

In the Supreme Court of the United States

ROBERT FOLEY,

Petitioner,

v.

LAURA PLAPPERT,

Respondent.

On Petition for Writ of Certiorari to the Supreme
Court of Kentucky

CAPITAL CASE

BRIEF IN OPPOSITION

Office of the Kentucky
Attorney General
1024 Capital Center Drive,
Ste. 200
Frankfort, KY 40601
(502) 696-5300
christopher.henry@ky.gov

CHRISTOPHER HENRY*
*Director of Capital
Litigation and Assistant
Solicitor General*

**Counsel of Record*

October 21, 2026

QUESTIONS PRESENTED

1. Whether the certiorari bar in 28 U.S.C. § 2244(b)(3)(E) precludes this Court's review of a state prisoner's second-in-time habeas petition when a federal appellate court determined it was successive?
2. Whether the abuse-of-the-writ doctrine triggers a second-or-successive analysis when the petitioner previously filed a habeas petition?
3. Whether a petitioner may raise a failure-to-mitigate argument in a successive habeas petition under 28 U.S.C. § 2244(b)(2)(B)(ii)?

CITATION TO REPORTERS OF OPINIONS AND ORDERS

1. *Foley v. Parker*, 481 F.3d 380 (6th Cir. 2007).
2. *Foley v. Parker*, 488 F.3d 377 (6th Cir. 2007) (en banc).
3. *Foley v. Parker*, No. 6:00-CV-552-DCR-REW, 2010 WL 9441123 (E.D. Ky. May 10, 2010).
4. *Foley v. White*, No. 6:00-CV-552-DCR-REW, 2012 WL 6965070 (E.D. Ky. Nov. 15, 2012).
5. *Foley v. White*, No. 6:00-552-DCR, 2013 WL 375185 (E.D. Ky. Jan. 30, 2013).
6. *Foley v. White*, No. 6:00-552-DCR, 2013 WL 990828 (E.D. Ky. Mar. 12, 2013).
7. *Foley v. White*, 835 F.3d 561 (6th Cir. 2016).
8. *In re Foley*, No. 25-5887, 2026 WL 620452 (6th Cir. Mar. 4, 2026).

BASIS FOR JURISDICTION

This Court does not have jurisdiction over this certiorari petition under 28 U.S.C. § 2244(b)(3)(E) because the United States Court of Appeals for the Sixth Circuit held that Foley’s petition was successive.

The district court entered an order transferring Foley’s habeas petition as successive on September 29, 2025. The United States Court of Appeals for the Sixth Circuit rendered an opinion affirming on March 4, 2026. The Sixth Circuit denied rehearing en banc on April 30, 2026. Later, Justice Kavanaugh extended the time for filing a certiorari petition to September 27, 2026. This Court docketed the petition on September 21, 2026.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
CITATION TO REPORTERS OF OPINIONS AND ORDERS	ii
BASIS FOR JURISDICTION	ii
STATUTORY PROVISIONS INVOLVED	Error! Bookmark not defined.
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	5
I. This Court does not have jurisdiction under AEDPA.	6
II. Foley has not presented any compelling reason to justify review regarding the abuse-of-the-writ doctrine.....	7
III. Regardless, Foley fails AEDPA’s gatekeeping requirements.	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Corall</i> , 263 U.S. 193 (1923)	8
<i>Banister v. Davis</i> , 590 U.S. 504, 514 (2020)	7, 8, 9, 10
<i>Bowe v. United States</i> , 607 U.S. 13, 29–31 (2026)	1, 6, 7, 8
<i>Burris v. Parke</i> , 130 F.3d 782, 785 (7th Cir. 1997)	11
<i>City & Cnty. of San Francisco, Calif. v. Sheehan</i> , 575 U.S. 600, 619 (2015)	5
<i>Felker v. Turpin</i> , 518 U.S. 651, 659-62 (1996)	7
<i>Foley v. Commonwealth</i> , No. 2019-SC-0182-MR, 2020 WL 6390212, at *2 (Ky. Oct. 29, 2020)	3
<i>Foley v. Parker</i> , 488 F.3d 377, 381 (6th Cir. 2007)	1, 2
<i>Foley v. Simpson</i> , 553 U.S. 1068 (2008)	2
<i>Foley v. White</i> , 835 F.3d 561, 563 (6th Cir. 2016)	2
<i>In re Foley</i> , No. 25-5887, 2026 WL 620452, at *2–5 (6th Cir. Mar. 4, 2026)	4, 9
<i>In re Garcia</i> , 756 F. App'x 391, 394 (5th Cir. 2018)	11
<i>In re Hanna</i> , 987 F.3d 605, 609 (6th Cir. 2021)	11

