No. _____

In The

Supreme Court of the United States

THOMAS LODEN, JR., PETITIONER

v.

MARSHALL L. FISHER, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

The court of appeals assumed that defense counsel conducted a constitutionally inadequate mitigation investigation. The court, however, held that a defendant's decision at sentencing not to go forward with an inadequate mitigation case forecloses a showing of prejudice. The court thus did not ask whether the defendant would have allowed the presentation of a mitigation defense if counsel had conducted an adequate investigation. Nor did the court ask whether there was a reasonable probability of a sentence other than death but for counsel's deficient performance.

The question presented is whether a capital defendant's decision not to introduce an inadequate mitigation defense at sentencing automatically defeats a claim that counsel's failure to prepare that defense deprived the defendant of his right to effective assistance of counsel.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Edwin Loden, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 778 F.3d 484. The opinion of the district court (Pet. App. 35a-162a) is unreported but is available at 2013 WL 5243670. The opinion of the Mississippi Supreme Court denying Loden's second petition for post-conviction relief (Pet. App. 163a-243a) is reported at 43 So. 3d 365.

JURISDICTION

The court of appeals issued an opinion on February 13, 2015 and a revised opinion on March 4, 2015. On March 31, 2015, the court of appeals denied petitioner's petitions for panel rehearing and rehearing en banc. Pet. App. 244a-245a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution and 28 U.S.C. § 2254 are reprinted in an appendix to the petition.

INTRODUCTION

This Court has emphatically and repeatedly held that capital defense counsel has a duty to conduct a

thorough investigation of possible mitigating evidence. In many capital cases, such evidence can make the difference between life and death. The Court has also repeatedly held that a defendant's claim that counsel was constitutionally ineffective for failing to develop a mitigation defense must be evaluated under the familiar *Strickland* standard. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-38 (2003) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). A defendant is thus entitled to relief if he demonstrates that counsel's performance was objectively unreasonable and that there was a reasonable probability that, but for counsel's failure, the defendant would have received a sentence other than death.

The Fifth Circuit here assumed that defense counsel conducted an inadequate mitigation investigation but then never asked whether there was a reasonable probability that the defendant, Thomas E. Loden, Jr., would have received a sentence other than death but for that failure. Instead, the court of appeals thought it reasonable to read this Court's decision in *Schriro v. Landrigan*, 550 U.S. 465 (2007), as conclusively foreclosing a finding of prejudice based merely on counsel's statement that Loden did not want presentation of mitigation evidence—evidence that counsel had not in fact collected.

In reaching that conclusion, the court split with other courts that have correctly read *Landrigan* to apply only where a state court reasonably found that a capital defendant would *never* have allowed a

mitigation defense to be presented, no matter what evidence would have been developed in a thorough investigation. To fit within *Landrigan*, those courts thus require that the defendant actively obstructed his counsel's attempt to introduce mitigation evidence or made a statement on the record conveying that he would not allow its introduction under any circumstances. Loden did neither here.

The Fifth Circuit's rule effectively excuses counsel's failure to conduct a constitutionally adequate mitigation investigation any time a capital defendant later chooses not to introduce the results, if any, of that inadequate investigation at sentencing. The court of appeals failed to appreciate that such a decision will often be the direct result of the inadequate investigation itself, as it was here. A defendant's decision caused by counsel's ineffectiveness should not shield that same ineffectiveness from constitutional scrutiny. This Court's review is warranted.

STATEMENT OF THE CASE

A. Factual Background

In 2000, Loden, an 18-year veteran of the United States Marine Corps, worked as a Marine recruiter in Vicksburg, Mississippi. Pet. App. 2a. On June 21, 2000, Loden traveled to Itawamba County to visit his ailing grandmother. *Id.* Loden went to a nearby restaurant the following day, where Leesa Marie Gray worked as a waitress. *Id.* After Gray left work that day, her car tire went flat and Loden discovered

her on the side of the road. *Id.* Loden, who had been drinking and taking drugs much of the day, told Gray about his job as a recruiter and asked her if she would be interested in joining the Marines. *Id.* at 2a-3a; ROA.432.[1] Gray responded "[n]o, that would be the last thing I'd want to do with my life." Pet. App. 3a. Loden subsequently ordered Gray into his van, where he raped her and strangled her to death. *Id.* Loden recorded portions of the crime on a camcorder. *Id.*

On June 23, 2000, Loden was found unconscious on the side of a road with his wrists slashed and the words "I'm sorry" carved into his chest. *Id.* at 4a. Loden was arrested on charges of capital murder, rape, and sexual battery. *Id.* At the time of his arrest, Loden had no criminal record. *Id.* at 9a.

B. Loden's Capital Murder Prosecution

In July 2000, Itawamba County Circuit Judge Thomas Gardner contacted James Johnstone, a private attorney, and asked him to represent Loden. Johnstone agreed. ROA.322 ¶ 2. Johnstone had worked on only two capital cases and had presented a mitigation case only once. ROA.15960:14-19; ROA.5961:3-5.

On July 6, 2000, Johnstone met with Loden for about 90 minutes, and Loden provided Johnstone

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[1] The record on appeal in 5th Circuit No. 13-70033 is cited as ROA.___.

with numerous details relevant to a potential mitigation case. ROA.322-23 ¶ 4. Loden told Johnstone that he had been a Marine since 1982; performed well in the Marines with many promotions over the years; fought in "Operation Desert Storm"; saw a friend burn to death in combat; was frequently transferred to units where problems existed because he was known as a problem solver; and was recently assigned to be a Marines recruiter, a high-pressure job. *Id.*

Loden further told Johnstone that his parents divorced when he was two and that his mother then abandoned him; his stepmother abused him as a boy; he had been sexually abused at his church as a child; he was shuffled back and forth between his mother and father while growing up; he had attempted suicide several times; his father died when he was sixteen; and he had been married to his wife Katrina for five years and they had a two-year-old daughter. *Id.*

Loden also told Johnstone that, on the night of the crime, he spoke to his wife on his cell phone. *Id.*; ROA.432. At a later meeting, Loden told Johnstone that, during the call, Loden's wife told Loden that she had just had "phone sex" with Jim Craig, a partner at the law firm where she worked as a paralegal. Loden's wife told Loden that she planned to have sex with Craig while Loden was away from home. ROA.161 ¶ 10; *see also* ROA.186-87.

Despite Loden's demonstrated willingness to cooperate with a mitigation investigation, Johnstone did not follow up on *any* of the above information, as the following timeline demonstrates.

From July 6, 2000 to January 9, 2001—when Johnstone asked another attorney to help him with Loden's case—Johnstone's time records show that he did not investigate any mitigation evidence. ROA.326-27; ROA.323-24 ¶ 6; ROA.184 ¶ 21.

On January 9, 2001, Johnstone asked David Daniels to associate as his co-counsel. ROA.324 ¶ 8; ROA.1841. Daniels had worked on only two capital cases and had never presented a mitigation case. ROA.5668:8-69:8; ROA.5778:14-17. From January 10, 2001 to March 2, 2001, Johnstone and Daniels worked exclusively on reviewing discovery and drafting motions. Neither Daniels nor Johnstone investigated mitigation evidence during this period. ROA.327; ROA.1841-42.

On March 2, 2001, Loden's counsel filed a number of motions, including a motion to suppress certain evidence and a motion seeking $5,000 to hire a mitigation investigator. ROA.1653-60; ROA.1669-71; ROA.1687-91. From March 2, 2001 to May 1, 2001, time records show that neither lawyer conducted any mitigation investigation. ROA.327; ROA.1842.

On May 1, 2001, Judge Gardner denied Loden's motion to hire the mitigation investigator. When doing so, however, he told Loden's counsel: "I'll give you an opportunity to tell me if you can locate any

authority for this other than the fact that [the expert has] done it in the past. I would like to know what the courts of this country have said about this before I authorize this expenditure." Pet. App. 5a. Johnstone told the court: "We'll look and provide that for you, Your Honor." *Id.* Loden's counsel, however, never furnished any additional authority to the court and thus never hired a mitigation investigator. *Id.*

After the court denied Loden's motion for funds for a mitigation investigator, Johnstone "did not conduct any mitigation investigation." *Id.*; *see also* ROA.324 ¶ 9.

Daniels similarly failed to conduct any mitigation investigation following the denial of the motion for funds to hire the investigator. While Daniels claims that he interviewed Loden's mother and sister, as well as a Marine Corps attorney, about mitigation evidence, all three individuals have provided sworn statements that "contradict [Daniels'] claims." Pet. App. 5a; *see* ROA.720-21 ¶¶ 5, 7-10; ROA.184 ¶ 20; ROA.685 ¶¶ 7-10; ROA.178 ¶ 17; ROA.687 ¶¶ 4-5.

In a 2008 sworn affidavit, Johnstone confirmed that Loden's counsel did not conduct any mitigation investigation. According to Johnstone, as of September 19, 2001—a mere two days before Loden entered his guilty plea and was sentenced to death—Daniels and Johnstone "did not have a mitigation case to present because *there had not been any mitigation investigation*." ROA.324 ¶ 11 (emphasis added).

Johnstone and Daniels' failure to conduct a mitigation investigation occurred despite Loden's urging them to do so. For example, on June 6, 2001, Loden wrote to Daniels asking whether he could subpoena military records and personnel. ROA.572. Daniels never fulfilled this request. *See* ROA.161 ¶ 11.

On March 11 and 20, 2001, Loden wrote letters to counsel suggesting that they obtain telephone records of his wife's conversations with him and with Jim Craig on the night of the crime. ROA.562; ROA.565. Counsel failed to obtain these phone records.

On September 18 and 19, 2001, Daniels and Johnstone advised Loden that Judge Gardner had said that Loden must soon decide whether to plead guilty. ROA.324 ¶ 11. During those meetings, Johnstone and Daniels did not discuss with Loden any mitigation evidence that they could present. *Id*.; ROA.163 ¶ 18.

On September 20, 2001, Loden agreed to plead guilty. Loden's plea and sentencing hearings took place the next day. At sentencing, Daniels announced that he would not be submitting any mitigation evidence. Daniels subsequently purported to "summariz[e]" the information obtained "through our investigation" and from Dr. O'Brien, a psychologist retained by defense counsel. ROA.2585:29-87:7. Daniels briefly explained that Loden had been sexually abused as a child; was an exemplary student; served in the Marine Corps for eighteen years; was a decorated combat veteran who fought in Desert Storm; and had no

criminal history. Pet. App. 9a. Loden had provided all of this information to Johnstone during their July 6, 2000 meeting or to Dr. O'Brien during a psychological examination. ROA.322-23 ¶ 4; ROA.549-50. None of this information was obtained as the result of any actual mitigation investigation conducted by any member of Loden's trial team. Counsel's entire summary is contained in two paragraphs of the sentencing transcript. Pet. App. 9a.

During the sentencing hearing, Daniels also told the court that Loden had "elected to and has instructed us that he desires to waive presentation of this mitigation evidence for reasons I feel he will explain to the Court when given an opportunity to make a statement." Pet. App. 8a. When Loden addressed the court, however, he did not confirm Daniels' statement or offer any reason why his counsel was not presenting mitigation evidence, and the court made no inquiry into the subject. Rather, Loden simply expressed his remorse to Ms. Gray's family. *Id*. at 9a.

Judge Gardner sentenced Loden to death.

Shortly after Loden was sentenced, Daniels accepted a position with the local district attorney's office, and the Mississippi Office of Capital Defense was appointed to represent Loden on appeal. Pet. App. 10a. In 2008, Daniels destroyed all his files from Loden's case without notice to Loden or Loden's post-conviction counsel, even though Daniels knew that Loden was challenging the adequacy of Daniels'

representation in post-conviction proceedings. *Id.* at 10a n.1; ROA.5681:22-83:9. The Mississippi Supreme Court acknowledged that Daniels "[w]ithout question" "exercised poor judgment in destroying Loden's case file, which is exacerbated by his present employment with the district attorney's office." Pet. App. 242a.

C. Loden's Direct Appeal And First Petition For Post-Conviction Relief

After Loden's sentencing, the trial court denied Loden's first motion to vacate his guilty plea. *Id.* at 10a. The Mississippi Supreme Court consolidated Loden's appeal of that denial with his direct appeal. The court affirmed. *See Loden v. State*, 971 So. 2d 548 (Miss. 2007), *cert. denied*, 555 U.S. 831 (2008).

D. Post-Conviction Counsel's Discovery Of Significant Mitigation Evidence

In a second petition for post-conviction relief, Loden asserted, among other arguments, that he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to investigate available mitigation evidence. *See*, *e.g.*, *Wiggins*, 539 U.S. at 524.

Along with the petition, post-conviction counsel submitted a wealth of mitigation evidence they uncovered by following the leads that Johnstone and Daniels had ignored.

1. Post-conviction counsel learned that Loden's father drank heavily and physically and sexually

abused Loden's mother. ROA.181 ¶ 6. Loden's father tied his mother up, sexually penetrated her with various objects, beat her with extension cords, and shocked her with electrical wires. Because the family shared a single bedroom, Loden likely witnessed his father's sexual abuse of his mother. Pet. App. 11a. Loden's mother was repeatedly unfaithful, and she frequently left Loden and his sister alone in the house—once for several days—while she was with other men. *Id.*; ROA.366; ROA.241; ROA.226 ¶ 5.

After his parents divorced, Loden went to live with his father, where Loden's stepmother physically abused Loden, often beating him with hangers and belts. Pet. App. 11a; ROA.241.

Starting around age seven or eight, Loden was molested on approximately fifteen occasions over the course of two years by an adult male employee at a vacation Bible school he attended. Pet. App. 11a; ROA.242.

Around age ten, Loden moved back to his mother's custody. While there, Loden's stepfather drank heavily and repeatedly beat Loden, sometimes with a leather horse strap. Pet. App. 11a; ROA.243. Loden's stepfather also beat his sister and mother, and Loden witnessed his stepfather beating his mother many times. Pet. App. 11a; ROA.175 ¶ 8.

At age twelve, Loden was returned to his father and stepmother, who resumed verbally and physically abusing Loden. ROA.244. Loden ran away and moved back in with his mother, who was then married to

her third husband. *See* ROA.244-45. When it became clear that Loden was unwelcome in his mother's home, he moved in with his grandparents. ROA.245.

Loden and his siblings have suffered tremendously as a result of their traumatic childhoods—Loden has attempted suicide several times, and his sister has attempted suicide as well. Pet. App. 11a.

Despite his harsh upbringing, Loden thrived socially and academically when he moved in with his supportive grandparents. *See* ROA.230-32; ROA.218-23; ROA.245; ROA.372-73; ROA.376-77. Loden grew especially close to his grandfather, and he helped him run the family farm. ROA.245. Loden also attended church, and he was well liked in the community. ROA.245; ROA.218 ¶ 3.

After graduating from high school, Loden joined the Marine Corps, where he was highly regarded. Pet. App. 11a. Loden was selected as an "Outstanding Recruit" and the "Honor Man" of his platoon. *See* ROA.395. Loden's commanding officer described Loden as a "poster Marine," and the "hardest charging Marine I have ever had work for me." ROA.204-07.

Loden's performance reviews consistently urged promotion. ROA.405-06 ("[Loden] is one of the most concerned, caring and involved leaders I have observed."); ROA.408 ("My most accomplished sergeant. His overall competence is extraordinary. . . . His level of maturity, moral courage, sense of justice and humor, and concern for his [M]arines are as those

expected of a [Staff Noncommissioned Officer], which is what this young [M]arine should be at the earliest possible moment. He is that good.").

Loden was promoted numerous times, ultimately to Gunnery Sergeant. Loden received a number of awards and medals, including the Combat Action Ribbon, Good Conduct Medal (five times), Navy Achievement Medal (three times, once with Combat "V" for valor in combat), and the Navy and Marine Corps Commendation Medal. ROA.397; ROA.399-401; ROA.403.

When the Gulf War started in 1990, Loden's unit was one of the first deployed. ROA.247-48. Loden witnessed several grisly casualties during the war. ROA.220-21 ¶ 11; ROA.210 ¶ 6; ROA.200-01 ¶ 16. Loden once saw a friend blown up, and his body parts and blood fell directly onto Loden. ROA.220-21 ¶ 11. In another incident, Loden saw a friend, who had just been married and had a baby, killed by "friendly" fire. Pet. App. 11a-12a. Following this incident, Loden took on dangerous assignments, risking his own life rather than the lives of his men. ROA.247-48.

After Loden returned from the war, he began drinking heavily and using drugs. Pet. App. 12a. He started fighting with other soldiers and suffered from memory loss, nightmares, and flashbacks. ROA.248-49, 253. He felt great anxiety around other people and grew distant from his loved ones. ROA.249; ROA.221 ¶¶ 13-14. Loden did not report these problems to his superiors in the military or to any doctors

because he feared this would end or hinder his career. *See* ROA.201-02 ¶ 21; ROA.207 ¶ 13.

After he returned from Desert Storm, Loden was selected as an instructor for the prestigious Fleet Anti-Terrorism Security Team ("FAST") in Norfolk, Virginia. While there, he met his third wife, Katrina ("Kat"). ROA.251. In 1998, Loden and Kat had a daughter, Abby. Loden was a very devoted father and took on many of the parental duties while Kat pursued her career. ROA.165 ¶ 34; ROA.227 ¶ 10.

Kat openly had a number of extramarital relationships. ROA.251-52. At the time of the crime, Kat had just begun an affair with Craig, the partner at the law firm where she worked. ROA.186-87.

In 1998, the Marines assigned Loden to a highly selective, but extremely stressful, recruiting post in Vicksburg, Mississippi. This post deprived Loden of the structured military support system that had helped him cope. ROA.166 ¶ 35; ROA.255-56. Recruiting was extremely demanding, involving constant pressure to meet often-unattainable recruiting quotas. ROA.166 ¶ 35; ROA.235 ¶ 8; ROA.211 ¶ 14.

In June 2000, a few days before the crime, Loden returned to his grandparents' farm to check on his grandmother. Loden's grandfather (his "rock") had died in 1999, and Loden was upset to find that his grandmother was fragile and that the family farm was in disrepair. *See* ROA.255-56. At this time, Loden knew that his marriage was failing and that he

was about to miss his recruiting quota for the third consecutive month. ROA.166 ¶ 35; ROA.256.

On the day of the crime, Loden spent the day drinking beer, nearly a fifth of a gallon of bourbon, and GHB ("liquid ecstasy"). ROA.165 ¶ 33. Shortly before the crime, Loden spoke to Kat by phone. Kat told Loden that she just had "phone sex" with Craig and that she was going to have sex with Craig while Loden was away. ROA.186-87; ROA.257. Loden hung up the phone feeling helpless and distraught, ROA.257, and he ingested more GHB.

2. Following Loden's conviction, Loden was examined by Dr. James R. High, who also reviewed interviews of Loden's family members, friends, and colleagues and the voluminous records that were obtained by Loden's post-conviction counsel. Based on his examination, testing, and record review, Dr. High concluded that Loden suffered from chronic post-traumatic stress disorder ("PTSD") due to his combat experience. Pet. App. 12a; ROA.271 § VIII.2 (citing Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") at 463-68 (4th ed. 2000)). Chronic PTSD "is signaled by intrusive recollections of traumatic events, emotional numbing and avoidance of triggers, and autonomic hyperarousal—irritability, insomnia, and hypervigilance." ROA.271 § VIII.2.

Dr. High concluded that Loden also suffered from "Complex PTSD" because of childhood abuse. Pet. App. 12a. Symptoms of this disorder include

"self-destructive and impulsive behavior; . . . feelings of ineffectiveness, shame[,] despair or hopelessness; feeling permanently damaged; . . . hostility; social withdrawal; [and] feeling constantly threatened." ROA.271-72 § VIII.3 (quoting DSM-IV-TR at 465).

Finally, Dr. High concluded that, from the time of the crime until Loden awoke the next morning, Loden suffered from an acute, localized episode of dissociative amnesia, which is characterized by an "inability to recall important personal information usually of a traumatic or stressful nature that is too extensive to be explained by ordinary forgetfulness." ROA.271 § VIII.1 (quoting DSM-IV-TR at 523). Dr. High also found that the crimes were committed while Loden was "under the influence of extreme mental or emotional disturbance." ROA.277 § IX.13.

E. State Court's Resolution Of Loden's Petition For Post-Conviction Relief

The Mississippi Supreme Court denied Loden's second petition for post-conviction relief. Pet. App. 163a-243a. The court rejected Loden's claim that his trial attorneys provided ineffective assistance due to their failure to investigate available mitigation evidence. According to the court, "'even if additional mitigation evidence had been discovered, pursuant to [Loden's] instructions, it could not [have been] presented during the sentencing phase of the trial.'" Pet. App. 195a (citation omitted) (alteration in original). "As such, Loden 'cannot show that counsel's

performance was deficient or that such deficiency prejudiced him.'" *Id.* (citation and footnote omitted).

The Mississippi court also stated that, even if Loden's instruction not to present mitigation evidence was not dispositive, Loden could not prevail on his ineffective assistance claim because his counsel's purported mitigation investigation was not deficient. *Id.* at 195a-205a.

F. Proceedings Before The District Court

Loden filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Mississippi, which denied it. Pet. App. 90a.

As relevant here, the district court found that Loden's ineffective assistance of counsel claim failed because Loden declined to present a mitigation defense at sentencing. *Id.* at 81a-82a (citing *Landrigan*, 550 U.S. 465). The district court also concluded that Loden had not demonstrated that it was unreasonable for the state court to reject Loden's claim that his counsel's mitigation investigation was deficient. *Id.* at 82a-89a. In two paragraphs, the district court further purported to hold that no reasonable sentencer would have sentenced Loden to anything other than death even if his mitigation evidence had been fully developed and presented. *Id.* at 89a-90a.

The district court granted a certificate of appealability on five issues, including trial counsel's failure to develop mitigation evidence. *Id.* at 162a.

G. Proceedings Before The Court Of Appeals

The court of appeals affirmed. Pet. App. 1a-34a.

The court assumed *arguendo* that counsel's performance was deficient due to counsel's failure to conduct an adequate mitigation investigation. *Id.* at 24a n.4. The court concluded, however, that "the Mississippi Supreme Court's conclusion that, under *Landrigan*, Loden's decision not to present mitigation evidence precludes a showing of *Strickland* prejudice was not an unreasonable application of clearly established Supreme Court precedent to the facts of this case." *Id.* at 29a.

In the court's view, the statement by Loden's attorneys that he had directed them not to object to the state's evidence or cross-examine the state's witnesses "lends support to an inference that Loden's decision not to present a mitigation case was firm." *Id.* at 28a. The court recognized that "the trial court did not inquire as to Loden's reasons for declining to present a mitigation case," but speculated that his "likely motivation" was to prove "a measure of penance for his crime." *Id.*

The court acknowledged that "Loden's instructions to his attorneys here may not have been as strident, public, or obstructive as those" of the defendant in this Court's decision in *Landrigan*. *Id.* at 29a. But it read *Landrigan* as holding "only that the defendant's actions in that case were *sufficient* to preclude a showing of prejudice; it does not speak to

what actions are *necessary* to bar such a showing." *Id.*

REASONS FOR GRANTING THE PETITION

Lower courts are divided on when it is permissible to dispense with inquiry into the reasonable probability of a different sentence in cases presenting a capital defendant's claim that his counsel was constitutionally ineffective for failing to prepare an adequate mitigation defense. Most require obstructive conduct by the defendant, or, at a minimum, statements by the defendant himself at sentencing that compel a conclusion that he would not permit introduction of a mitigation defense—no matter how compelling—under any circumstances. In the absence of such evidence, those courts conduct an ordinary *Strickland* prejudice inquiry, asking whether there is a reasonable probability that, but for counsel's failure to conduct an adequate mitigation investigation, the defendant would have received a sentence other than death.

In this case, the Fifth Circuit followed a conflicting approach, concluding that the defendant's decision at sentencing not to introduce an inadequate mitigation defense was a sufficient basis to conclude that he could not have been prejudiced by the inadequacy. That holding disregards the fact that such a decision will itself often be the result of counsel's inadequate investigation, as it was here. The court of appeals' decision rested on a misreading of this Court's decision in *Landrigan*, and it disregarded

record evidence demonstrating that Loden desperately wanted his counsel to conduct a proper mitigation investigation. This Court's review is warranted.

I. CAPITAL DEFENSE COUNSEL HAS AN OBLIGATION TO CONDUCT AN ADEQUATE MITIGATION INVESTIGATION AND FAILURE TO DO SO IS EVALUATED UNDER *STRICKLAND*

This Court has repeatedly emphasized the critical importance of an adequate mitigation investigation in capital cases. It has also repeatedly concluded that defendants whose counsel failed to satisfy that obligation were entitled to habeas relief after applying *Strickland*'s two-step test for ineffective assistance of counsel claims. That includes an inquiry into whether there was a reasonable probability of a different sentence but for counsel's failure. The Court has followed a different path only in extreme circumstances where a defendant's obstructive conduct and in-court statements inviting imposition of the death penalty render inescapable the conclusion that he would not have permitted introduction of *any* mitigation evidence, no matter how powerful.

A. In *Williams v. Taylor*, 529 U.S. 362 (2000), defense counsel had offered some mitigating evidence during the sentencing hearing, including the testimony of Williams' mother and a taped excerpt of a psychiatrist's statement. *Id.* at 369. The Court nonetheless found that counsel had not "fulfill[ed] their obligation to conduct a *thorough* investigation

of the defendant's background." *Id.* at 396 (emphasis added). In particular, counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood." *Id.* at 395. These records would have shown that Williams had been neglected by his parents and "severely and repeatedly beaten by his father." *Id.*

Applying *Strickland*'s prejudice test, the Court found that "the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence." *Id.* at 397. The Court concluded that discovery and introduction of evidence regarding "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

B. In *Wiggins*, *supra*, this Court likewise held that a defendant was entitled to habeas relief due to his counsel's failure to conduct an adequate mitigation investigation. 539 U.S. at 537-38.

The Court emphasized that its focus was "*not* whether counsel should have presented a mitigation case." *Id.* at 523 (emphasis added). Instead, the Court examined "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Id.* (emphasis in original). Relying on the

American Bar Association's 1989 Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"), the Court further stated that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* at 524 (emphasis in original) (quoting ABA Guidelines at 11.4.1(C)).

The Court concluded that counsel's performance fell short of the "well-defined norms" reflected in the ABA Guidelines. *Id.* at 524-25. Counsel's performance was especially unreasonable in light of the fact that the records available to them indicated that Wiggins had suffered deprivation and abuse during his childhood. *Id.* at 525. According to the Court, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Id.*

The Court also concluded that *Strickland*'s prejudice requirement was satisfied. *Id.* at 534-38. The Court concluded that, "[g]iven both the nature and the extent of the abuse [Wiggins] suffered, . . . there [was] a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form." *Id.* at 535. Additionally, the Court held that "had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it

would have returned with a different sentence." *Id.* at 536.

C. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Court again found a capital defendant entitled to habeas relief based on his counsel's failure to conduct an adequate mitigation investigation. *See id.* at 380-93. The Court found both parts of the *Strickland* inquiry satisfied, even though the defendant had been "uninterested in helping" his defense lawyers develop a mitigation case and even though "[t]here were times when [he] was even actively obstructive by sending counsel off on false leads." *Id.* at 381.

D. The Court followed a different analytical approach in *Landrigan*, *supra*, while acknowledging how extraordinary the facts were there. As the Court put it, "'[i]n the constellation of refusals to have mitigating evidence presented,'" *Landrigan* "'is surely a bright star.'" 550 U.S. at 477 (citation omitted). In *Landrigan*, the "client interfere[d] with counsel's efforts to present mitigating evidence to a sentencing court," a "situation" that the Court had never addressed. *Id.* at 478.

In particular, the defendant instructed his ex-wife and mother not to testify about mitigation evidence, even though his counsel had summoned these witnesses to the sentencing hearing and had advised Landrigan that it was "very much against his interests" to prevent them from testifying. *Id.* at 469. Landrigan also told the court, on the record, that he did not want his counsel to present any mitigation

evidence, and that there were in fact no mitigating circumstances. *Id.* Still not satisfied, the trial judge asked Landrigan's ex-wife and mother to testify, but they refused at Landrigan's instruction. *Id.* at 470.

Landrigan's counsel then attempted to make a proffer of the witnesses' testimony to the court, but Landrigan interrupted him and contradicted his proffers. *Id.* For instance, when counsel tried to explain that Landrigan had worked in a legitimate job to provide for his family, Landrigan interrupted, stating "if I wanted this to be heard, I'd have my wife say it." *Id.* Landrigan further volunteered that he was not only working but also "doing robberies supporting my family." *Id.* Moreover, when counsel asserted that a murder that Landrigan had previously committed had elements of self-defense, Landrigan interrupted him and said, "He didn't grab me. I stabbed him." *Id.*

Finally, at the end of his sentencing hearing, Landrigan told the court, "I think if you want to give me the death penalty, just bring it on. I'm ready for it." *Id.*

On that extraordinary record, this Court held that it had not been an unreasonable application of *Strickland* for the state court to conclude that counsel's inadequate mitigation investigation did not prejudice the defendant, without asking whether there was a reasonable probability of a different sentence but for counsel's error. *Id.* at 478. The Court concluded that the incontrovertible record of the sentencing hearing showed that Landrigan was actively

seeking a death sentence and would have thwarted the presentation of any mitigation evidence, no matter how persuasive. *Id.* at 477-80.

E. Following *Landrigan*, this Court made clear that—in the absence of extraordinary facts like those present in that case—*Strickland*'s ordinary two-step test would continue to apply to claims of constitutionally ineffective mitigation investigations. *See Porter v. McCollum*, 558 U.S. 30, 38-44 (2009) (per curiam). In that case, the defendant was "fatalistic and uncooperative" with defense counsel regarding development of a mitigation case. *Id.* at 40. The Court nonetheless conducted an ordinary prejudice inquiry, concluding that there was a "reasonable probability" that Porter would not have been sentenced to death if the available mitigating evidence had been introduced. *Id.* at 42.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS

The courts of appeals are divided on the applicability of *Landrigan* in cases, like this one, that do not involve a capital defendant's obstructive conduct or in-court statements making clear that he would never allow introduction of any mitigation evidence, no matter how compelling. In this case, the court of appeals found it reasonable to conclude that counsel's statement that Loden had instructed his attorneys "not to present mitigation evidence" conclusively precluded him from establishing that he was prejudiced

by counsel's inadequate mitigation investigation. Pet. App. 29a. By contrast, other federal courts of appeals and state supreme courts have held that *Landrigan* does not apply—and courts must therefore conduct an ordinary *Strickland* prejudice inquiry—where the defendant does not obstruct introduction of mitigation evidence or make an in-court statement making clear he would not permit its introduction under any circumstances. Loden would have been entitled to habeas relief under the approach of those courts. This Court should grant this petition to resolve the conflict.

A. A Majority Of Courts Hold That *Landrigan* Obviates A Prejudice Inquiry Only In Narrow Circumstances

A majority of federal courts of appeals to have addressed the question—along with two state supreme courts—hold that *Landrigan* authorizes a court to dispense with inquiry into the reasonable probability of a different sentence only where a defendant obstructs introduction of mitigation evidence, or personally makes statements to the court that effectively invite imposition of the death penalty. Under those narrow conditions, these courts hold, there is an inescapable inference that the defendant would not have permitted introduction of *any* mitigation evidence an adequate investigation would have uncovered. Those courts have held, however, that *Landrigan* does *not* apply in cases, like this one, involving only a decision by a defendant not to introduce (inadequately developed) mitigation evidence

at sentencing. Those courts understand that the decision not to present mitigation evidence can itself be the result of counsel's failure to conduct a reasonable investigation—as it was here.

1. The Tenth Circuit has found *Landrigan* inapplicable absent obstructive behavior by a capital defendant. In *Young v. Sirmons*, 551 F.3d 942 (10th Cir. 2008), the defendant had decided "to forego presenting the mitigation witnesses his trial counsel had subpoenaed and instead rely on a written stipulation of mitigation." *Id.* at 958. Citing *Landrigan*, the state argued that defendant Young "'cannot demonstrate prejudice from trial counsel's failure to investigate, develop and present all of the mitigation evidence he now embraces' because '[i]t is clear Young would not have allowed that evidence to be presented under any circumstances.'" *Id.* at 959 (citation omitted).

The Tenth Circuit rejected the state's argument. "Unlike the defendant in [*Landrigan*], who waived his right to present mitigating evidence, thereafter refused to allow his counsel to present any type of mitigating evidence on his behalf, and all but asked the trial court to sentence him to death," the court explained, "Young simply chose to forego the presentation of testimony from the handful of friends and family members that his trial counsel had lined up to testify." *Id.* The court thus found "it impossible to predict with any degree of certainty what Young would have done had his trial counsel investigated

and prepared to present all of the available mitigating evidence that Young now points to." *Id.*

2. The Ninth Circuit has twice held that *Landrigan* applies only when a capital defendant actively obstructs his counsel's presentation of mitigation evidence. In *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009), the court rejected the state's argument, based on *Landrigan*, that the "defendant's refusal to cooperate in the penalty phase" defeated his claim that counsel was constitutionally ineffective for failing to investigate and present an adequate mitigation defense. *Id.* at 1118-19. The court explained that *Landrigan* was a case in which "the defendant actively obstructed counsel's investigation and outright refused to allow counsel to present any mitigating evidence." *Id.* at 1119 (recounting that the defendant in *Landrigan* "instructed" family members not to testify, "repeatedly interrupted" counsel when he tried to offer mitigation evidence, and asked the judge to impose the death penalty).

"[U]nlike the defendant in *Landrigan*," the Ninth Circuit observed, the defendant before it "did not threaten to obstruct the presentation of any mitigating evidence that counsel found." *Id.* Without such obstructive conduct, the mere fact that he "refused to assist in his defense" was insufficient to render *Landrigan* applicable. *Id.*

In *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012), the Ninth Circuit affirmed a grant of habeas relief to a capital defendant based on his claim that

defense counsel was constitutionally ineffective for failing to conduct an adequate mitigation investigation. *Id.* at 1169-76. The state in that case "cite[d] to [*Landrigan*] for the proposition that [defense counsel's] failure to present additional mitigating evidence cannot be the basis for ineffective assistance under *Strickland* because [the defendant] expressed a desire not to present such evidence." *Id.* at 1170 n.2.

The Ninth Circuit "rejected this expansive reading of *Landrigan*." *Id.* (citing *Hamilton*, 583 F.3d at 1119). The court noted that *Landrigan* was a case in which the defendant "'actively obstructed counsel's investigation and outright refused to allow counsel to present any mitigating evidence.'" *Id.* (quoting *Hamilton*, 583 F.3d at 1119). The court held that "*Landrigan* is inapplicable where the defendant 'did not threaten to obstruct the presentation of any mitigating evidence that counsel found.'" *Id.* (quoting *Hamilton*, 583 F.3d at 1119).

3. The Third Circuit has similarly held that a defendant's decision "to forego the presentation" of mitigation evidence at his sentencing "simply does not permit the inference that, had counsel competently investigated and developed expert mental health evidence and institutional records, [the defendant] would have also declined their presentation." *Blystone v. Horn*, 664 F.3d 397, 426 (3d Cir. 2011). In that case, the Pennsylvania Supreme Court had found that the defendant could not establish *Strickland* prejudice because he had "'refused

to allow any other mitigating evidence to be presented in his behalf'" and, according to the state court, the jury therefore "would not have been privy to any additional evidence that [defense counsel] may have uncovered through an adequate investigation." *Id.* at 423 (quoting *Commonwealth v. Blystone*, 725 A.2d 1197, 1205 (Pa. 1999)). On federal habeas review, Pennsylvania argued that this conclusion meant that *Landrigan* "foreclosed" the defendant's ineffective assistance of counsel claim. *Id.*

The Third Circuit rejected that contention, concluding that the defendant's decision "to forego the presentation" of mitigation evidence at his sentencing was insufficient to raise an inference that he would not have permitted even a fully developed mitigation case to go forward. *Id.* at 426. The court observed that, unlike the defendant in *Landrigan*, the defendant before it "never behaved in a manner, either prior to or during sentencing, to suggest that such an inference might be appropriate." *Id.* Because a colloquy between the sentencing court and defendant focused only on the defendant's unwillingness to testify, the Third Circuit found "it not only incorrect, but also unreasonable, to infer from the colloquy that Blystone would have prevented counsel from presenting any mitigating evidence, regardless of the form that it took." *Id.* The Third Circuit therefore found "unreasonable" the Pennsylvania Supreme Court's "belief that it could predict what [the defendant] would have done" if counsel had conducted an adequate mitigation investigation. *Id.*

Likewise, in *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), the Third Circuit found the case before it—in which the defendant declined to present any mitigating evidence at sentencing—to "bear[ ] no resemblance to *Landrigan*." *Id.* at 112, 129. The court rested this conclusion on the fact that, during the colloquy with the trial judge, the defendant "never indicated that he would interfere with or otherwise prevent the presentation of all mitigating evidence, regardless of its nature." *Id.* at 129. The court therefore could not "conclude that [defendant's] conduct at sentencing eliminated all possibility that counsel's performance caused him prejudice." *Id.*

4. Two state supreme courts have likewise limited *Landrigan* to cases of defendant obstruction. The Florida Supreme Court has found *Landrigan* applicable only in cases where "the defendant either actively and intentionally concealed potential mitigation or ordered trial counsel not to conduct a penalty phase investigation." *Coleman v. State*, 64 So. 3d 1210, 1222 (Fla. 2011). The Ohio Supreme Court likewise declined to apply *Landrigan* even in a case where the defendant "refused to cooperate with the mitigation specialist and the defense psychologist in preparing mitigation." *State v. Neyland*, 12 N.E.3d 1112, 1157 (Ohio 2014). The court determined that such "refusal to cooperate" did not rise to the level of the obstruction present in *Landrigan* and thus "did not excuse counsel from conducting a mitigation investigation." *Id.*

B. By Contrast, The Fifth Circuit Holds That A Statement By Counsel That The Defendant Does Not Want Mitigation Evidence Presented Conclusively Forecloses Any Ineffective Assistance Of Counsel Claim

In contrast to the majority approach, the Fifth Circuit here interpreted *Landrigan* to allow dispensing with inquiry into the reasonable probability of a different sentence but for counsel's error in a case in which counsel merely stated that he was instructed by the defendant not to present mitigation evidence. Under that court's reasoning, such a statement by counsel has the effect of automatically defeating any ineffective assistance of counsel claim based on failure to conduct a reasonable mitigation investigation. That is the case even when, as here, counsel's failure precipitated the defendant's decision.

In this case, there was no colloquy in which Loden stated that he opposed presentation of mitigation evidence, would obstruct its presentation, or wanted to be put to death. The court of appeals also acknowledged that what counsel said were "Loden's instructions to his attorneys" not to present mitigation evidence "may not have been as strident, public, or obstructive as those in *Landrigan*." Pet. App. 29a. The court nonetheless concluded that counsel's statement that Loden did not want to make evidentiary objections, cross-examine government witnesses, or make a closing argument "lends support to an inference that Loden's decision not to present a mitigation

case was firm." *Id.* at 28a. The court thus found it reasonable to conclude that Loden could not establish prejudice—even though neither it nor the Mississippi Supreme Court ever asked whether there was a reasonable probability that Loden would have made a different decision on introduction of a mitigation defense had his counsel actually prepared one. *Id.* at 27a-29a.

Such statements at sentencing would have been insufficient to support application of *Landrigan* in any of the courts discussed above. Instead, those courts would have pursued *Strickland*'s ordinary prejudice inquiry and asked whether there was a reasonable likelihood of a different sentence if counsel had adequately investigated and presented a mitigation case. That was a question that the Fifth Circuit should have—but did not—ask in this case.

III. THE FIFTH CIRCUIT'S DECISION IS WRONG, AND THE ISSUE IS IMPORTANT

As this Court has repeatedly held, a claim that counsel was constitutionally ineffective for failure to conduct an adequate mitigation investigation is to be evaluated under *Strickland*'s familiar two-step inquiry. That includes a determination of whether there was a reasonable probability of a different sentence but for counsel's deficient performance. *See supra* pp. 20-25. *Landrigan* established a narrow exception to that rule in a case where the defendant repeatedly interfered with his counsel's attempt to introduce mitigation evidence and invited the court

to impose the death penalty. Under those extraordinary circumstances, the Court concluded that the only reasonable inference was that the defendant would not have permitted introduction of *any* mitigation evidence, no matter how compelling. It was therefore unnecessary to ask whether there was a reasonable probability of a different sentence if such evidence had been introduced. *See Landrigan*, 550 U.S. at 475-80.

A. The Fifth Circuit's erred in this case by effectively turning the narrow *Landrigan* exception into a general rule applicable any time a capital defendant opts against introducing mitigation evidence. That reading of *Landrigan* conflicts with its reasoning. The Court in *Landrigan* expressly distinguished *Wiggins* and *Strickland* on the ground that those decisions did not address "a situation in which a client *interferes* with counsel's efforts to present mitigating evidence to a sentencing court." *Landrigan*, 550 U.S. at 478 (emphasis added). The Court thus recognized that, absent such special circumstances, a defendant's ineffective assistance of counsel claim should be subject to ordinary review under *Strickland*. Indeed, in *Porter*, *supra*, a decision that came after *Landrigan*, the Court applied the ordinary *Strickland* prejudice test even though the defendant was "fatalistic and uncooperative" with defense counsel regarding development of a mitigation case. 558 U.S. at 40, 42.

