

No: _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

NICHOLAS CODY TATE

Petitioner,

v.

WARDEN,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE PA
320 W. Jefferson St.
Tallahassee, Florida 32303
(850)-212-7276
Meolive@aol.com
Counsel of Record

VANESSA CARROLL
GEORGIA RESOURCE CENTER
303 Elizabeth St.
Atlanta, Georgia 30309
(404) 222-9202

CAPITAL CASE

QUESTIONS PRESENTED

Whether the Georgia Supreme Court’s opinion reversing the state habeas corpus court’s reasoned grant of relief based on capital sentencing counsel’s prejudicial ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984):

(A) was contrary to this Court’s precedents; *see Porter v. McCollum*, 558 U.S. 30, 40 (2009)(“uncooperative” client with respect to mitigation does not relieve counsel of obligation to investigate and advise); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005)(“actively obstructive” client with respect to mitigation does not relieve counsel of obligation to investigate and advise); and

(B) extended (and misapplied) this Court’s AEDPA decision in *Schiro v. Landrigan*, 550 U.S. 465 (2007) in a non-AEDPA context?

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Nick Tate respectfully petitions this Court for a writ of certiorari to review the Supreme Court of Georgia's reversal of the grant of habeas corpus relief as to Petitioner's sentence of death by the Superior Court of Butts, Butts County, Georgia.

OPINIONS BELOW AND JURISDICTION

The opinion of the Superior Court of Butts County, the state habeas corpus court, granting sentencing relief, is attached as Appendix (App) B. The opinion of the Supreme Court of Georgia entered October 31, 2019, reversing the grant of relief on Petitioner's death sentence, is attached as App. C. A timely filed rehearing petition was denied on November 14, 2019. App. D. Without an extension of time, a Petition for Writ of Certiorari to review the final judgment of the Georgia Supreme Court would have been due on or before February 12, 2020. On February 3, 2020, Justice Thomas extended the time to file that petition until April 12, 2020. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteen Amendments to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence. U.S. Const. amend. VI.
[N]or [shall] cruel and unusual punishments [be] inflicted. U.S. Const. amend. VIII.

No State shall...deprive any person of life [or] liberty...without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

“In this expert’s experience, Mr. Tate’s background is **singular in the combined severity, duration, and nature of the stressors and abuse he suffered** and his strong familial, and possibly genetic, predisposition to severe mental illness.” Frederic Sautter, Ph.D., trauma expert, PE 4 at HT 502.¹

“In my experience in the duration and severity of abuse, **Nick’s childhood was one of nearly unrelenting trauma** and reflected an extraordinarily high level of abuse and neglect which persisted over many years.” Bekh Bradley-Davino, Ph.D., trauma expert, PE 6 at HT 596.

“Mr. Tate’s family is **remarkable** for the extensive mental illness on both sides and severe substance abuse on the maternal side,” Pablo Stewart, M.D., substance abuse expert, PE 5 at HT 547.

“This is notably a record of **one of the worst, if not the worst**, social histories of the many patients whom I have evaluated.” Robert Shaffer, Ph.D., Neuropsychologist, PE 3 at HT491.

“**I agree with Dr. Shaffer that this is one of the worst** social histories of the many persons whom I have evaluated.” Matthew Norman, M.D., expert for Respondent, PE 9 at HT 679.

“As a psychiatrist with an active practice treating the mentally ill, including those suffering with Post-Traumatic Stress Disorder, Mr. Tate’s childhood history of abuse is **among the worst I have ever heard.**” Bushan Agharkar, M.D., Forensic Psychiatrist, PE 2 at HT 485.

¹References to the record are as follows: “PE” is Petitioner’s exhibit in the state habeas court; “HT” is the state habeas transcript; “R” is the Georgia Supreme Court’s renumbering of the entire state habeas proceedings; “TT” is the trial transcript; “ROA” is the record on appeal; and “PTH” is pre-trial hearings.

“The extensive interviews with family members and records in this case show that **Mr. Tate suffered a childhood filled with abuse and trauma as extreme as any I have seen, and much greater than I knew at the time of the evaluations.** I did not know the magnitude of the sexual abuse suffered by Mr. Tate, and I did not know the magnitude of the physical and emotional abuse. **The repeated nature of the abuse in this case is astounding.**” Kevin Richards, Ph.D., appointed by the trial court in 2003 and 2005 to perform competency evaluations, PE 8 at HT 672-73.

Mr. Tate pled guilty to two murders and waived a sentencing jury. None of this evidence was heard by the sentencing judge. The Georgia Supreme Court accepted as true (or at least did not contest) all of the mitigation evidence that was introduced in the state habeas corpus proceedings. The Court, reversing the habeas court’s grant of sentencing relief, wrote that compelling mitigation did not matter because Mr. Tate would not have allowed it to be introduced at sentencing.

A. Course of proceedings

1. Petitioner plead guilty in 2005 to two counts of malice murder in the Superior Court for Paulding County, Georgia, and waived his right to a jury trial on sentencing. Following a bench trial, he was sentenced to death. His conviction was affirmed by the Georgia Supreme Court. *Tate v. State*, 287 Ga. 364, 835 S.E. 2d 198 (2010). A Petition for Writ of Certiorari was denied. *Tate v. Georgia*, 562 U.S. 1180 (2011).

2. Mr. Tate filed a Petition for Writ of Habeas Corpus in the Superior Court

of Butts County, Georgia, on January 31, 2012. An evidentiary hearing was held June 9-10, 2014. On December 27, 2018, the habeas corpus court vacated Petitioner's death sentence, finding that counsel rendered ineffective assistance in failing to investigate and present mitigating evidence to the trial court. The State appealed, and on October 31, 2019, the Supreme Court of Georgia reversed the grant of relief on Petitioner's death sentence and affirmed the habeas court's denial of relief as to Petitioner's convictions. 835 S.E.2nd 198 (2019). A timely filed rehearing petition was denied on November 14, 2019.

B. Facts Relevant to Question Presented

1. The state's 22 witnesses at sentencing

At a bench sentencing trial, the State made a full guilt phase presentation calling 22 witnesses over four days. As summarized by the lower court:

The evidence presented at Tate's sentencing trial, including his videotaped custodial interview, showed the following. On the morning of December 11, 2001, 21-year-old Tate and two of his brothers, 18-year-old Dustin Tate and 15-year-old Chad Tate, loaded a number of weapons into Tate's truck and left their mother's home, where they resided. They drove to a local sporting goods store with a shopping list that included ammunition, duct tape, and extra-long zip ties. Tate went inside, accompanied by Dustin Tate, and purchased duct tape, a knife, and ammunition for various firearms, including a Winchester rifle, a nine-millimeter pistol, a .357 Magnum revolver, and an AR15 semi-automatic rifle. The three brothers then drove to the home of Barry Williams and his wife, Chrissie Williams, whose sister was married to Tate's oldest brother, Curtis Tate. Tate had previously purchased methamphetamine from Barry Williams, and he

and his younger brothers planned to burglarize the home, to steal drugs and money from the home, and to use a stun gun to rape Chrissie Williams.

