No. 15-10

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court has emphasized the critical importance of thorough mitigation investigations in capital cases and has repeatedly sustained ineffective assistance of counsel claims where those investigations were inadequate. Pet. 20-25. In doing so, the Court has applied the familiar *Strickland* standard, granting relief where counsel's performance was objectively unreasonable and there was a reasonable probability that, but for counsel's failure, the defendant would have received a sentence other than death. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-38 (2003) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

In this case, however, the Fifth Circuit followed a fundamentally contradictory approach. As respondent puts it, the court of appeals held as a categorical matter that, "[b]ecause petitioner waived the presentation of mitigation evidence during his sentence phase bench trial, the ordinary *Strickland* review does not apply." Opp. 22. The Fifth Circuit's rule, as summarized by respondent, is that "[w]here 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*." Opp. 14 (emphasis added); *see also id.* at 21.

That rule is based on a misreading of *Landrigan* and conflicts with the holdings of other courts of appeals. *Landrigan* dispensed with an ordinary *Strickland* prejudice inquiry only because the defendant's obstructive conduct and on-the-record request for the death penalty made clear that, "regardless of what information counsel might have uncovered in his investigation, [the defendant] would have interrupted and refused to allow his counsel to present any such evidence." *Landrigan*, 550 U.S. at 477. There were no comparable circumstances here, and thus *Landrigan* supports no inference that Loden would not have allowed introduction of any mitigation evidence, no matter how powerful.

In cases like this, other courts of appeals have correctly held that a capital defendant's mere decision not to put on (inadequate or non-existent) mitigation evidence cannot be a basis for automatically defeating any ineffective assistance of counsel claim based on counsel's failure to gather such evidence. Indeed, as amicus American Bar Association explains, it will often be the inadequacy of the investigation itself that induces such a waiver, and that risk "is greatest when counsel's performance is the worst." Amicus Br. 5. "Thus, the Fifth Circuit's *Loden* rule perversely requires the least scrutiny in cases in which counsel's mitigation investigation is the most lacking." *Id.*

This Court's review is warranted.[1]

ARGUMENT

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

As petitioner has demonstrated (Pet. 25-33), the Fifth Circuit's decision conflicts with those of other courts of appeals (and state high courts) that do not presume a lack of prejudice under *Landrigan* based merely on a decision by a capital defendant not to introduce (non-existent) mitigation evidence at sentencing. In order to pretermit an ordinary *Strickland* prejudice inquiry, those courts require obstructive conduct or in-court statements by the defendant making clear that he would never allow introduction of any mitigation evidence, no matter how compelling. *See id.* at 26-31. Respondent attempts to diminish the significance of the split in authority (Opp. 22-28), but his efforts are unavailing.

As petitioner explained (Pet. 27-28), the Tenth Circuit in *Young v. Sirmons*, 551 F.3d 942 (10th Cir. 2008), held that a capital defendant's mere choice "to forego" presentation of mitigation evidence provides no basis "to predict with any degree of certainty what

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[1] In the Jurisdiction section of his brief, respondent states that petitioner "fails" to invoke this Court's jurisdiction but offers no explanation for that statement. Opp. 2. This Court would have jurisdiction under 28 U.S.C. § 1254(1) in the event it granted the petition.

[the defendant] would have done had his trial counsel investigated and prepared to present all of the available mitigating evidence." *Id.* at 959.

Respondent points out (Opp. 26) that the Tenth Circuit in *Young* went on to conclude that the defendant there was not prejudiced by counsel's deficient performance. *See Young*, 551 F.3d at 958-69. That proves petitioner's point about the fundamentally different approach the two courts of appeals have followed. The Tenth Circuit in *Young* made its no-prejudice finding only after a detailed examination of the mitigating evidence, which led it to conclude that there was no "reasonable likelihood that the jury would have reached a different second-stage outcome had it heard all of the available mitigating evidence now cited by [the defendant]." *Id.* at 969. That is precisely the kind of ordinary *Strickland* prejudice inquiry that should have been conducted here.

Respondent also cites (Opp. 23) the Tenth Circuit's later (unpublished) decision in *Duty v. Workman*, 366 Fed. App'x 863 (10th Cir. 2010). In that case, however, the capital defendant "was consistent in his actions from the time of the murder and throughout the initial proceedings" in "adamantly insist[ing] on the death penalty." *Id.* at 874; *see id.* at 867. Accordingly, it was reasonable to conclude that, even had he known of mitigating evidence, "he would have made the same decision to waive his right to present" it. *Id.* at 873. Here, by contrast, Loden was clear from the beginning that he wanted mitigating

evidence developed, and he never asked for imposition of the death penalty. Pet. 36.