Here, no circumstances like those at issue in *Landrigan* are present. Loden did not interfere with

counsel's efforts to introduce mitigation evidence. He made no statement inviting imposition of the death penalty, nor any statement to the sentencing judge indicating that he would never allow introduction of any mitigation evidence that could have been developed. Nor had Loden ever instructed his counsel not to pursue a mitigation investigation. To the contrary, Loden had repeatedly urged his counsel to conduct such an investigation, yet his counsel acknowledged that the reason the defense "did not have a mitigation case to present" was that "*there had not been any mitigation investigation*." ROA.324 ¶ 11 (emphasis added). *Landrigan* is inapplicable here, and the court of appeals thus should have engaged in a prejudice inquiry.

B. Despite the substantial differences between the present case and *Landrigan*, the Fifth Circuit held that the state court's application of *Landrigan* was not unreasonable for three reasons. None is availing.

First, the Fifth Circuit stated that Loden's words of apology to Ms. Gray's family suggested that he believed that declining to present mitigation evidence, along with refraining from objecting to the state's evidence and cross-examining the state's witnesses, served as a measure of penance for his crime. Pet. App. 28a. Those actions do not, however, establish that there was no reasonable probability that Loden would have allowed the presentation of mitigating evidence if his counsel had developed that

evidence, been prepared to present it, and explained the benefits of presenting a mitigation case to Loden.

To the contrary, Loden's conduct throughout the state court proceedings demonstrates that, if his counsel had conducted a thorough mitigation investigation, he would have instructed them to present a mitigation case. Indeed, during Loden's initial meeting with Johnstone on July 6, 2000, Loden demonstrated his willingness to cooperate with a mitigation investigation by sharing intimate details about his life. Following this initial meeting, Loden urged his counsel to contact witnesses and obtain documents relevant to mitigation, but they failed to do so. For example, Loden wrote to Daniels asking him to subpoena military records and personnel. ROA.572. Daniels never fulfilled this request. ROA.161 ¶ 11.

Loden also wrote at least two letters to counsel suggesting that they obtain telephone records of his wife's conversations with him and with Jim Craig from the night of the crime. ROA.562; ROA.565. Counsel failed to obtain these phone records. Moreover, Loden suggested that Craig would be helpful to his defense, ROA.161 ¶ 9, but Loden's attorneys never contacted Craig. ROA.187 ¶ 8. Loden fully cooperated with Dr. O'Brien, the defense psychologist (and complained to him about defense counsel's failure to work on his case). ROA.545-52.

Confronted with his counsel's consistent failure to follow meaningful leads, Loden was unable to reach a reasoned decision regarding the presentation

of mitigation evidence. In a 2008 affidavit, however, Loden confirmed what his actions already showed: "If [his] attorneys had conducted a thorough mitigation investigation and properly advised [him] about the mitigation case that could be presented, [he] would have instructed them to present mitigation evidence on [his] behalf." ROA.165 ¶ 28.

The Fifth Circuit also suggested that Loden wanted to abbreviate his sentencing proceedings because, according to Daniels' deposition testimony, "Loden did not want to acknowledge what he had done." Pet. App. 28a. But there is no logical connection between Loden's supposed unwillingness to talk about his crime and his willingness to allow his family members and military colleagues to talk about his nightmarish childhood, combat experience, and post-war psychological struggles.

Finally, the Fifth Circuit thought the state court's decision was not unreasonable because Daniels' two-paragraph "summary" of the mitigation evidence was at least the same type of evidence that post-conviction counsel later uncovered. *Id.* at 28a-29a. That was manifestly incorrect. During his extremely limited discussion at Loden's sentencing hearing, Daniels failed to mention a wealth of powerful mitigating evidence, including that: (1) when Loden was a child, he saw his father shock his mother with electrical wires and beat her with extension cords; (2) Loden likely witnessed his father's sexual abuse of his mother; (3) Loden's mother often left Loden and his sister alone, once for several days, while she was

having extramarital affairs; (4) Loden was physically abused by his stepmother, who often beat him with hangers and belts; (5) Loden was physically abused by his stepfather, who sometimes beat Loden with a leather horse strap; (6) Loden witnessed his stepfather beating his mother many times; (7) in the wake of their traumatic childhoods, both Loden and his sister have attempted suicide; (8) Loden witnessed gruesome casualties during his service in the Gulf War; (9) Loden returned from the Gulf War a changed man and began drinking heavily and using drugs; (10) hours before the crime, Loden's wife told him that that she had just had phone sex with Jim Craig and that she was going to have sex with Craig while Loden was away. *See supra* pp. 10-16.

Moreover, a mere summary by counsel of what the evidence would have been cannot replace the impact of live witness testimony on deeply personal matters such as these.

C. The Fifth Circuit's error is significant and will unfairly undermine the ability of capital defendants to ensure adequate representation. The decision authorizes courts within the circuit to reject ineffective assistance of counsel claims involving counsel's failure to develop a mitigation defense virtually every time a defendant elects not to present mitigation evidence. This approach is deeply problematic because in many cases (including this one) a defendant's decision not to introduce mitigation evidence will itself be based on—if not practically compelled by—counsel's deficient performance.

This Court has emphasized that even counsel is not "in a position to make a reasonable strategic choice as to whether" to introduce mitigation evidence when "the investigation supporting their choice was unreasonable." *Wiggins*, 539 U.S. at 536. It should follow that a capital defendant is likewise not in a position to make a reasonable strategic choice about introduction of a mitigation case when the only option before him is the deficiently prepared one offered by his counsel. Indeed, under such circumstances, many defendants will reasonably conclude that they should adopt some different course at sentencing rather than go forward with a poor mitigation defense. Such a choice effectively compelled by counsel's deficient performance should not be used to insulate that performance from review.

IV. LODEN CAN DEMONSTRATE A REASONABLE PROBABILITY THAT HE WOULD HAVE RECEIVED A DIFFERENT SENTENCE BUT FOR COUNSEL'S ERROR

Under a proper prejudice inquiry, there is a reasonable probability that Loden would have received a different sentence had a proper mitigation case been developed and presented. Indeed, Loden's newly uncovered mitigating evidence is precisely the kind of evidence that this Court has previously found to be powerful.

Like the counsel in *Wiggins*, *Williams*, and *Porter*, Loden's counsel failed to uncover and present mitigating evidence regarding Loden's traumatic

childhood, which was filled with physical abuse and severe privation. *See Wiggins*, 539 U.S. at 535 (finding prejudice where the defendant "experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother"); *Williams*, 529 U.S. at 398 (finding prejudice where the defendant's childhood was "filled with abuse and privation"); *see also Porter*, 558 U.S. at 41 (finding prejudice where the defendant had a "childhood history of physical abuse"). Moreover, like the defendant in *Wiggins*, Loden was repeatedly molested as a child. 539 U.S. at 517.

Furthermore, like the defendant in *Porter*, Loden had a history of heroic military service. His counsel could have presented evidence highlighting that service, as well as Loden's struggles following his traumatic combat experience. *See Porter*, 558 U.S. at 43 ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines. . . . ").

There were of course aggravating factors involving the crime here, as there were in all of the above cases. But the quality and quantity of mitigation evidence that was not put before the sentencing court here compels a conclusion that, had it been introduced, there is a reasonable probability of a different outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 29, 2015

APPENDIX A

REVISED MARCH 4, 2015
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-70033

THOMAS EDWIN LODEN, JR.,

Petitioner-Appellant,

v.

RICK MCCARTY, INTERIM COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Mississippi

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(Filed February 13, 2015)

Before KING, DAVIS, and ELROD, Circuit Judges.

KING, Circuit Judge:

Petitioner-Appellant Thomas Edwin Loden raped and murdered Leesa Marie Gray in 2000. After pleading guilty, Loden was sentenced to death by a Mississippi state court. Loden now appeals the district

court's denial of his petition for a writ of habeas corpus. That petition was premised on the denial of Loden's constitutional right to the effective assistance of counsel during the guilt and sentencing phases of his trial. For the reasons that follow, we AFFIRM the judgment of the district court.

I.

Thomas Loden worked as a recruiter for the United States Marine Corps in Vicksburg, Mississippi, where he lived with his wife and daughter. He had travelled to Itawamba County, Mississippi, on June 21, 2000 to visit his ailing grandmother, Rena Loden, at her farm. On June 22, Loden claims he spoke to his wife on the phone, and she told him that she had just had "phone sex" with a partner at the law firm at which she worked as a paralegal and that she planned on having sexual intercourse with that partner while Loden was away.

Shortly thereafter, at around 9:00 p.m., Loden went into Comer's Restaurant, where Leesa Marie Gray, the victim, worked as a waitress. He had been in the restaurant earlier that day, and, according to witnesses, he had attempted to flirt with Gray. Loden ordered a cheeseburger to go and then left the restaurant. After Gray left work, at around 10:30 p.m., her car tire went flat on her drive home. Loden claims he saw her car by the side of the road and stopped. Loden then told Gray that he was in the Marine Corps and asked if she would ever be interested in

enlisting. He claims that she replied "[n]o, that would be the last thing I'd want to do with my life." Loden states that her response enraged him, and he then kidnapped her in his van. He then raped her repeatedly and strangled her to death. Loden used a camcorder to record a substantial portion of his crime. The video shows Loden forcing Gray to perform fellatio on him, vaginally raping her, digitally penetrating her vagina and anus, and raping her repeatedly with an object, specifically a cucumber. At one point, Loden instructs Gray to smile so that he can see her braces. At another point, after he digitally penetrates her vagina, he states: "You really were a virgin, weren't you?" The video stops, and, when it restarts, Loden is seen twisting the breast of Gray, at that point unconscious, apparently attempting to return her to consciousness. After another break in the video, Gray's dead body is seen posed in the van with the cucumber forced into her vagina. Loden removes and reinserts the cucumber several times before the videotape stops. After Loden had murdered Gray, he went into his grandmother's house and fell asleep.

When Gray did not return home from work that night, the police began investigating her disappearance. Witnesses reported that Loden had arrived at the restaurant in a van shortly before closing and ordered food. They also reported that he had been flirting with Gray earlier in the day. The police went to Loden's grandmother's farm to speak with him, and one of his grandmother's helpers informed them that Loden was asleep in the house. The officers left

and returned later. When they returned, they spoke with Loden's grandmother, who informed them that Loden had left to go fishing at a nearby lake. The officers went to look for Loden, but could not find him. When they got back to the house, Ms. Loden gave her consent for the officers to search her property. The officers discovered a pair of shorts with blood on them in Loden's room and a rope tied into a handcuff-style knot in Ms. Loden's car. They then obtained a search warrant for the property and Loden's van. When the crime lab processed the van, they found Gray's body and, among other evidence, the camcorder with the video Loden made of his crime.

That same day, Loden was found lying by the side of a road in Itawamba County, Mississippi. His wrists were slashed and the words "I'm sorry" were carved into his chest. After he was released from the hospital, he was arrested. The police discovered a fresh grave, along with a shovel, in an out-of-the-way, heavily vegetated area on Loden's grandmother's property. Loden's wife visited him in jail and, after speaking with her, he confessed to raping Gray and to murdering her, though he stated that he did not remember killing her.

Loden was indicted for capital murder, rape, and sexual battery in Mississippi state court. James Johnstone, a private attorney, was appointed to represent Loden. Johnstone asked David Daniels, another attorney, to associate as his co-counsel in Loden's case.

Johnstone and Daniels filed several motions in Loden's case, two of which are relevant for purposes of this appeal. First, they filed a motion to suppress evidence obtained during the search of Loden's grandmother's property, including the vehicles on it, and Loden's confession as obtained in violation of the Fourth and Fifth Amendments, respectively. Second, they moved the court to provide funds so that they could hire an expert in the field of mitigation investigation. The trial court denied both motions, though, as to the second motion, the court told Loden's attorneys, "I'll give you an opportunity to tell me if you can locate any authority for this other than the fact that [the expert has] done it in the past. I would like to know what the courts of this country have said about this before I authorize this expenditure." Johnstone told the court: "We'll look and provide that for you, Your Honor." Neither Johnstone nor Daniels ever furnished any such supplemental authority to the court.

After the motion for funds was denied, Johnstone did not conduct any mitigation investigation during his representation of Loden. Daniels claims that he conducted a mitigation investigation by asking about mitigating issues when he interviewed witnesses, but the witnesses to whom he claims to have spoken contradict his claims. Further, Loden argues that neither of his attorneys spoke to the attorney with whom his wife was having an affair, who could have verified Loden's claim that his wife was taunting him about her infidelity on the night of the murder. Loden also argues that his attorneys failed to interview Loden's

military colleagues and to request his military records.

Further, Loden claims that his attorneys provided him with erroneous advice about his appellate rights after a guilty plea. Loden claims that his attorneys told him that if he pleaded guilty and received the death penalty, "the pre-trial motions would be reviewed by the Supreme Court of Mississippi under a heightened scrutiny review which applies to all death sentences." He claims that they assured him "that the rulings on the suppression motions were reviewable by the Supreme Court even if I pled [sic] guilty." A letter Loden sent to Daniels after he pleaded guilty appears to lend credence to Loden's claim that he misunderstood his appellate rights. Johnstone's recollection of his advice is somewhat different. He states in his affidavit:

> I told Loden that if he pleaded guilty and was sentenced to death, the Mississippi Supreme Court would review his sentence, and that they would review everything that was in the record. I told Loden that I believed that (1) the rulings on the suppression motions, (2) the order denying the request for funds to hire a mitigation specialist, and (3) the use of Loden's wife Kat to induce Loden to talk with the police on June 30, 2000 were issues that might be reviewed that were potentially viable.

Daniels's recollection differs. In Daniels's affidavit, he states:

> Mr. Loden asked me whether if he pleaded guilty to Capital Murder he could appeal his case. I told him there would be no direct appeal by us, but that the Mississippi Supreme Court would automatically review a sentence of death. I told him that we could not guarantee him exactly what the Court might do, or not do upon such review. I told Mr. Loden if he wanted to directly appeal and assign particular grounds for reversal of his conviction, that would be best served by going to trial.

In his deposition, Daniels further states that he explained to Loden that the Mississippi Supreme Court's automatic review of the sentence of death meant the court would review "[t]he Judge's finding, the Judge's sentence, whether or not evidence supported the sentence, whether or not there was a proper finding regarding the aggravators and mitigators, whether or not he killed, attempted to kill, whether legal force had been contemplated and those types of things." Daniels states that Loden understood that by pleading guilty, he was waiving his right to appeal the adverse rulings on the suppression motions and that the automatic review may not cover those issues. Loden pleaded guilty to all counts in the indictment. At a hearing, prior to accepting his guilty plea, the trial court advised him:

Q. . . . Do you understand that as to each of the charges, Counts I through VI, if you proceeded to trial before a jury and if the jury found you guilty of those charges and returned a verdict fixing the penalty at whatever they might fix it, in any event, the question of your guilt or innocence or imposition of the punishment determined by the jury would be something that you could appeal to the Supreme Court of this state?

A. Yes, sir, I understand.

. . .

Q. Do you understand that if you proceed through the course of this and the Court makes a determination of your guilt, you will have no right to appeal that? . . .

A. Yes, sir.

At that same hearing, Loden was sentenced. During the sentencing portion of the hearing, Loden's counsel told the court that "Mr. Loden has elected to and has instructed us that he desires to waive presentation of this mitigation evidence for reasons I feel he will explain to the Court when given an opportunity to make a statement." Loden had also instructed Daniels and Johnstone not to object to any of the State's evidence, not to cross-examine any of the State's witnesses, and not to make any closing argument at the sentencing hearing. Nevertheless, counsel summarized the mitigation evidence they would have presented had Loden not so instructed them:

> Your Honor, through our investigation and our clinical psychologist's expert [sic] that's been appointed by the Court we've been able to develop that Mr. Loden has a childhood history of extreme sexual child abuse himself; that in spite of that he was an exemplary student, that he entered the [M]arine [C]orps, that he served in the United States Marines with distinction for eighteen years, that he attained the rank of E-7, that he was highly decorated and a combat veteran of Desert Storm. He has no criminal record prior to today.
>
> The expert clinical psychologist that was appointed for the defense by the Court, Dr. Gerald O'Brien, would have been offered as an expert in the field of clinical psychology. Dr. O'Brien opines that at the time of the crimes Mr. Loden was not capable of appreciating the criminality of his conduct and that he was also incapable of conforming his conduct to the requirements of the law. And finally that at the time of the crimes he was suffering from extreme mental and emotional disturbance.

Loden then made a statement at the hearing—though in place of his attorneys' closing arguments, not as testimony—expressing remorse for his actions to Gray's family, stating that he had tried to keep the proceedings as short and painless as possible for everyone, and that he hoped Gray's family would have some sense of justice when they left the court.

The trial court sentenced Loden to death.

Shortly after Loden was sentenced to death, Daniels accepted a position with the local district attorney's office, and the Mississippi Office of Capital Defense was appointed to represent Loden on appeal.[1] Loden then brought a motion to vacate his guilty plea in the state trial court. The trial court held a hearing on the motion, and Loden testified that, based on the advice of his trial counsel, he erroneously believed that if he pleaded guilty, the Mississippi Supreme Court would automatically review the trial court's denial of his suppression motions. The trial court denied Loden's motion to vacate the guilty plea. The denial of his post-conviction motion to vacate the guilty plea was consolidated with his direct appeal, and the Mississippi Supreme Court affirmed the trial court on all grounds. *Loden v. State*, 971 So. 2d 548, 575 (Miss. 2007).

Loden then filed a second petition for post-conviction relief asserting the arguments addressed herein, among others that are not a part of this appeal.

As part of the habeas petition, Loden has come forward with what he characterizes as substantial

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[1] During Loden's post-conviction proceedings, which Daniels knew were ongoing, Daniels destroyed his files from Loden's case, an act which the Mississippi Supreme Court described as an exercise of "poor judgment." *Loden v. State*, 43 So. 3d 365, 400 (Miss. 2010).

additional mitigating evidence, summarized as follows. Loden's father was physically and sexually abusive towards Loden's mother, and, given that the family shared a single bedroom, Loden likely witnessed this abuse. Loden's mother would leave him and his sister alone in the house for days at a time. After his parents divorced, Loden went to live with his father, where Loden's step-mother abused him physically. Further, he was molested on several occasions by an adult male at a vacation Bible school that he attended. When Loden moved back to his mother's custody, his step-father drank heavily and beat him repeatedly. He also beat Loden's mother in front of Loden. Loden has attempted suicide several times, and his sister has attempted suicide as well.

After further shuffling back and forth between his parents, Loden went to live with his grandparents on their family farm. Loden was close to his grandparents, and Loden has proffered several affidavits from friends of Loden's in high school attesting to his good character. Loden did well academically in high school.

Loden was highly regarded in the Marine Corps. Loden was selected as an "outstanding recruit" from his platoon. He also received laudatory performance reviews and was promoted to the rank of Gunnery Sergeant. He was awarded, *inter alia*, the Navy Achievement Medal three times, the Good Conduct Medal five times, and a Combat Action Ribbon. Loden was deployed to Iraq during the Gulf War. During his deployment, he saw a friend, who had just gotten

married and had a baby, killed by "friendly" fire. After he returned from the war, Loden drank heavily and took drugs. Loden suffered from psychological troubles, including nightmares, as a result of the war.

Loden has a daughter with his third wife, and he frequently acted as the primary caregiver to his daughter. Loden was transferred to a job as a military recruiter and presents testimony that it is a difficult and stressful post due to the recruiting quotas.

Additionally, a psychologist employed by habeas counsel has diagnosed Loden with chronic Post-traumatic Stress Disorder due to his combat experience, complex Post-traumatic Stress Disorder due to abuse in his childhood, and Borderline Personality Disorder. Further, the psychologist diagnosed Loden as having suffered a localized episode of dissociative amnesia during the commission of the crime. Additionally, the defense psychologist originally retained by Loden's trial counsel, Dr. O'Brien, has stated in an affidavit that, had he been privy to the information relied on by Loden's habeas psychologist, he would have reached the same conclusions and diagnoses as the habeas psychologist.

The Mississippi Supreme Court denied Loden's second petition for post-conviction relief for reasons that will be discussed below. *Loden v. State*, 43 So. 3d 365, 401 (Miss. 2010). Loden then filed the instant petition for a writ of habeas corpus in the United States District Court for the Northern District of Mississippi. The District Court denied Loden's petition,

but granted a certificate of appealability on five issues: (1) trial counsel's failure to develop mitigation evidence; (2) the "effect" of Loden's "guilty plea and waiver of jury sentencing;" (3) "defense counsel's litigation of the case;" (4) the cumulative effect of trial counsel's performance; and (5) the performance of appellate counsel.[2] Loden then timely appealed to this court.

II.

Federal habeas corpus review of state court decisions is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254. Under AEDPA, a federal court cannot issue a writ of habeas corpus with respect to a claim adjudicated on the merits by a state court unless the state court's 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 in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Because of this highly deferential standard of review, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher

[2] Loden's brief does not address issue (4) or treat issue (3) separately; as such, we do not address them.

threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Under AEDPA, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, ___ U.S. ___, ___, 131 S. Ct. 770, 786 (2011).

When, as here, a habeas petitioner's claim has been adjudicated on the merits in state court, "review under § 2254(d)(1) is limited to the record that was before the state court." *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1398 (2011). Where section 2254(d) does not apply, section 2254(e) constrains the discretion of district courts to grant evidentiary hearings. *See id.* at 1400-01. A district court's decision not to hold an evidentiary hearing is reviewed for abuse of discretion. *Richards v. Quarterman*, 566 F.3d 553, 562 (5th Cir. 2009) (citing *Landrigan*, 550 U.S. at 468).

III.

Loden first argues that he was deprived of his constitutional right to the effective assistance of counsel because his trial counsel failed to accurately advise him of the scope of his appellate rights. According to Loden, his trial counsel inaccurately informed him that, if he pleaded guilty, the trial court's adverse rulings on his suppression motions would still be examined during the Mississippi Supreme Court's automatic review of his case. That is not the case, and, as such, the Mississippi Supreme Court did

not address Loden's suppression motions on direct appeal.

The Sixth Amendment right of criminal defendants to the assistance of counsel includes the right to the effective assistance of counsel. *Carty v. Thaler*, 583 F.3d 244, 257 (5th Cir. 2009). An ineffective assistance of counsel claim has two components: (1) the defendant must show that his attorney's performance was deficient; and (2) he must show that he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To show deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). Counsel's performance is judged based on prevailing norms of practice, and judicial scrutiny of counsel's performance must be highly deferential to avoid "the distorting effects of hindsight." *Carty*, 583 F.3d at 258. To show prejudice, the 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*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The Sixth Amendment right to the effective assistance of counsel applies at "critical stages of the criminal proceedings." *Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1405 (2012) (internal quotation marks omitted). The decision to plead guilty is a

critical stage of criminal proceedings. *Id.* "In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* at 1409 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

We do not address the first *Strickland* element, as we conclude that the district court did not err in holding that Loden failed to meet his AEDPA burden as to *Strickland* prejudice. As an initial matter, the Mississippi Supreme Court expressly did not rule on the prejudice element of the *Strickland* test. *See Loden*, 971 So. 2d at 574. As such, the Mississippi Supreme Court's decision is not entitled to AEDPA deference as to that element. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo* and agree with the dissent in the Court of Appeals."(citations omitted)). However, the state trial court ruled on Loden's ineffective assistance of counsel claims and did not expressly cabin its decision to either element. Where a lower state court ruled on an element that a higher state court did not, the lower state court's decision is entitled to AEDPA deference. *See Atkins v. Zenk*, 667 F.3d 939, 944 (7th Cir. 2012) ("Because both prongs have been addressed by Indiana state courts, in one form or another, the deferential standard of review

set out in § 2254(d) applies to both."); *Hammond v. Hall*, 586 F.3d 1289, 1332 (11th Cir. 2009) ("[W]here a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong, both of those state court decisions are due AEDPA deference."). Further, if a state court (here, the state trial court) does not state the grounds on which it denied an ineffective assistance claim, federal habeas courts will consider it to have adjudicated both grounds. *See Richter*, ___ U.S. at ___, 131 S. Ct. at 784. As such, here the state trial court's decision as to the prejudice element is entitled to AEDPA deference.

Assuming *arguendo* that Loden's attorneys' performance was deficient, he has failed to show that the state court's decision that he was not prejudiced by that performance is an unreasonable application of clearly established federal law or that it was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Loden testified during the habeas proceedings in the state trial court. He testified regarding his interpretation of his attorney's advice and stated that he would not have pleaded guilty but for that erroneous advice. Yet Loden's assertion that he would not have pleaded guilty had he known review of the suppression motions would be unavailable is contradicted by his statement to Gray's family at his sentencing hearing. At the sentencing hearing, Loden apologized to Gray's family and stated, "I hope that by my

actions here today you may see that I am trying to right a wrong," and "I am sorry for the delay, and I hope that you may have some sense of justice when you leave here today." Loden also stated that he had "tried to keep this as short and as painless as possible for everyone." Loden's statements indicate that he pleaded guilty as an offering of contrition to Gray's family and an attempt to spare them a lengthy trial and grant them some measure of closure. Loden's statements were also consistent with his earlier representations, made shortly after he had murdered Gray, to the district attorney that he wanted to plead guilty in order to allow his family and Gray's family to move forward, statements which were the subject of cross-examination during Loden's post-conviction hearing. In contrast, Loden testified during the post-conviction hearing that he only pleaded guilty in order to obtain a more searching review of the denial of his suppression motions by the Mississippi Supreme Court, a review he believed was available based on the (allegedly) erroneous advice of his attorneys.[3] Those suppression motions were directed at the most damning evidence in the State's possession—the video recording of Loden's crime and

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[3] Loden testified as follows:

> Q. When you pled [sic] guilty, did you want to be executed?
>
> A. No. I wanted the death penalty. I wanted the—I wanted the death penalty for the closer review and for their hopefully maybe getting some better rulings than what I had originally.

Loden's confession. As such, Loden's statement that he pleaded guilty only out of a desire for appellate review of his sentence is in sharp tension with his statement at the time of his plea and sentencing. That contradiction was drawn out during cross-examination by the State during Loden's post-conviction hearing:

> Q. Correct. Now more than a year later you were under whatever influence that night, you pled [sic] guilty. During that plea you went into this routine where you spoke to the Court. Do you recall that?
>
> A. Yes. I can't remember what I said, but I know I said a few words.
>
> Q. And you explained to the family, to the Court and the family of the victim that, you know, you knew nothing could offer solace or come close to expressing your most sincere regrets over this whole affair, wish there was something you could say more. *I hope that by my actions here today you may see that I am trying to right a wrong.*
>
> But what you're now telling the Court is you were pleading guilty but you didn't really mean it. You wanted this whole thing overturned so you could go back to Vicksburg and do whatever. Were you trying to right a wrong?
>
> A. What I would like to say to that is that is, I don't know how to explain this to you in a proper way, is that no matter

> what—do I have remorse and everything? Yes. But I'm still entitled to the rights that I'm supposed to have. And at that time I had been told that anything that was in the record is going to get looked at, and then subsequently I find out that's not the case.
>
> . . .
>
> Q. All right. Let's go back to what we're talking about. You then go on to tell the family, *I am sorry for the delay and I hope you may have some sense of justice when you leave here today.* Once again, at that time you're telling me that you thought at the time you're saying you're trying to right a wrong and you hope to have some sense of justice that you're in the back of your head thinking, *Yeah, I got the death penalty. I get to appeal all this and eventually walk out of here when my rights are asserted.* That's what you're really thinking when you're saying this stuff?

In summation at the post-conviction hearing, the State pressed the issue, arguing: "What has happened here is at some point Mr. Loden actually felt guilty and tried to do the right thing and pled [sic] guilty, and he's gotten down here and he doesn't much like it." Moreover, the state court habeas judge was also the judge who had presided over Loden's guilty plea and sentencing and who therefore had heard Loden's statement to Gray's family firsthand. Given that the trial court heard Loden's testimony and was able to assess his credibility, the trial court's finding

that Loden was not prejudiced by counsel's deficient performance was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The state trial court was free to conclude, based on Loden's testimony, that Loden understood his appellate rights at the time of trial or that the other considerations that prompted Loden to plead guilty would nevertheless have motivated him to maintain a guilty plea even had he known he would be unable to appeal the trial court's rulings on his suppression motions.

Further, the state habeas judge was the same judge who advised Loden of his appellate rights during his plea colloquy, which included an admonition that Loden would have no right to appeal a finding of guilt. Loden discounts that admonition here, arguing that a warning that he was waiving his right to appeal was perfectly consistent with his attorneys' erroneous advice that the Mississippi Supreme Court's *automatic review* would encompass his suppression motions. As such, he argues that he had no reason to question the trial judge further about his appellate rights or to be concerned that his right to review of the suppression motions was more limited than his attorneys had led him to believe. Yet the trial court was not unreasonable in rejecting that interpretation of the facts, as lending it credulity requires embracing several contradictions. First, Loden's argument rests on the notion that he was an uninformed novice when it came to understanding the legal system, incapable of understanding the difference between

review of a sentence and review of guilt, but that, at the same time, he possessed sufficient erudition to comprehend the (very) fine distinction between an *appeal* of a death sentence to the Mississippi Supreme Court and the Mississippi Supreme Court's *automatic review* of a death sentence without feeling the need to question the trial judge further. Second, Loden asserts that, with regard to the second issue in this appeal, discussed *infra*, that he was virtually abandoned by his attorneys and was so despondent because of their grossly negligent performance that he gave up hope and waived his right to present any mitigation evidence at sentencing. Yet at the same time, Loden argues that he posed no questions to the trial judge regarding his appellate rights because he was perfectly confident in *those same attorneys'* advice. Given Loden's repeated assertions that the right to appeal the suppression motions was crucially important to him, as he argues that he believed it was his only hope of avoiding the death penalty, it is difficult to believe that Loden would not have asked the trial judge for further clarification of his appellate rights after a guilty plea, especially if he had truly lost confidence in his attorneys.

Based on the Mississippi state court's ability to observe Loden's testimony firsthand and these contradictions in Loden's arguments, we cannot say that the Mississippi state court's finding that Loden was not prejudiced by his attorney's (purportedly) deficient performance was unreasonable. As such, the Mississippi courts' decision that Loden is not entitled

to habeas relief on the basis of his attorneys' advice regarding his appellate rights was not an unreasonable application of clearly established federal law as interpreted by the Supreme Court of the United States or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

IV.

A.

Loden's second argument is that his right to the effective assistance of counsel was violated by his attorneys' failure to prepare a mitigation case. Defense attorneys in capital cases have an "'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Such an investigation requires that defense counsel interview witnesses and request relevant records, such as school, medical, or military service records. *Id.* Further, when such interviews or records suggest "pertinent avenues for investigation," the defense attorney must follow up on those leads. *Id.* at 440; *accord Wiggins v. Smith*, 539 U.S. 510, 525 (2003) ("As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background."). As

with all claims for ineffective assistance of counsel, relief based on an insufficient mitigation investigation requires a showing of both deficient performance and prejudice. *See Porter*, 558 U.S. at 38.

We begin with the prejudice element first, as, in this case, it is dispositive. Loden's argument that he was prejudiced by his attorneys' mitigation investigation[4] is complicated by his instruction to his attorneys not to present mitigation evidence during the sentencing phase of his trial. *See Schriro v. Landrigan*, 550 U.S. 465 (2007). In *Landrigan*, the defendant was convicted of capital murder. 550 U.S. at 469. When his attorneys attempted to put on testimony in mitigation at sentencing, the witnesses refused to testify at the defendant's instruction. *Id.* Defense counsel told the court that he had advised the defendant against declining to put on a mitigation case. *Id.* The court then questioned the defendant, who told the court that he did not wish for his attorneys to put on a mitigation case and that there were no mitigating circumstances of which the court should be made aware. *Id.* When his attorneys attempted to summarize the mitigation evidence they had intended to put on, Landrigan interrupted and contradicted their explanations of his past actions. *Id.* at 470. The trial judge sentenced Landrigan to death. *Id.* at 471. Landrigan then challenged his death sentence via a habeas petition, challenging his attorney's failure to

[4] Which we assume *arguendo* was deficient.

conduct a proper mitigation investigation as ineffective assistance of counsel. *Id.* The Supreme Court held that Landrigan's refusal to allow his attorney to present mitigation evidence precluded his ability to show *Strickland* prejudice. *Id.* at 481. Relying on Landrigan's repeated statements to the court and his attorney that he did not want mitigating evidence presented, the Court held that the state post-conviction court was not unreasonable in determining that Landrigan instructed his attorney not to bring any mitigating evidence to the trial court's attention. *Id.* at 4773. As such, the Court held that the district court did not abuse its discretion in denying Landrigan an evidentiary hearing on habeas review. *Id.* The Court stated that "[t]he District Court was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence," and therefore, "the District Court could conclude that because of his established recalcitrance, Landrigan could not demonstrate prejudice under *Strickland* even if granted an evidentiary hearing." *Id.* Additionally, the Supreme Court rejected the Ninth Circuit's reliance on an absence of evidence that Landrigan's decision not to present mitigating evidence was informed and knowing, stating that "[w]e have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Id.* at 479.

At this point, the AEDPA standard of review bears reiterating. We may only set aside the Mississippi Supreme Court's judgment if it 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). Given that statutory mandate, we do not here decide whether Loden is able to demonstrate *Strickland* prejudice in spite of his instruction to his attorneys not to put on mitigation evidence. Rather, we decide only whether the Mississippi Supreme Court's judgment that he could not so demonstrate prejudice was unreasonable in light of clearly established Supreme Court precedent.

Loden here instructed his attorneys not to present any mitigation evidence. Daniels, one of his attorneys, told the court at the sentencing hearing that Loden had "elected to and has instructed us that he desires to waive presentation of this mitigation evidence for reasons I feel he will explain to the Court when given an opportunity to make a statement." Loden had also instructed his attorneys not to conduct any cross-examination of the State's witnesses and not to object to any of the State's evidence, an instruction that his attorneys honored. The trial court specifically inquired as to Loden's instruction not to cross-examine witnesses or object to evidence:

> MR. JOHNSTONE: Your Honor, if we could at this time advise the Court. We have conferred with our client Mr. Loden, and as the Court noted earlier we were not making any

> objections nor cross-examining these witnesses. And we've conferred with Mr. Loden and he's advised us that he does not want us to cross-examine witnesses or object to the introduction of any exhibits that are being introduced through these witnesses that the State intends to call.
>
> THE COURT: All right. Mr. Loden, you understand that in instructing your attorneys to that effect you are giving up a valuable right of cross-examination and timely objections to evidence which might or might not be admissible under the rules of this court.
>
> THE DEFENDANT: I understand, sir. I'm just doing what I feel I need to do.

Loden further instructed his attorneys not to make any closing argument during the sentencing phase, instead electing to make a brief statement himself apologizing to Gray's family and stating, "I hope that by my actions here today you may see that I am trying to right a wrong," and "I am sorry for the delay, and I hope that you may have some sense of justice when you leave here today."[5] Loden also stated that he had "tried to keep this as short and as painless as possible for everyone."

With those facts before it, we cannot say that the Mississippi Supreme Court's application of *Landrigan*

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[5] Loden's statement was made in lieu of his attorney's closing arguments and was not offered as testimony in mitigation.

in this case was an unreasonable application of clearly established Supreme Court precedent. Loden's instruction to his attorneys to not only refrain from putting on any mitigation case, but also to refrain from objecting to the State's proffered evidence, cross-examining the State's witnesses, and making closing arguments lends support to an inference that Loden's decision not to present a mitigation case was firm. Daniels's statement to the trial court further indicates that Loden's decision was a considered one and that he had explained his reasoning to his attorneys. While the trial court did not inquire as to Loden's reasons for declining to present a mitigation case, Loden's statement alludes to a likely motivation. Loden's words of apology suggest that he believed declining to object, cross-examine, or present evidence served as a measure of penance for his crime. Daniels also commented in his deposition that "Loden did not want to acknowledge what he had done, and he didn't want to acknowledge it to me. He didn't want a jury to hear it. He didn't want anybody that didn't have to know about it to know about it." Daniels's observations provide additional insight into the motivations behind Loden's instruction to abbreviate the sentencing proceedings. Moreover, the type of mitigation evidence described by Daniels, and interdicted by Loden, at the sentencing hearing—evidence of childhood physical and sexual abuse, academic achievement, distinguished military service, and psychological troubles—is at the very least of the same type as the evidence Loden now offers, further indicating that the Mississippi Supreme Court's

application of *Landrigan* was not unreasonable. Additionally, while Loden's instructions to his attorneys here may not have been as strident, public, or obstructive as those in *Landrigan*, the record here evidences something more resolute than a mere instruction not to present mitigation evidence. *Landrigan* states only that the defendant's actions in that case were *sufficient* to preclude a showing of prejudice; it does not speak to what actions are *necessary* to bar such a showing. *See Landrigan*, 550 U.S. at 475-77. Therefore, the Mississippi Supreme Court's conclusion that, under *Landrigan*, Loden's decision not to present mitigation evidence precludes a showing of *Strickland* prejudice was not an unreasonable application of clearly established Supreme Court precedent to the facts of this case.

As such, given the evidence in the record—and the AEDPA standard of review—we must conclude that the district court's denial of Loden's claim of ineffective assistance of counsel based on his attorney's mitigation investigation was not error.

B.

We also hold that the Mississippi Supreme Court's rejection of Loden's argument that the constitutionally ineffective advice of his attorneys led him to waive his right to jury sentencing was not an unreasonable application of clearly established Federal law as determined by the Supreme Court. During the plea colloquy, the trial judge explained to Loden

that he had the right to be sentenced by a jury, that the jury would weigh the aggravating factors against the mitigating factors, and that, in order to receive the death penalty, the jury would have to unanimously agree that the aggravating factors outweighed the mitigating factors. The judge then asked Loden if he understood those rights and waived them. The trial judge's careful explanation of Loden's right to jury sentencing on the record undermines Loden's present attempts to show *Strickland* prejudice. *See Frye*, ___ U.S. at ___, 132 S. Ct. at 1406-07 ("Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice."). As such, the Mississippi Supreme Court's decision that Loden could not show that—but for any unprofessional advice by his attorneys—he would not have waived jury sentencing was not an unreasonable application of clearly established Federal law as determined by the Supreme Court.[6]

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[6] Loden also appears to argue that his attorneys' performance was deficient due to their failure to explain to him the circumstances of the *Byrom* case, another death penalty case tried before Judge Gardner. Loden points us to no Supreme Court precedent holding that an attorney's failure to explain a trial judge's performance in specific prior cases constitutes ineffective assistance of counsel. Loden also fails to point to any resources relating to the professional responsibility of criminal defense attorneys indicating that a failure to explain the results and circumstances of specific prior cases before the trial judge is

(Continued on following page)

V.

Lastly, Loden argues that his appellate counsel was constitutionally deficient. A criminal defendant has a Sixth Amendment right to the effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Claims for ineffective assistance of appellate counsel are governed by the two-part *Strickland* standard. *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013).

Beginning with the first part of that standard, Loden has failed to show that his appellate attorneys' performance was deficient. As an initial matter, the Mississippi Supreme Court did not address this element of the *Strickland* standard, and, as such, this claim is reviewed *de novo*, not under AEDPA. *See Rompilla*, 545 U.S. at 390. In order to show that his appellate lawyers were deficient, Loden must show "'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment' based on 'an objective standard of reasonableness.'" *Dorsey*, 720 F.3d at 320 (quoting *Strickland*, 466 U.S. at 687-88). Counsel is "'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Pinholster*, ___ U.S. at ___, 131 S. Ct. at 1403 (quoting

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unprofessional. *See Strickland*, 466 U.S. at 688 (suggesting that "[p]revailing norms of practice as reflected in American Bar Association standards and the like" could be used to aid the inquiry into attorney performance).

Strickland, 466 U.S. at 690). Here, Loden's proffered evidence of deficient performance is an affidavit from his appellate attorney, Andre de Gruy. De Gruy states in his affidavit that he did not raise certain issues relating to Loden's mental state or social history. He also states, however, that Mississippi law was unclear at the time he represented Mr. Loden, and, therefore, he believed that the additional claims would have to be raised in post-conviction proceedings challenging the sentence. Given the apparent ambiguity in Mississippi law at the time counsel made his decision, Loden has failed to rebut the "strong presumption" that his attorneys' decision was the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 689-90.