Although Tate was aware that the Williams couple had temporarily lost custody of their children, he was not aware that Chrissie Williams had the children with her during the day pursuant to a reunification plan. Therefore, he expected Chrissie Williams to be home alone. However, when the three brothers arrived at the house, the Williams' three-year-old daughter, Katelyn Williams, answered the door. Although the child recognized Tate and called him "Big Nick," her name for him, she was obviously frightened by the three males, who entered the home armed, and she began screaming and running throughout the house. Tate and Chad Tate cut the telephone lines to the home, and Dustin Tate found Chrissie Williams sleeping in a bedroom with her two-year-old son in a crib beside her. When he shocked her with a stun gun, she awoke screaming, and Dustin Tate forced her to move to the bedroom across the hallway, intending to rape her there. At some point, both Tate and Chad Tate assisted Dustin Tate either in taping Chrissie Williams's mouth and eyes with duct tape or in handcuffing her hands to the bed's headboard and taping her legs to its footboard.

During an intense search for drugs and money, Tate rummaged through Chrissie Williams's purse, and he and Chad Tate ransacked the home, including turning furniture over, ripping the blinds off the windows, and removing heating vents. Tate attempted to silence Katelyn Williams's screams by taping her mouth with duct tape. After she continued to scream and run throughout the house, he placed her in the crib with her younger brother and told her to "shut up." When her brother started crying, Tate took her out of the crib, and she ran from him. Tate angrily ordered Chad Tate to "take her in the back bedroom" and quiet her. Chad Tate complied with Tate's order, and he strangled Katelyn Williams with a telephone cord, rendering her unconscious. When she revived and began crying again, Tate allowed Chad Tate to have his knife. Chad Tate slit Katelyn Williams's throat multiple times and then pushed her off the bed and onto the floor,

where she eventually bled to death.²

When Tate and Dustin Tate saw what Chad Tate had done, Tate took Katelyn Williams's younger brother out of the crib and "let him go in the living room," and "Dustin w[ent] ape" and insisted that they had "to get out of [t]here." He was so distressed that Tate directed him to wait outside. Bound to the bed with her eyes and mouth taped, Chrissie Williams became "hysterical," and Tate pointed his Smith and Wesson nine-millimeter pistol at her face and threatened to beat her with it if she did not cease her attempts to scream. Then Tate placed a cushion over Williams's head and shoved his pistol into it, firing one shot into the side of Williams's head and killing her. Tate and Chad Tate locked the door behind them as they left the home, leaving Chrissie Williams's toddler son inside. The three brothers fled Georgia, kidnapped a woman and stole her vehicle in Mississippi, and finally surrendered to authorities in Oklahoma. At the sentencing trial, the children's aunt testified that Katelyn Williams was wearing footed zip-up pajamas when she dropped Katelyn off at the home early on the morning of the crimes. When the victims were discovered, Katelyn Williams's body was completely nude, and Tate admitted at his guilty plea hearing that he removed her pajamas for his sexual gratification.

835 S.E.2d at 202-203.

²Chad did not give a statement to authorities upon arrest. Petitioner's and Dustin's confessions were largely consistent with Chad's later sworn statement and plea colloquy, both in November 2002, R-6:53, R-6:130, and Dustin's 2002 plea colloquy. R-6:249. Each told police that they had been taking large amounts of drugs leading up to the crimes, including that morning. They went to the Williams house because Dustin Tate wanted to rape Chrissie Williams. R-3:241; R-3:241; R-6:98-99; R-6:206. Nick and Chad believed there were drugs there, having bought drugs there before, and wanted to steal them. *Id.* They believed Williams would be the only person home because her children had been removed from the home. The situation spiraled out of control when Chad Tate, acting independently, killed Katelyn Williams. This was the prosecutor's version of events also. R-5:272, 276.

2. Defense counsel's two witnesses and mitigation argument

Defense counsel presented two persons in mitigation: Petitioner's father Oswald Tate and Cyril Watnes, the Paulding County Jail chaplain. Watnes testified he was the volunteer chaplain at the jail and that he had visited Nick Tate for three and a half years for an hour a week. TT. 5120-23. Nick had asked "questions pertaining to the Bible" and right and wrong. *Id.* This was with the "idea of accepting responsibility." *Id.* at 5125-26. Asked to tell the Judge what he "should know about Nick" before he passed sentence, Watnes said: "well, I believe in my own mind that Nick does know right and wrong. I do not believe he's crazy as some have eluded to that I have heard down there." TT 5127.

Oswald Tate's direct testimony took up just over one transcript page. He stated that he had taught his children to admit when they were wrong and because all three of his children had been involved in the crime they should all get the same life sentence. TT 5140. There were no other defense witnesses.

In his closing argument, trial counsel offered a "list" of mitigating factors, TT 5185, stating that Nick should get a life sentence because he was remorseful and had confessed, had no criminal record, had protected a kidnap victim from his brothers and surrendered peacefully,³ had cooperated with investigators, was a

³ When their truck broke down in Mississippi the day after the crimes, the brothers stole a jeep belonging to Angela Rowzee and took Ms. Rowzee with them. They spent the night in a motel where Nick kept Ms. Rowzee in a room separate from his

model inmate and would not be a future danger, accepted responsibility, and the prosecutor had made deals with his brothers for life sentences. TT 5185-91.

Counsel submitted into evidence the conviction of Petitioner's brother Curtis for molesting Petitioner, but did not refer to it. Judge Beavers sentenced Nick to death on December 15, 2005.

3. The undiscovered and un-presented compelling mitigation—the state habeas corpus court found counsel to be ineffective

a. The Unrebutted Social History Evidence before the Habeas Court

As found by the habeas court, a reasonable investigation would have revealed that Nick Tate's upbringing was characterized by poverty, neglect, violence, and shocking physical, sexual and emotional abuse, and incest. R-1:2733. The **unrebutted** evidence below from many lay witnesses included aunts, uncles, cousins, siblings and family friends, *see* R-3:6, 223, 232, 254, 261, 268, 275, 280 283, 287, R-4:2, 8, 16, and detailed how Petitioner's parents and other adults abused and mistreated the children in horrific ways. Seven mental health experts who reviewed the family history evidence in the record, *including the State's expert*, agreed that Nick's childhood history was one of the worst they had ever heard. The trial court heard none of it at sentencing.

brothers and released her the next morning. TT.4413-4463.

