CAPITAL CASE

No. _____

IN THE UNITED STATES SUPREME COURT

BENNY LEE HODGE,

Petitioner,

v.

LAURA PLAPPERT, Warden,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under its original meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment was interpreted as including disproportionate and arbitrary sentences. Under this Court's precedents, a death sentence should not be selectively, irregularly, or arbitrarily imposed. In this case the United States Court of Appeals for the Sixth Circuit has selectively, irregularly, and arbitrarily affirmed the denial of a writ of habeas corpus. Question presented: did the *en banc* Sixth Circuit violate the Eighth Amendment's Cruel and Unusual Punishments Clause by selectively, irregularly, and arbitrarily affirming Hodge's capital sentence?

II. Did the *en banc* Sixth Circuit violate the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because its holding resulted in a disproportionate sentence in comparison to the cases of similarly situated capitally-sentenced prisoners?

III. Did the en banc Sixth Circuit violate this Court's precedents when it affirmed the denial of federal habeas relief based upon a decision in which the Kentucky Supreme Court refused to consider mitigation evidence for any purpose – beyond explaining the crimes – even though the unpresented mitigation may well have been enough to outweigh evidence of a particularly brutal crime?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS AND OPINIONS

Hodge v. Commonwealth, Nos. 86–SC–882–MR, 86–SC–900–MR, Supreme Court of Kentucky, Judgment entered November 8, 1990 (Modified on Denial of Rehearing July 3, 1991), (Opinion on direct appeal affirming convictions and sentence) Reported at 809 S.W.2d 835 (Ky. 1990).

Hodge v. Commonwealth, Nos. 1999–SC–0050–MR, 1999–SC–0498–MR, 1999–SC–0051–MR, 1999–SC–0499–MR, Supreme Court of Kentucky, entered on September 27, 2001 (Modified on denial of rehearing March 21, 2002), (Affirming denial of Ky. RCr. 11.42 state post-conviction motion in part, and reversing and remanding for evidentiary hearing in part). Reported at 68 S.W.3d 338 (Ky. 2001).

Hodge v. Commonwealth, No. 2009–SC–000791–MR, Supreme Court of Kentucky, entered Aug. 25, 2011 (Affirming denial of two claims including ineffective assistance of counsel based upon defense counsel's failure to present mitigation evidence during penalty phase of trial.) Available at 2011 WL 3805960 (Ky. Aug. 25, 2011).

Hodge v. White, No. 7:13-cv-05-DLB-EBA, U.S. District Court, Eastern District of Kentucky, Judgment entered on Aug. 17, 2016 (denying 28 U.S.C. § 2254 petition for habeas corpus relief). Available at 2016 WL 4425094 (E.D. Ky. August 17, 2016).

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

OPINIONS BELOW

JURISDICTIONAL STATEMENT

Benny Lee Hodge was convicted and sentenced to death for first-degree murder and sentenced to 60 years of imprisonment for robbery and burglary in Letcher County, Kentucky on June 20, 1986. He appealed his sentence to the Supreme Court of Kentucky, which affirmed the sentence on November 8, 1990. His habeas petition under 28 U.S.C. §2254 (R.12) was denied in a memorandum opinion and order by the United States District Court for the Eastern District of Kentucky. (R.77). Hodge's motion to alter or amend, (R.79; R.82, Reply), was denied on August 7, 2017. (R.92).

Notice of appeal was filed on September 5, 2017. (R.93).

Following a reversal and remand to grant conditional habeas relief by a panel of the Sixth Circuit, the Respondent here filed a timely petition seeking *en banc* rehearing, which affirmed the district court's denial of the writ of habeas corpus on May 7, 2025.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). On July 22, 2025 Justice Kavanaugh granted an extension of time to file a petition for certiorari to October 4, 2025. Accordingly, this petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to Matt Kuhn, the Solicitor General of the Commonwealth of Kentucky and to Kentucky Attorney General, Russell Coleman and Deputy Attorney General Robert M. Duncan Jr. who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of

Laura Plappert, Warden a state office which is authorized by law to appear before this Court on its own behalf.

