

No. 26A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT FOLEY

Applicant/Petitioner

v.

LAURA PLAPPERT, WARDEN

Respondent

**Application to the Honorable Justice Brett M. Kavanaugh,
as circuit justice, for an extension of time
to file a Petition for a Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit**

To the Honorable Justice Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit.

Under Supreme Court Rules 13.5 and 30.3, Petitioner Robert Foley requests that this Court grant him a sixty (60) day extension of time from July 29, 2026, through September 27, 2026, in which to file a Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit. Counsel for Respondent Plappert, upon inquiry from undersigned counsel, does not oppose this request for an extension of time and authorized undersigned counsel to inform this Court.

In Robert Foley's case, the United States district court addressed two claims presented in a second-in-time habeas petition, holding one of those claims was not

successive and thus that claim is currently proceeding before the district court,¹ but holding the second claim is successive and thus transferring that claim to the Sixth Circuit to consider whether to grant authorization to file a successive habeas petition. Foley conceded he could not satisfy the requirements for authorization to file a successor but argued he need not do so because, under the Court's abuse-of-the-writ doctrine, the habeas claim was not successive. He therefore sought instead for the Sixth Circuit to remand to the district court for consideration as an initial federal habeas claim. Relying on its own precedent, *In re Hill*, 81 F.4th 560, 568 (6th Cir. 2023) (en banc), which differs drastically from the abuse-of-the-writ doctrine this Court adopted and has consistently applied for decades, the Sixth Circuit rejected Foley's argument, held the claim was successive, and dismissed the matter, on March 4, 2026 (ruling attached).² It subsequently denied a petition for rehearing en banc on April 30, 2026 (order attached). That makes the Petition for a Writ of Certiorari due on July 29, 2026, but an extension of time through September 27, 2026, is necessary to adequately present the certiorari worthy issue for which this Court has jurisdiction under 28 U.S.C. §1254(1).

The Petition will raise the conflict between the Sixth Circuit's precedent and the Court's governing precedent as to how to determine whether a second-in-time

¹ Because that claim remains before the federal district court and was not held to be successive, it is not a claim that will be addressed within Foley's Petition for a Writ of Certiorari. He mentions it here solely to provide context as to the procedural posture of the matter that will be presented through the Petition.

² Foley also had a pending Fed.R.Civ.P. 60(b) motion that the district court transferred to the Sixth Circuit for consideration of whether to authorize to file a successive habeas petition that the Sixth Circuit mentions in its ruling. Because of intervening law, Foley did not pursue that further and will not seek certiorari regarding it.

federal habeas claims is or is not a successive claim and thus subject to the statutory gatekeeping requirements for a successive claim to proceed.³ As will be explained within the Petition, the Sixth Circuit’s en banc precedent that was relied upon to hold Foley’s claim was successive has no foundation within the Court’s longstanding abuse-of-the-writ doctrine, cannot be reconciled with that precedent, relegates for those who fall within the jurisdiction of the Sixth Circuit whether a claim is not successive to merely addressing whether it satisfies a discreet checklist the Sixth Circuit created, and is an error recurring at rapid rates in recent times because the Sixth Circuit’s precedent controls the resolution of all matters regarding whether a habeas claim arising in Kentucky, Michigan, Ohio, and Tennessee, is successive.

Recently, the Court granted certiorari in *Guerrero v. Johnson*, No. 25-1003, which could be relevant here. That case deals directly with the successive context for federal habeas petitions. The question presented on which certiorari was granted is “[w]hether a claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable when the habeas petitioner could have asserted a claim based on the rule in a prior federal habeas petition” but would not have succeeded under the law as it existed at that time. Perhaps stated more simply, the Court will address, in *Guerrero v. Johnson*, whether the statutory provision that allows filing a successive habeas petition based

³ Foley acknowledges that a statute prohibits seeking certiorari from the grant or denial of leave to file a successive habeas petition. He does not seek certiorari from that. Instead, he seeks certiorari as to whether the Sixth Circuit applied the proper standard to make that determination and as to whether Foley’s habeas claim is successive, which is a distinct threshold analysis that must be conducted before a federal court of appeals can reach the matter of whether to grant authorization to file a successive petition.

on a retroactively applicable new rule applies when the basis for the claim existed beforehand but the law was adverse beforehand and thus the claim would have automatically lost before the law changed, such as an intellectual disability claim before the Court, in *Atkins v. Virginia*, 536 U.S. 304 (2002), overruled prior precedent allowing the execution of the intellectually disabled.