<i>In re Hill</i> , 715 F.3d 284, 295–299 (11th Cir. 2013)	11
---	----

<i>In re Webster</i> , 605 F.3d 256, 258–259 (5th Cir. 2010)	11
---	----

<i>Rico v. United States</i> , 607 U.S. 609 (2026)	8
---	---

Statutes

18 U.S.C. § 3583(i)	8
18 U.S.C. § 3599(a)(2) and (f)	2
28 U.S.C. § 2244.	8
28 U.S.C. § 2244(b)	8
28 U.S.C. § 2244(b)(2)(B)	11
28 U.S.C. § 2244(b)(2)(B)(ii)	11
28 U.S.C. § 2244(b)(3)(C)	9
28 U.S.C. § 2244(b)(3)(E)	1, 4, 5, 6, 7, 12
28 U.S.C. § 2254	1
28 U.S.C. 2244(3)(E)	6
S. Ct. R. 10	5, 6

Other Authorities

S. Shapiro, et.al., Supreme Court Practice § 5.12(c)(3), p. 5–45 (11th ed. 2019)	5
Tejas N. Narechania, <i>Certiorari in the Roberts Court</i> , 67 St. Louis U.L.J. 587, 590 (2023)	5

INTRODUCTION

This action arises from Robert Foley’s second-in-time habeas petition under 28 U.S.C. § 2254. The Sixth Circuit correctly determined that his habeas petition was successive, but Foley asks for certiorari anyway. This is so even though this Court just unanimously agreed that § 2244(b)(3)(E) “bars this Court’s review of panel authorization decisions concerning motions to file second or successive applications by state prisoners.” *Bowe v. United States*, 607 U.S. 13, 29–31 (2026). Setting that aside, Foley hasn’t provided any compelling reason to warrant this Court’s review. He has neither pointed to a split of authority, nor any other important reason to warrant the extraordinary step of this Court’s intervention. For these reasons, this Court should deny his certiorari petition.

STATEMENT OF THE CASE

The facts underlying this petition are lengthy, given that Foley has already litigated the nucleus of the claims in his new habeas petition across other state and federal cases. The Warden provides the facts necessary to understand Foley’s current filing.

In Foley’s latest petition, he attacks the same state-court judgment at issue in *Foley v. Parker*, a § 2254 case stemming from the murders of Rodney and Lynn

Vaughn.¹ 488 F.3d 377, 381 (6th Cir. 2007). Before the Sixth Court, Foley argued in part 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.” *Id.* at 382. To put a finer point on it, Foley insisted “that his counsel should have called six family members, five friends, and a school teacher” in his defense. *Id.* at 382–83. In rejecting his claim, the Sixth Circuit explained that, “[a]lthough family members testified that Foley had suffered head injuries, there were no medical records to substantiate these claims or to prove that Foley was mentally impaired at the time of his crimes.” *Id.* at 383. Ultimately, the Sixth Circuit affirmed the district court’s order dismissing Foley’s habeas petition. *Id.* at 392. This Court denied certiorari. *Foley v. Simpson*, 553 U.S. 1068 (2008).

Still, Foley continued to push his head-injury argument. In another federal-court filing arising from the deaths of the Vaughns, he “moved under 18 U.S.C. § 3599(a)(2) and (f) for the district court to appoint counsel and grant funds to retain experts in anticipation of state clemency proceedings.” *Foley v. White*, 835 F.3d 561, 563 (6th Cir. 2016). For our purposes, it’s relevant that “Foley requested a neuropsychologist to evaluate the impact of multiple head injuries on his mental functioning.” *Id.* To support that request, “he supplied an affidavit from his mother

¹ Foley was convicted of four additional murders in another case. *See Foley*, 488 F.3d at 381.