PRAYER FOR RELIEF

The Petitioner, Benny Lee Hodge, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. amend. VI.

(2) The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

(3) The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall .deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

(4) "An application for 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." 28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE AND FACTS

In 1986, the Petitioner, Benny Lee Hodge, and Roger Dale Epperson were tried for the murder of Tammy Acker, the attempted murder of Dr. Roscoe Acker, first-degree robbery, and first-degree burglary. *Hodge v. White*, No. 13-5-DLB-EBA, 2016 WL 4425094, at *4 (E.D. Ky. Aug. 17, 2016). Before the trial began, Epperson's attorney, Lester Burns, was federally indicted for accepting Dr. Acker's stolen money in exchange for representing Epperson. *Id.* at *5. Hodge's attorney, Dale Mitchell—a Burns protégé—represented Burns in his federal case. *Id*. Despite these obvious conflicts, Hodge's capital trial went ahead without notice to or waiver from Hodge. (*See* Doc. 90, Mot. to Expand COA).

During the sentencing phase, Mitchell's representation consisted of a two-sentence stipulation that was read to the jury. "Hodge's stipulation indicated that he had a wife and three children, a public-job work record, and a home in Tennessee." *Hodge*, 2016 WL 4425094, at *7–*8. Hodge received a death sentence. *Id*. at *8.

At his post-conviction hearing, Hodge presented substantial mitigation evidence that would have been available to Mitchell and should have been presented during the sentencing phase of his trial. In a sweeping opinion, the Kentucky Supreme Court recognized deficient performance but held that Hodge was not prejudiced under *Strickland* because Hodge's mitigation offered "virtually no rationale for the premeditated, cold-blooded murder and attempted murder of two innocent victims." *Hodge v. Commonwealth*, 2009-SC-000791-MR, 2011 WL 3805960, at *14 (Ky. Aug. 25, 2011;. Before reaching that legal conclusion, the state court swept

away the weight and impact of Hodge's mitigation evidence in its comparison with the "damaging evidence of [Hodge's] long and increasingly violent criminal history. . . . numerous escapes from custody, and the obvious failure of several rehabilitative efforts." *Id*. at *12. Then, after considering the "heinous nature of Hodge's crime," *id*., the state court announced that its "balancing" had culminated in the opinion that "many, if not most malefactors committing terribly violent and cruel murders are the subjects of terrible childhoods." *Id.* at *14.

Hodge filed a petition for writ of habeas corpus in the Eastern District of Kentucky, which was denied. *Hodge v. White*, No. 7:13-cv-05-DLB-EBA, 2016 WL 4425094 (E.D. Ky. Aug. 17, 2016).

Hodge next petitioned the United States Court of Appeals for the Sixth Circuit. In a divided opinion, the panel rejected Hodge's claims. *Hodge v. Jordan*, 6th Cir. Case No. 17:6032, Doc. 61-2 (Sept. 10, 2021). However, while Hodge's petition for rehearing *en banc* was pending, a reconstituted panel issued a superseding opinion granting Hodge relief on his ineffective assistance of counsel claim. *Hodge v. Jordan*, 95 F.4th 393 (6th Cir. 2024). Following a petition for rehearing *en banc* filed by the Respondent, the Sixth Circuit affirmed the denial of habeas relief in an *en banc* opinion. *Hodge v. Plappert*, 136 F.4th 648 (6th Cir. 2025).

REASONS FOR GRANTING OF THE WRIT

(1) By selectively, irregularly, and arbitrarily affirming Hodge's death sentence, the United States Court of Appeals for the Sixth Circuit has entered a decision that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and

(2) The Kentucky Supreme Court has decided important question(s) of federal law in a way that conflicts with relevant decisions of this Court.