As to the second part of the *Strickland* standard, Loden has failed to show that the Mississippi Supreme Court's conclusion that he was not prejudiced was an unreasonable application of clearly established federal law, as determined by the United States Supreme Court. In order to show prejudice under *Strickland*, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Here, that requires Loden to show a reasonable probability that the result of his direct appeal would have been different. Loden has failed to make such a showing here, as he has waived the issue for failure to adequately brief it. *See United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) ("A party that asserts an argument on appeal, but

fails to adequately brief it, is deemed to have waived it."). Loden's argument here is that an adequate performance by appellate counsel would have changed the outcome of his Motion to Vacate Guilty Plea before the trial court, yet he does not articulate the standard for such motions under Mississippi law. *See id.* at 447 ("[A]mong other requirements to properly raise an argument, a party must ordinarily identify the relevant legal standards and any relevant Fifth Circuit cases." (internal quotation marks omitted)). Loden also points to the additional psychological evidence presented in Dr. High's affidavit and argues that appellate counsel was deficient for not developing that evidence themselves and presenting it before the trial court. Yet Loden fails to connect Dr. High's statements regarding Loden's mental state at the time he pleaded guilty to the mental state required by law for the entry of a valid plea or even to articulate what the required mental state is. *See id.* at 446-47. Loden also argues that his appellate attorneys' arguments that his trial lawyers' erroneous advice about his right to appeal the denial of his suppression motions were deficient. Yet that claim was presented by Loden's appellate lawyers in the motion to vacate the guilty plea. In resolving that motion, Loden testified and the trial court apparently found his assertion that he misunderstood his appellate rights and would not have pleaded guilty had he been properly advised not to be credible. It is unclear what Loden contends his appellate counsel should have done that would alter that result. As such, the Mississippi Supreme Court's decision that Loden was not

prejudiced by any deficient performance by his appellate counsel was not unreasonable under clearly established federal law, as determined by the United States Supreme Court.

VI.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI ABERDEEN DIVISION

THOMAS EDWIN LODEN, JR. PETITIONER

vs. CIVIL ACTION NO. 1:10CV311-NBB

CHRISTOPHER EPPS, et al. RESPONDENTS

MEMORANDUM OPINION AND ORDER

(Filed September 18, 2013)

This matter comes before the Court on a petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, in which Thomas Edwin Loden, Jr., the petitioner in this action, seeks to challenge his otherwise final conviction and sentence of death for the capital murder of Leesa Marie Gray.[1] Having fully considered the pleadings, the record, and the applicable law, the Court finds that the petition should be denied, for the reasons that follow.

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[1] In addition to capital murder, Loden was convicted of rape and four counts of sexual battery.

Background Facts and Procedural History[2]

In June 2000, Thomas Edwin Loden, Jr., an eighteen-year veteran of the United States Marine Corps, was employed as a Marine recruiter and lived in Vicksburg, Mississippi, with his wife and young daughter. Around June 21, 2000, he traveled to northern Mississippi to visit his elderly and infirm grandmother, Rena Loden, at the family farm in the Dorsey Community of Itawamba County. Less than forty-eight hours later, on June 22-23, 2000, Loden kidnapped, raped, and sexually battered sixteen-year-old Leesa Marie Gray before suffocating and strangling her to death.

On June 22, 2000, Leesa Marie Gray was working as a waitress at Comer's Restaurant, which was located approximately a mile from her family's home. Loden, who had been in the restaurant earlier that day, came back to the restaurant around 9:00 p.m. and ordered a cheeseburger to go. After getting his cheeseburger, he left the restaurant. Leesa left work at approximately 10:30 p.m. According to Loden, he discovered Leesa stranded on the side of the road at around 10:45 p.m. with a flat tire on her car.[3] After

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[2] Because so many of the same facts are relevant to several claims raised in the instant petition, the Court recounts them at the outset in order to avoid unnecessary repetition in the body of the opinion.

[3] A utility knife blade, or something closely resembling it, was found in the tread of the tire. (*See, e.g.*, Pet. Ex. 28(a), Marlar Report).

telling her his profession and asking whether she would ever want to join the Marines, Loden stated that Leesa told him, "[n]o, that'd be the last thing I want to do with my life." Loden stated that her response made him so angry that he ordered her into his van and drove her to his family's farm. Over the course of the next few hours, he raped her numerous times and battered her sexually, videotaping portions of the abuse, before suffocating and strangling her to death inside of the van. He then pushed her nude, bound body under a fold-out seat in his van, went inside his grandmother's house, and fell asleep.

When Leesa did not return home from work as expected, her mother, Wanda Marie Farris, became worried and began making telephone calls in an attempt to locate her daughter. Mrs. Farris called Comer's Restaurant cook, Richard Tallant, who told her that he had earlier seen a car on the side of the road with its hazard lights flashing. Tallant returned to the abandoned car, saw that it was Leesa's, and drove to Mrs. Farris' home. Mr. and Mrs. Farris and Tallant drove back to the location of Leesa's car. They discovered that one of the tires on the vehicle was flat, the doors were unlocked, and Leesa's purse and cell phone were inside the car. The Itawamba County Sheriff's Office was contacted, and an investigation began into Leesa's disappearance.

After Tallant and various patrons of Comer's Restaurant were questioned, law enforcement officers learned that Thomas Edwin Loden, Jr., had been seen at the restaurant in two different vehicles: A beige

Oldsmobile 88 Regency and a green full-sized Ford van. They learned that he had shown up just before closing time on the night of Leesa's disappearance and ordered food. Tallant recounted that he knew Loden from school, and that Loden had been in the restaurant earlier that day attempting to flirt with Leesa. He also stated that he knew that Loden was visiting his elderly grandmother, with whom Loden used to live. Officers went to Rena Loden's residence to interview Loden and were met by Mrs. Loden's sitter, Joyce Brewer, who stated that Loden was asleep inside the house. Officers left the Loden residence and continued investigating Leesa's disappearance.[4]

After law enforcement officials had located and interviewed all of the customers who had been at Comer's Restaurant the previous evening, except Loden, they returned to Rena Loden's property and spoke with Mrs. Loden, who informed them that Loden had gone fishing at a lake a couple of hundred yards behind her house. The officers obtained her consent to walk to the pond to look for Loden, but they could not locate him. Officers then asked for and obtained Mrs. Loden's consent to search her home,

[4] Officer Jones states in his report that he saw a van at Mrs. Loden's residence matching the description of the one seen at Comer's Restaurant. He maintains that he brought two witnesses from Comer's Restaurant to Mrs. Loden's property to determine whether they could identify the van as the same one they had previously seen at the restaurant. Neither witness could make a positive identification. (*See, e.g.*, Pet. Ex. 28(g)).

car, and surrounding property. Based on the report of Loden's behavior at the restaurant the previous evening, along with the discovery of a pair of shorts with what appeared to be blood on them in Loden's bedroom and a rope fashioned into a hand-cuff style knot in Rena Loden's Oldsmobile, a search warrant was obtained for the home, Loden's van, the other vehicles on the property, and all surrounding property and buildings.[5] Officers gathered evidence from Mrs. Loden's residence and transported Loden's locked van to the Highway Patrol Headquarters in New Albany, Mississippi, where it was secured until a member of the Mississippi Crime Laboratory arrived.

Meanwhile, a full-scale search was underway for Loden. On the afternoon of June 23, 2000, he was discovered lying on the side of the road with the words "I'm sorry" carved into his chest and with self-inflicted lacerations on his wrists. He was transported to the hospital and treated for his injuries. He denied any knowledge of Leesa Gray or her whereabouts. While Loden was being treated, Leesa's body was found pushed under a fold-down seat in Loden's van. Along with other evidence, a JVC camcorder was recovered from the van, and a VHS compact video cassette was removed from it. Footage from the

[5] In his supporting brief, Loden argues that the inconsistencies in the reports of two of the investigating officers suggest that a search was unlawfully conducted. The Court notes, however, that Loden signed an Offer of Proof containing these facts prior to pleading guilty.

videotape depicts Leesa Marie Gray being forced to engage in fellatio on Loden[6], Loden vaginally raping her, Loden demonstrating vaginal and anal penetration of Leesa with his fingers, and the repeated vaginal insertion of a cucumber. Loden can be heard instructing Leesa to smile so that he can see her braces, and after he subjects her to a digital vaginal penetration, he comments, "You really were a virgin, weren't you?". There is a break in the videotape, and then the footage depicts Loden twisting the breast of an unconscious Leesa in an apparent attempt to bring her back to consciousness. Another break in the continuity of the video occurs, and when videotape footage reappears, the apparently murdered body of Leesa is seen propped up and posed in the van with the cucumber inserted in her vagina, which Loden removes and reinserts several times before the videotape finally stops.[7]

A DNA analysis performed on the cucumber found in Loden's van yielded a minor DNA profile

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[6] Loden's face is not clearly shown in the videotape, but his voice is clearly audible, as is the interior of his van, along with a comforter and other items seized from the van.

[7] The Court has a DVD copy of the videotape secured in its vault. Due to its highly sensitive contents, the Court determines that the DVD should be protected from public access and will not be placed in public mail. Therefore, it will remain in the possession of the Court unless or until it is transported to the Fifth Circuit at the appellate court's direction.

that matches Loden.[8] After he was released from the hospital, Loden was immediately arrested. Officers executing a search warrant at Mrs. Loden's residence the day after Loden's arrest discovered a freshly dug grave and shovel located approximately twenty yards into the woods in a well-hidden, thickly vegetated area. A few days later, Loden's wife, Katrina "Kat" Loden, visited him in jail. Loden indicated through Kat that he wished to make a statement to law enforcement officers in which he admitted raping Leesa Gray. He denied knowing that he killed her, but he acknowledged that he must have done so.

On November 21, 2000, Loden was indicted for capital murder during the commission of a kidnapping (Count I), rape (Count II), and four counts of sexual battery (Counts III-VI). The same day, attorney James P. Johnstone was appointed to represent Loden. Loden pleaded not guilty to all charges at his arraignment. In January 2001, attorney David Lee Daniels began assisting in Loden's defense, and he was formally appointed as co-counsel in February 2001. In preparation for trial, defense counsel filed numerous motions, and presiding Judge Thomas J. Gardner, III, granted Loden's motion for a change of venue and motion for the authorization of funds for the defense to retain DNA expert, George Schiro. It denied defense counsel's motion to hire Dr. Gary Mooers as a mitigation specialist, noting that it

[8] A warrant was secured and executed to obtain tissue samples from Loden.

appeared that Dr. Mooers wanted funds to do the work that the investigator, psychiatrist, and attorneys would be doing in the case. The judge stated a willingness to revisit the issue, however, provided defense counsel could provide the court with some authority supporting the authorization of a mitigation specialist. Despite the trial court's stated willingness to revisit its ruling, defense counsel did not present any additional authority to the court.

Additionally, the court authorized defense counsel funds to retain Herb Wells as a criminal defense investigator, and it granted defense counsel's motion to allow the Mississippi State Hospital to conduct a psychiatric evaluation of Loden. Loden was subsequently evaluated at the Mississippi State Hospital by psychiatrists Dr. Reb McMichael and Dr. Philip Meredith, along with psychologist, Dr. Shirley Beall. They unanimously opined that Loden:

> [H]as the sufficient present ability to consult with his attorney with [a] reasonable degree of rational understanding in the preparation of his defense, and that he has a rational as well as factual understanding of the nature and object of the legal proceedings against him[;] . . . that [Loden] would have known the nature and quality of his alleged acts at the time of the alleged offenses, and that he would have known at that time that those alleged acts would be wrong[;] . . . that [Loden] has the capacity knowingly, intelligently, and voluntarily to waive or assert his constitutional rights[; and] . . . that [Loden] was not

> experiencing extreme mental or emotional disturbance at the time of the alleged offenses, and that his capacity to appreciate the criminality of his alleged conduct, or to conform his conduct to the requirements of the law was not substantially impaired at that time.

They further concluded that factors, such as the alleged physical and sexual abuse he suffered as a child, combat-related trauma, and job and life-related stresses at the time of the crimes may have influenced Loden's mental state at the time of the offenses, but opined that the factors did not "rise to the level of exculpation or even of statutory mitigation."

After the Mississippi State Hospital report was received, defense counsel moved *ex parte* for funds to secure the assistance of an independent psychologist, Dr. C. Gerald O'Brien. The court trial granted the request, and Loden was evaluated by Dr. O'Brien on August 13, 2001. Loden reportedly informed Dr. O'Brien that he did not want to receive a sentence of life imprisonment, and that he wanted to plead in order to receive the death penalty because of his remorse about the crime, the fact that he did not want his wife to give false testimony, and because of his "diminishing confidence in his lawyers' handling of his case." Dr. O'Brien concluded as a result of his evaluation that Loden "was under the influence of extreme mental and emotional disturbance and distress" at the time of the crime but opined that it "probably did not rise to the level that he did not

know the nature and quality of his acts or the difference between right and wrong in relation to those acts at the time. However, his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired." He offered the forensic opinion that Loden appeared "to be competent to stand trial and assist in his own defense."

In pretrial proceedings, Loden moved to suppress his statement to police, as well as the evidence discovered following the search of Mrs. Loden's residence and the vehicles on her property. Loden argued that his statement to police was involuntarily given and given without the benefit of counsel, and that the physical evidence was obtained as the result of a search that was not fully consensual or voluntary. He also argued that the first affidavit and issuing search warrant was not supported by probable cause, such that all of the evidence yielded in the subsequent searches was inadmissible. After a hearing held on June 26-27, 2001, the trial court denied the suppression motions.

In August 2001, Loden wrote to defense counsel Johnstone and asked him to make a motion asking the trial court to reconsider the validity of the original search warrant. Loden stated that if the motion was unsuccessful, he wanted to talk to Johnstone about the appeals process "and go ahead and enter a plead [*sic*]." The letter continued, "(1) I'm fairly confident I'd get the death penalty, but how does 'appeal' work either way? (2) In your professional

judgment, do I have good grounds for an appeal? (3) How long, generally, would an appeal take to be heard? (4) With all I've told you and shown, again your opinion on appeal chances?" Loden's attorneys met with him for a total of approximately twenty hours on three consecutive days preceding Loden's September 21, 2001, court appearance.

On September 21, 2001, seventeen days before his October 8, 2001 trial date, Loden waived his right to a jury trial and jury sentencing and pleaded guilty to all six counts of the indictment. The trial court asked Loden a series of questions that were designed to determine whether Loden understood the proceedings and was entering the plea voluntarily. After putting Loden under oath and informing him of his right to consult with counsel, the following exchange transpired:

> The Court: Do you understand that by these questions the Court is attempting to determine if the pleas of guilty which you have offered to make will be made by you knowingly, freely, understandingly and voluntarily?
>
> Loden: Yes, sir.
>
> Q. Are your pleas of guilty free and voluntary on your part?
>
> A. Yes, sir, they are.
>
> * * *

Q. Do you understand that by entering pleas of guilty to these charges you are giving up or waiving a great number of legal rights that you have as a defendant in criminal proceedings?

A. Yes, sir.

Q. Do you understand the meaning of the word waive, W-A-I-V-E?

A. Yes, sir.

* * *

Q. As to Count I of this indictment, that being the capital murder charge, do you understand that a capital murder charge is conducted in two phases; that the jury in phase one determines guilt or innocence as to the charge itself, that being capital murder?

A. Yes, sir, I understand.

Q. And that by entering a plea of guilty you are waiving your right to have the jury make that determination?

A. I am, yes, sir.

* * *

Q. And that by—and that by proceeding to enter pleas of guilty to this charge you are waiving your right to have the jury make the determination of your guilt, first of all, and to determine what punishment would be imposed.

A. Yes, sir, I understand.

Q. All right. Do you understand that during the course of the guilt phase on all of these charges, all twelve of the jurors selected for the trial of your case would have to agree, it would have to be a unanimous verdict as to each of the counts in this indictment, each of the charges?

A. I understand.

Q. And in phase two, that is in Count I, the capital murder charge, the jury would likewise be required to unanimously agree upon the existence of certain factors which they are called upon to weigh and determine during the course of that trial.

A. Yes, sir, I understand.

Q. Do you understand that?

A. Yes, sir.

Q. And if they are unable to agree unanimously as to the existence of those factors, they cannot return a verdict or cannot impose the death penalty. Do you understand that?

A. Yes, sir.

* * *

Q. And that by entering a plea of guilty to this charge, or the capital murder case, you are waiving the jury making those determinations as to guilt and as to the punishment to be imposed;—

A. Yes, sir. I am waiving that.

Q. —do you understand that? Do you understand that as to each of the charges, Counts I through VI, if you proceeded to trial before a jury and if the jury found you guilty of those charges and returned a verdict fixing the penalty at whatever they might fix it, in any event, the question of your guilt or innocence or imposition of the punishment determined by the jury would be something that you could appeal to the Supreme Court of this state?

A. Yes, sir, I understand.

Q. Do you understand that by waiving a jury for the trial of this case and for the imposition or determination of an appropriate sentence to be imposed by this Court, you are giving up or waiving a valuable right?

A. Yes, sir, I am.

Q. And you understand that?

A. Yes, sir.

* * *

Q. Do you understand that if you proceed through the course of this and the Court makes a determination of your guilt, you will have no right to appeal that? Do you understand that?

A. Yes, sir.

* * *

> Q. [D]o you understand that on your plea of guilty to the charge of capital murder in Count I in this cause the maximum penalty which this Court might impose would be death; that the minimum penalty which this Court might impose would be life without parole. Do you understand that?
>
> A. Yes, sir, I understand that.

After all of the charging portions of the indictment were read into the record, and Loden stated his understanding of the charge and penalty, along with his plea of guilty, the prosecution submitted its "Offer of Proof," which was examined and signed by Loden before it was read into the record.[9] The prosecution made sentencing recommendations, including a recommendation that a sentence of death be imposed as to Count I. Loden stated that he knew that the prosecution would make those recommendations, and he informed the trial court that his willingness to plead was not based on an understanding that a different recommendation would be made if he pleaded guilty.

Defense counsel Daniels informed the trial court that he and Johnstone had conferred with Loden and

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[9] For the full content of the State's "Offer of Proof" *see, e.g.*, Trial Tr. vol. 2, 208-223. The state court papers and trial transcript are contained in seven consecutively numbered volumes. Therefore, the Court uses "Trial Tr. vol. ___" to reference particular locations in the record, regardless of whether the citation is to state court papers or the trial transcript itself.

believed he understood the charges, his possible defenses, the bifurcated process, and the rights he would be abandoning by entering a plea. Defense counsel both signed a "Certificate of Counsel" stating that, in their opinions, Loden was competent to waive a jury trial and sentencing. Thereafter, the trial judge questioned Loden, asking:

> BY THE COURT: (Continuing)
>
> Q. Mr. Loden, you have had the services, the advice and counsel of two attorneys during the course of these proceedings. Have you had occasion to talk with them thoroughly, to discuss fully all of the facts and circumstances surrounding this case?
>
> A. Yes, sir.
>
> Q. Have you had occasion to talk with them about your constitutional rights and the statutory provisions concerning the trial of a capital murder case—
>
> A. Yes, sir.
>
> Q. —the count in Count I?
>
> A. Yes, sir. The questions I had were answered. Yes, sir.
>
> Q. Once again, do you understand that you have a constitutional right and a statutory right under the law of the State of Mississippi to have a jury decide first of all your guilt or innocence on the charge of capital murder and in phase two to determine the punishment that is to be imposed?

A. I understand I had it, and I understand I waived it, sir.

Q. And you are aware of that and you wish to proceed to enter pleas of guilty to these charges?

A. I do, sir.

Q. Mr. Loden, is there anything about these proceedings that you do not understand?

A. Not at this time, sir.

Q. Are there any questions that you wish to direct to me as judge about these proceedings?

A. No, sir. No, sir.

Q. Do you understand that on your plea of guilty to capital murder and the other charges in this indictment that it is possible that I will, acting pursuant to the waiver, impose the death penalty in this case? Do you understand that?

A. I understand that fully, sir.

Thereafter, Loden pleaded guilty to each count in the indictment, and the trial court accepted the pleas after finding that Loden did so "knowingly, understandingly[,] freely[,] and voluntarily." Loden stated he was satisfied with the legal service rendered by counsel, and he voiced his understanding that he was abandoning his right to have a jury determine his punishment. The waivers of a jury trial and sentencing, which had been executed by Loden prior to the

hearing, were presented to the court, and Loden informed the court that he and his attorneys had discussed the waivers.[10] The court asked whether Loden agreed that the court should proceed without a jury to the sentencing phase of the hearing, and Loden responded, "Yes, sir. Let's proceed."

The prosecution reintroduced its "Offer of Proof" and Loden's guilty pleas before calling witnesses in its case-in-chief. At the lunch break, counsel Johnstone informed the court:

> Your Honor, if we could at this time advise the Court. We have conferred with our client Mr. Loden, and as the Court noted earlier we were not making any objections nor cross-examining these witnesses. And we've conferred with Mr. Loden and he's advised us that he does not want us to cross-examine witnesses or object to the introduction of exhibits that are being introduced through these witnesses that the State intends to call.
>
> THE COURT: All right. Mr. Loden, you understand that in instructing your attorneys to that effect you are again giving up a valuable right of cross-examination and timely objections to evidence which might or might not be admissible under the rules of this court.

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[10] Loden executed a "Waiver of Jury for Trial and Sentencing" and a separate "Waiver of Sentencing Jury." (Trial Tr. vol. 2, 202, 205).

> THE DEFENDANT: I understand, sir. I'm just doing what I feel I need to do.

During the presentation of its case in support of aggravating circumstances, the prosecution presented testimony from various law enforcement officials and forensic examiners, along with the testimony of Leesa's mother and Richard Tallant. Additionally, a forensic pathologist testified that Leesa was a virgin prior to her rape and would have experienced "significant pain" as a result of the rape, suffocation, and manual strangulation.

Once the State concluded its proof, defense counsel Daniels informed the court that the defense would not be offering mitigating evidence in the case. However, he asked for permission to summarize the mitigation evidence that had been developed, along with an explanation for its absence from the sentencing proceedings. Daniels stated:

> [W]e've been able to develop that Mr. Loden has a childhood history of extreme sexual child abuse himself; that in spite of that he was an exemplary student; that he served in the United States Marines with distinction for eighteen years, that he attained the rank of E-7, that he was highly decorated and a combat veteran in Desert Storm. He has no criminal history prior to today.
>
> The expert clinical psychologist that was appointed for the defense by the Court, Dr. Gerald O'Brien, would have been offered as

> an expert in the field of clinical psychology. Dr. O'Brien opines that at the time of the crimes Mr. Loden was not capable of appreciating the criminality of his conduct and that he was also incapable of conforming his conduct to the requirements of the law. And finally that at the time of the crimes he was suffering from extreme mental and emotional disturbance.
>
> Notwithstanding, Mr. Loden has elected to and has instructed us that he desires to waive presentation of this mitigation evidence for reasons I feel he will explain to the Court when given an opportunity to make a statement. Thank you.

Defense counsel tendered a copy of Dr. O'Brien's report and informed the court that Loden did not wish for closing arguments to be presented on his behalf, although Loden would like to make a statement prior to sentencing. In rebuttal, the prosecution introduced a copy of the Mississippi State Hospital's report of the results of its evaluation of Loden. When the prosecution concluded its closing argument in which it pressed for the death penalty, Loden was allowed to address the court. After expressing remorse for his crime, he said "I am sorry for the delay, and I hope you may have some sense of justice when you leave here today."

The trial court found that Loden's pleas were entered "knowingly, freely, understandingly[,] and voluntarily" and that he "was fully advised" of his constitutional and statutory rights as to each charge

and the sentence to be imposed by both his attorneys and the trial court. The court imposed a sentence of death as to Count I after considering all of the evidence introduced at the guilty plea and at the sentencing phase, which included the photographs introduced by the prosecution, the videotape recovered from Loden's van, the psychiatric report of Mississippi State Hospital, and the report of Dr. O'Brien. The court first found that Loden actually killed Leesa Gray, attempted to kill her, intended that her killing take place, and that he contemplated that lethal force would be employed. It then found as aggravating circumstances that the murder was committed while Loden was engaged in the felony crimes of kidnapping, rape, and sexual battery; that it was committed for the purpose of avoiding or preventing a lawful arrest; and that it was especially heinous, atrocious, or cruel. Finding that the aggravating circumstances outweighed the mitigating circumstances, the judge sentenced Loden to a sentence of death for Count I, and to thirty-year consecutive sentences of imprisonment on each remaining count.

In February 2002, Loden, represented by trial counsel Daniels, filed a motion for leave to file an out-of-time appeal. On January 2, 2002, the Mississippi Supreme Court remanded the issue to the circuit court for a determination of whether Daniels should be removed and substitute counsel appointed due to

Daniels' new position as an assistant district attorney.[11] Daniels moved to withdraw as counsel in January 2003, when the trial judge appointed the Mississippi Office of Capital Defense Counsel ("the Office") to represent Loden.

In July 2003, the Office filed a motion to vacate Loden's guilty plea, alleging that it was involuntarily given on the basis of inaccurate legal advice. Specifically, Loden maintained that he only pleaded guilty in reliance upon his lawyer's advice that he could still appeal adverse pretrial rulings despite entering a guilty plea. Loden supported the motion with an affidavit asserting that he would not have pleaded guilty if he had known he could not raise the suppression issues on appeal; correspondence to his attorneys wherein he raised questions about the appellate process; an affidavit from Johnstone stating that Loden was advised that it was unclear which issues the Mississippi Supreme Court would consider on automatic review; the August 2001 letter from Loden to Johnstone indicating his desire to plead guilty if the trial court would not reverse its pretrial suppression rulings; and a March 14, 2002, letter from Loden to the trial judge explaining Loden's attempts to communicate with counsel and requesting discovery of evidence presented to the grand jury

[11] Daniels began working for the Itawamba County District Attorney's Office on July 1 or 2, 2002. (*See* Daniels' Deposition, p. 17).

to assist him in defending the motion for a new trial and for appellate review.

The trial court held a hearing on the motion on June 2, 2005, and Loden testified. He testified that he felt hopeless after the suppression issues were decided against him, and that he waived his right to a jury and pleaded guilty in order for his case to receive review from the Mississippi Supreme Court. He maintained that his attorneys indicated to him that cases with death sentences received a more careful review, and that anything in the record would be reviewed. He iterated that he would not have pleaded guilty if his attorneys had properly advised him that he could not appeal the suppression issues, and that he was "basically assured" by his attorneys that he would receive the death penalty if he pleaded guilty and waived sentencing.

On cross-examination, Loden admitted that, initially, he wanted to receive a death sentence in order to get the case over with as quickly as possible, but that he changed his mind later in the process once he "got better" emotionally and mentally. He stated that he seemed to recall his attorneys telling him that they were prepared to go to trial if Loden wanted to proceed to trial, and he admitted that he freely and voluntarily waived his right to a jury, pleaded guilty, and desired the death penalty for the sake of the families involved. He maintained that, though he was told he had no appeal rights, he was told that he would get an automatic review of everything in the record if he pleaded guilty, waived a jury,

and received a death sentence. Neither Daniels nor Johnstone were subpoenaed for the hearing.

In an order filed February 16, 2006, the circuit court found "no merit to Petitioner's claim of ineffective assistance of counsel based on allegations that his attorney did not properly advise him, that by pleading guilty, he was waiving his right to appeal. Specifically, at the guilty plea hearing, the Court advised Petitioner of his rights. *Petitioner acknowledged that he was giving up his right to appeal by pleading guilty to the charge.*" (emphasis added). The court dismissed the motion, finding that Loden knowingly and voluntarily entered his plea and waived his right to appeal.

Subsequently, the Mississippi Supreme Court consolidated Loden's appeal of the denial of post-conviction relief, *i.e.*, the denial of his motion to vacate his guilty plea, with his direct appeal. The Mississippi Supreme Court denied relief on October 4, 2007, affirming the denial of the motion to vacate the guilty plea and Loden's sentence of death. *Loden v. State*, 971 So. 2d 548 (2007), *cert. denied*, 555 U.S. 831 (2008) ("*Loden I*"). He then filed a second petition for post-conviction relief, which was denied. *Loden v. State*, 43 So. 3d 365 (Miss. 2010) ("*Loden II*"). Following the appointment of federal habeas counsel, the

instant petition was filed with the Court on July 18, 2011.[12]

Legal Standard

A federal court may "entertain an application for a writ of habeas corpus . . . only on the ground that [the person] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). An application for such relief is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which provides that federal habeas relief may not be granted in connection with any claim adjudicated on the merits in state court proceedings unless that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established United States Supreme Court precedent; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the presented evidence. *See Lindh v. Murphy*, 521 U.S. 320, 324-26 (1997) (AEDPA applies to all federal habeas applications filed on or after April 24, 1996); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); 28 U.S.C. § 2254(d)(1) & (2). Additionally, the factual findings of the state court are presumed correct, and

[12] In order to avoid confusion, the Court refers to the Mississippi Supreme Court's disposition of Loden's consolidated action as his direct appeal, while it simply refers to Loden's second set of proceedings with the Mississippi Supreme Court as his post-conviction proceedings.

the petitioner bears the burden of rebutting the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Federal habeas relief may be granted under the "contrary to" clause of § 2254(d)(1) where the state court (1) arrives at a conclusion opposite that reached by the Supreme Court on a question of law; or (2) decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000). Under the "unreasonable application" clause, a federal court may grant relief where the state court applies the correct legal principle to the facts in an unreasonable manner. *See id.* at 407-08; *Brown v. Payton*, 544 U.S. 133, 141 (2005). Whether a decision is "unreasonable" is an objective inquiry, and it does not turn on whether the decision is merely incorrect. *See Landrigan*, 550 U.S. at 473 ("The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."); *Williams*, 529 U.S. at 410-11; *Morrow v. Dretke*, 367 F.3d 309, 313 (5th Cir. 2004) (habeas relief merited where state decision both incorrect and objectively unreasonable); *see also Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 793 (2011) ("The likelihood of a different result must be substantial, not just conceivable.") (citing *Strickland*, 466 U.S. at 693). The Court is required to deny federal habeas relief on any claim found lacking in merit by the state court "so long as 'fairminded jurists could disagree' on

the correctness of the state court's decision." *Richter*, ___ U.S. at ___, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Additionally, a petitioner must exhaust his claim in state court, which requires him to fairly present his claim to the highest court of the state prior to seeking federal habeas relief. *See Morris v. Dretke*, 379 F.3d 199, 204 (5th Cir. 2004); *Martinez v. Johnson*, 255 F.3d 229, 238 (5th Cir. 2001); 28 U.S.C. § 2254(b)(1). The federal claims presented for habeas relief must be the substantial equivalent of those presented to the state court in order to satisfy the requirement of fair presentation. *See Morris*, 379 F.3d at 204-05; *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir. 1999); *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) ("[W]here petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement.").

Where a petitioner fails to exhaust his state remedies, but it is clear that the state court to which he would return to exhaust the claim would find the claim procedurally barred, the claim is procedurally defaulted for purposes of federal habeas corpus relief. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001); *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995). Likewise barred from federal habeas review are claims that the state court held procedurally barred on review on the basis of independent and adequate state law grounds. *See, e.g.*, *Coleman*, 501

U.S. at 729-30 ("The doctrine applies to bar federal habeas claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests upon independent and adequate state procedural grounds."); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977). In order to receive federal habeas review of procedurally defaulted claims, a petitioner must demonstrate "'cause' for the default and 'prejudice attributable thereto,' or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.'" *Coleman*, 501 U.S. at 749-50 (internal citations omitted).

In order to demonstrate cause, a petitioner must show "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Prejudice may be demonstrated by showing that the errors "worked to [the petitioner's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (internal quotations omitted). If a petitioner is unable to demonstrate cause and prejudice, he may obtain review of his claim only by demonstrating that the application of the procedural bar would result in a miscarriage of justice because he is actually innocent of the crime. *See House v. Bell*, 547 U.S. 518, 537-38 (2006). In terms of the sentencing phase of a capital murder trial, innocence of the death penalty requires "a habeas petitioner who challenged his sentence in an otherwise defaulted petition [to] show 'by clear and convincing evidence that but for constitutional

error, no reasonable juror would [have found the petitioner] eligible for the death penalty.'" *Schlup v. Delo*, 513 U.S. 298, 339 (1995) (citing *Sawyer v. Whitley*, 505 U.S. 335, 348 (1992)). Moreover, where a state court holds a claim barred on independent and adequate state law grounds and reaches the merits of the claim in the alternative, the bar imposed by the state court is not vitiated. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Thacker v. Dretke*, 396 F.3d 607, 614 (5th Cir. 2005) (procedural bar imposed for petitioner's failure to contemporaneously object and preserve claim for review not circumvented by state court's alternative holding that constitutional claim lacked merit).

Finally, the Court notes that an evidentiary hearing is not available to a petitioner if his claims were reviewed on the merits, unless he meets the standards set forth in § 2254(d). *See Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1399 (2011). The AEDPA otherwise limits the circumstances in which an evidentiary hearing may be granted for those petitioners who fail to diligently seek to establish the factual bases for their claims in state court. *See Williams*, 529 U.S. at 433-34 (prisoners at fault for deficiency in state court record must satisfy heightened standard to obtain evidentiary hearing); *Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir. 2000); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); 28 U.S.C. § 2254(e)(2). Even where an evidentiary hearing is not precluded due to a petitioner's lack of diligence, the decision to grant an

evidentiary hearing is discretionary. *See, e.g.*, *Clark*, 202 F.3d at 765-66. In order to be entitled to an evidentiary hearing in federal court, a petitioner must demonstrate that he was denied a "full and fair hearing" in State court and persuade the Court that his allegations, if true, would warrant relief. *Id.* at 766 (citations omitted).

In light of these standards, the Court considers Loden's specific claims for relief.

Analysis[13]

I. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *See, e.g.*, *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). A federal habeas petitioner's claim that he was denied the effective assistance of counsel at trial is generally measured by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, Loden must establish that (1) his trial counsel's performance was so deficient that it cannot be said that he was functioning as "counsel" within the meaning of the

[13] The brief filed in support of the petition fails to track the claims presented in the petition itself. While the Court has considered all of the claims raised by the pleadings, it has consolidated some claims and reordered them for the sake of convenience.

Sixth Amendment, and (2) the deficient performance prejudiced his defense. *See id.* at 687; *see also Boyle v. Johnson*, 93 F.3d 180, 187 (5th Cir. 1996) (ineffective assistance of counsel claims analyzed under *Strickland* framework). The failure to prove either deficient performance by counsel or actual prejudice as a result of counsel's actions or omissions defeats a claim of ineffective assistance. *See Strickland*, 466 U.S. at 397; *Green v. Johnson*, 160 F.3d 1029, 1035 (5th Cir. 1998); *Smith v. Puckett*, 907 F.2d 581, 584 (5th Cir. 1990).

Where an attorney's representation falls below an objective standard of reasonableness as determined by professional norms, that performance is deficient. *See Rompilla v. Beard*, 545 U.S. 374, 380 (2005); *Strickland*, 466 U.S. at 687-89. Courts scrutinizing counsel's performance assume a "strong presumption" that the assistance was adequate and "that the challenged conduct was the product of reasoned trial strategy." *West v. Johnson*, 92 F.3d 1385, 1400 (5th Cir. 1996) (citation omitted). This presumption may be overcome if a petitioner can identify acts or omissions of counsel that were not the result of a reasoned, professional judgment. *See Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). However, even unreasonable errors by counsel do not warrant relief if the errors did not affect the judgment. *See Strickland*, 466 U.S. at 691. Rather, actual prejudice results from the errors of counsel when there exists a reasonable probability that, but for the errors, the result of the proceeding would have

been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

As claims of ineffective assistance of counsel involve mixed questions of law and fact, claims previously considered and rejected by the State court may be overturned only if "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See Strickland*, 466 U.S. at 698; 28 U.S.C. § 2254(d)(1). Counsel's failure to preserve a claim in State court can in some circumstances constitute cause sufficient to overcome a procedural default. *See Coleman*, 501 U.S. at 753-54. However, a petitioner claiming ineffective assistance of counsel for the purpose of having the underlying substantive claim reviewed on its merits must ordinarily have presented the ineffective assistance of counsel claim independently in State court before it may be argued as cause to excuse a procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451(2000).

A. Mitigation Evidence

On September 21, 2001, Loden executed a "Waiver of Jury for Trial and Sentencing" and a separate "Waiver of Sentencing Jury" before he entered his guilty plea. (*See* Trial Tr. vol. 2, 202-205). At sentencing, Loden instructed his counsel not to object to the State's evidence, not to cross-examine the State's witnesses, and not to present any mitigating evidence

on his behalf. When the State rested, defense counsel stated it would like to summarize the developed evidence for the court in order to make a record. Counsel's statements, as previously recounted by the Court, indicated that an investigation had been performed and evidence obtained that Loden suffered "extreme" sexual abuse as a child, that he was a combat veteran with eighteen years of service in the Marine Corps, that he had been an exemplary student, and that he had no criminal history prior to the crimes at issue in this case. (Trial Tr. vol. 7, 691). Counsel also noted that the defense expert, Dr. O'Brien, opined that Loden "was suffering from extreme mental and emotional disturbance" at the time of the crimes and was incapable of appreciating the criminality of his conduct and/or conforming his conduct to the requirements of the law at the time of the murder. (*Id.*). Copies of both of Loden's mental health evaluations were submitted to the sentencing trial judge for consideration prior to sentencing, with defense counsel agreeing to stipulate to the report from the Mississippi State Hospital. (*Id.* at 694).[14]

Loden maintains that he only told his attorneys not to put on mitigation evidence at the sentencing phase of trial because they told him that he would get the death penalty regardless of the evidence presented. He contends that once the motion for funds to hire

[14] The parties dispute whether the summary report or the full report from the Mississippi State Hospital was tendered to the trial court.

a mitigation expert was denied, his attorneys simply gave up and failed to investigate any of the numerous leads he provided them. He contends that they ignored his repeated requests for information about the case, and they failed to provide his retained expert, Dr. O'Brien, with sufficient information to allow him to conduct a proper evaluation. He argues that they did not discuss with him what might be presented as mitigating evidence, and that, had he been properly advised, he would not have waived the presentation of evidence or jury sentencing. (*See, e.g.*, Pet. Ex. 1, Aff. of Thomas E. Loden, Jr.). However, that claim is contradictory to the transcript of the record in this case.

Loden maintains that he volunteered numerous leads to defense counsel Johnstone in their initial meetings. Information in Johnstone's handwritten notes shows that Johnstone was informed that Loden (1) was sexually and physically abused as a child; (2) had over 18 years of decorated service in the Marines; (3) suffered from frequent nightmares following his combat experience; (4) suffered severe stress from his Marine recruiting assignment; (5) exhibited suicidal behaviors before and after his arrest; (6) was told by his wife shortly before the crime that she intended to have sex with a co-worker; and (7) that he was intoxicated and under the influence of drugs on the night of the crime. (*See, e.g.*, Pet. Ex. 25). Loden argues that an investigation into that information would have yielded powerful evidence in mitigation.

Loden argues that the available and untapped mitigating evidence into his background would have also included that (1) he witnessed his father, who often drank alcohol, physically and sexually assault his mother; (2) at age two, he and his four-year-old sister were left alone for several days; (3) his parents were both unfaithful to each other and went through a bitter divorce; (4) his stepmother was physically and emotionally abusive to Loden and his sister; (5) Loden was sexually abused while attending a vacation Bible school and was later molested over course of two years by a church employee; (6) his molester encouraged Loden and a female classmate, whom he was also abusing, to have sex with one another; (7) Loden went to live with his mother and her new husband at approximately age ten, where he was abused and neglected; (8) Loden and his three siblings from his mother suffer substance abuse problems as a result of traumatic childhood experiences; (9) Loden and his sisters have all attempted suicide; and (10) Loden performed well socially and academically when he lived with his grandparents. (*See* Pet. Exs. 3, 4, 7, 12, 13, 14, 16, 20, 22, 25).

Loden maintains evidence relevant to his adult life went undiscovered, as well. Loden argues that counsel failed to obtain his military records or interview his military colleagues, who would have testified that Loden was well-liked and well-respected. (*See* Pet. Exs. 8, 10, 15). He maintains that records would show that he joined the United States Marine Corps upon graduation and was selected an "outstanding

recruit" and "honor man" of his platoon. (*See* Pet. Ex. 24). He was described by his commanding officer as a "poster Marine," and his performance reviews consistently urged promotion in the Corps. (*See* Pet. Exs. 9, 24). By 1992, he was an E7 Gunnery Sergeant, and had received numerous military awards and medals. For instance, he received the good conduct medal fives times, the Navy Marine Corps Achievement Medal three times, and the Navy and Marine Corps Commendation Medal two times. (*See* Pet. Exs. 24(b), 24(c), 24(d)).

Loden maintains that counsel failed to investigate his Gulf War history and the possibility that he might suffer from Post-Traumatic Stress Disorder ("PTSD"). He notes that counsel, upon an investigation, would have learned that Loden was one of the first deployed, was often attacked, and repeatedly saw war casualties. (*See* Pet. Ex. 16, Aff. of Dr. James High). They would have learned that he witnessed a friend die when the vehicle in which he was riding was hit by friendly fire, and that his ex-wife reported that he was a different man after the war. (*See* Pet. Ex. 16 and Pet. Ex. 2). They could have learned, he argues, that he began to drink heavily and use drugs after the war, and that he then began getting in fights, suffering memory loss, and experiencing nightmares and flashbacks. (*See* Pet. Ex. 16). He maintains that he did not report these problems to his military superiors for fear that it would hurt his chances of advancement, though he did report them

to family members and friends. (*See* Pet. Exs. 9, 12, 16, 25, 31).

