(ORDER LIST: 568 U.S.)

MONDAY, DECEMBER 3, 2012

ORDERS IN PENDING CASES

12M51 BELL, DENORY A. V. CLARKE, DIR., VA DOC

12M52 PORTER, SUSAN V. JEWELL, RICKY L., ET AL.

12M53 VONTRESS, GEORGE V. DISTRICT COURT OF NV, ET AL.

12M54 MARTIN, GUY F. V. OBAMA, PRESIDENT OF U.S.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

11-1274 GABELLI, MARC J., ET AL. V. SEC

The motion of Former SEC Commissioners and Officials for leave to file a brief as *amici curiae* out of time is granted.

11-1545) ARLINGTON, TX, ET AL. V. FCC, ET AL.
)
11-1547) CABLE, TELECOMMUNICATIONS & TECH V. FCC, ET AL.

The motion of petitioners to dispense with printing the joint appendix is granted.

12-5196 LAW, STEPHEN V. SIEGEL, ALFRED H.

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

12-5896 QUARTERMAN, KENNETH V. CULLUM, JOHN M.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

12-6522 EDWARDS, DOUGLAS R., ET UX. V. EDMONDSON, R. G.

12-6842 CLOKE, ALFRED K. V. ADAMS, HERB, ET AL.

12-6972 BATISTA, LUIS M. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until December 26,

2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI DENIED

11-1324 VILLALON, MARTIN A. V. INDIANA

11-1486 ALDEN LEEDS, INC. V. UNITED STATES

11-1528 NORTHROP CORP. EMPLOYEE INS. V. UNITED STATES

11-10835 COOKE, STEVEN V. UNITED STATES

12-148 HITACHI HOME ELECTRONICS V. UNITED STATES, ET AL.

12-266 WESTERN RADIO SERVICES COMPANY V. QWEST CORPORATION, ET AL.

12-313 CITIGROUP GLOBAL MARKETS INC. V. STONEMOR OPERATING LLC, ET AL.

12-393 MARTINEZ, JOSE A. V. GEORGIA

12-396 BROWN, JOYCE V. NABOURS, ALAN, ET AL.

12-406 FLORIMONTE, CAROLYN J. V. DALTON, PA

12-516 EMBODY, LEONARD S. V. WARD, STEVE

12-520 VEY, EILEEN V. PENNSYLVANIA

12-533 GALLION, WILLIAM J. V. UNITED STATES

12-534 ROSGA, JACK V. UNITED STATES

12-5216 HOLLAND, JEFFREY V. HOLT, WARDEN

12-5334 AGUILLARD, RAY A. V. UNITED STATES

12-5535 BRASURE, SPENCER R. V. CHAPELL, WARDEN

12-5614 SHRADER, THOMAS C. V. UNITED STATES

12-5798 HARDINE, PAMELA D. V. OFFICE & PROFESSIONAL EMPLOYEES

12-6082 K. F. V. UTAH

12-6090 HARTLEY, KENNETH V. FLORIDA

12-6435 FORD, LAWRENCE A. V. BUCHANAN, WARDEN

12-6451 GUTIERREZ, JASON V. N. M. G.

12-6452 GATES, GLEN V. WESTERENG, MARK

12-6455 PIERCE, WILLIAM D. V. LEE, WARDEN

12-6456 HILL, CHARLES H. V. ARANAS, DR., ET AL.

12-6459 RIVERA, YSIDRO R. V. THALER, DIR., TX DCJ

12-6460 SANDERS, LONNIE J. V. TEXAS

12-6461 RUFFIN, GEORGE V. SMITH, WARDEN

12-6464 LEE, MARCUS D. V. TENNESSEE

12-6465 MARTINEZ, THOMAS E. V. YATES, WARDEN

12-6466 GLEASON, MARK A. V. CALIFORNIA

12-6468 BRAHMANA, METTEYYA V. HENARD, JOSEPH L., ET AL.

12-6474 SPENCER, JERRY E. V. WOODS, WARDEN

12-6476 PARKER, ANTWON V. FISK, KIMBERLY, ET AL.

