NO. 15-10

IN THE UNITED STATES SUPREME COURT

October 2015 Term

THOMAS LODEN, JR., *Petitioner*

versus

MARSHALL L. FISHER, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, *Respondent*

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. WHILE CAPITAL DEFENSE COUNSEL HAS AN OBLIGATION TO CONDUCT AN ADEQUATE MITIGATION INVESTIGATION A DEFENDANT CAN SHORT CIRCUIT THAT INVESTIGATION BY HIS OWN ACTIONS.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS.

III. THE FIFTH CIRCUIT'S DECISION IS NOT WRONG

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES *Page*

OTHER AUTHORITIES *Page*

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BRIEF IN OPPOSITION

The respondent, Marshall L. Fisher, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.

1a-34a) is reported as *Loden v. McCarty*, 778 F.3d 484 (5th Cir. 2015). The opinion of the district court (Pet. App. 35a-162a) is unreported but is available as *Loden v. Epps*, 2013 WL 5243670 (N.D. Miss. 2013). The opinion of the Mississippi Supreme Court denying Loden's second petition for post-conviction relief (Pet. App. 163a-243a) is reported as *Loden v. State*, 43 So. 3d 365 (Miss. 2010).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court, pursuant to the authority of 28 U.S.C.A. § 1254 (1). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Sixth Amendment of the United States Constitution and the provisions of 28 U.S.C. § 2254 as his constitutional and statutory provision involved in this case. He fails to do so.

STATEMENT OF THE CASE

A. Statement of Facts

When Leesa Marie Gray, did not arrive home from her job at 11:00 P.M. on June 22, 2000, her mother began calling to inquire if anyone had seen her.

Her employer stated that he had seen a car by the side of the road with emergency flashers on and would go check to see if it was Leesa. The car was Leesa's. It had a flat tire and she was not with the car. Leesa's purse and cell phone were in the car but her keys were missing. The authorities were notified.

Her employer and other patrons of the restaurant were interviewed by law enforcement and were told that a man named Thomas Loden, Jr. had come into the restaurant shortly before closing wanting a cheese burger. It was also related that Loden had been in the restaurant earlier in the day and had attempted to flirt with Leesa. The officer also found out that Loden was visiting his grandmother who lived in the area. The officer also examined the flat tire that had been removed from Leesa's car and found a razor blade in the center of the tire tread.

Early the next morning two law enforcement officers went to the home of Loden's grandmother, Rena Loden. They were informed by a sitter for Mrs. Loden, that Loden was in the house asleep. The officers did not disturb Loden at that time, but continued to question other patrons from the previous day and search for further clues relating to Leesa's disappearance.

At approximately 7:30 a.m. that morning the

authorities decided to return to the Loden farm as Loden was one of the few people who had not been interviewed. When they returned they were told that Loden had gone fishing on a pond near the house. The officers searched for Loden to no avail. They were given permission by Mrs. Loden to search the house and area around the house. In the bedroom used by Thomas Loden the officers found a pair of shorts with what appeared to be blood in the crotch area. They then obtained permission to search Mrs. Loden's car in which they found a rope fashioned into a handcuff styled knot. Based on these findings, the officers sought a search warrant for the van belonging to Thomas Loden, the other vehicles on the property and all of the property and buildings located on the farm. The property was secured until the search warrant was issued. The van belonging to Thomas Loden was locked and no keys were found in Mrs. Loden's house that would unlock it. The van was towed under law enforcement escort to the Highway Patrol Headquarters in New Albany, Mississippi. The van was secured in a garage until the arrival of the Mississippi Crime Laboratory. While the van was being processed the body of Leesa Marie Gray was found stuffed under the folded down seat in the rear of the van. Leesa Marie's body was nude and her hands and feet were bound with the same type rope found in the search of Mrs. Loden's car. The crime scene

technician also found a JVC Compact camcorder and three compact video cassettes. The also found a set of keys containing a Honda key and a Schlage key. Also retrieved from the van was an H & R Sportsman .22 caliber revolver and a box of Winchester Super X .22 long rifle hollow point high velocity cartridges. The crime lab personnel also recovered numerous items that included the victim's clothing; a plastic Wal-Mart bag with tape around the top and hair fiber stuck in the tape. Numerous box cutter blades similar to the razor blade which had been removed from the flat tire of Leesa's Honda automobile were also found in the van.

