

No. 23-5553  
CAPITAL CASE

IN THE SUPREME COURT  
OF THE UNITED STATES

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RANDY HAIGHT

PETITIONER

v.

SCOTT JORDAN

RESPONDENT

Warden, Kentucky State Penitentiary

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RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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## FACTS AND OPINIONS BELOW

In the pre-dawn hours of August 18, 1985, Randy Haight and two accomplices escaped from a jail in Johnson County, Kentucky. Haight spent the next several days hiding in the home of a former girlfriend in Richmond, Kentucky. On August 20, 1985, Haight burglarized the home of Elmer Shifflet. Among other items stolen was a .38 caliber pistol. Haight remained in the Richmond area until August 22, 1985, when he stole a 1979 GMC Jimmy 4x4 from Joseph Sasser, Jr. Sasser indicated that the vehicle contained a .45 caliber pistol and a key ring with a set of handcuff keys.

Late in the evening of August 22, 1985, Kentucky State Trooper Phil Yates observed a suspicious vehicle driving out of a grass field near Burgin, Kentucky. Trooper Yates began to follow the vehicle and recalled that it matched the description of the stolen Sasser vehicle (including that it had a handicapped registration). Trooper Yates initiated a traffic stop and as he approached the vehicle, Haight opened fire—getting off four shots. Trooper Yates returned fire as Haight fled. A high-speed chase ensued, in which Haight continued to fire at the police cruiser. Trooper Yates eventually lost sight of the vehicle. Other officers in the area discovered the vehicle—which had been wrecked on a nearby roadway. The vehicle was unoccupied—Haight had fled on foot. In and around the vehicle, authorities located a .38 caliber pistol, a .45 caliber pistol, ammunition, a billfold containing an ID for David Omer, a billfold containing the ID of Patricia Vance, and various other items including a pair of men's pants and a pair of women's panties. A fingerprint from Haight was also lifted from the vehicle.

Bloodhounds were brought to the scene and a search was conducted into the early morning hours of August 23, 1985. During that time authorities learned that a vehicle was stolen from some farm workers near the search area. The workers chased the vehicle, causing the thief to abandon it and flee into a nearby cornfield. The field was surrounded, and Haight was finally apprehended.

Meanwhile, in nearby Garrard County, Kentucky, around noon that same day (August 23, 1985), the sheriff's office received a call from a man living on a rural road near Herrington Lake. The man indicated that he observed two people in a car that had been parked in his driveway for an extended period of time, and that he believed the occupants were dead. Officers arrived and discovered the bodies of David Omer (wearing only a shirt and socks) and Patricia Vance (almost completely nude). Vance had been shot four times with bullets striking her right eye, temple, shoulder, and the back of her head. Omer had also been shot four times—in the face, shoulder, chest, and back of the head. The victims had been shot by .38 and .45 caliber handguns. Ballistics evidence revealed that the pistols found at the scene of the GMC Jimmy wreck were the guns used to kill Omer and Vance.

Among items taken from Haight's person upon his arrest was \$468.10 in cash (a significant sum considering testimony indicated that Haight only had \$2.00 a short time before his capture and Omer—a Danville businessman—had been known to carry large sums of cash). Police also located two handcuff keys on Haight which had been known to be attached to the key ring of the GMC Jimmy stolen from Sasser.

Haight initially pleaded guilty and agreed to a statement of facts that was consistent with those outlined herein. However, at sentencing, defense counsel advised the trial court that Haight believed statements made off the record indicated that the prosecutor's sentencing recommendation would be followed (life without the possibility of parole for 25 years). The trial court explained that was not the case and a motion to withdraw the guilty plea was entertained. The trial court denied the withdrawal motion and Haight was sentenced to death. The case was reversed and remanded by the Kentucky Supreme Court—vacating the judgment and the order accepting Haight's plea. *Haight v. Commonwealth*, 760 S.W.2d 84 (Ky. 1988).

