No. 25-6179

In the Supreme Court of the United States

BENNY LEE HODGE,

Petitioner,

v.

LAURA PLAPPERT, Warden,

Respondent.

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

CAPITAL CASE

BRIEF IN OPPOSITION

Office of the Kentucky
Attorney General
1024 Capital Center Drive
Suite 200
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

**Counsel of Record*

MATTHEW F. KUHN*
Solicitor General

JOHN H. HEYBURN
Principal Deputy
Solicitor General

JACOB M. ABRAHAMSON
Deputy Solicitor General

December 9, 2025

QUESTIONS PRESENTED

CAPITAL CASE

Over 40 years ago, Petitioner Benny Hodge murdered 20-year-old Tammy Acker and left her father Dr. Roscoe Acker for dead in Letcher County, Kentucky. A jury and judge sentenced him to death for the murder. His direct appeal was unsuccessful. And his state and federal attempts at securing post-conviction relief likewise failed. Most recently, the en banc Sixth Circuit affirmed the denial of his federal habeas petition. Now seeking certiorari from that judgment, Hodge presents the following questions:

1. Did the Sixth Circuit's decision to rehear Hodge's appeal en banc violate the Eighth Amendment?

2. Did the Sixth Circuit's decision to affirm the judgment denying Hodge's habeas petition violate the Eighth and Fourteenth Amendments?

3. Was the Sixth Circuit correct to hold, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that the Kentucky Supreme Court reasonably applied this Court's precedents to conclude that Hodge suffered no prejudice because of unpresented mitigation evidence during the penalty phase of his trial?

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INTRODUCTION

In 1986, a Kentucky jury and judge sentenced Benny Hodge to death for the brutal murder of 20-year-old Tammy Acker. At sentencing, Hodge presented only a two-sentence stipulation as mitigation evidence. He now claims that his trial counsel was ineffective for not presenting additional mitigation evidence from his childhood. In state post-conviction proceedings, the Kentucky Supreme Court weighed the evidence presented to the jury with the new evidence and decided that Hodge did not suffer any prejudice. The Sixth Circuit reviewed that decision under the double deference required by *Strickland v. Washington* and AEDPA, and held that the Kentucky Supreme Court's decision was "within the bounds of reasonableness under AEDPA deference." Pet. App. A 11.* That decision was faithful to AEDPA and this Court's precedents applying it, so the Court has no reason to review it. Indeed, Hodge does not suggest that the Sixth Circuit's decision is in tension with any other circuit's application of AEDPA.

That should make Hodge's petition an open-and-shut denial. Perhaps aware of this, Hodge offers two brand-new Eighth and Fourteenth Amendment arguments: First, that the en banc process below—which he does not suggest violated the Federal Rules of Appellate Procedure—singled him out for unique punishment. And second,

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* Hodge's appendices comprise four separate PDFs, without continuous page numbering. Warden Plappert thus refers to them by their assigned letter, with citations to internal page numbers: Pet. App. [Letter] [Internal Page Number].

that the Sixth Circuit's application of AEDPA deference led to a disproportionate sentence. Both arguments level novel attacks on the appellate process that every habeas petitioner is afforded. Neither has any basis in the constitutional text or this Court's precedents. And Hodge raises both for the first time at this Court, after the appellate process ended unfavorably for him.

Hodge brutally murdered Tammy Acker over 40 years ago. He has sought post-conviction relief at every level of the Kentucky and federal judiciary, all without success. The Sixth Circuit was demonstrably correct to affirm the denial of Hodge's habeas petition. And Hodge's eleventh-hour attempts to show otherwise should not delay finality of his case. For these reasons and as discussed below, the Court should deny his petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Over 40 years ago, Benny Hodge and two accomplices murdered 20-year-old Tammy Acker and left her father Dr. Roscoe Acker for dead. Pet. App. A 2. His crimes were "'heinous,' 'brutal,' 'vicious,' 'calculated,' and 'exceedingly cold-hearted.'" *Id.* (collecting cases).

Hodge, with Roger Epperson and Donald Bartley, planned a robbery with the intent to leave no witnesses. Dr. Acker, the local doctor in Fleming-Neon, Kentucky, was known to keep a large amount of cash at his home. *Id.* That money, stored in a safe, was the life savings he and his late wife had set aside over 40 years of marriage.