Loden was apprehended later that day and taken to the hospital for treatment of his lacerated wrists and the words "I'm sorry" that had been carved into his chest. Loden was given his *Miranda* rights but denied knowing anything about Leesa Marie Officials were in the process of obtaining search warrants of Loden's person when Leesa Marie's body was found in Loden's van. The search warrant was obtained and executed on Loden to obtain certain tissue samples from Loden. When Loden was released from the hospital he was arrested.

When viewed, the video tape found in the camera first depicts Leesa Marie Gray inside the van belonging to Thomas Loden. Early in the video Leesa

Marie is partially clothed with her hands tied behind her back and her feet and legs tied at the ankles, later in the video she is totally nude. The video shows Leesa Marie being forced to perform fellatio on Thomas Loden. During this assault, Loden orders Leesa Marie to smile because he wants to see her braces. The video is stopped and started numerous times during its duration with Loden giving commentary and directions to Leesa Marie. When the second scene begins Loden is vaginally raping Leesa Marie. Later in the video Loden is seen penetrating Leesa Marie's vagina with his fingers. He removes his fingers and comments "You really were a virgin, weren't you?" Later in the video Loden is seen inserting his fingers into Leesa Marie's anus and then rotating his fingers between her anus and vagina, penetrating both. Later, when the video is restarted we see that Leesa Marie's pubic area has been partially shaved. Then the video depicts Loden repeatedly inserting a cucumber into Leesa Marie's vagina. During this episode Leesa Marie is heard telling Loden, "I'm hurting . . . . please . . . I think I'm hurt really bad." There is a break in the video as it is stopped again. When it resumes we see Loden twisting Leesa Marie's breast and placing his fingers in her vagina in an apparent attempt to bring her back to consciousness. At the end of this segment Leesa Marie is still alive. The video stops again. When it is restarted, Leesa Marie is dead, her body has been

cleaned up and posed in the back of the van with the cucumber being placed in her vagina. Loden then removes the cucumber and reinserts it several times before the video finally ends.

While incarcerated Loden indicated, through his wife, that he wished to make a statement to the law enforcement officers. Loden described in some detail the events of the evening and drew a map showing the different locations around Itawamba County where different acts took place. He stated that at one point he went to his grandmother's house and went inside, got a glass of water for Leesa Marie, a comforter from his bedroom and a cucumber from the kitchen. He also admitted to raping Leesa Marie three other times that were not on the video tape. Loden claims not to have any recollection of making the video tape, but said that he was the only other person in the van other than Leesa Marie. He stated that he did not remember killing her, but he must have put her in a "sleeper hold and choked her."

Loden stated that when he awakened on June 23, he went out to the van and saw Leesa Marie's body. He locked the van and went back into the house and had a cup of coffee. He then drove around in the pickup truck to think. He said that when he arrived back at the farm he went for a walk. It was during this period of time when he heard the officers calling for

him. He hid and evaded the officers.

During the search of Rena Loden's farm, the officers found a shovel next to a grave that had been dug behind the lake in the pasture. After viewing the video tape, the officers retrieved the comforter depicted therein from Loden's bedroom. DNA testing was done on the bloody shorts, the blood on them matched Leesa Marie's DNA. Testing on the cucumber resulted in a major DNA match for the DNA of Leesa Marie and a minor match of Loden. A disposable razor found in the van and blood on the razor resulted in a major DNA match for Leesa Marie and a minor match for Loden. Loden's fingerprints were found on the tape containing hair fibers that was attached to the Wal-Mart bag. The hair stuck to the tape was found to be microscopically similar to Leesa Marie's head hair.

The conclusions of the autopsy were that Leesa Marie had died of "suffocation/manual strangulation" and listed the death as a "homicide". Contusions were noted on Leesa Marie's forehead, lower lip, the back of her neck, the apex of her scalp and on her right cheek. It was further found that there were deep furrows in her wrist and ankles where she was tightly bound by the ligatures found on her body when she was discovered. Contusions were also found on her left arm which were consistent with defensive posturing injuries. Contusions were found on her chest, her back,

her buttocks, her rectum and her anus. There were also lacerations to her rectum and anus which were consistent with penetration. Examination of her genitalia revealed extensive contusions and lacerations to her labia majora, labia minora, introitus and her vaginal vault consistent with penetration. The photographs taken during the autopsy demonstrate the extensive trauma to both the vaginal and anal area of Leesa Marie.

