

In The Supreme Court Of The United States

BENNY LEE HODGE,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY**

Petitioner briefly provides the following rebuttal points to arguments raised by Respondent's Brief in Opposition to the Petition for Writ of Certiorari. Otherwise, Petitioner stands on his original Petition.

1. Kentucky Supreme Court Did Require a Nexus.

The Supreme Court of Kentucky originally ordered an evidentiary hearing to determine whether there was a tactical reason that Petitioner's trial counsel did not present any mitigation evidence at his capital trial. *Hodge v. Commonwealth*, 68 S.W.3d 338, 342, 345 (Ky. 2001). Respondent agrees noting "[i]t bears repeating here that absolutely no evidence was presented in the penalty phase." Brief in Opposition p. 8.

While none was presented, there was overwhelming available evidence in mitigation that could have been presented by trial counsel. The availability as well as the substance of this mitigation has never been disputed. Indeed, Respondent, at the evidentiary hearing, specifically

passed on the opportunity to present any affirmative or rebuttal evidence to Petitioner's mitigation¹. The Kentucky Supreme Court describes the mitigating evidence as including PTSD caused by a childhood of "most severe and unimaginable" abuse and neglect. Apx. 1 p. 11; *see also* Apx. 1 p. 6 ("His mitigation case would have been based on his childhood, which was marked by extreme poverty, sustained physical violence, and constant emotional abuse.") The Kentucky Supreme Court even castigated the trial court for its inadequate descriptions of the depth and breadth of the mitigation. *See* Apx. 1 pp. 6-7 ("The trial court's characterization of Hodge's childhood as 'difficult' is not inaccurate, but certainly inadequate."); *Id.* p. 7 ("Again, the trial court's description of Billy Joe as 'particularly abusive' insufficient.")

Respondent does not contest that the correct standard for determining prejudice – as promulgated by this Court – states that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This Court has reaffirmed that the test of prejudice is simply a reasonable likelihood of a different result. *Porter v. McCollum*, 558 U.S. ___, 130 S.Ct. 447 (2009). Nor does Respondent contest that if the Kentucky Supreme Court did impose a nexus requirement that it would be contrary to this Court's authority of *Smith v. Texas*, 543 U.S. 37, 45 (2004) and *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

¹ Respondent now asserts it does not concede the evidence's admissibility or that it was available. Brief in Opposition p. 3 n. 2. Kentucky has a contemporaneous objection requirement. These were objections to make at the trial court level and were not. Thus, this argument is waived. Further, Respondent made no such argument to the Kentucky Supreme Court (*see* Respondent's Brief pp. 17-24); it is doubly waived. Further still, Respondent drafted what would become the findings of facts and conclusions of law with one minor addition by the trial court, and those findings noted, "Hodge called several witnesses to outline the evidence that would have been available for mitigation purposes at the time of trial." Apx. 3 at pp. 6-7. Having drafted the finding accepted by the trial court that this evidence was available Respondent is foreclosed from argument now that the evidence may not have been available.

Rather than contest the above, Respondent's sole argument is that the Kentucky Supreme Court did not impose a nexus requirement. Brief in Opposition, pp. 8-10. Respondent is categorically incorrect in that regard.

After conceding that no reasonable counsel would have acted as Hodge's trial counsel did in the penalty phase preparation (Apx. 1 p. 6) and describing the mitigation that could have been presented, the opinion of the Kentucky Supreme Court concluded that Hodge's counsel had not prejudiced him because:

[W]e 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.

Apx. 1 p. 11 (emphasis added). The Kentucky Supreme Court acknowledges the "a most severe and unimaginable level of physical and mental abuse" and the impact of PTSD upon Benny Hodge, yet it denies relief because the childhood abuse "offers virtually no rationale for the premeditated, cold-blooded murder and attempted murder of two innocent victims who were complete strangers to Hodge." The Kentucky Supreme Court ruled that Hodge's claim must fail because he cannot prove a nexus between the uncontested mitigation and the crimes for which he was charged.

The Kentucky Supreme Court stands alone in this regard. Other state and federal courts have followed this Court's authority. Thus, this Court should grant, vacate and remand for further proceedings consistent with *Strickland*, *Porter*, *Smith v. Texas*, and *Tennard*, or this Court should accept certiorari.

2. Respondent Fails To Respond to Aspects of the Question Presented.

Respondent contested the nexus component of Petitioner's Petition. However, Respondent stood mum on the other allegations of an erroneous application by the Kentucky Supreme Court's application of the *Strickland* prejudice prong.

Initially, the standard employed by the Kentucky Supreme Court violated the statements of this Court in *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.") and in *Porter*, 130 S.Ct. at 455-456 (state court in post-conviction improperly marginalized and reduced to inconsequential proportions mitigating evidence). Indeed, Petitioner's case closely resembles *Sears v. Upton*, 130 S.Ct. 3259 (2010), where this Court granted, vacated and remanded in a *per curiam* opinion a death penalty case when a state post-conviction court failed to appropriately apply *Strickland*'s prejudice prong.

Second, the Kentucky Supreme Court relied on evidence not in the record to deny Hodge's ineffectiveness allegation. An individual may only have his death sentence based upon evidence contained in the record. See *Gardner v. Florida*, 430 U.S. 439 (1977). The Kentucky Supreme Court relied upon the unproven allegation that "many, if not most, malefactors committing terribly violent and cruel murders are the subjects of terrible childhoods" (Apx. 1 p.

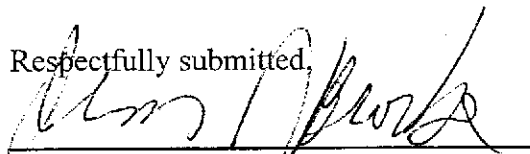
11 (no citation in original)) to deny relief to Petitioner. *Strickland* analysis should be premised upon the evidence before a court, not on generalizations of an appellate court, after an evidentiary hearing was conducted of which a defendant had no notice. Finally, the Kentucky Supreme Court indicated that Hodge had to prove that the entire jury would have rejected death. See Apx. 1 p. 11 (“...there exists no reasonable probability that the **jury** would not have sentenced Hodge to death.”) (“Even if the sentencing **jury** had this mitigation evidence before it, we do not believe...that it would have spared Hodge the death penalty.”). Under *Strickland*, 466 U.S. at 694, a different result means a “reasonable probability that at least **one** juror would have struck a different balance.” (emphasis added); *Wiggins*, 539 U.S. 510, 537.

Thus, this Court should grant, vacate and remand for further proceedings consistent with *Strickland*, *Rompilla*, *Porter*, *Sears*, and *Wiggins*; or, this Court should accept certiorari.

CONCLUSION

For the foregoing and previous stated reasons, this Court should grant Petitioner’s Petition and issue a writ of certiorari to review the decision of the Supreme Court of Kentucky. Alternatively, this Court should grant, vacate and remand for a proper prejudice analysis under *Strickland v. Washington*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Reply in Support of His Petition for Writ of Certiorari were served via regular U.S. Mail, on this 31st day of July, 2012 upon: Mrs. Julie Scott Jernigan, Assistant Attorney General, Criminal Appellate Division, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204. All persons required to be served have been served.


DENNIS J. BURKE*