12-6481 FORD, BILLY R. V. MISSISSIPPI

12-6484 ROLLINS, KERRY V. LOUISIANA

12-6486 HIBBERT, DESMOND G. V. KELLY, WARDEN

12-6487 FULMER, RACHEL V. BUXENBAUM, MICHAEL

12-6491 WILLIAMS, ERIC A. V. WOODS, WARDEN

12-6493 FIGUEROA, MIGUEL V. NEW YORK

12-6494 FERDINAND, RICKY E. V. DORMIRE, DAVE, ET AL.

12-6496 HALL, ROGER D. V. OR DOC

12-6497 HARRIS, FREDERICK V. GOODWIN, WARDEN

12-6503 SMITH, JAMES R. V. LANIGAN, COMM'R, NJ DOC, ET AL.

12-6504 GRAY, DAVID G. V. GIPSON, WARDEN

12-6505 ANDERSON, WILLIAM V. BROWN, CARMEN, ET AL.

12-6507 HARRISON, MARQUEION J. V. DAVIS, WILLIE

12-6508 HUGHES, IVAN J. V. CLARKE, DIR., VA DOC

12-6511 RANGEL, ADRIAN G. V. SCHMIDT, THOMAS, ET AL.

12-6517 HUGUELEY, STEPHEN L. V. TENNESSEE

12-6521 CAMPBELL, CARMEN E. V. ALEXANDER STEIN & BURL

12-6533 KORMONDY, JOHNNY S. V. TUCKER, SEC., FL DOC

12-6534 MARTINEZ, GILBERT V. ARIZONA

12-6536 MEDINA, NORBERTO V. HARTLEY, WARDEN, ET AL.

12-6539 MITCHELL, MARCUS D. V. MEDINA, WARDEN, ET AL.

12-6540 MISHALL, PATRICK V. WARREN, WARDEN

12-6546 RHODES, BERNARD V. HILL, WARDEN

12-6559 McCREARY, PAUL T. V. SANDOVAL, BRIAN, ET AL.

12-6577 GRIFFIN, MELVIN V. TERRY, WARDEN

12-6581 FREEMAN, JACK V. KADIEN, SUPT., GOWANDA

12-6583 HOPKINS, GLENN J. V. SPRINGFIELD HOUSING AUTHORITY

12-6585 FINE, OWEN R. V. TUCKER, SEC., FL DOC

12-6586 BAUL, JOEL V. CALIFORNIA

12-6591 HOUSTON, MICHON D. V. PERRY, WARDEN

12-6593 DOBRIC, MILADIN V. PARK LANE NORTH OWNER, ET AL.

12-6599 OWENGA, MICHAEL O. V. HOLDER, ATT'Y GEN.

12-6611 RODRIGUEZ, JORNAY R. V. CALIFORNIA

12-6622 DISHAROON, JEFFREY, ET AL. V. GEORGIA

12-6636 MANN, JOHN W. V. TUCKER, SEC., FL DOC, ET AL.

12-6675 SALCEDA, LEOVARDO V. SALAZAR, WARDEN, ET AL.

12-6681 GOROSPE, JOSEPH V. TIBBALS, WARDEN

12-6695 SANDS, JAMES W. V. GEORGIA

12-6709 CHAMBERLAIN, JOHN J. V. TUCKER, SEC., FL DOC, ET AL.

12-6713 ELLIS, FREDRICK C. V. BREWER, DWAIN

12-6714 BIRDETTE, ALEXANDRIA, ET AL. V. PUBLISHERS CLEARING HOUSE

12-6727 KOHLMEYER, STEPHEN N. V. INDIANA

12-6749 LINDER, EUGENE A. V. DONAT, WARDEN, ET AL.

12-6761 WOODARD, LESTER V. TUCKER, SEC., FL DOC, ET AL.

12-6782 FORD, JEFFREY D. V. SWARTHOUT, WARDEN

12-6805 BAILEY, JAMES V. TUCKER, SEC., FL DOC

12-6808 SANTIAGO, FABIAN V. ANDERSON, JEREMY, ET AL.

12-6824 WOODS, BRIAN J. V. OHIO, ET AL.