Lois Foley, transcripts of his family’s post-conviction testimony, a newspaper article, medical records, and a document from the Kentucky Department of Corrections.” *Id.* The district court denied Foley funds, and the Sixth Circuit affirmed. *Id.* at 563, 565.

Regardless, Foley obtained a head-trauma expert another way. *See Foley v. Commonwealth*, No. 2019-SC-0182-MR, 2020 WL 6390212, at *2 (Ky. Oct. 29, 2020). After performing an evaluation, Dr. Daniel Martell concluded “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).” *Id.* (citation and internal quotation marks omitted). “Additionally, Dr. Martell opined that Foley exhibited multiple areas of impairment in frontal lobe executive functioning.” *Id.* (internal quotation marks omitted).

After Dr. Martell’s assessment, Foley filed a post-conviction motion in state court. *Id.* The circuit court denied the motion, and he appealed to the Kentucky Supreme Court. *Id.* In part, that court rejected Foley’s claim as procedurally barred, because he had “first raised the issue of his head injuries over 20 years ago in his initial state postconviction proceeding.” *Id.* at *4. The Kentucky Supreme Court also conducted an ineffective-assistance-of-counsel analysis, concluding that it could not “say that it was unreasonable to confine the . . . 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.” *Id.* at *7.

Foley also returned to federal court. Specifically, he “filed a Rule 60(b) motion seeking relief from his conviction and sentence on the basis of the newly discovered evidence of his severe brain damage.” *In re Foley*, No. 25-5887, 2026 WL 620452, at *2 (6th Cir. Mar. 4, 2026) (citation modified). “He also filed a second § 2254 petition, raising two claims. One was an access-to-courts claim. The other . . . accused trial counsel of penalty-phase ineffectiveness.” *Id.*

“Holding that both the Rule 60(b) motion and the neuropsychologist claim were in effect successive petitions, the district court transferred them [to the Sixth Circuit] for authorization to file. The access-to-courts claim, however, the district court found not successive and so retained jurisdiction.” *Id.* Later, Foley “agree[d] to the dismissal of the Rule 60(b) case.” *Id.* So only one claim was pending before the Sixth Circuit when it rendered its opinion: the failure-to-mitigate claim raised in his new petition.

Importantly, Foley expressly agreed that he could not “meet the § 2244(b) requirements for filing a successive petition and so [did] not request permission to do so.” *Id.* Instead, the Sixth Circuit’s analysis below hinged primarily on the abuse-of-the-writ doctrine. *See id.* at *2–5. Ultimately, the Sixth Circuit determined that Foley’s second-in-time petition was not authorized by AEDPA’s gatekeeping requirements. *See id.* at *5. Afterward, Foley—despite the plain statutory bar in 28 U.S.C. § 2244(b)(3)(E)—filed this petition for certiorari.

ARGUMENT

Foley’s petition does not satisfy the Court’s demanding standard for granting certiorari. More precisely, “[a] petition for a writ of certiorari will be granted only for compelling reasons.” S. Ct. R. 10. By extension, “error correction . . . is outside the mainstream of the Court’s functions and . . . not among the ‘compelling reasons’ . . . that govern the grant of certiorari.” S. Shapiro, et.al., *Supreme Court Practice* § 5.12(c)(3), p. 5–45 (11th ed. 2019). Some “compelling reasons” “include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort.” *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 619 (2015) (Scalia, J., concurring in part and dissenting in part) (quoting S. Ct. R. 10). “While much of the Court’s docket may be understood as uniformity-enforcing (i.e., resolving conflicts among state and federal appellate courts), a substantial portion of the Court’s docket is dedicated to cases of importance.” Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 St. Louis U.L.J. 587, 590 (2023).

Foley has not alleged any compelling reason for review here. First, this Court doesn’t have jurisdiction over this petition under 28 U.S.C. § 2244(b)(3)(E). Because the Sixth Circuit determined that Foley’s petition was second or successive under § 2244(b), in other words, it falls within AEDPA’s certiorari proscription. Second, Foley has completely failed to allege any reason—for example, a split in the lower

courts—that would traditionally justify this Court’s review under S. Ct. R. 10. Foley has not provided any compelling reason to grant certiorari, so this Court should deny his petition

I. This Court does not have jurisdiction under AEDPA.

Under 28 U.S.C. § 2244(b)(3)(E), “[t]he grant or denial of an authorization by a court of appeals to file a second or successive application” is not appealable—nor can it “be the subject of a petition for rehearing or for a writ of certiorari.” Foley’s petition runs afoul of this provision, so this Court does not have jurisdiction over it.