The facts of this case are fully set forth in the opinion of the district court and the two opinions of the Mississippi Supreme Court. *See Loden v. Epps*, 2013 WL 5243670, *1-2 (N.D. Miss. 2013); *Loden v. State*, 43 So.3d 365, 368, n. 1 (Miss. 2010) *Loden II*; *Loden v. State*, 971 So.2d 548, 552 (Miss. 2007) *Loden I*.

B. Procedural History

Petitioner was indicted on November 21, 2000, during the Vacation Term, 2000 of the Circuit Court of Itawamba County, Mississippi, in a six count indictment charging Loden with capital murder while engaged in the crime of kidnapping;

rape, sexual battery by forcing the victim to perform fellatio, sexual battery by inserting a finger in the victim's vagina; sexual battery by inserting a finger in the victim's anus; sexual battery by inserting an inanimate object into her vagina. CP. at 9-11.

Loden decided to enter a plea of guilty to the six counts of the indictment making the necessity for a change of venue moot. On September 21, 2001, the trial court held a hearing to consider Loden's pleas of guilty to the six counts. SC Tr. 495-553. The trial court accepted the guilty pleas. Loden then moved to waive trial by jury on the sentence to be imposed on the conviction of capital murder. The State of Mississippi also waived the jury trial for the sentence phase as is required by MISS. CODE ANN. § 99-19-101(1).

Petitioner's sentencing trial then was conducted before the trial court sitting without a jury. At the conclusion of the sentencing phase the trial court entered an order sentencing Loden to death, which was Count I of the indictment. SCP. 226-231. Loden was also sentenced to 30 years for the rape conviction contained in Count II of the indictment (CP. 230); 30 years for the sexual battery conviction contained in Count III (CP. 230); 30 years for the sexual battery conviction contained in Count IV (CP. 231); 30 years for the sexual battery conviction contained in Count V (CP. 231); and 30 years for the sexual battery conviction contained in Count VI (CP. 231). The sentences, in addition to the death penalty, were all to run consecutive to all other sentences imposed in this cause.

Petitioner took his automatic appeal of the sentence of death to the Supreme Court of Mississippi.[1] *See Loden v. State*, No. 2002-DP-00282-SCT. Trial counsel was allowed to withdraw and the Office of Capital Defense Counsel was substituted as appellate counsel on January 27, 2003.

On July 16, 2003, Loden filed a post-conviction motion to vacate the guilty plea to capital murder with the Circuit Court of Itawamba County, Mississippi.[2] SCP. at 6-30. The proceedings in the direct appeal were stayed by the Mississippi Supreme Court pending the resolution of the post-conviction challenge to the guilty plea. On October 13, 2004, the trial court filed an order dismissing the motion to withdraw the guilty plea on the basis of lack of jurisdiction as the case was on appeal before the court below. SCP. 43-44. On January 24, 2005, the Mississippi Supreme Court entered an order noting that the circuit court had exclusive jurisdiction of a motion for post-conviction relief from the guilty plea entered by Loden. SCP. at 115-16.

A hearing was held on Loden's post-conviction

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[1]There is no right of direct appeal of a conviction entered after a guilty plea, however, the sentence can be appealed. *See* MISS. CODE ANN. § 99-35-101 (Rev. 2008).