Id. Hodge and his accomplices wanted that money. *Id.* So they planned "a white collar ruse" to access Dr. Acker's house. *Id.* And they did not intend to leave any witnesses—as "Hodge later told his cellmate," "it was 'the smart thing to do' to 'kill all witnesses when you commit any crime so nobody can testify against you.'" *Id.*

The ruse began during the evening of August 8, 1985. Tammy, who was a college student, was home in the mountains of eastern Kentucky to care for her grieving father after her mother died, and was set to head back to school the next day. *Id.* She answered the door to find two men (Hodge and Bartley) claiming to be FBI agents. *Id.* They looked the part: they "wore suits and appeared neatly groomed," carrying "a briefcase, a .41 magnum revolver, a .38 police revolver, badges, and IDs." *Id.* They claimed that "they needed to ask Dr. Acker 'a few questions' about someone they were investigating." *Id.* But Dr. Acker was not home, so they left with a promise to return later that evening. *Id.* The reunited trio retreated to a nearby road, situated above the house, where they watched for Dr. Acker to return. *Id.*

Once Dr. Acker was home, Hodge and Bartley renewed their scheme. *Id.* This time, Tammy answered the doorbell via intercom and again heard two purported FBI agents. *Id.* Dr. Acker met them outside, where they sought "a written statement about a previous business acquaintance." *Id.* He eventually agreed and, "after some coaxing by Hodge," let them inside to sign the statement with Tammy as a witness. *Id.*

The men quickly dropped their act. Hodge pulled a gun, and Bartley grabbed Tammy. Pet. App. A 2–3. Hodge held Dr. Acker at gunpoint in the kitchen and ordered Bartley to tie up Tammy in a back room. *Id.* Tammy "begged" Bartley, "'please don't hurt my Dad. My mother has just died.'" Pet. App. A 3. He left her bound and gagged, face down on the floor, and returned to the kitchen to bind Dr. Acker and cover his head. *Id.* With Dr. Acker and Tammy restrained, Hodge and Bartley let Epperson into the home. *Id.* The men "proceeded to 'ransack[]' the Acker home until finding the safe." *Id.* But they couldn't open it themselves—even after forcing Dr. Acker to reveal its combination with "a blow to the ribs"—"[s]o they dragged Dr. Acker to the vault and forced him to [open] it." *Id.* They took all its contents: "stacks of cash" totaling $1.9 million, guns, and jewelry. *Id.*

Dr. Acker and Tammy remained bound, with their heads covered. *Id.* But the men decided not to leave any witnesses. *Id.* Hodge agreed to kill Tammy, and Epperson ordered Bartley to kill Dr. Acker. *Id.* Hodge returned from his initial attempt and said, "she's not dead." *Id.* So Epperson handed him a butcher knife, and Hodge returned to Tammy. *Id.* He stabbed her "at least 10 times." *Id.* According to a pathologist, Hodge used a "considerable amount of force" to kill Tammy. *Id.* He "later told Epperson the knife had gone 'all the way through her to the floor.'" *Id.* (citation omitted). "Tammy died of hemorrhage from the stab wounds." *Id.*

Meanwhile, Bartley strangled Dr. Acker in the kitchen. *Id.* "He used the electrical cord from a curling iron to choke the physician until he lost consciousness." *Id.* The men thought Dr. Acker was dead. *Id.* But they were mistaken; Dr. Acker survived the attempted murder and follow-on heart attack. *Id.* He awoke "to experience the horror of finding Tammy lifeless in the corner of her room with a 'butcher knife protruding out of her back.'" *Id.* He knew she was dead and "consoled himself by saying that 'she was in God's hands' now." *Id.*

The trio fled to Florida and began "a spending spree with Dr. Acker's money . . . buying expensive vehicles and luxury goods." *Id.* Hodge later bragged "that he had stacked some of the stolen cash very high on a bed to have sex with a woman on top of it." *Id.* Thankfully, their spree was short lived. "FBI agents, with the help of a SWAT team, arrested the three fugitives." *Id.* Law enforcement seized stolen cash, jewelry, and weapons, along with items the group had purchased with Dr. Acker's money. Pet. App. A 3–4. They were brought back to Letcher County to stand trial. Pet. App. A 4.

