

NO. _____
SUPREME COURT OF THE UNITED STATES
_____ TERM

CAPITAL CASE

BENNY LEE HODGE

PETITIONER

versus On Petition For Writ Of Certiorari To
 The Supreme Court of Kentucky

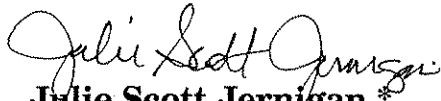
COMMONWEALTH OF KENTUCKY

RESPONDENT

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

Respectfully Submitted,

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CAPITAL CASE

COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I **DID THE KENTUCKY SUPREME COURT MISAPPLY THE PREJUDICE PRONG SET OUT IN STRICKLAND V WASHINGTON AND ITS PROGENY, THEREBY REQUIRING PETITIONER TO ESTABLISH A LINK BETWEEN THE POTENTIAL MITIGATION AND THE CRIMES FOR WHICH HE WAS SENTENCED TO DEATH.**

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OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendix thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254. The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the certiorari petition.

COUNTERSTATEMENT OF THE CASE

The facts of this case, as taken from the direct appeal opinion of the Kentucky Supreme Court are as follows:

On August 8, 1985, Donald Bartley and Hodge entered the home of the victim and her father posing as F.B.I. agents. Once inside, Hodge produced a gun and tied the father while Bartley took the daughter into a back bedroom and tied her. Both the father and the daughter had their heads covered. Epperson, who had been waiting in an automobile outside the home, was radioed and told to enter. The three men ransacked the house until a safe was found and the father was forced to open it. Almost \$2 million in cash, some weapons and jewelry were found by the three men. Hodge is charged with then killing the daughter by stabbing her twelve times in the back with a large kitchen knife, while Epperson and Bartley choked the father into unconsciousness with an electric cord. The three men then left the home. All three were arrested in Florida and returned to Kentucky for trial. Bartley turned prosecution witness and gave a detailed statement identifying both Hodge and Epperson as principals in the crimes.

Epperson v. Com., 809 S.W.2d 835, 838 (Ky. 1990)¹

Procedural History

Petitioner's recitation of the procedural history is accurate and complete. Respondent adopts that history and incorporates it by reference.

REASONS TO DENY THE WRIT

Petitioner claims that the Kentucky Supreme Court required that, in order to demonstrate that he was prejudiced by his counsel's ineffective

¹Hodge was tried, and appealed jointly with Roger Epperson, his co-defendant.

assistance, he show a nexus between the mitigation presented and the crime. This is an inaccurate interpretation of the Court's opinion. The Kentucky Supreme Court ruled that Hodge failed to meet his burden of proof. The court determined that the mitigation available to him at the time of trial would not, even if presented, have convinced a reasonable juror to recommend a sentence less than death.²

The portion of the Kentucky Supreme Court's opinion relating to ineffective assistance of counsel is set out below.

Hodge alleges ineffective assistance of counsel because his trial counsel failed to investigate or present any evidence in mitigation during the penalty phase. Rather, the parties agreed to the following stipulation, which was read to the jury: "Benny Lee Hodge has a loving and supportive family- a wife and three children. He has a public job work record and he lives and resides permanently in Tennessee." He argues that the failure to present mitigation evidence regarding his dramatically abusive childhood rendered the jury's sentence of death unreliable.

At the outset, we reiterate Hodge's burden in establishing ineffective assistance of counsel. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This analysis involves mixed questions of law and fact. While we will not disturb the trial court's factual findings if they are supported by substantial evidence, we review its conclusions of law *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky.2008).

²Commonwealth did not, and does not, concede that all the mitigation alleged to have been available - that is to say all the mitigation presented herein and before the Kentucky courts - was available or admissible at the time of trial.

Here, the Commonwealth concedes that the performance of Hodge's defense counsel was deficient in conducting a reasonable investigation to find mitigation evidence. Thus, the inquiry must focus only on the prejudicial effect of this deficiency. "When a defendant challenges a death sentence ..., the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. 668 at 695, 104 S.Ct. 2052, 80 L.Ed.2d 674. A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Id.* at 694. Hodge's burden in this respect is "highly demanding." *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Bearing this standard in mind, we turn to a review of the mitigation evidence that was available at the time of Hodge's trial. His mitigation case would have been based on his childhood, which was marked by extreme poverty, sustained physical violence, and constant emotional abuse. The trial court's characterization of Hodge's childhood as "difficult" is not inaccurate, but certainly inadequate.