[2]*Loden v. State*, No. 03-090(G)1.

motion on June 2, 2005. At the conclusion of the hearing the trial court took the case under advisement. On February 16, 2006, the trial court entered an opinion and order dismissing the motion to vacate Loden's guilty plea to capital murder.[3]

Loden then took an appeal from the denial of post-conviction relief on the capital murder guilty plea. *See Loden v. State*, No. 2006-CA-00432-SCT. The appeal of the denial of post-conviction relief was consolidated with the direct appeal of the sentence phase of his capital trial, No. 2002-DP-00282-SCT. Loden presented six issues relating to the direct appeal of the sentence and one issue relating to the denial of post-conviction relief as to the guilty in the consolidated appeal. *See* 971 So.2d at 561-62. On October 14, 2007, the Mississippi Supreme Court rendered its opinion affirming the sentence of death and affirming the denial of post-conviction relief on the guilt phase of the trial. *See Loden v. State*, 971 So.2d 548 (Miss. 2007). His petition for rehearing was denied on January 17, 2008. Loden then filed a petition for writ of certiorari with this Court presenting two

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[3]Loden made no challenge to his entry of guilty pleas to the other five counts in the indictment in this case. On appeal from the denial of post-conviction relief and federal habeas review petitioner focused solely on the guilty plea to capital murder. Thus, any challenge to the guilty pleas and sentences to the remaining five counts of the indictment was abandoned.

questions. On October 6, 2009, this Court denied the petition for writ of certiorari. *See Loden v. Mississippi*, 555 U.S. 831 (2008).

Petitioner then filed a motion for leave to file a petition for post-conviction relief in the trial court seeking relief from his sentence of death with the Mississippi Supreme Court. Loden presented six claims in this petition. *See* 43 So.3d at 377. On April 15, 2010, the Mississippi Supreme Court denied post-conviction relief in a written opinion. *See Loden v. State*, 43 So.3d 365 (Miss. 2010). A petition for rehearing was filed and later denied on September 30, 2010.

Petitioner then filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi asserting several claims relating to the death sentence. On September 18, 2013, the district court entered an unpublished memorandum opinion and order denying habeas relief. *See* Pet. Appx. B; *Loden v. Epps*, 2013 WL 5243670 (N.D. Miss. 2013). Thereafter, petitioner filed a motion to amend the judgment with the district court. In its memorandum opinion and order the district court granted COA on five questions. *See* 2013 WL 5243670, *52. The district court denied COA on all other claims. On February 4, 2014, the district court entered an unpublished order denying the motion to amend the

judgment. *See Loden v. Epps*, 2014 WL 457701 (N.D. Miss. 2014).

Petitioner perfected his appeal to the Court of Appeals for the Fifth Circuit. After briefing and oral argument, the Fifth Circuit affirmed the decision of the district court in a published opinion. *See Loden v. McCarty*, 778 F.3d 484 (5th Cir. 2015). Petitioner filed a petition for rehearing and a petition for rehearing *en banc*. Both petitions were denied on March 31, 2015. Petitioner now seeks relief from this Court.

REASONS FOR DENYING THE WRIT

Where a capital defendant instructs counsel not to put on a case in mitigation any claim of ineffective assistance of counsel is considered under *Schriro v. Landrigan*, 550 U.S. 465 (2007), instead of a strict analysis under *Strickland v. Washington*, 466 U.S. 668 (1984).

The cases cited by petitioner as creating a conflict among the circuits regarding the application of *Schriro v. Landrigan, supra*, are fairly easily distinguishable from the case at bar. The cases applying *Landrigan* demonstrate that the courts are applying that precedent on a case by case basis depending on the facts of the individual cases.

Petitioner's assertion that the decision is wrong

is without merit. The Mississippi Supreme Court, the federal district court and the Fifth Circuit all found that petitioner instructed his counsel not to present mitigating evidence at his his sentencing hearing. Petitioner has not shown that these courts are wrong by his rehash of the new evidence that each of these courts reviewed and considered. This case is on habeas review and the claim was decided on the merits. The state court decision is entitled to § 2254(d) deference as the decision of the Mississippi Supreme Court was not unreasonable.

Finally, the respondent asserts that there is no reasonable probability that the results of the sentencing hearing would have been different. The district court clearly so held. However, the decision to be made here is whether the decision of the Mississippi Supreme Court was reasonable. The district court and the Fifth Circuit have both held that the decision was not unreasonable under this Court's precedent.

ARGUMENTS

I. WHILE CAPITAL DEFENSE COUNSEL HAS AN OBLIGATION TO CONDUCT AN ADEQUATE MITIGATION INVESTIGATION, A DEFENDANT CAN SHORT CIRCUIT THAT INVESTIGATION BY HIS OWN ACTIONS.