ARGUMENT

I. The Sixth Circuit's opinion affirming Hodge's death sentence is selective, irregular, and arbitrary in violation of the Eighth Amendment.

The Eighth Amendment's Cruel and Unusual Punishments Clause prohibits punishments that are "unduly harsh in light of longstanding prior practice." John F. Stinneford, "The Original Meaning of 'Cruel'," Georgetown Law Journal Vol. 105:441, 493 (2017). The historical record shows that in additional to cruel, tortuous, or barbarous methods of punishment, the Founders—and the English drafters before them—were concerned primarily with disproportionate and arbitrary sentences. *See id*. at 473 (The Eighth Amendment "directs us to measure proportionality in light of longstanding prior punishment practices."). *See also* John F. Stinneford, "*Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*," Virginia L. Rev., Vol. 97: 4 899 (2011); Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839 (1969); 5 William Blackstone, Commentaries *378.

When this Court had occasion to address the original meaning of the Eighth Amendment after ratification, it too focused on disproportionate or arbitrary sentences. For example, in *O'Neil v. Vermont*, Justice Field wrote that the "inhibition" of the Eighth Amendment was directed "not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." 144 U.S. 323, 339–40

(1892) (Field, J., dissenting).[1] "The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." *Id.* at 340.

Nearly a century later in *Furman*, a majority of the Court struck down the death penalty because it was imposed selectively, irregularly, and arbitrarily. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). In separate concurrences the Justices opined that a death sentence would be "unusual" if it discriminated "by reason of [] race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices," *id.* at 242 (Douglas, J., concurring); that a principle "inherent in the Clause [is] that the State must not arbitrarily inflict a severe punishment," *id.* at 274 (Brennan, J., concurring); and that a system that arbitrarily and capriciously imposes death "wantonly" and "freakishly" cannot be tolerated under the Eighth Amendment, *id.* at 310 (Stewart, J., concurring). Justice Douglas also wrote that the Eighth Amendment "was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature. . ." *Furman*, 408 U.S. at 242 (Douglas, J., concurring). *See id.* at 249 (a punishment is "unusual" as that term is used in the Eighth Amendment, "if it is administered arbitrarily or discriminatorily"). Justice Brennan went further, explaining that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals

[1] The Court in that case ruled on the constitutionality of a state statute and did not base its holding on the federal question.

a particular concern with the establishment of a safeguard against arbitrary punishments." *Furman v.*, 408 U.S. at 274 (Brennan, J., concurring). *See also id*. at 277 ("The more significant function of the Clause [ ] is to protect against the danger of their arbitrary infliction."). Under Justice Brennan's test, "If there is a strong probability that [a death sentence] is inflicted arbitrarily. . . then the continued infliction of that punishment violates the command of the Clause. . . ." *Id*. at 282. And Justice Stewart quipped that "death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J. concurring).

The historical record and this Court's precedent show that the selective, irregular, and arbitrary way the death penalty was imposed was as much of a concern for the Justices as were chosen methods of execution. Indeed, at least one basis for reinstating the death penalty four years later in *Gregg* was the system of checks "against the random or arbitrary imposition of the death penalty" then put in place. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). *See Pulley v. Harris*, 465 U.S. 37, 50 (1986) (suggesting that proportionality review is one "safeguard against arbitrarily imposed death sentences"). *Cf. Roberts v. Louisiana*, 428 U.S. 325, 335 (1976). But even in *Gregg*, the Court acknowledged that the death penalty *would* be unconstitutional if "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188.

Under an original meaning of the Eighth Amendment, then, and this Court's precedents, a death sentence is unconstitutional if it imposed selectively, irregularly, and arbitrarily. That is precisely what has occurred here. Even though Hodge's death

sentence itself may not be arbitrary—any more than any death sentence is arbitrary[2]; and even though Hodge maintains that the Kentucky Supreme Court's decision was contrary to *Strickland v. Washington*, 466 U.S. 668 (1984); Hodge brings a different concern to the Court. This case proves the harm that the drafters of the Eighth Amendment (and of the English precepts before it) were seeking to avoid: the Sixth Circuit has selectively, irregularly, and arbitrarily singled-out Hodge as deserving of the death penalty.