The evidence established that Hodge's mother, Kate, was married to six different men, all of whom were substance abusers and some of whom were physically abusive to Kate. She married Billy Joe when Hodge was eight years old. The majority of Hodge's evidence concerned the extreme violence he suffered at the hands of his stepfather. Again, the trial court's description of Billy Joe as "particularly abusive" is insufficient.

Billy Joe was described by at least four witnesses as a "monster ." His rage was explosive and violent, often triggered by Kate's shows of affection towards her children. At other times, he was incited for no apparent reason and the household lived in constant fear as a result. He would regularly rape Kate, threaten her with a gun, and beat her. On one occasion, Billy Joe assaulted Hodge's mother so violently that she suffered a miscarriage. Hodge's sisters testified that, more than once, they thought Kate had been beaten to death.

Hodge's mother and sisters agreed that Billy Joe was more violent and abusive towards him than any other person in the house. This is perhaps because Hodge, being the only male child in the home, often tried to defend his mother and sisters from physical attacks. He was regularly beaten with a belt and metal buckle, which left bruises and welts on his body that were observed by family members and neighbors alike. At other times, he was kicked, thrown against walls, and punched. Hodge's half-sister specifically recalled an occasion when Billy Joe rubbed Hodge's face in his own feces. His sisters testified that Billy Joe made Appellant watch while he brutally killed the boy's dog. Because his mother, who was evidently paralyzed by fear and substance abuse, refused to protect Hodge, he often ran away from home.

School records indicate that Hodge was of normal intelligence and received average grades through elementary school. After Billy Joe entered the home, his grades declined, he became withdrawn, and he was often truant. He began stealing at the age of twelve and was sentenced to a juvenile detention facility when he was fifteen.

There was testimony that, at the Tennessee residential facility, Hodge was subjected to regular beatings. He escaped from the facility twice and once refused to return after a furlough. After finally being released at the age of sixteen, Hodge assaulted his stepfather, which resulted in his return to the juvenile facility until he was eighteen years old.

At the age of twenty, Hodge pled guilty to his first felonies: burglary and grand larceny. He escaped from custody four days later. Following his capture and eventual parole, he was convicted of a separate armed robbery. Again, he escaped and was recaptured. After serving nearly eight years in prison for that felony, Hodge was again paroled. He was thirty-four years old at the time he killed Tammy Acker. He had been married three times and had fathered three children.

At the evidentiary hearing, Hodge presented the expert opinions of two psychologists, both of whom had assessed him in 2009. Both agreed 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. One of the psychologists diagnosed Hodge with post traumatic stress disorder (PTSD) and opined that it was present at the time of Hodge's crimes and trial. This expert further testified that PTSD can render a person violent, hypervigilant, aggressive, and erratic. Both psychologists found it particularly interesting to note that Hodge did not inflict any abuse on his own children and was described by all as a loving father.

We now turn to the primary inquiry before us, i.e., whether the result of the penalty phase would have been any different had this mitigation evidence been presented to the sentencing jury. In doing so, we must weigh this mitigation evidence against other aggravating circumstances. First, we consider, as did the trial court, that the evidence of Hodge's abusive childhood would have 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.

And, we must also consider the heinous nature of Hodge's crime. See *Epperson and Hodge v. Commonwealth*, 809 S.W.2d 835 (Ky.1990). The assault on Dr. Acker and the murder of his daughter were not just brutal and vicious, but calculated and exceedingly cold-hearted. The sentencing jury was aware that Hodge and his two co-defendants carefully planned the robbery after learning of the large quantity of cash kept in the home safe, that they traveled from out of state to carry out the plan, and that they packed weapons and tools in advance. They posed as FBI agents to gain entry into the elderly doctor's home and followed him to the kitchen where they pretended to take his statement regarding a former business partner's supposed fraud. They had the doctor call his daughter to the room to witness the statement. At that point, Hodge brandished a handgun. They covered the heads of both the father and the daughter. They restrained Tammy, a young college student due to go back to school the next day, alone in a bedroom. She begged them not to hurt her father. After forcing Dr. Acker to open the safe, Hodge's accomplice strangled him with an

electrical cord until he lost consciousness. Hodge went to Tammy's bedroom and stabbed her at least ten times, then stole a bracelet and watch from her wrist. Afterwards, he coolly told Epperson that he knew Tammy was dead because the knife had gone "all the way through her to the floor." Autopsy reports confirmed this boast.

