new evidence of his brain abnormalities by way of an MRI, “[Foley] seeks, with his new evidence, to vacate the state criminal judgment,” making his 60(b) motion a “classic example of a second or successive habeas petition.” *See Smith v. Anderson*, 402 F.3d 718, 724 (6th Cir. 2005).

The expert report, just as in Foley's second-in-time petition, serves as new evidence to support the *Strickland* claim addressed in the prior petition: that Foley's trial counsel ineffectively handled the mitigation stage of sentencing. Section 2244 requires appellate authorization to proceed, and this Court, by extension, lacks jurisdiction to take the matter further. Accordingly, the Court transfers Foley's 60(b) motion to the Sixth Circuit.

IV. Conclusion

The Court, pursuant to 28 U.S.C. § 2244(b)(3)(A) and 28 U.S.C. § 1631, **ORDERS** as follows:

1. The Court **GRANTS** in part and **DENIES** in part DE 13 in 6:21-cv-78.
2. The Court **TRANSFERS** the ineffective assistance claim in Foley's second-in-time petition to the Sixth Circuit for a determination of whether that claim constitutes a "second or successive" habeas application under § 2244.
3. The Court **RETAINS** the due process claim and directs the parties to tender a proposed briefing/scheduling order within thirty days of this Order.
4. The Court likewise **GRANTS** DE 211 in 6:00-cv-552 and **TRANSFERS** the case to the Circuit for § 2244 "second or successive" analysis as to DE 161/206.
5. The Court **DENIES** DE 208 as moot, given the prior substitution.

This the 29th day of September, 2025.



Signed By:

Robert E. Wier

A handwritten signature in black ink that reads "REW".

United States District Judge

Supreme Court of Kentucky

2019-SC-0182-MR

ROBERT FOLEY

APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE MICHAEL O. CAPERTON, JUDGE
NO. 91-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robert Foley (“Foley”), is no stranger to this Court. In the twenty-seven years since he was sentenced to death for the murders of Rodney and Lynn Vaughn, Foley has mounted numerous assaults on his conviction. This appeal stems from a recent neuropsychological evaluation Foley received. In light of a clinical psychologist’s expert opinion that he suffers from certain cognitive impairments, Foley seeks to vacate his death sentences. Now, we must decide whether the trial court erred in denying Foley’s motion to vacate or set aside his sentences. Based on our review of the record and applicable law, we hold that the trial court did not err and affirm its Order.

I. FACTUAL BACKGROUND¹

This case arises out of the shooting deaths of Rodney and Lynn Vaughn in August 1991. Foley shot and killed both brothers during a party at his Laurel County residence. At trial, the Commonwealth presented eyewitness testimony and circumstantial evidence identifying Foley as the killer and his attempts to conceal the crime. The jury accepted this evidence and found Foley guilty of two counts of murder. During the penalty phase of the trial, Foley's counsel did not introduce mitigating evidence. Based on the jury's recommendation, the trial court sentenced Foley to death for both murders.

This Court affirmed Foley's convictions and sentences on direct appeal.² Foley then sought post-conviction relief pursuant to RCr³ 11.42, alleging, as is relevant here, that trial counsel was ineffective due to his failure to adequately investigate and to present mitigating evidence during the penalty phase of his trial. Foley's state post-conviction counsel did not include a claim that trial counsel's ineffectiveness consisted in part of a failure to seek appointment of a neuropsychological expert.⁴ The circuit court denied post-conviction relief and this Court affirmed.⁵ In the intervening years, Foley unsuccessfully sought

¹ In light of the extensive procedural history of this case and the narrowness of the issue at hand, we set out only an abbreviated recitation of the facts. For a more comprehensive account, see *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014); *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000); *Foley v. Commonwealth*, 942 S.W.2d 876 (Ky. 1997).

² *Foley*, 942 S.W.2d at 890.

³ Kentucky Rule of Criminal Procedure

⁴ Foley's state post-conviction counsel did seek funding for a ballistics expert and a clinical social worker for assistance in the RCr 11.42 hearing. See *Foley*, 17 S.W.3d at 887.

⁵ *Foley*, 17 S.W.3d

federal habeas corpus relief⁶ and unsuccessfully pursued numerous CR⁷ 60.02 motions.⁸

In 2018, Foley received funding to hire a neuropsychologist in connection with a separate federal habeas case.⁹ Dr. Daniel Martell (Dr. Martell), a clinical psychologist, evaluated Foley for over fifteen hours across two days. The examination consisted of a review of prior case materials, an investigation into Foley's personal and medical history, and the evaluation of Foley's performance on numerous neuropsychological tests. Based on his examination, Dr. Martell opined that Foley demonstrated a decline in cognitive abilities consistent with a history of prior head injuries and "appeared to suffer from progressive chronic traumatic encephalopathy (CTE)."¹⁰ Additionally, Dr. Martell opined that Foley exhibited "multiple areas of impairment in frontal lobe executive functioning."

Foley moved the Laurel Circuit Court to vacate his sentences due to this report. Foley alleged that the report was "newly discovered evidence" sufficient to grant relief under either CR 60.02, CR 60.03, RCr 10.02; and RCr 11.42(10).

⁶ *Foley v. Parker*, 488 F.3d 377 (Cir. 2007).

⁷ Kentucky Rule of Civil Procedure.

⁸ *Foley v. Commonwealth*, 425 S.W.3d 880 (Ky. 2014); *Foley v. Commonwealth*, No. 2008-SC-000909-TG, 2010 WL 1005873 (Ky. March 18, 2010); *Foley v. Commonwealth*, No. 2007-SC-000754-MR, 2009 WL 1110333 (Ky. Apr. 23, 2009); *Foley v. Commonwealth*, No. 2002-SC-0222-TG, 2003 WL 21993756 (Ky. Aug. 21, 2003).

⁹ Foley is currently serving four additional death sentences related to four murder charges arising out of a separate incident. See *Foley v. Commonwealth*, 952 S.W.2d 924 (Ky. 1997).

¹⁰ Foley Brief on Appeal, Ex. 2 at 58.

The circuit court denied the motion, finding it to be “procedurally improper, time-barred, or otherwise defective.” Foley now appeals as a matter of right.¹¹

II. ANALYSIS¹²

Foley seeks relief under three different procedural rules, but each shares a basic premise: Dr. Martell’s expert opinion and report constitute newly discovered evidence of such import that a reasonable juror, had he or she known of it, would not have voted to impose the death penalty. The circuit court’s Order purportedly declines to reach the merits. Instead, the court dismissed each challenge on procedural grounds. The gist of the court’s reasoning was that the report is not new evidence. Instead, that circuit court found that the report rearticulates similar claims of head injuries that Foley has raised for years. We consider these general arguments in context of the specific procedural vehicles Foley raised.

A. CR 60.02

First, Foley seeks relief from his sentences under CR 60.02. On appeal, we review the denial of a CR 60.02 motion for abuse of discretion.¹³ The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”¹⁴ We will

¹¹ KY. CONST. § 110(2)(b); *Skaggs v. Commonwealth*, 803 S.W.2d 573, 577 (Ky. 1990) (Court of Appeals has no authority to review any matter affecting the imposition of death sentence).

¹² Each of these issues is preserved via Foley’s omnibus motion to vacate. See Foley Brief, Ex. 3 at 20-36.

¹³ *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996).

¹⁴ *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

affirm the lower court's decision unless doing so would be a "flagrant miscarriage of justice."¹⁵

In addition to the causes enumerated in subsections (a)-(e), CR 60.02(f) provides that a court may relieve a party from its final judgment for "any other reason of an extraordinary nature justifying relief." Ordinarily, the rule requires claims grounded on the discovery of new evidence to be brought within one year.¹⁶ Our case law recognizes, however, that evidence discovered outside of the one-year time limit may support a claim under 60.02(f) in certain limited circumstances.¹⁷ "In order for newly discovered evidence to support a motion for new trial it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted."¹⁸

A movant must bring an action under CR 60.02(f) "within a reasonable time" of the entry of judgment. This determination is inherently fact-specific and, as such, is best placed in the trial court's discretion.¹⁹ While the distance between final judgment and the motion is a relevant factor, a reviewing court should consider the basis for the movant's claim, when the information

¹⁵ *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

¹⁶ See CR 60.02(b).

¹⁷ See *Foley*, 425 S.W.3d at 886.

¹⁸ *Jennings v. Commonwealth*, 380 S.W.2d 729, 730 (Ky. 1963)(internal quotations omitted).

¹⁹ See *Gross*, 648 S.W.2d at 858.

supporting such claim was discovered by the movant, and the reason behind the delay in discovering the information and the filing of the motion.²⁰

Further, Kentucky law expresses a strong aversion to successive post-judgment motions.²¹ In the context of CR 60.02, a defendant must only raise those claims which she could not have raised either on direct appeal, in a RCr 11.42 action, or in another CR 60.02 motion.²² Evidence discovered after the conclusion of *all prior proceedings*, in a limited set of circumstances, may provide an adequate basis for a subsequent CR 60.02 motion.

The trial court found that Foley’s motion was untimely and successive because the facts underlying Dr. Martell’s opinion—Foley’s history of head injuries—were known to Foley at the time of trial and could have been raised in a prior proceeding. Effectively, the trial court found that Dr. Martell’s report was not “newly-discovered.” In doing so, the trial court relied on our previous opinion in this litigation concerning a similar CR 60.02 motion.²³ In that previous decision, this Court held that an expert opinion “cannot fit the definition of newly-discovered evidence unless it is based on facts that were not

²⁰ See e.g., *Bedingfield v. Commonwealth*, 260 S.W.3d 805 (Ky. 2008)(holding that a CR 60.02 motion filed eight years after trial was timely when new DNA testing methods gave rise to exculpatory evidence). By contrast, when the information supporting a CR 60.02(f) motion was known to the defendant at trial or within one year of final judgment, the reviewing court will find the motion to be time-barred. See *Foley*, 425 S.W.3d at 884-886; see also, *Stoker v. Commonwealth*, 289 S.W.3d 592, 594-95 (Ky. App. 2009)(holding that trial court did not abuse its discretion when it found that motion premised on facts known to defendant for ten years was untimely).

²¹ See e.g. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); *Gross*, 648 S.W.2d at 853-56.

²² *McQueen*, 948 S.W.2d at 416.

²³ *Foley*, 425 S.W.3d at 887.

previously known and could not with reasonable diligence have been discovered.”²⁴ There, we rejected on the merits a CR 60.02 motion premised on a ballistic report that reexamined and reinterpreted previously known facts.²⁵

Here, the trial court reasoned that Dr. Martell’s report was similar in kind to the ballistics report. The trial court found that Martell’s opinion was “derived from facts known to the [Foley] for his literally his entire life.”²⁶ Moreover, the issue of Foley’s history of head injuries was previously raised in his initial RCr 11.42 hearing, albeit without any medical reports supporting his claims.²⁷ In sum, the trial court concluded that this was not newly discovered evidence of sufficient gravity to justify reopening Foley’s case.