2. At a consolidated trial for Epperson and Hodge, a Kentucky jury heard the above facts from Dr. Acker, a now-cooperating Bartley, and several other witnesses. *Id.* The jury convicted Hodge and Epperson of Tammy's murder, Dr. Acker's attempted murder, first-degree robbery, and first-degree burglary. *Id.* Before imposing a sentence, the jury heard little additional evidence. "Hodge's mitigation case at the

penalty phase consisted of just a two-sentence stipulation: he had 'a loving and supportive family—a wife and three children,' and 'a public job work record.'" *Id.* (citation omitted). The jury recommended a death sentence for Tammy's murder and 60 years in prison for the other crimes. *Id.*

Kentucky's courts rejected Hodge's direct appeal and post-conviction claims. Pet. App. A 4–5. The only of those claims relevant here is Hodge's assertion that his lawyer provided ineffective assistance at the penalty phase. Pet. App. A 5. In 2011, the Kentucky Supreme Court, after weighing "'the totality of evidence before Hodge's sentencing jury, including the proposed mitigation evidence,' . . . concluded 'that there exists no reasonable probability that the jury would not have sentenced Hodge to death' considering the 'heinous nature' of his crimes, and the fact that the 'mitigation evidence' included 'damaging evidence' about his criminal history." *Id.* (citation omitted). This Court, over Justice Sotomayor's dissent who would have remanded for further consideration, denied Hodge's petition for a writ of certiorari from that judgment. *Id.*

3. Without success in the Kentucky courts, Hodge filed a federal habeas petition in the Eastern District of Kentucky. *Id.* Applying AEDPA, the district court denied each of Hodge's 29 claims. Pet. App. A 5–6. It also granted a certificate of appealability for three claims—ineffective assistance of counsel, jury tampering, and jury bias. Pet. App. C 58.

A panel of the Sixth Circuit originally affirmed the denial of habeas relief. Pet. App. A 6. But before the panel decided Hodge's rehearing petition, one member of the panel took inactive status, after which a new judge was assigned. *Hodge v. Jordan*, 95 F.4th 393, 403 (6th Cir. 2024) (Siler, J., dissenting). That newly constituted panel reversed itself in a superseding opinion on rehearing, granting Hodge habeas relief on his ineffective-assistance claim. Pet. App. A 6. On rehearing en banc, the full Sixth Circuit, by a 14 to 4 vote, affirmed the denial of Hodge's habeas petition. Relevant here, it held that "the Kentucky Supreme Court articulated the correct legal standard" and "provided adequate reasoning" under AEDPA. Pet. App. A 10. Because the state court "weighed Hodge's missing mitigating evidence against aggravating evidence of Hodge's 'particularly depraved and brutal' crimes to conclude that the sentencing jury would not have spared Hodge the death penalty," the Sixth Circuit concluded that "the Kentucky Supreme Court acted within the bounds of reasonableness under AEDPA deference." Pet. App. A 11 (citation omitted). And it rejected Hodge's argument that the Kentucky Supreme Court applied "an improper nexus requirement," reasoning that the state court's statement that Hodge's mitigation evidence failed to explain his brutal crime "simply put[] a period on [its] earlier analysis." Pet. App. A 12. This petition followed.

ARGUMENT

Hodge has reached the very end of his decades-long effort to undo the decision of a Kentucky jury and judge. After all this judicial process, he now takes the position that he is the victim of an unfair process. But Hodge cannot escape the facts: He was convicted and sentenced in 1986. In the nearly 40 years since, he has taken both his direct and postconviction challenges through Kentucky's Court of Justice, culminating in this Court's denials of review. *Hodge v. Kentucky*, 502 U.S. 1037 (1992); *Hodge v. Kentucky*, 568 U.S. 1056 (2012). And a federal district court heard 29 claims for federal habeas relief, three of which were certified for appeal. His appeal resulted in two full-length decisions from three-judge panels after briefing and argument, followed by briefing and argument before the en banc Sixth Circuit. The full Sixth Circuit's decision to deny habeas relief is the latest stop on that long road. This Court should make it the last one.

Hodge's only preserved challenge is to his trial counsel's failure to introduce additional mitigation evidence during the penalty phase of his trial. The appropriate inquiry is straightforward under AEDPA: Was the Kentucky Supreme Court's conclusion that Hodge was not prejudiced by the unpresented evidence unreasonable? Pet. App. A 8. The Sixth Circuit, by a lopsided vote, held that it was not. Hodge's arguments to the contrary depend on interpreting a single sentence in the Kentucky

Supreme Court's unpublished decision—hardly the stakes that warrant a grant of certiorari.

