No. 15-10

IN THE

Supreme Court of the United States

THOMAS EDWIN LODEN JR.,
Petitioner,

v.

MARSHALL L. FISHER, COMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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.

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INTEREST OF *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37.2, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner. While taking no position on the death penalty *per se*, the ABA urges the Court to grant the petition for a writ of certiorari to consider whether a capital defendant's decision to waive presentation of mitigating evidence should preclude a court from a finding of reasonable probability that the defendant was prejudiced by counsel's deficient mitigation investigation.

With nearly 400,000 members, the ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its members practice in all fifty states, the District of Columbia, the U.S. Territories, and other jurisdictions. They are prosecutors, public defenders, private defense counsel, and appellate lawyers, as well as attorneys in law firms, corporations, non-profit organizations, and governmental agencies. Its members are also judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This

The ABA has long taken a leading role in advocating for the ethical and effective representation of all clients. In 1908, the ABA adopted its original Canons of Professional Ethics, setting out the duties owed by lawyers to their clients. Continuously revised and updated over the years, they are now the ABA Model Rules of Professional Conduct.[3] The ABA has focused on representation in the criminal justice system through the ABA Standards for Criminal Justice.[4] Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, they are based on the consensus views of a broad array of criminal justice professionals, and have been recognized by this Court as "valuable

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brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] *Available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. Only resolutions presented to and adopted by vote of the ABA's House of Delegates ("HOD") become ABA policy. Today, the HOD is comprised of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See House of Delegates – General Information*, *available at* http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited July 27, 2015).

[4] *Available at* http://www.americanbar.org/groups/criminal_justice/standards.html. The ABA Standards for Criminal Justice, which are also ABA policy, are now published in twenty volumes, based on topical area. They were developed and continue to be refined by task forces made up of prosecutors, defense lawyers, judges, academics, the public and other representatives with criminal justice interests, as well as the diverse membership of the ABA. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, (Winter 2009).

measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determin[ing] what [performance of counsel] is reasonable . . . ."); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("[W]e long have referred [to these ABA Standards] [for Criminal Justice] as 'guides to determining what is reasonable.' " (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (first alteration in original, second alteration added)).

The ABA has also worked to ensure that any imposition of capital punishment must be consistent with fundamental principles of fairness and justice. In 1986, the ABA created its Death Penalty Representation Project, which works to improve the quality and availability of counsel in all stages of capital litigation, from arrest through post-conviction review.[5] In 1989, the Representation Project issued, and the ABA adopted, its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*"Death Penalty Guidelines" or "Guidelines"*).[6] Revised and expanded in 2003, they have been cited by hundreds of state and federal courts.[7] The Representation Project has also recruited and trained hundreds of ABA members as volunteer attorneys to represent defendants in capital cases.

The ABA Model Rules, the ABA Standards for Criminal Justice, and the Guidelines have provided the

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[5] Information on the Death Penalty Representation Project is available at http://www.americanbar.org/deathpenalty.

[6] *Available at* http://www.ambar.org/1989Guidelines.

[7] 31 HOFSTRA L. REV. 913 (2003), *available at* http://www.ambar.org/2003Guidelines.

bases for *amicus* briefs that the ABA has previously submitted to this Court on issues relating to the effective assistance of counsel in capital defense. Among these are amicus briefs filed in *Wiggins v. Smith*, 539 U.S. 510 (2003),[8] *Rompilla*,[9] and *Schriro v. Landrigan*, 550 U.S. 465 (2007).[10]

The unbroken theme that runs through these *amicus* briefs, the ABA Model Rules, the ABA Standards for Criminal Justice, and the Guidelines is the ABA's conclusion that a lawyer must promptly and thoroughly investigate the circumstances of a client's case to ensure that the client receives sound advice and can make informed decisions. In capital cases, the potential for prejudice is particularly great when a lawyer's inadequate investigation into the client's circumstances causes the client to lose confidence in the lawyer's ability to present effective sentencing evidence. *See, e.g.*, ABA Standards for Criminal Justice § 4-4.1 ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

The ABA therefore urges the Court to grant certiorari in order to consider whether a defendant's decision to waive the right to present sentencing evidence should foreclose a finding that he was prejudiced by a deficient sentencing investigation.

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[8] *Available at* http://www.americanbar.org/content/dam/aba/publications/individual_rights/wiggins_v_corcoran.authcheckdam.pdf.

[9] *Available at* http://www.americanbar.org/content/dam/aba/migrated/amicus/briefs/rompilla_v_beard.pdf.

[10] *Available at* http://www.americanbar.org/content/dam/aba/migrated/amicus/briefs/schriro_v_landrigan.pdf.