Additionally, he contends that an adequate investigation by counsel would have yielded information that, at the time of the crime, he was a devoted father with a struggling marriage to his third wife, Kat, whom he married in 1995. He maintains that when the Marines assigned him to a recruiting post in Vicksburg, Mississippi, in 1998, he was deprived of a military support system in a demanding, high-pressured job as a recruiter. (*See, e.g.*, Pet. Exs. 10, 29). Loden states that, during this time, Kat began having affairs, and that Loden sometimes participated in threesomes to keep her happy. (Pet. Ex. 29). He alleges that an investigation would have shown that, shortly before the crime, Kat began working as a paralegal at a prestigious law firm and began a flirtatious relationship with a partner in that firm. (*See* Pet. Ex. 5).

Loden maintains that when he came to visit the family farm, he found it deteriorated and his grandmother fragile. (*See* Pet. Ex. 29). He maintains that he drank beer, bourbon, and took some drugs throughout the day on June 22, 2000, before speaking to his wife, Kat, from his cell phone that evening. (*Id.*). He reports that she taunted him by telling him that she planned to have sex with the partner in the law firm where she worked, and he notes that the attorney has submitted an affidavit confirming his conversation with Kat that night, along with an

assertion that Loden's attorneys never contacted him. (*See* Pet. Exs. 1, 5, 16, 29).

In connection with his post-conviction proceedings, Loden was interviewed by James R. High, M.D.[15] Dr. High also left numerous tests with Loden, which Loden completed in his cell and later returned to Dr. High. After assimilating all of the information, Dr. High concluded that Loden suffers from Chronic PTSD and Complex PTSD, Borderline Personality Disorder, and Dissassociative Amnesia, and that he was suffering from these disorders at the time of the murder. (Pet. Ex. 16). Dr. High also opined that the crimes were committed while Loden was "under the influence of extreme mental or emotional disturbance." (*Id.* ¶ 13). He concluded that Loden's various work and family pressures, when combined Loden's fear that his wife might leave him for a male with a more prestigious job, "precipitated an acute episode of Dissociative Amnesia within his Borderline Personality Disorder during which he raped and murdered Leesa Gray." (*Id.* ¶ 10).

Loden maintains that, had his background social information and military record information been shared with Dr. O'Brien prior to his pretrial evaluation, Dr. O'Brien would have known to test for dissociative

[15] An affidavit from Dr. High is included in Loden's federal habeas filings, but it does not identify Dr. High's particular medical specialty. For present purposes, the Court assumes that he is a psychiatrist.

symptoms that would have explained the significance of Loden's reported amnesia as a reflection of the extreme degree of emotional disturbance suffered by Loden. Since reviewing the evidence adduced during Loden's post-conviction proceedings, he maintains, Dr. O'Brien has submitted an affidavit stating that he agrees with the later report of Dr. High. (*See* Pet. Ex. 18). Loden notes that counsel did not discuss Loden's case with Dr. O'Brien either before or after the evaluation, and that Daniels never responded to Dr. O'Brien's attempts to communicate with him. (*See id.*; *see also* Daniels Dep. at 106).

Loden alleges that, on September 19, 2001, counsel met with him and informed him that he had to decide whether he was going to plead guilty by September 20, 2001. He argues that his attorneys never discussed with him the sentencing process or strategy for sentencing, and they did not discuss with him whether he wanted to put on a case in mitigation. (*See* Pet. Ex. 1). Loden maintains that the only time his family met with Johnstone was on August 22, 2000, and then they primarily discussed Loden's treatment in jail. (*See* Pet. Exs. 4 and 38, Affs. of Bobbie Christian; Pet. Ex. 13, Aff. of Stella Renick; Pet. Ex. 19, Johnstone time records). In support of his claim that counsel failed to adequately investigate, Loden presents numerous affidavits from friends, family, and military connections stating that defense counsel never made a concerted effort to speak with them about Loden's background. (*See, e.g.*, Pet. Exs. 2-15; 38, 39, 44). Loden maintains that the affidavits

of his mother, Bobbie Christian, and his aunt, Stella Renick, contradict Daniels' assertion that he met with them and discussed Loden's background, as they state they only met with Daniels once to discuss getting Loden psychiatric treatment. (*See, e.g.*, Pet. Exs. 4, 13, 38). He notes that Johnstone concedes in his affidavit that no witnesses were identified nor a mitigation investigation performed at the time defense counsel announced that Loden had decided to forego the presentation of a case in mitigation. (*See, e.g.*, Pet. Ex. 19).

Loden further maintains that his attorneys ignored his requests to obtain a copy of discovery and gather evidence in the case, and that his letters demonstrate that his requests for discovery were ignored until after the suppression issues were decided. (*See* Pet. Ex. 30 and 35; Pet. Ex. 1). Loden argues that counsel did not consult with him regarding the grounds for the suppression motions, and they did not discuss whether he would testify at the hearing. (Pet. Ex. 1). He maintains that he began contemplating obtaining new counsel after defense counsel's performance at the suppression hearing, but that Johnstone and Daniels told him that the trial judge would not allow the involvement of new counsel so late in the case. (*See* Pet. Ex. 1 ¶ 16).

Loden otherwise argues that Daniels' aspirations to join the Itawamba County Office of the District Attorney contributed to the ineffective assistance he rendered in this case, noting that Daniels destroyed Loden's case file in October 2008 without notice to

Loden or his attorneys. Loden maintains that Daniels was clearly serving his own interests by destroying the file when Loden was fighting his death sentence, and he notes that Daniels submitted an affidavit on January 23, 2009, in support of the State's response to Loden's motion for post-conviction relief, even though he had submitted a sworn affidavit in 2003 stating that he would not speak about the case.

Loden notes that the time records of his investigator and of his counsel indicate that most of their efforts were spent preparing for the suppression hearing. (*See* Pet. Ex. 19; Pet. Ex. 36; Pet. Ex. 26(b)). Loden maintains that he cannot be blamed for counsel's failure to investigate, which is what led to his decision not to present mitigating evidence. Loden asserts that counsel did not have the right to fail to prepare his case and then blame the resulting absence of proof on him. Had the trier of fact been fully apprised of Loden's background and the circumstances of the offense, he maintains, he would not have been sentenced to death. The decision rejecting this claim, he argues, is unreasonable.

In reviewing this claim, the Mississippi Supreme Court declined to find ineffective assistance of counsel with regard to the investigation or the presentation of evidence in this case but found that Loden had expressly instructed his attorneys not to present mitigating evidence. *See Loden II*, 43 So.3d at 380. After citing the affidavits of Johnstone and Loden, the court noted that Daniels stated in an affidavit that he personally conducted a mitigation investigation,

including personal interviews with Loden's mother, sister, and a Marine liaison. *Id.* at 381-82. The court iterated parts of Johnstone's affidavit recounting the leads given to Johnstone in his initial interview with Loden, and it recounted Johnstone's statement that, later in the case, Loden became less forthcoming with information. *See id.* at 382. It noted that Johnstone stated that "while Loden did not expressly discourage mitigation investigation, he was reluctant to discuss either the underlying facts of the case, the development of mitigation evidence, or the prospect of testifying." *Id.* at 382. The court found that Daniels stated that investigator Wells assisted in uncovering mitigating evidence, as well. *Id.*

The court insinuated that some of Loden's assertions about the persuasiveness of some of the available mitigating evidence were overstated. For example, it noted that Loden's health and military history assertions were contradicted by Loden's records and Major Chaney's affidavit, which showed him to have a "good record" in the Marine Corps up to the time of his arrest. *Id.* at 384. It noted that defense counsel Daniels sated [sic] he thought it best to not speak to the court about Loden's parenting abilities, because an analysis of Loden's computer showed he had accessed websites involving incest with children. *Id.* at 384.

The court otherwise found that no proof had been presented that defense counsel stopped preparing for trial prior to Loden's plea and his instruction not to present evidence on his behalf, noting that Daniels stated that he intended to subpoena Loden's mother,

grandmother, sister, and aunt as witnesses if the matter had proceeded to trial. *Id.* at 384. In concluding that the mitigation investigation conducted was not deficient, the court noted that Loden had failed to support his claim by pointing to cases where ineffective assistance was found in regard to an attorney's investigation into mitigation evidence where the defendant opposed the presentation of such evidence. *Id.* at 385. Finally, citing the separate psychiatric examinations that had been conducted by the Mississippi State Hospital and Dr. O'Brien, the court found the information actually presented to the court through those reports was not sufficiently more than that Loden states should have been presented by counsel. *Id.* at 384-85.[16] The court concluded that Loden had failed to prove an entitlement to relief and rejected his claim. *Id.* at 385.[17]

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[16] The court found that the summary report of the forensic mental evaluation by the Mississippi State Hospital, Dr. O'Brien's report, and the brief summary presented by Daniels "collectively addressed nearly every subject deemed pertinent by Loden." *Id.* at 385.

[17] The Mississippi Supreme Court considered whether Loden was denied the opportunity to fully develop evidence in this case due to Daniels' destruction of his case file. *See Loden II*, 43 So. 3d at 400. The court noted Daniels' "poor judgment in destroying" Loden's file, which was "exacerbated by his present employment with the district attorney's office." *Id.* The court found, however, that Daniels testified that he only had copies of documents, and that there would have been duplication between his file and Johnstone's file, which Loden did receive. *Id.* It also found that Loden had failed to allege and support a showing of prejudice "by failing to have Daniels's file of copies, when Loden

(Continued on following page)

Respondents contend that this claim is controlled by *Schriro v. Landrigan*, 550 U.S. 465 (2007), which holds that it is not objectively unreasonable for a court to "to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Landrigan*, 550 U.S. at 478. They maintain that Daniels stated on the record at sentencing that Loden expressly instructed his attorneys not to object or cross-examine witnesses, and that he instructed them to waive the presentation of mitigating evidence. They note that Loden also stated on the record that he was satisfied with the advice given to him by his attorneys. Moreover, they argue, it is clear that a mitigation investigation was conducted, as counsel introduced Dr. O'Brien's report and a brief summary into the record. Johnstone's affidavit, they maintain, does not negate the fact that Daniels stated he did perform an investigation. Respondents maintain that the colloquy at sentencing demonstrates that Loden expressly made an "informed and knowing" decision *not* to introduce evidence.

Conversely, Loden argues that *Landrigan* is inapposite, because unlike the defendant in that case, there is no evidence that Loden "actively subverted the sentencing hearing after he told his attorneys not to present the mitigating evidence." *Id.* at 465, 470,

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had the originals of the very same material. Thus, this Court is presented with a veritable 'red herring.' " *Id.*

479, 481. Loden argues that the fact that he may not have been forthcoming with personal information does not insulate his attorneys from a challenge to the investigation they performed. *See, e.g.*, *Porter v. McCollum*, 588 U.S. 30, 40 (2009) (holding that even a defendant's "fatalistic or uncooperative" behavior "does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation") (citing *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005) (holding counsel's mitigation investigation deficient despite defendant's refusal to discuss background)). This duty is well-established, he argues, and counsel's investigation "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.I(C), p. 93 (1989)). Loden argues that his instructions for counsel to "stand down" were uninformed, and they were only given because of counsel's ineffective performance in the first place.

Loden maintains that nothing materially distinguishes his case from the facts in *Porter*, where the Supreme Court concluded that trial counsel's failure to uncover and present any evidence of the inmate's mental health or mental impairment, family background, or military service clearly constituted deficient performance of counsel that was prejudicial to the death-row inmate. *See Porter*, 588 U.S. at 40-41. Loden argues that by failing to apply *Strickland* to

trial counsel's inadequate investigation into Loden's mental health merely because Loden chose not to present mitigation evidence, the ruling is contrary to clearly established federal law. He notes that in a 2008 affidavit, Johnstone states that when he and Daniels met with Loden in September 2001 to discuss whether Loden would plead guilty, there was no "mitigation case to present because there had not been any mitigation investigation." (Pet. Ex. 19). Additionally, he argues, the fact that Dr. O'Brien was not given the information necessary to conduct a proper evaluation is proven by the fact that Dr. O'Brien has repudiated his prior opinion and agrees now with the diagnoses of Dr. High. Therefore, he argues, the decision is unreasonable light of the evidence.

The Court notes that defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A court reviewing counsel's performance is "required not simply to 'give [the] attorneys the benefit of the doubt,' . . . but to affirmatively entertain the range of possible 'reasons [the petitioner's] counsel may have had for proceeding as they did[.]'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011) (citations and internal citations omitted). The determination that counsel was not deficient and Loden was not prejudiced "precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness

of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quotations omitted).

In *Schriro v. Landrigan*, 550 U.S. 465 (2007), the Supreme Court held that "it was not objectively unreasonable for [a state] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice." *Id.* at 478. The Court there noted that "[n]either *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court[,]" and it noted that the defendant in *Rompilla* "did not inform the court that he did not want mitigating evidence presented." *Id.* Loden argues this case does not fit within *Landrigan* because Loden did not refuse the presentation of a well-developed mitigation case after being fully informed of his options. The Court, however, finds that Loden has not demonstrated that it is unreasonable to conclude otherwise.

In his deposition testimony, Johnstone stated that he and Daniels explained to Loden the procedure of the sentencing hearing, as well as the evidence that could be presented to mitigate his crimes. (*See* Johnstone Dep., pp. 106-07). Johnstone states that, once Loden decided to enter a plea, Loden became adamant that he did not want witnesses cross-examined or evidence introduced in mitigation. (*See id.* at pp. 84-85, 87, 97, 103). Defense counsel Daniels asserted that Loden did not want to discuss the facts of the crime, because he "did not want to acknowledge what he had done." (Daniels Dep. at pp. 80-81, 149).

Loden's statements to Dr. O'Brien also led Dr. O'Brien to opine that Loden did not want "further reminders of the things that happened." (Pet. Ex. 29). Additionally, Loden informed the trial judge that he understood the rights he was giving up by foregoing cross-examinations and objections to evidence. (*See* Trial Tr. vol. 6, 594). The Court notes that the trial court and the Mississippi Supreme Court determined that the waivers executed by Loden were knowing, voluntarily, and intelligently given, and the record exchanges between Loden and the trial court are sufficient to prevent the Court from concluding that finding is unreasonable.

However, even if *Landrigan* is inapposite, the Court finds that Loden's case is materially distinguishable from *Porter*, as counsel in that case failed to conduct any investigation into Porter's background. *Porter*, 558 U.S. at 40-41. In his deposition testimony, Johnstone clarified that the statements in his 2008 affidavit concerning the lack of a mitigation case meant only that there was no expert to testify in the field of mitigation. (*See* Johnstone Dep. at p. 95). He maintained that Loden was informed that evidence of his background, military history, etc., could be put before the court for mitigation purposes. (*See id.* at pp. 106-07). Daniels claimed to have "conducted extensive investigation into the facts of the case, and into mitigation factors, which included interviews with my client, military personnel, his family and friends." (Daniels Dep., Ex. 12-B, 2003 affidavit). Specifically, Daniels maintained that he "personally

interviewed" Loden's mother and sister, and that he spoke with a Marine liaison officer about Loden's "military situation and background." (Daniels Dep., Ex. 9, Daniels 2009 affidavit). Additionally, the record reveals that, at a pretrial hearing held in the case, the State referenced a list that Daniels had produced in discovery that contained the names of witnesses intended for mitigation purposes. (Trial Tr. vol. 1, 100).

Daniels denied the allegations in the affidavits of Loden's aunt, Stella Renick, and his mother, Bobbie Christian, stating that they were lying if they said that he did not meet with them and discuss Loden's background. (Daniels Dep. at p. 167). He concedes that he did not speak to Loden's sister or aunt about testifying at Loden's trial, but he stated that he intended to subpoena them if they were needed. (Daniels Dep. at pp. 83, 139). In his deposition testimony, Daniels stated that he and Wells both uncovered mitigation evidence, some of which was discovered by "just a general talking to witnesses" and people with knowledge of Loden or the case. (Daniels Dep. at p. 15). Although he conceded that Wells was not expressly instructed to conduct a mitigation investigation, he maintained that Wells located witnesses and would have known the type of evidence the attorneys were looking to gather. (Daniels Dep. at pp. 76-77).

Wells maintains that he obtained information "about Mr. Loden's family background, his childhood and youth, that had been physically and sexually

abused, the problems he had in his personal life, and his military experiences[,]" all of which he relayed to Daniels. (Pet. Ex. 34). Wells' time records show that he met with Loden's mother, aunt, ex-wife, and sister, and that he relayed the information learned to Daniels. (*See* Pet. Ex. 26-B). He also delivered some of Loden's military documents to Daniels' office on April 13, 2001, which he apparently obtained from Loden's mother. (*See id.*; *see also* Pet. Ex. 30, June 14, 2001 letter from Loden to Daniels).

The record evidence shows that between February 2, 2001 and August 29, 2001, Loden submitted approximately seventeen letters to his attorneys repeatedly requesting a copy of the discovery in the case, asking whether potential witnesses have been contacted, and inquiring about the possibility of getting phone records and his military records. (*See, e.g.*, Pet. Exs. 30, 35).[18] His attorneys met with him approximately ten times during the same period, outside of meetings at court proceedings. (*See* Daniels Dep. Ex. 2; Pet. Ex. 19). Investigator Wells also met with him at least four times during the same time period. (*See, e.g.*, Pet. Ex. 34).

Daniels' time sheet indicates that he copied all discovery and delivered it to Loden on July 11, 2001, which Loden contends was too late to do any good at the suppression hearing and evidences his attorneys'

[18] He also submitted several letters to investigator Wells, which are not included in the count.

neglect of him. (*See* Pet. Ex. 36).[19] However, it is clear that as early as April 1, 2001, Loden had been provided some discovery, as his letter to Wells on that date references questions about his confession based on the "papers" Daniels left him. (Pet. Ex. 35(d)). In a June 7, 2001, letter to Wells, Loden notes that Daniels, having recently come to visit him, brought a copy of Wells' interview with Kat. (Pet. Ex. 35(h)). In a letter to Daniels postmarked July 3, 2001, it is clear that Loden has a copy of the investigative reports, and this begins a series of letters wherein he points out to counsel perceived flaws and holes in the investigation of the case and asks counsel to file another suppression motion. (*See, e.g.*, Pet. Ex. 30(h), 30(i), 30(j)).[20]

Additionally, and contrary to Loden's claim that counsel waited months before contacting Dr. O'Brien to conduct an evaluation, the record shows that counsel was not authorized to retain Dr. O'Brien's services as a defense expert until July 2001. (*See, e.g.*, Trial Tr. vol. 1, 140-149; Trial Tr. vol. 2, 157-59). Dr. O'Brien evaluated Loden on August 13, 2001 and

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[19] Daniels also states that he and Johnstone went over the evidence with Loden prior to the hearing, and that Loden never indicated that he wanted another attorney. (Daniels Dep. pp. at 153-55, 132-33).

[20] The Court acknowledges that July 3, 2001, is a date after the suppression hearing was held. The Court includes this letter only to show that counsel was in communication with Loden and was attempting to get him information.

submitted his report to counsel on September 14, 2001. (*See* Pet. Ex. 18; Pet. Ex. 29).

The Court notes that Dr. O'Brien reports Loden sharing information regarding the trauma Loden experienced at the loss of his friend in combat, his father's death, his suicide attempts, his substance abuse, the absence of mental health treatment, his sexual addiction, his abandonment by family, his good performance in school, his failed marriages, his grandmother's poor health, his job stress, his wife's affair, his failed marriages, the sexual abuse he suffered as a child, and his lack of a criminal history prior to Leesa Gray's murder. (*See, e.g.*, Pet. Ex. 29). The Mississippi State Hospital Report, also generated as a result of defense counsel's request that Loden undergo an evaluation, contains a recitation of factors that might have mitigating effect, though the examiners did not feel that they rose to the level of statutory mitigation. (*See*, *e.g.*, Pet. Ex. 28(j)). These factors included Loden's reported history of: childhood physical and sexual abuse; combat experiences, including witnessing the death of a close friend and killing others; experiencing and acting upon "paraphilic urges, including deriving sexual pleasure from the suffering of others"; intoxication at the time of the offenses; suicidal ideation at the time of the offenses; distress over his relationship with his wife, his work, his concern about the condition of his grandmother, and the condition of the family farm; and his experience of anger at the anti-Marine

remark made by the victim a short time before the offenses. (*Id.*).

Loden faults counsel for not providing the court with evidence relating to the sexual abuse he suffered and the profound effect war and military pressures had on his mental state. However, his military records contained no description of any mental health treatment, and all mention of sexual abuse in the record comes from reports of individuals who stated that Loden informed them of the abuse. (*See* Pet. Ex. 3; Pet Ex. 13; Pet. Ex. 16, p. 5). No one could identify the alleged abuser by name. (*See id.*; *see also* Daniels Dep. at 100). Additionally, it appears that counsel made a strategic decision not to introduce proof that Loden was a devoted husband and father, as that likely would have allowed the introduction of evidence that Loden's computer had accessed websites promoting incest and child molestation. *See Wong v. Belemontes*, 558 U.S. 15, 19-20 (2009) (holding that a court considering available but untapped mitigating evidence must also consider other inculpatory evidence that would have been admitted if the mitigating evidence had been presented).

Moreover, Dr. O'Brien's 2008 affidavit does not repudiate the conclusions he reached in 2001 when he evaluated Loden. Rather, he states that if he had known much of the information relied upon by Dr. High, he "would have come to the same conclusions and diagnoses[.]" (Pet. Ex. 18 ¶ 17). Dr. High's opinion, to which Dr. O'Brien states he agrees, is that the crime was committed while Loden was "under the

influence of extreme mental or emotional disturbance." (Pet. Ex. 16 ¶ 13). Dr. O'Brien concluded the same when he evaluated Loden in 2001. (*See, e.g.*, Pet. Ex. 18, Pet. Ex. 29).[21] Regardless of any initial disagreement over which mental impairment or personality disorder served as the vehicle for Loden's mental disturbance, the fact is that the sentencing court had before it an expert opinion that Loden's mental state at the time of the crime could serve to mitigate his sentence. *See* Miss. Code Ann. 99-19-101(6)(b) (listing as a mitigating circumstance that "[t]he offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.").[22]

When Loden entered his plea on September 21, 2001, trial was still over two weeks away. The time records kept by the attorneys in this case show that trial preparations were still ongoing as of September 12 and 13, 2001. (*See* Pet. Ex. 19; Pet. Ex. 36). According to Daniels, Loden vacillated on whether he wanted to plead or go to trial, and Daniels "was going to be prepared for trial no matter what." (Daniels Dep. at p. 85). Counsel employed an investigator who

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[21] Dr. High notes that Dr. O'Brien "failed to give a diagnostic formulation from which he could support the conclusions he gave, though I agree with his opinion in that regard." (Pet. Ex. 16, pp. 43-44).

[22] Dr. High did not opine that Loden's impairments rendered him *M'Naghten* insane at the time of the murder. *See Edwards v. State*, 441 So. 2d 84, 86 (Miss. 1983) (noting that Mississippi follows the *M'Naghten* Rule for legal insanity).

uncovered leads, and Daniels spoke with family members and obtained records. There were no psychiatric records for counsel to pursue, and family members could not identify the person resonsible [sic] for Loden's reported sexual abuse.[23] The mental evaluations that were conducted prior to trial yielded much of the information Loden states was undiscovered at the time of trial. In light of the record evidence, Loden has not demonstrated that it was objectively unreasonable to conclude that he failed to show counsel performed deficiently at trial by failing to adequately investigate the available mitigating evidence.[24]

As the Court found earlier, Loden is unable to demonstrate prejudice because of his decision not to allow the introduction of mitigating evidence. *See, e.g.*, *Brawner v. Epps*, 439 F. App'x 396, 404, 2011 WL 3822344 (5th Cir. 2011) (holding that the quality of counsel's investigation could not have prejudiced a client who refused to allow the introduction of relevant

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[23] The Court notes that Loden's mother was estranged from him for years prior to his arrest for the instant offense, and Daniels otherwise states that she was not forthcoming with information. (*See, e.g.*, Pet. Ex. 4 ¶¶ 18-19; Daniels Dep. at p. 90). It also notes that Loden's only full-blooded sibling did not submit an affidavit in this case.

[24] Based on the Court's discussion of this claim, it finds that, to the extent Loden claims that Daniels' "split allegiances" between his representation of Loden and his preparation for entering the district attorney's office support this claim, he fails to demonstrate an entitlement to relief.

evidence). That finding aside, the Court also determines that Loden has failed to demonstrate it is unreasonable to reject a finding of prejudice as a result of counsel's performance. The question of prejudice asks "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have conlcuded [sic] that the balance of aggravating and mitigating circumstances did not warrant death." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (citing *Strickland*, 466 U.S. at 695). Under the facts and circumstances of this case, the Court finds no such reasonable probability is found that the sentencer would have so concluded.

Loden kidnapped and raped a sixteen-year-old girl over the course of several hours, videotapping [sic] portions of the abuse and ignoring her pleas, before suffocating her and stuffing her nude, bound body beneath a seat in his van. The evidence counsel is alleged to have failed to uncover and present does not, in light of these aggravating facts, raise a reasonable probability that a sentence of death would not have been given had the evidence been presented. Loden has not demonstrated that the decision rejecting this claim is unreasonable, and habeas relief is denied on the issue of counsel's investigation and presentation of mitigating evidence.

B. Guilty Plea and Waiver of Jury Sentencing[25]

1. Plea

Loden argues that once he failed to receive favorable pretrial rulings, he began to focus on the hope of a successful appeal of the trial judge's rulings. (*See* Pet. Ex. 1). He contends that he inquired of counsel whether pretrial rulings would be reviewed on appeal if he pleaded guilty, and that counsel repeatedly informed him that, if he received the death penalty, everything in the record would be reviewed by the Mississippi Supreme Court as part of its automatic review. (*See id.*; *see also* Vol. 1 of 3, Ex. 5 to Mot. to Vacate).[26] Based on this alleged erroneous advice, he maintains, he chose to plead guilty and waive jury sentencing in hopes of receiving a death sentence that would necessitate review of the pretrial rulings.

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[25] Loden asserts that the facts demonstrate his entitlement to relief on the substantive issue of the voluntariness of the guilty plea and waiver of jury sentencing, as well as on his claims of ineffective assistance of counsel. Because the underlying facts are the same for both asserted grounds for relief, the Court addresses them under this heading, although the grounds have been independently considered by the Court.

[26] In an August 2, 2001, letter to defense counsel Johnstone, Loden asked Johnstone to file a motion to revisit the suppression issues stemming from the original warrant, and if the court's ruling on those issues proved to be unfavorable, to speak with counsel about entering a plea. (*See* Vol. 1 of 3, p. 22, Ex. 3 to Mot. to Vacate).

Loden maintains that trial counsel failed to discuss with him his available defenses, his appellate rights, or any of the questions that the trial judge might ask during the plea allocution. (Pet. Ex. 1). Loden contends that his mental and emotional condition barred his accurate understanding of the consequences of a decision to waive the right to a jury for sentencing, and that the trial judge erroneously told him that he was waiving a jury as to guilt and to punishment by entering a plea. He argues that his counsel failed to attempt to negotiate a plea with the prosecution, and that they failed to discuss with him whether to put on a case in mitigation or whether to waive a jury for sentencing. Loden alleges that trial counsel failed to advise him that he would almost assuredly receive a death sentence from the trial judge if he pleaded guilty, and counsel failed to advise him that he would not be able to challenge the judge's rulings. Loden contends that counsel failed to develop a mitigation case, failed to instruct their retained investigator to conduct a mitigation case, and they failed to ask the trial judge to reconsider his ruling denying funds for a mitigation expert. The totality of these factors, he maintains, renders his plea and waivers involuntary, even aside from counsel's performance.

Counsel met with Loden on September 18, 19, and 20, 2001. (*See, e.g.*, attachment to Pet. Ex. 19; Pet. Ex. 36). It is undisputed that Loden inquired, prior to pleading, whether he could appeal from the circuit court's adverse pretrial rulings if he pleaded

guilty. (*See, e.g.*, Pet. Ex. 1; Johnstone Dep. at pp. 80-83; Daniels Dep. at pp. 161-62). According to Daniels, the State made no plea offers to Loden, and as the trial date approached, it became clear to counsel that Loden was either going to plead guilty to the indictment in its entirety or go to trial. (Daniels Dep. at p. 58). Daniels states that Loden vacillated on whether to plead guilty, and that he and Johnstone continued to prepare for trial up until they knew Loden intended to enter a plea. Daniels states that he "wasn't going to wait for [Loden] to make up his mind," and that he "was going to be prepared for trial no matter what." (*Id.* at p. 85). Johnstone stated that Loden ultimately "indicated that he didn't want to proceed anymore, he wanted to plead guilty, [and] he didn't want to put the family through a trial." (Johnstone Dep. at p. 69).

At his September 21, 2001, plea, Loden stated on the record under oath that he was "konwingly [sic], freely, understandingly, and voluntarily" entering a plea. (Trial Tr. vol. 6, 501). He acknowledged that he was waiving his right to have a jury make the determination as to his guilt and the punishment to be imposed. (*Id.* at 502). He acknowledged that, if he proceeded to a jury trial and received a sentence, he could appeal to the Mississippi Supreme Court, and that he was giving up that right by waiving a jury trial. (*Id.* at 502-510).

Loden later sought to vacate his guilty plea based upon counsel's advice regarding the scope of the Mississippi Supreme Court's automatic review, and

he supported the motion with the transcript of the guilty plea colloquy, letters, his own affidavits, and a July 10, 2003 affidavit from Johnstone in which Johnstone admitted that he told Loden it was unclear which issues would be reviewed by the Mississippi Supreme Court as a part of their automatic review. (*See* Vol. 1 of 3, Ex. 1-5). Following a hearing, the trial court found that the record belied Loden's claims and found his claims without merit. (*See, e.g.*, Vol. 1 of 3, pp. 143-45).

Loden appealed the dismissal of his motion for post-conviction relief, which was consolidated with his earlier-filed direct appeal. The Mississippi Supreme Court considered whether trial counsel's advice caused Loden to enter an involuntary guilty plea to capital murder, noting that Loden bore the burden of proving to the circuit court by a preponderance of the evidence that he was entitled to post-conviction relief, and that the trial court's factual findings would not be disturbed unless they were clearly erroneous. *Loden I*, 971 So. 2d at 572. Citing the on-the-record exchanges between Judge Gardner and Loden regarding the rights available to Loden and the consequences of foregoing those rights, along with Loden's affirmations under oath regarding his willingness to plea, the Mississippi Supreme Court found that the trial court was not clearly erroneous in finding the plea "knowing and voluntary." *Id.* at 573.

The court also considered Loden's claim that counsel performed ineffectively in advising him regarding the guilty plea. The court noted that

Johnstone's affidavit stated that he advised Loden that he would be waiving his right to appeal, and that Loden's exchanges with Judge Gardner explicitly informed him that he would waive his right to appeal by pleading guilty. *Id.* at 574. The court found Loden's claim "unpersuasive," finding Loden failed to show the circuit court's decision rejecting his claim clearly erroneous. *Id.*

Loden subsequently filed a second motion for post-conviction relief in which he argued that he was denied the effective assistance of counsel in deciding whether to plead guilty and waive jury sentencing. A 2008 affidavit from Johnstone, a 2009 affidavit from Daniels, and the deposition testimony from both attorneys were submitted for the court's consideration. In his 2008 affidavit, Johnstone stated:

> Loden wanted to know whether, if he pleaded guilty, he could appeal, and in particular whether he could appeal the Circuit Court's adverse pre-trial rulings including the rulings on the suppression motions. I told Loden that if he pleaded guilty and was sentenced to death, the Mississippi Supreme Court would review his sentence, and that they would review everything that was in the record. I told Loden that I believed that (1) the rulings on the suppression motions, (2) the order denying the request for funds to hire a mitigation specialist, and (3) the use of Loden's wife Kat to induce Loden to talk with the police on June 30, 2010 were issues that

> might be reviewed that were potentially viable.

(Pet. Ex. 19, Johnstone Aff.) Daniels' 2009 affidavit states that Loden was informed that "there would be no direct appeal by [trial counsel], but that the Mississippi Supreme Court would automatically review a sentence of death. . . . [and that if Loden] wanted to directly appeal and assign particular grounds for reversal of his conviction, that would be best served by going to trial." (*See, e.g.*, Daniels Dep., Ex. 9).[27]

In a December 4, 2008, affidavit, Loden stated that his attorneys informed him that all pretrial issues would be reviewed by the Mississippi Supreme Court even if he pleaded guilty. (Pet. Ex. 1 ¶ 19). Daniels states that he discussed the court's review with Loden more than once, and "[t]he answer was always the same and unequivocal, and that was, if he plead guilty, he could not appeal his case. And that if he wanted to appeal those issues that he was unhappy with what had been decided by the [c]ourt, he would need to go to trial." (Daniels Dep. at pp. 161-62). Daniels stated that he did tell Loden that a death sentence would be reviewed by the Mississippi Supreme Court, but that he "at no time" told Loden that

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[27] Daniels submitted an affidavit dated September 3, 2003, in which he stated he had never disclosed any information learned during his representation to an employee of the Office of the District Attorney, nor did he intend to do so. (*See* Pet. Ex. 41 ¶ 4). He later submitted an affidavit contesting Loden's claims of ineffective assistance of counsel.

he could appeal any specific issues. (*Id.* at p. 162). Daniels maintained that he thought he would be misadvising Loden by attempting to tell him exactly what the court would consider in its review of "the sentence," but that he told Loden that the suppression issues would not be assigned as error if he pleaded guilty. (*Id.* at pp. 165-66). Daniels stated that Loden "understood that there would be no appeal." (*Id.* at p. 162).

In his deposition testimony, Johnstone maintained that Loden wanted to plead guilty in order to spare the family a trial, and that Johnstone, along with Daniels, had several discussions with Loden about the appeal process. (*See* Johnstone Dep. at pp. 70, 81). Johnstone's testimony was that Loden was informed that a review would be automatic, and that while some issues were potentially viable, Loden would "have to go to trial and have a jury verdict" in order to assuredly preserve his appealable grounds. (*See id.* at pp. 82-83).

On post-conviction review, with his claim bolstered by the affidavits of counsel, Loden argued that trial counsel provided ineffective assistance by providing erroneous advice to him regarding the Mississippi Supreme Court's automatic review of his death sentence. The court found the issue procedurally barred in light of its earlier denial. *Loden II*, 43 So. 3d at 389 (citing Miss. Code Ann. § 99-39-23(6)). Specifically, it noted that Loden had new counsel when he filed his motion to vacate the guilty plea and could have issued subpoenas for his trial attorneys to

testify at that proceeding. *Id.* at 390. It otherwise noted that both attorneys informed Loden that they could not guarantee which issues the Mississippi Supreme Court would address, and that a reasonable inference from Johnstone's advice is that Loden needed to get everything on the record. *Id.* at 390. The court otherwise found that Daniels' 2009 affidavit was not evidence that was "practically conclusive" to have caused a different result in Loden's conviction or sentence, and "his deposition testimony is conclusive for the opposite, and is convincingly similar to Daniels's deposition testimony that erroneous advice was not given to Loden." *Id.* at 390. The court denied relief.

Separate and apart from Loden's claim that counsel performed ineffectively in advising him as to the plea, the court considered Loden's claim that his plea was not knowing, voluntary, or intelligent. *Loden II*, 43 So. 3d at 394. The court noted that it had already found his plea "knowing and voluntary" in its prior decision, and that even if Daniels' 2009 affidavit were considered, it was not evidence that is "practically conclusive . . . [to] have caused a different result[.]" *Id.* at 395. The court determined that Loden was not entitled to relief. *Id.*

At the outset, the Court notes that no plea offer was made to Loden, who cites *Missouri v. Frye* and *Lafler v. Cooper*, in support of his claims. In *Missouri v. Frye*, defense counsel failed communicate a plea offer to the defendant, and it lapsed. *See* ___ U.S. ___, 132 S. Ct. 1399, 1409 (2012) (noting the case involved

an "application of *Strickland* to the instances of an uncommunicated, lapsed plea"). In *Lafler v. Cooper*, a favorable proposed plea agreement was rejected upon the erroneous advice of counsel. *See* ___ U.S. ___, 132 S. Ct. 1376, 1390 (2012). To the extent that Loden argues that counsel was ineffective for failing to negotiate a plea in this case, no support is found in the record for such a claim. The evidence in this case suggests that the State had no interest in extending a plea offer to Loden. At a January 11, 2001, hearing, the prosecutor informed the trial court that it was "highly unlikely" that any plea negotiations would take place. (Trial Tr. vol. 1, 20, 25). Daniels' deposition testimony likewise indicates that there was no reason to believe that the prosecution would be open to plea negotiations. (Daniels Dep. at p. 58). The State Hospital report reveals that Loden voiced an understanding to the forensic staff that the prosecution would not make a plea offer. (*See* Pet. Ex. 28(j)). Therefore, Loden's arguments are speculative, as there is no indication that any attorney could have negotiated a plea offer for Loden under these circumstances.

The Court otherwise notes that a guilty plea is valid only when it is "voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Counsel's advice is competent when counsel informs the accused of the "relevant circumstances and the likely consequences" of entering a plea. *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir.

2005). Conversely, pleas entered on advice that fails to so inform the client are not voluntary. *See, e.g.*, *Kennedy v. Maggio*, 725 F.2d 269, 273 (5th Cir. 1984). The *Strickland* test applies to ineffective assistance of counsel claims based on guilty pleas. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In order to prevail on such a claim, the Loden must show that counsel's representation fell below an objective standard of reasonableness, and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 57 (quotations omitted).

Loden maintains that the Mississippi Supreme Court's decision is unreasonable, because it merely found an absence of prejudice to Loden based on the fact that he pleaded guilty, waived jury sentencing, and waived the presentation of mitigating evidence in sentencing. Loden argues that the issue is whether he would have insisted on going to trial if he had been properly advised, and that his February 2002 post-plea letter to Daniels clearly shows that Loden misunderstood the review he would receive by the Mississippi Supreme Court. (*See, e.g.*, Pet. Ex. 30(L), "My only hope was re-presenting everything I had trouble with on appeal. Glad to hear that I still can.")).

The Supreme Court has held "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, counsel's advice must be "within the

range of competence demanded of attorneys in criminal cases." *Id.* at 771. Where counsel makes an error in determining how a court will apply a law where the application allows for discretion, his actions are within range of competence demanded by the Sixth Amementment [sic]. *See, e.g.*, *Parker v. North Carolina*, 397 U.S. 790, 797-98 (1970) (finding counsel's allegedly mistaken conclusion that defendant's confession was admissible well within range of competence demanded of criminal defense attorney). Where the law is clear, however, "the duty to give correct advice is equally clear." *Padilla v. Kentucky*, 559 U.S. 356, ___, 130 S. Ct. 1473, 1483 (2010) (discussing deficiency in immigration context).

Loden's attorneys interpreted the appeal waiver that accompanies a valid guilty plea in light of the statutory requirement that death sentences receive automatic review by the Mississippi Supreme Court. *See* Miss. Code Ann. § 99-19-105 ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court."); Miss. Code Ann. § 99-35-101 (2001) ("Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty."). The record supports a conclusion that Johnstone and Daniels voiced their uncertainty to Loden as to what issues would specifically be reviewed if Loden were to plead guilty and

receive a sentence of death, but that each stated that they informed Loden that he had to go to trial and get a jury verdict to ensure review of the alleged errors. (*See, e.g.*, Daniels Dep.; Johnstone Aff. at 83). Moreover, the Court notes that the Mississippi Supreme Court did address the issue of the trial court's ruling regarding the denial of a mitigation specialist, thus making it clear that they do, at least on occassion [sic], consider pretrial rulings even in the face of a guilty plea. *See, e.g.*, *Loden I*, 971 So. 2d at 562-63.

Based on a review of the entirety of the record before it, the Court concludes that Loden has not rebutted by clear and convincing evidence the finding that Loden was informed that he would need a jury determination if he wanted to appeal any unfavorable determinations to the Mississippi Supreme Court. Loden asks the Court to ignore the evidence that he entered a knowing, intelligent, and voluntary plea and find that counsel rendered ineffective assistance because Loden wanted to receive a death sentence but not actually be subjected to the death penalty. The records supports a conclusion that Loden was made aware of the consequences of his plea and chose to proceed with the plea. He fails to demonstrate a reasonable probability that he would have proceeded to trial if his attorneys had given him different advice. *See, e.g.*, *Hill*, 474 U.S. at 59. His attorneys did not offer advice that led him to reject a favorable plea offer or accept a less than favorable offer, they did not fail to advise him of the risk of waiving a jury trial, and they did not fail to warn him of the consequences

and likely result of waiving a jury for trial and sentencing.

Loden was informed by Judge Gardner that he was waiving both his right to a jury determination of guilt and punishment by entering a guilty plea, which Loden states supports his claim that his plea was not voluntarily given. Upon a review of the record, however, it appears that Loden had executed written waivers for both phases of trial prior to the plea colloquy. (*See, e.g.*, Trial Tr. vol. 2, 202-03, 205; *see also* Trial Tr. vol. 6, 555-56). Additionally, the effect of the plea and the rights related thereto were explained to Loden on the record, and he stated his understanding and desire to waive his right to a jury trial. *See, e.g.*, *Roland v. State*, 666 So. 2d 747, 750 (Miss. 1995) ("Solemn declarations in open court [by a defendant] carry a strong presumption of verity.").