Likely recognizing as much, Hodge resorts to unpreserved arguments in an effort to skirt AEDPA's requirements. Both arguments suggest that the Sixth Circuit's en banc opinion somehow caused constitutional violations warranting reversal. The first claims that the en banc process singled out Hodge for punishment, and the second claims that the Sixth Circuit's opinion resulted in a disproportionate sentence. Both unpreserved arguments are altogether untethered from existing law and, perhaps more importantly, from the procedural realities of Hodge's habeas appeal. Neither remotely justifies certiorari.

I. Hodge offers no reason to review the Sixth Circuit's central holding.

On the merits, Hodge elects to challenge only the Sixth Circuit's resolution of his ineffective-assistance claim. He summarizes (at 22) his primary objection to the Sixth Circuit's analysis: its alleged "failure not [sic] to apply this Court's holding of *Andrew v. White* to the legal principle relied upon by this Court in *Williams*, *Wiggins*, and *Rompilla*." But a closer look at Hodge's claim makes clear that the Sixth Circuit got his case right.

To start, all agree that AEDPA governs Hodge's challenge to the Kentucky Supreme Court's decision to reject his ineffective-assistance claim. That means relief

"shall not be granted" "unless" the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts" introduced in state court. 28 U.S.C. § 2254(d). Much like he did below, Hodge purports to raise a contrary-to challenge, but in reality he simply disagrees with how the Kentucky Supreme Court applied *Strickland*. As Hodge tells it, he disputes (at 22) whether the state court applied "the proper *Strickland* test."

There can be no doubt that the Kentucky Supreme Court "applied the correct governing legal principle . . . to the facts of [Hodge's] case." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam) (cleaned up). Kentucky's high court appropriately cited and quoted *Strickland*. Pet. App. B 3. The real question, then, is whether its application of *Strickland* "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). It's not enough "that the state court's decision was 'merely wrong' or 'even clear error'"—AEDPA demands "far more." *Shinn*, 592 U.S. at 118 (cleaned up).

Hodge can show no such grievous error. The Kentucky Supreme Court's 12-paragraph analysis is more than sufficient to overcome an AEDPA challenge. As the Sixth Circuit described, the state court "examined all of Hodge's proposed mitigating evidence" and "analyzed the mitigating evidence and testimony from Hodge's mother,

sisters, and two psychologists." Pet. App. A 10. It even criticized the trial court for understating the severity of Hodge's childhood abuse. *Id.* Yet it also "recognized that Hodge's supposed extenuating proof 'also included the damaging evidence of his long and increasingly violent criminal history, his numerous escapes from custody, and the obvious failure of several rehabilitative efforts.'" *Id.* (citation omitted).

Next, as *Strickland* demands, "the Kentucky Supreme Court weighed the mitigating evidence against the aggravating 'heinous nature of Hodge's crime.'" *Id.* (citation omitted). It recounted the "direct evidence" presented "against Hodge in damning fashion": the vulnerability of the victims, the careful plans, and the horror of the violent murder Hodge himself committed. *Id.* "His crimes 'were not just brutal and vicious, but calculated and exceedingly cold-hearted.'" *Id.* (citation omitted). Indeed, "Hodge had no regrets: he enjoyed the fruits of his crimes." Pet. App. A 11. So the Kentucky Supreme Court, after independently weighing Hodge's new evidence and the evidence presented at trial, "determined the unpresented mitigating evidence was not enough to overcome the aggravating facts of Hodge's odious conduct." *Id.* Its "conclusion was not so objectively wrong under U.S. Supreme Court precedent to be beyond any possibility for fairminded jurists to disagree." *Id.*

Hodge disagrees with the Kentucky Supreme Court's balancing, but he has little to say about the Sixth Circuit's actual holding under AEDPA. Instead, he argues (at 20) that AEDPA deference "should not apply" at all. His main objection to AEDPA

deference (at 21–22) is that the Kentucky Supreme Court allegedly applied a nexus requirement while applying *Strickland*. In making this point, Hodge takes issue with a sentence, buried within the Kentucky Supreme Court's analysis, stating that Hodge's mitigation evidence "offers virtually no rationale for the pre-meditated, cold-blooded murder and attempted murder of two innocent victims who were complete strangers to Hodge." Pet App. B 4.

