

CAPITAL CASE

No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

RANDY HAIGHT,

Petitioner,

v.

SCOTT JORDAN, WARDEN, KENTUCKY STATE PENITENTIARY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Capital Case

The lower courts are split and confused about how to reconcile the seemingly contradictory statutory language in 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254 (e)(1). This death penalty case provides the perfect procedural vehicle to settle the split and provide clarity. The Questions Presented are:

1. Where a state trial court resolves disputed issues of material fact without an evidentiary hearing and ignores relevant expert opinion, is the state court's decision an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2)?
2. Is a diligent capital habeas petitioner entitled to the appointment of experts and an evidentiary hearing in federal court to overcome the presumption of correctness of state court fact-findings, 28 U.S.C. § 2254(e)(1), where the state court denied a well-pleaded request for experts and an evidentiary hearing and then resolved disputed issues of material fact by ignoring evidence of Petitioner's "borderline mental retardation," "psychosis," and "possible organic brain damage?"

**PARTIES TO PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

All parties appear in the caption on the cover page. Under Rule 29.6, Petitioner states that no parties are corporations.

LIST OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *Haight v. White*, No. 3:02-CV-206-GNS, 2017 WL 3584218 (W.D. Ky. Aug. 18, 2017), decision of the district court denying the habeas petition.
- *Haight v. Parker*, No. 3:02-CV-206-GNS, 2015 WL 13548182 (W.D. Ky. July 17, 2015), Findings of Fact, Conclusions of Law and Recommendation of United States Magistrate Judge.
- *Haight v. Commonwealth*, 760 S.W.2d 84, 89 (Ky. 1988) (“*Haight I*”), the Kentucky Supreme Court’s decision vacating Haight’s plea of guilty and death sentence.
- *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992) (“*Haight II*”), *cert. denied*, 507 U.S. 925 (1993), the Kentucky Supreme Court’s denial of Haight’s request to enforce the plea agreement.
- *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996) (“*Haight III*”), *cert. denied*, 522 U.S. 837 (1997), the Kentucky Supreme Court decision in the direct appeal from the jury trial judgment sentencing Haight to death.
- *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) (“*Haight IV*”), *cert. denied*, 534 U.S. 998 (2001), the Kentucky Supreme Court decision in the appeal from the denial of post-conviction relief.
- *Haight v. Commonwealth*, No. 2006-SC-000344-MR, 2007 WL 2404494 (Ky. Aug. 23, 2007)(Unpublished) (“*Haight V*”), the Kentucky Supreme Court decision in the appeal from the denial of relief based upon Haight’s amendment and supplement to his request for post-conviction relief.

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PETITION FOR A WRIT OF CERTIORARI

Randy Haight respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The split per curiam panel opinion of the court of appeals is reported at 59 F.4th 817 (6th Cir. 2023). A4. A timely-filed petition for rehearing was denied. A2.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit rendered its split per curiam opinion affirming the denial of habeas relief on February 9, 2023. *Haight v. Jordan*, 59 F.4th 817 (6th Cir. 2023). A4. Haight’s timely filed petition for rehearing *en banc* was denied on April 10, 2023. A2. The Court extended the time to file a petition for a writ of certiorari to, and including, September 7, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”

The Eighth Amendment to the United States Constitution provides, in relevant part, that “cruel and unusual punishment [shall not] be inflicted.”

The Fourteenth Amendment to the United States Constitution provides, in relevant part:
“... nor shall any State deprive any person of life, liberty, or property, without due process of law[.]”

Section 2254 (d) of Title 28 of the United States Code (“Section 2254(d)”) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254 (e) of Title 28 of the United States Code (“Section 2254(e)”) provides:

- (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
- (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that ...

INTRODUCTION

This case was never a whodunnit. Randy Haight has never denied that he is responsible for the shooting deaths of two people. The only question was what the appropriate punishment is. At first, the Commonwealth of Kentucky agreed that Mr. Haight should be sentenced to life in prison. In reliance on the Commonwealth's agreement, Mr. Haight pled guilty. But the trial judge did not accept the agreement and sentenced Mr. Haight to death. That sentence was reversed and, on remand, the Commonwealth reneged on the deal. Mr. Haight sought specific performance of the agreement but was rebuffed. At trial—which was delayed for eight years due to the dispute over the Commonwealth's failure to remain true to its original position that Mr. Haight should be sentenced to life—appointed defense counsel failed to present critical evidence in mitigation that Mr. Haight has organic brain damage. In fact, trial counsel presented the opposite picture—not for reasons of strategy—but because of his failure to recognize a “tidal wave” of readily available “red flags” of neurological impairment.

To his credit, trial counsel alerted the trial court of his error and sought an expert to testify about Mr. Haight's brain damage. It was too late. The jury had already returned a verdict of death and the trial court was unwilling to accept an entirely new category of mitigating evidence after the jury had been discharged.

Randy Haight doggedly pursued his constitutional claim that trial counsel was ineffective in failing to recognize readily apparent “red flags” of brain damage—evidence which juries (and courts) find uniquely compelling in mitigation of capital sentences. Mr. Haight, who is poor, was

repeatedly denied the tools necessary to substantiate his claim: namely appointment of experts and an evidentiary hearing.