12-6835 CIACCI, MICHAEL K. V. HAWAII

12-6884 QUIROZ, DIEGO V. McDONALD, WARDEN

12-6923 COWAN, LAWRENCE E. V. FLORIDA

12-6924 MAJEED, THOMAS J. V. UNITED STATES

12-6927 LANCASTER, REGINALD A. V. UNITED STATES

12-6928 EDER, CURTIS R. V. UNITED STATES

12-6929 REPLOGLE, RANDALL L. V. UNITED STATES

12-6930 THOMPSON, SABRANINO A. V. UNITED STATES

12-6932 WILLIAMS, ALEJANDRO R. V. UNITED STATES

12-6934 MOORE, CHARLES V. UNITED STATES

12-6942 JOHNSON, BENJAMIN V. FL DOC

12-6946 LARSON, ROBERT C. V. UNITED STATES

12-6948 LIMON, RICARDO V. UNITED STATES

12-6949 LaROSE, RONALD V. UNITED STATES

12-6951 SMITH, MICHAEL V. UNITED STATES

12-6952 SAINT-JEAN, ANDRE V. UNITED STATES

12-6953 DEMBRY, EDWARD K. V. OLIVER, WARDEN

12-6954 CROOKER, JAKE C. V. UNITED STATES

12-6955 DILLARD, WILLIE A. V. UNITED STATES

12-6957 DICKSON, BRADFORD V. SUBIA, WARDEN, ET AL.

12-6961 LOPEZ, RAMON V. UNITED STATES

12-6968 WINKELMAN, GEORGE A. V. UNITED STATES

12-6971 AILEMEN, PIUS V. UNITED STATES

12-6975 ALEJANDRO, JOHN P. V. UNITED STATES

12-6976 OBAEI, HOSSEIN V. UNITED STATES

12-6982 DAVIS, JEFFREY V. FARLEY, WARDEN

12-6985 ELLIOTT, SANDRA V. UNITED STATES

12-6989 YEPIZ, HORACIO V. UNITED STATES

12-6990 HEYWARD, LONNIE V. UNITED STATES

12-6992 HIENG, ORM V. UNITED STATES

12-6997 MORENO-MENDOZA, JAVIER V. UNITED STATES

12-7002 BERRONES-ZAVALA, JOSE L. V. UNITED STATES

12-7003 CORONA-PORRAS, SAUL V. UNITED STATES

12-7007 ANDREWS, ORASAMA B. V. JARVIS, WARDEN

12-7009 HYDE, BART V. UNITED STATES

12-7010 HOLLOWAY, CAESAR V. UNITED STATES

12-7011 FLANAGAN, CAMERAN A. V. UNITED STATES

12-7013 GUTIERREZ-PEREZ, RAMON V. UNITED STATES

12-7020 EPPS, HUGH V. UNITED STATES

12-7024 MIRANDA, WALTER J. V. UNITED STATES

12-7027 ZEBROWSKI, DAVID V. UNITED STATES

12-7028 VAKSMAN, FABIAN V. UNITED STATES

12-7039 SHARP, DAVID W. V. UNITED STATES

The petitions for writs of certiorari are denied.

12-152 DE LA ROSA, JOSE E. V. HOLDER, ATT'Y GEN.

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

12-256 STATE STREET BANK AND TRUST CO. V. PFEIL, RAYMOND M., ET AL.

The motion of The American Benefits Council for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

12-6568 WILLIAMS, THRESA L. V. TALLADEGA COMMUNITY, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner

unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*).

12-6582 FOX, CHERUNDA V. MI DOC, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

HABEAS CORPUS DENIED

12-7151 IN RE LIDIA VARGAS-LOMBANA

The petition for a writ of habeas corpus is denied.

12-7042 IN RE MICHAEL DOYLE

12-7112 IN RE JEFFREY M. DANIELS

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of habeas corpus are dismissed. See Rule 39.8. As the petitioners have repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioners unless the docketing fees required by Rule 38(a) are paid and the petitions are submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*).

MANDAMUS DENIED

12-5911 IN RE SPENCER R. BRASURE

12-6483 IN RE DAVID D. SMITH

12-6506 IN RE TERRY BROWN

12-6561 IN RE LINDA L. SHELTON

The petitions for writs of mandamus are denied.