At bottom, Hodge's argument against AEDPA deference asks the Court to "mischaracteriz[e]" this sentence from the Kentucky Supreme Court's opinion, despite this Court's admonition against doing so when a state court "expressed and applied the proper standard for evaluating prejudice." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (per curiam). The correct approach under AEDPA "demands that state-court decisions be given the benefit of the doubt." *Id.* That's how the Sixth Circuit treated the Kentucky Supreme Court's opinion here: it read the decision as a whole and found that "[t]he paragraph now under scrutiny simply puts a period on the Kentucky court's earlier analysis." Pet. App. A 12. It was correct to adopt that reading. An independent assessment of the mitigating and aggravating evidence necessarily involves considering the weight of the mitigating evidence. Indeed, while Hodge's case was pending before the full Sixth Circuit, this Court made it crystal clear that a sentencer can simply find mitigating evidence "unpersuasive." *See Thornell v. Jones*, 602 U.S. 154, 164–65 (2024). More to the point, "where the aggravating factors greatly

outweigh the mitigating evidence, there may be no 'reasonable probability' of a different result." *Id.* at 165. That sentence captures well the Kentucky Supreme Court's view of the evidence here.

Relying on the dissent below, Hodge also claims (at 22) that this Court's recent decision in *Andrew v. White*, 604 U.S. 86 (2025) (per curiam), means that the Sixth Circuit erred by not following *Williams*, *Wiggins*, and *Rompilla*—three fact-driven cases. This contention fails several times over. For one, *Andrew*—a summary reversal—broke no new ground in describing what counts as a holding under AEDPA. *See Andrew*, 604 U.S. at 92 (citing preexisting caselaw). And nothing in *Andrew* suggests that an AEDPA court must blindly adopt the outcomes of this Court's fact-driven decisions applying *Strickland* to different sets of mitigating and aggravating evidence. Instead, the reviewing court's primary task is applying "the important 'double deferential' standard of *Strickland* and AEDPA" to the state court's prejudice analysis. *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011) (citations omitted). *Williams* and *Rompilla*, two of Hodge's favored cases, "offer no guidance" on that question, as this Court has held. *Id.* And the Sixth Circuit rightly concluded that *Wiggins*, which involved "a defendant who had no aggravating factors or history of violence," is readily distinguishable from the aggravating history the Kentucky Supreme Court weighed here. Pet App. A 11.

Lost in all of Hodge's arguments is the Sixth Circuit's bottom-line conclusion: "Regardless of the significance of Hodge's childhood abuse, controlling Supreme Court precedent does not render it unreasonable for the Kentucky Supreme Court to find no prejudice here, given its view that the aggravating factors overwhelmingly pointed to imposing the death penalty." *Id.* Hodge of course continues to disagree with the Kentucky Supreme Court's balancing. Some judges might, too. *See id.* (applying ADEPA deference despite the reality that some judges "would have reached a different conclusion in the first instance"). In fact, earlier in this case without the strictures of AEDPA, Justice Sotomayor harbored concerns. *Hodge*, 568 U.S. at 1056 (Sotomayor, J., dissenting from denial of cert.). But mere disagreement with the state court's conclusion does not an AEDPA violation make.

All in all, Hodge's AEDPA argument reduces to how to construe a single sentence in an unpublished decision of the Kentucky Supreme Court. Even if doubts exist about the Sixth Circuit's 14–4 decision, an AEDPA dispute about how to read a state court decision that is binding on only a single inmate comes nowhere close to satisfying this Court's high standard for granting certiorari.

II. Hodge cannot escape the constraints of AEDPA by attacking the appellate process.

Lacking a compelling reason to justify this Court's review, Hodge also raises two unpreserved issues. He attempts to tie both remaining arguments to the appellate procedure he was afforded after the district court denied habeas relief. He claims (at 10)

that the Sixth Circuit, by rehearing his appeal en banc, "selectively, irregularly, and arbitrarily singled-out Hodge as deserving of the death penalty." And he adds (at 13) that "the Sixth Circuit's opinion violates the Eighth and Fourteenth Amendments" "because it is disproportionate to the outcomes of similarly situated capital prisoners." Hodge made neither argument until now. The Court has no reason to review either of Hodge's procedural arguments—they are unpreserved and unserious.