On September 10, 2021 a panel of the Sixth Circuit affirmed the denial of the writ by the district court. A footnote in that opinion stated: "The Honorable Deborah L. Cook participated in this decision before she took inactive senior status on August 27, 2021." *See Hodge v. Jordan*, 6th Cir. Case No. 17:6032, Doc. 61-2 (Sept. 10, 2021). However, as argued in Hodge's petition for rehearing *en banc*, *see Hodge v. Jordan*, 6th Cir. Case No. 17:6032, Doc. 64 (Oct. 15, 2021), Judge Cook—who cast the decisive vote in the 2-1 majority and was an active senior judge when she participated in the oral argument—had assumed inactive senior judge status before the opinion was released. *See Robinson v. Sullivan*, 905 F.2d 1199, 1200 (8th Cir. 1990).

Two months later, on November 18, 2021, while Hodge's petition for *en banc* rehearing was pending, the Court entered an Order stating that the footnote in the

[2] The death penalty still suffers from what Justice Breyer described as "constitutional defects": serious unreliability, arbitrariness in application, and unconscionably long delays. *Glossip v. Gross*, 576 U.S. 863, 909 (2015) (Breyer, J., dissenting). In fact, statistics show that the death penalty is disproportionately and arbitrarily charged in a handful of counties, in a handful of states, on a handful of defendants—usually racial minorities or those with intellectual or other mental disabilities. *Id*. at 909–24.

Court's Opinion of September 10, 2021, which indicated that Judge Cook had assumed inactive status on August 27, 2021, "was inaccurate." The Order directed that "an amended opinion—without the erroneous footnote—will issue on this date." But an amended opinion did not issue on November 18, 2021. Instead, the docket reflects that the Opinion dated September 10, 2021, was merely "corrected" by removing the footnote. *See Hodge v. Jordan*, 6th Cir. Case No. 17-6032, Doc. No. 61 *compare* (Addendum A, p. 1, Docket No. 61-2, Original Opinion 9/10/21) *with* (Addendum B, p. 1, Docket No. 66, Corrected Opinion 11/18/21).

Then, in February 2024, a reconstituted panel of the Sixth Circuit issued a superseding opinion, granting habeas relief on Hodge's ineffective assistance of counsel claim. The panel found, in relevant part, that the "Kentucky Supreme Court applied a standard of prejudice that is contrary to established Supreme Court precedent, [that] counsel's failure to present mitigation evidence was constitutionally deficient, and there is reasonable probability that counsel's failures affected the outcome of Hodge's sentencing. . ." *Hodge v. Jordan*, 95 F.4th 393, 396 (6th Cir. 2024). Perhaps urged by Judge Siler's dissent criticizing the workings of the court, or perhaps taking up the advice of this Court, *Shoop v. Cunningham*, 143 S. Ct. 37* (Nov. 14, 2022) (Thomas, J., dissenting), the Circuit Court granted the Commonwealth's petition for *en banc* hearing and reversed. *Hodge v. Plappert*, 136 F.4th 648 (6th Cir. 2025). To date, the Sixth Circuit has offered no explanation for the "erroneous footnote."

Hodge's death sentence was affirmed, and then reversed, and then affirmed

because he lost the judicial lottery. The outcome is not the result of the functioning of a healthy judicial system, where appellate courts provide a system of checks "against the random or arbitrary imposition of the death penalty," *Gregg*, 428 U.S. at 206, but rather, the functioning of an arbitrary death penalty jurisprudence that depends more on geography and judicial lottery than the facts and law. As a result, Hodge's death sentence has been rendered unconstitutional because of the selective, irregular, and arbitrary way the Sixth Circuit has imposed it.