This Court discussed § 2244(b)(3)(E) recently in *Bowe v. United States*, albeit in the context of a federal prisoner. 607 U.S. 13, 28–36 (2026). Although this Court held that the bar in that provision did not apply to federal prisoners, *id.* at 22, the Court was likewise clear that the bar *did* apply to state prisoners. As the Court explained, “[a]s all agree, [28 U.S.C. § 2244(b)(3)(E)] bars this Court’s review of panel authorization decisions concerning motions to file second or successive applications by state prisoners.” *Id.* at 30–31. And Justice Gorsuch echoed this point in his separate dissenting opinion: “Everyone agrees [28 U.S.C. 2244(3)(E)] precludes [the Court] from exercising certiorari jurisdiction to review an appellate panel’s decision granting or denying certification to state prisoners.” *Bowe*, 607 U.S. at 49 (Gorsuch, J., dissenting).

Similarly, this Court upheld that provision in *Felker v. Turpin*, 518 U.S. 651, 659-62 (1996). In that case, this Court considered whether § 2244(b)(3)(E) “deprived this Court of power to entertain an original habeas petition.” 518 U.S. 651, 659 (1996). The Court acknowledged that the section removed its “authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its ‘gatekeeping’ function over a second petition.” *Id.* at 661. Having said that, the Court declined to find that the section deprived it of original jurisdiction. *Id.*

Under *Bowe* and *Felker*, the certiorari bar in § 2244(b)(3)(E) is well grounded in this Court’s jurisprudence. Because that provision applies here, Foley’s certiorari petition is squarely foreclosed.

II. Foley has not presented any compelling reason to justify review regarding the abuse-of-the-writ doctrine.

Foley’s petition focuses on his disagreements with the Sixth Circuit’s interpretation of the abuse-of-the-writ doctrine. Even assuming the Court has jurisdiction to review his petition for certiorari, his complaints do not amount to a compelling reason to justify this Court’s review.

“Before AEDPA, abuse-of-the-writ principles limited a habeas applicant’s ability to file repetitive petitions. That doctrine was more forgiving than AEDPA’s gatekeeping provision[.]” *Banister v. Davis*, 590 U.S. 504, 514 (2020) (citation modified). But this Court recently expressly declined to address that doctrine’s continued viability: “Although the common law did not apply traditional res judicata

principles to habeas petitions, courts developed different equitable doctrines to address abuses of the writ.” *Bowe*, 607 U.S. at 41 n.10. This Court continued: “Congress can displace those doctrines, but in the absence of evidence of that intent, federal courts can continue to use those common-law tools.” *Id.* Additionally, “Section 2244(b) codified a ‘modified res judicata rule’ for second or successive petitions.” *Id.* (citation omitted). But this Court declined to provide guidance on that question, stating that “AEDPA may not have displaced other practices that courts can still use to address repetitive filings made by *federal prisoners* in the absence of § 2244(b)(1).” *Id.* (emphasis added).

This Court assessed the abuse-of-the-writ doctrine correctly in its dicta in *Banister*—Congress displaced it for state prisoners by adopting § 2244. To support this argument, the Warden analogizes to this Court’s recent opinion in *Rico v. United States*, 607 U.S. 609 (2026). In *Rico*, the United States argued that this Court’s interpretation of the tolling provision in 18 U.S.C. § 3583(i) should be informed by a common-law principle that this Court recognized in *Anderson v. Corall*, 263 U.S. 193 (1923). *Rico*, 607 U.S. at 620. This Court rejected the government’s argument, as well as another policy-related argument. *Id.* at 620–21. This Court explained: “If the government thinks § 3583(i)’s warrant-or-summons requirement too demanding, the proper place to register that complaint is with those who drafted it. This Court is not free to rewrite the directions Congress has provided.” *Id.* at 621–22. So too here. To

the extent that Foley disagrees with § 2244(b), he should petition Congress to change it.