A. Hodge's arguments are unpreserved.

Start with the vehicle problems. Hodge raises these challenges—which ultimately argue that a rules-driven process and the resulting opinion are unconstitutional—for the first time before this Court. That is frowned upon in "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (citation omitted). Especially so for a habeas appeal, where federal courts must enforce AEDPA's requirements that a habeas petitioner raise only issues that have been exhausted in state court, 28 U.S.C. § 2254(b)(1), and certified for appeal, 28 U.S.C. § 2253(c). *See also Shinn v. Ramirez*, 596 U.S. 366, 377–79 (2022) (describing the "strict rules requiring prisoners to raise all of their federal claims in state court before seeking federal relief"); *Buck v. Davis*, 580 U.S. 100, 115 (2017) ("A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a [certificate of appealability] from a circuit justice or judge." (citation omitted)).

Of course, Hodge attempts to cast his arguments as incapable of airing until now by directing his attacks against (at 12) "the Sixth Circuit's handling of this case" and (at 13) "the Sixth Circuit's opinion." But Hodge had plenty of chances to raise his constitutional arguments below. He could have invoked his new Eighth and Fourteenth Amendments arguments in his petitions for rehearing from the original panel decision, given the footnote issue he now mentions (at 10–11). CA6 Dkt. 64, 72. He could have addressed these constitutional arguments in his opposition to the Warden's petition for rehearing after the superseding opinion, CA6 Dkt. 87, or in his two supplemental en banc briefs, CA6 Dkts. 92, 100. He could have raised the issue during the en banc argument or in a rehearing petition after the full Court ruled. Hodge, however, let this constitutional issue pass without mention at every juncture—until now.

At bottom, Hodge's late-breaking arguments are a challenge to the federal appellate process that every habeas petitioner receives. The possibility that the full Sixth Circuit would rehear his appeal was on the table from the start. *See* 28 U.S.C. § 46(c) (adopted in 1948). Same for the possibility that AEDPA deference might result in the Sixth Circuit affirming the denial of his requested habeas relief. *See* 28 U.S.C. § 2254(d) (adopted in 1996). If Hodge thought this process created an Eighth or Fourteenth Amendment problem, he had to say so much earlier than now. Yet it is telling that Hodge challenges this process only after he is unhappy with its results. Indeed,

Hodge was fine with the en banc process when he twice sought full-court review after the Sixth Circuit's first panel decision. CA6 Dkts. 64, 72.

B. Even if preserved, Hodge's arguments do not warrant this Court's intervention.

Preservation aside, Hodge's procedural arguments are unsound. His key claim—that the Sixth Circuit's decision to rehear his appeal en banc and affirm the denial of habeas relief was itself a constitutional violation—rests on several flawed assumptions, with no support in the Constitution, statutes, procedural rules, or caselaw.

1. To start, Hodge's arguments reflect a deep misunderstanding of the role of the federal courts in his habeas case. His underlying claim is an attack on "the judgment of a State court." 28 U.S.C. § 2254(d). That's why this Court has explained that "[g]ranting habeas relief to a state prisoner 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Brown v. Davenport*, 596 U.S. 118, 132 (2022) (quoting *Harrington*, 562 U.S. at 103). But denying habeas relief is not the same as imposing (or even affirming) that state-court judgment in the first instance. All a denial of habeas relief means is that there was no "extreme malfunction[] in the state criminal justice system[.]" *Harrington*, 562 U.S. at 102 (citation omitted).

Hodge is therefore wrong to say that the Sixth Circuit (at 12) "imposed" or "met[ed] out the most solemn and final of penalties" and (at 13) "affirmed Hodge's death sentence." A Kentucky circuit court sentenced Hodge to death in 1986 on a

Letcher County jury's recommendation, and the Kentucky Supreme Court affirmed that sentence in 1990. Pet. App. C 3. A federal district court, by contrast, denied Hodge's federal habeas petition, and the Sixth Circuit affirmed that denial. Pet. App. A 13–14 ("We are not deciding the issues in this case on direct appeal.").

That distinction destroys any connection between cases about Eighth Amendment proportionality and what happened here. The relevant decisionmaker in a proportionality analysis is the sentencing body—not the federal habeas court. So most of the cases Hodge cites answered, on direct appeal from a state-court judgment, whether an initial sentencing decision was so disproportionate to the crime of conviction that it violated the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (considering "whether Georgia may impose the death penalty on the petitioner in this case"); *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976); *see also O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Fields, J. dissenting) (claiming in dissent that Vermont's sentence for liquor-law violations was too severe).