Relying heavily on the decisions in *Porter v.*

McCollum, 558 U.S. 30 (2009); *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000), petitioner contends that he is entitled to relief under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel did not preform an adequate investigation into mitigating evidence and then present the same during the sentencing phase of the case. This claim was presented to the Mississippi Supreme Court which found that Loden had instructed his counsel not to present any mitigation evidence and not to cross-examine any of the state's witnesses at the sentencing hearing. The state court relied on *Schriro v. Landrigan*, 550 U.S. 465 (2007) and its own precedent found in *Bishop v. State*, 882 So.2d 135 (Miss.2004), *cert. denied*, 543 U.S. 1189 (2005).

After discussing the circumstances of Loden's instructions regarding the presentation of mitigation evidence, the Mississippi Supreme Court concluded:

> ¶ 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. . . .
>
> 43 So.3d at 381.

Again after analyzing the allegations, evidence and facts regarding counsel's investigation (*see* 43 So.3d at 381-84), the state court concluded:

> ¶ 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, 175 L.Ed.2d 398 (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, 123 S.Ct. 2527. 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.
>
> 43 So.3d at 384-85.

In both the district court and the court of appeals, respondent asserted finding of the Mississippi Supreme Court was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984) or *Schriro v. Landrigan*, *supra*, and further that the findings were not an unreasonable application of the facts to the law.

Both the district court and the court of appeals agreed that the application of *Landrigan* by the state court was not unreasonable. On habeas review, the district court found that Loden had instructed his counsel not to 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, *See* 2013 WL 5243670, *13. The court below conducted a lengthy analysis of the issue and arrived at the same conclusion and also determined that the Mississippi Supreme Court's decision was not unreasonable.

In most cases, a claim of ineffective assistance of counsel for failing to investigate mitigating evidence is considered under *Strickland v. Washington*, 466 U.S. 668 (1984). However, when a defendant instructs his counsel not to present a case in mitigation the inquiry is to be conducted under *Landrigan*. That is the circumstance presented in this case. The Mississippi Supreme Court applied *Landrigan* to the factual situation here and the district court and the Fifth Circuit held on habeas review that application was neither contrary to or an unreasonable application of that precedent.

This claim is without merit, therefore certiorari should be denied.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS.

Petitioner contends the Fifth Circuit's application of *Landrigan* conflicts with other federal courts of appeals and state supreme courts. The respondent would assert that this is not the case as the application of *Landrigan* by the Mississippi Supreme Court was found reasonable by the Fifth Circuit. This ruling is not in conflict with these other courts. Because petitioner waived the presentation of mitigation evidence during his sentence phase bench trial, the ordinary *Strickland* review does not apply.

Petitioner seems to argue that the only way such a waiver can occur is by a defendant's obstructive behavior or affirmative statements to the trial court that no mitigation case is to be presented. Respondent asserts that petitioner reads *Landrigan* to narrowly.

A. Contrary to Petitioner's Assertion, a Majority of the Court Decisions Applying *Schriro v. Landrigan* Do Not Conflict with the Fifth Circuit's Application of That Precedent.

Petitioner contends that a majority of the Circuits have applied *Scrhiro v. Landrigan*, in a manner that conflicts with the application of the Fifth

Circuit in this case. Respondent would assert that this is incorrect as the Sixth, Tenth, and Eleventh have applied *Landrigan* similar to the Fifth Circuit.

In *Zagorski v. Bell*, 326 Fed.Appx. 336 (6th Cir. 2009), *cert. denied*, 559 U.S. 1068 (2010), the Sixth Circuit held that Zagorski "presented no reason to label his counsel's efforts as anything other than reasonable, especially given his insistence-despite being advised against and understanding the consequences-that counsel not present mitigation evidence." *Id.* at 344. The Court does not point to any obstructive behavior from the petitioner other than his insistence. This was less than the case at bar.