Following extensive litigation concerning Haight's attempt to have his guilty plea specifically enforced,<sup>3</sup> Haight's case was moved, and he was tried in Jefferson County, Kentucky, in early 1994. Haight was convicted of two counts of capital murder and sentenced to death based upon two statutory aggravators, murder in the course of first-degree robbery and intentional killing involving multiple deaths. Haight's defense strategy, which included Haight's own testimony, was to admit his criminal acts and attempt to mitigate punishment so as to avoid the death penalty.

Haight's convictions and sentences were affirmed on direct appeal. *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996). Haight also sought post-conviction relief,

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<sup>3</sup> In *Haight v. Williamson*, 833 S.W.2d 821 (Ky. 1992), the Kentucky Supreme Court ruled that Haight was not entitled to specific performance of the Commonwealth's recommendation from the previous plea proceeding and that there was no prosecutorial vindictiveness due to the Commonwealth seeking the death penalty upon retrial.

which was denied by the trial court and also affirmed on appeal. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001).

Haight filed his federal habeas petition on April 12, 2002. The case was held in abeyance for Haight to exhaust certain ineffective-assistance-of-counsel claims in state court. *Haight v. Commonwealth*, No. 2006-SC-344-MR, 2007 WL 2404494 (Ky. Aug. 23, 2007). After the respite, the case was extensively litigated by the parties—including requests for discovery, expert funding, and an evidentiary hearing. On July 17, 2015, U.S. Magistrate Judge Dave Whalin issued a detailed, 311-page *Findings of Fact, Conclusions of Law, and Recommendation* denying Haight’s habeas petition. *Haight v. Parker*, Civil Action No. 3:02-CV-206-S, 2015 WL 13548182 (W.D. Ky. July 17, 2015). The magistrate recommended granting a certificate of appealability (COA) on 23 issues. *Id.* at \*152. On August 18, 2017, U.S. District Court Judge Greg. N. Stivers issued an opinion and order that overruled Haight’s objections to the magistrate’s recommendations and denied his habeas petition. *Haight v. White*, Civil Action No. 3:02-CV-206-S, 2017 WL 3584218 (W.D. Ky. Aug. 18, 2017). After COA expansion by both the district court and the United States Court of Appeals for the Sixth Circuit, three more issue were added.

On February 9, 2023, the Sixth Circuit affirmed the denial of Haight’s habeas petition. *Haight v. Jordan*, 59 F.4th 817, 862 (6th Cir. 2023). Relevant to this proceeding, the Court held that Haight’s counsel did not perform deficiently with respect to the investigation and presentation of a “strong case for mitigation on Haight’s behalf.” *Id.* at 840. Further, based on what was presented, in concert with

the aggravating factors, the court also found that the additional evidence Haight wished to present would not have changed his sentence, therefore, he suffered no prejudice. *Id.* at 840-841.

## REASONS TO DENY THE PETITION

### I. and II.

**The Sixth Circuit correctly affirmed the district court's conclusion that the Kentucky Supreme Court reasonably determined the facts underlying Haight's claim that his defense counsel were ineffective with regard to mental-health mitigation evidence.**

At its core, Haight's petition to this Court essentially seeks to re-litigate the conclusions of Haight's own expert at trial, rather than focus on the actual issue—assessing the state court's conclusions with regard to whether Haight's trial counsel were ineffective related to mental-health mitigation evidence. Regardless, Haight was granted appropriate expert assistance and defense counsel's investigation and presentation of that evidence were reasonable. Because defense counsel provided effective assistance, the Kentucky Supreme Court's conclusions were properly affirmed—which included making a reasonable determination of the facts pertaining to Haight's mental-health mitigation evidence. Haight now seeks to engage this Court's discretionary review by positioning his case in a manner that hinges on the interplay between 28 U.S.C. § 2254(d)(2) and (e)(1)—a discussion that this Court has



not explicitly clarified.<sup>1</sup> However, just as in *Wood v. Allen*, 130 S.Ct. 841, 848-849 (2010), because the reasonableness of the factual determinations here are not decided by interpretation of the relationship between the different statutory provisions, no reasons exists to grant review.