Attached to the motion to vacate that was presented to the trial court were exhibits that included two affidavits by Loden, Johnstone's 2003 affidavit, Loden's letter to Johnstone, and Loden's letter to Judge Gardner. (*See, e.g.*, Vol. 1, 6-30). At the hearing on the motion to vacate, the trial judge made a credibility determination based on the transcript of the plea colloquy, Loden's testimony, and the evidence attached to the motion. The Mississippi Supreme Court found the trial judge's credibility determinations as to the knowing and voluntary nature of the guilty plea were not clearly erroneous and that counsel was not deficient. *See, e.g.*, *Loden I*, 971 So. 2d at

574. The Court does not find this determination unreasonable.

Inasmuch as Loden raises a separate claim that his plea was not knowing and voluntary separate and apart from counsel's advice, the Court finds that a decision finding it voluntarily rendered is not unreasonable, and his challenge thereto is rejected based on the results of the two mental health evaluations conducted prior to Loden's trial, the information contained in the affidavits filed with the Court, as well as the on-the-record exchanges involving Loden, his attorneys, and the trial court. *See Brady v. United States*, 397 U.S. 742, 749 (1970) (holding voluntariness of a plea determined by totality of relevant surrounding circumstances). These exchanges show that Loden was aware of the charges against him and the consequences of his plea. *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). Loden has not demonstrated that it was unreasonable to conclude that his wavier was voluntary, knowing, and intelligent. Relief on this claim will be denied.

2. Sentencing

Loden also maintains that his waiver of jury sentencing was not knowingly, intelligently, or voluntarily given. In his petition for post-conviction relief, Loden raised a claim that ineffective assistance was rendered based on trial counsel's advice to waive jury sentencing. *Loden II*, 43 So. 3d at 385. Loden argued that it was unreasonable for his attorneys to advise

the waiver of jury sentencing in light of Judge Gardner's capital sentencing record. *Id.* at 386. The Mississippi Supreme Court found that the argument lacked credibility, particularly when it considered Loden's statement to Dr. O'Brien that he wished to plead so that he would receive the death penalty. *Id.* The court found that the record "is replete with evidence beyond all doubt that Loden knowingly, intelligently, and voluntarily waived jury sentencing." *Id.* It found that Loden's affidavit failed to give any details of the discussion between defense counsel regarding the waiver of jury sentencing, and that any alleged deficiency by counsel, therefore, could not be determined. *Id.*

On federal habeas review, Loden argues that he stated to Dr. O'Brien that one of the reasons that he wanted to plead and get the death sentence was due to his diminishing confidence in his attorneys. (*See* Pet. Ex. 29). Moreover, he notes that he did state that his attorneys failed to discuss the waiver issue with him, which renders the Mississippi Supreme Court's factual finding unreasonable. (*See* Pet. Ex. 1 ¶ 21; Pet. Ex. 37 ¶ 4).

Prior to trial, the forensic staff of the Mississippi State Hospital found that Loden had "the capacity [to] knowingly, intelligently, and voluntarily . . . waive or assert his constitutional rights." (Pet. Ex. 28(j)). Dr. O'Brien opined that Loden was competent to stand trial and assist in his own defense. (*See* Pet.

Ex. 29).[28] During his evaluation, Loden informed Dr. O'Brien that he wanted to get the death penalty. (*See* Pet. Ex. 29). Before he entered his plea, Loden was advised that, if he proceeded to a jury trial and sentencing, unanimity would be required among the jurors before the death penalty could be imposed. (*See id.* at 508; *see also* Trial Tr. vol. 2, 202-05).

The record demonstrates that the trial judge informed Loden that he was waiving a jury as to guilt and sentencing because he executed two separate waivers stating such. (*See* Trial Tr. vol. 2, 202, 205). Loden was expressly asked by the trial court whether he understood that he had a right to have a jury determine his punishment, and Loden responded, "I understand I had it, and I understand I waived it, sir." (Trial Tr. vol. 6, 551). Before Loden entered his plea and waiver of jury sentencing, Daniels stated to the trial court that he and Johnstone had conferred with Loden "about the bifurcated hearing process," along with a discussion of the charges against him and his possible defenses thereto. (*Id.* at 547). Daniels informed the court that he believed Loden understood the significance of his waivers, and that he waived his rights "freely and voluntarily, with full understanding."

[28] The forensic findings of mental health professionals can inform a court's determination of a defendant's competency, which is a legal determination that requires the defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

(*Id.* at 548). Johnstone agreed with Daniels' impression of Loden's understanding. (*Id.* at 548-50). In response to the court's further inquiry, Loden stated that he understood that he had the right to have a jury determine his punishment and had waived it. (*Id.* at 556-57).

As this Court has already discussed, Loden's argument that his guilty plea and waiver of jury sentencing were invalid because of counsel's failure to make him aware of the mitigation that could be offered is contradicted by counsel's affidavits and deposition testimony. Johnstone specifically stated in his deposition that Loden was advised that the matters he did not want put before the trial court were issues that could be mitigating. (*See* Johnstone Dep. at pp. 105-07). Both attorneys stated that Loden was firmly against the cross-examination of witnesses or the presentation of mitigation evidence once he decided to plead guilty. (*See* Johnstone Dep. at pp. 84-85; Daniels Dep. at pp. 113-14).

Moreover, the record supports a finding that Loden knew prior to executing his wavier of jury sentencing that the trial judge might impose a sentence of death. (*See* Pet. Ex. 29; Trial Tr. vol. 6, 551-52). Although Loden has argued that counsel should have insisted upon jury sentencing, the decision was Loden's to make. *See, e.g.*, *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (noting that a defendant has "the ultimate authority" to decide whether to plead guilty). Loden has failed to demonstrate that the

waiver was invalid due to his ignorance of the mitigating evidence that could have been offered on his behalf, and he has failed to show that counsel was ineffective. Loden has also failed to demonstrate that the Mississippi Supreme Court's decision rejecting his claim of ineffective assistance of counsel is contrary to, or involves an unreasonable it involve an unreasonable application of, *Strickland* or its progeny. *See Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 788 (2011) (holding that inquiry on habeas is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard").

To the extent that Loden claims that his waiver of jury sentencing was involuntarily given aside from counsel's performance, the Court determines that the trial judge's exchange with Loden and his attorneys and the waiver executed by Loden demonstrates that Loden signed the waiver "with sufficient awareness of the relevant circumstances and likely consequences" of his action. *Brady v. United States*, 397 U.S. 742, 748 (1970). Therefore, the Court finds that Loden has not demonstrated that it was unreasonable to conclude that Loden's wavier of jury sentencing was voluntary, knowing, and intelligent. Habeas relief on this claim will be denied.

3. Sufficient Contact

In his petition, Loden also argues that his right to the effective assistance of counsel was violated when trial counsel failed to maintain sufficient contact

with him. He alleges that they ignored his requests for information and consultation. Respondents maintain that Loden failed to exhaust this claim for federal habeas relief in State court, and Loden maintains that Respondents waived the right to assert exhaustion as a defense to his claim. However, the Court finds it unnecessary to resolve the procedural bar question on the facts of this case. As the Court has already found, Loden pleaded guilty after a valid waiver of his rights to a jury trial and sentencing. This Court has already determined that Loden is not entitled to habeas relief on his claims that counsel performed ineffectively in investigating evidence, or in advising him as to the effect of his guilty plea and waiver of jury sentencing. Counsel's contact with Loden can hardly be deemed abandonment, and the Court notes that Loden had no right to a "meaningful relationship" with trial counsel. *See Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel."). The lack of trust between Loden and his attorneys, if it existed during Loden's case, has not been demonstrated to be a product of any lack of effort by defense counsel. Additionally, in light of Loden's guilty plea and waiver of the presentation of mitigating evidence, Loden has not demonstrated that he was prejudiced by the frequency of counsel's contact with him. *See McCrae v. Blackburn*, 793 F.2d 684, 688 (5th Cir. 1986) (lack of communication between counsel and appellant did not constitute ineffective assistance absent showing that lack of communication resulted

in prejudice to appellant). Loden is denied relief on this claim.

C. Litigation of the Case

1. Motion for Funds for Expert Mitigation Assistance[29]

During pretrial proceedings, Loden's attorneys moved the trial court for funds to hire Dr. Gary Mooers, a professor of social work at the University of Mississippi, as a mitigation expert. They maintained that his participation in the case was critical to the development of mitigating evidence. (*See* Trial Tr. vol. 3, 61-75). The trial court heard argument on the motion but denied the request, noting that Loden had already been authorized funds for the service of an investigator, and that retaining Dr. Mooers would require expenditures of money that would be aimed at evidence normally investigated and developed by investigators, the attorneys, and psychologists or psychiatrists. (*Id.* at 75). The trial court, however, did inform defense counsel that if they could provide the court with additional authority for the proposition

[29] In his reply brief, Loden argues that he "is not challenging the [trial court]'s substantive determination, as is made clear from Loden's Opening Brief." Rather, he maintains that he is challenging counsel's failure to litigate the motion. (*See* doc. entry no. 33, 60). The Court notes that, to the extent Loden intended to assert this claim by citing it as a substantive issue in his petition, he has abandoned the claim. *See, e.g.*, *Chambers v. Mukasey*, 520 F.3d 445, 448 n.1 (5th Cir. 2008).

that there existed a speciality within the law for the appointment of a mitigation expert, the matter could be revisisted [sic]. (*Id.*). Trial counsel never provided the court with any additional authority, and Loden maintains that counsel performed ineffectively in failing to provide the trial court with the necessary information to obtain an expert.

On appeal, the Mississippi Supreme Court noted that the circuit court provided Loden with funds to hire an investigator, granted a psychological evaluation by the forensic staff at the Mississippi State Hospital, and granted defense funds to retain the services of Dr. O'Brien, an independent psychologist. *Loden* I, 971 So. 2d at 562-64. The court found that Loden's motion for a mitigation investigator "set forth generic reasons for the need of an additional expert" and "mirrored his prior requests to obtain an investigator and an expert in the field of psychology[.]" *Id.* The court concluded that the circuit court "did not err in concluding that Mooers's redundant services were not justified" and dismissed the claim. *Id.* Alternatively, the court noted that the issue was moot, given Loden's choice not to present mitigation evidence. *Id.* n.15. The court again considered the claim in the context of ineffective assistance of counsel on post-conviction review and found that Loden could not establish prejudice under *Strickland* because he waived the presentation of mitigating evidence. *See Loden II*, 43 So. 3d at 387-88.

On habeas review, Loden argues that, because investigator Wells' investigation was almost totally

related to suppression issues, counsel rendered ineffective assistance in failing to followup on the trial court's order to supplement its motion.

First, the Court notes that counsel filed a well-cited motion in support of the motion for a mitigation expert. (*See* Trial Tr. vol. 1, 61-67). In his deposition testimony, Daniels stated that he was uncertain that additional authority would have altered the trial court's ruling, as the initial motion presented the best available support for the request. (Daniels Dep. at pp. 104-05). Second, the Court notes that the law entitles Loden not to the "most-sophisticated defense," but rather, an opportunity to create an "effective defense." *Moore v. Johnson*, 225 F.3d 495, 502-04 (5th Cir. 2000) (finding defendant failed to make sufficient showing to appoint mitigation expert). In this case, Loden was given funding to hire an investigator, he was provided a full evaluation by the forensic staff at the Mississippi State Hospital, and he was provided the services of an independent psychologist upon defense counsel's motion. He was given "the basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (citation omitted); *see also Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985) (finding criminal defendants are guaranteed "access to the raw materials integral to the building of an effective defense" and "an adequate opportunity to present their claims fairly within the adversary system"). Defense counsel did not render ineffective assistance merely by failing to supplement its motion, particularly where the record demonstrates that counsel's

initial attempt was well-cited, and counsel's other efforts secured Loden investigative and psychiatric assistance. Loden has not demonstrated that the decision rejecting this claim is unreasonable application of *Strickland*.

Moreover, Loden's claim is moot under *Schriro v. Landrigan*, 550 U.S. 465 (2007), as the State courts found that he instructed counsel not to present evidence in mitigation, cross-examine witnesses, or object to exhibits offered by the State. The Court has determined that he has not rebutted this determination. Therefore, relief on this issue will be denied.

2. Failure to Challenge the State's Evidence—Suppression Hearing

At a pretrial hearing held June 26-27, 2001, defense counsel argued motions to suppress Loden's statement to law enforcement and to suppress evidence from the initial search conducted by law enforcement officers. Defense counsel argued that Loden's statements to law enforcement officials were given without the benefit of counsel and were otherwise involuntary, as Loden gave a statement only after his then-wife, Kat, encouraged him to speak to law enforcement officials at their "strong encouragement." Defense counsel's theory for suppressing the evidence that was seized from the Loden property was that: (1) the search was not consensual and voluntary, inasmuch as Loden had a privacy interest in the home and Mrs. Loden was incompetent to give

consent; and (2) the initial search warrant signed by Itawamba County Justice Court Judge, Lance Bean, was not supported by probable cause, thereby tainting the later discovered evidence. (*See* Trial Tr. vol. 4, 257-59; *see also* Trial Tr. vol. 5, 343-45; 361-362). After hearing evidence and the argument of counsel, the trial court found that Loden's statement to law enforcement was "knowingly, understandingly, freely[,] and voluntarily given." (Trial Tr. vol. 5, 341-32). It also found that Kat acted independently of the State when she encouraged Loden to give a statement. (*Id.*). As for the physical evidence seized, the trial court found that Mrs. Loden had given a valid consent to search her home and her property, and that the information gained by law enforcement as a result of the consent search was sufficient probable cause for a valid search warrant to issue. (*See id.* at 430-31).

On federal habeas review, Loden maintains that there was ample evidence suggesting that law enforcement officials unlawfully searched his van, as evidenced by the fact that officers tagged and removed a video camera charger from Loden's overnight bag located in his room at Mrs. Loden's house at 12:00 p.m., some eight hours before officers obtained the warrant that they formally relied upon for the search of his van. (*See* Pet. Ex. 28(a), 28(c), 28(e), and 28(i)). Loden notes that officers failed to seize other items from his overnight bag, and that the significance of the charger would not have been apparent unless the police had already been in his van and

found the video depicting the crime. He also refers the Court to a 2008 affidavit in which he claimed that he saw police officers in his van before a search warrant was issued, and that he was told by an officer upon his arrest that the officer had seen the videotape in his van. (Pet. Ex. 1 ¶ 15). He contends that defense counsel performed ineffectively by failing to challenge the timing of the recovery of the charger at the suppression hearing.

Loden also argues that counsel failed to cross-examine investigator Rick Marlar about the discrepancies between his and officer Bryan Jones' chronologies of the search-specifically, the timing of their recovery of the rope and blood-stained shorts that formed the basis for the initial search warrant. He argues that Marlar's written report shows that Rena Loden gave written consent to search her property and the vehicles on it at 9:27 a.m., which was after the military-style rope was found in Ms. Loden's Oldsmobile at 8:30 a.m. (*See* Pet. Ex. 28(a); Pet. Ex. 28(d)). Loden also notes that Marlar's report states that Loden's room was not searched until the search warrant issued; however, at the suppression hearing, Marlar testified that he saw the blood-stained shorts in plain view before the search warrant issued. (*See* Pet. Ex. 28(a), 28(b); *see also* Trial Tr. vol. 4, 271). Loden also maintains that counsel failed to question Marlar about the discrepancy between his testimony that Loden's room was in disarray, and the fact that the police photos show Loden's room both neatly kept and in disarray, suggesting that an illegal search took

place. (*See* Pet. Ex. 28(e); Trial Tr. vol. 4, 271). He also notes that his attorneys did not cross-examine the judge who issued the warrants in the case.

Further, Loden maintains that his attorneys failed to adequately cross-examine witnesses about his statement, which he alleges was obtained only after Kat met with investigators who requested that she convince Loden to make a statement. Finally, he notes that he requested that counsel file a motion to reconsider the rulings on the suppression issues after he was finally provided discovery and noticed these discrepancies, but that counsel failed to do so. Their failures in litigating the suppression issues, he maintains, rendered their assistance ineffective.

Loden first raised these issues on post-conviction review, where the Mississippi Supreme Court found them barred "[i]nsofar as [Loden] raises this issue as a backdoor challenge to his purportedly 'involuntary guilty plea,' with no new evidence presented in support thereof[.]" *Loden II*, 43 So. 3d at 392. The court also found Loden's claim that counsel performed ineffectively at the suppression hearing procedurally barred, as he had different counsel on direct appeal and failed to raise the issue at that time. *Id.* at 393. Additionally, the court noted that Loden offered no explanation for how the suppression issues affected his sentencing, inasmuch as he pleaded guilt. *Id.* The court rejected the claim as procedurally barred and without merit. *Id.*

Respondents urge the Court to find this claim barred, but they otherwise maintain that Loden cannot demonstrate that he is entitled to relief. The Court agrees that, because this record-based claim was available at the time of Loden's direct appeal and was not raised, an independent and adequate State law procedural ground bars its consideration on federal habeas review. *See* Miss. Code Ann. § 99-39-21(1); Miss. R. App. P. 22(b); *Coleman v. Thompson*, 501 U.S. 722 (1991); *see also Stokes v. Anderson*, 123 F.3d 858, 860 (5th Cir. 1997) (holding that § 99-39-21(1) contains an independent state procedural bar). Loden has not demonstrated the requisite cause and prejudice or fundamental miscarriage of justice as necessary to overcome application of the bar. *Coleman*, 501 U.S. at 749-50.

Notwithstanding the bar, the Court finds that a review of the merits would not support a determination that Loden is entitled to relief. Marlar's written report states that he and Jones arrived at the Loden residence at approximately 7:50 a.m. on June 23, 2000, and that Mrs. Loden gave officers verbal permission to go to the pond located on her property to speak with Loden. (*See* Pet. Ex. 28(a)). When officers could not locate Loden, Marlar maintains that he requested and received written consent to search "all the common areas of the property and Rena Loden's vehicle." (*Id.*). Marlar testified that he asked Ms. Loden which room Loden was occupying, and that she "advised it was the room that we were looking in. But in order to go through the rest of the house you have

to pass through his room. . . . It's like a breezeway. . . . And we had to cross that threshold in order to go through the rest of the house." (Trial Tr. vol. 4, 269-70). Marlar stated that as they walked through the room to get to other common areas of the house, he noticed that the bed was unmade, an overnight bag was on the floor, and that there was a pair of cargo shorts in plain view on the floor with what appeared to be blood on them. (*Id.* at 271; Trial Tr. vol. 5, 320). He stated at the hearing that he did not touch the shorts or anything else in Loden's room during the consent search. (*See* Trial Tr. vol. 5, 307).

Marlar stated that officers searched Ms. Loden's Oldsmobile and discovered a military-style rope in a handcuff design. (*See* Pet. Ex. 28(a), Trial Tr. vol. 4, 272). He stated that procedures were initiated to obtain a search warrant, Judge Bean signed the search warrant, and it was executed. (*See id.*; *id.* at 274-75). Marlar's report stated that Loden's shorts, the video camera charger, and other items were seized pursuant to the warrant and listed on the search warrant return. (*See* Pet. Ex. 28(a)). Most of these, he maintained, had been in plain view when he initially asked for permission to search. (*Id.*). Marlar stated that Loden's van, which was locked, was transported to the Highway Patrol headquarters for processing. (Trial Tr. vol. 5, 315; Pet. Ex. 28(a)).

Officer Jones did not testify at the suppression hearing. Jones' first report stated that the officers obtained consent and searched Ms. Loden's vehicle before they went to the pond to look for Loden, and it

omitted any mention of Loden's blood-stained shorts. (Pet. Ex. 28(g)). It stated that the property was searched and the van was transported when the search warrant was in hand. (*Id.*). In his second report, Jones stated that he and Marlar obtained Mrs. Loden's consent and found the military-style rope in Mrs. Loden's Oldsmobile before going to the pond. (Pet. Ex. 28(h)). He stated, however, that the officers requested additional consent to search Ms. Loden's home upon their return. (*Id.*). Jones stated that, during the second consent search, Marlar called him into Loden's room and showed him the shorts, which is when the officers discussed obtaining a search warrant. (*Id.*).

The Court finds that there is no reasonable probability that the results of the hearing would have been different if the discrepancies alleged by Loden had been exposed at the suppression hearing. It is clear from the reports that Ms. Loden was asked for and gave a verbal consent to search her property, followed by a written consent to search the common areas of her home and the vehicles on the property. The testimony of Marlar and the reports of Jones indicate that the van was not searched until a search warrant was procured. The "Offer of Proof," which Loden signed prior to pleading guilty, states that the van was locked when law enforcement officers seized it, and that the keys were not located. (*See* Trial Tr. vol. 2, 211). An additional report confirms that the van was locked until it was opened by Kenneth Gill of

the Mississippi Crime Laboratory. (*See, e.g.*, Pet. Ex. 28(i)).

Marlar's testimony was that, although he could see the blood-stained shorts in plain view, he did not attempt to touch them until a search warrant had been procured. Nothing in Jones' report disputes this. Marlar testified that he had to travel through Loden's room to get to other areas of the house, and Loden himself testified that it was a "fair statement" to say that one had to walk through his room to get to other parts of the house. (*See, e.g*, Trial Tr. vol. 5, 385).[30] That the evidence submission form has a time of 8:30 a.m. for the recovery of the rope does not alter this conclusion, given the trial testimony and the reports of the officers stating that the rope was found following Ms. Loden's consent to search, which the trial court found was competently given. (*See, e.g.*, Trial Tr. vol. 5, 430-31).

As for Loden' incriminating statement, various law enforcement officials, and Loden himself, testified that Loden was advised of his *Miranda* rights[31] and

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[30] At the suppression hearing, Mrs. Loden's two sitters both testified that it was necessary to go through Loden's room to gain access to the rest of the house, unless you entered from the back door. (Trial Tr. vol. 5, 390-31; 408).

[31] "*Miranda* rights" refers to the familiar warnings that must be given by law enforcement officials prior to a custodial interrogation to protect an accused's Fifth Amendment privilege against self-incrimination. *See Gachot v. Stadler*, 298 F.3d 414, 418 (5th Cir. 2002). These rights include: (1) the right to remain silent; (2) that any statement may be used against them at trial;

(Continued on following page)

waived them before giving a statement. (Trial Tr. vol. 3, 114-150; Trial Tr. vol. 4, 151-255). Loden testified that, while he understood his constitutional rights and waived them, he only did so because law enforcement officers told him that he would not be able to see his wife and daughter again unless he cooperated with them. (Trial Tr. vol. 4, 186, 186-87, 194). Captain Bethay and Lieutenant Baker, who were present when Loden's statement were given, testified that Loden was not told that he had to confess to see his wife and daughter. (*See* Trial Tr. vol. 4, 206; 252-53).[32] Additionally, Loden admitted at the suppression hearing that he told his wife to inform law enforcement officers that he wanted to speak with them. (*Id.* at 196-97).

The trial court found Loden's statement "knowingly, understandingly, freely and voluntarily given by [Loden] after he had been properly advised repeatedly of his constitutional rights," and it found that Kat acted "independently of any interest or at the behest or request of the State" when she spoke to Loden. (Trial Tr. vol. 5, 431). The court found that there was no inducement, threat, or promise involved with Loden's statement, and it also determined that

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(3) the right to an attorney's presence during questioning; and (4) the right to an appointed attorney if the suspect cannot afford one. *Miranda v. Arizona*, 384 U.S. 436 (1966).

[32] FBI Special Agent Bullwinkel testified that he did not remember Loden's wife and children being mentioned during the interview. (Trial Tr. vol. 4, 224).

the State did not make any representations to Loden about visitation with his daughter if he would make a statement. (*Id.* at 432).

The record supports a finding that law enforcement officers obtained evidence against Loden during a valid consent search that gave them probable cause to secure a search warrant, which led to the discovery of Leesa's body and the videotape of Loden's abuse of her. That counsel failed to renew its motion based on the fact that conflicting times were listed on the consent form and the evidence submission form does not render counsel's performance ineffective in light of the surrounding circumstances. Additionally, the record evidence supports a finding that Loden knowingly and voluntarily and intelligently gave a statement to law enforcement officials implicating himself in the murder, and the fact that Loden now regrets his decision is not sufficient to rebut this finding. Therefore, the Court finds this claim barred, and it otherwise finds that it does not warrant federal habeas relief.

3. Dr. O'Brien

Upon defense counsel's motion, Judge Gardner authorized a mental evaluation of Loden at the Mississippi State Hospital. (*See* Trial Tr. vol. 1, 119-22). The court directed the staff there to render an opinion regarding Loden's competency, sanity, and the existence of any statutory mitigators related to Loden's mental state at the time of the offense. (*See,*

e.g., *id.* at 119-20). After the report from the State Hospital was received and filed by the trial court on June 27, 2001, Loden filed a motion to secure funds to retain the services of psychologist, Dr. C. Gerald O'Brien, to assist the defense in preparing for the sentencing phase of trial. (Trial Tr vol. 1, 140-49). The trial judge granted the motion for funding and authorized Dr. O'Brien to evaluate Loden by order filed July 17, 2001. (Trial Tr. vol. 2, 157-59). Dr. O'Brien conducted his evaluation of Loden on August 13, 2001, and he faxed his completed report to defense counsel Daniels on September 17, 2001. (*See, e.g.*, Pet. Ex. 29(a)).

Loden maintains that trial counsel failed to discuss Loden's case with Dr. O'Brien prior to or following the evaluation, they failed to provide Dr. O'Brien with Loden's background information or information regarding his mental state, and he argues that counsel did not ask Dr. O'Brien to evaluate whether Loden was competent to plead guilty. Rather, he alleges that counsel only provided limited information to Dr. O'Brien and failed to discuss the report with Dr. O'Brien after it was received. (*See, e.g.*, Pet. Ex. 18). Due to the lack of information provided, Loden maintains, Dr. O'Brien did not link Loden's emotional disturbance at the time of the crime to his PTSD, nor did Dr. O'Brien otherwise provide a context for his findings. (*See* Pet. Ex. 29(a); Pet. Ex. 16; Pet. Ex. 18). Loden argues that Dr. O'Brien, unlike Dr. High, did not have access to the necessary information or do the proper testing in

order to be able to contextualize Loden's crime in light of the emotional disturbance he was experiencing. Had he performed the proper testing, Loden maintains, Dr. O'Brien could have explained the significance of Loden's reported amnesia. (*See* Pet. Ex. 18; Pet. Ex. 16). Since reviewing the evidence offered during Loden's post-conviction proceedings, Loden maintains, Dr. O'Brien has submitted an affidavit stating he agreed with the later report of Dr. James R. High, who diagnosed Loden with chronic PTSD, Dissassociative Amnesia, and Borderline Personality Disorder. (*See* Pet. Ex. 16; Pet. Ex. 18).

The Mississippi Supreme Court considered this claim on post-conviction review and determined that Loden could not establish that he suffered any prejudice as a result of counsel's lack of interaction with Dr. O'Brien, as Loden chose not to present mitigating evidence at trial. *Loden II*, 43 So. 3d at 391. The court otherwise determined that counsel did not perform deficiently, inasmuch as counsel secured Dr. O'Brien's independent examination as a second, discretionary examination after the forensic staff at the Mississippi State Hospital also examined Loden. *Id.* at 392. The court found "a review of Dr. O'Brien's report reflects that he was acquainted with Loden's family background and childhood, claim of sexual abuse, alleged history of substance abuse, military experience, suicidal ideation, and personal experience on the evening of the crime." *Id.* at 392. The court also noted that Dr. O'Brien concurred with the earlier assessment that Loden was competent to stand trial and

assist in his own defense. *Id.* In a footnote, the court stated that Loden's military records contain no evidence that Loden suffered mental health issues or a diagnosis of PTSD, but rather, are "replete with positive comments." *Id.* at 391 n. 32. The court found Loden failed to demonstrate any deficiency by counsel and rejected the claim. *Id.* at 392.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that trial judges must "allow expert psychiatric or psychological assistance to indigent defendants upon a threshold demonstration that sanity will be an issue or for the purpose of rebutting the State's experts regarding mental condition." *Ake*, 470 U.S. at 83. Loden's first evaluation by the Mississippi State Hospital was sufficient to satisfy this requirement, and Loden had no entitlement to the second, independent evaluation by Dr. O'Brien, although he was provided it at his request. *See Byrom v. State*, 863 So. 2d 836, 852 (Miss. 2003); *Woodward v. State*, 726 So. 2d 524, 528-29 (Miss. 1997) (holding that evaluation by psychiatrist and psychologist from the Mississippi State Hospital satisfies *Ake*'s constitutional mandate). Defense counsel requested and received two separate forensic mental health evaluations of Loden prior to trial, and counsel could rely on findings by the forensic staff at the State Hospital without being subject to a later finding of ineffective assistance of counsel based on counsel's actions or inactions regarding the discretionary evaluation. *See Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002) (finding "[c]ounsel should

be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment . . . and rule his performance [ ] substandard for doing so."), *overruled in part on other grounds*, *Tennard v. Dretke*, 542 U.S. 264 (2004).

Additionally, the Court notes that trial counsel moved for Dr. O'Brien's assistance less than a month after the report was filed from the Mississippi State Hospital. (*See, e.g.*, Trial Tr. vol. 1, 137, 140). The trial court granted the motion on July 17, 2001, but Dr. O'Brien was not available to evaluate Loden until August, 2001, which is when the evaluation actually occurred. (Trial Tr. vol. 2, 157-59, 161). Both the State Hospital and Dr. O'Brien opined that Loden appeared competent to stand trial and assist in his defense. (*See, e.g.*, Trial Tr. vol. 1, 135-37; Pet. Ex. 29(a)). Loden pleaded guilty within days of counsel's receipt of Dr. O'Brien's report.

The Court otherwise notes that Dr. O'Brien's report contains information regarding Loden's statements about the death of his friend during combat, his father's death, his suicide attempts, his substance abuse, the abandonment by his mother, his exemplary military service, his school performance, his sexual addiction, his failed marriages, the stress of his recruiting assignment, his wife's affair, his grandmother's illness, the physical and sexual abuse he suffered in childhood, and the fact that he was intoxicated on the night of the offense. (*See, e.g.*, Pet. Ex. 29). In short, Dr. O'Brien was not as stunted in his

understanding of Loden's history or background as Loden now suggests. Additionally, Dr. High's assessment of Loden's behavior is that Loden committed his crimes "while under the influence of extreme mental or emotional disturbance," which is a determination originally made by Dr. O'Brien following his assessment of Loden in 2001. (Pet. Ex. 16, p. 40 ¶ 13; *see also* Pet. Ex. 29).

Therefore, the Court finds that Loden has failed to demonstrate that the decision rejecting this claim warrants federal habeas relief, and relief on this claim will be denied.

4. Witnesses and the State Hospital Report

Defense counsel requested that the trial court order an examination of Loden at the Mississippi State Hospital, citing Loden's suicide attempts and history of "blackouts and amnesia" as events that called into question Loden's competency. (*See* Trial Tr. vol. 3, 86-87). The order granting the evaluation stated that the written report of the evaluation should be furnished to defense counsel, the district attorney, and to the trial court. (Trial Tr. vol. 1, 120). The State Hospital's psychiatric report was introduced by the State at the sentencing phase of trial to rebut Dr. O'Brien's report, which was introduced by defense counsel. Loden maintains that his defense counsel failed to show him the report or advise him of its contents, and that he would have instructed

counsel to object to the evidence at the sentencing phase of trial if he had known what it contained. He argues that the State Hospital report is highly prejudicial, as it attempts to link him to prior murders, turns cattle slaughtering into sadistic abuse, and offers prejudicial and unsupported diagnoses of Malingering and Antisocial Personality Disorder.

Loden presented this claim on post-conviction review, where the Mississippi Supreme Court noted that Loden had instructed defense counsel not to cross-examine the State's witnesses or object to the introduction of evidence. *Loden II*, 43 So. 3d at 386. The court found that counsel's behavior in accordance with their client's wishes precluded a finding that counsel performed deficiently, and it rejected the claim. *Id.*

As the Court has already cited, Loden instructed defense counsel not to cross-examine witnesses or object to the introduction of any evidence presented by the State during the sentencing phase of his trial. (*See* Trial Tr. vol. 6, 594). When the trial judge again reminded him that he was giving up a valuable right, Loden stated "I understand, sir. I'm just doing what I feel I need to do." (*Id.*). As Loden expressly instructed his attorneys not to cross-examine witnesses or object to evidence at the sentencing phase of trial, he cannot now claim that counsel was ineffective in following his instructions. *See Nixon v. Epps*, 405 F.3d 318, 325-26 (5th Cir. 2005) ("A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective

for failing to introduce evidence supporting that defense."); *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant cannot claim ineffective assistance of counsel after he has blocked counsel's efforts). Moreover, the Court finds that it appears that only the summary report was submitted to the trial court, which does not include the allegations Loden finds objectionable. (Trial Tr. vol. 1, 135-37; *see also* State's Trial Ex. 39). This conclusion is supported by the fact that, when defense counsel submitted a motion for an independent psychological expert, he attached the State Hospital's summary report in support of his motion. (*See* Trial Tr. vol. 1, 150; Trial Tr. vol. 2, 151-52). Loden has not demonstrated that the decision rejecting this claim warrants federal habeas relief, and relief on this claim will be denied.

D. Cumulative Prejudice

Loden maintains that the aggregate prejudice of his counsel's constitutionally deficient acts and omissions compels the conclusion that the result of proceedings against him would have been different but for counsel's deficient performance.

On post-conviction review, the Mississippi Supreme Court considered Loden's "catchall" argument that he was denied the effective assistance of counsel at his capital murder trial. *Loden II*, 43 So. 3d at 393-94. Loden argued that if counsel's performance been adequate, fourteen mitigation witnesses would have

testified as to his chaotic and abusive family background and his outstanding service as a Marine, he would have had a psychological expert who could have testified as to Loden's combat-related trauma, he would have been properly advised as to the consequences of pleading guilty, and he would have elected to be sentenced by a jury. *Id.* The court noted that Loden had also submitted the affidavit of an attorney primarily involved in criminal practice who concluded that the performance of Loden's attorneys fell below the minimum standard of care. *See id.* at 394 n.35. The Mississippi Supreme Court refused to consider the affidavit, however, as the question of counsel's effectiveness is one of law "not to be decided by plebiscite, by affidavits, by deposition, or by live testimony." *Id.* (citation omitted). Finding that Loden failed to demonstrate relief as to any of his individual ineffective assistance of counsel claims, the court denied his claim. *Id.* at 394.

The Court finds that Loden has failed to demonstrate that he was prejudiced by any alleged deficiencies of trial counsel, as Loden pleaded guilty, waived jury sentencing, and instructed his attorneys not to cross-examine witnesses or present evidence in mitigation. *See, e.g.*, *Landrigan*, 550 U.S. at 478. The Court also finds that the evidence in this case of sexual abuse and torture is such that the evidence now cited by Loden would not have created a reasonable probability that the sentencing phase of the case would have been different had the cited evidence been introduced. *See Clark v. Thaler*, 673 F.3d 410, 424

(5th Cir. 2012) (noting that overwhelming evidence in aggravation makes it "virtually impossible to establish prejudice") (citation omitted).

Moreover, the Fifth Circuit has stated that the cumulative error theory: (1) applies only to actual errors committed at the trial level; (2) applies only to those errors which have not been procedurally defaulted; and (3) applies only to errors of constitutional dimension, i.e., those which "infused the trial with unfairness as to deny due process of law." *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc). In the absence of individual instances of constitutional error, or errors at all, "there is 'nothing to cumulate.'" *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007). In this case, the Court has found that Loden has not identified any meritorious claim of ineffective assistance, and he has failed to demonstrate that the decision rejecting this claim warrants federal habeas relief. Relief on this claim will be denied.

E. Appellate Counsel

Loden maintains that appellate counsel, Andre De Gruy of the Mississippi Office of Capital Defense Counsel, failed to investigate and present evidence that Loden's guilty plea was not knowing, voluntary, and intelligent. He argues that, while appellate counsel filed a motion to vacate the guilty plea, counsel did not fully develop and present evidence of Loden's perceived abandonment by counsel or Loden's

misunderstanding as to the effect of his guilty plea. Loden notes that appellate counsel did not present to the court psychiatric testimony of his depression, suicide attempts, or complex PTSD. He also argues that appellate counsel did not present evidence that trial counsel's failure to advise Loden or present a strategy for defense contributed to Loden's feelings of hopelessness and ultimately led to his decision to plead guilty.

On post-conviction review, Loden argued that, but for appellate counsel's ineffective assistance, "there is at least a reasonable probability that the [c]ourt would have altered its credibility ruling and [Loden's] Motion to Vacate his guilty plea would have been successful." *Loden II*, 43 So. 3d at 395. The Mississippi Supreme Court found that Loden's argument ignored the circuit court's finding that his plea was voluntary, noting that the sentencing court had before it the Mississippi State Hospital's summary report and Dr. O'Brien's report. *Id.* at 395-96. It also noted that the "Order and Opinion" dismissing Loden's motion for post-conviction relief specifically stated that the court advised Loden of his rights, and that Loden "acknowledged that he was giving up his right to appeal by pleading guilty to the charge" and "entered a knowing and voluntary plea." *Id.* at 396. The court found that the exchange resolved the question of whether Loden knew that he was abandoning his right to appeal by pleading guilty, and that his sworn statement, coupled with the trial court's on-the-record explanations of Loden's rights and the

"effects and consequences of the plea," rendered the plea voluntarily given in spite of any advice of counsel to the contrary. *Id.* The court concluded "that the submissions by [Loden] are woefully insufficient to rise to the level necessary to invalidate his express plea-colloquy statements to the circuit judge, so as to create a 'reasonable probability' that his 'Motion to Vacate Guilty Plea' would have been granted." *Id.*

On federal habeas review, Loden maintains that the Mississippi Supreme Court's decision is based on an unreasonable determination of facts, as the psychological reports of the State Hospital and Dr. O'Brien are unreliable and do not constitute unimpeachable documentary evidence. He otherwise notes that the State Hospital's report conflicts with Dr. High's report and Dr. O'Brien's 2008 affidavit, such that an evidentiary hearing is needed to resolve the conflicts.

A criminal defendant is constitutionally guaranteed the right to effective assistance of counsel on direct appeal, and counsel's performance on appeal is reviewed by the two-pronged *Strickland* standard. *Evitts v. Lucey*, 469 U.S. 387, 397-99 (1985). The record demonstrates that Andre De Gruy, Director of the Office of Capital Defense, was appointed as counsel for Loden on direct appeal, along with current habeas co-counsel, Stacy Ferraro. (*See, e.g.*, vol. 3 of 3). De Gruy submitted an affidavit during the pendency of Loden's post-conviction proceedings stating his belief that claims regarding Loden's mental state

or social history would have to be raised in a post-conviction challenge, and not in connection with a challenge to the guilty plea. (*See* Pet. Ex. 45).

The Respondents persuasively point out that the information in Dr. High's affidavit does not alter the facts presented to appellate counsel, which were that Loden had been found competent by two separate mental evaluations, and his trial transcript showed his awareness of the proceedings and his active participation in the plea colloquy. Given the two reports rendering a professional conclusion that Loden was competent, as well as the on-the-record exchanges where he expressly waived his rights and voiced his understanding that he was forgoing his right to appeal, the Court cannot conclude that the decision rejecting this claim is based upon an unreasonable determination of facts, nor is it "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 876-87. Relief on this claim will be denied.

II. State Hospital Report

Loden maintains that the use of the State Hospital's psychiatric report at the sentencing phase of his trial violates the constitutional requirement that evidence introduced in a capital case meet a heightened standard of reliability, and it violates his right to confront witnesses against him. Loden asserts that the report, offered by the State and stipulated to by

the defense, contains biased and unsupported allegations that were presented to the trial judge prior to sentencing. Specifically, he argues that the report attempts to link him to murders in Louisiana and Mississippi, it labels him with the unsupported diagnoses of Malingering and Antisocial Personality Disorder, and it recharacterizes the slaughtering of cattle on his grandfather's farm as the sadistic abuse of animals.

Additionally, he asserts that the doctors at the State Hospital failed to administer standard tests or screening for PTSD or Dissociative Amnesia, which, combined with the unsupported allegations of Loden's character, skewed the proper mental diagnosis of Loden and tainted the reliability and accuracy of his sentencing. Loden also argues that the report was introduced in violation of the Confrontation Clause of the Sixth Amendment, as he did not have an opportunity to cross-examine the doctors as to the conclusions and statements in the report, and he maintains that its introduction violated his due process rights, as the sentencing judge considered the inaccurate information contained within the report in sentencing Loden to death.