Foley urges us to reject the comparison to the ballistics report. Instead, he argues that this Court’s decision in *Bedingfield* supplies the more appropriate analogy. There, this Court held that the presence of physical evidence, discovered through DNA-testing methods not available at the time of trial, that implicated another person for the commission of the crime in question was grounds for a new trial.²⁸ Foley claims that Dr. Martell’s conclusions regarding his cognitive impairments arise out of newly-performed psychological tests rather than a reexamination of Foley’s prior medical history. Under Foley’s theory, Dr. Martell’s report supplies a basis for his conclusion

²⁴ *Id.*

²⁵ *Id.*

²⁶ Foley Brief, Ex.1 at 102.

²⁷ *See Foley*, 17 S.W.3d 878 (Ky. 2000).

²⁸ *See Bedingfield*, 260 S.W.3d at 815.

independent of facts previously in the record, thereby distinguishing it from the ballistics report.

While acknowledging that it is a somewhat close call, we do not determine that the trial court abused its discretion. While Dr. Martell performed an independent evaluation of Foley's cognitive abilities as they stood in 2018, Dr. Martell's conclusions explicitly take into account Foley's history of head injuries. In his report, Dr. Martell opines that Foley's decline in cognitive abilities was "consistent with his history of multiple head injuries" and was consistent with "progressive CTE."²⁹ While Foley never underwent psychological testing before 2018, he first raised the issue of his head injuries over 20 years ago in his initial state postconviction proceeding. So, while he now possesses a new report claiming that he currently exhibits signs of neuropsychological decline, it is not as if the possibility that Foley may suffer from effects of head trauma could not have been raised in a previous proceeding. In fact, it was raised. Therefore, *on the facts of this case*, we hold that the trial court did not abuse its discretion in finding that Foley's CR 60.02 motion was procedurally barred.

B. RCr 10.02 and 10.06

Foley advances a similar argument under RCr 10.02 and 10.06. RCr 10.02 permits a court to "grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." Ordinarily, a motion for a new trial on the basis of newly discovered evidence

²⁹ Foley Brief, Ex. 2 at 58.

may only be brought later than one year after the entry of judgment “if the court for good cause so permits.” While the standards are not identical, “[a]n extraordinary circumstance under CR 60.02(f) always establishes good cause under RCr 10.06(1).”³⁰ So each inquiry takes into consideration similar factors, given differing weights. In this case, we do not find that distinction controlling. Just as we determine that Dr. Martell’s report does not constitute an extraordinary circumstance under CR 60.02, we similarly conclude that it does not constitute good cause pursuant to 10.06.

C. RCr 11.42

Foley’s claim under RCr 11.42 (10) takes three alternative forms. To the extent that Foley advances the same argument for relief under RCr 11.42 as he maintains under CR 60.02, we find the motion to be procedurally improper. Such a theory impermissibly elides the standard for relief under CR 60.02 and RCr 11:42. Kentucky law is very clear the standards for relief under CR 60.02 and RCr 11.42 are distinct; one cannot simply repackage their 60.02 argument in an 11.42 motion or vice versa.³¹

To the extent that Foley attempts to relitigate the effectiveness of counsel in his initial post-conviction proceedings, his claims are procedurally barred. He brings his current challenge under RCr 11.42(10), which imposes a three-year period from final judgment during which a movant must bring their

³⁰ *Bedingfield*, 260 S.W.3d at 811.

³¹ *See Gross*, 648 S.W.2d at 856 (“The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping but is organized and complete.”)

claim.³² While the rule provides an exception for claims predicated on newly discovered evidence, Foley already pursued a RCr 11.42 claim against trial counsel. And RCr 11.42(3) provides that the motion to vacate “shall state all grounds for holding the sentence invalid of which the movant has knowledge.” Given that Foley’s prior history of head injuries was both known to him at that time and actually litigated in his state postconviction hearing, he cannot now raise that issue against trial counsel under the plain language of RCr 11.42(3).

But Foley anticipated our conclusion and offers a third way to consider his 11.42(10) claim. He argues that if we find that he is procedurally barred under 11.42(3) from asserting an ineffectiveness-of-trial-counsel claim, then that procedural bar should be excused due to the ineffectiveness of his state post-conviction proceedings counsel. While this theory is not currently recognized under Kentucky law, Foley asks us to extend the holdings of *Martinez v. Ryan*³³ and *Trevino v. Thaler*³⁴ to claims arising out of Kentucky post-conviction proceedings. Specifically, he contends that this Court’s holding in *Bowling v. Commonwealth* implicitly compels this result.³⁵ This argument requires unpacking.

Under the doctrine of procedural default, a federal habeas court will not review the merits of claims that a state court declined to hear due to the failure

³² See RCr 11.42(10).

³³ 566 U.S. 1 (2012).

³⁴ 569 U.S. 413 (2013).

³⁵ 163 S.W.3d 361 (Ky. 2005).

of a prisoner to comply with a state procedural rule.³⁶ The theory behind this doctrine is that principles of federalism require federal courts to respect the finality of state court judgments.³⁷ However, this general rule has an exception. Federal courts may invoke their equitable powers to excuse a procedural default and hear the merits of a case if a prisoner can show cause for the default and prejudice resulting from a violation of federal law.³⁸

This Court has, on at least one occasion, looked to federal case law in this area for support in fashioning equitable relief. In *Bowling*, this Court utilized the federal cause-and-prejudice standard to decide if a prisoner's waiver of a constitutional claim should be excused.³⁹ Specifically, the Court considered whether the "miscarriage of justice" exception, which allows a prisoner to maintain a merits-based challenge to a defaulted claim even if she fails to show cause for the default, permitted them to consider the merits of the prisoner's claim.⁴⁰ While this Court did not engage in an exhaustive analysis on the applicability of that exception in state court proceedings, we did use the federal analytical framework to guide the use of our own equitable discretion.

³⁶ *Martinez*, 566 U.S. at 9 (citations omitted).

³⁷ *See Davila v. Davis*, 137 S. Ct 2058, 2064 (2017).

³⁸ *See Martinez*, 566 U.S. at 10 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

³⁹ 163 S.W.3d at 372-373.

⁴⁰ *Id.* The "miscarriage of justice" exception allows a court to review the merits of a procedurally defaulted claim even if the prisoner cannot show cause for the default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* (citing *Coleman*, *supra*, at 749-50).

For years, “[n]egligence on the part of a prisoner’s postconviction attorney [did] not qualify as cause.”⁴¹ *Martinez* expanded this exception, holding that in states where an ineffective-assistance-of trial-counsel claim must first be brought in a collateral proceedings, the lack of state post-conviction counsel or the ineffectiveness of state post-conviction counsel, under the standard of *Strickland v. Washington*⁴², may serve as “cause” to excuse a procedural default.⁴³ The following year, the United States Supreme Court further extended the exception to cover states, which, as a matter of procedural design, deny a meaningful opportunity for prisoners to raise ineffective-assistance-of-trial-counsel claims outside of collateral proceedings.⁴⁴

With that background in mind, we now address Foley’s claim. Foley argues that the *Martinez/Trevino* rule applies to our review of RCr 11.42 proceedings because we have already recognized the cause-and-prejudice exception in *Bowling*. Since we have adopted this exception before *Martinez* and *Trevino*, Foley contends that the subsequent expansion of the exception brought about by those decisions holds sway over Kentucky courts. This is an interesting question that deserves consideration in the appropriate case. But *this* case is not *that* case.

⁴¹ *Id.* (citing *Maples v. Thomas*, 565 U.S. 266, 280 (2012)).

⁴² 466 U.S. 668 (1984).

⁴³ *Martinez*, 566 U.S. at 13-14.

⁴⁴ See *Trevino v. Thaler*, 569 U.S. 413 (2013). The Sixth Circuit held that Kentucky’s state postconviction regime fall under the scope of *Trevino*. *Woolbright v. Crews*, 791 F.3d 628 (2015).

Let's assume that *Martinez* and *Trevino* apply. Under those cases, Foley may establish "cause" to excuse a procedural default where: (1) his claim of ineffectiveness-of-trial-counsel is "substantial" **and** (2) the cause consisted either of the lack of state-postconviction-proceeding counsel or the ineffectiveness of state-postconviction-proceeding counsel.⁴⁵ Thus, the ineffectiveness of state-postconviction-proceedings counsel is a necessary condition for relief under *Martinez* and *Trevino*.⁴⁶ Here, we are not convinced that Foley can demonstrate that his counsel performed below constitutional standards in the RCr 11.42 proceedings.

We have described *Strickland* as containing two prongs, both of which must be met to sustain a claim of ineffective assistance of counsel: the "performance" and "prejudice" prongs.⁴⁷ To meet the "performance" prong, a movant must show that "counsel's representation fell below an objective standard of reasonableness."⁴⁸ To meet the "prejudice" prong, a movant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁴⁹

Here, Foley claims that his counsel in his RCr 11.42 proceedings rendered ineffective representation due to their failure to adequately develop a claim that trial counsel was ineffective in failing to present mitigating evidence

⁴⁵ See *Trevino*, 569 U.S. at 423.

⁴⁶ See *Martinez* at 16. ("When faced with the question whether there is cause for an apparent default, a State may answer...that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.").

⁴⁷ See *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

⁴⁸ *Strickland*, 466 U.S. at 687-88.

⁴⁹ *Id.* at 694.

concerning Foley’s head injuries and their effect on his neuropsychological well-being. Under the performance prong, this challenge poses two questions. First, whether, under an objective standard of reasonableness, Foley’s post-conviction counsel should have raised a claim that trial counsel was ineffective for their failure to pursue neuropsychological testing in preparation for trial. And second, whether Foley’s post-conviction counsel should have sought funds for a neuropsychological expert for use at the RCr 11.42 hearing.

As to the latter question, we cannot find that Foley’s post-conviction counsel erred in failing to request funds for psychological testing. We observe that a claimant did not have a constitutional right to expert assistance in a collateral attack proceeding at the time of Foley’s RCr 11.42 hearing.⁵⁰ Nor do they today. Importantly there is a “strong presumption” that an attorney’s decision to pursue some claims and decline to pursue others is a tactical choice.⁵¹ And “[r]are are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach.”⁵²

Foley’s counsel requested funding for both a ballistics expert and a clinical social worker and was denied on both counts. The decision to pursue funding for experts to help develop what appears at the time to be stronger

⁵⁰ See *Foley*, 17 S.W.3d at 886-87.

⁵¹ *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.”).