REHEARINGS DENIED

11-1352	CCA ASSOCIATES V. UNITED STATES
11-9951	REYNOLDS, JAMES V. QUEENS COUNTY BD. OF ELECTIONS
11-9985	McKAY, TOREY V. UNITED STATES
11-10051	HOOKER, EZRA V. CALIFORNIA
11-10250	COLLIER, MARTHA V. BLAGOJEVICH, ROD R., ET AL.
11-10391	FOULKE, SAMANTHA J. V. ASTRUE, COMM'R, SOCIAL SEC.
11-10446	ROSS, MICHAEL J. V. NEW YORK STATE BOARD OF PAROLE
11-10465	ALLEN, MARIO A. V. INDIANA
11-10468	ROEDER, SCOTT P. V. KANSAS
11-10494	DeSUE, MICHAEL C. V. FLORIDA
11-10577	INMAN, RONALD J. V. CLARK, WARDEN
11-10605	McCARTHY, PATRICK V. SOSNICK, EDWARD, ET AL.
11-10725	LI, XIANG V. UNITED STATES
11-10736	VELASCO-HERNANDEZ, LUIS E. V. MILLER-STOUT, SUPT., AIRWAY
11-10821	ARROYO, MARTIN V. V. GROSS, TAMMY, ET AL.
11-10881	MALDONADO, JOSE A. V. CARTLEDGE, WARDEN
11-11001	RUFFIN, MARY V. HOUSTON INDEPENDENT SCH. DIST.
11-11119	SHAO, LINDA V. CALIFORNIA
12-204	IN RE SRINIVAS V. VADDE
12-213	CLAIR, CHARLES L. V. MAYNARD, SEC., MD DOC, ET AL.
12-249	PRUETT, CARL R., ET AL. V. HARRIS CTY. BAIL BOND BD.
12-5035	SULLIVAN, DWIGHT V. DeRAMCY, STEPHANIE G., ET AL.
12-5043	LEE, KIT V. USDC NJ
12-5094	McCARTHY, PATRICK V. SCOFIELD, ALISON, ET AL.
12-5156	STURM, KENNETH D. V. UNITED STATES
12-5237	SHULICK, JOHN J. V. MI DOC, ET AL.
12-5280	LEWIS, JAMES J. V. SINCLAIR, SUPT., WA
12-5429	WOOLMAN, MICHAEL B. V. NEBRASKA, ET AL.

12-5515 CHRISTIAN, TARYN V. USDC HI

12-5609 BIRDETTE, JAMES A. V. ASSOC. RECOVERY SYSTEMS, ET AL.

12-5659 MORRIS, CAROL J. V. THALER, DIR., TX DCJ, ET AL.

12-5669 WISE, LA'NARE V. HILL, WARDEN

12-5670 ZAKAT, AALIYAH V. BUREAU OF ADMIN. ADJUDICATION

12-5677 TEAGUE, JOE V. NC DEPT. OF TRANSPORTATION

12-5811 ZAJRAEL, WARITH T. V. HARMON, WARDEN, ET AL.

12-5910 ROWE, HERNANDO V. MISSOURI

12-6202 SOLER-NORONA, CARLOS V. UNITED STATES

The petitions for rehearing are denied.

12-5765 WILLIAMS, RONALD V. UNITED STATES

The petition for rehearing is denied. Justice Kagan took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

BENNY LEE HODGE *v.* KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 11–10974. Decided December 3, 2012

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, dissenting from denial of certiorari.

Petitioner Benny Lee Hodge was convicted of murder. Then, after his trial counsel failed to present any mitigation evidence during the penalty phase of his trial, he was sentenced to death. In fact, counsel had not even investigated any possible grounds for mitigation. If counsel had made any effort, he would have found that Hodge, as a child, suffered what the Kentucky Supreme Court called a "most severe and unimaginable level of physical and mental abuse." No. 2009–SC–000791–MR (Aug. 25, 2011), App. to Pet for Cert. 11. The Commonwealth conceded that counsel's performance was constitutionally deficient as a result. Yet the court below concluded that Hodge would have been sentenced to death anyway because even if this evidence had been presented, it would not have "explained" his actions, and thus the jury would have arrived at the same result. *Ibid.* This was error. Mitigation evidence need not, and rarely could, "explai[n]" a heinous crime; rather, mitigation evidence allows a jury to make a reasoned moral decision whether the individual defendant deserves to be executed, or to be shown mercy instead. The Kentucky Supreme Court's error of law could well have led to an error in result. I would grant the petition for certiorari, summarily vacate, and remand to allow the Kentucky Supreme Court to reconsider its decision under the proper standard.