This Court has had previous occasion to invalidate Hodge's death sentence and chose not to do so. *See Hodge v. Kentucky*, 133 S. Ct. 1056 (2012) (Sotomayor, J., dissenting). And even if this Cout is inclined to deny Hodge's petition for certiorari on the same grounds—namely, AEDPA deference—this Court must address the blatant and biased disregard shown by the Sixth Circuit in meting out the most solemn and final of penalties. *See Furman*, 408 U.S. at 289 (Marshall, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself."); *Gregg*, 428 U.S. at 188 ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty. . . it [can] not imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."). The Sixth Circuit's handling of this case highlights the arbitrariness with which the death penalty is administered. For those reasons, the holding of the *en banc* Sixth Circuit violates Hodge's Eighth Amendment rights and must be reversed.

II. The Sixth Circuit's opinion affirming Hodge's death sentence is disproportionate to the sentences meted out to similarly situated capital prisoners according to precedent from this Court and the Sixth Circuit in violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The Eighth Amendment prohibits the imposition of excessive bail and fines, and the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. Together, these clauses "direct[ ] [courts] to measure proportionality in light of longstanding prior punishment practices." John F. Stinneford, "The Original Meaning of 'Cruel'," Georgetown Law Journal Vol. 105:441, 473 (2017). *See Solem v. Helm*, 463 U.S. 277, 284 (1983) ("The final clause prohibits not only barbaric punishments, but also sentences are disproportionate to the crime committed."). As the Court in *Solem* explained, "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). No less an authority than Blackstone considered the "cruel and unusual punishments" clause to prohibit excessive or disproportionate fines and prison sentences. Stinneford at 477 (citing 5 William Blackstone, Commentaries *378).

In addition to the selective, irregular, and arbitrary way the Sixth Circuit affirmed Hodge's death sentence, that decision is also unconstitutional because it is disproportionate to the outcomes of similarly situated capital prisoners both before this Court, and before the Sixth Circuit itself. For that reason, the Sixth Circuit's opinion violates the Eighth and Fourteenth Amendments. *See Furman*, 408 U.S. at 249 (Douglas, J., concurring) ("There is increasing recognition of the fact that the

basic theme of equal protection is implicit in 'cruel and unusual.'"); *id*., at 255 ("In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect.").

In this case, the Kentucky Supreme Court's "brief discussion of the weight and impact of Hodge's mitigation evidence reasonably suggests that its prejudice determination flowed from its legal errors." *Hodge v. Kentucky*, 568 U.S. 1056, 1062 (2012) (Sotomayor, J., dissenting). Hodge had "the kind of troubled history [the Supreme Court] has declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535. "Evidence of a difficult family history and of emotional disturbance is relevant to capital sentencing." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (It is "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future."). *See Cauthern v. Colson*, 736 F.3d 465, 486-87 (6th Cir. 2013) ("It is clearly established law that evidence of abuse is significant to a jury's determination of moral culpability.").

But Hodge's jury did not hear evidence of his childhood, "which was marked by extreme poverty, sustained physical violence, and constant emotional abuse," *Hodge v. Commonwealth*, 2009-SC-000791-MR , 2011 WL 3805960, at *8 (Ky. Aug. 25, 2011); or that his stepfather was a "monster" who would regularly rape and beat Hodge's mother, including at least once causing a miscarriage; or that his stepfather "was

more violent and abusive towards [Hodge] than any other person in the house"; or that Hodge was "regularly beaten with a belt and metal buckle. . . kicked, thrown against walls, and punched"; or that on one occasion he "rubbed Hodge's face in his own feces," and "made [Hodge] watch while he brutally killed the boy's dog"; or that "the violence in Hodge's childhood home was ruinous to his development and compounded by the physical abuse occurring at the Tennessee residential facility"; or that Hodge was diagnosed with PTSD which "was present at the time of Hodge's crimes and trial." *Id.* at *9–*11. Instead of presenting all that mitigation—or any of it—Hodge's counsel prepared a two-sentence stipulation that was read to the jury.