1. Mentally Ill Family Stretching Back Three Generations on Both Sides

As found by the habeas court, there was an extensive, multi-generational history of severe mental illness on both sides of Nick's family. Nick's mother, Debora, suffered from depression and anxiety disorders and was medicated most of her adult life on Xanax and other drugs.⁴ R-5:3-133. Nick's father's, Oswald Tate's, family history is equally remarkable for the extent and severity of mental illness. Oswald's mother was institutionalized regularly for schizophrenia and three of her siblings were severely mentally ill. At least four of Oswald Tate's siblings have been treated for mental illness, including schizophrenia and bipolar disorder. R-3:254-255, R-3:289, R-4:18-19. None of this was discovered or presented by counsel.

2. Childhood of unrelenting trauma, cruelty and abuse

Nick Tate's upbringing was one of poverty, neglect, violence, abuse and

⁴ Mrs. Tate underwent psychological treatment from 1988 until 2001 at Three Rivers Behavioral Health in Georgia. She was prescribed medications including Lithium, and opioids such as Oxycontin. R-5:2; R-3:88-89. Her sister Brenda was medicated from the time of the birth of her first child after marriage at age 13, and was a longtime drug abuser. She died in 2013. R-3:18, R-3:233, R-4:18, R-3:285. Her youngest sibling, Petitioner's uncle Ricky Crader, was diagnosed with schizophrenia and ruled incompetent at one point. R-18:47. He sexually molested Nick's older brother Curtis and raped Nick's sister Kim. R-7:53-55. He was married nine times and had a daughter who committed suicide at age 15. He died at age 34 after overdosing on prescription medication. R-3:275.

incest. The consistent and unrefuted evidence is that Nick's mentally ill mother suffered from severe mood swings and flew into sudden rages leaving her children on pins and needles. R-3:258. She hit them with her fists and whipped them with belts. R-3:13, R-3:258, R-3:272. She slapped them for simply looking at her. R-3:273, R-4:10-11. She forced them to kneel and hold their ankles, sometimes nose to nose, and would "smack them or hit them with a shoe if they let go of their ankles or were not gripping them tight enough." R-3:257, R-3:264. She routinely yelled at them, called them names, and berated them.⁵ R-3:273. She humiliated them. She whipped Petitioner for wetting the bed and sent his older brother Curtis to school in soiled clothing and to town with a sign saying "I wet myself."⁶ R-

⁵ According to her brother Edward Crader, she called the children "sons of a bitch, asshole and pig," R-3:273, and called Petitioner's sister a "stupid, ugly bitch," and a "whore," R-3:257. *See also* R-3:277, R-3:284. The family were afraid it would make it worse for the children if they confronted her. *Id.*, R-3:272, R-3:291. Petitioner's aunt wanted to call DFACS but was told by her husband they should not interfere.

⁶ The habeas court found the evidence included many acts of malicious psychological abuse directed toward Curtis, the oldest of the siblings. Many adults had the opportunity to observe Mrs. Tate's abuse of Curtis as a young child, since at that time the family all lived near one another in Louisiana. This included dumping him in a cemetery at night as a small child and then driving off, and locking him in an outbuilding at night and then banging and scratching on the sides to frighten him, as well as food deprivation and physical abuse which was compared by one witness to "a type of military torture." R-3:281. He was sexually abused at age 5 by Mrs. Tate's brother, Ricky, and was sent away to live in a Masonic Home for Boys at age 12. Upon his release at age 15 he sexually assaulted his younger siblings and cousins. R-5:117, R-6:306.

3:257-258. Curtis “thought my name was motherfucker until I was 16 years old.”

R-3:12. Oswald Tate, in addition to being collusive in his wife’s abuse, R-3:263, R-3:284, beat the children routinely and harshly with belts, extension cords, and his fists. R-3:232, R-5:153, R-4:201.

a. Rape by brother at age 8 and sadistic abuse by mother’s boyfriend

As found by the habeas court, Nick’s life was a horror:

The record reflects that in October of 1987, when Petitioner was eight years old, the family moved from Louisiana to Georgia. In August 1988, Debora Tate reported to counselors at Three Rivers Behavioral Health that Curtis had been molesting Petitioner and his younger siblings. (HT 5:1235). Petitioner later reported to a social worker that he had been anally raped for a year. (HT 4:1017). As noted in the Three Rivers records, the Tate children expressed “anger, fear, shame and embarrassment” over the molestation. (HT 5:1235). According to records, Petitioner asked for help in controlling his anger, which had become “more uncontrollable,” and he reported having stopped attending school. *Id.* School records show that Petitioner failed second grade and was placed in remedial second grade. (HT 17:4679, 4681).

The following year, Curtis was released from a juvenile detention center at age 17 and again molested Petitioner and raped his sister Kim. (HT 3:693). In 1990 Curtis pleaded guilty to incest and child molestation charges. (PX 49). When Petitioner was eleven, in the spring 1991 Petitioner’s family moved back to Louisiana but his father and sister soon went back to Georgia. (HT 3:473). The record reflects that Mrs. Tate’s boyfriend, Peter Johnson, lived with the family and physically abused the children and Mrs. Tate. (HT 3:685-686, 693-694). He forced the boys to kneel on frozen rice scattered on the floor for hours, held them a gunpoint, and force-fed them. (HT 3:686). Mr. Johnson punished Petitioner’s 10-year-old brother Dustin for wetting the bed by stripping him naked, hosing him with freezing

water, and threatening to glue his penis shut with plumber's glue. (HT 3:686, 693). Mr. Johnson once put Dustin on his knees on frozen rice and would not let him up until Mrs. Tate performed oral sex on Johnson in Dustin's presence. (HT 3:474, 694). Petitioner told Dr. Richards that Mr. Johnson would keep them on their knees for 24-36 hours at a time with only bread and water to eat. (HT 5:1271). Petitioner performed poorly in school and moved back to Georgia to live with his father in 1992 (HT 3:694; 17:4656).

Records admitted from the Department of Family and Child Service ("DFACS") show the agency was called to the Tate's trailer park in October 1992 after a complaint of child abuse or neglect, following a fistfight between Petitioner and his father. (HT 3:695; 21:5495-5496). Petitioner attended school in Paulding County for a few weeks and stopped when he was bullied for having been sexually molested. (HT 4:953, 958). Following another fight with his father, at the age of 13, Petitioner was committed to Northwest Georgia Regional Hospital for 30 days for psychological evaluation. (PX 35)(emphasis added).

b. Commitment to Mental Hospital at Age 13

NGRH records show that as a **13-year-old** Petitioner suffered from distorted thinking, hopelessness, self-hatred, and signs of "major depression with psychotic features." R-4:205. He reported he did not want to live anymore. As noted by the habeas court:

He made statements suggesting grandiosity and paranoia which were "possibly delusional" and reported he thought he was crazy. (HT 4:955). Though he had denied hallucinations earlier, Petitioner said he heard voices saying "come to me." *Id.* His judgment and insight were poor. *Id.* The psychologist noted that he experienced much stress at school due to difficulty doing his work and the harassment by other students regarding his sexual molestation, which led to "inappropriate emotional responses and distorted thinking," and then violence or threatened violence. (HT 4:958).