Believing both victims were dead, they left the home. The three men then fled to Florida. Along with their girlfriends, they brazenly spent the stolen money on a lavish lifestyle and luxury goods, including a Corvette. A former cellmate testified that Hodge recounted spreading all the money out on a bed and having sex with his girlfriend on top of it.

We have considered the totality of evidence before Hodge's sentencing jury, including the proposed mitigation evidence. *Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky.2008) (reviewing court must consider totality of the evidence in considering prejudice prong of ineffective assistance of counsel claim). Balancing all of the available evidence in mitigation and aggravation, we are compelled to reach the conclusion that there exists no reasonable probability that the jury would not have sentenced Hodge to death. There is no doubt that Hodge, as a child, suffered a most severe and unimaginable level of physical and mental abuse. 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. Even if the sentencing jury had this mitigation evidence before it, we do not believe, in light of the particularly depraved and brutal nature of these crimes, that it would have spared Hodge the death penalty. We, therefore, affirm this portion of the trial court's judgment.

Hodge v. Commonwealth, 2009-SC-000791-MR, 2011 WL 3805960 (Ky. Aug. 25, 2011), reh'g denied (Feb. 23, 2012)

I

**THE KENTUCKY SUPREME COURT DID NOT REQUIRE
THAT PETITIONER ESTABLISH A LINK BETWEEN MITIGATION
AND THE CRIMES FOR WHICH HE WAS SENTENCED TO DEATH.
THE COURT'S OPINION DID NOT MISAPPLY OR CONFLICT
WITH ANY PRECEDENT OF THIS COURT.**

Petitioner argues that the state court's opinion requires him to show a connection between the mitigation presented and the crime. He argues that this requirement misapplies existing precedent set forth by this court. This argument indicates that Petitioner misread the Kentucky Supreme Court's opinion. The Kentucky court identified the correct standard, citing to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 and Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The court analyzed the mitigation that Petitioner presented and weighed that mitigation with the evidence that had been presented by the Commonwealth in the guilt phase of the trial, as well as the evidence that Commonwealth could have presented in the penalty phase.

It bears repeating here that absolutely no evidence was presented in the penalty phase. In response to the stipulation read into the record that Petitioner was a good father, lived in Tennessee and had worked publically, Commonwealth agreed to present no evidence to the jury. Commonwealth called no witnesses, did not discuss Petitioner's extensive and violent criminal record, and did not refute the statement that Petitioner was a good father

despite evidence that he was, at best, an absentee father. The court correctly noted in its opinion that, had the stipulation not been read, a bevy of damaging information - including a victim impact statement - could have been presented. The court pointed out that in such situations, mitigation cannot be weighed in a vacuum, but rather the totality of the evidence must be considered.

Far from requiring a nexus between the potential mitigation and the crime, the court ruled that the potential mitigation was such that no reasonable juror would have been persuaded to sentence Petitioner to anything less than death. The jurors, the court concluded, when presented with all the evidence available to both Petitioner and the Commonwealth, would not have acted differently. This ruling does not require Petitioner to establish a connection between the mitigation and the crime, nor does it require the Kentucky court to misapply this court's precedent; the Kentucky court's opinion merely determines that Petitioner failed to meet his burden of proof. He did not show that the mitigation available to the defense at the time of trial was sufficient to alter the opinion of a reasonable juror. As the Kentucky court stated

We have considered the totality of evidence before Hodge's sentencing jury, including the proposed mitigation evidence. *Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky.2008) (reviewing court must consider totality of the evidence in considering prejudice prong of ineffective assistance of counsel claim). Balancing all of the available evidence in mitigation and aggravation, we are compelled to reach the conclusion that there exists no reasonable probability that the jury would not have sentenced Hodge

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Hodge v. Commonwealth, 2009-SC-000791-MR, 2011 WL 3805960 (Ky. Aug. 25, 2011), reh'g denied (Feb. 23, 2012).

Petitioner's arguments herein misread the Kentucky court's opinion.

There is no conflict with this court's controlling decisions.

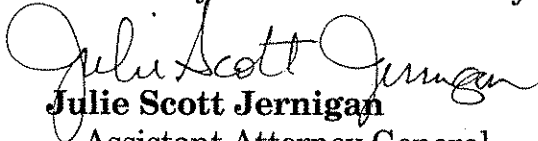
CONCLUSION

WHEREFORE, the Attorney General of the Commonwealth of Kentucky requests that Hodge's petition for writ of certiorari be denied.

Respectfully submitted,

Jack Conway

Attorney General of Kentucky

A handwritten signature in cursive script, appearing to read "Julie Scott Jernigan", is written over the printed name.

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