⁵² *Harrington v. Richter*, 562 U.S. 86, 106 (2011)(citations omitted)(internal quotations omitted).

claims is a reasonable tactical decision. At the time of the RCr 11.42 proceeding, numerous witnesses were available to recount tales of Foley's brutal upbringing.⁵³ Additionally, there was a factual dispute about the nature of the firefight. Compared to general allegations of previous head injuries, numerous as they were, we cannot say that counsel's choice to lend support to what he or she determined to be stronger mitigating evidence was constitutionally deficient performance.

Similarly, we cannot conclude that post-conviction counsel was ineffective in failing to bring a claim of ineffective-assistance-of-trial-counsel related to the failure to seek funding for a neuropsychological expert. Foley's post-conviction counsel did raise claims based on trial counsel's failure to adequately investigate and present mitigating evidence.⁵⁴ As it relates to evidence of head injuries, counsel challenged trial counsel's failure to introduce the testimony of several family members who recalled head injuries suffered by Foley during his childhood. While this court rejected the mitigating force of that testimony due in part to the absence of medical records supporting trauma,⁵⁵ we do not find that post-conviction counsel rendered ineffective performance.

"Reliance on the harsh light of hindsight to cast doubt on [proceedings] that took place" nearly two decades ago runs contrary to the *Strickland*

⁵³ See generally *Foley*, 17 S.W.3d 878 (2000).

⁵⁴ *Id.* at 883.

⁵⁵ *Id.*

standard.⁵⁶ We must evaluate counsel’s conduct in context of the time in which he or she acted.⁵⁷ In this case, post-conviction counsel raised over twenty-six grounds for ineffective-assistance-of-trial counsel, including the failure to introduce mitigating testimony regarding Foley’s head injuries at trial. In light of these allegations, Foley’s counsel sought expert assistance to develop the strength of the mitigation arguments concerning Foley’s background. From the perspective of post-conviction counsel, there were surely a number of claims and experts that he felt trial counsel might have pursued. However, an attorney is entitled to filter activities that appear “distractive from more important duties.”⁵⁸ In this case, we cannot say that it was unreasonable to confine the ineffective-assistance-of-trial-counsel claim to the failure to present the testimony of family members as opposed to a psychological expert who may or may not have been provided. While this calculus may change in light of contemporary understanding, that is not the inquiry. Considering the record before us, Foley’s state post-conviction counsel did not fail to meet the performance prong of *Strickland*.

In sum, we do not need to reach the question of whether *Martinez* and *Trevino* apply to Kentucky proceedings because, even if they did, Foley’s post-conviction counsel provided constitutionally adequate assistance. As a result,

⁵⁶ See *Harrington* 562 U.S. at 107.

⁵⁷ *Id.*

⁵⁸ *Id.* (citing *Bobby v. Van Hook*, 558 U.S. 4, 11, (2009)(*per curiam*)); accord *Haley v. Commonwealth*, 586 S.W.3d 744 (Ky. App. 2019), *review denied* (Oct. 24, 2019)

Foley is procedurally barred from raising a new ineffectiveness of trial counsel claim pursuant to RCr 11.42(3).

IV. CONCLUSION

In light of the facts of this case and the applicable standard of review, we conclude that the trial court did not abuse its discretion in denying Foley's motion. As such, we affirm.

All sitting. All concur.

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17 S.W.3d 878

Supreme Court of Kentucky.

Robert C. FOLEY, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

No. 1997–SC–1098–MR, 1998–SC–
0378–MR and 1998–SC–0379–MR

|

March 23, 2000.

|

As Modified on Denial of Rehearing June 15, 2000.

Synopsis

Following two convictions of murder, defendant brought motion for postconviction relief. The Circuit Court, Laurel County, [Roderick Messer](#), J., denied relief. Defendant appealed. The Supreme Court, [Wintersheimer](#), J., held that: (1) trial counsel was not ineffective with regard to decision not to introduce mitigating evidence; (2) trial counsel was not ineffective for declining to request mental competency hearing; (3) change of venue issue could not be relitigated in postconviction relief proceedings; (4) trial counsel was not ineffective with regard to impeachment of witnesses for Commonwealth; (5) defendant was not entitled to funds for ballistic expert or social worker; (6) defendant was not entitled to new trial based on allegedly new evidence of prosecution witness' confession to murder, where evidence was not credible or new; (7) there was no valid reason for circuit court to grant defendant additional time to prepare postconviction relief motion; and (8) defendant was not entitled to relief based on prosecutorial or juror misconduct.

Affirmed.

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Opinion[WINTERSHEIMER](#), Justice.

This appeal is from a denial of a [RCr 11.42](#) motion seeking the vacation of two murder convictions and sentences of death because of allegations of ineffective assistance of counsel.

In 1993, the Laurel Circuit Court imposed two death sentences on Foley pursuant to convictions for the murders of two people. In that case, Foley set out 26 allegations of error seeking a reversal of his conviction. After reviewing the record, the briefs and hearing oral arguments, this Court affirmed the conviction in [Foley v. Commonwealth, Ky.](#), [942 S.W.2d 876 \(1997\)](#).

The events that culminated in the violent deaths of the two Vaughn brothers occurred on the evening of August 17, 1991, when ten other adults were at the home of Foley, along with five children. Other male guests had checked their pistols in the kitchen cabinet, but Foley kept his .38 colt snub-nose revolver concealed in the small of his back, under his belt and shirt. The first victim consumed enough alcohol to become belligerent and two fights erupted between Foley and the first victim. Foley admits that he started the first fight and later in the evening shot and killed the first victim. The deceased received multiple gunshot wounds to the left arm and body which resulted in hemorrhaging and death. Foley claims he acted in self-defense. Shortly thereafter, the ***883** second victim was killed at a time when only Foley, the victim and Ronnie Dugger remained inside the house. Foley claims that Dugger shot the victim while Dugger testified that Foley shot the victim in the back of the head. The victim died as a result of multiple penetrating and perforating gunshot wounds to the head and extremities. After the killings, Foley, Dugger and two other individuals dumped the bodies into a creek in Laurel County.

As noted in the opinion of the Court in *Foley, supra*, Foley was charged on October 26, 1991, with killing four other people whose bodies had been found in a septic tank in Laurel County. Prior to the indictment on the later charges, the district court had restrained all law enforcement personnel and court personnel from making any public comment about the case.

After this Court affirmed the jury verdict in 1997, Foley filed an unsuccessful petition for a writ of certiorari in the United States Supreme Court. Three days after that denial he faxed to the Laurel Circuit Court a motion pursuant to [RCr 11.42](#) to vacate his judgment of conviction. That motion was filed by the Clerk on October 14, 1997, and on that same date, the Governor signed an executive order that Foley be put to death by electrocution on November 13, 1997. The circuit court refused a stay of execution and scheduled an evidentiary hearing on the [RCr 11.42](#) motion on November 10, 1997, which was three days before the scheduled execution. This Court granted a stay of execution on November 3, 1997. Before the evidentiary hearing began on November 10, counsel for Foley renewed his motion for continuance which was denied. The [RCr 11.42](#) motion was denied on November 25, 1997. This appeal followed.

I. Mitigating Evidence

Foley argues that his death sentence must be vacated because his trial attorney did not investigate and present to the jury all available evidence which would mitigate a finding that he deserved the death penalty. He asserts that evidence was available to trial counsel which would have proved relevant mitigation in the penalty phase of the trial, but his attorney did not conduct an adequate investigation of the available mitigating evidence and presented no evidence in mitigation. At his [RCr 11.42](#) hearing, Foley presented twelve witnesses who would have been available to offer similar mitigating evidence at trial. He also claims that trial counsel did not properly explain the mechanics of the penalty phase, including the concept of mitigation so that Foley could make a rational choice and properly assist in his own defense.

At the [RCr 11.42](#) hearing, trial counsel testified that he and Foley had discussed the penalty phase and that Foley did not want to put family witnesses through the ordeal of testifying. There was no testimony that Foley knew of any witnesses who possessed critical mitigating information evidence in the penalty phase.

The witnesses who testified at the [RCr 11.42](#) hearing indicated that Foley was a lovable child and that he idolized his grandfather who was a seven-time murderer. One of the Foley witnesses testified that he was nice even though he carried a gun and had been convicted earlier of manslaughter. His mother testified that her father had killed seven men and had taught Foley to shoot a gun when he was only 6 years old.

His mother also discussed some alleged injuries that Foley sustained, the implication being that there was some sort of brain damage. That inference was never substantiated by any medical record. Testimony regarding the injuries has no relevance to mitigation. Her testimony that he could be fine one minute and very angry the next certainly did not mitigate the propensity for violence. At the end of her testimony, she identified two different photographs of Foley with guns. The persuasive mitigation of this testimony is highly questionable.

Foley's brother testified about his brother's violent nature and how well he could ***884** handle a gun. He admitted on cross-examination that Foley could be violent, and that people were afraid of Foley.

Trial counsel also testified at the [RCr 11.42](#) hearing. He stated that he had been a practicing attorney in Kentucky for almost 19 years with criminal defense work as a substantial part of his practice. Although this was his first capital case, he said he had handled other violent crimes. He had previously represented Foley and represented him in a quadruple homicide after this case was tried. He stated that Foley was reluctant to put his family through the rigors of testifying in mitigation. Trial counsel said that Foley assisted him in the defense and that they worked very closely together. He did not remember anything that would make him think that Foley was incompetent during trial because his client was lucid and able to converse with counsel and others. Trial counsel said that he met with post-conviction counsel and was cooperative in regard to the [RCr 11.42](#) motion.

The general standards which measure questions relative to the ineffective assistance of counsel are set out in [Strickland v. Washington](#), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord [Gall v. Commonwealth, Ky.](#), 702 S.W.2d 37 (1985); [Sanborn v. Commonwealth, Ky.](#), 975 S.W.2d 905 (1998). In order to be ineffective, performance of counsel must be deficient and below the objective standard of reasonableness and prejudicial so as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." [United States v. Morrow](#), 977 F.2d 222, 229 (6th Cir.1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*. The purpose of [RCr 11.42](#) is to provide a forum for known grievances, not to

provide an opportunity to research for grievances. *Gilliam v. Commonwealth, Ky.*, 652 S.W.2d 856, 858 (1983).

In considering an ineffective assistance of counsel claim, the reviewing court must consider the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. See *Morrow*; *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *McQueen v. Commonwealth, Ky.*, 949 S.W.2d 70 (1997). *Strickland* notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial. In a death penalty case where the aggravating factors are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigating evidence. *Bonin v. Calderon*, 59 F.3d 815 at 836 (9th Cir.1995).

In a *RCr 11.42* proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth, Ky.*, 433 S.W.2d 117, 118 (1968).

The information that the witnesses at the *RCr 11.42* hearing may have testified to during the penalty phase of the original trial would have been offset by their testimony regarding the propensity *885 of Foley for violence. The performance of trial counsel was not ineffective because he failed to present testimony of these witnesses in the penalty phase of the original trial.