Respondent attempts (Opp. 26-27) to distinguish the Ninth Circuit's holdings in *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009), and *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012). In both cases, however, the court of appeals read *Landrigan* as categorically "inapplicable where the defendant 'did not threaten to obstruct the presentation of any mitigating evidence that counsel found.'" *Stankewitz*, 698 F.3d at 1170 n.2 (quoting *Hamilton*, 583 F.3d at 1119); *see* Pet. 28-29. Loden made no such threat here. To the contrary, he repeatedly urged his counsel to gather mitigating evidence and declined to introduce a mitigation defense only after counsel failed entirely to develop one.[2]

Respondent incorrectly contends that the Fifth Circuit's application of *Landrigan* does not conflict with the Third Circuit's approach. *Compare* Opp. 25-26 *with* Pet. 29-31. Respondent notes that in *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), the court "found the application of *Landrigan* was inappropriate

[2] Respondent's reliance (Opp. at 25) on *Cox v. Del Papa*, 542 F.3d 669 (9th Cir. 2008), fails for the same reason. The Ninth Circuit in that case held *Landrigan* applicable where the defendant "had interrupted" counsel's attempt to discuss mitigation evidence, thus leading to the inference that "[h]ad his lawyer attempted to continue that line of argument, . . . [the defendant] would have stopped him." *Id.* at 683. Loden made no such interruptions here, and no such inference is supportable.

because the questioning of the petitioner, found in the record, did not demonstrate that he would prevent counsel from presenting mitigating evidence." Opp. 25. That is no distinction. Loden was not questioned at all about his counsel's failure to offer mitigating evidence, Pet. 9, so application of *Landrigan* here was just as inappropriate as it was in *Thomas*.

Similarly, it does not distinguish *Blystone v. Horn*, 664 F.3d 397 (3d Cir. 2011), to point out (Opp. 25-26) that the court of appeals there "found that [the defendant's] answers to the trial court's questions did not demonstrate an intent to interfere with the presentation of mitigation evidence." None of Loden's statements in court demonstrated any such intent either. *Blystone* (applying the AEDPA standard of review) squarely held that a mere decision "to forego the presentation" of mitigation evidence "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." 664 F.3d at 426. That decision is therefore fundamentally inconsistent with the Fifth Circuit's decision, which found such an inference permissible on exactly that basis.

Contrary to respondent's contention (Opp. 25), the Third Circuit's earlier decision in *Taylor v. Horn*, 504 F.3d 416 (3d Cir. 2007), did not "appl[y]" *Landrigan* "in a similar fashion as the Fifth Circuit" did here. The Third Circuit has explained that *Taylor* applied *Landrigan* based on the *Taylor* defendant's

"dogged opposition to the presentation of mitigating evidence" and the fact that "he unwaveringly refused to allow his attorney to present any evidence in mitigation, going so far as to personally call potential witnesses to instruct them not to attend his sentencing." *Blystone*, 664 F.3d at 424. Loden did nothing of the kind here.

Finally, respondent also cites additional decisions from the Sixth and Eleventh Circuits and contends that they follow the same approach as did the Fifth Circuit in this case. That is incorrect. In *Zagorski v. Bell*, 326 Fed. App'x 336 (6th Cir. 2009) (*see* Opp. 23), counsel's "efforts to present a mitigation argument encountered intractable obstacles." *Id.* at 343. The defendant affirmatively told his counsel that, if convicted, he wanted a death sentence, and he forbade counsel from contacting family members in support of a mitigation defense. *See id.* Moreover, the defendant "insist[ed]—despite being advised against and understanding the consequences—that counsel not present mitigation evidence." *Id.* at 344. There is no comparable conduct here, where Loden begged his counsel to develop a mitigation defense. The court of appeals here based its application of *Landrigan* on nothing more than the statement by Loden's counsel that Loden had decided not to present mitigation evidence.

In *Conner v. GDCP Warden*, 784 F.3d 752 (11th Cir. 2015) (*see* Opp. 24), the capital defendant personally stated in a colloquy with the court at sentencing that he wanted no mitigation evidence presented.

Id. at 767. Loden made no such statement. Pet. 9. In addition, the defendant in *Conner* "pointed to no direct or circumstantial evidence (such as post-conviction testimony or an affidavit from [the defendant] himself) that he would have allowed trial counsel to present mitigating evidence." 784 F.3d at 768. Here, by contrast, Loden submitted just such an affidavit, and there was ample circumstantial evidence of the kind lacking in *Conner*, namely Loden's repeated (and unsuccessful) requests that his counsel prepare a mitigation defense. *See* Pet. 36-37.

When confronted with circumstances like those present here, the Eleventh Circuit has declined to apply *Landrigan*. In *Hardwick v. Secretary, Fla. Dep't of Corrections*, ___ F.3d ___, No. 97-2319, 2015 WL 5474275 (11th Cir. Sept. 18, 2015), that court rejected the state's argument "that counsel's recollection that [the defendant] instructed him not to call any mitigation witnesses in the penalty phase precludes a finding of prejudice." *Id.* at *17 (citing *Landrigan*). Instead, the Eleventh Circuit concluded that the proper question was what the defendant would have done had counsel conducted a proper investigation, and it rested on the district court's finding on that point:

> [H]ad counsel "investigated the many red flags" in [the defendant's] case, presented this potentially mitigating evidence to [the defendant], and explained that this evidence could be used to make a compelling case for life, [the defendant] "would have permitted

> [counsel] to introduce *some* mitigation evidence."