This is not a case where Mr. Haight sat on his rights. He was denied the opportunity to present the most critical category of mitigating evidence to his jury by constitutionally ineffective counsel and then thwarted from vindicating his substantial claim for relief by the denial of due process in the state and federal courts. The state court resolved material disputed facts by ignoring critical evidence and failing to apply clearly established federal law to the facts in the record. The federal court deferred to the state court's finding of fact and faulted Haight for not presenting additional expert proof to overcome the state court factfindings—after denying Haight's request for resources and a hearing. The tail wagged the dog.

The choice between life and death was difficult for this jury. At one point, it reported that it was “stalemated.” It is reasonably probable that had the jury heard the evidence of “borderline mental retardation,” “psychosis,” and “brain damage” at least one juror would have voted for life, resulting in the sentence originally agreed to by the Commonwealth.

STATEMENT OF THE CASE

Randy Haight was convicted of the murders of two people by shooting them while they were in a parked car. The Commonwealth of Kentucky gave notice that it would seek the death penalty based upon two aggravating circumstances: 1) the murders were intentional and resulted in multiple deaths, and 2) the murders occurred during a robbery in the first degree. The Commonwealth offered Haight a plea agreement in which Haight would plead guilty to the murders and robberies and the Commonwealth would recommend and advocate for a life sentence,

promising to “take no action inconsistent [with that recommendation].” When the trial judge then sentenced Haight to death, he became the first and only person in Kentucky since the reinstitution of the death penalty in 1976 to be sentenced to death over the prosecutor’s recommendation of life. After the Kentucky Supreme Court reversed Haight’s convictions and death sentence, the Commonwealth refused to abide by its promise and began to advocate for the death penalty, which gave Haight no choice but to go to trial.

In December 1985, counsel for Petitioner filed a “Motion for Funds for Expert Witness and for an Ex Parte Hearing.” GTR 81. On January 10, 1986, the circuit court entered an order overruling the motions, but the court also granted leave to the defense to establish a need for experts, that state facilities would be impractical to use, and that DPA was unable to provide funds. GTR 89-90. A month later, the defense made a request for a continuance, stating that it could not make requests for experts until after discovery was completed. GTR 94. The same motion hinted that plea bargaining discussions were taking place and that the defense had, therefore, delayed working on expert witness issues and other procedures. GTR 95. Petitioner’s case was continued to June, 1986, but in April, Petitioner entered his pleas of guilty. GTR 1008-111. Final sentencing was held in September of 1986 and the first appeal to the Kentucky Supreme Court was taken.

No investigation of the need for experts was pursued after the plea and during the first appeal. After the Kentucky Supreme Court reversed Petitioner’s convictions and remanded the case for a plea or a trial, the Commonwealth announced that there would be no plea offer made. At this point, it was clear that the case would be tried and defense counsel again sought funds for

experts. But the defense soon dropped the matter, agreeing to forego using any funds while the issue was litigated concerning whether the Commonwealth remained bound by its original plea agreement to not seek the death penalty. On April 23, 1991, after a telephone conference call involving Special Judge Williamson and the attorneys, the court entered an order which ordered Garrard Fiscal Court to pay Dr. Carol R. Goode \$652.13 for “fees and expenses”. JTR 171.

That same order stated, “The parties shall not incur further expert witness fees until the questions raised in the petition for writ of prohibition are finally resolved.” (JTR 172). After *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992), was decided, it was crystal clear that the Commonwealth would not extend a plea bargain offer, and Petitioner’s case would go to trial.

A second telephone conference occurred on September 10, 1992 for purposes of scheduling the case for trial. JTR 174. During that conference, defense counsel argued that they needed a year to prepare for trial because they had been ordered to **not work at all on the case**; they were not allowed to get expert witnesses; they were not allowed to go forward on the case at all and the court had ordered them **not to work on the case** pending a decision by the appellate court. JTR 174; Tape Counter No. 120-141. Defense counsel also claimed that they wanted to be preparing for trial and they were in contact with experts, but the court ordered counsel not to prepare. JTR 174; No. 160. Judge Williamson took exception to the statement of counsel, noting that the decision to not spend money on experts pending the outcome of the appeal was a “consensus.” JTR 174; No. 162.

It was not until the month before trial, December, 1993, that defense expert witness Carol Goode, Associate Professor of Social Work, produced her social history report on Petitioner’s

family. Tape 9, 2/1/94, 13:18:20. The defense's other expert trial witness, Dr. Brad Fisher, Clinical Forensic Psychologist, reviewed Dr. Goode's report (on December 17, 1993) and then interviewed Petitioner on December 27th and 28th, for about a total of six hours, barely two weeks before trial. Tape 9, 2/2/94, 09:37:34, 09:36:44, 09:55:02. Thus, the actual defense expert investigation and preparation took place less than a month before trial, but more than eight years after the crime and related incidents.¹

Twelve days after trial began, Petitioner's counsel received a 1974 mental health evaluation of Petitioner. The evaluation was conducted by three mental health experts, including a psychiatrist. The evaluation revealed symptoms of "cortical dysfunctio[n]" and "brain damage."²

The evaluation was not obtained by the defense until too late to be used at trial. Counsel asked that this evidence of possible brain damage be explored prior to sentencing by the court to determine if a new trial should be granted for any cause which prevented the defendant from

¹The prosecutor used these facts to her advantage in closing argument, effectively destroying the testimony of the defense experts. Tape 10, 2/2/94, 11:45:54, 11:54:30. *See Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) ("Because counsel did not acquire the services of this key witness until days before trial, a hurried and inaccurate report resulted. Presenting the witness at trial was a disaster.")