I

Hodge and two others posed as Federal Bureau of Inves-

tigation agents to gain entry to the home of a doctor. Once inside, they strangled the doctor into unconsciousness, stabbed his college-aged daughter to death, and stole around $2 million in cash, as well as jewelry and guns, from a safe. A jury convicted Hodge and a codefendant of murder and related charges. *Epperson* v. *Commonwealth*, 809 S. W. 2d 835, 837 (Ky. 1990). In advance of the penalty phase of his trial, Hodge's counsel conducted no investigation into potential mitigation evidence and presented no evidence to the jury. The Commonwealth did not put on evidence of aggravating circumstances either, beyond the facts of the crime. Instead, the parties agreed that the jury should be read this stipulation: "'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.'" App. to Pet. for Cert. 5. After hearing argument from counsel on both sides, the jury recommended a sentence of death, which the trial court imposed.

On postconviction review in Kentucky state court, Hodge alleged that his counsel had been ineffective during the penalty phase for failing to investigate, discover, and present readily available mitigation evidence concerning his childhood, which was marked by extreme abuse. Hodge was granted an evidentiary hearing, during which he presented extensive mitigation evidence and the testimony of expert psychologists. The Commonwealth did not contest Hodge's evidence, although it did not concede that all the evidence would have been available or admissible at the time of trial. The Kentucky Supreme Court credited the evidence and found it would have been available at the time of trial. The evidence established the following:

The beatings began *in utero*. Hodge's father battered his mother while she carried Hodge in her womb, and continued to beat her once Hodge was born, even while she held the infant in her arms. When Hodge was a few years

older, he escaped his mother's next husband, a drunkard, by staying with his stepfather's parents, bootleggers who ran a brothel. His mother next married Billy Joe. Family members described Billy Joe as a "'monster.'" *Id.,* at 7. Billy Joe controlled what little money the family had, leaving them to live in abject poverty. He beat Hodge's mother relentlessly, once so severely that she had a miscarriage. He raped her regularly. And he threatened to kill her while pointing a gun at her. All of this abuse occurred while Hodge and his sisters could see or hear. And following many beatings, Hodge and his sisters thought their mother was dead.

Billy Joe also targeted Hodge's sisters, molesting at least one of them. But according to neighbors and family members, as the only male in the house, Hodge bore the brunt of Billy Joe's anger, especially when he tried to defend his mother and sisters from attack. Billy Joe often beat Hodge with a belt, sometimes leaving imprints from his belt buckle on Hodge's body. Hodge was kicked, thrown against walls, and punched. Billy Joe once made Hodge watch while he brutally killed Hodge's dog. On another occasion, Billy Joe rubbed Hodge's nose in his own feces.

The abuse took its toll on Hodge. He had been an average student in school, but he began to change when Billy Joe entered his life. He started stealing around age 12, and wound up in juvenile detention for his crimes. There, Hodge was beaten routinely and subjected to frequent verbal and emotional abuse. After assaulting Billy Joe at age 16, Hodge returned to juvenile detention, where the abuse continued. Hodge remained there until he was 18. Over the 16 years between his release from juvenile detention and the murder, Hodge committed various theft crimes that landed him in prison for about 13 of those years. He twice escaped, but each time, he was recaptured.

Psychologists who testified at Hodge's evidentiary hearing, and were credited by the court below, explained that the degree of domestic violence Hodge suffered was extremely damaging to his development. The environment caused "'hypervigilance'"—a state of constant anxiety that left Hodge always "'waiting for the next shoe to fall.'" Pet. for Cert. 7. It taught him "'that the world was a hostile place and that he was not going to be able to count on anybody else to protect him'"—not his family and not society. *Id.,* at 8. Being taken to a juvenile facility only to be beaten more likely hit Hodge as a "'double betrayal.'" *Id.,* at 9. The result was that Hodge had posttraumatic stress disorder. Unable to control his behavior and his emotions because of PTSD, he turned to drugs and alcohol to numb his feelings. This condition could have been diagnosed at the time of his trial.