SUMMARY OF ARGUMENT

In *Loden v. McCarty*, 778 F.3d 484 (5th Cir. 2015), the Fifth Circuit transformed the context-specific holding of *Schriro v. Landrigan*, 550 U.S. 465 (2007), into a bright-line rule. According to the Fifth Circuit, a capital defendant's waiver of the right to present punishment-phase evidence precludes any inquiry into the prejudicial impact that trial counsel's deficient investigation had on the defendant's waiver decision, even when the court assumes *arguendo* that trial counsel's mitigation investigation was deficient. This Court should grant certiorari to correct that interpretation of *Landrigan*.

Deficient sentencing investigations adversely affect sentencing outcomes by failing to uncover mitigating evidence, leaving defendants unable to contest statutory aggravators, and reducing the possibility of plea-bargaining. By undermining client trust and rapport, they can result in prejudice that can take the form of a waiver like the one at issue in this case. When counsel fails to perform an adequate mitigation investigation, the defendant may be left with few options other than to waive his Eighth Amendment right to present mitigating evidence, or risk putting on a weak or damaging mitigation defense. A waiver induced under such circumstances creates " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

Moreover, the risk that counsel's deficient investigation induced a defendant to waive a sentencing presentation is greatest when counsel's performance is the worst. Thus, the Fifth Circuit's *Loden* rule perversely requires the least scrutiny in cases in which counsel's mitigation investigation is the most lacking.

Because the Fifth Circuit failed to appreciate the many prejudicial forms that a deficient sentencing investigation can take, it incorrectly read *Landrigan* as establishing a broad, bright-line rule. The Court should grant certiorari to correct this erroneous conclusion that *Landrigan* categorically prohibits inquiry into the impact of a deficient mitigation investigation when the defendant declines to present punishment-phase evidence.

ARGUMENT

A defendant receives ineffective assistance of counsel, and a capital sentence is unconstitutional under the Sixth and Fourteenth Amendments, when (1) trial counsel's mitigation investigation is objectively unreasonable and (2) that deficiency had a "reasonable probability" of affecting the penalty imposed. *See Porter v. McCollum*, 558 U.S. 30, 38-39 (2009). Because the Fifth Circuit assumed *arguendo* that trial counsel's mitigation investigation was deficient, *see Loden*, 778 F.3d at 498 n.4, the Question Presented involves the second part of the ineffective-assistance-of-counsel ("IAC") inquiry: whether Mr. Loden's decision to waive a sentencing presentation means that he experienced no prejudice from counsel's deficient investigation.

In *Landrigan*, this Court held that a defendant's scorched-earth opposition to the investigation and presentation of mitigating evidence precluded any prejudice finding. *See* 550 U.S. at 477-78. A certiorari grant is appropriate to consider whether *Landrigan* should also preclude a finding of prejudice in the great bulk of cases, like *Loden*, where the deficient investigation may have contributed to the defendant's decision to waive a sentencing presentation.

The certiorari issue implicates constitutional rights at the core of modern capital sentencing: the Eighth Amendment right to present mitigating evidence at the sentencing phase of a capital trial, *see Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982), and the Sixth Amendment right to have counsel adequately investigate that evidence, *see Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). This Court has explained that "the grave task of imposing a death sentence" requires that the sentencer consider mitigating factors such as the defendant's "personal history and characteristics and circumstances of the offense." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007).

A defendant's decision to waive his Eighth Amendment right to present sentencing evidence can be a direct function of the sentencing case that counsel is prepared to present. When counsel's failure to do an adequate investigation precipitates a waiver like Mr. Loden's, the waiver itself should not preclude a finding of "reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation." *Sears v. Upton*, 561 U.S. 945, 956 (2010).

I. THE MITIGATION FUNCTION IS CENTRAL TO CAPITAL DEFENSE.

At a bifurcated capital trial, the Eighth and Fourteenth Amendments guarantee a "sentencing hearing at which [a defendant] is permitted to present any and all relevant mitigating evidence that is available." *Skipper v. South Carolina*, 476 U.S. 1, 7-8 (1986). Because the presentation of mitigating evidence is "defense counsel's job" at the sentencing phase, *Rompilla*, 545 U.S. at 380-81, the Sixth and Fourteenth Amendments entitle a defendant to a lawyer who performs a reasonable

mitigation investigation. *See Wiggins*, 539 U.S. at 534. Criminal process cannot reliably select "the worst of the worst" defendants for capital sentencing if defense counsel does not perform the mitigation function adequately—a reality of capital defense reflected in the Guidelines and ABA Standards for Criminal Justice.

