
No. 26-5670

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**

**REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

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Robert Foley’s Petition for a Writ of Certiorari presents a companion issue to that for which certiorari was recently granted in *Guerrero v. Johnson*, No. 25-1003—a matter the Warden does not address. Foley does not seek review of a decision denying authorization to file a successive habeas petition. The Sixth Circuit made no such decision. It addressed whether Foley’s petition was successive. Foley’s certiorari petition is about the threshold matter of how to determine if a second-in-time habeas petition is successive, a matter for which 28 U.S.C. §2244 says nothing and thus did not supplant the Court’s long-standing abuse-of-the-writ doctrine. *See, e.g., Bowe v. United States*, 607 U.S. 13, 41. n.10 (2026) (“Congress can displace those doctrines, but in the absence of evidence of that intent....”). In short, nothing within §2244’s text deprives the Court of jurisdiction here.

In holding Foley’s petition is successive, the Sixth Circuit paid lip service to the abuse-of-the-writ doctrine while applying a standard that bears no resemblance—a matter the Warden does not expressly dispute. That provides a compelling basis to justify review: does the standard the Sixth Circuit applies conflict with the Court’s longstanding, still applicable abuse-of-the-writ doctrine? It does, and the Warden provides no argument otherwise. Certiorari is therefore important to bring the Sixth Circuit’s precedent into conformance with the Court’s precedent and to make clear yet again that the Court’s precedent may be overruled, only if the Court directly says so—a point the Warden fails to understand. Ultimately, the Warden’s response presents a strong case for granting certiorari.

Recharacterizing the questions presented, the Warden tells the Court that one of the questions the petition raises is whether the law, after §2244(b) and the Court’s recent cases, means all habeas petitions filed after the initial petition are automatically successive and thus must meet §2244(b)’s gatekeeping requirements to proceed. *Brief in Opposition* at i.¹ The Warden’s recharacterization of the question presented corresponds with her erroneous Sixth Circuit argument that *Rivers v. Guerrero*, 605 U.S. 443, 457 (2025), overturned the abuse-of-the-writ doctrine and replaced it with a bright-line rule that any habeas petition filed after the district court denied the first habeas petition is successive. *See* R.13 at 5.

Now that this has been presented as a clear-cut basis for certiorari, the Warden attempts to backtrack by asserting the Sixth Circuit sidestepped the issue. (*Brief in Opposition* at 9). That does not change the fact that the Warden has pitched it as a real issue—one the Court should address and resolve by making clear *Rivers* did not discard the abuse-of-writ-doctrine. Thus, the doctrine still applies to determine if a habeas petition is successive, while §2244(b) then applies only *if and after* a court determines a petition is successive at which point the statutory analysis for whether the successive petition may proceed kicks in.

¹ The Warden spends much time discussing how Foley does not satisfy the successive habeas petition requirements because he focuses on the sentence instead of on actual innocence. That matters only if authorization to file a successive habeas petition is sought. Foley did not seek that. He argued his habeas petition was not successive. Whether the Sixth Circuit’s newly created standard for determining that conflicts with the Court’s precedent is the issue Foley presented.

The Court made this clear in *Banister v. Davis*, 590 U.S. 504 (2020). It did not hold “Congress displaced it [the abuse-of-the-writ doctrine] for state prisoners by adopting §2244” (*Brief in Opposition* at 8). Rather, it held “the statute did not redefine what qualifies as a successive petition.” *Banister*, 590 U.S. at 515. Thus, there are two distinct inquiries. First, whether a habeas petition is successive; second, if and only if, the petition is determined to be successive, whether the petition then satisfies the stringent §2244(b) requirements for when a successive petition can proceed. *Id.*; *Magwood v. Patterson*, 561 U.S. 320 (2010); *Panetti v. Quarterman*, 551 U.S. 930 (2007). The brief in opposition hovers between suggesting this precedent has been implicitly overruled and simply misunderstanding the applicable law and when the statute applies, a seemingly common misunderstanding. Either way, the Court should address the matter and set the record straight as to the applicable law, either through plenary review or a summary opinion. This is particularly so since the Court did not hold in *Rivers* that it was overturning, or otherwise abandoning, the abuse-of-the-writ doctrine. Thus, under the Court’s precedent, the doctrine must still be applied to a tee—a matter that would benefit from the Court’s clarification in light of its recent decision in *Rivers*, the Warden’s misunderstanding of the law, and the Sixth Circuit’s standard being irreconcilable with the abuse-of-the-writ doctrine.

The Warden’s misunderstanding of the two-step process led to her clearly erroneous argument that the Court lacks jurisdiction. Assuming Foley’s Petition was successive and that the Sixth Circuit’s correctly determined that, the Warden

argues this Court lacks jurisdiction because §2244(b) prohibits certiorari from the decision of whether to authorize a successive habeas petition.

But Foley does not seek authorization to file a successive habeas petition. He asserted his habeas petition is *not successive* and thus authorization is not required and asks the Court to address whether the standard the Sixth Circuit applied in that context conflicts with the Court's precedent. Section 2244(b) says nothing about the Court's certiorari jurisdiction to either review a determination of whether a habeas petition is successive and or whether the lower court applied a legal standard that differs from the Court's controlling standard. Thus, the statute does not divest the Court's jurisdiction to resolve the question Foley presents.

The Court has made that clear. Under the Warden's argument, the Court would have had no jurisdiction to grant certiorari in *Johnson* or in *Magwood*, where it "granted certiorari to determine whether Magwood's [habeas] application...is subject to the constraints that §2244(b) imposes on the review of 'second or successive' habeas applications" and held that the petition was not successive. 561 U.S. at 330, 342. It is therefore abundantly clear that the Court has jurisdiction to grant certiorari to determine if the Sixth Circuit applied a standard that cannot be reconciled with the abuse-of-the-writ doctrine, and, thus, essentially ruled the Court overruled, or abandoned, the abuse of writ doctrine without expressly saying it was doing so. The Court's precedent is clear that a lower court cannot do so.

The question is therefore whether the Sixth Circuit did so. It did, as explained within the Petition, and as the Sixth Circuit's ruling demonstrates.

Simply stated, it applied a standard that cannot be reconciled with the Court's longstanding abuse-of-the-writ doctrine.

Although not intentional, it is serious business when a lower court applies a legal standard that conflicts with the Court's governing precedent. So serious that it warrants the Court's review to address and correct the matter. The Court has not hesitated to reverse the Sixth Circuit for not properly following the Court's AEDPA precedent. This is another opportunity for the Court to do so. Certiorari should be granted for either plenary review or summary reversal.

Respectfully submitted,

/s/ David M. Barron

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