In *Thornell*, this Court reaffirmed its longstanding precedent that in cases where trial counsel introduces "little, if any, mitigation evidence at the original sentencing," trial counsel's ineffectiveness is prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). In support of that principle, the Court cited *Porter v. McCollum*, 558 U.S. 30 (2009) (*per curiam*), *Williams v. Taylor*, 529 U.S. 362, (2000), *Rompilla v. Beard*, 545 U.S. 374, (2005), and *Wiggins v. Smith*, 539 U.S. 510, (2003). In *Williams*, this Court foudn the state court's prejudice determination "contrary to" *Strickland*'s reasonable probability standard because it "turned on [an] erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 529 U.S. at 397. In *Rompilla* this Court found that the evidence *not* presented during Rompilla's sentencing "add[ed] up to a mitigation case that bears no relation to the few naked please for mercy actually put before the jury. . . ." *Id.* at 393. The Court held that the

mitigation evidence "taken as a whole, 'might well have influenced the jury's appraisal' of Rompilla's culpability. . . and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine the confidence in the outcome' actually reached at sentencing." *Id*. (citing *Strickland*, 466 U.S. at 694). In *Porter v. McCollum*, after finding that this was not a case where the new evidence "would barely have altered the sentencing profile presented to the sentencing judge," *id*. at 41 (citing *Strickland*, 466 U.S. at 700), this Court held that the state court's decision was unreasonable because it "did not consider or unreasonably discounted the mitigation evidenced adduced in the post conviction hearing," *Id*. at 42. *See also id*. at 43 ("[The court also] unreasonably discounted the evidence of Porter's childhood abuse. . . ."). And in *Wiggins*, this Court found that given the "considerable mitigating evidence, there [was] a reasonable probability that [the jury] would have returned with a different sentence," *id*. at 536, and held that the state court's findings on prejudice were "objectively unreasonable" under *Strickland*, *id*. at 529.

Even in the most extreme of these cases, this Court has never found that such a woeful presentation at capital sentencing did not result in prejudice. Neither has the Sixth Circuit. *See Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003) (*en banc* denied) ("In our view, had the available evidence been presented. . . at least one juror would have voted against the death penalty."); *Sowell v. Anderson*, 663 F.3d 783, 795, 797 (6th Cir. 2011) (finding prejudice given the defendant's "nightmarish" childhood, the "atmosphere of violence that permeated his formative years," and "extreme poverty and abuse"; finding of prejudice was "squarely in line with the Supreme Court

decisions addressing ineffective assistance during the penalty phase of a capital trial"); *Foust v. Houk*, 655 F.3d 524, 527–28 (6th Cir. 2011) (*en banc* denied) ("powerful aggravating circumstances. . . do not preclude a finding of prejudice."); *Goodwin v. Johnson*, 632 F.3d 301, 328–29 (6th Cir. 2011) (the jury "heard almost nothing that would humanize [Goodwin] or allow them to accurately gauge his moral culpability"; "Our own circuit precedents also support our finding that Goodwin was prejudiced by his counsel's failure to present this mitigating evidence.") (citing *Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008); *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008); *Johnson v. Bagley*, 544 F.3d 592 (6th Cir. 2008); *Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007); *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005)). *See also Phillips v. Bradshaw*, 607 F.3d 199 (6th Cir. 2010).

When the holding of a circuit court in a capital case is so clearly outside of the judicial norm and results in a disproportionate sentence, it violates the Eighth Amendment. *See Solem*, 463 U.S. at 284. The Sixth Circuit's opinion also violates the Equal Protection Clause of the Fourteenth Amendment because it is disproportionate compared to similarly situated capital prisoners before that Court, and this one. *See Furman*, 408 U.S.at 249 (Douglas, J., concurring).

III. The Sixth Circuit ignored this Court's holding in *Andrew v. White*, 604 U.S. 86, 92 (2025), that when this Court "relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA" to affirm Hodge's death sentence.