That's not to say that a petitioner cannot raise proportionality issues in federal habeas. *See Pulley v. Harris*, 465 U.S. 37, 40–41 (1984); *Solem v. Helm*, 463 U.S. 277, 283–84 (1983). But the cases Hodge cites are still directed towards the initial decision to set a punishment. Hodge has not challenged the decision to sentence him to death on proportionality grounds here. Indeed, he admits (at 9–10) that his "death sentence itself may not be arbitrary—any more than any death sentence is arbitrary." If

Hodge's failure to raise this concern until now does not end the proportionality analysis, that admission should do the job. There is simply no connection between the caselaw Hodge cites and the claims he makes about the Sixth Circuit's decision to rehear his case and affirm the denial of habeas relief.

2. Even if the federal habeas proceedings here could trigger Hodge's constitutional concerns, Hodge has the wrong takeaway from them. No mystery surrounds what happened in his appeal. As Judge Siler explained, "one of the original panelists in the majority, Judge Cook, took inactive status, and was replaced by [Judge Clay], who joined the original dissent to create a new majority contrary to the original majority opinion in this matter." *Jordan*, 95 F.4th at 403 (Siler, J., dissenting). The Warden agrees that this process was out of the ordinary—she noted as much in seeking rehearing en banc. CA6 Dkt. 85 at 17. Regardless, the end result was *more*, not *less*, opportunity for Hodge to assert his habeas claims on appeal. Indeed, until the en banc Sixth Circuit granted rehearing, this procedural oddity worked to Hodge's benefit by granting him habeas relief. That's why the Warden exercised her procedural right to seek rehearing en banc from a panel opinion ruling against her—a right Hodge does not (and cannot) dispute, given that he sought en banc relief from the panel's original decision. CA6 Dkts. 64, 72.

Simply put, Hodge cannot seriously claim (at 11–12) that his habeas petition was denied "because he lost the judicial lottery." The full Sixth Circuit, with 18 members, heard his claims, and he lost on the merits, fair and square. The full court did so consistent with the relevant Federal Rules of Appellate Procedure and local rules. His disagreement with that result is, on its own, insufficient to conclude that the process leading to it was biased against him. *See Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (explaining that "adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are deigned to advance").

3. Finally, Hodge offers no support for his argument (at 17) that a federal court can violate the Eighth or Fourteenth Amendments with a holding "outside of the judicial norm." The way to attack an erroneous holding is to contest it on appeal, not to say the holding itself violates the Constitution. In arguing to the contrary, Hodge cites *Solem v. Helm*, which restates the proposition that the Eighth Amendment "prohibits . . . sentences that are disproportionate to the crime committed." 463 U.S. at 284. Hodge also throws in a reference to a concurrence from *Furman v. Georgia* connecting "the basic theme of equal protection" to a claim that the death penalty was "disproportionately imposed" on certain groups in the mid-twentieth century. 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring). That first proposition is uncontroversial, but relevant only to the initial imposition of Hodge's death sentence, which

Hodge never claims was disproportionate to his brutal crimes. And the second proposition (to the extent that the concurrence states binding law) appears relevant only when a defendant claims that he has received a sentence for discriminatory reasons, another claim Hodge does not make. So neither of Hodge's chosen cases makes his point—it's unclear how they are even relevant to it.

Hodge's arguments are best viewed as a disagreement with how the Sixth Circuit applied this Court's precedents to the AEDPA question at the heart of this case. Those objections are answered by the Sixth Circuit's reasoning, and the Warden's defense of it, discussed at length above. Hodge has had his day in court and then some. Two panels of the Sixth Circuit carefully ruled on his claims over nearly seven years' time, after which the full Sixth Circuit disagreed with the second panel following additional briefing and oral argument. It is hard to imagine how Hodge could have gotten fuller, or fairer, consideration by the Sixth Circuit.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

/s/ Matthew F. Kuhn
Office of the Kentucky
Attorney General
1024 Capital Center Drive
Suite 200
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

*Counsel of Record

MATTHEW F. KUHN*
Solicitor General

JOHN H. HEYBURN
Principal Deputy
Solicitor General

JACOB M. ABRAHAMSON
Deputy Solicitor General