Trial counsel became familiar with members of the Foley family during the course of this representation and discussed the trial strategy with the defendant. There was no testimony that Foley told the trial attorney that there were witnesses that had critical mitigating evidence. As a result of the discussions with Foley and trial strategy, the trial counsel decided not to call mitigation witnesses. There is no evidence to substantiate the claim that Foley may not have understood mitigation. It is clear that trial counsel understood what issues could be raised

in the penalty phase. "Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir.1998).

Although we certainly recognize the necessity for complete investigation by defense counsel, we must conclude that a reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight would conduct. *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir.1998). It is only reasonable for any lawyer to place certain reliance on his client. The investigation must be reasonable under all the circumstances. *Stevens v. Zant*, 968 F.2d 1076 (11th Cir.1992). In this case, there was no proof of any reason for trial counsel to investigate Foley's background more thoroughly. There was no evidence of any mental defect. Trial counsel knew Foley and his family from previous representations, and their testimony at the *RCr 11.42* hearing indicated a violent nature. The decision of counsel not to conduct additional investigation into a defendant's background in search of mitigating circumstances can be supported by reasonable professional judgment. Cf. *Fretwell*, *supra*. Even if he had documented additional mitigating evidence, trial counsel could have decided that the negative testimony that would be elicited might only serve to inflame the jury and therefore decline to present it. As in *Fisher v. Angelone*, 163 F.3d 835 (4th Cir.1998), it cannot be said that a strategic decision not to call mitigating witnesses was unreasonable. See also *Preston v. Delo*, 100 F.3d 596, 603 (8th Cir.1996).

In this case, there is no reasonable probability that the omitted testimony would have changed the result reached by the jury or the sentencing fixed by it. Foley was not prejudiced by the alleged failure of trial counsel to investigate and present mitigating evidence. There is no showing of either deficient performance or substantial prejudice which are required to present an ineffectiveness of counsel argument.

II. Competency and Mental Health

It is axiomatic that federal and state law prevent the trial of an incompetent defendant. *KRS 504.090*; *RCr 8.06*. If there are reasonable grounds to believe that a defendant is not competent to stand trial, the proceeding must be discontinued and the trial judge must appoint a psychologist or psychiatrist to examine the defendant, file a report and then a hearing must

be held. [KRS 504.100](#). Here, at the [RCr 11.42](#) hearing, trial counsel testified that Foley assisted him in his defense and that they worked very closely. The attorney further testified that he did not remember anything that made him think Foley was incompetent during trial and that Foley seemed lucid and was able to converse with him and others. Foley testified in his own defense for over one and one-half hours. The trial judge had the opportunity to observe that Foley was able to communicate effectively his version of the offense and was able to answer questions both on direct and cross-examination.

Foley did not testify at his [RCr 11.42](#) hearing. No medical proof of any mental history was offered to support the claim of ***886** incompetency. The only evidence introduced indicating any bizarre behavior were letters supposedly written by Foley to his deceased grandmother shortly before trial. Although family members spoke of various [head injuries](#) suffered by Foley during childhood, no medical records were presented to support such testimony. Trial counsel testified at the [RCr 11.42](#) hearing that he saw no signs of mental illness and that he had no problem communicating with Foley before and during the trial, and that Foley maintained his own trial folder and discussed it intelligently with counsel. There was no evidence that Foley was incompetent. The authorities cited by Foley are unpersuasive. Trial counsel was not ineffective for declining to request a competency hearing.

III. Effective Assistance of Counsel

A review and analysis of the argument presented by Foley that he was denied effective assistance of counsel because the circuit court improperly denied an evidentiary hearing on certain issues is without merit.

The [RCr 11.42](#) motion contained twenty-six grounds and the circuit court disposed of issues 1 through 17, 19, 20, 22 and 26, determining that a hearing was not required. An evidentiary hearing was held on the remaining issues on November 10, 1997. As has been previously noted, the standard for reviewing ineffective assistance of counsel claims has been discussed and Foley was not denied effective assistance. Here, the record clearly refutes the allegations contained in the [RCr 11.42](#) motion. He was not entitled to an evidentiary hearing on all of the allegations. He received a full and fair litigation of his alleged grounds for relief pursuant to [Stone v. Powell](#), 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

We have reviewed the other issues and find them to be without merit. In the guilt phase, the change of venue issue was raised on direct appeal and cannot be relitigated in this proceeding. [Wilson v. Commonwealth, Ky.](#), 975 S.W.2d 901, 903 (1998). The ballistic expert used by the defense was allowed to testify and was extensively cross-examined at trial. The trial court was correct in finding that there was no ineffective assistance of counsel in this respect. The question of rebuttal evidence was rejected on direct appeal as were the issues regarding the impeachment of Foley, victim evidence and the fact the victim's father testified while in a wheelchair.

In regard to the impeachment of witnesses for the Commonwealth, Marge Foley was extensively cross-examined by defense counsel. The jury had sufficient evidence to make an informed judgment about the credibility of such witnesses. There was no evidence that the witness, Watt, was a suspect in the other case involving Foley and her testimony was consistent with that of Foley. Defense counsel cross-examined the witness and pointed out inconsistencies in regard to her prior deposition.

Defense counsel was not ineffective for failing to object to a prior felony conviction from 1977. The indictment gave sufficient notice of aggravators pursuant to [Perdue v. Commonwealth, Ky.](#), 916 S.W.2d 148 (1995), and instruction issues were rejected in the direct appeal.

IV. Funds for Experts

Foley argues that the trial court improperly denied him funding for a ballistics expert and a social worker because he needed these two experts for the evidentiary hearing to prove the prejudice in his original jury verdict.

Foley has no constitutional right to expert assistance in a collateral attack proceeding. [Murray v. Giarratano](#), 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). The requirement to provide funds to indigent defendants for necessary experts as stated in [Binion v. Commonwealth, Ky.](#), 891 S.W.2d 383 (1995) and ***887** [Ake v. Oklahoma](#), 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), has not been extended to post-conviction matters. The standard for determining whether a criminal defendant is entitled to funds for expert assistance is whether such assistance is reasonably necessary. [Hicks v. Commonwealth, Ky.](#), 670 S.W.2d 837 (1984). Such a decision is within the sound discretion of the trial judge, and the same

standard is to be applied in [RCr 11.42](#) proceedings. *McQueen, supra*.

Foley contends that a ballistics expert was necessary to prove that he did not kill Harry Vaughn and only shot at Rodney Vaughn in self-defense. He does not have an affidavit from any ballistics expert stating this proposition. There is no showing that the one expert he contacted could change the Foley verdict. He also claims that he needs a social worker to explain his background and character to the jury. Again, he does not indicate what a social worker would testify to or how this testimony would change the reliability of the verdict. Foley does not demonstrate that either of these proposed expert witnesses was reasonably necessary pursuant to *Hicks, supra*. It was not error for the trial judge to deny motions for funds for experts because those experts were not reasonably necessary.

V. Credibility of Witness

Foley claims that newly discovered evidence would show that a prosecution witness lied and that thus his conviction and sentence should be reversed. His new evidence is based on affidavits from another death-row inmate and a convicted felon who both alleged they were in jail with the prosecution witness who confessed to them that he actually shot Lynn Vaughn. The evidence is not new because it only corroborates the trial testimony.

The granting of a new trial is disfavored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature. See *Collins v. Commonwealth, Ky.*, 951 S.W.2d 569, 576 (1997). At the [RCr 11.42](#) hearing, a witness testified that Dugger confessed to him also. The witness admitted that he had five felony convictions and that four of them had been prosecuted by the current prosecutor of Foley. Newly discovered evidence is not a basis for [RCr 11.42](#) relief. *McQueen*. There is nothing to suggest that in the absence of this allegedly newly discovered material, the verdict would have been any different. The trial judge did not abuse his discretion in finding that the testimony submitted by affidavits from prison inmates was not credible. See *Epperson v. Commonwealth, Ky.*, 809 S.W.2d 835 (1991).

VI. Rush to Judgment

Foley contends that his [RCr 11.42](#) attorneys needed additional time to prepare and present issues. In this case, Foley had sufficient time to prepare issues for the [RCr 11.42](#) motion. His conviction was affirmed in 1996 and certiorari was denied by the U.S. Supreme Court. Foley did start preparing for his [RCr 11.42](#) hearing by faxing a 15-page motion to the circuit court just three days after certiorari was denied. The motion had attached to it the affidavits of two potential [RCr 11.42](#) witnesses which were signed on September 26, 1996 and November 22, 1996, approximately one year before the evidentiary hearing would eventually be scheduled. Foley and his lawyers were well aware of what was coming and had the commendable foresight to begin preparations even before the direct appeal was affirmed.

As previously stated, the purpose of a [RCr 11.42](#) proceeding is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Gilliam, supra*. There was no valid reason for the circuit court to grant additional preparation time.

[RCr 9.04](#) provides a standard for postponing a trial or evidentiary hearing. It requires the defendant to demonstrate *888 what witnesses or evidence counsel has been unable to obtain in time for the hearing, the materiality and that due diligence has been exercised to obtain it. Foley did not comply with the requirements of this rule.

Foley was unable to identify with any particularity, any witnesses or evidence of claims that they would have been able to present had they been granted a continuance of the [RCr 11.42](#) hearing. Foley mentions three missing witnesses but of those he only gives the name of one, Ronnie Dugger. He provides no affidavits to indicate what he believes Dugger's testimony would be. He merely claims that Dugger lied during trial, and yet he presented the testimony of two witnesses at the [RCr 11.42](#) hearing that Dugger had lied. He claims in a vague general way that he learned of useful information that could have been presented by other witnesses, but no mention of these individuals is made and what they would have specifically testified about.

In addition, there is no indication as to what a ballistics expert and a social worker would have testified or why their testimony was material. Again, no affidavits of any nature were filed. Thus, there was no need to grant a continuance based on either of these suggested sources of testimony. Neither of these witnesses would have been reasonably necessary and the trial court was correct in not granting funds.

Foley's complaint about discovery issues is without merit because pretrial discovery rules do not apply in [RCr 11.42](#) proceedings. *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905 (1998).

In regard to the missing evidence of medical records, there is no showing as to what those records would say or if he was ever taken to a doctor and if there were any medical records in existence. He did not comply with [RCr 9.04](#) and was not entitled to a postponement of the hearing.

Foley contends that an [RCr 11.42](#) proceeding requires a "virtual reinvestigation." We disagree. This proceeding is not a retrial. He had ample time in which to prepare for the hearing and there is no legitimate [RCr 11.42](#) claim which would justify the extraordinary relief available in an [RCr 11.42](#) proceeding. There was no abuse of discretion or error of any kind in not granting a continuance.

VII. Prosecutorial Misconduct

Foley complains that he was denied due process of law, a fair trial and a reliable sentence because the prosecutor withheld favorable evidence, coached witnesses and tossed a gun into the jury box. All aspects of this issue were raised in his motion for a new trial as well as the [RCr 11.42](#) motion.