²The report also documented childhood illness, high fevers, and multiple head injuries. The doctors described Petitioner's childhood behaviors as what they would call a "hyperkinetic child." *Id.*

having a fair trial, or if required in the interest of justice.³ The defense asked for funds to do a complete neuropsychological evaluation. The defense asked to retain a qualified expert to do a complete neurological evaluation, and for the sentencing to be delayed until the results of that expert's testing could be presented to the trial court. The trial court denied that request. R. 160, Page Id# 3287.⁴ The trial court's failure to provide expert assistance to investigate this critical mitigating evidence violated Petitioner's rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), and its progeny.

In *Haight III*, the Kentucky Supreme Court addressed the issue of the trial court's failure to provide an appropriate expert after Petitioner's trial counsel made their belated request. The court's ruling on the merits of this issue was factually and legally unreasonably wrong. The court's entire merits ruling is:

Appellant's claim that a twenty-year-old mental health evaluation discovered during trial would have affected the case is without merit. Appellant had full benefit of mental health evaluations and experts and there was no abuse of discretion in the trial court's failure to Order another such examination. Moreover, the trial court gave all proper consideration to the mitigating evidence prior to imposition of its final judgment.

³Counsel's request is persuasive evidence that counsel did not make a reasoned tactical decision to forgo neurological, neuropsychological, and neurochemical testing. Quite the opposite. That counsel was still receiving evaluations during the penalty phase is proof that counsel was dilatory in investigating which is professionally unreasonable.

⁴Haight requested an evidentiary hearing on this issue in federal court. That request was denied.

Haight III, 938 S.W.2d at 249. This perfunctory review makes it clear that the court did not “engage with” the mitigation evidence that was being sought. *Porter*, 558 U.S. at 44. The report was not simply a “20 year old mental health report.” It was a report from a team of experts who found evidence of brain damage, which is perhaps the most powerful mitigation that a capital defendant can present.⁵ Moreover, the state court’s reasoning that because Petitioner had some access to mental health experts that he had “full benefit of mental health evaluations” is completely inaccurate. Having a clinical psychologist examine a person with organic brain damage is not “full benefit” of experts; it is effectively no benefit. Nonetheless, those words - no matter how inaccurate medically and legally - have become the mantra of both the Commonwealth and every reviewing court since.

The “red flags” in the report which found evidence of brain damage should have been investigated and reviewed. It does not matter that the trial court “gave all proper consideration to the mitigating evidence prior to imposition of its final judgment” because this evidence was not presented; it had not been developed. It is not the 20 year old report that the defense wanted the court to consider. It is the fact that the 20 year old report gave rise to the need for the appointment of the additional expert and therefore met *Ake*. It is precisely because the report was 20 years old that counsel required the appointment of a qualified expert. The report indicated a history of symptoms and testing that support brain damage. That the court discounted the report as being “old” demonstrate the merits of this claim. It certainly is not a

⁵This Court has consistently recognized the crucial importance of brain damage as mitigation for a capital defendant. See e.g., *Sears v. Upton*, 561 U.S. 945, 947 (2010); *Porter v. McCollum*, 558 U.S. 30, 36 (2009); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237 (2007); *Smith v. Texas*, 543 U.S. 37, 41 (2004); and *Williams v. Taylor*, 529 U.S. 362, 370 (2000). “It is beyond debate that evidence of brain damage can be powerful mitigating evidence. See *Sears*, 561 U.S. at 956; *Porter*, 558 U.S. at 36, 41.” *Williams v. Filson*, *supra*, 908 F.3d at 570.

proper application of clearly established federal law. The state court opinion failed to identify or apply the principles of *Ake* and failed to engage with the facts. The decision is contrary to and an unreasonable application of *Ake* and an unreasonable application of the facts.

The Kentucky Supreme Court addressed the issue of trial counsel's ineffectiveness in failing to obtain appropriate expert assistance for Petitioner in *Haight IV*. The court acknowledged, but did not address, the fact that counsel delayed the mitigation investigation in Petitioner's case. Instead, the court focused on the fact that counsel utilized one mental health expert. But the court failed to analyze what counsel failed to do, despite readily available red flags that constitutionally effective counsel would have pursued. This is contrary to the requirements of *Strickland*.

The state court decision is unreasonable for another reason – the court deprived Petitioner of the necessary resources to develop this claim in state court. Where the state court failed to provide Petitioner with the necessary resources to develop his claim then the court's decision is unreasonable.