R-1:2740. According to the records, both Nick's refusal to go to school and the "terroristic threats" against his father were explained by this stress avoidance. R-4:205-06. Following the 30 day commitment, further psychiatric treatment and examination for medication was recommended. *Id.* Nick did not receive this recommended follow-up.⁷

c. More sexual abuse, and incest between the siblings

The evidence before the Court shows that several months after his commitment to NGRH Mr. Tate was again sexually molested, this time by the husband of his aunt. (HT 1:206; 3:687, 718; 5:1271). Additionally, there was testimony during habeas proceedings that the Tate children routinely had incestuous relationships with one another throughout their adolescence. (HT 1:174-176, 201-205; 3:687). This continued until their arrests in 2001. (HT 1:205; 3:687).⁸

R-1:2738

d. Self-medication, suicide, crippling anxiety and cry for help

Nick began using drugs, R-3:102, ultimately including painkillers oxycontin and MS Contin (morphine sulfate controlled release) which he obtained from his mother. R-3:103-104, 229. Petitioner told Dr. Richards in 2003 that he began

⁷ Counsel's billing records reflect he did not review "DHR records" until October 28, after voir dire began.

⁸ Petitioner's trauma expert Dr. Bradley testified that the sexual abuse the children suffered at the hands of Curtis and others are "almost certainly the predominant contributing factors to the fraternal incest that both Chad and Dustin report." R-3:199. Both Chad and Dustin testified by affidavit and at the hearing were cross-examined by Respondent.

using drugs because of being sexually abused. R-5:153.

In 1998 Nick was repeatedly hospitalized with two suicide attempts in two weeks from overdosing. R-4:111, 61, 108, 110-112, 122).⁹ He had overwhelming anxiety. He would cut himself in reaction to stress and burn himself with cigarette lighters. R-3:230.¹⁰ He became increasingly stressed closer to the crime as pressure from his dysfunctional family to pay bills and keep the family logging business solvent combined with his drug use. R-3:229, R-3:240. This anxiety was confirmed by his employer, R-4:21, and his girlfriend, the granddaughter of his father's second wife. R-4:12-13. Counsel never spoke to these people.

Additionally, extensive records documenting Petitioner's family's mental health history were presented during habeas proceedings. These records include:

a) Three Rivers (aka Highland Rivers) mental health records from January 2001 detailing how Petitioner sought help for "extremely high" anxiety, his inability to sleep more than 2-3 hours a night due to nightmares about falling or getting killed, his history of sexual abuse,¹¹ several suicide attempts, his inability to be in crowds or interact with people other than family members or at work, and his

⁹ Nick told ambulance personnel he had taken 20 Soma muscle relaxants because of "family trouble and depression." R-4:118. The hospital clinical assessment noted it was the second overdose in two weeks and that Nick showed "no insight into the seriousness of his act and is using prescription drugs as a means of coping with a negative situation." Id. at 120. He characterized the incident as a suicide attempt to both Dr. Richards and the counselor at Three Rivers. R-4:62.

¹⁰ He told Cella that he had lit his arm on fire when he was 19 or 20. R-21:112.

¹¹

desire to improve his quality of life. Petitioner was prescribed anti-anxiety medication, but he did not return for follow-up treatment; (HT 4:812-814).

b) Three Rivers (Highland Rivers) mental health records from February – March 2002, in which Petitioner described suffering flashbacks and nightmares, and hearing voices. (HT 4:815-817).¹² Petitioner also reported being hospitalized at NGRH at age 18 following a suicide attempt by drug overdose as well as suicide attempts at ages 14 and 16. (HT 4:815-817). He also stated his “brain isn’t the same” and that he “destroyed [himself] when that gun went off.” (HT 4:817). Petitioner spoke of social anxiety and said, “I don’t go anywhere” and “I have nothing inside,” *Id.* He expressed remorse in stating “what’s gone on is horrible”. *Id.* Additionally, Petitioner admitted long-term heavy use of cocaine, meth, acid, marijuana, and alcohol. (HT 4:816). The psychiatrist who saw him recommended neuropsychological testing. (HT 4: 816).

c) Jail records which reflect that Petitioner was treated by Three Rivers and which contain copies of the 2002 Three Rivers notes and the recommendation for neuropsychological testing. (PX 34).

d) 1998 Paulding Wellstar Hospital records documenting Petitioner’s attempted suicides. (HT 4:872-873).

e) Three Rivers counseling records of Debora Tate from 1988 through 2001. Documenting her ongoing mental health problems, including anger, anxiety, depression, and her addiction to Xanax. (HT 5:1124-1178).

R-1:2741-42.¹³ Trial counsel got none of these records.

¹² This was two months after his arrest, after referral by the Paulding County jail. R-4:58.

¹³ The habeas court also credited the testimony of Leslie Lunney, a licensed professional counselor who treated Mrs. Tate from 1993 to 1995. R-1:2734. Ms. Lunney testified that Mrs. Tate tried to manage her mental health and emotional problems by abusing prescription narcotics and “was constantly preoccupied with her own issues and seldom seemed concerned for the well-being of her children,”

The habeas court found that counsel “knew or should have known about all these records” but did not obtain the because they failed to investigate even though “Petitioner himself requested that counsel obtain his jail records, which referenced his treatment at Three Rivers in 2002, and also asked for his mental health records. (HT 1:93-94).” R-1:2742. The habeas court concluded counsel’s failure to obtain the records and further investigate based on the records and information in their possession was unreasonable. R-1:2742. “This is not a situation where trial counsel was unaware of their client’s psychiatric problems before trial,” *id.*, citing *Turpin v. Christenson*, 269 Ga. 226, 239 (1998).

b. Unrefuted Expert Testimony:

1. Chronic Trauma

Fredric Sautter, Ph.D., a psychologist specializing in trauma, reviewed the records and background information on Nick, as did trauma expert Bekh Bradley, Ph.D. In addition to interviewing Petitioner, Dr. Bradley interviewed Oswald Tate, Curtis Tate, Dustin Tate, Chad Tate, Priscilla Thompson, and Alice Upton Tate. R-3:118. Both experts opined that Petitioner exhibits symptoms consistent with Complex Posttraumatic Stress Disorder (“Complex PTSD”). R-3:58-61; R-3:122, 186. Complex PTSD is an “especially severe form of PTSD,” R-3:58, and “chose to stay in abusive relationships.” *Id.*, citing R-3:245.

arising from severe, repetitive trauma which usually begins early in life. Its symptoms include the inability to regulate emotions, disassociation, depression, suicide and self-destructive behavior, substance abuse and post-traumatic stress.