Our review of the record does not indicate that the prosecutor withheld evidence. This issue has already been addressed on direct appeal and was raised by Foley in a motion for a new trial that was rejected by the trial judge. We find no reason to relitigate this subject. See *Foley v. Commonwealth*, 942 S.W.2d at 886. Foley claims that the prosecutor withheld evidence that Ronnie Dugger was not intimidated because the prosecutor knew that Dugger called his mother and said he was okay. In order to support a motion for a new trial, any newly discovered evidence must be of such a decisive nature that it would, with reasonable certainty, change the verdict. *Collins v. Commonwealth*, Ky., 951 S.W.2d 569, 576 (1997); *Coots v. Commonwealth*, Ky., 418 S.W.2d 752, 754 (1967). The granting of a new trial is not favored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature.

Reliance by Foley on *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is misplaced. Those federal cases held that a new

trial is not automatically required whenever a combing of the prosecutor's files after trial has disclosed evidence possibly useful to the *889 defense, but not likely to have changed the verdict. Next, Foley asserts that the prosecutor met with prosecution witnesses prior to trial, provided them with portions of the discovery and instructed them on their testimony. This ground was also included in his motion for a new trial. We agree with the trial judge that this claim has been waived because post-conviction counsel has not introduced any evidence to substantiate this allegation at the evidentiary hearing. There was no abuse of discretion in refusing a request for reconsideration or for a supplemental hearing because of an alleged automobile accident involving the witness. Finally, the suggestion that the prosecutor threw a gun in the court room is without merit and has been refuted by an examination of the video tape of the trial. There was no basis for avowal testimony from the person who has testified that he was a personal friend of Foley and would do anything to help him. There was no credible evidence to support this claim and it was refuted by the video tape of the trial. The trial judge properly overruled the issue before the [RCr 11.42](#) hearing and avowal testimony was not proper at the hearing. Cf. *McQueen*.

VIII. Juror Misconduct

Foley argues there was misconduct on the part of three jurors during his original trial. To support these allegations he presented evidence from four witnesses, his trial attorney, one of the jurors and two other persons. All three of the jurors unequivocally denied making the statements attributed to them by Foley.

The trial attorney testified that he was aware of a claim that a juror had told others at a restaurant that the jury had already decided guilt. The trial lawyer sent an associate to the restaurant to investigate the claim but the associate was not able to verify the allegation.

The witnesses called by Foley to support his contention could not name a single individual who supposedly heard such statements or passed information on to them. Foley offered no proof as to the assertions regarding the kinship of jurors to an assistant Commonwealth Attorney and the Commonwealth offered proof that there was no such kinship. The assistant Commonwealth Attorney did not participate in the trial. The claims of juror misconduct are based on suspicion, rumor and speculation. There is no credible evidence to support such

allegations. The authorities cited by Foley are unconvincing and without merit.

IX. Discovery Denial

Foley contends that he was denied discovery during the [RCr 11.42](#) post-conviction proceedings. He asserts that the proceedings must have the same scope as a pretrial investigation. We disagree. The [RCr 11.42](#) proceeding is limited in purpose and scope. This Court has stated that such proceedings are not the equivalent of a retrial. *Dorton v. Commonwealth, Ky.*, 433 S.W.2d 117 (1968). *Sanborn, supra*, has indicated that pretrial rules of discovery do not apply in [RCr 11.42](#) proceedings.

Foley has already received complete discovery and has been convicted. He is no longer simply an accused. He is not permitted to fish through official records in hopes that something may turn up to his benefit. *See Gilliam, supra*.

X. Letter from Wife

An examination of the record does not indicate any testimony that the trial attorney was made aware of an alleged letter from Foley's wife to the defendant prior to trial. The letter indicated that she became pregnant by a state police officer and that another police officer had given her money. Obviously, defense counsel did not cross-examine her about the letter or about her relationships with either of the two police officers. Foley does not state when he received the letter, nor does he indicate when trial counsel became aware of the letter during trial. *890 Foley, who testified in his own defense, made no mention of the facts that he now argues. Trial counsel cross-examined Foley's wife concerning pending criminal charges against her and the fact that she had unresolved custody litigation. At trial, Foley testified that his wife was "a dopehead and a whore."

The trial judge correctly found that Foley did not assert that he made trial counsel aware of the purported letter or that he asked trial counsel to question his wife about the alleged letter. Foley did not testify at the [RCr 11.42](#) hearing.

In attempting to obtain post-conviction relief, the movant must present facts with sufficient particularity to generate a basis for relief. [RCr 11.42\(2\)](#); *Skaggs v. Commonwealth, Ky.*, 803 S.W.2d 573 (1990); *Lucas v. Commonwealth, Ky.*, 465 S.W.2d 267 (1971).

XI. Denial of Mitigating Evidence

Foley complains that he was not allowed to present relevant mitigating evidence during the testimony of four witnesses at the [RCr 11.42](#) hearing. Foley argues that the evidence was highly relevant to the issue of his character both as a child in school and as a grown adult. All of the evidence he wanted to present was placed in the record by avowal. An examination of it indicates that it is clearly unreliable, inadmissible hearsay. [KRE 802](#). None of the information would have been admissible at trial even through the hearsay exception route. [KRE 803](#) and [804](#). Thus, it was not ineffective assistance of counsel for the defense lawyer not to have produced it at trial.

The hearsay testimony offered here meets none of the criteria of reliability noted by the United States Supreme Court in *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). In any event all the testimony was recorded by avowal and we conclude that the trial court did not commit any error in excluding it.

We conclude that Foley did not receive ineffective assistance of counsel pursuant to [RCr 11.42](#). He has not demonstrated a professional performance that was so deficient that it prejudiced the defense. There is no showing that the alleged errors of defense counsel were so serious that the result of the trial was unreliable. *See Strickland; Gall; McQueen; Sanborn*.

The decision of the circuit court is affirmed in all respects.

All concur.

All Citations

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- Security

May 7, 2018

Shawn Nolan, Esq.
Federal Community Defender Office
Suite 545 West – The Curtis Center
601 Walnut Street
Philadelphia, PA 19106

RE: Robert Foley

Dear Mr. Nolan,

I am writing to share the findings and opinions from my review of the case materials you have provided, and my examination of Mr. Foley in the above captioned matter.

Referral Questions

You have asked that I review the materials in this case, and examine and test Mr. Foley, in order to address the following referral questions:

- (1) Does Mr. Foley have neuropsychological impairments?
- (2) Given his life history, could Mr. Foley suffer from Posttraumatic Stress Disorder?

Answers to Referral Questions

It is my opinion to a reasonable degree of psychological certainty that:

- (1) Mr. Foley does have neuropsychological impairments involving his frontal lobe executive functioning and his memory functioning; and
- (2) although he has had extensive trauma exposure, Mr. Foley does not meet criteria for PTSD at this time.

Basis for Opinions

Materials Reviewed

I have reviewed materials regarding Mr. Foley, which included the following:

- (1) Foley v. Commonwealth, 2014-SC-000478-MR – Opinion
- (2) Foley v. Commonwealth, 2014-SC-000743-MR – Opinion
- (3) Clara Ingram Mental Health Report (6/15/1980)
- (4) Ronald S. Dubin Patient Referral Letter (10/04/1988)
- (5) Appalachian Hospital Records (1976)
- (6) Background Profile on Robert Karl Lee Foley
- (7) Danny Felosi Affidavit (04/21/2003)
- (8) Dennis Hyatt Affidavit (11/16/2002)
- (9) John Matthew Fabian Affidavit (09/09/2017)
- (10) Fred Seals Affidavit (1/16/2002)
- (11) John B. Foley Affidavit (11/16/2002)
- (12) Mary Mount Hospital Records (1993)
- (13) News Article – Car Crash (07/18/1975)
- (14) Walter Daniels Affidavit (11/16/2002)
- (15) Memo Prepared by Lisa Collins (11/05/1997)
- (16) Letter from Michelle Goeller (03/15/1999)
- (17) Memo Prepared by Heather Drake (09/26/2017)
- (18) Lois Foley Affidavit (03/21/1999)
- (19) Lois Foley Transcript – Laurel County
- (20) Ted Foley Transcript – Laurel County
- (21) Vickie Mollenhaur Transcript – Laurel County
- (22) Report of James J. Clark, Ph.D., LCSW, 2/4/2018
- (23) Report of Andres Lugo, MD, MPH, 2/2/2018
- (24) Report of Kathleen Kaib, MSS, MLSP, LCSW, 2/9/2018
- (25) Presentence/Post-Sentence Investigation Report (09/05/1993)
- (26) Artemis Gross Affidavit (03/05/1999)
- (27) Ron Devere Affidavit (03/19/1999)
- (28) John and Louis Foley Affidavit
- (29) Application for Marriage License: John and Marjorie Foley
- (30) John Foley Declaration (2018)
- (31) Glenna Rogers Declaration (2018)
- (32) Frank Pennington Declaration (2018)
- (33) Eddy Gross Declaration (2018)
- (34) Artemis Gross Declaration (2018)

Forensic Neuropsychological Examination
May 7, 2018

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- (35) Violet Foley Declaration (2018)
- (36) Diana Bracket Declaration (2018)

Scope of Examination and Informed Consent

I examined and tested Mr. Foley in a quiet, private medical office at the Kentucky State penitentiary on January 24th and 25th, and April 12, 2018. We spent approximately five hours together each day. Comfort brakes were taken as needed. Mr. Foley was hands-free, but had his right leg restrained to a bolt in the floor during most of the examination. He was advised that I had been retained by your office, of the limits on confidentiality in this forensic context, and of the lack of any treating relationship between us. Mr. Foley was able to provide his informed consent to participate with this understanding.

Tests Administered

- Structured Neuropsychological Interview
- Mental Status Examination
- Test of Memory Malingering
- Rey's 15-Item Memory Test
- Validity Indicator Profile – Verbal Subtest
- Wechsler Adult Intelligence Scale-IV
- Wechsler Memory Scale-IV
- Wide Range Achievement Test-IV
- California Verbal Learning Test -II
- Halstead-Reitan Neuropsychological Test Battery
 - Booklet Category Test
 - Seashore Rhythm Test
 - Speech Sounds Perception Test
 - Portable Tactual Performance Test (deferred)
 - Finger Oscillation Test
 - Strength of Grip (Smedley Hand Dynamometer)
 - Reitan-Klove Sensory-Perceptual Examination (deferred)
 - Tactile Form Recognition (deferred)
 - Lateral Dominance Examination
- Stroop Color-Word Test
- Grooved Pegboard Test
- Tests of Verbal Fluency (F-A-S)
- Animal Naming Test
- Boston Naming Test
- Copy Cross & Cube

- Hooper Visual Organization Test
- Trail Making Test, Parts A & B
- Luria's Tests of Graphomotor Sequencing and Inhibition
- Test of Motor Sequencing and Control
- Wisconsin Card Sorting Test
- Detailed Assessment of Posttraumatic Stress
- Delis-Kaplan Executive Functioning System
- Visual Form Discrimination
- Judgment of Line Orientation
- Bender Visual-Motor Gestalt Test
- Clock Drawing
- Reitan-Indiana Aphasia Screening Test
- d2 Test of Attention
- Rey's Complex Figure
- Personality Assessment Inventory
- Clinical Interview

Background Information

Mr. Foley's case, background, and family history have been extensively discussed elsewhere in the case materials and will not be reiterated in detail here at this time. However, a few important facts obtained during the present examination will be presented to provide context and support for my preliminary opinions.