While the Sixth Circuit's ruling in Foley's case, and resultingly his Petition for a Writ of Certiorari, does not deal with a "new rule," it deals with the related situation in which the factual predicate of his claim did not exist earlier, or at least did not exist in a manner in which relief could have been possible when his first habeas petition was filed. Specifically, Foley raised, in his state court post-conviction proceeding, an ineffective assistance of trial counsel claim regarding the failure to investigate and present *any* mitigation, which included the failure to investigate and present evidence of head injuries. He was denied funds for expert assistance to develop and support the claim, which he then lost. Despite the lack of funds, the Kentucky Supreme Court affirmed by holding that, under *Strickland v. Washington*, 466 U.S. 668 (1984), lay evidence of head injuries that creates an inference of brain damage is irrelevant as mitigation unless medical documentation, such as an expert's conclusions and an expert report, proves brain damage. *Foley v. Commonwealth*, 17 S.W.3d 878, 883 (Ky. 2000). Foley then lost federal habeas relief. Subsequently, in the context of separate federal habeas proceedings in his other case, he obtained funds for expert assistance, namely a neuropsychologist, who administered standardized tests. The neuropsychologist concluded Foley suffered from brain damage at the time of the crime and produced a report so concluding. In other words,

with funding finally available that was unavailable at the time of Foley's state post-conviction proceeding and first federal habeas proceeding in the instant case, Foley was able to obtain the information the Kentucky Supreme Court had ruled was necessary for a claim regarding head injuries and likely brain damage as mitigation to be relevant. So, he returned to state court with the Kentucky Supreme Court then noting whether the claim could proceed was a close call but rejected the claim because of its prior ruling that the then lack of medical documentation confirming brain damage rendered mitigation evidence of head injuries irrelevant. *Foley v. Commonwealth*, 2020 WL 6390212, *4 (Ky.) Foley then filed a new federal habeas petition presenting two claims. Relevant here, one of those claims argued the factual predicate was the recent neuropsychologist's testing, the results of those tests, his conclusions based on those tests, and the report he wrote that confirmed the existence of brain damage at the time Foley was charged with the underlying crimes. Thus, Foley's claim, in this regard, could not have been presented in his prior habeas petition and therefore was, under the abuse of the writ doctrine, a second-in-time but initial habeas claim, instead of a successive habeas claim.

Applying its own rigid and more limited checklist in which only three scenarios cannot be successive, instead of applying the Court's long-standing abuse-of-the-writ doctrine, the Sixth Circuit held Foley's claim was successive and thus dismissed it. That is despite the reality that if he had presented the claim in his first habeas petition, he could not have prevailed because the necessary information – that from the expert whom he could not obtain previously – did not then exist, through no fault on Foley's part. That makes the grant of certiorari in *Guerrero v. Johnson* relevant

because that case and Foley’s case deal with how to handle a second habeas petition premised, at least under the Sixth Circuit’s interpretation of Foley’s claim, on a matter that could have been presented earlier even though the claim would have undoubtedly failed then, when it would not necessarily fail now, because of an intervening development. While Foley disputes that the factual predicate of his claim existed at the time of his first federal habeas petition and disputes that the Sixth Circuit’s analysis comports with the abuse-of-the-writ doctrine the Court requires be applied to determine if a habeas petition is successive, the Sixth Circuit’s ruling and reasoning makes *Guerrero v. Johnson* relevant to whether to grant Foley’s Petition for a Writ of Certiorari and will provide reason for the Court to “hold” Foley’s Petition pending the outcome of *Guerrero v. Johnson*.

All of this, including how the checklist the Sixth Circuit created for determining whether a habeas claim is successive conflicts with, and cannot be reconciled with, the abuse-of-the-writ doctrine, will be explained within Foley’s Petition for a Writ of Certiorari. To adequately develop all of this within the Petition, an extension of time from July 29, 2026, to, and including, September 27, 2026, to which counsel for Respondent Plappert does not object, is necessary.

In addition to some medical issues that currently includes having shingles, Counsel of Record David M. Barron, who has represented Foley for over eight years, filed ten pleadings in death penalty cases in the month of May alone. He also filed two pleadings in federal court in June, with additional pleadings due in July 2026, oral argument before the Kentucky Supreme Court in two consolidated capital cases on August 13, 2026, another Petition for a Writ of Certiorari due on August 16, 2026.

Additionally, another capital habeas Petition for a Writ of Certiorari in an unrelated case is due shortly after Foley's Petition is due. To give the Petition here the adequate attention it deserves and that the Court expects, a sixty-day extension of time is necessary.

Foley therefore requests an extension of time from July 29, 2026, through, and including, September 27, 2026, to adequately develop and prepare a Petition for a Writ of Certiorari on Foley's behalf.

Respectfully submitted,

/s/ David M. Barron

David M. Barron
Counsel of Record
Staff Attorney III
Ky. Department of Public Advocacy
Capital Post-Conviction Unit
5 Mill Creek Park, Section 101
Frankfort, KY 40601
(502)-782-3601 (direct line)
(502) 564-3948 (office)
david.barron@ky.gov

June 29, 2026