Regardless, this case does not present an appropriate vehicle to discuss the continued viability of the abuse-of-the-writ doctrine. For one thing, the Sixth Circuit didn't speak on it below—the court completely sidestepped the issue, seemingly assuming that the abuse-of-the-writ doctrine was still viable. *See In re Foley*, No. 25-5887, 2026 WL 620452, at *2–5 (6th Cir. Mar. 4, 2026). For another, Foley hasn't cited any authority to suggest that there is a split on the issue—or any other reason to believe that there is disagreement. In these circumstances, there's simply no reason to address that question in this case.

III. Regardless, Foley fails AEDPA's gatekeeping requirements.

As this Court has explained, “AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications.” *Tyler v. Cain*, 533 U.S. 656, 661 (2001). “To file a second or successive application in a district court, a prisoner must first obtain leave from the court of appeals based on a ‘prima facie showing’ that his petition satisfies the statute’s gatekeeping requirements.” *Banister*, 590 U.S. at 509 (quoting 28 U.S.C. § 2244(b)(3)(C)).

Generally, a district court is not

required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court

of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus.

28 U.S.C. § 2244(a) .

To file a successive habeas petition, Foley needed to satisfy the requirements of § 2244(b) . Under 28 U.S.C. § 2244(b)(1) , “[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” In other words, Foley “may not reassert any claims ‘presented in a prior application.’” *Banister*, 590 U.S. at 509 (quoting 28 U.S.C. § 2244(b)(1)). So if the claim currently under review had been presented in a prior application, it should fail outright.

A different section, § 2244(b)(2) , applies to “new” habeas claims. Indeed, this Court has explained the “gist” of § 2244(b)(2): a prisoner “may bring a new claim only if it falls within one of two narrow categories—roughly speaking, if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish his innocence.” *Banister*, 590 U.S. at 509. Under § 2244(b)(2)(A), an applicant may demonstrate “that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” If the habeas petition cannot satisfy that provision, there is one additional path open to raise a successive habeas claim. More precisely, the petitioner could raise a “new” habeas claim if:

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; *and*

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B) (emphasis added).

This Court has explained that § 2244(b)(2)(B) applies to “claims predicated on newly discovered facts that call into question the accuracy of *a guilty verdict*.” *Tyler*, 533 U.S. at 661–62 (emphasis added). That quote describes the reach of § 2244(b)(2)(B)(ii)—it applies to only to attacks on convictions, not sentences.

Several federal appellate courts have reached a similar conclusion about that provision. *See, e.g., In re Hanna*, 987 F.3d 605, 609 (6th Cir. 2021) (“Mitigation evidence categorically does not meet § 2244(b)(2)(B)(ii)’s requirement that the new facts establish a petitioner’s actual innocence.”); *In re Garcia*, 756 F. App’x 391, 394 (5th Cir. 2018); *In re Hill*, 715 F.3d 284, 295–299 (11th Cir. 2013); *In re Webster*, 605 F.3d 256, 258–259 (5th Cir. 2010); *Burris v. Parke*, 130 F.3d 782, 785 (7th Cir. 1997). Because Foley’s claims indisputably involve only mitigating evidence, he has simply not made the sort of argument that could be raised in a second-or-successive petition. Nothing he sets forth now suggests that he is actually innocent of the murders, so he has categorically failed to meet the habeas gatekeeping standard of § 2244(b)(2)(B)(ii).

CONCLUSION

For several reasons, the Court should deny Foley's petition for a writ of certiorari. For one, thing, this Court does not have jurisdiction under 28 U.S.C. § 2244(b)(3)(E). For another, he hasn't shown any deep-seated legal disagreement among lower courts on the matter. For these reasons, the Commonwealth respectfully asks this Court to deny Foley's petition.

Respectfully submitted,

/s/ Christopher Henry

Director of Capital Litigation and Assistant Solicitor General

Office of the Solicitor General

Criminal Appeals Division

1024 Capital Center Dr., Ste. 200

Frankfort, Kentucky 40601

Phone: 502-696-5342

christopher.henry@ky.gov

Counsel for Respondent

**Counsel of Record*