Family of Origin

Mr. Foley was born in Harlan County, Kentucky on September 13, 1955.¹ He is currently 62 years of age

His father John died of lung cancer at 78 years old. He had a ninth-grade education and worked as a coalminer. His mother Lois died at 78, of lung and brain cancer. She was housewife who had some high school education, although Mr. Foley was not sure how much. He reported that his mother was Cherokee, and his father was Irish. He identifies as Native American and follows Cherokee beliefs.

He has three brothers, of which only one survives. John Jr. is currently 57 years of age and in good health. His brother Byron died last

¹ He repeatedly informed me that the prison records indicate that he was born in 1956, but claims it's actually 1955.

October at age 59, of a heart attack. His brother Howard died at age 50 from kidney and brain cancer.

Mr. Foley reported that he has been married several times. He was married to his first wife, Shelley Scott, from 1982 until 1985. They had no children. He was married to his second wife, March Bedford, from 1987 until 1994. They had three daughters, Ashley who is now 30, Clara who is now 28, and Tonya who is now 27. He was married to his third wife, Donna Zambruski, from 2000 2005. They had no children. He was married to his fourth wife, Caron Hayes, from 2007 until 2012.

He also has a son out of wedlock named Jake, who is now 28.

He reported being raised primarily by his grandparents and spoke at length about the influence of his grandfather, who was a rough character who raised him to be tough, teaching him about guns, killing animals, and fighting.

Education

Mr. Foley stated that he quit school in the 11th grade at the request of the assistant principal. He described barely passing in school largely due to poor attendance. To help raise money to support his family, he would "run" moonshine for his family's moonshine business and did odd jobs at the mine and at his father's garage that would take him away from school.

He described his favorite subject is history and his most difficult subjects as English and grammar. He described his teachers as understanding and supportive of him.

Employment

Mr. Foley described an extensive history of odd jobs beginning at age 12. He shot dogs and cats for the local dog catcher for 2 to 3 years, then did odd jobs at the coal mine, cleaning heavy equipment. He cut grass, did a job for neighbors are on their property, worked at the airport in Harlan has a cleaner, drove a dump truck, and was hired his first job out of high school is a backhoe operator. Later in life he worked as a truck driver.

Notably, Dr. Lugo notes in his report that Mr. Foley was exposed to many neurotoxic substances throughout his life, many associated with his employment situations.

Military

He denied any military service

Medical History

Mr. Foley reported that his mother tried to abort him, using a folk potion intended to terminate her pregnancy. It was not successful but warrants investigation to determine whether he was exposed to toxic substances *in utero*. He described her as a heavy smoker, but not a drinker. He was not aware of any difficulties with his mother's pregnancy, labor, or delivery; and described achieving developmental milestones like walking and talking within normal limits.

He reported experiencing a bout of pneumonia when he was 10 or 11 years old it was nearly fatal. He stated he was taken to a hospital in Virginia where he was treated.

He had his gallbladder removed approximately 15 years ago. He also had a hip replacement in November 2016.

He described having numerous small procedures to remove bullets and set broken bones over the course of his life.

He reported an, "induced stroke" in 1991 or 1992, as a result of an iatrogenic medication interaction. He stated that various doctors would write prescriptions without knowing what previous doctors had written, and he ended up taking medications that induced a stroke. He suggested there should be evidence of this in his medical records as well.

He denied any history of seizures.

He denied any history of diabetes.

He also reported that he has been diagnosed with hepatitis C, stage III. He reported being treated with interferon but stated that, "it came

back after six months.” He believes he was infected as the result of a blood transfusion.

He stated that he has hypertension and has been treated with lisinopril for the past 15 years.

His current medications include lisinopril for hypertension, naproxen sodium, cholesterol medication, and medication for his prostate.

History of Head Injuries

Mr. Foley reported on extensive history of head injuries, beginning as a child. As an infant, he reported that when his umbilical cord fell out his mother was frightened and threw him down on the ground. Family members feared she had killed him.

When he was two or three years old, he reported standing on a straight-backed chair which fell over. He said, “I laid there for a pretty good while.” he did not know whether he lost consciousness.

When he was approximately eight years old he was playing Little League baseball and while trying to catch a ball he was hit in the head and knocked unconscious, “for a while.” He stated the coach took him out of the game.

We also reported a football injury around the same time in which he broke his arm and sustained a concussion as a result of falling into a deep hole that was being dug on the field for a bathroom. He stated he was treated by Dr. Buttermore² who diagnosed the concussion at that time.

When he was nine or 10 years old he reported swinging on a vine, falling, and hitting the back of his head. He denied losing consciousness, however he said, “but the world was kind of woozy for a while.”

He also reported several accidents during which he fell off horses and hit his head.

At age 16 he stated that he was at a “bootleg joint” and was pistol-whipped to near unconsciousness by a man named Luke Waters. This

² Dr. Buttermore reportedly also owned the Coal Camp where his family lived.

subsequently escalated into a situation where he claims he shot Jess Hensley, the fire chief, who tried to get between him and Mr. Waters.

He stated that in his mid-teens he was in a car accident with Rick Napier during which, "both our heads went through the windshield." He claimed he was unconscious for, "a few seconds."

He also reported an incident while he was cutting and hauling trees where he was clipped in the head by a tree limb and lost consciousness for approximately one minute. He described this as, "One of the worst hits I've had." He stated he was hit in the left temple, could not go back to work, and was sent home. He said his face and his eye were swollen so badly that he was given a week off to stay home and heal.

At age 18 he reported being involved in the mining accident during which he hit his head with a "come-along bar" that slipped as he was working with it. He reported loss of consciousness for one minute, after which he was awakened and sent up out of the mine. He described a softball-size "goose egg" on the right side of his head following this injury.

At age 19 he was involved in a car accident in which he turned a Camaro over at 100 mph. He lost consciousness and was taken by ambulance to the emergency room. At the emergency room following this accident, as he was regaining consciousness he apparently made a smart remark to a police officer who then reportedly hit him in the head repeatedly with a nightstick in the emergency department until he was pulled off by medical personnel. He described having a "pumpkin head" after this incident.

In 1982 or 1983, he reported that he was shot in the face and fell backwards, hitting the back of his head. He has a visible scar on his face that he indicated was from this gunshot injury. He described being semi-conscious and stated that he laid there and watched people go by in a daze for quite some time.

He was involved in another car accident in 1989 resulting in a brief loss of consciousness when he rolled the car. He indicated there are medical records from this injury.

In 1988 he was crushed between two trailers and suffered a concussion, broken bones, and other injuries that have plagued him throughout his life. This is documented in his medical records.

He stated the last time he lost consciousness was six or seven years ago while in prison. He reported that his hip popped out, he fell and cut his head on a footlocker, and was unconscious for 2 to 3 minutes. He stated he was given 17 stitches to close the wound in his head. He indicated this incident should be reflected in his prison medical records.

He also described in incident in which he was out with friends playing with dynamite on Halloween as a teenager. He threw 3/4 of a stick of dynamite out the truck window. It landed in the truck bed and exploded, blowing the rear window out of the truck and blowing the rear gate off the truck and bending it in half. He stated that everyone in the car had hearing loss after the blast concussion.

Neurotoxic Exposure

Dr. Lugo had conducted an extensive evaluation of Mr. Foley's exposures to neurotoxic substances, both in utero and throughout his life.³ Based on his investigation, Dr. Lugo arrived at the following conclusions:

CONCLUSION

After performing the toxicology investigation and public health assessment at Harlan County, Kentucky, I have confirmed that Robert Foley suffered from chronic environmental exposure to neurotoxic and neuroendocrine disrupting chemicals capable of causing brain damage, neuropsychiatric problems and other negative health effects. The source of the toxic exposure came from breathing contaminated air from coal mining operations (outdoors and indoors), as well as drinking contaminated water and eating food (water from water well was used on a daily basis for preparing meals) contaminated by industrial chemicals dumped into the water, soil and air by coal mining and other industrial corporations. Also, at age 10, Robert began working at the service station where on a daily basis he was exposed to trichloroethylene by breathing vapors and liquid TCE used to clean his hands from oil and tar. The toxic exposure was

³ Report of Andres Lugo, MD, MPH, 2/2/2018

aggravated during the 1950s to 1980s due to poor housing, lack of basic household sanitation services (sewage, indoor plumbing and potable water), as well as poor sanitary conditions outside on the dirt roads and streets.⁴

Substance Use History

He denied any history of using tobacco, alcohol, or drugs. He did relate one incident during which he had a small amount to drink but could not tolerate it.

He also claimed that he had used "speed" to stay awake when he was driving trucks but denied recreational abuse.

He also reported using his wife's Valium on a few occasions to help him sleep.

Psychiatric History

He said his first contact with a mental health professional was while he was in prison in 1980. A psychologist named Clara Ingram administered an IQ test in preparation for his parole. These results are discussed below.

He described his second mental health contact as being with a vocational rehabilitation psychologist after he was "crushed" in the tractor trailer accident. In addition to vocational rehab, he was also provided with support for dealing with his injury. Finally, he stated that he saw a psychiatrist or psychologist in prison, "a couple times," after his mother passed away.

He denied any history of suicidal ideation.

Early Witnessing of Extreme Violence

Mr. Foley reported during my examination that he witnessed multiple murders, beginning in 1963 when he was 8 years old. He reported watching as his next-door neighbor Esile Trosper was shot in the chest with a shotgun by mentally disordered man named Jess Anderson. He described working in a "bootleg joint" as a boy, running drinks for adult poker players in return for tips, and witnesses a murder following

⁴ Ibid at p. 18.

an agreement between two men. He also described "walking up on" three different shootings in a single night. He reported that he started carrying a pistol at age 12 after his grandfather was sent to prison, in part due to feeling unsafe.

This history is important because of research that has demonstrated that witnessing violence causes psychiatric impairment and brain impairment, including structural brain changes that result in diminished IQ and impaired neurocognitive functioning.⁵

Prior Cognitive Testing

Mr. Foley was tested by Clara Ingram, M.S., an Institutional Psychologist at Kentucky State Prison on June 16, 1980. She reported a WAIS Full Scale IQ score of 122, which would have placed him in the Superior range of intelligence. His Verbal IQ was 128, and his Performance IQ was 114. The 14-point difference between his verbal and performance scores indicates that his verbal abilities were more highly developed than his non-verbal abilities at that time.