Although the Guidelines and ABA Standards for Criminal Justice do not themselves set constitutional standards for deficient performance in IAC cases, this Court has cited them favorably as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). For example, ABA Standards for Criminal Justice § 4-4.1 restates the professional consensus regarding the importance of a penalty-phase investigation, and this Court has cited § 4-4.1 favorably in no less than three of its six major mitigation-investigation opinions. *See Rompilla*, 545 U.S. at 387 ("[T]he [ABA] Standards for Criminal Justice . . . describes the obligation [to investigate mitigating evidence] in terms no one could misunderstand . . . ."); *Wiggins*, 539 U.S. at 524 (noting that "we long have referred" to the ABA standards "as 'guides to determining what is reasonable' " and citing § 4-4.1 (quoting *Strickland*, 466 U.S. at 688)); *Williams v. Taylor*, 529 U.S. 362, 396 (2003) (citing § 4-4.1 in support of the conclusion that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Standard § 4-4.1 provides:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case *and the penalty in the event of conviction*. . . . The duty to investigate exists regardless

> of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(emphasis added).

The Guidelines and ABA Standards for Criminal Justice specify investigatory norms because failure to meet them tends to prejudice defendants. Various provisions of the Death Penalty Guidelines emphasize the centrality of the mitigation investigation in capital defense. In *Wiggins*, this Court favorably cited multiple sections of the 1989 Guidelines, including § 11.4.1(C) and § 11.8.6. The Commentary to § 11.8.6 explains, "Counsel may not choose, without investigation and preparation, to sit back and do nothing at sentencing." This is so even when a defendant initially objects to the presentation of mitigating evidence. 1989 Death Penalty Guidelines § 11.4.1(C) ("The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered."). Part II explains that an inadequate mitigation investigation increases the likelihood of a death sentence in many ways—for example, by inducing the Eighth Amendment waiver at issue here.

II. A DEFICIENT MITIGATION INVESTIGATION CAN BE PREJUDICIAL, EVEN IF A CLIENT WAIVES THE RIGHT TO PRESENT SENTENCING-PHASE EVIDENCE.

A defendant is prejudiced by counsel's inadequate mitigation investigation if "there is a reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation." *Sears*, 561 U.S. at 956; *see also Wiggins*, 539 U.S. at 534 ("[T]o establish prejudice,

a defendant must show . . . a probability sufficient to undermine confidence in the outcome." (internal citations and quotation marks omitted)). Usually, prejudice to the sentencing "outcome" involves inadequate presentation of mitigating evidence to a jury. There are, however, other ways a deficient mitigation investigation can create prejudice.

A defendant may be prejudiced by counsel's deficient investigation if it causes him to waive his Eighth Amendment right to present mitigating evidence. The decision to waive is not necessarily independent of a deficient investigation, and a waiver that is contaminated by the deficiency cannot foreclose a finding of prejudice. Waiver may be precipitated by counsel's deficient investigation for a number of reasons.

First, an inadequate mitigation investigation may artificially inflate the desirability of an Eighth Amendment waiver, making it more attractive only because there is no viable mitigation case to present. *See, e.g.*, *Blystone v. Horn*, 664 F.3d 397, 426 (3d Cir. 2011) ("The fact that Blystone chose to forego [presentation of inadequately investigated mitigation], simply does not permit the inference that, had counsel competently investigated and developed [other mitigation], Blystone would have also declined their presentation.").

Second, inadequate investigation may lead counsel to recommend against presenting a mitigation case when a thorough investigation would have uncovered evidence prompting counsel to make the opposite recommendation. Defendants, in turn, may waive their right to present mitigating evidence in reliance on counsel's faulty advice. A deficient investigation therefore undermines not only the strategic options available to a defendant (present a weak mitigation

case or none at all), but also counsel's ability to competently recommend against waiver. *See* Commentary to 1989 Death Penalty Guidelines § 11.4.1 ("Without investigation, counsel's evaluation and advice amount to little more than a guess").

Third, even when counsel advises a client to present mitigating evidence, deficient investigation may precipitate waiver by disrupting confidence in the attorney-client relationship. Thorough investigation gives counsel access to important personal information about the client that tends to facilitate a better relationship of trust and understanding. By contrast, a compromised relationship undermines defense counsel's ability to secure necessary cooperation from the defendant and his family, as well as a defendant's confidence in counsel's preferred sentencing strategy.[11] A defendant's lack of confidence in counsel's mitigation strategy may in turn contribute to the decision to waive.

Under any of these three scenarios, counsel's deficient investigation can prejudice the sentencing outcome by causing a capital defendant to forego his Eighth Amendment right to present sentencing evidence to a jury.