Haight was represented by two trial attorneys—including lead counsel Hon. Ernie Lewis, a seasoned defense attorney with almost 20 years’ experience.<sup>2</sup> During the guilt phase, Haight testified and laid the foundation for his mitigation case—alcohol/substance abuse, extreme emotional disturbance, remorse, and a difficult family upbringing (physical, sexual, and emotional abuse, extreme poverty, and multiple trips to foster care). *Haight v. Jordan*, 59 F.4th at 837-839. Haight’s testimony was complemented by testimony from members of his own family. *Id.* at 838. Defense counsel also employed and utilized Carol Good, an associate professor at Eastern Kentucky University who had a master’s degree in social work. *Id.* at 837-838. Good completed a full social history of Haight’s life—including an exhaustive examination of records and interviews with members of Haight’s family. *Id.* Good testified extensively about her findings. *Id.*

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<sup>1</sup> To support this contention of “confusion” and a “split” amongst the circuits, Haight has cited to Brian Means, *Postconviction Remedies*, § 28.3. While the treatise does contain discussion of this Court’s intent to at some point clarify the interplay between 28 U.S.C. § 2254(d)(2) and (e)(1), the Warden would not describe the discussion of the state of the law in such divisive terms. Rather, the treatise merely notes the slight deviations between the circuits. To the extent more significant deviations exist, those would seem to be between the courts and commentators.

<sup>2</sup> Mr. Lewis received an undergraduate degree from Baylor University in 1969, a Masters of Divinity from Vanderbilt University in 1973, and a J.D. from Washington University in 1977. Mr. Lewis worked at the Kentucky Department of Public Advocacy in various roles from 1976 to 2008. He was appointed as the Public Advocate, the head of the entire Kentucky public defender system, in 1996 (two years after Haight’s trial). Among his many accolades, in 2000, Mr. Lewis was named Outstanding Lawyer by the Kentucky Bar Association. See <https://ncdc.net/faculty/name/ernie-lewis/>.

Regarding mental-health evidence, Haight’s attorneys repeatedly sought funding for experts at every turn. Funding was denied for a time during the initiation of Haight’s criminal proceeding by the Garrard Circuit Court and later due to consideration of Haight’s appeal seeking specific performance of his prior plea agreement (as the result of that proceeding would have rendered the request moot). *See Haight v. Williamson*, 883 S.W.2d 821 (Ky. 1992). Expert assistance was also impeded due to the unexpected withdrawal of a previously retained expert. *Haight v. Jordan*, 59 F.4th at 839. Ultimately, defense counsel secured Dr. Brad Fisher, a Harvard-educated forensic-clinical psychologist with significant experience in criminal cases. *Id.* at 838. Dr. Fisher performed a pretrial evaluation on Haight and testified on his behalf during the trial. *Id.* Dr. Fisher specifically highlighted issues with attention-deficit disorder and hyperactivity. *Id.* It was also noted that Haight exhibited rage, feelings of worthlessness, feelings of inferiority, lack of judgment, and an inability to cope with stress or engage in problem resolution. *Id.* Dr. Fisher’s testing indicated that Haight was not suffering from any psychosis, neurological deficits, or intellectual disability. *Id.*

However, midway through Haight’s trial, defense counsel received a 21-year-old report from the Ohio prison system that raised the “possibility” of neurologic issues—speculation that was directly contradicted by the findings of Dr. Fisher. *Haight v. Jordan*, 59 F.4th at 839. The report no longer existed in court records and was finally located on microfiche after protracted attempts by an investigator to find all previous social history, psychological records, and other similar evaluations. *Id.*

As soon as practicable, defense counsel used the outdated report in an unsuccessful new-trial motion in order to secure additional expert assistance. *Id.* At that point, there was nothing more that could have been done. All other available records and Dr. Fisher’s conclusions refuted the speculation contained in the report. The Kentucky Supreme Court ultimately found that defense counsel did not perform deficiently regarding mental-health experts and that Haight suffered no prejudice. *Haight v. Commonwealth*, 41 S.W.3d 436, 446-447 (Ky. 2001). The Sixth Circuit agreed with the district court’s conclusions denying Haight’s ineffective-assistance-of-counsel claims regarding mental-health mitigation—noting that “[c]ounsel presented a strong case for mitigation on Haight’s behalf[.]” *Haight v. Jordan*, 59 F.4th at 841.