R-3:46.¹⁴ As the habeas court noted:

Dr. Bradley testified that certain risk factors increase the chance an individual exposed to trauma will suffer lasting and profound damage, including 1) exposure to abuse and trauma during critical developmental periods of childhood and adolescence; 2) exposure to extremely high levels of trauma and adversity during development as well as multiple types of maltreatment including physical, emotional, and sexual abuse, and neglect; and 3) abuse which is repeated, versus a single instance, which “increases the risk for negative outcomes.” HT 3:640, 641. Petitioner also had a chaotic and unstable environment, characterized by multiple moves and unpredictable caregiving, which “are known to increase the risk for the development of psychiatric and behavioral problems over the lifespan.” HT 3:641). Other risk factors identified by Dr. Bradley include the fact that much of the violence and abuse in Petitioner’s childhood and adolescence came at the hands of caregivers; that he was born into a family with multigenerational patterns of family violence; that he grew up in poverty; and that he carried a genetic risk for substance abuse and other psychological problems, which was compounded by being raised by a mother with ongoing psychiatric symptoms of mood and anxiety disorders. (HT 3:642-44).

R-1:2745-46.

¹⁴ In his report Dr. Sautter distinguished complex PTSD from “Classic” PTSD, which usually results from a singular traumatic occurrence. R-3:46. Complex PTSD is a widely recognized diagnosis and was known and available in 2005. *See* R-26:162; R-27:185-86; R-27:84. In 2005, complex PTSD “was an available syndrome or set of symptoms. It’s not officially in the DSM, but [] there’s robust ... research literature and clinical literature about it. It was definitely available then.”). This evidence was unrefuted.

Dr. Bradley concluded Nick “clearly was suffering from significant and impairing symptoms of a mental disorder at the time of the crime,” R-27:89, and “suffer[ed] from impaired ability to make decisions and impaired ability to control impulses and to think clearly.” *Id.* State’s expert Dr. Norman agreed that each of the risk factors outlined by Dr. Bradley is “associated with psychiatric disturbance, including possible brain damage” and that “[t]ogether, the sheer number of these factors, and the degree to which these factors was present in Mr. Tate’s development, is significant.” R-3:219-220.

2. Brain Damage

A neuropsychological evaluation of the type recommended in 2002 by Three Rivers Behavioral Health was performed in 2012 by Dr. Robert Shaffer. As found by the habeas court,

Dr. Shaffer’s testing revealed that Petitioner has brain damage in the right parietal and frontal lobes. (HT 3:492). This impairment “involves neuropsychological functions which operate in higher functions of memory, meaning and judgment.” (HT 3:495). According to Dr. Shaffer, a known source of parietal lobe dysfunction is chronic traumatic stress. (HT 3:494).

R-1:2743.

Dr. Shaffer testified that his testing revealed significant impairment in specific subtests which “suggests that [Petitioner] has trouble anticipating and thinking ahead of what will be the consequence of specific actions that he takes in sequence.” (HT 28:7110). On one subtest measuring frontal lobe functioning, Petitioner “was exceeded by

about 98 out of 100 individuals from the standard sample,” which represents significant impairment. (HT 28:7109). Dr. Shaffer testified this means that in new or unfamiliar situations, a person with this sort of brain damage would have trouble conforming their behavior appropriately where a situation changed in an unanticipated manner. (HT 28:7111-7112).

R-1:2734.

Each of the experts who reviewed Nick’s background and mental health history concurred with Dr. Shaffer’s findings. Dr. Norman also deferred to Dr. Shaffer’s findings that Petitioner has brain damage. *Id.*; R-3:217, 220-221.

3. Trauma-induced Substance Abuse

The habeas court credited the testimony of substance abuse expert Dr. Pablo Stewart who evaluated Nick to assess his drug and alcohol history and its impact on his mental state and functioning in light of his trauma history. Dr. Stewart concluded:

It is my opinion, which I hold to a reasonable degree of medical certainty, that Mr. Tate suffered from chronic drug dependence, that he had a family history which predisposed him to drug dependence; that his drug usage began wholly as an effort to self medicate for the serious depression, extreme anxiety, and feelings of shame which stemmed from his incredibly traumatic upbringing and sexual abuse; and that his underlying organic brain deficits made him particularly vulnerable to the damaging effects of the relentless abuse he experienced and left him with few resources to cope with those effects. Mr. Tate’s drug usage, however, could ultimately only exacerbate both his underlying cognitive impairments and his mental health symptoms.

R-3:575. Dr. Stewart’s conclusions make plain that Petitioner’s drug addiction

was not a conscious and free choice but a reaction to his chaotic and traumatic upbringing. *Id.* at 572. As noted by the habeas court, Appellant's expert Dr. Norman also "diagnosed Petitioner with polysubstance dependence and concluded that Petitioner's crime was 'the result of his drug dependency and usage, and his compromised abilities to cope with the circumstances.'" (HT 3:676)". R-12748.

Thus, all of the experts below agreed that Nick Tate suffered chronic trauma, brain damage, and trauma-induced polysubstance dependence and abuse. The trial court which sentenced Nick to death did not hear this evidence.

4. The Georgia Supreme Court's reversal based upon *Schiro v. Landrigan*

In reversing the grant of relief, the Georgia Supreme Court accepted much of this evidence as true and did not discount any of it. *Tate*, 835 S.E.2d at 217-222. However, the Court held that Mr. Tate would not have allowed the presentation of the evidence and so this Court's AEDPA federal habeas corpus decision *Schiro v. Landrigan*, 550 U.S. 465 (2007), precluded relief. According to that Court, the controlling principle from *Landrigan* is that "a defendant who 'interferes with counsel's efforts to present mitigating evidence to a sentencing court' cannot show prejudice under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] for counsel's failure to conduct an adequate investigation or to present such evidence." *Tate*, 835 S.E. 2d at 209.

REASONS FOR GRANTING THE WRIT

In order to prevail on a claim of ineffective assistance of counsel, Nick Tate must have made the following two-pronged showing: first, “that counsel’s performance was deficient;” and second, “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 686. An attorney’s “[p]erformance is deficient if it falls below an objective standard of reasonableness,” which is defined in terms of “prevailing professional norms.” *Wiggins v. Smith*, 539 U.S. 519, 521 (2003) (citing *Strickland*, 466 U.S. at 688). “It is unquestioned that under the prevailing professional norms at the time of [Petitioner’s] trial, counsel had ‘an obligation to conduct a thorough investigation of the defendant’s background.’” *Porter v. McCollum*, 558 U.S. 30, 39 (2009)(citing *Williams v. Taylor*, 529 U.S. 362 (2000)); see also *Sears v. Upton*, 561 U.S. 945, 951 (2010). As to prejudice, the petitioner must show only “a reasonable probability of a different outcome, not that a different outcome would have been certain or even more likely than not.” *Strickland*, 466 U.S. at 693. Counsel must conduct a “thorough” and “diligent” investigation into the client’s background for reasonably available mitigating evidence *before* selecting a strategy. *Williams*, 529 U.S. 362, 415 (2000).