(a) The legal principle that mitigation evidence that does not explain the crime can have enough weight for other purposes to outweigh evidence of a particularly brutal crime is clearly established federal law under AEDPA.

The purpose of mitigation evidence is for "the jury to give 'a reasoned *moral* response to the defendant's background, character, and crime.'" *Penry v. Lynaugh*, 487 U.S. 164, 184 (1988) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in judgment)). A defendant is prejudiced by the ineffective assistance of counsel at the sentencing phase of a capital case, if "there is a reasonable probability that, absent [counsel's] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). "Sentencer," as in this case, includes an "appellate court, to the extent it independently reweighs the evidence." *Id.*

"Mitigating evidence unrelated to [aggravation] may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor*, 529 U.S. 362 (2000). For example, in *Williams*, the defendant violently beat his victim with a mattock as he drunkenly lay on the bed, gasping for breath, and the defendant had been previously convicted of armed robbery, burglary, and grand larceny. *Id.* at 368 n. 1. Still, on review, this Court noted that the state court failed to evaluate the totality of the available mitigation evidence or accord it appropriate weight including evidence that Williams "had been severely and repeatedly beaten by his father" and "committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home)." *Id.* at 395. This was mitigating evidence the state court had failed to consider that "may alter the jury's selection of penalty, even if it does

not undermine or rebut the prosecution's death-eligibility case." *Id*. at 397-98. Similarly, in *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) this Court held that a Maryland death-row inmate, who was found guilty of drowning a seventy-seven-year-old woman in her bathtub, was prejudiced by counsel's failure to produce evidence of a childhood characterized by extreme neglect and physical and sexual abuse. Despite the highly aggravating evidence of the crime, this Court held that Wiggins's extremely difficult childhood, along with other mitigating evidence, " 'might well have influenced the jury's appraisal' of Wiggins' moral culpability" despite little apparent connection between Wiggins's childhood and the crime he committed. *Id*. at 398 (quoting *Williams*, 529 U.S. at 398). In *Rompilla v. Beard*, 545 U.S. 374 (2005), the defendant stabbed, set the victim on fire, tortured the victim and he had a prior rape conviction. *Rompilla v. Horn*, 355 F.3d 233, 236–38 (3rd Cir. 2004.) Like in this case, Rompilla's counsel failed to investigate and present mitigating evidence of parental alcoholism, parental violence, physical abuse, a terrifying household environment, the defendant's mental illness, and his impairment at the time of the offense. *Rompilla*, 545 U.S. at 392. Despite the brutality of the crime, and mitigation evidence that did nothing to explain the crime, this Court reversed denial of relief because "the jury never heard any of this" and the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" decided by the jury. *Id*. at 392-93. (citations omitted).

When the Supreme Court "relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA." *Andrew v. White*, 604 U.S. 86, 92 (2025). *Williams, Wiggins,* and *Rompilla* "all relied on the legal principle that mitigation evidence that does not explain the crime can have weight for other purposes, and, indeed, can have enough weight to outweigh evidence of a particularly brutal crime. And all three opinions were rendered before the Kentucky Supreme Court decided Hodge in 2011. Thus, "their holdings constitute clearly established federal law for the purposes of (a reviewing court's) AEDPA analysis." *Hodge v. Plappert*, 136 F.4th at 675 (White, J., dissenting).

(b) The Kentucky Supreme Court applied a rule that contradicts the governing law set forth by this Court regarding prejudice in the capital sentencing context.

Ordinarily, in assessing a constitutional claim, a state court decision is entitled to deference under 28 U.S.C. § 2254(d)(1)[3]. In this case, § 2254(d)(1) deference should not apply because the Kentucky Supreme Court's refusal to consider mitigation evidence that did not explain the crimes in this case, but had enough weight to outweigh evidence of a particularly brutal crime, is contrary to clearly established federal law as established by *Williams, Wiggins,* and *Rompilla.*

[3] A federal court will grant habeas relief only if a state court decision was "contrary to clearly established Federal law," or "involved an unreasonable application of clearly established Federal law." *See Williams v. Taylor*, 529 U.S. 362, 404–05, 412 (2000. A decision is "contrary to" clearly established federal law when the state court "applies a rule that contradicts the governing law set forth in" Supreme Court precedent, or when it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from that precedent. *Id.* at 405–06, 413.