The Mississippi Supreme Court considered this claim on post-conviction review and found that "the record does not indicate that the circuit judge was presented with the full Mississippi State Hospital report at issue." *Loden II*, 43 So. 3d at 396. It also found that Loden was procedurally barred from presenting the claim for the first time during his

post-conviction proceedings, inasmuch as he was represented by new counsel on appeal and his claim is "based on facts fully apparent from the record." *Id.* at 396-97, citing Miss. R. App. P. 22(b); Miss. Code Ann. § 99-39-21(1). It otherwise found Loden's claim "duplicitous" in light of his instructions to defense counsel not to object to the State's introduction of evidence or cross-examine the State's witnesses. *Id.* at 397. Finally, it "reject[ed] the implication that these contextually benign statements within the full Mississippi State Hospital report" led to Loden's death sentence given the graphic evidence considered by the trial court. *Id.*

Loden argues that the Mississippi Supreme Court's decision acknowledges that the record "does not reveal" whether the sentencing judge was presented with the full report from the State Hospital, and that it therefore improperly resolved doubt against Loden. He argues that because it is uncertain whether the full report was before the court, it is questionable whether the objectionable aspects were fully apparent from the record, and thus, this claim could not have been raised on direct appeal pursuant to Mississippi Rule of Appellate Procedure 22(b).[33] He

[33] At the time Loden entered his guilty plea, Miss. R. App. P. 22(b) read: "Issues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute waiver barring consideration of the issues in the post-conviction proceedings." *See Loden II*, 43

(Continued on following page)

also argues that the Mississippi Supreme Court's characterization of the report's allegations as "benign" is an improper factual determination. He argues that he has submitted "compelling evidence" in post-conviction proceedings to undermine the conclusions in the report, but that the Mississippi Supreme Court ignored the new evidence.

Respondents argue, persuasively, that Loden's claim is barred from consideration based on an independent and adequate state law ground. *See, e.g.*, *Coleman*, 501 U.S. 722, 729-30 (1991); Miss. Code Ann. § 99-29-21(1).[34] The Court also agrees, alternatively, that Loden cannot demonstrate an entitlement to relief. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (finding that courts may reach merits of barred claim in an alternative holding without lifting the bar).

First, as the Court has already noted, the examination serving as the predicate to the report at issue was requested by defense counsel, who filed the motion for Loden to be examined by the forensic staff at the State Hospital. Second, the report introduced at Loden's sentencing hearing as "State Exhibit 39" is

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So. 3d at 374 n.6. Rule 22(b) was amended effective February 10, 2005, to add that issues may be raised on direct appeal "if such issues are based on facts fully apparent from the record." *Id.*

[34] The Court notes that it has already rejected Loden's claim of ineffective assistance related to the State Hospital's report, such that counsel's performance cannot serve as "cause" for the procedural default. *See Coleman*, 501 U.S. at 750.

the short report. (*See* Trial Tr. vol. 7, 694 and "Vault" consolidated exhibit vol.). The full report is not contained in the record that was before the trial court at sentencing. Loden argues that Judge Gardner acknowledged at an April 2009 hearing that he had seen the full report, as Judge Gardner stated: "[Loden] has been—he waived the trial, pleaded guilty, and at a sentencing hearing was sentenced. And I knew all about him. I had the benefit of all the information [post-conviction counsel has] probably seen." (PCR vol. 3, Ex A. to "Motion to Supplement Petition for Extraordinary Relief: Motion to Require Circuit Court to Entertain Discovery Motion and Motion to Stay Proceedings"). The Court notes, however, that later in the same proceedings, an attorney from the Attorney General's Office states that the report that was sent to the trial court does not contain the challenged information. (*Id.* at 12). Therefore, even if the trial court at one time saw the full report that was generated as a result of defense counsel's request for an examination, it was not the report that was introduced for consideration at sentencing.[35]

Additionally, the Court finds that the examiners did not create unsupported allegations of other murders or animal abuse, contrary to Loden's claim. The report states what interviewed individuals told the

[35] A copy of the full report was sent to Daniels on August 14, 2001, by the medical-legal record coordinator at the Mississippi State Hospital. (*See* PCR vol. 2, *see also* Ex. 28(j)).

examiners. For instance, investigator David Sheffield stated that Loden could be placed in South Mississippi and Louisiana at the time that similar murders were committed against two other teenage girls, but that Loden could not be charged for the crimes absent a confession. (Pet. Ex. 28(j), p. 12). Bobbie Christian, Loden's mother, told examiners, without explanation as to how or why, that Loden killed cows on his grandfather's farm. (*See id.* at 11).[36] However, the examiners also included a statement from Sheffield, who grew up on a farm adjacent to the farm of Loden's grandparents, that if Loden killed animals, it was for food. (*See id.* at 12). Conversely, Loden's ex-wife, Kat, stated that, although Loden ordinarily killed animals for food or when they were suffering, he once told her that he shot a cow and had sex with it because he thought Kat "was running around on him." (*Id.* at 12). Loden himself reported during administration of the psychological testing that he "tortured and hurt animals on purpose." (*See* PCR vol. 3, State's PCR Ex. B, p. 3). It appears, then, that the examiners merely documented the events reported and did not infer abuse where none was suggested.

The diagnoses given to Loden also find support in the record. An addendum to the State Hospital Report that recited the results of psychological testing administered to Loden on June 21, 2001, was submitted as an exhibit to the State's filings during Loden's

[36] The examiners noted that Mrs. Christian endorsed Loden's history of cruelty to animals. (*See* Pet Ex. 28(j) at 12).

post-conviction proceedings. (*See* PCR vol. 3, Response to Mot. for PCR Ex. B). The addendum indicates that Loden underwent approximately five hours of psychological testing in association with the evaluation, and that two separate personality inventories were used: the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2") and items associated with assessing antisocial traits on the Structured Clinical Interview for DSM-IV Axis II Personality Disorders ("SCID-II"). (*Id.*). The addendum notes that the examiner administered several different tests to assess Loden's general mental state and identify attempts at malingering. (*Id.*). Based on the testing results, the examiners concluded that Loden did not attempt to feign psychotic symptoms or intellectual deficits, but that the MMPI-2 results indicated that he "was exaggerating psychological problems." (*Id.*). The examiners further noted that Loden's scores "appear to suggest either deliberate distortion or exaggeration of the severity of psychopathology in an attempt to derive secondary gain or a plea for help by an extremely anxious individual." (*Id.* at 2-3). In the summary of findings, the examiners stated that Loden "appeared to exaggerate psychological difficulties during the personality assessment phases of this evaluation" and noted his "longstanding history of antisocial, impulsive, defiant, and explosive behavior." (*Id.* at 3).

Loden notes that Dr. High maintains that there is no evidence to show that Loden has a "pervasive pattern of disregarding the rights of others[,]" "no

history of lying or conning[,]" "no record of dangerous impulsivity, irresponsibility, lack of remorse, or reckless disregard for [ ] his own safety or that of others[,] and no evidence of a conduct disorder before the age of 15" as required for a diagnosis of Antisocial Personality Disorder. (Pet. Ex. 16, pp. 41-42). The results from the administration of the SCID-II show, however, that he met the criteria for a diagnosis of Antisocial Personality Disorder, which requires a finding of three out of seven items of antisocial behavior prior to the age of fifteen, and three items and one subcomponent of one other item after the age of fifteen. (*See* Response to Mot. for PCR Ex. B).[37]

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the United States Supreme Court held that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson*, 486 U.S. at 584 (citation omitted). Loden asks the Court to find the introduction of the State Hospital's

[37] Loden reported that prior to the age of fifteen, he had tortured animals, shoplifted, and that he ran away from home and stayed overnight at least twice. He reported that after the age of fifteen, he had broken the law, had at times had no regular place to live, had been in fights, had thrown things at his wife, had physically threatened to harm others, had driven a car when he was drunk and high, and that he had received approximately five speeding tickets. (*See* Response to Mot. for PCR Ex. B).

report to violate this principle because an expert, years after Loden's trial, disagrees with the methodology and conclusions reached by two experts who examined Loden contemporaneously with his trial. The Court finds that the record contains statements from interviewees and Loden himself, along with empirical data, to support the conclusions contained in the State Hospital's report.

Loden expressly instructed his attorneys not to cross-examine witnesses or object to the State's evidence at trial. The State Hospital report was generated as the result of an examination requested by Loden, its contents appear supported by statements made to the interviewers and other empirical data, it was introduced in summary form only at trial, and its introduction did not deprive Loden of any constitutionally entitled procedures. Therefore, the Court concludes that the claim is barred from federal habeas review, and that it does not otherwise support an entitlement to relief under the AEDPA.

III. Defective Indictment[38]

Loden argues that the indictment in his case failed to include a valid statutory aggravating factor or a mens rea element, such that it failed to give him

[38] This issue was raised for the first time on appeal but allowed because the court found that it was a non-waivable issue. *See Loden I*, 971 So. 2d at 565.

proper notice and otherwise failed to charge a death-eligible offense as required by State law. He argues that the indictment violated the Fifth, Sixth, and Fourteenth Amendments as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004), which require that any fact, other than a prior conviction, that increases the penalty for a defendant's crime beyond the statutory maximum be submitted to a jury and proven beyond a reasonable doubt. *See, e.g.*, *Apprendi*, 530 U.S. at 490; *Ring*, 536 U.S. at 602; and *Blakely*, 542 U.S. at 303.

Count I of the indictment returned by the grand jury charged, in relevant part, that on or about June 22 or 23, 2000, Thomas Edwin Loden, Jr.:

> [D]id willfully, unlawfully, feloniously and without authority of law, with or without any design to effect death, kill and murder Leesa Marie Gray, a human being, while he, the said THOMAS EDWIN LODEN, JR., was engaged in the commission of the felony crime of Kidnapping . . . in violation of Section 97-3-53, all in violation of 97-3-19(2)(e), of the Mississippi Code of 1972, as amended.

(Trial Tr. vol. 1, 9-10).

Loden's argument was rejected on direct appeal by the Mississippi Supreme Court. Citing federal precedent, the court noted that "[u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment,

any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." *Loden I*, 971 So. 2d at 565 (citing *Ring v. Arizona*, 536 U.S. 584, 600 (2002)) (quotation omitted). The court found, however, that the inclusion of aggravating circumstances in an indictment is unnecessary, as "anytime an individual is charged with murder [in Mississippi], he is put on notice that the death penalty may result." *Id.* (citation omitted). The court also noted that the death penalty statute lists the only aggravating factors that may be relied upon by the prosecution in seeking the death penalty. *Id.* Citing its previous holdings, the court found that *Ring*, *Apprendi*, and *Blakely* "have no applicability to Mississippi's capital murder sentencing scheme." *Id.*

Loden argues that the maximum statutory sentence in Mississippi for capital murder is life imprisonment unless a sentencing hearing is held where the finder of fact finds at least one aggravating factors and a mens rea element. *See* Miss. Code Ann. § 99-19-101(5) and (7). Since a sentence of death exceeds a sentence of life imprisonment and cannot be imposed absent additional factors, Loden maintains, *Apprendi* applies and the State must include the additional factors in the indictment and prove them beyond a reasonable doubt. *See Ring*, 536 U.S. 584 at 597. He argues that because the finding of additional facts elevate the punishment, they are elements of an aggravated crime, and the State must

include in the indictment any aggravating factors which it intends to prove at the sentencing phase of the trial where those factors are related to the commission of the crime.

At the outset, the Court notes that the maximum penalty for capital murder under Mississippi law is death. *See* Miss. Code Ann. § 99-19-101(1); *see also Moffett v. State*, 49 So. 3d 1073, 1115 (Miss. 2010 ("As the death penalty is not beyond the statutory maximum for [the defendant's charge of capital murder], reliance on *Apprendi* and *Ring* is misplaced."). Additionally, the Supreme Court has held that the Fifth Amendment right to an indictment is not applicable to the states. *See, e.g.*, *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3035 n.13 (2010) (noting that the "Fifth Amendment's grand jury indictment requirement" is not applicable to the states); *Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Branzburg v. Hayes*, 408 U.S. 665, 687-88 n.25 (1972) (noting that "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment"). *Apprendi* itself noted that "the Fifth Amendment right to 'presentment or indictment by a Grand Jury" has never been incorporated against the states. *Apprendi*, 530 U.S. at 477 n.3. Furthermore, "there is no clearly established federal law that requires that each aggravating circumstances on which the state intends to rely to pursue the death penalty must be named in the indictment." *Mitchell v. Epps*, No. 1:04cv865-LG (S.D. Miss. 2010), 2010 WL 1141126 at ** 36-37 (S.D. Miss.

March 19, 2010); *Brawner v. Epps*, No. 2:07cv16-MPM, 2010 WL 383734 at *22 (N.D. Miss. January 27, 2010); *Stevens v. Epps*, No. 2:04cv118-KS, 2008 WL 4283528 at *25 (S.D. Miss. September 15, 2008). Accordingly, the decision by the state court rejecting the of a defective indictment does not warrant federal habeas relief, and relief on this claim is denied.

IV. "Avoiding Arrest" Aggravator

At Loden's sentencing hearing, the trial judge found as an aggravating circumstance that Loden committed murder for the purpose of avoiding or preventing his lawful arrest. Loden argues that the aggravator is invalid, as he drove home after the crime and parked his van in plain sight. He notes that he left the victim's body in his van, left a videotape in the van implicating himself in the crime, and carved "I'm sorry" into his chest upon waking up the next morning and discovering what he had done. He maintains that the finding of the "avoiding arrest" aggravator rested solely upon his single, tentative statement to investigators that he must have committed the killing to avoid tarnishing his image as the perfect Marine, and that it was error to consider this aggravating circumstance.

Loden's challenge to the "avoiding arrest" aggravator was found barred on direct appeal for Loden's failure to object to it at trial. *See, e.g.*, *Loden I*, 971 So. 2d at 565-67. Notwithstanding the bar, the court considered the claim on its merits, noting that the

"avoiding arrest" aggravator is only appropriately supported where "there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or . . . to 'cover their tracks' *so as to avoid apprehension and eventual arrest by authorities*[.]" *Id.* at 566 (citation omitted) (emphasis in original). Under this construction, the court continued, the aggravator is properly submitted to the jury if evidence exists "from which the jury could reasonably infer that concealing the killer's identity, or covering the killer's tracks to avoid apprehension and arrest, was a substantial reason for the killing." *Id.* at 566-57 [sic] (citation omitted). It also noted that a freshly dug grave was found by investigators during their search of Mrs. Loden's property. *Id.* at 567. The court found that, viewing the evidence in the light most favorable to the finding of the aggravating circumstance, "a rational trier of fact could find beyond a reasonable doubt that Loden killed Leesa in order to avoid apprehension and arrest." *Id.* In a footnote, the court concluded that, even if the aggravator was found in error, the statutorily mandated reweighing in Miss. Code Ann. 99-19-105(3)(d) and 5(b), would lead the court to "hold the error harmless and affirm the sentence of death because Loden presented no mitigating evidence." *Id.* at n.18.

On federal habeas review, Loden argues that no reasonable sentencer could have found the existence of this aggravator on the evidence adduced at trial, and that it should not have been considered, citing

Jackson v. Virginia, 443 U.S. 307 (1979) and *Lewis v. Jeffers*, 497 U.S. 764, 783 (1990). Respondents cite some eighteen cases for the proposition that this claim is barred from federal habeas review for Loden's failure to contemporaneously object to the aggravating circumstance at trial, and they argue that the procedural bar relied upon by the state is regularly applied to aggravating circumstances in similar cases. *See, e.g.*, *Blue v. State*, 674 So. 2d 1184, 1215-16 (Miss. 1996) (finding claim procedurally barred despite defendant's argument that the court had a statutory obligation to consider the error). Respondents otherwise argue that there is evidence to support the aggravator, and that the decision of the Mississippi Supreme Court is not unreasonable.

In order for the Mississippi Supreme Court's contemporaneous objection rule to be sufficiently "adequate" to bar Loden's claims, it must be strictly or regularly followed by the State courts and applied to the majority of similar claims. *See, e.g.*, *Roberts v. Thaler*, 681 F.3d 597, 604 (5th Cir. 2012); *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001). The Court notes that, if it were to find this claim barred, its determination would exist merely as a matter of form, as the Mississippi Supreme Court was statutorily obligated to determine whether the evidence supported the judge's findings of the aggravating circumstances in this case. Therefore, the Court finds that the bar imposed by the State court is inadequate to bar federal habeas review of this claim. *See, e.g.*, Miss. Code Ann. § 99-19-105(3)(b); *Simmons v. State*,

805 So. 2d 452, 495-96 (Miss. 2001) ("The State argues that the procedural bar should apply. However, Miss. Code Ann. § 99-19-105(3)(b) states that this Court must consider the sufficiency of the evidence to support the aggravating circumstances."); *Manning v. State*, 735 So. 2d 323, 349 (Miss. 1999) ("However, because this Court is required by statute to review the sufficiency of the evidence supporting the jury's finding of aggravating circumstances, there can be no procedural bar here.").

Mississippi's "avoiding arrest" aggravator requires evidence from which it may reasonably be inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to cover their tracks so as to avoid apprehension and eventual arrest by the authorities. *See Leatherwood v. State*, 435 So. 2d 645, 651 (Miss. 1983); *Taylor v. State*, 672 So. 2d 1246, 1275 (Miss. 1996); *see also Gray v. Lucas*, 677 F.2d 1086, 1100 (5th Cir. 1982) (finding the avoiding arrest circumstance satisfied when the defendant purposefully kills the victim of underlying felony to avoid or prevent arrest for that felony). The evidence is insufficient to support the finding of this aggravating circumstances only if, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the prosecution, no rational trier of fact could have found the existence of the aggravator based on the evidence presented at trial. *See, e.g.*, *Lewis v. Jeffers*, 497 U.S. 764, 783 (1990); *Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979).

Loden argues that the record evidence shows that he killed Leesa Gray to avoid tarnishing his professional image, not because he wanted to avoid arrest. The Court finds no significant distinction between Loden's stated goal and the one inferred by the Mississippi Supreme Court. He killed Leesa so that she could not report the crime, he hid her body to avoid her from being discovered, and he dug a grave on his grandmother's property, presumably to prevent her body from being detected. The harm he self-inflicted after murdering Leesa does not support his claim, as he informed law enforcement officials after his arrest that he decided to slash his wrists and carve his chest when he saw a patrol car at the Loden farm. (*See* State's Tr. Ex. 4, "Vault" consolidated ex. vol.). This aggravator has been found supported on similar or fewer facts. *See, e.g.*, *Gillett v. State*, 56 So. 3d 469, 506 (Miss. 2010) (finding evidence that the defendant took the bodies to Kansas sufficient to support avoiding-arrest aggravator); *Ross v. State*, 954 So. 2d 968, 1010 (Miss. 2007) (finding aggravator supported where the defendant knew the victim personally); *Edwards v. State*, 737 So. 2d 275, 312 (Miss. 1999) (finding the burning of the victim's vehicle sufficient evidence to support giving avoiding arrest aggravating circumstance to jury). A reasonable juror could conclude from the facts of this case that Loden committed murder to avoid the victim's identification of him as her kidnapper and rapist and continued to cover up his crime after her death to avoid detection and arrest.

Furthermore, even assuming arguments that the submission of the aggravator was error, the Mississippi Supreme Court had the authority to reweigh the evidence pursuant to Miss. Code Ann. § 99-19-105(3)(d) and (5)(b) and find the error harmless.[39] *See, e.g.*, *Simmons v. Epps*, 654 F.3d 526, 538-39 (5th Cir. 2011); *Clemons v. Mississippi*, 494 U.S. 738, 745, 753-54 (1990); *Stringer v. Black*, 503 U.S. 222, 229 (1992). The harmless error test found in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) governs the inquiry of whether an improperly submitted aggravating factor was nevertheless harmless. The *Brecht* test asks whether the error "had a substantial and injurious effect or influence in determining the jury's verdict."

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[39] Miss. Code Ann. § 99-19-105(3)(d) reads, in pertinent part: (d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

Miss. Code Ann. § 99-19-105(5)(b) reads: The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to: (b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, and (i) affirm the sentence of death or (ii) hold the error in the sentence phase harmless error and affirm the sentence of death or (iii) remand the case for a new sentencing hearing[.]

Brecht, 507 U.S. at 637. The Fifth Circuit has interpreted this to mean that relief is not warranted unless there is "more than a reasonable probability" that the erroneously admitted aggravator contributed to the imposition of the death sentence, and an error is harmless if "the sentence would have been the same had the unconstitutional aggravator never been submitted to the jury." *Simmons v. Epps*, 654 F.3d 526, 539 (5th Cir. 2011) (citations omitted).

Here, the trial court found that Loden actually killed, attempted to kill, intended that the killing take place, that he contemplated lethal force would be employed. (Trial Tr. vol. 7, 711). The court found that the following aggravators existed beyond a reasonable doubt: (1) that the offense was committed while Loden was engaged in the commission of the felony crimes of kidnapping, rape and sexual battery; (2) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) that the offense was especially heinous, atrocious, or cruel. (*Id.* at 711-12). The court considered the aggarvators [sic] and mitigators and found the aggravating circumstances to outweigh the mitigating circumstances and that the mitigating did not outweigh the aggravating. (*Id.* at 713-14).

The evidence showed that Loden kidnapped Leesa and drove her to a secluded spot where he repeatedly assaulted and raped her before he suffocated and strangled her to death. He dug a shallow grave in a secluded area on his grandmother's property, and he told law enforcement officers that he killed

Leesa in order to avoid tarnishing his reputation. He did not present any evidence at trial to mitigate these facts. Therefore, the Court finds it was not unreasonable to conclude that the inclusion of this aggravator, even if it was admitted in error, was harmless. Loden is not entitled to relief on this claim.

V. Felony-Murder Aggravator

At sentencing, the trial court found as an aggravating circumstance that Leesa's murder was committed while Loden "was engaged in the commission of the felony counts of kidnapping, rape[,] and sexual battery." (Trial Tr. vol. 7, 712).[40] Loden argues that use of the underlying felony as an aggravating circumstance fails to adequately distinguish death-eligible defendants from other murderers in light of *Apprendi* and *Ring*, discussed previously in section III, as those cases hold that aggravating circumstances in capital sentencing proceedings are "elements" of the offense for constitutional purposes. He also maintains that, because the felony-murder aggravator was based on the kidnapping, rape, and sexual battery counts in the indictment, for which Loden was separately convicted and sentenced, the consideration of the aggravator violated the Double Jeopardy Clause of the United States Constitution.

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[40] As noted in the previous ground for relief, the court also found that the murder was committed for the purpose of avoiding or preventing a lawful arrest, and that the offense was especially heinous, atrocious, or cruel. (Trial Tr. vol. 7, 712-13).

On direct appeal, Loden's claim that the underlying felony was also impermissibly charged as an aggravating circumstance was rejected on its merits by the Mississippi Supreme Court. *See Loden I*, 971 So. 2d at 567-69. The court found that its statutory capital sentencing scheme constitutionally narrowed the class of death-eligible defendants, and it otherwise noted that it had previously found "*Ring* and *Apprendi* inapplicable to Mississippi's capital murder sentencing scheme." *Id.* at 569. The court also found Loden's double jeopardy claim barred, as Loden had failed to raise the issue at trial. *Id.* at 568. Alternatively, the court found that Loden was charged with an underlying felony of kidnapping in the indictment, for which no separate charge was included, such that his argument was without merit. *Id.* at 570.

The Supreme Court has explained that "[t]o pass constitutional muster, a capital sentencing scheme "must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared with others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (citation omitted). This may occur by legislative function or by requiring that the jury find the presence of an aggravating circumstance. *Id.* at 246. The Mississippi statute narrows the class of capital defendants who are eligible for the death penalty by its definition of capital murder, *see* Miss. Code Ann. § 97-3-19(2), and through the use of aggravating circumstances. *See* Miss. Code Ann. § 99-19-101. As Mississippi has, by

statute, provided a narrowing function, "[t]he fact that the aggravating circumstance duplicated one of the elements of the crime does not make [the] sentence constitutionally infirm." *Lowenfield*, 484 U.S. at 246; *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986); *Evans v. Thigpen*, 809 F.2d 239, 241 (5th Cir. 1987); *see also Holland v. Anderson*, 583 F.3d 267, 283-84 (5th Cir. 2009). Furthermore, in *Tuilaepa v. California*, 512 U.S. 967, 972 (1994), the Court held that "[t]he aggravating circumstances may be contained in the definition of the crime or in a separate sentencing factor (or in both)." *See also Williams v. Taylor*, 529 U.S. 362, 393 n.16 (2000) (finding no prohibition in using underlying felony as aggravating circumstance). The decision rejecting this claim, therefore, does not warrant federal habeas relief.

Additionally, the Court finds that the Mississippi Supreme Court clearly and expressly found Loden's double jeopardy claim barred, and Loden's failure to comply with Mississippi's procedural rules bars federal habeas review of this claim. *See, e.g.*. *Coleman*, 550 U.S. at 729-30. The fact that it was addressed in the alternative does not vitiate the bar. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). The Court otherwise notes that the Supreme Court has held that the use of the underlying felony in aggravation at sentencing does not expose defendant to double jeopardy. *Schiro v. Farley*, 510 U.S. 222, 230 (1994); *see also United States v. Wittie*, 25 F.3d 250, 257 (5th Cir. 1994) (court finding it "well-settled that using prior crimes to 'enhance' a sentence does not

impinge on double jeopardy, because defendants are not 'punished' for crimes so considered"). Loden's sentencing was not a second prosecution, nor a second punishment, for the same offense. Rather, his punishment was elevated based on the aggravating circumstances found at sentencing. Federal habeas relief on this claim is denied.

VI. Right to Fully Develop and Present Evidence

Loden maintains that he was denied the right to fully develop and present evidence in his case, citing his previous grounds for relief in support of this claim. For the reasons already discussed by the Court, including Loden's valid plea and waiver of sentencing, along with his valid waiver of the presentation of mitigating circumstances, the Court finds that Loden has not demonstrated that he was denied the right to develop and present evidence in his case. However, Loden otherwise makes a specific argument that defense counsel Daniels' destruction of Loden's case file denied Loden his due process right to fully develop evidence in his case. The Mississippi Supreme Court found Daniels exercised "poor judgment" in destroying Loden's file while Loden was still pursuing post-conviction relief. *Loden II*, 43 So. 3d at 400. The court rejected the claim, however, due to Loden's failure to allege and support a showing of prejudice where "Loden had the originals of the very same material." *Id.*

Loden maintains that nothing supports a conclusion that Johnstone's file contained copies of everything that had been in Daniels' file. *See Loden*, 43 So. 3d at 400 (noting that Daniels stated there was duplication between the files, and that the items in his file were merely copies). Loden argues that the contents of the file cannot now be known, and that Daniels' statements about the contents of the file cannot be reliably trusted, "particularly where his conduct has violated Mississippi law and ethical obligations he owed to his former client." (Pet. Memo at 124). Loden maintains that the Court should presume that he was denied his right to fully present evidence in light of Daniels' actions, and it should find him entitled to an inference that the files were adverse to Daniels, citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1994) (finding denial of due process may be shown where evidence "potentially useful" to defendant is destroyed by police in bad faith and "permanently lost").

Daniels destroyed the case file he maintained on Loden without consulting Loden or his post-conviction counsel. (Daniels Dep. at p. 48). The Court has little difficulty in agreeing that Daniels showed extremely poor judgment in destroying Loden's case file while Loden's post-conviction proceedings were ongoing. It also agrees that the timing is suspect, given that post-conviction counsel stated that he spoke with Daniels briefly in August 2008, and that Daniels indicated at that time "that he was done with this case and did not want to be involved with it."

(Pet. Ex. 42, Aff. of Mark McDonald at ¶ 4). Daniels then destroyed the files in October 2008. (Daniels Dep. at pp. 47-48).

In his 2009 deposition testimony, Daniels testified that he kept the files in a box in his storage room for seven years and decided to destroy them to prevent the dissemination of "private and confidential information" in the event that his storage room was compromised in some way. (*Id.* at pp. 47-48). Looking through boxes of documents that Loden's counsel brought to the deposition, Daniels identified some of his "handwritten notes," even though he did not recognize the folders as his. (*Id.* at pp. 48-49). When asked whether there was anything in the boxes that did not come from him or his files, Daniels stated that it was impossible to say for certain, as there was "a good bit of duplication" between his and Johnstone's file. (*Id.* at p. 49). Johnstone also gave a deposition, and it is apparent from his testimony that he had, years prior, turned over his original files on Loden's case to the attorneys associated with Loden's direct appeal. (Johnstone Dep. at p. 8). Those files were in the room with Johnstone during his deposition, and they are presumably the same ones Daniels was asked to look through just before he found copies of his handwritten notes. (*See id.*).

Loden's claim is that the Court should infer bad faith by Daniels, and that it should presume that Daniels' case files contained information that would have altered the outcome of Loden's trial or post-conviction proceedings. The Court finds that Loden's

claim is not analogous to claims of police destruction of evidence in a case, as was the case in *Youngblood*, and there is no suggestion that potentially exonerating material was destroyed by Daniels. *See Youngblood*, 488 U.S. at 57-58. Neither has Loden pointed to any evidence potentially contained in the files that would have been "so critical to the defense as to make a criminal trial fundamentally unfair." *Id.* at 57 (Stevens, J., concurring in the result). Additionally, the Court notes that there is no indication that Daniels had been asked for a copy of his files on Loden at any point during Loden's direct appeal and refused to provide them, and there is no indication in the record that post-conviction counsel asked for a copy of the files in August 2008 and was refused. *See, e.g.*, *id.* at 56 n* ("The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.").

Even assuming, *arguendo*, Loden's claim of bad faith by Daniels, the mere absence of access to Daniels' files will not support Loden's due process claim, and there is no indication that Daniels' files would have contained potentially critical information that has otherwise gone undiscovered. *See, e.g.*, *United States v. Thompson*, 130 F.3d 676, 686 (5th Cir. 1997) (requiring that defendant seeking to establish a due process violation show bad faith by government officials; that the evidence is material in showing the defendant's innocence; and no alternate means of

establishing same); *United States v. Jobson*, 102 F.3d 214, 219 (6th Cir. 1996) (holding that mere speculation of potentially exculpatory value will not support due process claim). Loden is not entitled to relief on this claim.

Similarly, to the extent that Loden claims ineffective assistance of counsel based on these facts, he fails to demonstrate prejudice under *Strickland* for the above-stated reasons. Conclusory allegations do not raise a constitutional issue in a habeas proceeding. *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983). Habeas relief is not warranted on the basis of Daniels' destruction of his case file, either as a substantive due process claim or as a claim of ineffective assistance of counsel, and relief on this ground is denied.

Certificate of Appealability

Under the AEDPA, Loden must obtain a certificate of appealability ("COA") before appealing this Court's decision denying federal habeas relief. 28 U.S.C. § 2253(c)(1). A COA will not issue unless Loden makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner makes such a showing "when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248

(5th Cir. 2000); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a petitioner's claim has been denied on procedural grounds, Petitioner must additionally demonstrate that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

This Court must issue or deny a COA upon its entry of an order adverse to the petitioner. *See* Rule 11 of the Rules Governing § 2254 Cases. The Court, resolving in Loden's favor any doubt as to whether a COA should issue, determines that he is entitled to a COA on his claims of ineffective assistance of counsel. Specifically, the Court finds that a COA should issue as to Loden's ineffective assistance of counsel claims regarding: the development of mitigation evidence (Ground 1.A), the effect of his guilty plea and the waiver of jury sentencing (Ground 1.B), defense counsel's litigation of the case (Ground 1.C), the cumulative effect of trial counsel's performance (Ground 1.D), and the performance of appellate counsel (Ground 1.E). The Court determines that Loden has not demonstrated that reasonable jurists would debate its procedural and/or substantive rulings on the remaining claims. Therefore, a certificate of appealability will issue only on the previously designated claim.

Conclusion

For the reasons set forth above, Loden has not demonstrated that the denial of his State petition

was contrary to, or involved an unreasonable application of, clearly established federal law, nor has the denial been shown to have been based on an unreasonable determination of facts in light of the evidence presented in the State court proceedings. Accordingly, it is hereby **ORDERED** that:

1. All federal habeas corpus relief requested by Loden is **DENIED**, and the instant petition shall be **DISMISSED** with prejudice.

2. Loden's request for an evidentiary hearing is **DENIED**.

3. All pending motions are **DISMISSED** as moot.

4. Loden is **GRANTED** a COA on the following claims of ineffective assistance of counsel: the development of mitigation evidence (Ground 1.A), Loden's guilty plea and the waiver of jury sentencing (Ground 1.B), defense counsel's litigation of the case (Ground 1.C), the cumulative effect of trial counsel's performance (Ground 1.D), and the performance of appellate counsel (Ground 1.E).

5. Loden is **DENIED** a COA on all remaining claims raised in the petition.

SO ORDERED, THIS the 18th day of September, 2013.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-DR-01758-SCT

THOMAS EDWIN LODEN, JR.

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT: 09/21/2001
TRIAL JUDGE:
HON. THOMAS J. GARDNER, III
COURT FROM WHICH APPEALED:
ITAWAMBA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:
OFFICE OF CAPITAL POST-CONVICTION
COUNSEL:
BY: GLEN S. SWARTZFAGER
CHARLES E. PATTERSON
CHARLES S. BARQUIST
MARK R. McDONALD
OLGA A. TKACHENKO
ELINA KREDITOR
ATTORNEY FOR APPELLEE:
OFFICE OF THE ATTORNEY GENERAL
BY: MARVIN L. WHITE, JR.
NATURE OF THE CASE:
CIVIL—DEATH PENALTY—POST-CONVICTION
DISPOSITION:
POST-CONVICTION RELIEF DENIED—04/15/2010
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

RANDOLPH, JUSTICE, FOR THE COURT:

¶ 1. On September 21, 2001, Thomas E. Loden, Jr., an eighteen-year veteran of the United States Marine Corps who had attained the rank of gunnery sergeant (E-7), waived his right to a jury at trial and sentencing, and pleaded guilty to capital murder, rape, and four counts of sexual battery.[1] After conducting an extensive hearing on the knowing, intelligent, and voluntary nature of said waivers, the Circuit Court of Itawamba County accepted Loden's pleas and adjudged him guilty on each count. At sentencing, Loden:

> elected to waive cross-examination of all of the State's witnesses, to waive objection to all exhibits presented by the State, and not to offer any mitigation evidence on his own behalf. During the proceeding, Loden addressed the court and apologized to the friends and family of [Gray], by stating "I hope you may have some sense of justice when you leave here today."

Loden, 971 So. 2d at 552. The circuit court sentenced Loden to death.

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[1] Details regarding the crime are provided in ***Loden v. State***, 971 So. 2d 548 (Miss. 2007). Summarily, Loden kidnapped sixteen-year-old Leesa Marie Gray and, for more than four hours, "repeatedly raped and sexually abused [her], videotaping portions of the sadistic acts, before murdering her by way of suffocation and manual strangulation." ***Id.*** at 551.

¶ 2. Subsequently, Loden filed a "Motion to Vacate Guilty Plea" only as to capital murder, and now asks this Court to disregard his sworn testimony and out-of-court declarations that he preferred death to life in prison. Loden neither sought to vacate his guilty pleas to rape and four counts of sexual battery, nor appealed the convictions or sentences which followed his guilty pleas. Loden alleged that his plea was involuntary because it "was based on inaccurate legal advice given by his trial attorneys." Specifically, Loden maintained that his guilty plea was based upon "trial counsel's erroneous advice that he could still appeal adverse rulings on pre-trial motions after entering the guilty plea." The circuit court dismissed Loden's motion for post-conviction relief, "finding that Loden knowingly and voluntarily entered his guilty plea, and that Loden cognizantly waived his right to appeal." ***Id.***

¶ 3. Loden's direct appeal of his conviction and sentence, and his appeal of denial of post-conviction relief ("PCR") regarding the denial of his "Motion to Vacate Guilty Plea" were consolidated by this Court. Thereafter, this Court "affirm[ed] the conviction and death sentence imposed by the [circuit court], and subsequent denial of post-conviction relief." ***Id.*** at 575. Following denial of his "Motion for Rehearing," Loden filed a "Petition for Writ of Certiorari" with the United States Supreme Court, which also was denied. *See* ***Loden v. Mississippi***, 129 S. Ct. 45, 172 L. Ed. 2d 51 (2008). Loden now proceeds before this

Court with his second Petition for Post-Conviction Relief.[2]

FACTS

¶ 4. The following pertinent facts are contained in the record and previously were provided by this Court in ***Loden***, 971 So. 2d at 552-61:

> Loden was indicted for capital murder, rape, and four counts of sexual battery. That same day, the circuit court entered an order appointing James P. Johnstone to represent Loden. . . . Subsequently, the circuit court entered an order appointing David Lee Daniels as additional counsel for Loden.
>
> . . .
>
> Loden filed a number of pretrial motions, including: . . . "Motion for Appointment of Investigator for the Defense"; "Motion for Psychiatric Examination"; "Ex Parte Motion for Funds for Expert Assistance in the Field of Mitigation Investigation" . . . .
>
> . . .
>
> Loden's "Motion for Appointment of Investigator for the Defense" . . . proposed Herb Wells as a qualified investigator. The circuit

[2] In Loden's first PCR petition it was alleged that "erroneous advice of trial counsel prejudiced Loden by causing him to enter an involuntary guilty plea to capital murder." ***Loden***, 971 So. 2d at 562.

court entered an order "authoriz[ing] the appointment of Herb Wells, as the Criminal Defense Investigator." Loden later filed a "Motion for Additional Funds for Investigator for the Defense." The circuit court likewise granted that motion. Loden then filed a nearly identical motion styled "Ex Parte Motion for Funds for Expert Assistance in the Field of Mitigation Investigation" [which] . . . proposed Dr. Gary Mooers as a mitigation specialist. . . . Prior to ruling, the circuit court noted that "I have already authorized your employing an investigator." . . . An order denying Loden's motion was entered by the circuit court.

Loden's "Motion for Psychiatric Examination" . . . pleaded that it was "necessary for the State to examine the capacity of [Loden] at the Mississippi State Hospital at Whitfield in order to properly try this cause." The circuit court found that "[a] psychological evaluation will be required by the [c]ourt at the Mississippi State Hospital." An order granting Loden's request was [entered] by the circuit court.

Later, Loden filed an "Ex Parte Motion for Funds to Secure Expert Assistance in the Field of Psychology." . . . Once more, the circuit court entered an order granting Loden the relief sought and making funds available for a psychological evaluation to be performed by Dr. C. Gerald O'Brien.

. . .

In August 2001, Loden wrote a letter to Johnstone and requested that Johnstone:

> make the motion for a re-visit of the original warrant. I'd like that at least for the record. Would you do your best at trying to convince the judge to hear this. Then immediately following his ruling on that, *if against, I'd like to speak to you of the appeal process, and go ahead and enter a plead* [sic].

(Emphasis added). Regarding the appeal process, Loden asked "(1) *I'm fairly confident I'd get the death penalty, but how does 'appeal' work either way?* (2) In your professional judgment, do I have good grounds for an appeal?" (Emphasis added).

After a forensic mental evaluation of Loden, the Mississippi State Hospital unanimously found that Loden:

> has the sufficient present ability to consult with his attorney with [a] reasonable degree of rational understanding in the preparation of his defense, and that he has a rational as well as factual understanding of the nature and object of the legal proceedings against him.
>
> We are unanimous in our opinion that [Loden] would have known the nature and quality of his alleged acts at the time of the alleged offense, and that he would have known at that time that those alleged acts would be wrong.

> *We are unanimous in our opinion that [Loden] has the capacity knowingly, intelligently, and voluntarily to waive or assert his constitutional rights.*
>
> We are unanimous in our opinion that [Loden] was not experiencing extreme mental or emotional disturbance at the time of the alleged offenses, and that *his capacity to appreciate the criminality of his alleged conduct, or to conform his conduct to the requirements of the law was not substantially impaired at that time.*

(Emphasis added). The report concluded that factors such as Loden's alleged physical and sexual abuse as a child, combat-related trauma, and job and life-related stresses at the time of the crimes did not "rise to the level of exculpation or even of statutory mitigation."

Loden's expert, Dr. O'Brien, opined that Loden was of average to above-average intelligence and, after extensively reviewing Loden's background, concluded that:

> . . . at the time of the incident with which he is charged, *[Loden] was under the influence of extreme mental and emotional disturbance and distress, although this probably did not rise to the level that he did not know the nature and quality of his acts or the difference between right and wrong in relation to those acts at that time. . . . He appears at the present*

> *time to be competent to stand trial and assist in his own defense.*

(Emphasis added). Significant to the issue raised in Loden's post-conviction relief appeal, Dr. O'Brien's report reveals the mindset of Loden within thirty days before his pleas of guilty, stating, in part, that:

> [Loden] makes a point of telling me "I don't want life," in prison, and that he would like to plead so that he will receive the death penalty. This is not only because of his regret about the crime, but also because "I don't want to see my wife lie on the stand," referring to statements she has made which do not match up with his recollection of events and also because he has diminishing confidence in his lawyers' handling of his case.

Faced with a mountain of evidence (of Himalayan proportions) sufficient to overwhelmingly prove his guilt, on September 21, 2001, Loden expressly waived his right to a jury at trial and in sentencing, and pleaded guilty to all six counts in the indictment. The circuit court accepted the pleas and adjudged Loden guilty on each count. Prior to pleading guilty, Loden responded to a series of direct and simple questions from the court, reflecting a full understanding of the proceedings and a voluntariness to willingly enter his plea, including:

. . .

Q. . . . Do you understand that as to each of the charges . . . if you proceeded to trial before a jury and if the jury found you guilty of those charges and returned a verdict fixing the penalty at whatever they might fix it, in any event, the question of your guilt or innocence or imposition of the punishment determined by the jury *would be something that you could appeal to the Supreme Court of this state?*

A. *Yes*, sir, I understand.

Q. *Do you understand that by waiving a jury for the trial of this case and for the imposition or determination of an appropriate sentence to be imposed by this Court, you are giving up or waiving a valuable right?*

A. *Yes*, sir, I am.

. . .