Looking to the Tenth Circuit, we find the case of *Duty v. Workman*, 366 Fed.Appx. 863 (10th Cir. 2010), *cert. denied*, 562 U.S. 918 (2010), where the court distinguished its earlier case of *Young v. Sirmons*, 551 F.3d 942 (10th Cir. 2008), cited by petitioner. The *Duty* Court did not discuss the deficient performance prong of the ineffective assistance of counsel claim and proceeded directly to the prejudice prong, finding there was no prejudice. The Court applied *Landrigan* precedent that there was no "informed and knowing" requirement on a defendant's decision not to introduce evidence. Further, the Court held that *Landrigan* did not establish a rule that required a proffer of the evidence that would have been presented.

Looking to the Eleventh Circuit, we find *Conner v. GDCP Warden*, 784 F.3d 752 (11th Cir. 2015), where that Court ruled similar to the Fifth Circuit. There the petitioner, through counsel, advised the trial court he did not wish to put on any mitigating evidence. The trial court asked him two questions regarding his choice and then proceeded with the trial. *Id.* at 766-69. Again, there were no outbursts or antics aimed at disrupting the proceedings by the petitioner. *See Cummings v. Secretary for Dept. of Corrections*, 588 F.3d 1331, 1367-69 (11th Cir. 2009), *cert. denied*, 562 U.S. 872 (2010); *Gilreath v. Head*, 234 F.3d 547 (11th Cir. 2000), *cert. denied*, 534 U.S. 913 (2001) (pre *Landrigan* case).

Looking to other cases in which the Fifth Circuit has applied *Landrigan*, we find *Burns v. Epps*, 342 Fed.Appx. 937 (5th Cir. 2009), *cert. denied*, 561 U.S. 1013 (2010), another Mississippi case, where the Fifth Circuit found that Burns had failed to rebut the state habeas court's determination that it was his decision to forego presenting mitigation evidence and that he had been informed by counsel of the likely consequence of this decision. *Id.* at 939. *See Diaz v. Quarterman*, 239 Fed.Appx. 886, 890 (5th Cir. 2007), *cert. denied*, 552 U.S. 1232 (2008); *Wood v. Quarterman*, 491 F.3d 196, 204-05 (5th Cir. 2007), *cert. denied*, 552 U.S. 1151 (2008).

Even the Ninth Circuit ruled similar to the Fifth Circuit in *Cox v. Del Papa*, 542 F.3d 669, 682-84 (9th Cir. 2008). There the Court found that petitioner's claim of ineffective assistance for failure to present evidence of drug use by the petitioner lacked merit. The Court based its decision on petitioner's continued insistence that he was not a drug user.

Looking to the cases cited by petitioner which he claims conflict with the decision of the Fifth Circuit and supposedly with the other circuits, we have presented, we first look to the Third Circuit's decision in *Thomas v. Horn*, 570 F.3d 105 (3rd Cir. 2009). The Court found the application of *Landrigan* was inappropriate because the questioning of the petitioner, found in the record, did not demonstrate that he would prevent counsel from presenting mitigating evidence. Further, there was no AEDPA deference on this claim because it had not been addressed by the state court. More telling is the earlier decision of the Third Circuit in *Taylor v. Horn*, 504 F.3d 416, 455-56 (3d Cir. 2007), where *Landrigan* was applied in a similar fashion as the Fifth Circuit.

Petitioner also cites to *Blystone v. Horn*, 664 F.3d 397, 426 (3d Cir. 2011), where the Court found that the petitioner was simply asked if he wanted to testify, have his family members testify or offer any other mitigating evidence. The Court found that these

answers were insufficient to trigger the application of *Landrigan* as the trial court's questions were focused almost entirely on whether petitioner wished to take the stand himself or have his parents testify on his behalf. The Court found that petitioner's answers to the trial court's questions did not demonstrate an intent to interfere with the presentation of mitigation evidence that was "strong enough to preclude a showing of prejudice" in the manner found in *Landrigan* and its earlier case of *Taylor, supra.* In both of the cases cited by petitioner, the Third Circuit was distinguishing those cases from its seminal precedent found in *Taylor, supra*, which is in line with the holding in the Fifth Circuit.

The decision in *Young v. Sirmons*, 551 F.3d 942 (10th Cir. 2008), the Tenth Circuit, declined to apply *Landrigan* based on the finding of the Oklahoma state court that "Young did not waive mitigation, but [rather] opted to introduce it through stipulation." *Id.* 959. However, in the final analysis the court found counsel was not ineffective as there was no prejudice in counsel's performance. *Id.* at 969. This is hardly a case that conflicts with the Fifth Circuit's decision.