Deficient investigation also increases the likelihood of a death sentence by reducing a prosecutor's incentive to de-capitalize the proceeding. Specifically, it reduces the prosecutorial incentive to charge defendants with noncapital offenses, to decline to seek death sentences

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[11] *See* Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases*, 31 HOFSTRA L. REV. 1157, 1163 (2003) ("Life-history investigation not only unearths mitigation evidence but also identifies the support system that may motivate a client to want to live, even behind bars. This investigation also provides counsel with insight into any mental disorders that may affect the relationship with the legal team and the client's ability to come to terms with his case realistically.").

in cases that remain nominally capital, and to make plea bargains. *See* Commentary to ABA Criminal Justice Standards § 4-4.1 (noting that the lawyer has an important role to play in raising mitigating factors to the prosecutor, which may cause the prosecutor to defer or abandon prosecution).

The 2003 Death Penalty Guidelines were not formally in effect during the trial of this case, but 2003 Guidelines § 10.9.1 (Duty to Seek an Agreed-Upon Disposition) is a consolidated version of several 1989 Guidelines.[12] The Commentary to the 2003 Guidelines explains how important the mitigation investigation is to plea negotiations:

> [P]lea bargains in capital cases are not usually offered but instead must be pursued and won. . . . In many jurisdictions, the prosecution will consider waiving the death penalty after the defense makes a proffer of the mitigating evidence that would be presented at the penalty phase and explains why death would be legally and/or factually inappropriate. . . . [Whether such consideration is formal or informal], the mitigation investigation is crucial to persuading the prosecution not to seek death.

Commentary to 2003 Guidelines § 10.9.1, *reported at* 31 HOFSTRA L. REV. 913, 1040-41 (2003) (quotations and citations omitted). An empirical study performed for the Texas Indigent Defense Commission concluded that "greater investment in mitigation" entails "[d]evelop[ing] a defense narrative . . . [that] can often

[12] *See* § 11.6.1 (Plea Negotiation Process), § 11.6.2 (Contents of Plea Negotiations), and § 11.6.3 (Decision to Enter a Guilty Plea).

dissuade prosecutors from pursuing a capital death trial."[13]

In sum, a deficient mitigation investigation can have a "reasonable probability" of affecting a sentencing outcome even if a defendant waives the Eighth Amendment right to present mitigating evidence to a fact-finder. Indeed, when the deficiency *causes* such a waiver, it has prejudiced the defendant's Sixth Amendment right to counsel and should not be countenanced.

III. THE FIFTH CIRCUIT RULE PERVERSELY ENSURES THAT THE MOST DEFICIENT INVESTIGATIONS WILL TRIGGER NO-PREJUDICE FINDINGS.

Loden establishes a perverse rule under which the greatest investigatory deficiencies will be the most likely to trigger findings of no prejudice. Defense counsel's failure to perform an adequate mitigation investigation left Mr. Loden with a Hobson's choice during his penalty phase: Because he could not present a coherent or compelling mitigation case, his only other option was simply to forego an evidentiary presentation. The fact that Mr. Loden had to make such a "choice" establishes the prejudice the Fifth Circuit found lacking.

Moreover, unless reversed, the Fifth Circuit's *Loden* rule will tend to predetermine no-prejudice findings precisely when counsel has been the least diligent. The more deficient the investigation, the less mitigating evidence will be available, and the more likely it is that the defendant will have no viable options other

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[13] Public Policy Research Inst., *Judgment and Justice: An Evaluation of the Texas Regional Public Defender for Capital Cases*, at viii (June 2013), *available at* http://tidc.texas.gov/media/18616/130607_finalcapitaldefenderreport.pdf.

than waiver. In addition, if counsel fails to build the trust and rapport facilitated by a thorough mitigation investigation, the more abandoned and hopeless the defendant is likely to feel, which may also contribute to a waiver. Thus, the less time and effort counsel devotes to developing mitigating evidence, the more likely the defendant is to believe that his only choice is to forego a mitigation case, even though such a case might have been compelling if counsel had explored the evidence and explained its potential impact. This result is inconsistent with the Court's precedents explaining the importance of a thorough investigation of mitigating evidence, and with the ABA's Standards for Criminal Justice and Guidelines that set out the prevailing professional norms for effective representation in capital cases.

Because the more inadequate the representation, the more likely the waiver becomes, the Fifth Circuit's *Loden* rule is most pernicious when counsel's conduct is most deficient. No Supreme Court precedent, including *Landrigan*, supports such a result. In *Landrigan*, this Court carefully explained why there was no chance that a deficient investigation induced the client's waiver—the defendant in that case faced no Hobson's choice.

This Court's review is necessary to consider the distinction between a defendant like Mr. Landrigan, who was a "bright star" in the "constellation of refusals to have mitigating evidence presented," *Landrigan v. Stewart*, 272 F.3d 1221, 1226 (9th Cir. 2001), and a defendant like Mr. Loden, for whom the Eighth Amendment waiver may have been a direct result of counsel's inadequate investigation. In recognition of the profound practical and doctrinal implications of

the Fifth Circuit's rule, this Court should grant the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the ABA respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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