The Commonwealth conceded that counsel was deficient for failing to gather and present this evidence at the penalty phase of Hodge's trial. But it contended that Hodge would have been sentenced to death even if the evidence had been presented. Examining the evidence, the Kentucky Supreme Court had "no doubt that Hodge, as a child, suffered a most severe and unimaginable level of physical and mental abuse." App. to Pet. for Cert. 11. Yet it felt "compelled to reach the conclusion that there exists no reasonable probability that the jury would not have sentenced Hodge to death" anyway. *Ibid.*

The Court based its conclusion in part on the aggravating circumstances against which the jury would have had to weigh the mitigation evidence. The murder itself was "calculated and exceedingly cold-hearted." *Id.,* at 9. Hodge stabbed the daughter "at least ten times," and he "coolly" told his codefendant that he knew the daughter "was dead because the knife had gone 'all the way through her to the floor.'" *Id.,* at 10. Hodge's conduct after the murder was shocking as well: He and the two other rob-

bers "brazenly spent the stolen money on a lavish lifestyle and luxury goods, including a Corvette," and Hodge told a cellmate he had "sprea[d] all the money out on a bed and ha[d] sex with his girlfriend on top of it." *Ibid.* Moreover, had Hodge put on evidence in mitigation, the Commonwealth may have sought to introduce evidence of Hodge's "long and increasingly violent criminal history, his numerous escapes from custody, and the obvious failure of several rehabilitative efforts." *Id.,* at 9.

The court's conclusion was also based, however, on what effect the mitigation evidence might have had:

> "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." *Id.,* at 11.

Accordingly, the court denied Hodge relief.

II

The Sixth Amendment guarantees capital defendants the effective assistance of counsel during the penalty phase of trial. This right includes counsel's "obligation to conduct a thorough investigation of the defendant's background," *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000), so

as "to uncover and present . . . mitigating evidence" to the jury at sentencing. *Wiggins* v. *Smith*, 539 U. S. 510, 522 (2003). It is uncontested that trial counsel failed to discharge that duty here. But to establish a Sixth Amendment violation, Hodge must also demonstrate that counsel's failures prejudiced his defense. In *Strickland* v. *Washington*, 466 U. S. 668 (1984), we explained 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." *Id.,* at 694. In the capital sentencing context, to assess prejudice, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U. S., at 534; see also *Sears* v. *Upton*, 561 U. S. ___, ___ (2010) (*per curiam*) (slip op., at 10–11); *Porter* v. *McCollum*, 558 U. S. 30, 41 (2009) (*per curiam*); *Rompilla* v. *Beard*, 545 U. S. 374, 393 (2005). The critical question is whether "there is a reasonable probability that at least one juror would have struck a different balance" in weighing the evidence for and against sentencing the defendant to death. *Wiggins*, 539 U. S., at 537.*

In applying this standard, the Kentucky Supreme Court properly took account of the possible evidence in aggravation. But in discounting the countervailing effect of Hodge's proposed mitigation, the court misunderstood the purpose of mitigation evidence. The court reasoned that Hodge's mitigation evidence might have altered the jury's recommendation only if it "explained" or provided some

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*At the time Hodge was sentenced, Kentucky required jury unanimity to recommend a sentence of death. Cf. *Carson* v. *Commonwealth,* 382 S. W. 2d 85, 95 (Ky. App. 1964); Ky. Rev. Stat. Ann. §532.025 (Michie 1985). The trial court was responsible for the ultimate sentencing determination, but the jury's recommendation was to "carr[y] great weight" in that decision. *Gall* v. *Commonwealth*, 607 S. W. 2d 97, 104 (Ky. 1980). See also *Porter*, 558 U. S., at 40, 42 (applying *Wiggins* to an "advisory jury").

"rationale" for his conduct. App. to Pet. for Cert. 11. We have made clear for over 30 years, however, that mitigation does not play so limited a role. In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), we held that the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, "*any* aspect of a defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.,* at 604 (plurality opinion) (emphasis added). We emphasized the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Id.,* at 605. This rule "recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender,'" as part of deciding whether the defendant is to live or die. *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982) (quoting *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937)). And it ensures that "'the sentence imposed at the penalty stage . . . reflect[s] a reasoned *moral* response to the defendant's background, character, and crime.'" *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 252 (2007) (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring)).