After filing his federal habeas petition, Petitioner requested funds to hire experts. Petitioner provided the court with Declarations from two highly qualified experts who had reviewed Petitioner's records. Dr. George Woods, MD, neuropsychiatrist, and Dr. Myla Young, PhD, neuropsychologist, both reviewed voluminous records regarding Haight's background and medical history.⁶ Both doctors found more than ample indication that Haight suffers from brain impairment. Dr. Woods states, "There are clear indications, even within the limited cognitive evaluations completed, of Mr. Haight's brain impairments, indications that have not been

⁶Since they had not been appointed by the court, but rather Petitioner was requesting their appointment, Petitioner's counsel funded the doctors' review of records.

evaluated.” Dr. Young notes that Haight’s “psychoeducational evaluations provide clear indication of brain dysfunction.” The district court denied Petitioner’s request for the appointment of experts.

The per curiam majority of the Sixth Circuit panel forgives counsel’s last second preparation of a mitigation case because of funding issues. *Haight v. Jordan*, 59 F.4th at 839.⁷ The panel majority defends counsel’s failure to obtain Petitioner’s 1974 report detailing his brain damage because it was “obtained ... only after considerable effort.” *Id.*⁸ The panel majority excuses Petitioner’s trial counsel’s lack of investigation and presentation of evidence regarding Petitioner’s organic brain damage by arguing that Petitioner’s trial counsel presented some evidence in mitigation,⁹ including the testimony of a forensic psychologist. *Id.*, 59 F.4th at 837-839. Finally, the panel majority asserts that the cases finding performance similar to Petitioner’s trial counsel to be ineffective involved “much more egregious conduct.” *Id.*, 59 F.4th at 839, n. 6.¹⁰

⁷This is questionable, at best. See 59 F.4th at 866-67 (Stranch, J., dissenting).

⁸The dates listed in the panel majority’s explanation of these “considerable efforts” - mid-November 1993 to mid-January 1994, when Petitioner’s trial began in early January, 1994 - refutes the panel majority’s characterization. *Id.*

⁹Counsel presented testimony from Petitioner’s family members, talking about his deprived upbringing (which, at least, one juror had said he would not listen to), and asking for mercy. This meager attempt at mitigation has not been the standard of care since long before Petitioner’s trial.

¹⁰This is a misstatement of the law. Under prevailing professional norms, trial counsel's professional errors and omissions are not excused simply because trial counsel presented some evidence in mitigation. This Court reiterated this principle in *Sears v. Upton*, 561 U.S. 945, 954 (2010), that it has "never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." The Court reaffirmed that the presentation

In dissent, Judge Stranch examines the panel majority's rationalizations for turning a blind eye to counsel's shortcomings. Noting that, "(t)he Supreme Court has highlighted the importance of following evidence of possible brain damage in a defendant's past when evaluating the adequacy of counsel's investigation," 59 F.4th at 865 (Stranch, J., dissenting), Judge Stranch documents that "(a)lthough counsel conducted some investigation," evidence pointing to Petitioner's potential brain damage "was either not discovered or ignored" *Id.* "(C)ounsel missed numerous readily available indicators that Haight might have brain damage." *Id.*¹¹ This failure resulted "in counsel's failure to hire a qualified expert to diagnose and explain the consequences of possible brain damage to the jury." *Id.*¹² Ultimately, "(c)ounsel's failure to investigate obvious sources of mitigating evidence, or to follow important leads they did uncover, constitutes deficient performance under *Strickland*." *Id.*¹³

Turning to the issue of prejudice, Judge Stranch explains that "(a) comparison of the available evidence of brain damage with what was presented by trial counsel at mitigation reveals the significant amount of evidence the jury never heard." *Id.*, at 872. Judge Stranch documents the "many references to incidents that might cause brain damage ... available and

of mitigation evidence and the development of a mitigation theory by trial counsel does not preclude a finding of constitutionally ineffective assistance of counsel.

¹¹Judge Stranch also documents the inexplicable delays in counsel's mitigation investigation and negligent behavior after belatedly receiving the critical 1974 report. *Id.*, at 866-67.

¹²Unlike the panel majority, Judge Stranch recognizes the medically indisputable fact that a forensic psychologist has neither the training nor the expertise to diagnose organic brain damage. *Id.*, at 875.

¹³Judge Stranch applied AEDPA deference in reviewing this issue, despite the fact that it is "dubious" whether the Kentucky courts review constituted "adjudicated on the merits." *Id.*, at 871.

discoverable to trial counsel before trial.” *Id.*, at 873. “The ‘red flags’ indicating the need for further investigation into Haight’s neurological functioning were present long before the 1974 Report came to light during trial in January 1994.” *Id.*

When comparing the testimony actually presented at trial regarding Petitioner’s “poor upbringing” and “unstable childhood” (which, again, it must be noted, at least one juror said he would not listen to) versus the testimony that could have been presented by an adequate investigation and neurological evaluation, Judge Stranch finds the Kentucky Supreme Court’s opinion that “Haight had the full benefit of mental health evaluations and experts during his trial,” *Haight IV*, 41 S.W.3d at 445-47, to be error. *Id.*, at 875. “(T)here is at least a reasonable probability that the development and presentation of testimony by a neurologist and/or neuropsychologist about brain damage would have changed the result of the sentencing proceeding.” *Id.*, at 876.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split and Confused