The lower court did not address whether counsel performed according to

professional norms. The lower court did not assess whether the mitigating evidence not presented by counsel at sentencing might have convinced a juror to vote for life. The only thing the lower court wrote was that Mr. Tate would not have allowed the compelling mitigation to have been presented and so there was no *Strickland* prejudice. This holding cannot constitutionally be made without a finding that counsel acted according to professional norms.

The lower Court's decision is worthy of this Court's reversal. It's "application" of *Landrigan* dangerously expanded its reach, is contrary to *Porter* and *Rompilla v. Beard*, 545 U.S. 374 (2005), and undermines this Court's directives regarding how counsel must perform in capital cases.

Defense Counsel Were Prejudicially Ineffective and the Georgia Supreme Court Reversed the State Habeas Corpus Court's Grant of Relief by Wrongfully Extending *Schriro v. Landrigan*, Contrary to this Court's Controlling Precedent

The lower court misconstrued *Landrigan*, expanded it, and misconstrued the record in order to reverse the state habeas court's grant of relief.¹⁵

A. Petitioner did not prohibit the presentation of mitigating evidence

The state habeas corpus court order, in the guilt/innocence portion of its

¹⁵For all of the reasons articulated by the state habeas corpus court, Petitioner should be awarded sentencing phase relief. *See* Statement of the Case, Section B, 1-3.

decision written by Respondent, states:

The record shows that following trial counsel's attempts to negotiate a plea, Petitioner expressed a desire to plead guilty, did not want trial counsel to present mitigation evidence, and wanted to receive the death penalty. (MHT, 4/9/04, pp. 31-32).

"MHT, 4/9/04, pp. 31-32" refers to a hearing on April 9th, 2004, where the parties and the Court addressed defense motions. At the hearing, the state began to discuss defense Motion No.1 which requested the state to provide to the defense any mitigating evidence in its possession that could benefit Mr. Tate at sentencing. Pretrial Motions Hearing 4/9/04 at 28. The discussion turned to a motion filed by defense counsel Cella--Motion No. 56:

Mr. Osborne [prosecutor]:I think, in regard to this motion, that the court needs to address the fact that **Mr. Tate has asserted to the Court, in his motions, that he killed these victims so that the jury will want to execute him, and he wants to waive mitigation.** So I don't understand motion number one, he wants the mitigation, but he is alleging that he killed them and he wants the death penalty.¹⁶ **He's**

¹⁶At the motions hearings April 8- 9, 2004, Mr. Tate was in fact fully invested in resolving his case or going to trial and was "working with [counsel] toward a lighter sentence." R.65:77 (testimony of Marc Cella). Counsel's time records reflect plea negotiations were ongoing through April 8 and following these hearings Tate continued to work with counsel. The hearing on *ex parte* motions was held at the end of June 2004 and counsel discussed trial and sentencing preparation. R.22:2-35. Counsel's records show conferences with Tate in July following contacts with Dr. Richards and with ballistics expert Kelly Fite. R.21:53. In August 2004, counsel met with Tate and reviewed evidence. *Id.* Then Judge Foster, the presiding Judge, retired. There had been no discussion of any desire to obtain the death penalty. It was only "[w]hen the case proceedings

asking for the Court to allow him to waive mitigation. Judge, I don't know how that's –

Mr. Cella: I don't have that in this case. I don't know what he's talking about.

Mr. Osborne: Well ...

The Court: Yeah. I admit I'm kind of baffled, too.

Mr. Osborne: I would – in motion number fifty-six, he alleges –

The Court: We are dealing with motion number one right now.

Mr. Osborne: Okay. I guess we'll deal with fifty-six. He's asking you to let him waive mitigation.

The Court: Well, I don't have a clue what fifty-six is at this point.

Mr. Osborne: Well, the only reason I point it out is your ruling on one will impact number fifty-six. You might want to take them home and look at it.

He's filed two different motions: I want mitigation, but I want to waive mitigation. I don't understand that, either, Judge, but it will impact your ruling on number one.

The Court: Where is fifty-six?

* * *

The Court: Okay. I'm looking at fifty-six. That's a motion for appointment of counsel to investigate and present mitigation.

Mr. Osborne: Paragraph one. Read paragraph one.¹⁷

picked up again" in *August of 2005* that counsel found "Nick had become religious. He felt like he should plead guilty to the crime without a deal because he was guilty, and open himself up to the death penalty." R.4:33 (affidavit of Brad Reed). That same month Tate told Dr. Richards that he had "[d]ecided in the last 6-8 months that he want[ed] to" plead guilty and risk the death penalty. R.5:159.

¹⁷Paragraph #1 states:

That the facts and circumstances of this case will present an issue of

Mr. Cella: Judge, I'll remind the Court: this is the one I told you earlier this morning that I'm not ready to argue and, **obviously, paragraph one doesn't have anything to do with this case. There's no evidence that the defendant is mentally ill or killed for the express purpose of being executed by the state.**¹⁸ So we'll **withdraw paragraph number one from motion fifty-six.**

The Court: Okay.

Mr. Osborne: Paragraph thirteen further alleges he's – he's pleading guilty and directing his attorney not to present mitigation and punishment (sic) and wants the death penalty. It's what Nick Tate has filed with the Court. If we want to let him do it, it's –

Mr. Cella: **We will withdraw motion fifty-six**, Judge, and refile it if we need to.

Pretrial Motions Hearing 4/9/2004 at 28-32 (emphases added).

Thus, the motion that was filed was a mistake, **“I don't have that in this case. I don't know what he's [the prosecutor's] talking about;”** “it obviously, **paragraph one doesn't have anything to do with this case.** There's no evidence that the defendant is mentally ill or killed for the express purpose of being

first impression to the Georgia Supreme Court. The facts are a mentally ill defendant who kills for the express purpose of being executed, who waives the presentation of any mitigation and demands the imposition of a death sentence.

ROA at 1610.

¹⁸As Judge Foster commented when he accepted the guilty plea of Petitioner's brother Dustin:

Well, I guess you've already figured out what I was getting at that oftentimes we make bad choices and we start things in action, and consequences that we never anticipated result, and *I think that was the situation here.*

R.5:299 (emphasis added). Tate's crime was not homicide to get the death penalty.

executed by the state;” and *the motion dehors the record inasmuch as defense counsel completely withdrew it.*¹⁹

The Georgia Supreme Court nevertheless quoted and cited the state habeas court’s erroneous “finding.” *Tate*, 835 S.E.2d at 209. The Court acknowledged Tate’s argument that “the factual findings about Tate’s not wanting counsel to

¹⁹How defense counsel came to file a motion having nothing to do with this case is explained by counsel’s use of form motions. As Cella testified, and as his billing records reflect, he obtained a disk with 125 motions from the Multi County Defender in August, 2003. R.65:81, R.21:63. From this disk he filed motions 1 - 40 on September 2, 2003, and filed motions 41-56 (and ex parte motions) on September 18, 2003. R.21:63-64. Motion 56 is a verbatim copy of a motion from the disk provided by the Multicounty Public Defender in *State of Georgia v. Daniel Colwell*, 544 S.E.2d 120, 122, 273 Ga. 634 (2001)(“The evidence presented at Colwell’s sentencing trial showed that Colwell, wishing to die but unable to commit suicide, formulated a plan to kill more than one person in order to secure his own execution.”). The *Colwell* motion sought an order “appoint[ing] an attorney to investigate and present mitigation about Mr. Colwell as a representative of the Court and not of the defendant.” See R.47:278, section I.A. 130 (checklist of form motions filed from Cella’s file). What Cella filed is identical to the *Colwell* motion with the exception that Mr. Colwell’s name throughout the motion was replaced by Cella with “The defendant.”