Q. *Do you understand that if you proceed through the course of this and the Court makes a determination of your guilt, you will have no right to appeal that?* . . .

A. *Yes*, sir.

. . .

Q. Mr. Loden, do you understand that on your plea of guilty to the charge of capital murder in Count I . . . the maximum

> penalty which this Court might impose would be death . . . ?
>
> A. Yes, sir, I understand that.
>
> . . .
>
> Q. Do you understand that on your plea of guilty to capital murder and the other charges in this indictment it is possible that I will, acting pursuant to the waiver, impose the death penalty in this case? Do you understand that?
>
> A. I understand that fully, sir.

(Emphasis added).[3] . . . [A]fter the State recommended that Loden receive the death penalty, Loden acknowledged that he was aware the State would make that recommendation.

In the subsequent sentencing hearing, Loden testified under oath:

> Q. *Are you satisfied with the legal services and the advice given you by your attorneys?*
>
> A. *Yes*, I am, sir.
>
> Q. Do you think that they have properly advised you concerning your constitutional

[3] "Additionally, Johnstone and Daniels testified that, in their respective opinions, Loden understood the nature of the proceedings and desired to enter guilty pleas to the charges." ***Loden***, 971 So. 2d at 556 n.6.

> rights, your legal rights, and properly advised you before pleading guilty to these charges?
>
> A. Yes, sir, I do.

(Emphasis added). Consistent with Loden's stated desire to Dr. O'Brien to concede guilt and accept the death penalty, *supra*, Johnstone advised the court that "[w]e have conferred with our client Mr. Loden . . . and he's advised us that he does not want us to cross-examine witnesses or object to the introduction of any exhibits that are being introduced through these witnesses that the State intends to call." Furthermore, Loden's other attorney Daniels informed the Court that Loden "has elected to and instructed us that he desires to waive presentation of . . . mitigation evidence for reasons I feel he will explain to the Court when given an opportunity to make a statement."[4] According to Loden, "I'm just doing what I feel I need to do."

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[4] "Nonetheless, Daniels made a brief statement summarizing the mitigation evidence which would have been offered absent Loden's instruction otherwise. According to Daniels:

> through our investigation and our clinical psychologist's expert that's been appointed by the Court we've been able to develop that Mr. Loden has a childhood history of extreme sexual child abuse himself; that in spite of that he was an exemplary student, that he entered the marine corps, that he served in the United States Marines with distinction for eighteen years, that he attained the rank of E-7, that he was highly

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. . .

After having instructed counsel not to speak on his behalf, Loden asked to make a statement to the court, which was granted. Loden proceeded to apologize to the friends and family of [Gray] and admitted responsibility and culpability for "tak[ing] an irreplaceable element out of your world. . . . I hope you may have some sense of justice when you leave here today."

. . .

The sentencing order reveals that the learned trial judge:

> conducted an extensive, on the record, examination of the Defendant for the purpose of determining whether or not the pleas of guilty offered by him were to be entered by him knowingly, freely, understandingly, and voluntarily. The Court further made specific inquiry concerning the Defendant's understanding of his rights under the Constitution of the United States and the State of Mississippi and his right to have a jury hear the evidence offered by the State of Mississippi and himself on the issue of guilt or innocence on each of the charges against him and to decide those issues.

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decorated and a combat veteran in Desert Storm. He has no criminal history prior to today."

Loden, 971 So. 2d at 557 n.8.

> The Court further examined Defendant concerning his understanding of his right to have a jury fix the punishment imposed (i.e. death, life without parole or life imprisonment) in the event he was found guilty of [c]apital [m]urder by a jury.

The circuit court further stated that it:

> does hereby find that each of *the pleas of guilty entered by Defendant were knowingly, freely, understandingly and voluntarily made . . . and that the Defendant was fully advised by his attorneys and the Court of his [c]onstitutional and statutory rights with regards to each charge and more specifically with reference to the sentence to be imposed*. . . .

(Emphasis added). In imposing the sentence on the capital murder count, the circuit court:

> considered all of the evidence previously introduced in the proceedings on entry of Defendants[’] pleas of guilty, and the additional proof offered including photographs introduced by the State, a video tape recovered from the vehicle of the Defendant introduced by the State, the psychiatric reports of [Dr.] McMichael and members of the [s]taff at Mississippi State Hospital, and [Dr.] O’Brien, a clinical psychologist and forensic consultant who examined the Defendant at the request of the Defendant’s attorney.

Finding each factor required by Mississippi Code Annotated Section 99-19-101(7) was satisfied, the circuit court considered whether sufficient aggravating circumstances existed. . . . Thereafter:

> [t]he Court having considered and weighed the aggravating and mitigating circumstances *finds that the aggravating circumstances outweigh the mitigating circumstances and that the mitigating circumstances do not outweigh the aggravating circumstances and that the death penalty should be imposed.*

(Emphasis added).

. . .

In February 2002, Loden, then represented by Daniels, filed notice of appeal. A month later, Loden personally sent a letter to Circuit Judge [Thomas J.] Gardner[, III] stating "I'd just like the opportunity to assist myself and review any motions before the court." Included with the letter was a pro se "Motion for Discovery of Evidence Presented to the Grand Jury[,]" which "may be needed for a pending motion, and certainly needed for appellate review."

Subsequently, the Office of Capital Defense Counsel assumed Loden's representation[5]

[5] Daniels withdrew as counsel for Loden when he accepted a position as an assistant district attorney.

and filed a "Motion to Vacate Guilty Plea and Incorporated Memorandum of Law" arguing that Loden's plea was involuntary because his "decision to plead guilty was based on inaccurate legal advice given by his trial attorneys."[6] Loden then claimed that his pre-plea August 2001 letter to Johnstone was indicative that he "[was] clearly interested in the appeal process and wants to appeal ruling in his case." Furthermore, he asserted that his March 2002 letter to Circuit Judge Gardner "specifically stated that the discovery will be needed for 'appellate review.'" Loden disingenuously complained that his guilty plea

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[6] Some procedural background is helpful in the case *sub judice*. When Loden pleaded guilty in 2001, Mississippi Rule of Appellate Procedure 22(b) stated:

> [i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

Miss. R. App. P. 22(b) (2001). Effective February 10, 2005, the first sentence of Rule 22(b) was amended to state that "[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal *if such issues are based on facts fully apparent from the record*." Miss. R. App. P. 22(b) (emphasis added). To ensure that Loden's claim was preserved under the old Rule 22(b), Andre De Gruy, Loden's new counsel, filed the petition for post-conviction relief "rais[ing] a challenge to the erroneous advice that trial counsel gave to [Loden]." This petition was filed in the circuit court, which had jurisdiction because of Loden's guilty plea.

was made in reliance upon "trial counsel's erroneous advice that he could still appeal adverse rulings on pre-trial motions after entering the guilty plea." . . . Loden attached an affidavit asserting:

> 3. Prior to my decision to plead guilty, I discussed this decision with my attorneys, [Johnstone] and [Daniels]. [Johnstone] and [Daniels] advised me that by pleading guilty, I waived certain rights. [Johnstone] and [Daniels] also told me that if I received a sentence of death that the case would be subject to automatic review by the Mississippi Supreme Court. It was *my* understanding that I could appeal my case.
>
> 4. Prior to pleading guilty, I was very concerned about several pretrial motions and the decisions made on these motions. It was *my* understanding that I could appeal these decisions and raise these issues again.
>
> 5. I would not have plead guilty if I had known that I could not raise these issues in an appeal.

(Emphasis added).[7]

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[7] An affidavit of Johnstone was also filed which provided:

> 4. Prior to [Loden's] entry of the guilty plea, *[Daniels] and I advised [Loden] that by pleading guilty he was waiving his right to direct appeal.* I also informed him that if he received a sentence of death that the case

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. . .

The circuit court held a hearing on Loden's "Motion to Vacate Guilty Plea." On direct examination, Loden testified as follows:

. . .

> Q. Did you ever discuss with your attorneys appealing those rulings?
>
> A. . . . I can't say a appeal in that sense of the word. After that meeting that I had with [Johnstone] when I thought that they could have done a better job, we sat down and *he said that as long as everything was in the record it would automatically be reviewed.* That's when [Daniels] told me that death penalty cases get looked at closer and it might be better . . . if I did get the death penalty in order to get the better closer look and review.
>
> . . .
>
> A. . . . What I got told was the Supreme Court gets it, death penalty cases are looked at closer. We had stuff in the record, and the Supreme Court could

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would be subject to an automatic review by the Mississippi Supreme Court.

5. I told [Loden] that this *automatic review would be some sort of appeal but that [it] was unclear to us which issues would be subject to review.*

(Emphasis added). ***Loden***, 971 So. 2d at 560 n.12.

> rule off the record and grant a new trial. . . .
>
> . . .
>
> Q. *Did they ever tell you that if you pled guilty the only thing that would be reviewed by the Supreme Court was the sentence?*
>
> A. *No*, definitively not.
>
> . . .
>
> Q. If you have been told that the only thing that would be reviewed was your sentence, *would you have pled guilty?*
>
> A. *No.*

(Emphasis added).

On cross-examination, however, Loden clearly admitted that on September 21, 2001, ***he freely and voluntarily waived his right to a jury at trial and in sentencing, pleaded guilty, and desired the death penalty for the sake of both [Gray's] family and his own family***. Furthermore, Loden clearly admitted that he stated in open court that he understood he would not be able to appeal his guilty pleas, but "fall[s] back to what Johnstone told [him], as long as it was in the record [he] didn't need an appeal, it was going to get looked at anyway."

. . .

The "Order and Opinion" of the circuit court filed on February 2, 2006, dismissed Loden's motion for post-conviction relief. The circuit court found that:

> [Loden] was informed in his lengthy guilty plea hearing of the important constitutional rights that he was waiving by entering a plea of guilty. . . . In addition, [Loden] stated under oath at the plea hearing that he had been fully advised of all aspects of his case by his counsel, including the nature and elements of the charge. Subsequently, at the guilty plea hearing, the Court advised [Loden] of the charges against him and asked him if he understood that charge, to which he replied in the affirmative. . . . *The Court fully advised [Loden] that he was waiving his right to appeal. The Court then found that [Loden] had entered a knowing and voluntary plea.*

(Emphasis added).

Loden filed a notice of appeal on dismissal of his motion for post-conviction relief. This Court entered an order consolidating this appeal with his earlier-filed direct appeal.

Loden, 971 So. 2d at 552-61 (emphasis in original).

¶ 5. The issues considered by this Court in that consolidated appeal were:

> (1) Whether Loden was improperly denied funds to retain the assistance of a forensic

social worker to investigate and present relevant mitigating factors.

(2) Whether the indictment charged a death-penalty eligible offense.

(3) Whether the trial court erred in weighing the "avoiding arrest" aggravating circumstance.

(4) Whether the submission of the Mississippi Code Annotated Section 99-19-101(5)(d) aggravating circumstance violated the state and federal constitutions.

(5) Whether the trial court erred in considering both the Mississippi Code Annotated Section 99-19-101(5)(d) aggravating circumstance and the "especially heinous, atrocious or cruel" aggravating circumstance.

(6) Whether the statutorily-mandated proportionality review of Mississippi Code Annotated Section 99-19-105(3) was satisfied.

. . .

(7) Whether alleged erroneous advice of trial counsel prejudiced Loden by causing him to enter an involuntary guilty plea to capital murder.

Id. at 561-62. This Court "affirm[ed] the conviction and death sentence imposed by the [circuit court], and subsequent denial of post-conviction relief." ***Id.*** at 575.

¶ 6. Regarding the voluntariness of Loden's guilty plea, this Court concluded:

> [t]he record clearly reflects that Judge Gardner expressly informed Loden of the charges against him; the consequences of his guilty plea, including the minimum and maximum penalties in sentencing; and the implications of waiving his right to trial by jury, right to confront adverse witnesses, and right to protection against self-incrimination. Furthermore, Loden affirmatively stated under oath that his guilty pleas were "free and voluntary." Thereafter, Loden pleaded guilty to all charges. As such, this Court finds that the circuit court was not "clearly erroneous" in finding that Loden's guilty plea was "knowing and voluntary." [***Brown v. State***, 731 So. 2d 595, 598 (Miss. 1999)].

Loden, 971 So. 2d at 573. As to ineffective assistance of counsel, this Court did not address the prejudice prong, concluding:

> [t]he lower court rejected Loden's pretext and found no deficiency in counsel before Loden pleaded guilty and waived his right to appeal. This Court, accepting all evidence reasonably supporting that finding and the reasonable inferences therefrom,[8] *see* [***Mullins v. Ratcliff***,

[8] "For instance, a reasonable inference regarding Johnstone's affidavit on automatic review is that he was simply advising Loden to get all matters on the record because, while he was uncertain which specific issues this Court would address, he was

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> 515 So. 2d 1183, 1189 (Miss. 1987)], finds no support for the proposition that the circuit court's conclusion that counsel's performance was not deficient was "clearly erroneous." *Brown*, 731 So. 2d at 598. This issue is without merit.

Loden, 971 So. 2d at 574.

¶ 7. On January 17, 2008, this Court denied Loden's "Motion for Rehearing." On April 16, 2008, Loden filed a "Petition for Writ of Certiorari" with the United States Supreme Court and presented the following issues:

> (1) Are the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States violated where counsel erroneously advises a capital defendant that he can appeal a guilty plea if he is sentenced to death and the defendant enters a guilty plea based on that erroneous advice?
>
> (2) Are the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States violated where a state court denied an indigent capital defendant funds to retain a forensic social worker to investigate mitigating factors?

On October 6, 2008, the United States Supreme Court denied Loden's petition. *See* ***Loden***, 129 S. Ct.

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certain that this Court would only address issues of record." ***Loden***, 971 So. 2d at 574 n.20.

at 45. Loden now proceeds before this Court with his second Petition for Post-Conviction Relief.[9]

¶ 8. This Court will consider the following grounds for post-conviction relief raised by Loden:

> (1) Loden was denied his constitutional right to effective assistance of counsel guaranteed by the United States and Mississippi Constitutions.
>
> (2) Apart from the ineffectiveness of Loden's counsel, his guilty plea was not knowing, voluntary or intelligent.
>
> (3) Loden was denied effective assistance of appellate counsel.
>
> (4) The State's use of the expert psychiatric report from Dr. McMichael violates the Eighth Amendment's reliability requirement, the Sixth Amendment's confrontation clause, and due process.
>
> (5) Loden's waiver of jury for sentencing was not voluntary, knowing and intelligent.
>
> (6) Loden has been denied his Fourteenth Amendment due process right to fully develop and present the evidence in his case.

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[9] *See* footnote 2, *supra.*

STANDARD OF REVIEW

¶ 9. The purpose of the Mississippi Uniform Post-Conviction Collateral Relief Act "is to provide prisoners with a procedure, *limited in nature,* to review those objections, defenses, claims, questions, issues or errors *which in practical reality could not be or should not have been raised at trial or on direct appeal.*" Miss. Code Ann. § 99-39-3(2) (Rev. 2007) (emphasis added). Mississippi Code Section 99-39-27(5) provides that:

> [u]nless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are *not procedurally barred* under Section 99-39-21[10] *and* that *they further present a*

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[10] Mississippi Code Section 99-39-21 provides that:

(1) Failure by a prisoner to raise . . . *issues* . . . *either in fact or law which were capable of determination at trial and/or on direct appeal,* regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a *waiver* thereof and shall be *procedurally barred,* but the court *may* upon a showing of cause *and* actual prejudice grant relief from the waiver.

(2) The *litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue;* and any relief sought under this article upon said facts but upon different state or federal legal theories shall be *procedurally barred* absent a showing of cause *and* actual prejudice.

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> *substantial showing of the denial of a state or federal right,* the court shall by appropriate order *deny* the application.

Miss. Code Ann. § 99-39-27(5) (Rev. 2007) (emphasis added). *See also* Miss. Code Ann. § 99-39-23(7) ("[n]o relief shall be granted under this article unless the petitioner proves by a *preponderance of the evidence* that he is entitled to the relief") (emphasis added).

¶ 10. Mississippi Code Section 99-39-27(7) states that:

> the court, in its discretion, may:
>
> (a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together

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> (3) The doctrine of *res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.*
>
> (4) The term "*cause* " as used in this section shall be defined and limited to those cases where the *legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.*
>
> (5) The term "*actual prejudice* " as used in this section shall be defined and limited to those *errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.*
>
> (6) The *burden is upon the prisoner* to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

Miss. Code Ann. § 99-39-21 (Rev. 2007) (emphasis added).

> with any exhibits submitted with those documents, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.
>
> (b) Allow the filing of the motion in the trial court for further proceedings under Sections 99-39-13 through 99-39-23.[11]

Miss. Code Ann. § 99-39-27(7) (Rev. 2007).

ANALYSIS

I. Loden was denied his constitutional right to effective assistance of counsel guaranteed by the United States and Mississippi Constitutions.

¶ 11. Loden was represented at trial by Johnstone and Daniels. Prior to representing Loden, Johnstone had been a part-time public defender since 1994 and had represented defendants in two prior capital-murder cases, one of which resulted in a verdict of life without parole. Prior to representing Loden, Daniels had been a public defender since 1996 and had represented defendants in two prior capital-murder cases, one of which resulted in a directed verdict of

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[11] "[A] post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief." ***Marshall v. State***, 680 So. 2d 794, 794 (Miss. 1996).

acquittal. Regarding the representation of defendants in capital cases, Daniels stated "[i]t's what I did."

¶ 12. According to Daniels, as the trial date approached, the State made no plea offers to Loden, as "it was a situation where he was either going to have to plead guilty to the indictment in its entirety or go to trial on the indictment."[12] Daniels stated that:

> probably latter part of August, maybe end of September . . . [Loden] said before that . . . he didn't want the case to go to trial. We had prevailed upon him that we needed to prepare for trial and that we needed to try and get this case in the . . . most favorable posture we could. That's the reason we were filing these motions, but at some point he said, I'm not going to trial, I'm not going to. He didn't want to plead but he didn't want to go to trial.

Nonetheless, Daniels and Johnstone continued to prepare for trial.[13] Thereafter, according to Johnstone, "Loden came to us and . . . indicated that he didn't want to proceed anymore, *he wanted to plead guilty,*

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[12] As Daniels stated, Loden "was up against it evidentiary wise."

[13] According to Daniels, "I was going to be prepared for trial no matter what[,]" and "I wasn't going to wait for him to make up his mind."

he didn't want to put the family through a trial."[14] (Emphasis added.)

¶ 13. On September 21, 2001, seventeen days before the scheduled trial date of October 8, 2001, Loden formally waived his right to a jury at trial and in sentencing; pleaded guilty to all six counts in the indictment; waived presentation of mitigation evidence in sentencing, as well as any cross-examination of the State's witnesses[15] or objection to the introduction of evidence presented by the State;[16] admitted responsibility and culpability to the victim's family for "taking an irreplaceable element out of your world;" and made a brief statement of apology.[17] Notwithstanding Loden's waiver, Daniels made a brief statement summarizing the mitigation evidence which would have

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[14] This comports with Dr. O'Brien's report which "reveals the mindset of Loden within thirty days before his pleas of guilty, stating, in part, that: ['][Loden] makes a point of telling me 'I don't want life,' in prison, and that he would like to plead so that he will receive the death penalty.[']" ***Loden***, 971 So. 2d at 555.

[15] According to Johnstone, Loden was "[v]ery firm" and "adamant" in his request for no cross-examination of the State's witnesses and no presentation of mitigation evidence at sentencing.

[16] The evidence presented at sentencing included a summary report of the forensic mental evaluation of Loden by the Mississippi State Hospital and the report of Loden's independent psychologist, Dr. O'Brien.

[17] For details of the proceedings, *see* paragraph 4, *supra* (quoting ***Loden***, 971 So. 2d at 552-61).

been offered on behalf of Loden.[18] *See* footnote 4, *supra.* The circuit court subsequently found "that the aggravating circumstances outweigh the mitigating circumstances and that the mitigating circumstances do not outweigh the aggravating circumstances and that the death penalty should be imposed."

¶ 14. Loden now claims that his trial counsel's "failure to perform any mitigation investigation, to litigate pre-trial motions competently, to assist the independent psychologist in his evaluation of Loden, to advise Loden competently regarding his guilty plea and sentencing, and to present any mitigation evidence resulted in a denial of Loden's Sixth Amendment right to competent counsel."

¶ 15. This Court has stated that:

> [u]nder ***Strickland***[19] . . . the Court makes a *two-pronged inquiry; first,* a defendant must show that counsel's performance was *deficient* by identifying specific acts and omissions. *Counsel's conduct, viewed as of the time of the actions taken, must have fallen outside of a wide range of reasonable*

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[18] According to Daniels, "I wanted the [c]ourt to know . . . that there was some evidence that could be put on but that [Loden] elected not to do it[,]" and "I was hoping to impress the [j]udge with . . . some of the good things Loden had done and some of the bad things that may have prompted him doing what he did."

[19] *See* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> *professional assistance.*[20] The *attorney's actions are strongly presumed to have fallen within that range,* and a court must examine counsel's conduct without the use of judicial hindsight.[21] *Secondly,* a defendant must show that the *deficient performance was prejudicial,* that is, that there is *a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.* A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Wiley v. State, 517 So. 2d 1373, 1378 (Miss. 1987) (emphasis added).

(A) Trial counsel provided ineffective assistance by failing to investigate and present available mitigation evidence.

¶ 16. Loden argues that:

> [t]he State attempts to blur an important distinction between Daniels and Johnstone's failure to *present* mitigation evidence at the

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[20] "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." ***Strickland***, 466 U.S. at 688.

[21] A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Byrom v. State***, 927 So. 2d 709, 714 (Miss. 2006) (quoting ***Stringer v. State***, 454 So. 2d 468, 477 (Miss. 1984)).

> sentencing hearing, and their failure to *investigate* mitigation evidence before the hearing. Defense counsel cannot "latch-on" to a client's instruction not to present mitigation evidence to justify their prior failure to investigate mitigating evidence.

(Emphasis in original.) We recognize that there is a distinction between the investigation and the presentation of mitigation evidence. *See* ***Wood v. Quarterman***, 491 F.3d 196, 203 n.7 (5th Cir. 2007). However, this Court previously has found no ineffective assistance of counsel with respect to either the investigation *or* the presentation of mitigation evidence when counsel is specifically instructed not to present mitigation evidence. *See* ***Bishop v. State***, 882 So. 2d 135, 143-46 (Miss. 2004).

¶ 17. In ***Bishop***, the defendant expressly declined to offer any mitigating facts or circumstances in sentencing. *See* ***id.*** at 143-44. After being sentenced to death, Bishop argued on appeal that "there was an abundance of relevant, significant mitigating evidence which could have been obtained from his family members, but his counsel failed to interview them." ***Id.*** at 143. Regarding the *presentation* of mitigating evidence, this Court held that:

> Bishop has included the affidavits of his mother, other family members, and his ex-wife to support his argument. However, *the quantity and quality of possible mitigation evidence is irrelevant based on Bishop's instructions to his defense attorneys. Bishop's*

> *counsel did all that they could, within the limitations placed on them by Bishop. Witnesses were not called, and mitigation evidence was not presented pursuant to Bishop's specific instructions. Because defense counsel acted in accord with Bishop's instructions, their performance was not deficient.*

Id. at 144-45 (emphasis added). *See also* ***Wood***, 491 F.3d at 203 ("[n]either the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence. In fact, this court has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions."); ***Dowthitt v. Johnson***, 230 F.3d 733, 748 (5th Cir. 2000); ***Clark v. Johnson***, 227 F.3d 273, 283-84 (5th Cir. 2000). As to the *investigation* of mitigating evidence, this Court concluded that:

> Bishop "has not submitted sufficient evidence of a breach of the duty of counsel to investigate and present mitigation evidence as described by the United States Supreme Court in *Wiggins v. Smith*[, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)]." ***Simmons v. State***, 869 So. 2d 995, 1004 (Miss. 2004). *Finally, even if additional mitigation evidence had been discovered, pursuant to Bishop's instructions, it could not be presented during the sentencing phase of the trial. Bishop cannot show that counsels'*

> *performance was deficient or that such deficiency prejudiced him.*

Bishop, 882 So. 2d at 146 (emphasis added). *See also* ***Schriro v. Landrigan***, 550 U.S. 465, 478, 127 S. Ct. 1933, 1942, 167 L. Ed. 2d 836 (2007) ("[I]t was not objectively unreasonable for [the Arizona postconviction court] to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish ***Strickland*** prejudice based on his counsel's failure to investigate further possible mitigating evidence.").

¶ 18. As Loden waived presentation of mitigation evidence in sentencing, "defense counsel act[ing] in accord with Loden's instructions . . . was not deficient." ***Bishop***, 882 So. 2d at 145. Likewise, Loden's investigation argument is without merit because "even if additional mitigation evidence had been discovered, pursuant to [Loden's] instructions, it could not be presented during the sentencing phase of the trial." ***Id.*** at 146. As such, Loden "cannot show that counsel's performance was deficient or that such deficiency prejudiced[[22]] him." ***Id.*** Accordingly, Loden fails to prove that he is entitled to any relief on this issue. However, even assuming *arguendo* that Loden's instruction not to present mitigating evidence is not case-dispositive for purposes of defense counsel's prior

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[22] With respect to mitigation evidence, "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." ***Wiggins***, 539 U.S. at 534.

mitigation investigation, this Court further concludes that such mitigation investigation was not deficient.

¶ 19. According to Loden's 2008 affidavit:

> [i]f my attorneys had conducted a thorough mitigation investigation and properly advised me about the mitigation case that could be presented, I would have instructed them to present mitigation evidence on my behalf.
>
> Had I been properly advised, I would have also instructed my attorneys to contact and ask my friends, family and military colleagues to testify on my behalf in the course of a mitigation presentation.

By contrast, Daniels's 2003 affidavit states that "I conducted extensive investigation into the facts of the case, and into mitigation factors, which included interviews with my client, military personnel, his family and friends."

¶ 20. In his present petition, Loden places great weight upon statements from Johnstone's 2008 affidavit.[23] That affidavit provides that after the circuit court's ruling on the "Ex Parte Motion for Funds for Expert Assistance in the Field of Mitigation Investigation," Johnstone "did not personally interview any mitigation witnesses, and . . . did not personally conduct a 'mitigation' investigation." Johnstone's affidavit

[23] This affidavit initially was prepared by Loden's present counsel, Mark R. McDonald.

further states that on September 19, 2001, "*we did not have a mitigation case to present because there had not been any mitigation investigation.*"[24] (Emphasis added.) In response to Johnstone's 2008 affidavit,[25] Daniels filed a 2009 affidavit providing that:

> [r]egarding mitigation, our Motion for Funds to Hire a Mitigation Expert was denied by the [c]ourt, I believe, in lieu of our psychological expert. However, I personally interviewed [Loden's] mother and his sister regarding possible mitigation should we have needed it.
>
> I also spoke personally with a Marine liason officer who traveled to my office in Tupelo,

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[24] Subsequently, both Johnstone and Daniels expounded on the content of the affidavit. According to Johnstone, "I think the true meaning would have been *I did not do any mitigation . . . , Daniels was pretty much in charge of that*[;]" that "Daniels certainly could have talked to . . . people that I do not recall that he discussed with me[;]" and that "[e]ssentially *what I was talking about was an expert to testify in the field of mitigation* and . . . the real meaning of that statement is that in my opinion . . . the expert . . . was needed to flush out that mitigation. . . . *Certainly we had some evidence.*" (Emphasis added.) Daniels stated, "I'm guessing probably what [Johnstone] meant was that *there was no formal mitigation investigation done.* We requested a mitigation expert . . . that was denied by the [c]ourt, and so in that sense there was no formal mitigation presentation prepared." (Emphasis added.)

[25] According to Daniels, Johnstone "said there was no mitigation investigation done, . . . and I didn't feel like that was entirely correct. And I didn't want the Court to be misled."

> Mississippi to talk with me about [Loden's] military situation and background.
>
> It was my opinion that *evidence of [Loden's] traumatic early childhood and his good military background would not have been insubstantial if offered in mitigation. However, [Loden] elected not to go to trial, and not to put on any mitigation evidence.*

(Emphasis added.)

¶ 21. Johnstone's 2008 affidavit states that:

> I first met with Loden on July 6, 2000 for about one to one and a half hours. . . . [D]uring that initial meeting Loden told me that . . . he had been a Marine since 1982 and had performed well with many promotions over the years; he had been married twice before, but both those marriages ended because both wives had been unfaithful; . . . he fought in "Operation Desert Storm" from August 1990 to April 1991 where he was "first in and last out;" he saw a friend of his burned to death and couldn't do anything about it; . . . he was transferred in about 1995 to Virginia to serve as an instructor in the Marine Corps FAST ("Fleet Anti Terrorism Security Team") which Loden described as a prestigious and high pressure assignment; and more recently, he had been assigned to recruiting in Vicksburg, Mississippi, which also imposed pressures on Loden to make his recruiting goals every month. Loden told me that his parents were divorced when he was two; his mother

> thereafter abandoned him; his stepmother abused him as a boy; he had been sexually abused at church at a young age; he had been exposed to pornography at a young age; he was shuffled back and forth between his mother and father while growing up; his sister had attempted suicide as an adolescent; Loden himself had attempted suicide several times; and his father died when he was 16. Regarding the night of Ms. Gray's death, Loden told me that he had spoken to his wife that evening via cell phone, and that he had been drinking.

According to Johnstone, this initial interview gave him "a lot of leads to work with," and he subsequently shared this information with Daniels. Thereafter, however, while Loden did not expressly discourage mitigation investigation, he was reluctant to discuss either the underlying facts of the case, the development of mitigation evidence (e.g., the alleged incident of sexual abuse), or the prospect of testifying.

¶ 22. According to Daniels, court-appointed criminal defense investigator Herb Wells assisted him in the mitigation investigation.[26] Daniels also gathered mitigation evidence regarding Loden's childhood, family background, claim of past sexual abuse,[27] military experience, and the possibility of psychological issues

[26] Daniels stated that the investigation performed by Wells "was inclusive" of mitigation investigation.

[27] No one was able to provide Daniels with the name of the alleged offending individual.

arising from that military experience,[28] through interviews with Loden's mother, grandmother, sister, and aunt.[29] Daniels states that he intended to subpoena each of these individuals as witnesses if the matter had proceeded to trial.[30] Furthermore, Daniels spoke with Loden and Major Gregory L. Chaney, a Marine liason officer, about Loden's "exemplary military service." During his conversation with Major Chaney, Daniels "may have talked to him about the possibility of him testifying. . . ." Additionally, Daniels states that "some of the mitigating evidence came by way of just a general talking to witnesses and people that knew anything about [Loden] or anything about the case." In Daniels's estimation, "Loden would be the best mitigation witness we had because he could relate his experiences in the military, his experience [of] traumatic sexual abuse as a small child, and his mother and sister could testify to those facts as well."

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[28] Regarding additional investigation into post-traumatic stress disorder, Daniels stated that Loden "said there aren't any records of . . . my seeking psychological help or anything else as the result of his Gulf War experiences. So I mean, I took him at his word."

[29] However, Loden's mother and sister now maintain that they never had discussed such mitigation evidence with Daniels.

[30] Loden responds that "[a]t the time of [the] plea, trial was about three weeks away. Daniels' claim that he would have subpoenaed witnesses if Loden had not pleaded guilty is not credible or competent."

¶ 23. Loden now argues that:

> [i]f a lawyer does not conduct an adequate investigation into all potentially available areas of mitigation evidence that can be presented in the penalty phase, he will not have sufficient information to make informed decisions about trial strategy or how to advise his client; nor will the client have sufficient information "to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."

See Miss. R. Prof'l Conduct 1.4 cmt. Loden now offers that if defense counsel had conducted an adequate investigation:

> the [c]ircuit [j]udge or the jury would have heard that (1) Loden was suffering from Complex Post Traumatic Stress Disorder . . . and Disassociative Disorder; (2) his childhood was characterized by abandonment, instability and ongoing physical and sexual abuse; (3) on the night of the crime, Loden's wife had tormented Loden by boasting about her plans to sleep with a successful and well known attorney and law partner at the firm where she worked as a legal assistant; (4) he had a long history of depression and suicide attempts; (5) he had suffered further trauma during his service in the Marines, including his combat experience in the Gulf War; (6) he was heavily intoxicated at the time of the crime; and (7) despite all these hardships, Loden was a loving and caring grandson and

> father, had an exemplary military career, was a highly decorated veteran, and served as a mentor to younger Marines.

Loden contends that "but for counsel's complete failure to prepare a mitigation case, Loden would not have been sentenced to death."

¶ 24. Loden's health and military-history assertions are contradicted by Loden's military records and an affidavit of Major Chaney which states, "[t]he only discussion which [Daniels] and I had concerning [Loden's] service in the United States Marine Corps was my indicating to [Daniels] that I was surprised to see [Loden] charged with this crime because he had had a good record up to that time in the Marine Corps."

¶ 25. Regarding Loden's parenting abilities, Daniels stated that he "thought it best, strategically, to leave it alone[,]" as "part of the discovery was a lot of web sites that had been logged on to . . . on Loden's computer. And a lot of them were about incest and having sex with little children and men reciting episodes of sex with their daughters."

¶ 26. The State responds that:

> [t]he record shows . . . counsel had investigated the area of mitigation and was ready to present such evidence to the trial court had they been allowed to do so. This recorded colloquy appears to refute the affidavit of [Johnstone] . . . . Perhaps, Johnstone has forgotten what was stated to the trial court in

> the transcript or perhaps he did not personally do any mitigation investigation. It is clear from the transcript that [Daniels] had done an investigation into mitigation evidence and was ready to produce such evidence. Further, [Daniels] has furnished an affidavit regarding his representation of [Loden]. . . . Counsel was not ineffective because an investigation into mitigation was done. However, . . . this is not a question in this case because [Loden] instructed his attorneys that they were to put no case in mitigation on in his behalf. In addition[,] counsel were instructed they were not to cross-examine any of the state's witnesses or object to any exhibits.

¶ 27. Defense counsel had an "obligation to conduct a thorough investigation of the defendant's background." ***Porter v. McCollum***, ___ U.S. ___, 130 S. Ct. 447, 452-53 (2009) (quoting ***Williams v. Taylor***, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). However, there is a strong presumption that such investigation was within the "wide range of reasonable professional assistance." ***Wiley***, 517 So. 2d at 1378. Moreover, this assessment "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Byrom***, 927 So. 2d at 714 (quoting ***Stringer***, 454 So. 2d at 477).

¶ 28. Evaluating defense counsel's conduct from their perspective "at the time" is of particular import in the case *sub judice*. ***Id.*** This is because trial was scheduled for October 8, 2001, seventeen days *after* Loden pleaded guilty on September 21, 2001. No proof has been presented that defense counsel quit preparing for trial prior to Loden's pleading guilty and instructing his attorneys not to prepare for trial or present evidence on his behalf. Daniels testified that he intended to subpoena Loden's mother, grandmother, sister, and aunt as witnesses, had the matter proceeded to trial. Furthermore, the investigation conducted by Daniels up to that point had been significant. *See* paragraph 22, *supra*. Additionally, Wells was engaged in mitigation investigation on behalf of defense counsel, and separate psychiatric examinations of Loden had been conducted by the Mississippi State Hospital and Dr. O'Brien. In sum, the mitigation investigation already conducted by Loden's defense counsel until they were told to stand down, presents a stark contrast to the negligible mitigation investigation efforts by defense counsel in ***Wiggins*** and ***Porter***.

¶ 29. ***Wiggins*** and ***Porter*** are further distinguishable by the fact that they did not involve defendants who opposed the presentation of mitigation evidence. While Loden cites ***Blanco v. Singletary***, 943 F.2d 1477 (11th Cir. 1991), as an analogous case in which defense counsel was still found to have engaged in deficient mitigation investigation despite the defendant's instruction not to present mitigating evidence,

that case is likewise distinguishable insofar as there was a jury verdict in the guilt phase, no statement by defense counsel of the evidence that would have been presented in mitigation, and no psychiatric examination of the defendant at any point. *See* ***id.*** In ***Wiggins***, the United States Supreme Court found defense counsel's mitigation investigation to constitute deficient performance, as it was limited to obtaining a presentence investigation report and Department of Social Services records "documenting petitioner's various placements in the State's foster care system." ***Wiggins***, 539 U.S. at 523, 533. In *Porter*, defense counsel was for the first time "represent[ing] a defendant during a penalty-phase proceeding. At the postconviction hearing, he testified that he had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military services records or interview any members of Porter's family." ***Porter***, 130 S. Ct. at 453. Finally, the information which Loden asserts should have been presented, *see* paragraph 23, *supra*, is not significantly greater than that which was actually before the circuit judge despite Loden's insistence that no mitigation evidence be presented. Specifically, Daniels's brief summary of the mitigation evidence which would have been presented, *see* footnote 4, *supra*, the summary report of the forensic mental evaluation of Loden by the Mississippi State Hospital, and Dr. O'Brien's report collectively addressed nearly every subject deemed pertinent by Loden. Accordingly, on this basis as well, Loden fails to prove that he is entitled to any relief on this issue.

(B) Trial counsel was ineffective in advising Loden to waive jury sentencing.

¶ 30. The "Waiver of Jury for Trial and Sentencing" signed by Loden on September 21, 2001, provided that:

> I understand that I am entitled to have a sentencing hearing or proceeding on the Capital Murder Count of the Indictment . . . before a jury empaneled for the purpose of determining the sentence I shall receive, pursuant to Section 99-19-101 of the Mississippi Code of 1972, as amended. *I hereby expressly waive my right to a jury for sentencing in this cause* and hereby agree that [Circuit Judge Gardner] may sentence me in this matter without a jury after a sentencing hearing without a jury pursuant to said Section 99-19-101.

(Emphasis added.) The "Waiver of Sentencing Jury" signed by Loden on September 21, 2001, stated that "I understand the [c]ourt has the discretion to sentence me to the death penalty . . . ." The sentencing hearing reflects the following colloquy:

> Q. Once again, *do you understand that you have a constitutional right and a statutory right under the law of the State of Mississippi to have a jury* decide first of all your guilt and innocence on the charge of capital murder and *in phase two to determine the punishment that is to be imposed?*

> A. I understand I had it, and *I understand I waived it* . . . .
>
> . . .
>
> Q. Do you understand that on your plea of guilty to capital murder and the other charges in this indictment it is possible that I will, acting pursuant to the waiver, impose the death penalty in this case? Do you understand that?
>
> A. I understand that fully . . . .

(Emphasis added.) Finally, the "Sentencing Order" of the circuit court stated that "[t]he [c]ourt . . . examined [Loden] concerning his understanding of his right to have a jury fix the punishment to be imposed . . . in the event he was found guilty of Capital Murder . . . ."

¶ 31. Loden argues "it was entirely unreasonable for [defense counsel] to advise Loden to waive jury sentencing . . . in light of Judge Gardner's capital sentencing record." Loden's argument is dubious, for it lacks credibility when compared to his statements to his mental health expert, Dr. O'Brien, that he preferred death over life and that he would "like to plead so that he will receive the death penalty." *See* paragraph 4, *supra*. Now, Loden unpersuasively argues that defense counsel "should have advised [him] that if he . . . waived jury sentencing, he would almost undoubtedly receive a death sentence from Judge Gardner . . . ." Loden now asks this Court to assume that "[i]t is reasonably probable that at least one

juror would have concluded that the aggravating factors did not outweigh the mitigating factors if a full portrait of Loden's circumstances [had] been presented."

¶ 32. The State responds that "this claim is simply an extension and a replay of what [Loden] presented to this Court in the post-conviction appeal regarding the entry of the guilty plea." *See* ***Loden***, 971 So. 2d at 572-74. Specifically, "[t]he circuit court found that petitioner's waiver of the sentencing jury was knowing, intelligent and voluntary. [Loden] has presented nothing to this Court that indicates that [Loden] did not knowingly, intelligently, voluntarily waive the sentencing jury in this case."

¶ 33. The record is replete with evidence beyond all doubt that Loden knowingly, intelligently, and voluntarily waived jury sentencing. *See* paragraph 30, *supra*. Moreover, in order to prove that the advice given to Loden constituted deficient performance, this Court first would have to determine the nature of that advice. Loden's affidavit fails to provide any details of his discussion with defense counsel regarding the waiver of jury sentencing. Absent the details of such advice, the deficiency thereof cannot be determined. Finally, Loden's statement to Dr. O'Brien, which has not been repudiated, contradicts this claim of error. Accordingly, Loden fails to prove that he is entitled to any relief on this issue.

(C) Trial counsel provided ineffective assistance of counsel by failing to object [to] and cross-examine witnesses during the sentencing phase and [by] stipulating to the State psychiatric report.

¶ 34. Loden "adamant[ly]" advised defense counsel that he did not want them to cross-examine witnesses for the State or object to the introduction of evidence presented by the State. As Loden stated, "I'm just doing what I feel I need to do."