Present Examination Findings

Behavioral Observations and Mental Status Examination

Robert Carl Lee Foley is a 62-year-old ambidextrous man of mixed Cherokee and Irish heritage, who presented for testing dressed in red scrubs and white tennis shoes. He is a short, stocky, barrel-chested

⁵ Perkins, S. and Graham-Bermann, S (2012). Violence Exposure and the Development of School-Related Functioning: Mental Health, Neurocognition, and Learning. *Aggress Violent Behav.*; 17(1): 89–98.

Koenen, KC, Moffitt, TE, et al. (2003). Domestic violence is associated with environmental suppression of IQ in young children. *Development and Psychopathology*, 15, 297–311.

Jennifer Delima and Graham Vimpani, (2011). The neurobiological effects of childhood maltreatment: An often overlooked narrative related to the long-term effects of early childhood trauma. Australian Institute of Family Studies No. 89, p. 42-51.

Baker, L., and Campbell, M. (2012). Exposure to Domestic Violence and its Effect on Children's Brain Development and Functioning. Learning Network Brief (2). London, Ontario: Learning Network, Centre for Research and Education on Violence Against Women and Children.

man, with very black close-cropped hair, and a small black mustache. There are multiple scars visible on his face and head, and on his left arm. He wore bifocals. He was cooperative, effortful, open, and friendly throughout two days of examination and testing.

He was well oriented to the world around him, knowing who he was, where he was, and the approximate date and time. He reported the date is January 23 rather than January 24, in part because my examination had previously been scheduled a day earlier. His left arm and hand were numb and visibly swollen, which he attributed to arthritis and carpal tunnel syndrome. He indicated that he is scheduled for surgery to address this soon. He had a limited range of motion and decreased motor strength and speed on his left side. Due to this, some of the neuropsychological testing was deferred (e.g., Halstead Tactual Performance Test, sensory-Perceptual Examination, and Tactual Form Recognition).

His motor behavior was slow, and he appeared stiff upon rising after sitting for a period of time. He required bathroom breaks at regular intervals.

There was also a notable although subtle tremor observable in his right hand. When asked about this he claimed to be unaware of it, but overnight between the two days of examination he mentioned it to other inmates and told him that he has had this for a couple of years. He was told they noticed this when he plays cards.

His speech was produced at a rapid rate with a thick, what he described as "country," accent. His quantity of output was voluminous. There was a cognitive stickiness to his interactions. He was prone to telling long and elaborate, circumstantial stories. However, he was able eventually to tie his story back to the original question or issue at hand. He was difficult to interrupt.

His thoughts were expressed in a coherent, logical, and goal-directed fashion, although with the circumstantiality described above. There was no evidence of psychosis. This included no evidence of fixed, false beliefs (i.e., delusions), abnormal sensory experiences (i.e., hallucinations, including auditory, visual, somatosensory, tactile, and olfactory channels). There is no evidence of phobias, obsessive thoughts, or preoccupations. He did describe vivid, recurrent dreams involving two black wolves that he believes are his spirit animals.

Emotionally his observable affect was bright and affable, being broad in range and intensity, and remaining stable over both days of examination. His affect was appropriately related to his mood and to the content of his thoughts. His underlying mood was inferred to be euthymic. His insight was good.

He described his appetite as, "it comes and goes," stating that he has gained 15 pounds since his hip replacement surgery last year. He attributed this to increased appetite secondary to increased activity. He described his sleep as intermittent and stated that he often wakes up and has difficulty going back to sleep. He described this is a long-standing pattern.

He described his social relationships and activities as, "pretty good," but stated that he has a temper and tends to get aggravated at times. With regard to his temper he stated, "there are days when I'm level-headed, other days it doesn't take much to set me off." He stated that he does not argue or scream or cuss, but rather strikes out instead. "I'm in control, but I'm not in control." He related that he's, "been that way all my life." He explained that if he's in a situation where someone pulls a weapon or threatens him or for those he cares for, he becomes weapon-focused and finds himself unable to control his anger.

He described a loss of libido which is characterized as, "typical old man stuff."

Emotionally, he stated that he has been feeling less depressed and more "energized and inspired" as a result of new attorneys being appointed in his case. When asked if he's noticed any changes in his thinking or memory he reported that his memory is not as good as it used to be, which he attributed to advancing age. He stated that he reads a lot and likes to write stories.

When asked if he has noticed any differences in his speech or language he replied, "just typical old country boy language." He also stated he has noticed over the past 5 to 10 years an increase in his use of profanity because of the environment that he finds himself in.

When asked about motor problems, he related that he has carpal tunnel syndrome in his left hand which is scheduled for surgery; and has a bad disc in his back which is causing numbness in his legs and

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feet. He also reported his hip replacement last year. Prior to that he had to walk using a walker.

He reported tinnitus in his right ear.

Neuropsychological Testing Results

Level of Effort and Test Validity

In any forensic examination, it is imperative to ensure that the obtained test data provide reliable and valid indications of the individual's current level of neurocognitive functioning. Therefore, a battery of free-standing and embedded measures of effort was administered to Mr. Foley throughout the present examination.

He passed the Test of Memory Malinger, Rey's 15-item Test, Validity Indicator Profile, Reliable Digit Span, Forced-Choice subtest of the CVLT-II, and the malingering indicators for the Halstead Category Test. Based on these performances, the current battery of neuropsychological tests reflects a reliable and valid indication of Mr. Foley's current level of neurobehavioral functioning and ability.

Intelligence

Mr. Foley obtained a Full-Scale IQ score of 93 on the WAIS-IV. His test scores are summarized in the table below:

Composite Score Summary

Scale	Sum of Scaled Scores	Composite Score	Percentile Rank	95% Confidence Interval	Qualitative Description
Verbal Comprehension	33	VCI 105	63	99-110	Average
Perceptual Reasoning	26	PRI 92	30	86-99	Average
Working Memory	16	WMI 89	23	83-96	Low Average
Processing Speed	15	PSI 86	18	79-96	Low Average
Full Scale	90	FSIQ 93	32	89-97	Average
General Ability	59	GAI 99	47	94-104	Average

Confidence Intervals are based on the Overall Average SEMs. Values reported in the SEM column are based on the examinee's age.

The GAI is an optional composite summary score that is less sensitive to the influence of working memory and processing speed. Because working memory and processing speed are vital to a comprehensive evaluation of cognitive ability, it should be noted that the GAI does not have the breadth of construct coverage as the FSIQ.

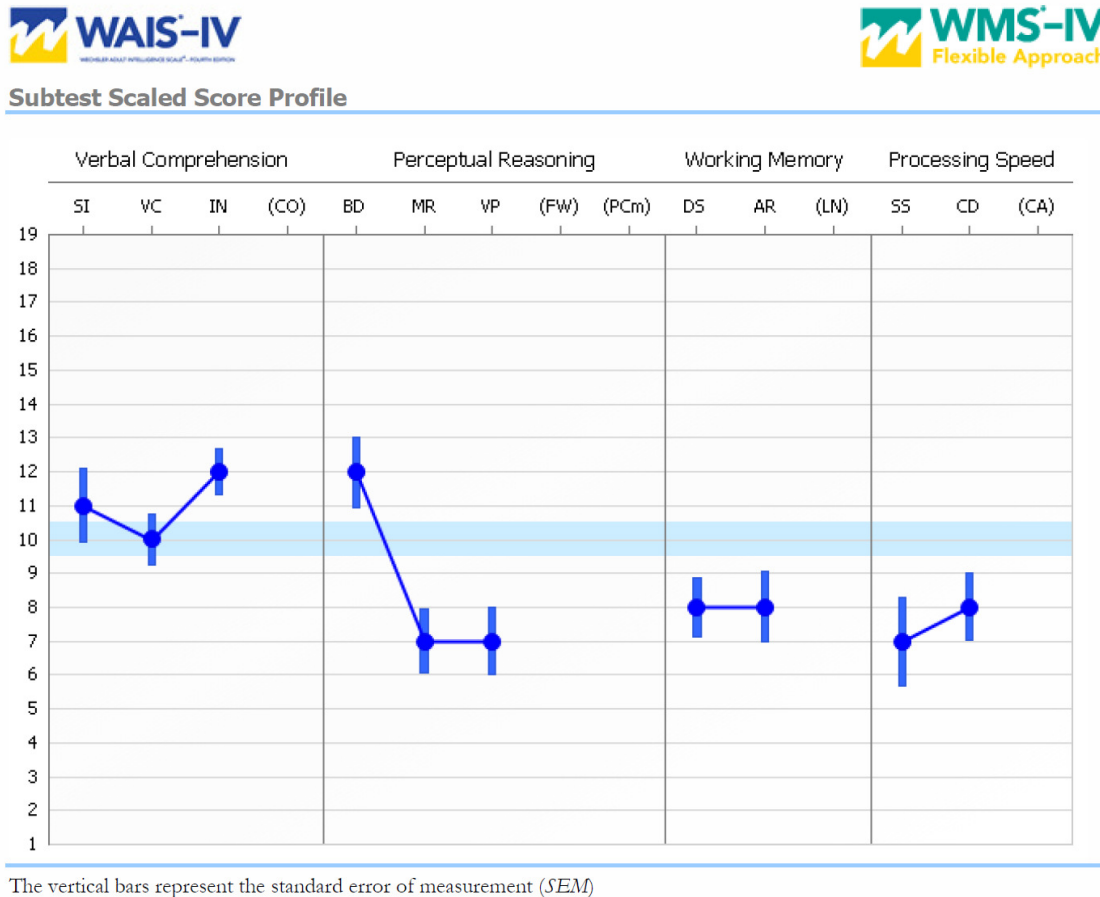
His scores are significantly diminished globally when compared to his testing in 1980. His FSIQ has dropped 29 points, which is a

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remarkable decline in his intellectual abilities.

He continues to demonstrate a pattern where his verbal abilities are significantly stronger than his non-verbal skills, as was seen in 1980. However, he has experienced significant declines in perceptual reasoning, working memory, and processing speed as reflected in the graph below:



Academic Functioning

Mr. Foley has a checkered school history, marked by absences due to the need to work. He attended into the 11th grade and obtained his GED while in prison. Formal testing of his academic skills shows expected abilities in word reading and sentence comprehension, given this history. However, he has relative deficits in spelling and math computation that may reflect an underlying learning disability. Results from the WRAT4:

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	<u>Grade Level</u>
Word Reading	10.2
Sentence Comprehension	11.5
Spelling	8.3
Math Computation	7.4

Memory

Formal memory testing with the Wechsler Memory Scale-IV revealed memory abilities in the average to low-average range:

WMS–IV Flexible Approach Results

WMS–IV Alternate Index Score Summary

Index	Sum of Scaled Scores	Index Score	Percentile Rank	Confidence Interval	SEM	Qualitative Description
Immediate Memory (LMVR)	15	85	16	78-94	4.5	Low Average
Delayed Memory (LMVR)	18	94	34	88-101	3.67	Average
Auditory Memory (LM)	17	93	32	86-101	4.5	Average
Visual Memory (VR)	16	89	23	84-94	2.12	Low Average

WMS–IV Alternate Indexes derived using Logical Memory and Visual Reproduction (LMVR).