Lower courts have been vexed with the confusing and contradictory language of 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254 (e)(1) since AEDPA's inception. Brian Means, Post-conviction Remedies § 28.3 (Aug. 2022 Update) (describing the disparate approaches among the circuit courts of appeal). This Court has acknowledged the problems with the statute since *Rice v. Collins*, 546 U.S. 333, 339 (2006). In *Wood v. Allen*, this Court granted certiorari to settle the split in the circuits and “to resolve the question of how §§ 2254(d)(2) and (e)(1) fit together.” 558 U.S. 290, 300 (2010). Ultimately, the Court did not answer the question and has twice since acknowledged “We have not yet ‘defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)[.]’” *Brumfield v. Cain*, 576 U.S. 305, 322 (2015), quoting *Burt v. Titlow*, 571 U.S. 12, 18 (2013).

The answer to the question is consequential. The defects in the state court factfinding process here are on all fours with *Jefferson v. Upton*, 560 U.S. 284 (2010). In *Jefferson*, this Court found that a state court's decision was not entitled to deference where the factfinding process was defective. *Jefferson* was a pre-AEDPA case, but its logic is echoed in *Panetti v. Quarterman*, 551 U.S. 930 (2007) (state court decision was unreasonable under 28 U.S.C. § 2254 (d)(1) for failure to provide due process in the adjudication of constitutional claim). As the dissenting opinion below states:

[I]f Haight can show that the state courts plainly misapprehended or misstated the record in making their findings, and the misapprehension goes to a material factual issue that is central to his claim, that misapprehension can fatally undermine the factfinding process, rendering the resulting factual findings an unreasonable determination of the facts under § 2254(d)(2).

Haight, 59 F.4th at 868. The dissent goes on to describe the evidence in the post-conviction record including an expert affidavit and “an abundance of other record evidence” which would have demonstrated Haight’s neurological difficulties. *Id.* at 870. But, as the dissent points out, the state court ignored this evidence and discounted the expert affidavit as “speculation.” The conclusion that the affidavit was speculation was improper, as the dissent notes, because the affidavit was offered to demonstrate the specific need for the appointment of an expert to conduct further testing. But that request was denied and so further factfinding, which “was necessary resolve disputed facts in the record” never occurred. The dissent concludes that this is error. “The Supreme Court of Kentucky—in resolving disputed issues of fact, based on conflicting evidence and without an evidentiary hearing—made an unreasonable determination of the facts under § 2254 (d)(2).” *Id.*

The dissent further describes the maddeningly circular logic of the lower courts:

In the district court, the magistrate judge concluded that the Kentucky Supreme Court made the “entirely reasonable” determination that Haight failed to demonstrate any prejudice “due to the absence of further expert testimony that he suffered from brain damage.” *Haight v. Parker*, No. 3:02-cv-206, 2015 WL 13548182, at *74 (W.D. Ky. July 17, 2015). But that conclusion begs the question because the reason no “further expert testimony” exists stems directly from trial counsel’s deficient performance, coupled with the refusal of the trial court, postconviction court, and the federal court to allow further expert testimony into the record, despite Haight’s repeated requests.

A comparison of the available evidence of brain damage with what was presented by trial counsel at mitigation reveals the significant amount of evidence the jury never heard. Haight’s postconviction counsel found extensive evidence of Haight’s likely brain damage stemming from illness, abuse and head trauma in childhood, and alcohol and substance abuse in his teens and adult years—evidence that should have alerted trial counsel to Haight’s need for examination by a neurologist or neuropsychiatrist. Based on the available evidence, trial counsel was aware, or should have been, that Haight suffered numerous head injuries throughout his childhood and as an adult. This included falling from an automobile at age 2, receiving a blow to the head and losing consciousness while at the Methodist Children’s Home, being hit by a car at age 14, being pistol whipped about the head at age 16, being hit in the head with a baseball, and receiving a very serious head

injury after being hit with a horseshoe as an adult. RCr. 11.42 Motion at p. 21. There are also numerous references to the beatings Haight received from his father. Haight's mother was severely beaten by Haight's father while pregnant, drank alcohol to excess while pregnant, and took the drug Demarol. Haight's birth was also traumatic. He was delivered by forceps, and the umbilical cord was around his neck, resulting in a very low Apgar score. *Id.* Counsel also knew Haight had a history of drug and alcohol abuse during his adolescence, *id.* at 22, which can exacerbate existing brain damage, or cause brain damage itself.