Cella filed a separate motion to appoint a mitigation investigator (R.22:75) which was discussed at an *ex parte* hearing on June 29, 2003, almost three months after the *Colwell* motion was withdrawn. R.22:10-12. In this “Motion for Funds to Hire a Mitigation Investigator to Aid Nicholas Tate in the Presentation of Mitigating Evidence,” Cella detailed how a mitigation investigation had to be conducted including “comprehensive interviews with the client and as many individuals as possible who have known the client.” R.22:80. At the June 29th hearing, Cella advised the Court that he had a private investigator in mind and “I feel comfortable in him being able to assist me in the nature of what a mitigation investigator” would do, at least at that stage of the case. *Id.* at 10.

present mitigating evidence but, instead, wanting a death sentence are clearly erroneous because the citation to the record that immediately follows them does not support them.” *Id.* at 209-210. The Court then looked for whatever other “evidence in the record to support such findings” it could find. *Id.* There was not enough.

The Court ignored the habeas court’s factfindings in the penalty phase ineffectiveness section which contradict that single sentence, are fully supported by the record, and, unlike the cited guilt portion sentence, accord with the habeas court’s conclusion that Mr. Tate was not afforded effective assistance of counsel. Those factfindings are that the only mitigation evidence Mr. Tate asked counsel not to present was limited to testimony about his brother having raped Tate in childhood, and having his mother testify. First, the habeas court wrote, “[t]he record reflects that Petitioner *did not want trial counsel to discuss the rapes* by Curtis at trial (HT 1:68, 4:788).” (emphasis added) This citation, HT 1:68, is to lead counsel Cella’s response to the specific question which is at the crux of the case: exactly “how” Tate limited his focus in the sentencing phase.²⁰

²⁰ Cella’s answer was not that Tate told him not to present mitigation. It was that “he did not want me to talk about the anal rape, and he was very adamant about that, so much so that I ultimately gave in to him. And I don’t believe we did present anywhere near as much evidence about that incident as I would have.” R.65:72.

The habeas court also found that “*Petitioner also did not want his mother to testify* because he did not want her subject to the district attorney’s cross-examination (HT 4:788).” (emphasis added). This citation is to co-counsel Reed’s affidavit testimony, which he verified and endorsed at the habeas hearing.²¹ The Georgia Supreme Court’s opinion does not mention these factfindings.

According to the Court, “[e]ven if portions of trial counsel’s testimony appear somewhat at odds with other testimony and evidence, it was for the habeas court to resolve any conflicts.” Op. at 41. The habeas court did so. It found, “[a]lthough Petitioner might have expressed that he did not want evidence regarding his molestation by Curtis to be brought out in court, trial counsel’s failure to present any of the extensive evidence of Petitioner’s family life was unreasonable and Petitioner suffered resulting prejudice.” R.1-2754. It did not find that counsel’s failure to present any of the overwhelming mitigation evidence introduced at the habeas hearing was because Petitioner prohibited them from doing so. There was

²¹ Reed testified “Nick did not want evidence of the molestation by his brother presented. However, it was our call and we probably should have gone forward and presented it. If we had, I do not think Nick would have stopped us. Because Nick did not want to present evidence against Curtis, we put Curtis’ conviction and sentence into the record. Nick approved this. We had his father testify to his belief that all the boys should get equal sentences, and ask for a life sentence. Marc wanted the mother to testify similarly and ask for mercy, but Nick did not want his mom up there to be subject to the District Attorney’s questioning.” R.4:35. (emphasis added).

no conflict: the “factfinding” that Mr. Tate would not allow mitigating evidence is clearly erroneous.

The Georgia Supreme Court’s own opinion demonstrates this error. If it is true that Mr. Tate forbade counsel from presenting mitigation because he wanted to die, 835 S.E.2d 209, why, then, did defense counsel “elicit some mitigating testimony from several of the state’s witnesses,” present “two witnesses in mitigation,” introduce “correspondence to Tate from his mother and Dustin Tate and Curtis Tate’s certified conviction for the molestation of Tate”? *Id.* at 208-09. All without objection from Mr. Tate. And then counsel listed in closing argument, according to the lower Court’s opinion, thirteen mitigating reasons not to sentence Mr. Tate to death. *Id.* at 209. Mr. Tate again made no objection. All of these actions by defense counsel were part of a patent, open, public effort to obtain a life sentence for Mr. Tate. Mr. Tate did nothing at all to stop it.

Nevertheless, the lower court writes that Mr. Tate at first would have allowed mitigation but changed his mind. But counsel’s testimony as to what transpired at trial was not limited to early in the case.

Q: Did he – other than the Curtis stuff – *ever* object to you presenting or calling witnesses?

A: No.

R.26:58 (emphasis added).

Q: Did he *ever* tell you not to talk to any of his family members, any of his friends?

A: *No*. As I said, we were able to talk throughout the whole thing; we just couldn't overcome our disagreement about what his goal should be.

R.26:41-42. *See also* R.65-74 (Cella testifying there were no other witnesses in the mitigation investigation Tate did not want counsel to talk to); R.26:120 (Reed did not remember Nick ever telling him not to talk to any witnesses.)

B. This case is not controlled by *Schriro v. Landrigan*²²

Throughout the trial proceedings, Tate never told the court he did not want his lawyers to present mitigation. The lawyers also never told the court that. The opposite is true. *See* R.22:12-14 (6/29/04 pretrial hearing discussing possible mitigating evidence in Dr. Richards' report about drug and alcohol abuse and the "pathological relationship" with Dustin, and whether Dr. Richards' expertise included "how substance abuse affects one's brain and therefore, one's

²²The lower court acknowledged this case is not *Schriro v. Landrigan*: "While Tate's instructions to trial counsel 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.'" *Tate*, 835 S.E.2d at 213-14 (citation omitted). Nevertheless the *Porter* court applied *Landrigan* and reduced *Porter* and *Rompilla* to irrelevancy: "no Supreme Court authority post-*Landrigan* indicat[es] that a competent capital defendant's decision not to present any mitigating evidence may be informed or knowing only if trial counsel first thoroughly or even adequately investigates the evidence and tells her client about it.'" *Tate*, 835 S.E.2d at 215.

judgment.”);²³ PTH 9/9/05 (further discussion of same); R.32:268 (Cella at guilty plea, telling the court that he would be presenting information at the sentencing trial about Dustin’s influence over Nick, i.e., mitigation.) What Mr. Tate did tell the Court upon deciding that he wanted to plead guilty was that he was ready to accept the Court’s verdict, no matter what it was. *See* R.32:262 (“I wanted to give my statement, correct my wrongs, and accept what’s coming to me, *whatever it might be.*”); *id.* at 268 (“I have to live with the sentence that you give me.”).