¶ 35. In spite of the clarity of his then-declared position, Loden now argues that the Mississippi State Hospital report contained "a number of biased, disparaging and unsupported allegations[,]"[31] upon which defense counsel had "an obligation . . . to discuss the downside of admission so that Loden could have made a somewhat informed decision." The State responds that "[o]n top of the fact that the [Mississippi State Hospital] examination was conducted at the behest of

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[31] According to Loden:

> [t]hese include an unsupported and extremely prejudicial allegation attributed to police officers that Loden may have committed prior similar murders in Louisiana and Mississippi, the tainted and unsupported diagnoses of Malingering and Antisocial Personality Disorder, and the attempt by the doctors and the social worker to turn cattle slaughtering on his grandfather's farm into sadistic abuse of animals.

We note that the record does not reveal that the circuit judge was ever presented with the full Mississippi State Hospital report at issue, as the record contains only a summary report which does not include the subject allegations.

[Loden], . . . [Loden] instructed counsel not to object to exhibits offered by the State during the sentencing hearing [and] they cannot be held . . . ineffective in doing what he instructed them . . . ."

¶ 36. The State's position is in accord with our law. "Because defense counsel acted in accord with [Loden's] instructions, their performance was not deficient." ***Bishop***, 882 So. 2d at 145. *See also* ***Strickland***, 466 U.S. at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Accordingly, Loden fails to prove that he is entitled to any relief on this issue.

(D) Trial counsel provided ineffective assistance of counsel through their wholly inadequate litigation of the Motion for Funds for Expert Mitigation Assistance.

¶ 37. Issue I in Loden's direct appeal addressed "[w]hether Loden was improperly denied funds to retain the assistance of a forensic social worker to investigate and present relevant mitigating factors." ***Loden***, 971 So. 2d at 562. This Court concluded that:

> [w]hile "American Bar Association standards and the like . . . are guides to determining what is reasonable . . . *they are only guides.*" ***Strickland***[, 466 U.S. at 688] (emphasis added). *See also* ***Wiggins***[, 539 U.S. at 524]. Furthermore, "[t]he State does not have a constitutional obligation to provide indigent defendants with the costs of expert assistance

> upon every demand." [***Thorson v. State***, 895 So. 2d 85, 122 (Miss. 2004)]. The lower court did not err in concluding that [Mooers's] redundant services were not justified. This Court finds there is no evidence to support that the learned circuit judge abused his discretion in so finding.

Loden, 971 So. 2d at 564. In an accompanying footnote, this Court added that "[a]lternatively, this Court agrees with the State that this issue is moot because Loden chose to present no mitigation evidence to the circuit court." ***Id.*** at 564 n.15.

¶ 38. Notwithstanding this Court's earlier ruling, Loden now argues that:

> [h]ad counsel initiated their investigation into Loden's social, mental, military and employment history from the moment they were appointed as Loden's counsel—as they were required to do by the prevailing norms—they would have been able to present "concrete reasons" for requiring assistance of Dr. Mooers. In addition, had counsel adequately researched the law on the need for a mitigation expert and provided more compelling authority to the court, the court would have (and certainly should have) granted the motion.

The State responds that Loden:

> now wants to relitigate this as a claim of ineffective assistance of counsel for counsel's failure to better argue in the trial court for

> such an expert. Because this Court has found no error in the underlying substantive claim [Loden] cannot demonstrate prejudice and therefore cannot demonstrate ineffective assistance of counsel under ***Strickland*** . . . .
>
> This is simply . . . an extension of [Loden's] claim that counsel failed to properly investigate for mitigation evidence. Just as the substantive claim was held to be moot by the Court on direct appeal, the ineffective assistance of counsel claim is moot because [Loden] instructed counsel not to present any evidence in mitigation, not to cross-examine witnesses and not to object to any exhibits offered by the State.

¶ 39. The substantive issue underlying this ineffective-assistance-of-counsel claim was fully addressed on direct appeal. "Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*." ***Bishop***, 882 So. 2d at 149 (quoting ***Jackson v. State***, 860 So. 2d 653, 660-61 (Miss. 2003)). Moreover, as the underlying substantive issue was found both to be without merit and moot on account of Loden's decision not to present mitigation evidence (*see* ***Loden***, 971 So. 2d at 564 n.15), Loden cannot establish the requisite prejudice under ***Strickland*** to prove ineffective assistance of counsel. Accordingly, Loden fails to prove that he is entitled to any relief on this issue.

(E) Trial counsel provided ineffective assistance by providing erroneous advice to Loden.

¶ 40. Issue VII in Loden's first post-conviction-relief appeal addressed "[w]hether alleged erroneous advice of trial counsel prejudiced Loden by causing him to enter an involuntary guilty plea to capital murder." ***Loden***, 971 So. 2d at 562. This Court concluded that Loden's guilty plea was "knowing and voluntary[,]" and that his claim of ineffective assistance of counsel was "without merit," as defense counsel's performance was not deficient. *See* paragraph 6, *supra* (quoting ***Loden***, 971 So. 2d at 573-74).

¶ 41. Notwithstanding this Court's earlier ruling, Loden urges that this ineffective-assistance-of-counsel argument is not procedurally barred because Johnstone's 2008 affidavit and Daniels's 2009 affidavit constitute "evidence, not reasonably discoverable at the time of trial" (*see* Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Rev. 2007), which "provides an exception to any claimed procedural bar.").

¶ 42. Johnstone's 2008 affidavit provides, in pertinent part, that:

> Loden wanted to know whether, if he pleaded guilty, he could appeal, and in particular whether he could appeal from the [c]ircuit [c]ourt's adverse pre-trial rulings including the rulings on the suppression motions. I told Loden that if he *pleaded guilty* and was sentenced to death, the Mississippi Supreme Court *would review his sentence,* and that

> they would review everything that was in the record. I told Loden that I believed that (1) the rulings on the suppression motions, (2) the order denying the request for funds to hire a mitigation specialist, and (3) the use of Loden's wife Kat to induce Loden to talk with the police on June 30, 2000 *were issues that might be reviewed* that *were potentially viable.*

(Emphasis added.) In his subsequent deposition, Johnstone explained this statement to Loden's present counsel as follows:

> I believe the language reviewed that were potentially viable was language back and forth between you and I . . . on this affidavit. . . . *I told Loden that I did not know what the . . . Supreme Court or any other court . . . would review . . . in their automatic review should he get the death penalty.*
>
> . . .
>
> I knew the statute said that it would be an automatic review, and, therefore, I told him that rather than say they would review certain things or would not review certain things, I said, I do not know what they would review. . . . *[P]otentially viable is a term that I would say would mean I don't know whether they would review them or not.*
>
> *That meaning that they might review them or they might not, but that the direct appeal would not be available to him if he . . . plead guilty. Specifically he would be told that he*

> *could not appeal a . . . guilty plea.* ***That in order to*** *. . .* ***preserve for sure*** any of his appealable grounds, it's like Daniels said, ***he had to go to trial and have a jury verdict****.*

(Emphasis added.) Daniels's 2009 affidavit provides that:

> Loden asked me whether if he pleaded guilty to Capital Murder he could appeal his case. *I told him there would be no direct appeal* by us, but that the Mississippi Supreme Court would automatically review a sentence of death. I told him that we could not guarantee him exactly what the Court might do, or not do upon such review. ***I told [Loden] if he wanted to directly appeal*** *and assign particular grounds for reversal of his conviction,* ***that would be best served by going to trial.***

(Emphasis added.) Daniels's subsequent deposition testimony adds that:

> A. *. . .* ***The answer was always the same and unequivocal****, . . . if he plead guilty, he could not appeal his case.* And ***that if he wanted to appeal those issues that he was unhappy with what had been decided by the [c]ourt, he would need to go to trial****.*
>
> I did tell him that if the [j]udge gave him the death penalty or if a jury gave him the death penalty, that the Supreme Court would review his sentence. And *I'm aware that's one*

> *of the provisions that the Supreme Court makes is whether or not the evidence supports the [j]udge's findings.*
>
> . . .
>
> *[A]t no time did I ever tell him that he could appeal this or that the Supreme Court would reconsider those suppression issues or not.* Because I can't tell the Supreme Court what they're going to look at and not look at . . . ***he understood that there would be no appeal***.
>
> . . .
>
> Q. So what did you tell him that the Supreme Court was going to review?
>
> A. The [j]udge's finding, the [j]udge's sentence, whether or not evidence supported the sentence, whether or not there was a proper finding regarding the aggravators and mitigators, whether or not he killed, attempted to kill, whether legal [sic] force had been contemplated and those types of things. And he's a reasonably intelligent person. He understood all of that.

(Emphasis added.)

¶ 43. In light of the circuit court's and this Court's earlier denial of post-conviction relief, *see* paragraph 40, *supra*, this Court finds that this issue is procedurally barred. *See* Miss. Code Ann. § 99-39-23(6) (Rev. 2007) ([T]he circuit court "order dismissing the petitioner's motion or otherwise denying relief under

this article is a final judgment and shall be conclusive until reversed. It shall be a *bar to a second or successive motion* under this article.") (emphasis added); Miss. Code Ann. § 99-39-27(9) (Rev. 2007) ("[t]he dismissal or denial of an application under this section is a final judgment and shall be a *bar to a second or successive application* under this article.") (emphasis added). Mississippi Code Sections 99-39-23(6) and 99-39-27(9) provide exceptions to their respective procedural bars for "cases in which the petitioner can demonstrate . . . that he has *evidence, not reasonably discoverable at the time of trial,* which is of such nature that it would be *practically conclusive* that, if it had been introduced at trial, *it would have caused a different result in the conviction or sentence.*" Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Rev. 2007). As Loden was represented by new counsel when he filed his "Motion to Vacate Guilty Plea," he could have issued subpoenas for both Johnstone and Daniels and had them appear and testify at the post-conviction hearing. As such, the subject affidavits do not constitute "evidence, not reasonably discoverable at the time of trial . . . ." ***Id.***

¶ 44. However, with respect only to Daniels's 2009 affidavit, Loden contends that this is "evidence, not reasonably discoverable at the time of trial," ***id.***, because Daniels's 2003 affidavit stated "*I do not intend to ever disclose any information I gained during that representation to anyone.*" (Emphasis added.) Even assuming *arguendo* that Loden's contention is correct, this Court cannot conclude that such evidence

"would be practically conclusive that . . . it would have caused a different result in the conviction and sentence." ***Id.*** This Court previously emphasized that Loden's plea was "knowing and voluntary" because of his affirmative responses to Judge Gardner's queries regarding his guilty plea. *See* ***Loden***, 971 So. 2d at 573. As to Johnstone's 2003 affidavit statement that "I told Loden that this automatic review would be some sort of appeal but that was unclear to us which issues would be subject to review[,]" which is remarkably similar to the contested statement in Daniels's 2009 affidavit that "I told him that we could not guarantee him exactly what the Court might do, or not do upon such review[,]" this Court determined "a reasonable inference regarding Johnstone's affidavit on automatic review is that he was simply advising Loden to get all matters on the record because, while he was uncertain which specific issues this Court would address, he was certain that this Court would only address issues of record." ***Id.*** at 574 n.20. Therefore, Daniels's 2009 affidavit, additionally explained by his subsequent deposition testimony, does not lead this Court to conclude that "a different result" would have been "practically conclusive." Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Rev. 2007). In short, Daniels's 2009 affidavit is not "practically conclusive" for purposes of the circuit court's vacating Loden's guilty plea, and his deposition testimony is conclusive for the opposite, and is convincingly similar to Daniels's deposition testimony that erroneous advice was not given to Loden. Accordingly, Loden fails to prove that he is entitled to any relief on this issue.

(F) Trial counsel's delay in having Loden evaluated by an independent psychologist and failure to make adequate use of the psychologist amounted to ineffective assistance of counsel.

¶ 45. Dr. O'Brien's 2008 affidavit provided that "[b]ased on my observations at the time and the limited history that was given to me, I concluded that [Loden] was competent to stand trial and assist in his own defense." However, Dr. O'Brien stated that this conclusion and the remainder of his diagnosis would have been significantly different had he been provided with additional background information on Loden (e.g., "any military records, interviews of [Loden's] military colleagues, or even basic information about [Loden's] combat experience.").[32]

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[32] This Court has reviewed the military records exhibited in this appeal, which contain no evidence of mental-health issues or diagnosis of post-traumatic stress disorder ("PTSD"). Rather, those records are replete with positive comments regarding Loden's leadership, skills, abilities, intelligence, and insightfulness. For example, appraisals of Loden's professional character provided, *inter alia*, "[f]irst-rate leader, manager and organizer[;]" "[a] gifted leader he combines drive and patience to accomplish the mission with excellence[;]" "[d]etermined, loyal and aggressive! Initiative is strongest trait[;]" "the most intelligent staff noncommissioned officer I know[;]" "an imaginative and far-sighted thinker[;]" "[a]rchitect of the plan—then makes it happen with the desired results[;]" "[a] self-starter who[se] initiative is only surpassed by his imagination[;]" "INNOVATIVE and FLEXIBLE . . . .".

¶ 46. According to Loden, the information sources provided to Dr. O'Brien "were in no way sufficient for [him] to form a reliable clinical picture of Loden's mental state at the time of the crime, or potential mitigating factors in Loden's background." Specifically, Loden emphasizes that Dr. O'Brien:

> was not able to put Loden's mental condition in proper focus because he did not diagnose Loden with PTSD, did not connect Loden's problems with his experiences in childhood and during the Gulf War, and did not take into account or explain the possible significance of amnesia as a reflection of the extreme degree of mental disturbance Loden was suffering. A diagnosis of PTSD, developed while Loden was serving his country in the Marines, would have provided especially powerful mitigating evidence.

¶ 47. Loden's argument relates back to the lack of mitigation investigation argument in I(A), insofar as he claims that, because defense counsel failed to adequately investigate mitigation evidence, Dr. O'Brien failed to receive sufficient background material, and, as a result, Dr. O'Brien's report was prejudicially flawed. Fundamentally, Loden's argument is moot on account of his decision not to present mitigation evidence. As such, he cannot establish any prejudice resulting from defense counsel's alleged "failure to make adequate use of the psychologist . . . ." Accordingly, Loden fails to prove that he is entitled to any relief on this issue.

¶ 48. But even considered solely from a deficient-performance perspective, Loden's argument is without merit. On March 5, 2001, Loden filed a "Motion for Psychiatric Examination," requesting examination of Loden's "capacity . . . at the Mississippi State Hospital . . . ." Following an "Order for Mental Examination," the summary report of the Mississippi State Hospital was completed in June 2001. On July 16, 2001, Loden filed an "Ex Parte Motion for Funds to Secure Expert Assistance in the Field of Psychology," stating that:

> [b]ecause the report [of the Mississippi State Hospital] confirms that several factors taken together may have influenced [Loden's] mental state at the time of the alleged offenses, and because such factors are mitigating in nature, [Loden] needs to have these factors evaluated, for possible defense, or for mitigation, during any sentencing trial.

The circuit court granted Loden's motion for a *second* evaluation, to be performed by Dr. O'Brien. In short, Loden's allegedly ineffective defense counsel was able to secure a discretionary, second evaluation by Dr. O'Brien from the circuit court. *See* ***Byrom v. State***, 863 So. 2d 836, 852 (Miss. 2003) ("*Ake*[33] does not require that an indigent defendant be given funds to pay for the psychiatrist of his or her own choosing, even in cases where sanity is at issue."). Furthermore, a

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[33] *See* ***Ake v. Oklahoma***, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

review of Dr. O'Brien's report reflects that he was acquainted with Loden's family background and childhood, claim of sexual abuse, alleged history of substance abuse, military experience,[34] suicidal ideation, and personal experience on the evening of the crime. Possessing this information, Dr. O'Brien concluded, like the Mississippi State Hospital, that Loden "appears at the present time to be competent to stand trial and assist in his own defense." Under these circumstances, and given the strong presumption that defense counsel's actions fell within "a wide range of reasonable professional assistance[,]" ***Wiley***, 517 So. 2d at 1378, this Court cannot conclude that defense counsel's performance was deficient. On this basis as well, Loden fails to prove that he is entitled to any relief on this issue.

(G) Counsel provided constitutionally ineffective assistance of counsel by failing to effectively inspect the State's evidence and adequately cross-examine the State's witnesses during the suppression hearings.

¶ 49. Loden argues that "the police officers' account of the search was riddled with inconsistencies[,]" and that defense counsel's "failure to inquire into these

[34] For example, Dr. O'Brien's report provided that "[a]t times he hears the voice of his friend, 'Frank,' who was killed in 1991 during a missile attack. He describes times when he can 'still see it, smell it.' "

issues at the suppression hearing was not a tactical or strategic choice—it was simply ineffective representation." According to Loden, defense counsel "did nothing before, during or after the suppression hearing other than placate Loden by telling him he had no chance in front of Judge Gardner anyway and he's better off raising these issues on appeal." Loden's 2008 affidavit provides that:

> [i]f my trial attorneys had properly advised me I would have testified during the suppression hearing that (i) I observed [p]olice [o]fficers inside my van sometime before 11 A.M. on the day of my arrest, which I now know was before a warrant was issued for a search of my van; (ii) when I was arrested a [p]olice [o]fficer told me that they had seen the videotape which showed that they had searched my van before obtaining a warrant; and (iii) I provided a statement to the police even though I did not recall most of the events I described in my alleged confession.

¶ 50. Insofar as Loden raises this issue as a backdoor challenge to his purportedly "involuntary guilty plea," with no new evidence presented in support thereof, this Court concludes that it is a procedurally barred "second or successive motion . . . ." *See* paragraph 43, *supra* (citing Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Rev. 2007)). To the extent that this issue pertains directly to the performance of defense counsel at the suppression hearings, this Court likewise concludes that it is procedurally barred. The purpose of the Mississippi Uniform Post-Conviction

Collateral Relief Act "is to provide prisoners with a procedure, *limited in nature,* to review those objections, defenses, claims, questions, issues or errors *which in practical reality could not be or should not have been raised at trial or on direct appeal.*" Miss. Code Ann. § 99-39-3(2) (Rev. 2007) (emphasis added). Therefore:

> [i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. *Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceeding.*

Miss. R. App. P. 22(b) (emphasis added). *See also* Miss. Code Ann. § 99-39-21(1) (Rev. 2007) ("[f]ailure by a prisoner to raise . . . issues . . . either in fact or law which were capable of determination at trial and/or on direct appeal . . . shall constitute a waiver thereof and shall be procedurally barred . . . ."); Miss. R. App. P. 22(b) cmt. ("[u]nder this provision, issues such as claims of ineffective assistance of counsel for failure to object to evidence offered by the state or to argument by the state must be raised on direct appeal."). Loden was represented by new counsel on direct appeal and his first motion for post-conviction relief, and this issue was "based on facts fully apparent from the record[,]" Miss. R. App. P. 22(b), yet Loden failed to raise the suppression issue. As such,

he is procedurally barred from raising it now. *See* Miss. R. App. P. 22(b); Miss. Code Ann. § 99-39-21(1) (Rev. 2007). While Loden may assert that his failure to raise the suppression issue on direct appeal was dictated by the waiver-of-guilt-phase issues arising from his purportedly involuntary guilty plea, such an argument merely returns this Court to the improper backdoor challenge to that plea as referenced *supra*.

¶ 51. Additionally, Loden offers no explanation of how the suppression issues relate to sentencing, the requisite focal point of this Petition for Post-Conviction Relief. These suppression issues might have been pertinent during the guilt phase of trial had he not pleaded guilty, but Loden fails to explain how he was prejudiced in sentencing by defense counsel's performance during the suppression hearings. Accordingly, Loden fails to prove that he is entitled to any relief on this issue, as it is both procedurally barred and without merit.

(H) The totality of the circumstances demonstrates that constitutionally ineffective assistance of counsel resulted in extreme prejudice to Loden.

¶ 52. Loden, in "catch-all" form, argues that:

> [i]f Daniels and Johnstone had performed adequately, then Loden would have faced an entirely different situation. He would have had a line of fourteen witnesses in mitigation, ready, willing, and able to testify to Loden's tumultuous family history marred by

physical, emotional, and sexual abuse, and to his honorable and outstanding service to the Nation as a Marine serving in Operation Desert Storm. He would have had a mitigation investigator to provide experienced assistance to his trial counsel, who were in any case obliged to conduct a thorough mitigation investigation on their own. He would have had a properly-informed psychological expert in Dr. O'Brien, who could comment meaningfully on his suffering from PTSD and other combat-related trauma having been provided with his military records. He would have been properly advised on the consequences of pleading guilty and the inability to appeal the suppression rulings thereafter. He would have elected to try his mitigation case to a jury of twelve—knowing that he need only convince one of them to spare his life—instead of agreeing to be sentenced by a judge with a well-established record of handing down death sentences. Most importantly, he would have had legitimate hope that at least one of the twelve sentencing jurors would have found his life history sufficiently compelling to spare him the death penalty.[35]

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[35] In support of this ineffective-assistance-of-counsel argument, Loden includes the affidavit of attorney Sean D. O'Brien whose "primary area of criminal practice has involved the trial, appeal and post-conviction representation of individuals in capital cases." O'Brien concludes that:

> [i]t is my professional judgment that [Loden's] trial defense team failed to perform consistently with the

(Continued on following page)

¶ 53. "In order for there to be a cumulative effect of errors, there must first be errors." ***Walker v. State***, 863 So. 2d 1, 23 (Miss. 2003). *See also* ***Miller v. Johnson***, 200 F.3d 274, 286 n.6 (5th Cir. 2000) ("Miller has not demonstrated error by trial counsel; thus, by definition, Miller has not demonstrated that cumulative error of counsel deprived him of a fair trial."). As this Court has concluded that Loden fails to prove that he is entitled to any relief on each of his ineffective-assistance-of-counsel claims individually, this Court likewise concludes that Loden fails to prove that he is entitled to any relief on such claims cumulatively.

ABA guidelines on the appointment and performance of counsel in capital cases as well as with the supplemental guidelines on the defense mitigation function in capital cases, and that their performance fell below the constitutional minimum standard of care.

This Court will not consider O'Brien's affidavit as:

> it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

Johnson v. Quarterman, 306 Fed. Appx. 116, 129 (5th Cir. 2009) (quoting ***Provenzano v. Singletary***, 148 F.3d 1327, 1332 (11th Cir. 1998)).

II. Apart from the ineffectiveness of Loden's counsel, his guilty plea was not knowing, voluntary or intelligent.

¶ 54. Loden argues that his guilty plea:

> was neither knowing, nor intelligent nor voluntary for a number of reasons. First, counsel gave erroneous advice to Loden in telling him that he could appeal the denial of certain pre-trial motions and that all other issues in his case would remain subject to appeal after a plea of guilty if he was sentenced to death. Second, the numerous instances of counsel's ineffectiveness . . . contributed to Loden being uninformed and, as a result, unaware of the defense and mitigation options available to him. . . . Third, counsel, the court and the prosecution all ignored Loden's psychological state and its impact on the voluntariness of his plea.[36]

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[36] Regarding this third reason, Loden alleges that:

> Daniels and Johnstone did not ask Loden any questions about his motivation to plea[d] and waive mitigation, made no attempt either privately or on the record to dissuade Loden from waiving all his rights and made no attempt to explain to the [c]ourt or place on the record the rationale behind such an unusual decision. The [c]ourt, like counsel, was well aware of Loden's evaluation by two psychiatrists and of his repeated suicide attempts, yet did not question the competence of this radical action or feel the need to satisfy itself of its voluntariness.

¶ 55. Issue VII in Loden's first post-conviction appeal addressed "[w]hether alleged erroneous advice of trial counsel prejudiced Loden by causing him to enter an involuntary guilty plea to capital murder." ***Loden***, 971 So. 2d at 562. This Court concluded that Loden's guilty plea was "knowing and voluntary." *See* paragraph 6, *supra* (quoting ***Loden***, 971 So. 2d at 573). Therefore, as discussed under I(E), *supra*, Loden's present claim regarding the voluntariness of his guilty plea is procedurally barred.[37] *See* paragraph 43, *supra* (citing Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Rev. 2007)). Furthermore, even if Daniels's 2009 affidavit is deemed "evidence, not reasonably discoverable at the time of trial," ***id.***, this Court previously has concluded that such evidence would not "be practically conclusive that . . . it would have caused a different result," i.e., the circuit court vacating Loden's guilty plea, especially when compared to his deposition testimony. *See* paragraph 44, *supra* (quoting Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Rev. 2007)). Accordingly, Loden fails to prove that he is entitled to any relief on this ground.

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[37] This Court would add that Loden's argument that "the court and the prosecution all ignored [his] psychological state and its impact on the voluntariness of his plea[,]" is also procedurally barred pursuant to Mississippi Code Section 99-39-21(2).

III. Loden was denied effective assistance of appellate counsel.

¶ 56. Loden relied upon De Gruy of the Mississippi Office of Capital Defense Counsel "to prepare a petition for post-conviction relief to challenge his guilty plea."[38] Loden argues that he "has presented extensive evidence to this Court in support of Loden's claims that his plea was not knowing, voluntary and intelligent, that was not investigated or presented by Loden's counsel in his direct appeal." Specifically, Loden refers to "[t]he vast additional evidence presented in this [P]etition regarding Loden's background, psychological history and his [c]ounsel's numerous instances of ineffectiveness . . . ." According to Loden, "appellate counsel [De Gruy] neglected to fully develop evidence that Loden pled guilty with the understanding that the issues he attempted to address with trial counsel . . . could still be reviewed by the Supreme Court after Loden's entry of a guilty plea." In Loden's estimation, "[h]ad appellate counsel presented the evidence contained in the instant Petition and informed the [c]ourt of all factors surrounding Loden's decision to plea," then "there is at least a reasonable probability that the [c]ourt would have

[38] According to De Gruy, he did not include information regarding Loden's mental state or social history in connection with this challenge to the guilty plea because he believed such claims "would probably have to be raised in a post-conviction petition challenging the sentence . . . ."

altered its credibility ruling and [Loden's] Motion to Vacate his guilty plea would have been successful."

¶ 57. Throughout his argument on this ground, Loden ignores the circuit court's specific reasoning in finding that his guilty plea was voluntary. At the sentencing hearing, the circuit court was presented with the summary report of the forensic mental evaluation of Loden by the Mississippi State Hospital and the report of Dr. O'Brien. The summary report of the Mississippi State Hospital provided that Loden has "the sufficient present ability to consult with his attorney with reasonable degree of rational understanding in the preparation of his defense" and "the capacity knowingly, intelligently, and voluntarily to waive or assert his constitutional rights . . . ." Dr. O'Brien's report provided that Loden "appears at the present time to be competent to stand trial and assist in his own defense." Thereafter, Loden pleaded guilty following extensive inquiry by the circuit judge into the nature of that plea. *See* paragraph 4, *supra.* In its "Order and Opinion" dismissing Loden's motion for post-conviction relief, the circuit court stated, in pertinent part, that:

> at the guilt plea hearing, the [c]ourt advised [Loden] of his rights. *[Loden] acknowledged that he was giving up his right to appeal by pleading guilty to the charge.*
>
> . . .
>
> [Loden] was informed in his lengthy guilty plea hearing of the important constitutional

> rights that he was waiving by entering a plea of guilty. In addition, [Loden] stated under oath at the plea hearing that he had been fully advised of all aspects of his case by his counsel, including the nature and elements of the charge. Subsequently, at the guilty plea hearing, the [c]ourt advised [Loden] of the charges against him and asked him if he understood that charge, to which he replied in the affirmative. . . . *The [c]ourt fully advised [Loden] that he was waiving his right to appeal. The [c]ourt then found that [Loden] had entered a knowing and voluntary plea.*

(Emphasis added.) In short, the circuit court found that "[t]he record speaks for itself." There is "a strong presumption of validity of anyone's statement under oath." ***Holt v. State***, 650 So. 2d 1267, 1270 (Miss. 1994). Moreover, this Court has held "that when the trial court questions the defendant and explains his rights and the effects and consequences of the plea on the record, the plea is rendered voluntary despite advice given to the defendant by his attorney." ***Harris v. State***, 806 So. 2d 1127, 1130 (Miss. 2002).

¶ 58. On these bases, this Court concludes that the submissions by Loden are woefully insufficient to rise to the level necessary to invalidate his express plea-colloquy statements to the circuit judge, so as to create a "reasonable probability" that his "Motion to Vacate Guilty Plea" would have been granted. Accordingly, Loden fails to prove that he is entitled to any relief on this ground.

IV. The State's use of the expert psychiatric report from Dr. McMichael violates the Eighth Amendment's reliability requirement, the Sixth Amendment's confrontation clause, and due process.

¶ 59. Loden asserts that the "disparaging, unsupported allegations of criminal activity and general bad character" in the full Mississippi State Hospital report[39] "tainted the reliability and accuracy of the sentencing in violation of the Eighth Amendment[;]" violated the Confrontation Clause of the Sixth Amendment because he had "no opportunity to cross-examine the conclusions of the state doctors and the highly damaging hearsay statements in the report[;]" and generally deprived him of due process.

¶ 60. This Court concludes that the flaws in Loden's argument are myriad. Addressing these flaws without assigning order of import, we first observe, as noted earlier, *see* footnote 31, *supra*, the record does not indicate that the circuit judge was presented with the full Mississippi State Hospital report at issue, but only with a summary report which does not include the complained-of allegations. Second, as Loden was represented by new counsel on appeal, and the issue of objection to evidence at the sentencing hearing is "based on facts fully apparent from the record[,]" he is procedurally barred from presenting it for the first time in this Petition for Post-Conviction Relief. *See*

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[39] Regarding such allegations, *see* footnote 31, *supra.*

Miss. R. App. P. 22(b); Miss. Code Ann. § 99-39-21(1) (Rev. 2007). Third, Loden's claim is altogether duplicitous given his instruction to defense counsel not to cross-examine any of the State's witnesses or object to the introduction of evidence presented by the State at sentencing. Finally, this Court rejects the implication that these contextually benign statements within the full Mississippi State Hospital report led to his death sentence. The evidence considered by the circuit court in imposing that sentence included a graphic videotape of Loden's repeated brutal raping, taunting, and sexually abusing of a sixteen-year-old child before he murdered her. On any of the aforementioned bases, Loden fails to prove that he is entitled to any relief on this ground.

V. Loden's waiver of jury for sentencing was not voluntary, knowing and intelligent.

¶ 61. Loden argues:

> [f]irst, trial counsel did not do a mitigation investigation and did not inform Loden what kind of mitigation case they could present. By failing to prepare a mitigation case, they undermined the value of the right to a jury for sentencing. If Loden had no case, it did not matter before whom he would appear for sentencing.
>
> . . .
>
> Second, during Loden's plea, the [c]ircuit [c]ourt [j]udge erroneously informed Loden

> that "by entering a plea of guilty to this charge, or the capital murder case, you are waiving the jury making those determinations, as to the guilt *and* as to the punishment to be imposed." . . . This was particularly confusing given that Loden received no information about the sentencing phase from his counsel.
>
> . . .
>
> Third, Loden's mental and emotional condition . . . barred an accurate understanding of the consequences of a decision to waive the jury for sentencing.
>
> . . .
>
> Finally, Loden's decision . . . was based on the erroneous advice of defense counsel that, if Loden were sentenced to death, all of the [c]ircuit [c]ourt's rulings would be reviewed by the Mississippi Supreme Court notwithstanding his guilty plea. . . . Had he been properly advised . . . Loden would not have waived the jury for sentencing.

(Emphasis in original.)

¶ 62. This Court notes that Loden's first argument regarding mitigation investigation was fully addressed in I(A), *supra*, and deemed to be without merit. Likewise, Loden's fourth argument regarding his guilty plea was fully addressed in I(E) and II, *supra*, and found to be without merit. Loden's third argument regarding his "mental and emotional condition" at the time of sentencing was addressed by this Court in paragraph 57, *supra*, noting that the summary report

of the forensic mental evaluation of Loden by the Mississippi State Hospital and the report of Dr. O'Brien both indicated he was capable of understanding the implications of his decision to waive jury sentencing.[40] Finally, Loden's second argument fails to take into account the repeated opportunities in which he was apprised of the implications of waiving jury sentencing, yet proceeded nonetheless. *See* paragraph 30, *supra*. For instance, the sentencing hearing reflects that, in response to a query regarding his constitutional and statutory right to jury sentencing, Loden responded "I understand I had it, and I understand I waived it . . . ." As with his guilty plea, the record clearly establishes that Loden knowingly, intelligently, and voluntarily waived jury sentencing. Accordingly, Loden fails to prove that he is entitled to any relief on this ground.

VI. Loden has been denied his Fourteenth Amendment due process right to fully develop and present the evidence in his case.

(A)

¶ 63. On September 4, 2008, this Court entered a *sua sponte* Order directing that the following items in the direct-appeal case file be placed under seal:

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[40] Filings before this Court of Loden's military records contain rave reviews of his performance sufficient to satisfy this Court that, according to the United States Marine Corps, Loden was well-regarded mentally and emotionally.

"State's [E]xhibit # 7 (original video) and the envelope labeled "State v. Thomas E. Loden, Jr., . . . Original Photos." The Order added that defense counsel and the State could inspect such items in the manner outlined in an August 22, 2008, Order, so as "to preserve the integrity of the evidence." On September 29, 2008, Loden filed a "Motion to Compel" in the circuit court seeking:

> that the [c]ourt compel production of the complete files of the District Attorney and the Mississippi Bureau of Investigation, including but not limited to, clear color copies of all photographs including all autopsy photographs and other photographs depicting the deceased's body and a copy of [Loden's] statement to law enforcement.

Following a hearing, the circuit court denied Loden's motion. On November 25, 2008, Loden filed a "Petition for Writ of Mandamus" requesting that this Court:

> vacate the ruling of the Circuit Court of Itawamba County and grant [Loden's] experts access to inspect all the evidence from the District Attorney's files from *State of Mississippi v. Thomas Loden Jr.*, including autopsy photographs or any photographs depicting the deceased body and direct the State to provide defense counsel with color photocopies of the same.

The December 4, 2008, Order of this Court denied Loden's "Petition for Writ of Mandamus." On June 24,

2009, this Court entered an Order providing that Loden was "granted leave to take the oral depositions of [Johnstone] and [Daniels] on or before July 10, 2009." On July 9, 2009, Johnstone and Daniels were deposed.

¶ 64. Loden argues that "the State's *denial of access to the evidence* necessary to conduct a full and complete investigation of the facts of Loden's case has violated Loden's due process rights and prevented the presentation of all potentially meritorious claims in his Petition . . . ." (Emphasis added.) Specifically, Loden asserts that the "copies of color photographs taken in the course of the State's investigation and contained in the files of the District Attorney's office" are evidence "which the State is required to turn over under both M.R.A.P. 22(c)(4)(ii) and ***Brady v. Maryland***, 373 U.S. 83 (1963)." According to Loden, the circuit court's denial of his "Motion to Compel" and this Court's denial of his "Petition for Writ of Mandamus" led to Loden's experts being "*unable to view the photographic evidence* in the District Attorneys' files." (Emphasis added.) This has resulted in his present counsel being unable "to provide their experts with evidence that is central to the case and . . . conclusively determine how this evidence may be used to fully develop all possible claims in the Petition . . . ."

¶ 65. The State responds that:

> [t]his appears to be an attempt to file a petition for rehearing from the denial of [Loden's] petition for writ of mandamus regarding the

> furnishing of color copies of the photographs in the State's file. These photographs were sealed . . . due to the graphic nature of the pictures. . . . What [Loden] does not mention is that *post-conviction counsel has been allowed to view every photograph in the State's file*. . . . We note that [Loden's] experts were able to come to Jackson and view the videotape of the murder under the strict guidelines set out by this Court.[41]

(Emphasis added.) As such, the State maintains that "[t]here is no *Brady* violation . . . ." More fundamentally, the State insists that such evidence relates back to the guilt phase,[42] is procedurally barred as a "successive petition" pursuant to Mississippi Code Sections 99-39-25(6) and 99-39-27(9), and that Loden "cannot demonstrate either an intervening decision of this Court or the United States Supreme Court that would adversely affect the conviction . . . nor can he demonstrate that he has new evidence that was not readily discoverable by the original post-conviction counsel . . . ."

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[41] Loden merely responds that "[r]equiring post-conviction counsel to return to Mississippi each time a color photograph is desired to advance an argument is both costly and burdensome."

[42] Loden replies that such evidence also is relevant "to the question of whether trial counsel were constitutionally ineffective[,]" insofar as "[a]bsent a complete review of the evidence, Loden cannot adequately advance an argument about where defense counsel failed to probe the weaknesses in the State's case and ensure that it was subjected to meaningful adversarial testing."

¶ 66. Even assuming *arguendo* that this ground is not procedurally barred pursuant to Mississippi Code Sections 99-39-25(6) and 99-39-27(9), this Court finds that Loden fails to prove that he is entitled to any relief on this ground. Mississippi Rule of Appellate Procedure 22(c)(4)(ii) provides, in pertinent part, that:

> [t]he State, to the extent allowed by law, shall make available to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner. If the State has a reasonable belief that allowing inspection of any portion of the files by post-conviction counsel for the petitioner would not be in the interest of justice, the State may submit for inspection by the convicting court those portions of the files so identified. *If upon examination of the files, the court finds that such portions of the files could not assist the capital petitioner in investigating, preparing, or presenting a motion for post-conviction relief, the court in its discretion may allow the State to withhold that portion of the files.*

Miss. R. App. P. 22(c)(4)(ii) (emphasis added). The circuit court's decision to deny Loden's "Motion to Compel," affirmed by this Court's denial of his "Petition for Writ of Mandamus," was hardly an abuse of discretion. In fact, contrary to Loden's assertions, he was not denied access to the subject evidence. Rather, his access was merely limited, which was perfectly

permissible in light of the sensitive nature of said evidence. Loden has been well-afforded his constitutional protections by this Court.[43] Accordingly, Loden fails to prove that he is entitled to any relief on this ground.

(B)

¶ 67. In Loden's Rebuttal, he asserts that Daniels destroyed his case file while "well aware that Loden's post-conviction proceedings were under way . . . ." Given Daniels's present employment position, *see* footnote 5, *supra*, Loden asserts that:

> [w]e are left with a situation where a prosecutor for the State . . . has destroyed files which he knows are relevant to a pending capital post-conviction proceeding—a proceeding in which his former client is challenging his professional competence, no less. This raises the *inescapable inference* that an agent of the State has destroyed *relevant evidence in bad faith*.

(Emphasis added.)

¶ 68. Mississippi Rule of Appellate Procedure 22(c)(4)(ii) provides that "[u]pon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate

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[43] For instance, this Court allowed Loden additional time to take the depositions of defense counsel in spite of the fact that he certainly could have obtained these years before the filing of this Petition.

counsel shall make available to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence." Miss. R. App. P. 22(c)(4)(ii). According to the affidavit of Mark R. McDonald, Loden's present counsel, in a brief August 2008 conversation, Daniels informed him "that he was done with this case and did not want to be involved with it." Thereafter, in October 2008, and without consulting Loden or his present counsel, Daniels destroyed his files on the Loden case. According to Daniels, "after seven years, I just determined the best way to protect that would be to destroy it." Elaborating further, Daniels stated that "if somebody had broken into my storage room and gotten that file, I feel like I would probably have been liable. At any rate a lot of private and confidential information would fall into the hands of somebody else." However, Daniels further stated that "I copied [Johnstone] on a lot of things that I did, and I'm sure [Johnstone] copied me. So I mean, *there would have been a good bit of duplication, I think, between his file and mine.*" (Emphasis added.)

¶ 69. Without question, Daniels exercised poor judgment in destroying Loden's case file, which is exacerbated by his present employment with the district attorney's office. However, Daniels also states that there was "a good bit of duplication" between his file and Johnstone's original file, which Loden did receive (between two and five boxes);[44] Daniels testified that

[44] For instance, during Daniels's 2009 deposition, he was handed a folder by Loden's counsel and replied, "I see some of

(Continued on following page)

"[e]verything I had was copies." Moreover, Loden fails to allege or support by affidavit or otherwise any prejudice caused by failing to have Daniels's file of copies, when Loden had the originals of the very same material. Thus, this Court is presented with a veritable "red herring." Conclusorily stating that there is an "inescapable inference" that "relevant evidence" was destroyed "in bad faith," standing alone, is insufficient. Under these circumstances, this Court cannot conclude that Loden presents "a substantial showing of the denial of a state or federal right . . . ." Miss. Code Ann. § 99-39-27(5) (Rev. 2007). Accordingly, Loden fails to prove that he is entitled to any relief on this ground.

CONCLUSION

¶ 70. For the aforementioned reasons, this Court finds that Loden is not entitled to seek post-conviction relief and, therefore, denies his "Petition for Post-Conviction Relief."

¶ 71. **POST-CONVICTION RELIEF DENIED.**

WALLER, C.J., CARLSON AND GRAVES, P.JJ., DICKINSON, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR.

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my handwritten notes in this folder here. I don't recognize any of these folders as being mine, but I do see some of my work here."

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-70033

THOMAS EDWIN LODEN, JR.,

Petitioner-Appellant

v.

RICK MCCARTY, INTERIM COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Filed March 31, 2015)

(Opinion 2/13/15, 5 Cir., ___, ___, F.3d ___)

Before KING, DAVIS, and ELROD, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R.

APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
UNITED STATES CIRCUIT JUDGE

APPENDIX E

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX F

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from

reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a 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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.