The documents attached to Haight's Kentucky Civil Rule 59.05 Motion to Vacate are even more telling. Counsel submitted hundreds of pages of documents, many related to possible brain injury, that counsel intended to explore with witnesses at an evidentiary hearing scheduled at the postconviction stage. That hearing, however, was abruptly cancelled *sua sponte* and without explanation by the postconviction trial judge, Judge Shobe. Much of the evidence was included in Haight's RCr 11.42 motion, but because the trial court cancelled the evidentiary hearing where Haight planned to introduce and explain the evidence, Haight was forced to submit the evidence in a RCR 59.05 motion. The documents include evidence of school trancies, poor academic performance, armed robberies, destruction of property and abuse of animals when Haight was 14 and 15 (Attachment 2); a psychological evaluation when Haight was 13 that concluded that he might have “experienced cerebral dysfunction in his early school years, creating a serious academic difficulty” (Attachment 7); psychological testing when Haight was 14 that indicated his IQ had dropped from 86 at age 7 to 72, and noted that he functioned near the borderline of retardation (Attachment 8); severe substance abuse beginning at age 12 with alcohol, marijuana, LSD, hallucinogens, and sniffing toluene, glue and gasoline, and taking cocaine, heroin, morphine, and dilaudid by age 14 (Attachment 10); prenatal substance abuse by Haight's mother, as well as beatings suffered by his mother during her pregnancy (Attachment 11); and numerous head traumas (Attachment 14). This is a sample of the evidence that Haight would have introduced at an evidentiary hearing to demonstrate that his trial counsel failed to adequately investigate his background. This failure to investigate resulted in trial counsel's failure to hire an appropriate expert to evaluate Haight and to present the powerful mitigating evidence of possible brain damage to the jury, thereby prejudicing Haight. See *Coleman v. Mitchell*, 268 F.3d 417, 447 n.15 (6th Cir. 2001) (noting there is a “direct relationship between the quality of background investigation and the quality of mitigation strategy”)

The documents from the postconviction motions paint a picture of a sexually, physically, and emotionally abused child and teenager, largely abandoned by his family and failed by social workers and others in the foster-care system, much of which was not referenced during mitigation. Most important to the focus here, the documents include many references to incidents that might cause brain damage, as referenced above. All this evidence was available and discoverable to trial counsel before trial. The “red flags” indicating the need for further investigation into

Haight's neurological functioning were present long before the 1974 Report came to light during trial in January 1994.

Id., 872–73.

Here, the Sixth Circuit gave deference to the state court decision which is tethered to factfindings made without appointment of experts or an evidentiary hearing and faulted Mr. Haight for not overcoming the presumption of correctness of those factfindings after denying his renewed request for experts and a hearing in federal court. But how can one ever overcome the presumption of correctness of state court fact-findings by clear and convincing evidence when one has been denied the tools with which to build the case? If Mr. Haight was given the tools he needed, and thus overcome the presumption of correctness (as well as demonstrated the unreasonableness of the state court factfindings), then he would be entitled to *de novo* review of his substantial claim of ineffective assistance of counsel.

There is inequity in the gordian knot tied by AEDPA. First, the state court denies resources. Second the state court denies relief by resolving disputed facts summarily and by ignoring critical evidence while faulting Haight for not presenting expert opinion that they denied him the opportunity to present. Third, the federal court defers to the state court factfinding rendered after a defective process. Fourth, the federal court denies Haight the opportunity to overcome the factfindings pursuant to 28 U.S.C. § (e)(1), by refusing to appoint experts, hold a hearing, or even consider the expert declarations that appointed counsel obtained at personal expense. This must be a violation of due process.

28 U.S.C. § (e)(1) provides a habeas petitioner the opportunity to overcome factfinding by clear and convincing evidence. But how can that showing ever be made, if he is denied the opportunity to present the evidence? The panel opinion appears to believe that new evidence can

never be presented in federal court to make this showing. 59 F. 4th at 841. But how can that be? Such a cramped view of the statute renders (e)(1) essentially meaningless. This cannot be the case as the courts must presume that the legislature intended its statutory language to have meaning. This case, involving a diligent defendant and record that establishes that trial counsel did not make a tactical strategy decision to forego this compelling evidence provides the ideal vehicle for this Court to finally explain how 2254(d)(2) and (e)(1) should operate in the real world..

II. Petitioner's Claim that Trial Counsel was Constitutionally Ineffective for Failing to Recognize Readily Available and Apparent "Red Flags" of Neurological Deficits Is Meritorious

Counsel knew or should have known that Petitioner's mother had regularly abused drugs and alcohol while she was pregnant with him, yet they did not investigate the possibility of fetal alcohol spectrum disorder. Counsel knew or should have known that Petitioner likely suffered from intellectual disability and organic brain injury - due to both fetal alcohol spectrum disorder and repeated head trauma - yet they failed to order neuropsychological testing to confirm it. Counsel knew or should have known that Petitioner had been repeatedly sexually abused and raped.

In 1973, Petitioner had a mental health evaluation while being considered for a return to the Ohio Correctional system. The evaluation was conducted by three mental health experts, including a psychiatrist. The evaluation said that Petitioner manifested considerable discrepancies in his performance, a finding "which is not infrequently noted in persons who have some cortical dysfunctioning." The report stated, "Psychological testing and social history support an impression that there is a possibility of brain damage which is interfering selectively with verbal expression."

Ignoring numerous red flags, Petitioner's trial counsel failed to investigate Petitioner's organic brain damage and did not seek a neurological evaluation of Petitioner prior to trial, although counsel knew or should have known that such investigation and evaluation was crucial to the case. *Rompilla v. Beard*, 545 U.S. 374, 385-387 (2005). Trial counsel had a duty to conduct a thorough investigation of Haight's medical history. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020)(per curiam). They failed to do so at every turn.

