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.

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

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),

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.

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.

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

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); s*ee 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

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).

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).

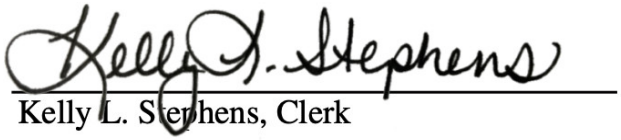
If the neuropsychologist claim is new, then it was not raised in the first petition. The exhaustion exception, therefore, would not apply. And if the claim is not new, § 2244 simply classifies it a second or successive petition. *Hill*, 81 F.4th at 569.

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