Mr. Tate said he would accept a death sentence if that was the verdict, but he did not forbid the presentation of mitigation and if mitigation resulted in a life sentence he would “live with” it. The distinction underlies the lower court’s mistaken insistence that Tate’s case is governed by *Schriro v. Landrigan*. The Court acknowledges that for *Landrigan* to apply the record must show the defendant “clearly and unequivocally expressed an intention not to present any mitigating evidence or to limit the mitigating evidence,” and states *Landrigan*’s case was distinguishable from “cases where ‘the defendant refused to assist in the

²³The lower court writes that trial counsel sought funds for a pharmacologist to show how Tate’s drug use affected him, op. at 82, but Tate was “not real happy about pursuing” this mitigation. The record shows Cella did not pursue this because, as he told the court, he was going to see if Dr. Richards was qualified to address “how substance abuse affects one’s brain.” PTH 6/29/04 at 12-14. As Cella testified, Tate did not care about whether Dr. Richards testified, R-65:109, and had no “strong opinion one way or the other” about presenting evidence of substance abuse. R-65:84.

development of a mitigation case but did not inform the court that he did not want mitigating evidence presented,” 835 S.E.2d at 210, *i.e.*, *Rompilla v. Beard*. 545 U.S. 374, 381 (2005). Mr. Tate did *not* inform the court he did not want mitigating evidence presented, and mitigation was presented, as discussed *supra*. He instead informed the court at his guilty plea that he was throwing himself on the mercy of the court, and if he got the death penalty that result was just. It was not until four years later, primed by his legal “education” on the subject gained on death row, that he claimed he had not wanted any mitigation at all.²³ The only other evidence that he did not want “any and all” mitigation presented was co-counsel Reed’s varied characterizations. But defense counsel Reed did not know the extent of the mitigation.²⁴

²³The Court quotes Mr. Tate’s 2009 status hearing testimony that “I wanted to forego- I wanted to just leave out any mitigating evidence at all. I had no problem with that. .. I did not know that it was right that I could just forego all of this.” Op. at 40. This was the first, only, and four years late assertion to the trial court that he wished not to present any mitigation, *cf. Landrigan*, 550 U.S. at 478. If Tate indeed did not know “until recently” that he had the right to forego all mitigation, he could hardly have demanded that right at trial.

²⁴ The lower court’s conclusion that *Landrigan* applies leads it to an extensive recitation of the mitigation presented in the habeas court regarding Mr. Tate’s abusive and traumatic background, drug abuse and dependency stemming from that background, and his extensive history of mental illness and brain damage. The Court writes that counsel knew about all these areas and discussed them as possible mitigation with Mr. Tate, and Mr. Tate made a knowing and informed waiver of them. The Court’s overarching conclusion that Mr. Tate directed counsel not to present any mitigating evidence is incorrect. An analysis of what Mr. Tate understood or failed to understand regarding mitigation does not “obviate

Landrigan does not address cases where a defendant is unhelpful in developing a mitigation case, “uncooperative,” *Porter v. McCollum*, 558 U.S. 30 at 40, or even “actively obstructive,” *Rompilla v. Beard*, 545 U.S. 374 (2005). Mr. Tate’s case is not a *Landrigan* case. In *Landrigan*, the defendant stated on the record at trial he had instructed his lawyers not to present mitigation. He then “interrupted repeatedly when counsel tried to proffer anything that could have been considered mitigating.” 550 U.S. 465, 476-77. He “would have undermined the presentation of any mitigation evidence that his attorney might have uncovered.” *Id.* at 477. Cases contained in the lower court’s opinion follow this pattern. *See, e.g., Allen v. Sec’y*, 611 F.3d 740 (11th Cir. 2010)(state court rejection of ineffectiveness claim where counsel presented no mitigation and did not investigate was not an unreasonable application of *Landrigan* where counsel was following the defendant’s explicit instructions, memorialized in a sworn document which also set forth his understanding of his actions and the consequences); *Cummings v. Sec’y*, 588 F.3d 1331 (11th Cir. 2009)(counsel informed court pretrial defendant did not want to present mitigation and refused to provide mitigation related information; defendant affirmed this in a colloquy, stated it again following conviction, and reaffirmed in state habeas, thus “clearly, the need for defense counsel to conduct some sort of mitigation investigation.” *Porter, supra*.

consistently and adamantly” refusing mitigation); *Loden v. McCarty*, 778 F.3d 484, 500 (5th Cir. 2015)(where counsel announced defendant instructed him not to present mitigation or cross-examine the state’s penalty witnesses and the trial court explicitly inquired, “we cannot say this was an unreasonable application of *Landrigan*”); *Krawczuk v. Sec’y*, 873 F.3d 1273, 1296 (11th Cir. 2017)(defendant pled guilty, dismissed a motion for funds to hire a mitigation investigator, affirmed he did not want to present any mitigating evidence, reiterated in a colloquy prior to jury selection he did not want counsel to participate in any part of the penalty phase trial, and refused to allow a pretrial competency report which discussed his background to be presented). *But see Blystone v. Horn*, 664 F.3d 397, 424-26 (3^d Cir. 2011)(limiting *Landrigan* to cases where defendant has demonstrated a strong determination not to present any mitigating evidence and concluding “[t]he fact that [the defendant] chose to forego the presentation of his own testimony and of [] two family members...simply does not permit the inference that, had counsel competently investigated and developed expert mental health evidence and institutional records, [the defendant] also would have declined their presentation”).

The *Landrigan* Court expressly distinguished *Rompilla*, where “the defendant refused to assist in the development of a mitigation case, but did not

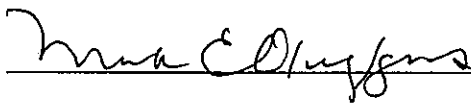
inform the court that he did not want mitigating evidence presented.” 550 U.S. at 478, citing *Rompilla*, 545 U.S. at 381. The Georgia Supreme Court ignored this distinction, extended *Landrigan* beyond its four corners, and ignored binding precedent from this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for writ of certiorari.

Dated, this the 13th day of April, 2020.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mark E. Olive", is written over a horizontal line.

MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE PA
320 W. Jefferson St.
Tallahassee, Florida 32303
(850)-212-7276
Meolive@aol.com

VANESSA CARROLL
GEORGIA RESOURCE CENTER
303 Elizabeth St.
Atlanta, Georgia 30309
(404) 222-9202