The per curiam majority failed to appreciate the fact that the expert enlisted by Petitioner's counsel, Fisher, did not consider brain damage in his evaluation in Haight's case. There is good reason for that fact. "(M)ost psychologists are neither trained or experienced in the nature of brain injury and its complex effects on behavior. The result is frequently that factors of brain injury are not considered in forensic evaluations."¹⁴ "Traditional clinical psychology does not address the issues of behavioral consequences specific to brain damage."¹⁵ As such, the expert hastily chosen by Petitioner's counsel right before trial was particularly ill suited both to address and present testimony to the jury about the issue that could likely have changed their verdict on either Petitioner's guilt of murder or the appropriateness of a death sentence.

By way of contrast, "(A) neuropsychology expert is able to present quantifiable, normative data about the relationship between physical aspects of brain damage and its behavioral consequences, in sharp contrast to traditional reliance on professional opinions deduced merely from clinical interview impressions, or mental status examinations."¹⁶ "Neuropsychology is in a unique position to detect ... changes in an individual's cognitive capacity."¹⁷ This is the type of information provided by Drs. Woods and Young in their Declarations to the district court. Contrary to the panel majority's opinion, Fisher was substantially deficient precisely because he was incompetent to test, diagnose, and testify regarding Petitioner's organic brain damage and reasonably competent counsel would have known that.

¹⁴Mental Health & Experts Manual, Chapter 16: "Neuropsychological Evidence in Criminal Defense: Rationale and Guidelines for Enlisting an Expert," 16-1.

¹⁵*Id.* 16-2.

¹⁶*Id.*

¹⁷*Id.* at 16-3.

Counsel chose the wrong type of expert to address Petitioner's particular mental health issues. The expert at trial did not, because he could not, explain to the jury how Petitioner's organic brain damage affected his behavior. He simply did not have the expertise or training to diagnose and present such evidence. "The measure of prejudice is the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *James v. Ryan*, 679 F.3d 780, 810 (9th Cir. 2012).

What counsel's actions do show is that he was on notice that Petitioner had significant mental health problems and those problems needed to be developed for trial. Had he properly prepared in advance of trial and conducted a thorough and competent investigation, he would have discovered the readily available red flags which would cause constitutionally effective counsel to secure the services of experts similar to those requested by Petitioner in district court. Counsel only needed to request one expert who was capable of diagnosing organic brain damage. He did not.

The question, simply put, is whether it is sufficient performance by counsel to consult **some** type of expert, or does adequate representation require consulting the **right** type of expert required by the facts of the case. In *Evans v. State*, 109 So.3d 1044 (Miss. 2013), the court considered that very issue. In *Evans*, trial counsel presented evidence that the defendant suffered from post traumatic stress disorder (PTSD). However, the doctor retained by counsel lacked the expertise to explain how PTSD affects a person's mental state. *Id.* at 1048. This Court reasoned that, to present his defense theory, the defendant needed a PTSD expert to explain the ramifications of PTSD. The defendant also needed an expert who could explain PTSD's effects to the jury. The expert counsel retained could do neither. The court held "that the trial court abused

its discretion in denying (the defendant) funds to hire an expert in PTSD to assist ... in the preparation of his defense.” *Id.*, at 1049.

No court has provided Petitioner with the experts required to confirm what every doctor medically qualified to make that determination has stated. Literally, the only piece of the puzzle missing is a court willing to appoint qualified medical experts to confirm what everyone knows: Petitioner has organic brain damage.

Petitioner’s trial counsel provided ineffective assistance of counsel by ignoring clear indicia of mental health issues - including organic brain damage, which is an extremely important mitigating factor - in the preparation and presentation of petitioner’s mitigation case. This Court has recognized that attorneys in death penalty cases are ineffective if they do not present evidence that might have altered the jury’s selection of a penalty. *Williams v. Taylor*, 529 U.S. 362, 398 (2000). “The sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating **and presenting** mitigating evidence.” *Cargle v. Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2003)(emphasis added). “There is no more important hearing in law or equity than the penalty phase of a capital trial. At the penalty phase, a capital defendant has a constitutionally protected right to provide the jury with . . . mitigating evidence. Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel.” *Correll v. Ryan*, 539 F.3d 938, 946 (9th Cir. 2008)(citations omitted). “In capital cases, ... courts scrutinize attorney performance particularly closely in the sentencing phase.” *Harris v. Sharp*, 2019 U.S. App. LEXIS 32253, *8 (10th Cir., 10-28-19), *citing*, *Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir. 2013).

One does not have to go far back in time to find that the panel majority’s holding on this issue is inconsistent with this Court’s precedent. In *Andrus v. Texas*, 140 S.Ct. 1875, 1881-83

(June 15, 2020), the Court held that defense counsel was ineffective for failing to investigate and present voluminous mitigation evidence and such failure was not justified as a tactical decision.