Haight requested and received expert assistance in compliance with *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). As noted, the Ohio report’s speculation was in conflict with the findings of Dr. Fisher and records examined and utilized during the mitigation testimony of Carol Good (which included two prior IQ-related examinations at age 7 [by Dr. Shelton] and age 14 [by Dr. Gussett]). Defense counsel conducted a reasonable investigation and was entitled to rely on Dr. Fisher’s opinions. The Ohio report, which reached no conclusions with regard to brain damage (only the “possibility” of potential brain damage interfering selectively with verbal expression - *Haight v. Commonwealth*, 41 S.W.3d at 446-447), did not diminish or otherwise change the fact that Haight received everything to which he was constitutionally entitled. “It is ‘not unreasonable’ for counsel, ‘untrained in the field

of mental health,' to rely on the professional opinions of expert witnesses.” *Haight v. Jordan*, 59 F.4th at 839 (citing *Clark v. Mitchell*, 425 F.3d 270, 285 (6th Cir. 2005)). Reasonably diligent counsel are permitted to cease investigation down a certain path when they have good reason to think further investigation would be fruitless. *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

The factual findings by the Kentucky Supreme Court in this instance are entitled to a presumption of correctness. 28 U.S.C. § 2254(d)(2). The presumption can be rebutted, but only through “clear and convincing evidence” to the contrary. 28 U.S.C. § 2254(e)(1). Habeas courts defer to the state court’s factual determinations if “reasonable minds reviewing the record might disagree about the finding in question.” *Brunfield v. Cain*, 576 U.S. 303, 314 (2015). A finding that the state court’s determination is unreasonable will not be made simply because the habeas court would have reached a different result in the first instance. *Id.* at 314. As previously noted, Haight has argued that this Court’s indication of the need to address the interplay between 28 U.S.C. 2254(d)(2) and (e)(1) supports review, and while analysis from this Court may prove beneficial in some future case, this is not the case for that instruction. The evidence presented did not come close to rebutting the presumption that the state court findings were correct. Additional review is not warranted.

Presented with the aforementioned circumstances, the Kentucky Supreme Court’s conclusions were not an unreasonable determination of the facts in Haight’s case. The Ohio report was an outlier to all other available evidence, and it merely

raised the possibility of some type of neurologic deficit. The Kentucky Supreme Court's conclusion that Haight's brain-damage claim was "speculation" was an entirely reasonable determination. *See Haight v. Commonwealth*, 41 S.W.3d at 445. Similarly, as the Kentucky Supreme Court explained later in its opinion when dismissing the importance of the affidavit filed late during Haight's post-conviction proceeding (filed after the trial-level court made its decision), its similarly speculative conclusions were based on the same report and brief references to documents from the mid-1970s (utilized during Haight's mitigation presentation) but given a new interpretation. *Id.* at 446-447. There is simply no basis to conclude that the Kentucky Supreme Court's analysis was unreasonable.

**CONCLUSION**

Haight does not present a compelling reason for this Court to grant the petition. None of the considerations highlighted in Supreme Court Rule 10 exist or create a legal basis for review by this Court in this case.

Based on the foregoing, the petition should be denied.

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**FILING/PROOF OF SERVICE**

The foregoing Brief in opposition was filed electronically this day, November 21, 2023, and also was mailed to the Clerk of this Court.

Further, I, Matthew R. Krygiel, a member of the Bar of this Court, hereby certify that on the 21st day of November, 2023, a copy of this Brief was mailed via United States Postal Service, postage prepaid, and emailed to Hon. John M. Bailey, 330 Franklin Road – Suite 135A-427, Brentwood, Tennessee 37027 (hansgurkin@att.net), and Hon. Bruce P. Hackett, 300 LaFollette Station South – Suite 302, No. 256, Floyds Knob, Indiana 47119 (bphackettlaw@gmail.com).

*/s/Matthew R. Krygiel*  
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