Looking to the two cases from the Ninth Circuit cited by petitioner, we first consider *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009). The petitioner was uncooperative with counsel in furnishing them

information regarding mitigation. Counsel did a cursory investigation for mitigation evidence. The Court found that petitioner never made any statement to counsel stating that he did not want mitigation evidence presented. His main concern was that he be allowed to read a statement to the jury at the beginning of the sentencing phase of his case. The trial court refused this request and the sentencing phase proceeded with counsel presenting the little information that had been garnered. *Id.* 1114-19. This is not the case here. In *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012), the court, citing *Hamilton, supra*, again found *Landrigan* did not apply as a case in mitigation was presented and petitioner made no objection. *Id.* at 1169, n. 2. This is simply not a conflicting decision

Petitioner also cites to state cases from Florida and Ohio as support for his assertion. In *Coleman v. State*, 64 So. 3d 1210, 1222 (Fla. 2011), the court found that petitioner's attorney failed to conduct "any" investigation into mitigationg evidence. The court found that merely asserting an alibi defense and maintaining that he was innocent did not indicate that the petitioner did not want an investigation done and evidence presented. This is not the case at bar. Further, in earlier cases, the Florida Supreme Court had held that when a defendant gives counsel reason to

believe certain investigations would be fruitless or harmful, counsel's failure to pursue those areas would not be unreasonable. *See Reed v. State*, 640 So.2d 1094, 1097 (Fla. 1994); *Bryan v. State*, 748 So.2d 1003, 1007 (Fla. 1999).

Petitioner's citation to *State v. Neyland*, 12 N.E.3d 1112, 1156 (Ohio 2014), *cert. denied*, ___ U.S. ___, 135 S.Ct. 1530 (2015), is puzzling as the court pointed out that the defendant "made two unsworn statements during the mitigation proceedings, indicating that he *did* want to present some mitigation." *Id.* at 1157 (emphasis added). In such a case, *Landrigan* would not apply. After finding deficient performance in the case, the Ohio Court found there was no prejudice and affirmed the conviction and sentence. This case is not in conflict with the decision of the Fifth Circuit.

Basically, we have various courts making a case by case determination as to whether a capital defendant has waived his right to challenge the actions of trial counsel because of his own actions. Petitioner has failed to show the dramatic conflict between the Fifth Circuit and other circuits applying *Landrigan*. Petitioner has failed to demonstrate that the Fifth Circuit or the Mississippi Supreme Court misapplied this Court's precedent in *Landrigan*. Therefore, certiorari should be denied.

B. Petitioner's Instruction To His Counsel That He Wanted No Case In Mitigation Presented Was Sufficient, In This Case, To Preclude A Finding Of Ineffective Assistance Of Counsel.

First, respondent would point out that this case is on federal habeas review, making the issue whether the state court's decision on this claim was an unreasonable application of the precedent of this Court. Petitioner appears to ignore this procedural posture of the case, instead he attacks the Fifth Circuit's decision as if it were a *de novo* review of claim. Under the AEDPA, a state court decision on the merits is entitled to deference and relief can be granted only if that decision 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). The Fifth Circuit faithfully applied § 2254(d) in this case.

Petitioner appears to argue that a defendant must be obstreperous and highly vocal in his demands that no mitigation case be placed before the sentencer and that the trial court must make an inquiry into whether this is his choice. Respondent would submit that is not the case. The Fifth Circuit found:

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, 127 S.Ct. 1933. 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.
>
> 778 F.3d at 500.

It is clear from the review of the other circuit courts of appeal, *supra*, that a defendant does not have to be as disruptive and adamant as Landrigan in order to waive the presentation of evidence.

Petitioner also seems to argue that any waiver of presentation of mitigation evidence must be informed and knowing. This assertion was rejected in *Landrigan*. *See* 550 U.S. at 479.

Loden was present in the court room when his

attorneys announced his instructions to him about not putting on a case in mitigation. He made no objection indicating that these were not his instructions. More specifically, when counsel reiterated that they would not be cross-examining witnesses or objecting to the State's evidence, the trial court questioned Loden and he affirmatively stated that it was his decision and he understood what he was waiving. 778 F.3d at 499. A reading of the record in this case demonstrates just how informed and resolute Loden was in his chosen decision.