Id. at *18 (last alteration and emphasis in original). The Fifth Circuit in this case never asked that fundamental question.

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

Respondent excerpts long passages from the decisions of the Fifth Circuit and the Mississippi Supreme Court (Opp. 16-20, 32-40), but offers virtually no response to petitioner's arguments about why those decisions are wrong (Pet. 33-39).

Both courts' fundamental error was in failing to ask 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. In *Landrigan*, the inescapable answer to that question was "no" because the defendant's obstructive conduct and on-the-record request for a death sentence made that case "a bright star" in the "constellation of refusals to have mitigating evidence presented." 550 U.S. at 477 (quotation marks and citation omitted). The star here is dim, if it sheds any light at all: Loden begged his attorneys to prepare a mitigation defense, gave them numerous leads, and never made any statement at sentencing that he did not want mitigation evidence presented. His counsel represented that Loden had decided not to present a mitigation defense that counsel had not prepared. It was therefore entirely unreasonable to

conclude that counsel's failures were harmless on the supposition that Loden never would have permitted introduction of the (incredibly powerful) mitigating evidence counsel could have collected.

Contrary to respondent's suggestion, petitioner does not "ignore" the fact that this case "is on federal habeas review," thus triggering the AEDPA standard of review. Opp. 29. Indeed, petitioner explained at length why the Fifth Circuit erred in holding "that the state court's application of *Landrigan* was not unreasonable." Pet. 35-38; *see also id.* at 2. Moreover, *all* of this Court's decisions over the last fifteen years granting relief to capital defendants raising claims involving inadequate preparation of a mitigation case were also governed by the AEDPA standard of review. *See Porter v. McCollum*, 558 U.S. 30, 42 (2009) ("The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable."); *Rompilla v. Beard*, 545 U.S. 374, 388 (2005) (finding state court's resolution of ineffective assistance of counsel claim to be "objectively unreasonable" under AEDPA); *Wiggins*, 539 U.S. at 527 ("The Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable."); *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (finding the Virginia Supreme Court's "analysis of prejudice" to be "unreasonable" under AEDPA).

Nor is respondent correct that petitioner is arguing "that any waiver of presentation of mitigation evidence must be informed and knowing." Opp. 30. As the Third Circuit has recognized, the distinct question at issue in cases like this one is "whether [the defendant] would have waived his right to present mitigating evidence had he been represented by effective counsel." *Thomas*, 570 F.3d at 129 n.9. That question can be answered without "offer[ing] [an] opinion on whether a waiver of the right to present mitigating evidence must be 'informed and knowing.'" *Id.* (quoting *Landrigan*, 550 U.S. at 479).

Finally, respondent offers no response to petitioner's demonstration that the Fifth Circuit's error is significant because it unfairly undermines the ability of capital defendants to ensure adequate representation. Pet. 38-39. As the ABA explains, the Fifth Circuit's rule "will tend to predetermine no-prejudice findings precisely when counsel has been the least diligent." Amicus Br. 13. "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 than waiver." *Id.* at 13-14. To then use that waiver automatically to defeat any ineffective assistance of counsel claim based on the inadequate investigation is a "pernicious" rule with "profound practical and doctrinal implications." *Id.* at 14.

III. 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. *See* Pet. 39-40. Evidence of Loden's traumatic, abuse-filled childhood and heroic wartime military service is exactly the type of evidence this Court has found to support prejudice findings in other cases. *See id.* [3]

Respondent contends that the aggravating circumstances of Loden's crime would nonetheless weigh in favor of imposition of the death penalty. Opp. 44. Yet "egregiousness of the crime is only one of several factors that render a punishment condign—culpability, rehabilitative potential, and the need for deterrence also are relevant." *Glossip v. Gross*, 135 S.Ct. 2726, 2748 (2015) (Scalia, J., concurring). "That is why this Court has required an individualized consideration of all mitigating circumstances, rather than formulaic application of some egregiousness test." *Id.*

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[3] If this Court grants the petition for a writ of certiorari and concludes that the Fifth Circuit erred in finding that *Landrigan* justified dispensing with an ordinary *Strickland* prejudice inquiry, it could leave such an inquiry to the court of appeals on remand.

That critical individualized consideration of all mitigating circumstances cannot happen if mitigation evidence is not presented. And mitigation evidence cannot be presented if counsel never gathers it. When such a failure takes place, a defendant should secure relief if he demonstrates a reasonable probability of a different sentence but for counsel's lapse. To instead use the defendant's "decision" not to introduce the mitigation defense his counsel never prepared to automatically defeat his ineffective assistance of counsel claim unjustly denies him the protections of the Sixth Amendment when they are most needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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