Hodge's jurors did not hear mitigating evidence "based on his childhood, which was marked by extreme poverty, sustained physical violence, and constant emotional abuse." *Hodge*, 2011 WL 3805960, at *3. Or that Hodge's PTSD "impaired his ability to think, exercise sound judgement, and control his behavior," and made "it difficult for Hodge to fully appreciate the wrongfulness of his conduct at the time of the crime." *Hodge v. White*, 2016 E.D. Ky., WL 4425094 at *29. In fact, the jury did not hear any mitigation at all. Instead, they were read a woefully inadequate stipulation that Hodge "had a wife and three children, a public-job work record, and a home in Tennessee." *Id*. at *7–*8.

Under *Strickland*'s test, the mitigation Hodge presented in post-conviction was "sufficient to undermine the confidence in the outcome actually reached at sentencing." *Williams*, 529 U.S. at 393 (citing *Strickland*, 466 U.S. at 694). But the Kentucky Supreme Court refused to consider the unpresented mitigation evidence—beyond explaining the crimes.

> "Perhaps this information may have offered insight for the jury, providing some *explanation* for the career criminal he later became. If it had been admitted, the PTSD diagnosis offered in mitigation might have *explained* Hodge's substance abuse, or perhaps even a crime committed in a fit of rage as a compulsive reaction. But it offers virtually *no rationale* for the premeditated, cold-blooded murder and attempted murder of two innocent victims who were complete strangers to Hodge. Many, if not most, malefactors committing terribly violent and cruel murders are the subjects of terrible childhoods.

Hodge, 2011 WL 3805960, at *5.

The majority and concurring opinions of the Sixth Circuit dismissed the state court's refusal to consider the mitigation evidence unless it explained the crime as

merely reweighing the evidence, but in reality, it added an additional requirement to the *Strickland* prejudice test. A state court is not permitted to add an extra legal requirement to the Supreme Court's well-established *Strickland* test. *Williams*, 529 U.S. at 392-94. Mitigation evidence "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id*. at 397–98. The state court decision is plainly contrary to *Strickland* and the legal principles relied upon by this Court is *Williams*, *Wiggens,* and *Rompilla*.

Under the proper *Strickland* test, i.e., considering the totality of the evidence before the sentencer by evaluating "the strength of all the evidence" and comparing "the weight of aggravating and mitigating factors," *Thornell*, 602 U.S. at 164, 171–72, the mitigation Hodge presented in state post-conviction was "sufficient to undermine the confidence in the outcome actually reached at sentencing." *Williams*, 529 U.S. at 393 (citing *Strickland*, 466 U.S. at 694). And in any event, the evidence that Hodge's PTSD "impaired his ability to think, exercise sound judgement, and control his behavior," and made "it difficult for Hodge to fully appreciate the wrongfulness of his conduct at the time of the crime," *did* provide an explanation to the jury. *Hodge*, 2016 E.D. Ky., WL 4425094 at *29.

This Court should grant Hodge's petition because the Sixth Circuit's failure not to apply this Court's holding of *Andrew v. White* to the legal principle relied upon by this Court in *Williams*, *Wiggins,* and *Rompilla* will not only deny Hodge his right to affective assistance of counsel, but also endanger the same constitutional right of

all petitioners litigating ineffective assistance of counsel claims in the capital sentencing context with Sixth Circuit.

CONCLUSION

In consideration of the foregoing, Mr. Benny Hodge submits that the petition for certiorari should be granted, the order of the Sixth Circuit Court of Appeals vacated, and that the writ issue.

Respectfully submitted,

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