The Fifth Circuit did not base its decision that the Mississippi Supreme Court's decision was reasonable solely on the statement of counsel to the court. Petitioner's claim is without merit and certiorari should be denied.

III. THE FIFTH CIRCUIT'S DECISION IS NOT WRONG

Petitioner returns to his theme that *Landrigan* is a very narrow decision and can only be applied when the there is some special or extraordinary circumstance calling for its application. Petitioner cites to this Court's statement that the circumstance must be "a situation in which a client *interferes* with counsel's efforts to present mitigating evidence to a sentencing court." 550 U.S. at 478 (emphasis added). Petitioner's

interpretation of the word "interferes" is flawed. To interfere clearly can mean simply telling counsel that he does not want a case in mitigation presented. It does not have to be the strident, public, or obstructive display found in *Landrigan*. *See Conner v. GDCP Warden*, 784 F.3d at 766-69; *Zagorski v. Bell*, 326 Fed.Appx. at 344; *Burns v. Epps*, 342 Fed.Appx. at 939.

Petitioner argues that the Fifth Circuit's view of the evidence was wrong and parses through the record pointing out snippets of what he contends demonstrate this claim. The full record was before both the district court and the Fifth Circuit and both found the decision of the Mississippi Supreme Court was not unreasonable.

Looking to the decision of the Fifth Circuit we find:

> 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, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (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 40, 120 S.Ct. 1495; *accord Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("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, 130 S.Ct. 447.

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, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). In *Landrigan*, the defendant was convicted of capital murder. 550 U.S. at 469, 127 S.Ct. 1933. 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, 127 S.Ct. 1933. The trial judge sentenced Landrigan to death. *Id*. at 471, 127 S.Ct. 1933. Landrigan then challenged his death sentence via a habeas petition, challenging his attorney's failure to 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, 127 S.Ct. 1933.

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 477, 127 S.Ct. 1933. 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, 127 S.Ct. 1933.

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* 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, 127 S.Ct. 1933. 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.

778 F.3d at 497-500.

Respondent would assert that Loden was sufficiently clear in his demand that no case in mitigation be put before the sentencing judge in this case. This claim is without merit, therefore certiorari should be denied.

IV. LODEN CANNOT DEMONSTRATE A REASONABLE PROBABILITY THAT HE WOULD HAVE RECEIVED A DIFFERENT SENTENCE BUT FOR COUNSEL'S ERROR

Petitioner contends that he can demonstrate a reasonable probability that he would have received a different sentence but for counsel's errors. He bases this claim on the new evidence that was obtained during the post-conviction investigation. However, the flaw in this argument is that this evidence was considered by the Mississippi Supreme Court, the federal district court and the Fifth Circuit. All of these courts determined that there was no prejudice. Thus there was no reasonable probability that the results of the sentencing phase would have been different.

The Mississippi Supreme Court found:

> 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.

43 So. 3d at 385.

The district court found:

> 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 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 concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Cullen v. Pinholster*, —— U.S. ——, ——, 131 S.Ct. 1388, 1408, 179 L.Ed.2d 557 (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 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.
>
> 2013 WL 5243670, *23.

The Fifth Circuit concluded its discussion of this issue stating:

> 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.
>
> 778 F.3d at 500.

After considering all the mitigation evidence presented by petitioner that is in the record, the state and federal

courts have determined that petitioner was not prejudiced by counsel's performance.

It must be remembered that petitioner had waived the sentencing jury and the hearing was conducted before a judge sitting without a jury. As was pointed out by the district judge, petitioner "kidnapped and raped a sixteen-year-old girl over the course of several hours, videotapping portions of the abuse and ignoring her pleas, before suffocating her and stuffing her nude, bound body beneath a seat in his van." 2013 WL 5243670, *23. The videotape was horrific, using the term abuse does not suffice for the torture this girl underwent. Respondent would assert there is no reasonable probability that the results of the sentencing trial would have been different.

Petitioner was not prejudiced. Therefore, certiorari should be denied.

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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