Like the instant case, defense counsel in *Andrus* called Andrus' family members who testified about basic biographical information. *Id.* Trial counsel also called an expert about the general effects of drug use on developing adolescent brains as well as a prison counselor who testified that Andrus "started having remorse" and was making progress. *Id.* Andrus himself then testified during the penalty phase about how his mother had started selling drugs when he was around six years old, that he and his siblings were often home alone when they were growing up, and that he first started using drugs regularly around the time he was 15. *Id.*

Despite the fact that counsel presented several witnesses and an expert, the Court found counsel ineffective for failing to investigate and present additional mitigation evidence. *Id.* at 1881-83. The Court ruled that counsel "ignored pertinent avenues for investigation of which he should have been aware" and that such a decision could not be tactical. *Id.* at 1882 and 1883 (additional citations omitted). Similarly, here, trial counsel's failure to investigate and present evidence of organic brain damage cannot be justified as a tactical decision.

The panel majority opinion conflicts with the language and reasoning of this Court's precedent, as well as the decisions of the Sixth Circuit and other courts throughout the country, by finding that an attorney's failure to investigate and present evidence on a critical mitigating circumstance - organic brain damage - is not ineffective assistance of counsel. This issue is one of exceptional importance and likely to recur.

Just recently, in *Williams v. State*, 73 F.4th 900 (11th Cir. July 11, 2023), the court found the trial attorney's performance during the penalty phase of a capital trial to be deficient and prejudicial because the attorney failed to investigate the defendant's background for critical

mitigating evidence. In *Williams*, the defendant's attorney failed to adequately investigate the defendant's background, meaning the judge and jury never heard evidence of the defendant's childhood trauma, sexual abuse, abandonment issues, familial dysfunction, and other significant issues that could have supported mitigation. In the instant case, due to counsel's deficient and prejudicial performance, the trial judge and jury never heard evidence of Petitioner's organic brain damage.

The panel majority failed to acknowledge how critically important the type of mitigating evidence Petitioner's counsel missed - organic brain damage - is. As the Tenth Circuit held:

"evidence of mental impairments 'is exactly the sort of evidence that garners the most sympathy from jurors,' and that this is especially true of evidence of organic brain damage.'" *Barrett II*, 797 F.3d at 1231 (*quoting Smith*, 379 F.3d at 942); *see also Grant v. Royal*, 886 F.3d 874, 920 (10th Cir. 2018)("Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect.")(quotations omitted)); *Littlejohn v. Trammell*, 704 F.3d 817, 864 (10th Cir. 2013)("Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available.")

United States v. Barrett, 2021 U.S.App. LEXIS 1425, *42 (10th Cir., Jan. 19, 2021). *See also United States v. Fields*, 949 F.3d 1240, 1243, 1253, 1259 (10th Cir. 2019)(district court erred in denying "evidentiary hearing on Fields's claim that his trial counsel was ineffective for failing to adequately investigate and present at trial evidence of his organic brain damage": "evidence presented by Fields, including most notably ... [postconviction] declaration [by lead trial attorney], relates 'to purported occurrences outside the courtroom,' and creates a genuine issue of material fact regarding whether ... [trial counsel] made a strategic decision to forego the use of ... [neuropsychologist's] testimony or otherwise rely on evidence of Fields's possible brain damage").

Petitioner’s trial counsel, like the trial counsel in *Wiggins*, “abandoned their investigation of [Petitioner’s] background after having acquired only rudimentary knowledge of his history from a narrow set of sources,” thereby making the investigation itself unreasonable. 539 U.S. at 524; *see also Williams*, 529 U.S. at 369, 395; *Cooper v. Sec’y, Dep’t of Corr.*, 646 F.3d 1328, 1351-52 (11th Cir. 2011)(finding deficient performance based on inadequate investigation where trial counsel interviewed the defendant, his mother, and a clinical psychologist, but not others).

Because Petitioner’s trial counsel failed to conduct a minimally adequate mitigation investigation, they “were not in a position to make a reasonable strategic choice as to whether” to conduct further investigation, *Wiggins*, 539 U.S. at 536, or to conclude that further investigation “would be fruitless or even harmful.” *Strickland*, 466 U.S. at 691. The record includes nothing to indicate that trial counsel’s lack of investigation into Petitioner’s brain damage was the product of reasonable professional judgment. *See Burger v. Kemp*, 483 U.S. 776, 794-95 (1987). *See also Goodwin v. Johnson*, 632 F.3d 301, 328 (6th Cir. 2011)(prejudice established under AEDPA where counsel failed to discover and submit evidence of “low educational level,” “signs of organic brain impairment,” “an unstable home life” in which petitioner was “physically abused by his mother’s boyfriends” and “exposed by his father to sexual abuse, drug use, and criminal behavior”). To the contrary, the record clearly demonstrates that counsel’s limited investigation was due to waiting to the last minute to conduct a rushed, incomplete investigation. The Sixth Amendment requires more.

Mr. Haight was prejudiced by trial counsel’s failure. “The evidence submitted in the post-conviction motions filed by Haight directly contradict the penalty-phase testimony ... that Haight did not suffer from neurological deficits.” *Haight*, 59 F. 4th at 870 (Stranch, J. dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the writ.

Respectfully submitted,

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