Confidence Intervals reported at the 95% Level of Confidence.

His immediate memory and his visual memory are functioning at significantly lower levels than his intellectual ability would predict, indicating that these are relative deficit areas for him:

Ability–Memory Analysis

Ability Score Type: GAI

WAIS–IV/WMS–IV Discrepancy Analysis

Index	WAIS–IV GAI Score	WMS–IV Alternate Index Score	Difference	Critical Value	Significant Difference	Base Rate
IMI (LMVR)	99	85	14	10.19	Y	13.8
DMI (LMVR)	99	94	5	8.82	N	37.6
AMI (LM)	99	93	6	10.19	N	37.4
VMI (VR)	99	89	10	6.58	Y	24.6

Statistical significance (critical value) at the .05 level.

His scores were within normal to above average limits on the California Verbal Learning test-II, however his performance was marked by severe perseveration (pathological repetition of items he has already said). He repeated 26 items, placing him five standard deviations below normal (i.e. about 1 in 3.5 million people score this poorly) – a profound deficit. This pattern of abnormal repetition is indicative of a

severe impairment in attention. He has extreme difficulty remembering what he has already said while searching his memory for other words. This reflects his inability effectively to do two things at once, monitor his performance while engaging in a memory search.

Attention

In addition to the profound attentional deficit reflected in his CVLT-II repetitions, he also obtained scores in the impaired range on two other tests of attention, the Speech Sounds Perception Test and the Seashore Rhythm Test.

These results lend convergent validity to the conclusion that Mr. Foley has significant impairment in his attentional abilities. However, testing the d2 TOA did not indicate Attention Deficit Disorder.

Speed of Information Processing

He scored in the low-average on WAIS-IV Processing Speed Index, and within normal limits on the Trial Making Test, Part A.

Language Functioning

Mr. Foley's scores were within normal limits on the Boston Naming Test (a test of his ability to access his vocabulary to name pictures of common objects) and on tests of both semantic and phonemic verbal fluency. However, he exhibited speech dyspraxia on the Aphasia Screening Test.

Executive Functioning

The frontal lobes are the largest part of the brain and subsume a variety of neurobehavioral functions. Mr. Foley exhibited normal functioning in some respects, but serious deficits in others.

His capacity for switching (Trails B), verbal fluency (F-A-S and Animal Naming), and response inhibition (Stroop) were all intact.

However, his scores on tests of problem solving, learning from mistakes, and abstract reasoning were all severely impaired. His scores on the Wisconsin Card Sorting Test (WCST) were uniformly

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impaired at the bottom 1st percentile (i.e., 99% of individuals perform better on this test than Mr. Foley).

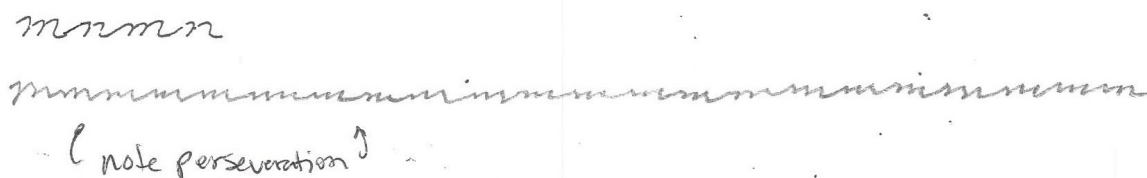
His scores on the WCST reflect severe difficulties with:

- (1) adapting to changing problem situations;
- (2) perseveration (pathological repetition of incorrect answers);
- (3) self-monitoring his behavior;
- (4) a failure to learn from feedback or use feedback to improve test behavior; and
- (5) an inability to develop new concepts.

A similar pattern of deficits was apparent on the Halstead Category Test, where his score fell below the cut-off for suspected brain damage (cut score = 51 or more errors, Mr. Foley had 78 errors).⁶

Although his production scores were within normal limits on tests of verbal fluency (F-A-S), his performance behavior was notable for perseveration (i.e., pathological repetition of words).

Mr. Foley also exhibited grapho-motor perseveration on Luria's tests, specifically on the "mnmmn" task.



mnmmn

note perseveration

This is notable because individuals with frontal lobe damage often exhibit the type of supramodal perseveration seen here (i.e., perseveration seen across multiple tasks assessing different neurobehavioral functions).

⁶ Normatively this level of performance places him at a T score of 44, in the dull normal range for men of his age and education – however the pattern of deficits was still apparent in his approach to the test.

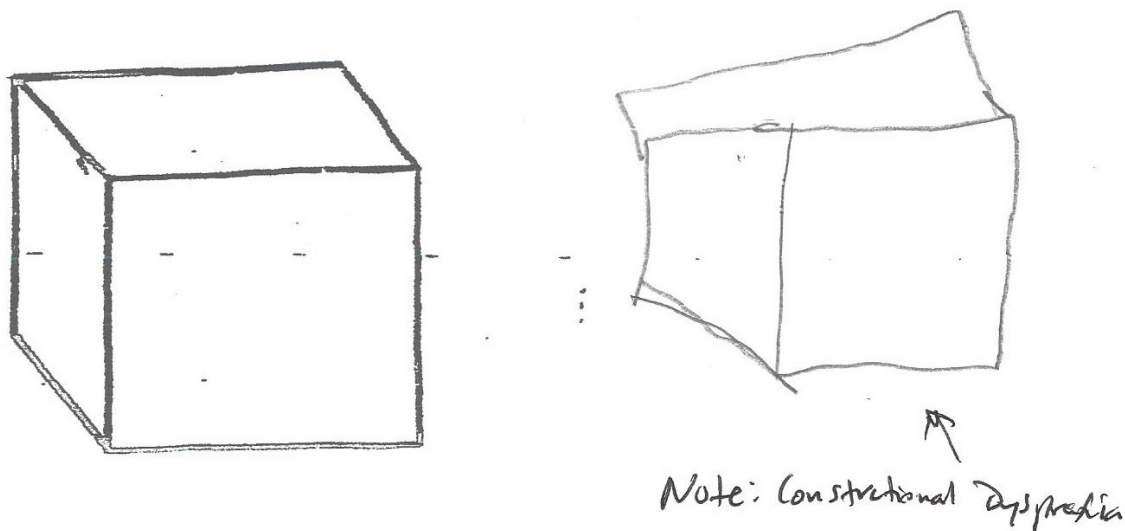
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Spatial Skills

Mr. Foley had mild impairment on a test of visual organization (HVOT).

He also exhibited mild to moderate constructional dyspraxia on the Copy Cube task.



On Visual Form Recognition, his performance was mildly impaired overall, and severely impaired for Major Distortions. However, he performed within normal limits on the JOLO, Clock Drawing, and Bender Gestalt Test. This suggests a mixed picture where he shows mild impairment in some areas, but his skills are spared in others.

Lateralized Sensorimotor Functions

Much of the testing in this area was deferred due to Mr. Foley's acute carpal tunnel syndrome in the left hand.

Tests of motor speed (tapping), dexterity (Grooved Pegboard), and strength (Hand Dynamometer) in the upper extremities were within normal to superior limits, but his scores on the left side were uniformly diminished due to his peripheral injury.

Psychodiagnostic Testing

Test Validity

Both the Personality Assessment Inventory (PAI) and the Detailed Assessment of Posttraumatic Stress (DAPS) have built-in validity scales to detect efforts to manipulate the test results, either by exaggerating problems or symptoms ("faking-bad") or minimizing them ("faking-good").

Mr. Foley's validity scales on both instruments were within normal limits, indicating that he was responding honestly, and the resulting test profiles are valid and interpretable.

Personality Assessment Inventory

Mr. Foley's PAI profile indicates three broad areas of difficulty: (1) somatic complaints; (2) mild depression and anxiety; and (3) emotional lability.

Given his health problems, he expressed a degree of concern about physical functioning and health matters, and probable impairment arising from somatic symptoms. He reports that his daily functioning has been compromised by one or more physical problems. While he feels that his health is good in general, he reports that the health problems that he does have are complex and difficult to treat successfully.

He also reports difficulties consistent with relatively mild or transient depressive symptomatology; and he occasionally experiences maladaptive behavior patterns aimed at controlling anxiety. He is troubled by disturbing traumatic events in his past, and these events continue to distress him and produce recurrent episodes of anxiety.

Finally, he is quite moody and emotionally labile, with the mood swings being rapid and rather extreme. He endorses experiencing episodes of poorly controlled anger, although other emotions are also poorly controlled.

Detailed Assessment of Posttraumatic Stress

On the DAPS Mr. Foley had a significantly elevated score for trauma exposures, although he does not meet criteria for PTSD at this time.

Opinions Regarding Neurobehavioral Impairments

The results of the current neuropsychological testing indicate the following:

- Mr. Foley currently has a normal IQ with cognitive abilities in the average to low average range but has experienced a significant loss of 29 IQ points since his testing in 1980, consistent with his history of multiple head injuries and environmental exposure to neurotoxins. As a result, he appears to suffer from progressive chronic traumatic encephalopathy;
- He 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;
- He has mild impairment in spatial skills involving visual organization and constructional dyspraxia; and
- He may have learning disabilities for spelling and mathematics.

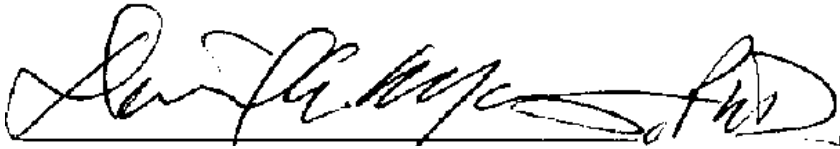
Psychodiagnostic testing reflects problems adjusting to chronic physical illness, stress, depression, anxiety, and an underlying affective impulsivity. Persons with CTE are also known to exhibit signs of anger, aggression, and depression. He has experienced an enormous burden of traumatic event exposures that cause him psychic distress, but he does not currently meet criteria for Posttraumatic Stress Disorder.

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Thank you for the opportunity to evaluate this interesting case. If you have any questions, please feel free to contact me directly any time at (949) 230-7321.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel A. Martell', with a stylized flourish at the end.

Daniel A. Martell, Ph.D., A.B.P.P.
Fellow, American Academy of Forensic Psychology
Fellow, National Academy of Neuropsychology
Fellow and Past President, American Academy of Forensic Sciences