Thus we have consistently rejected States' attempts to limit as irrelevant evidence of a defendant's background or character that he wishes to offer in mitigation. In *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), for example, we held that the exclusion of evidence regarding the defendant's good behavior in jail while awaiting trial deprived him of "his right to place before the sentencer relevant evidence in mitigation of punishment." *Id.,* at 4. We explained that the jury "could have drawn favorable inferences . . . regarding [the defendant's] character and his probable future conduct." *Ibid.* Although "any such inferences would not relate specifically to [the defendant's] culpabil-

ity for the crime he committed, . . . such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Id.,* at 4–5 (quoting *Lockett*, 438 U. S., at 604 (plurality opinion)).

Particularly instructive is *Smith* v. *Texas*, 543 U. S. 37 (2004) (*per curiam*). In *Smith*, the Texas courts withheld a mitigation instruction concerning the defendant's background, on the ground that he had offered "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." *Ex parte Smith*, 132 S. W. 3d 407, 414 (Tex. Crim. App. 2004). We rejected this "nexus" requirement as one we had "never countenanced," and we reiterated that the only relevant question is whether the proposed mitigation evidence would give a jury "a reason to impose a sentence more lenient than death." 543 U. S., at 44–45.

The Kentucky Supreme Court's opinion is plainly contrary to these precedents. The evidence of Hodge's brutal upbringing need not have offered any "rationale" for the murder he committed in order for the jury to have considered it as weighty mitigation. It would be enough if there were a "reasonable probability" that, because of Hodge's tragic past, the jury's "reasoned moral response" would instead have been to spare his life and sentence him to life imprisonment instead.

More fundamentally, the Kentucky Supreme Court appears to believe that in cases involving "violent and cruel murders," it does not matter that the "malefacto[r]" had a "terrible childhoo[d]"; the jury would return a death sentence regardless. App. to Pet. for Cert. 11. That view is contrary to our cases applying *Strickland*'s prejudice prong. In *Rompilla*, for example, we considered counsel's failure "to present significant mitigating evidence about Rompilla's childhood," which was as horrific as Hodge's, as well as his "mental capacity and health, and alcoholism." 545 U. S., at 378; see *id.,* at 391–392 (describing the abuse

in Rompilla's household while he was young). We concluded that "the undiscovered mitigating 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 confidence in the outcome actually reached at sentencing." *Id.,* at 393 (internal quotation marks, citations, and brackets omitted). We reached this conclusion notwithstanding that Rompilla had been convicted of stabbing a man repeatedly and setting him on fire. *Id.,* at 377. Similarly, we found prejudice in *Wiggins* even though the defendant had drowned a 77-year-old woman in her bathtub. 539 U. S., at 514. The evidence of "severe physical and sexual abuse" Wiggins suffered as a child was sufficiently "powerful" that "[h]ad the jury been able to place [Wiggins'] excruciating life history on the mitigating side of the scale, there [was] a reasonable probability that at least one juror would have struck a different balance." *Id.,* at 516, 534, 537.

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. Perhaps if the court had afforded proper consideration to the mitigation evidence, it still would have reached the same result; it might have found no "reasonable probability" that the jury would have weighed Hodge's difficult past more heavily in its moral calculation than the callous nature of the crime and Hodge's history of imprisonment and escape. But, giving full effect to the mitigation evidence, the court may well have concluded that the story of Hodge's childhood was so extraordinary, "there is a reasonable probability that at least one juror would have struck a different balance" had the jury known. *Id.,* at 537; see also *Porter*, 558 U. S., at 42. A "reasonable probability" is only "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466

U. S., at 694. Absent its errors, the Kentucky Supreme Court may have found that minimal threshold met on these facts.

We are a reviewing court, so I would leave it to the Kentucky Supreme Court to reweigh the evidence under the proper standards in the first instance. But this is a capital case, and clear errors of law such as those here should be redressed. I respectfully dissent from our failure to grant the petition for certiorari, vacate the judgment below, and remand for further consideration.