No: 19-8272

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS CODY TATE,

Petitioner,

v.

WARDEN,
Georgia Diagnostic Prison,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Georgia

PETITION FOR REHEARING

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
104 Marietta St. NW, Suite 260
Atlanta, Georgia 30303
(404) 222-9202

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Petitioner Nicholas Cody Tate, a Georgia death row inmate, submits this Petition for Rehearing of the June 22, 2020 Order of this Court denying his petition for a writ of certiorari. Counsel's certification that this petition complies with Rule 44.2, is attached.

The Georgia Supreme Court's decision reinstating Mr. Tate's death sentence is worthy of this Court's reversal, and rehearing on the Court's denial of certiorari is appropriate. The record reflects that the state habeas court properly applied this Court's precedent under *Strickland v. Washington*, 466 U.S. 668 (1984) in concluding that Mr. Tate was denied the effective assistance of counsel in the penalty phase of his capital case. The Georgia Supreme Court relied on a single, clearly erroneous sentence in the habeas court order to "apply" *Schriro v. Landrigan*, 550 U.S. 465 (2007) and vacate that court's grant of relief. This misapplication undermines this Court's directives as to how counsel must perform in capital cases.

The recent decision in *Andrus v. Texas*, 590 U.S. __, 140 S.Ct. 1875 (June 15, 2020,)(per curiam) confirms the analysis of the state habeas court was the proper application of this Court's precedent. This Court should grant rehearing, grant the petition, vacate the Georgia Supreme Court's judgment, and remand in light of *Andrus*.

A. This Court's decision in *Andrus* shows the habeas court was correct

In *Andrus,* this Court found deficient performance under the first prong of *Strickland* and remanded the case to address whether the Texas Court of Criminal Appeals properly considered prejudice. That court had "concluded without elaboration that Andrus had 'fail[ed] to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance.'" 140 S.Ct. at 1881.

In remanding *Andrus*, the Court underscored the proper application of *Strickland*: "Counsel in a death penalty case has 'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Id.*, citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)(citations omitted). It examined "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Andrus'] background was itself reasonable," *id*. at 1882, citing 539 U.S. at 523. The Court concluded "the scope of counsel's investigation into petitioner's background," *id*., citing *Porter v. McCollum*, 558 U.S. 30, 39

(2009), was unreasonable despite counsel having called witnesses to testify at the penalty phase.

Counsel in *Andrus* acknowledged the failure to "look into or present the myriad tragic circumstances that marked Andrus' life," 140 S.Ct. at 1882. These circumstances echo those in Tate's case. They include the failure to meet with any close family members other than the petitioner's mother and biological father, though all these persons "had disturbing stories about Andrus' upbringing." *Id*. "Andrus suffered 'very pronounced trauma' and posttraumatic stress disorder symptoms from, among other things, 'severe neglect' and exposure to domestic violence, substance abuse, and death in his childhood." *Id*., (internal citations omitted). Additionally, "counsel 'ignored pertinent avenues for investigation of which he should have been aware,' and indeed was aware," *id*., citing *Porter*, 558 U.S., at 40, such as mental health issues.

As in *Andrus*, Tate's counsel failed to follow through on "known evidence" which "would [have] le[d] a reasonable attorney to investigate further." 140 S.Ct. at 1883, quoting *Wiggins*, 539 U.S., at 527. As the habeas court properly found, Tate's upbringing was characterized by "poverty, neglect, violence, and shocking physical, sexual and emotional abuse, and

incest." R-1:2733. Unrebutted evidence from family members and other lay witnesses detailed horrific cruelty by adults acting in caretaker roles. Seven mental health experts who reviewed the family history evidence in the record, including the State's expert, agreed the childhood history was one of the worst they had ever heard. The sentencing court heard none of this. There were extensive records documenting the family's mental health history presented during habeas proceedings, including a mental health commitment at age 13, repeated suicide attempts, and jail records reflecting mental health expert recommendations for neuropsychological testing. The recommended testing in state habeas proceedings found unrefuted evidence of brain damage. The habeas court found that counsel "knew or should have known about all these records" but did not obtain them because they failed to investigate, even though "Petitioner himself requested that counsel obtain his jail records, which referenced [specific mental health treatment] and also asked for his mental health records." 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. As in *Andrus*, "counsel

disregarded, rather than explored, the multiple red flags." 140 S.Ct. at 1883.

B. The Georgia Supreme Court opinion conflicts with *Strickland* and *Andrus*

Like the lower court in *Andrus*, the Georgia Supreme Court here did not consider *Strickland* prejudice, though it did not dispute or discount any of the extensive evidence relied on by the habeas court in finding prejudice. It instead mischaracterized the record evidence as showing Mr. Tate would not have allowed the presentation of the evidence and so this Court's AEDPA federal habeas corpus decision *Schriro v. Landrigan*, 550 U.S. 465 (2007), precluded relief. A correct application of this court's *Strickland* jurisprudence, as set forth in *Andrus*, illustrates the Georgia Supreme Court's application of *Landrigan* is mistaken and defies this Court's instructions regarding how counsel must function in capital cases.

The Georgia Supreme Court misconstrued the record as to Mr. Tate's wishes at sentencing (to accept the court's verdict and "accept what's coming to me, whatever it might be," *not* to prohibit the presentation of mitigation). The court ignored counsel's testimony that Tate did not direct counsel not to investigate, never told counsel to not to speak to family

members or other potential witnesses, and never curtailed the presentation of any witnesses other than his mother and oldest brother. R-26:42, 58, 120; R-65-74. This was despite the court's acknowledgment that parts of counsel's testimony appeared "at odds with the other testimony and evidence." The habeas court, in contrast, granted penalty phase relief by faithfully applying this Court's precedent under *Strickland*. *See Andrus*, 140 S.Ct. at 1887 ("That prejudice inquiry 'necessarily require[s] a court to "speculate" as to the effect of the new evidence' on the trial evidence 'regardless of how much or little mitigation evidence was presented during the initial penalty phase,'" quoting *Sears v. Upton*, 561 U.S. 945, 956 (2010)). The habeas court did so, and concluded that 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 further concluded that counsel was prejudicially deficient for failing to investigate and present "psychiatric mitigating evidence regarding childhood trauma, including post-traumatic stress disorder, brain damage, major depression and anxiety disorder, and [] resulting drug dependency and use leading up to the crimes." R-65:2728.

This Court should grant rehearing, grant the petition, vacate the lower court judgment, and remand in light of *Andrus*.

Respectfully submitted,

/s/ Mark E. Olive

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

VANESSA CARROLL
GEORGIA RESOURCE CENTER
104 Marietta St. NW, Suite 260
Atlanta, Georgia 30303
(404) 222-9202
vanessa.carroll@garesource.org

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Petition for Rehearing complies with the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

/s/ Mark E. Olive
Mark E. Olive
Counsel of Record