

CAPITAL CASE
No. 23-5553
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

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

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I. RESPONDENT’S BRIEF IN OPPOSITION MAKES THE CASE FOR REVIEW IN THIS COURT.

Respondent’s brief in opposition deliberately fails to engage with the legal issues presented by the petition for writ of certiorari.¹ Instead, Respondent spends nearly half of its ten-page brief on facts which it admits are not in dispute.² The recitation of facts, along with the rest of Respondent’s brief, for which it sought a lengthy extension, is a simple cut and paste from its appellate court briefing. Buried in the middle of its attempt to convince the Court that the petition is fact-bound, is a telling admission—the petition presents the issue of “the interplay between 28 U.S.C. § 2254(d)(2) and (e)(1)—a discussion that this Court has not explicitly clarified.” BIO at 5-6. Further, Respondent admits that there is a circuit split—even if it quibbles with the level of divisiveness. BIO at 6, n. 1.

Respondent does not deny that trial counsel delayed in preparation for the case resulting in the discovery of organic brain damage evidence mid-trial when, “there was nothing more that could have been done.” BIO at 8. Respondent lauds trial counsel’s reputation, including the fact that he received an award years after his representation of Mr. Haight. Respondent’s fawning over trial counsel proves too much. Trial counsel has never said that he made a strategic decision to abandon further investigation. Quite the opposite. What happened is clear, trial counsel believed that the case would be resolved, after all Mr. Haight had always agreed to plead guilty and accept a life sentence. So, like any overburdened public defender, he put his efforts elsewhere. But he miscalculated and got caught unprepared.

¹ Of the 13 cases cited by Respondent, 8 are Mr. Haight’s.

² To the extent that Respondent tries to insinuate otherwise, it is an indisputable fact in the record that Mr. Haight had nothing to do with the victims’ state of undress at the time of their deaths.

Similarly, the fact that Brad Fisher went to Harvard does not magically transform his professional expertise into that which was needed here—again something trial counsel realized as soon as he received evidence of organic brain damage and requested relevant expert assistance. As Judge Stranch points out in dissent, a forensic psychologist has neither the training nor expertise to diagnose organic brain damage. *Haight v. Jordan*, 59 F. 4th 817, 875 (6th Cir. 2023).

The record shows that trial counsel did not strategically choose to not develop evidence of organic brain damage. The record shows that Mr. Haight diligently sought necessary expert services and was denied at every turn. Yet, the denial has repeatedly been used against him. This denial should have been the basis for a finding that the state court factfinding was unreasonable and opened the opportunity for further factual development in federal court.

This case squarely presents the issue that this Court has acknowledged is unresolved. The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ John M. Bailey

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AFFIRMATION OF MAILING

I, Bruce Hackett, a member of the Bar of the United States Supreme Court, hereby affirm under penalty of perjury that on this 5th day of December, 2023, I caused to be placed the original and ten copies of the Reply to Brief in Opposition to Petition for Writ of Certiorari in the above-captioned case with Federal Express for priority overnight delivery to the United States Supreme Court, 1 First Street, NE, Washington, D.C. 20543, and a copy to counsel for Respondent: Assistant Attorney General Matthew Krygiel, Kentucky Office of the Attorney General, Office of the Solicitor General, Criminal Appeals Unit, 1024 Capital Center Drive, Frankfort, KY 40601-8204.

Respectfully submitted.

s/Bruce P. Hackett

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