

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10834

NICHOLAS CODY TATE,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION
PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 4:12-cv-00019-WMR

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

More than twenty years ago, Nicholas Tate and two of his brothers pleaded guilty to murdering Chrissie Williams and her three-year-old daughter, Katelyn. At the time, Tate told the trial

court and his attorneys that his religious beliefs required him to confess what he had done and submit to a death sentence. He elected to waive his right to a jury trial in part because his experience with the trial judge gave him confidence that he would receive a just sentence. And in the years since the state trial court imposed the death penalty for Chrissie’s and Katelyn’s murders, he has said more than once that he thought the sentence was fair and ought to be carried out without delay.

Nonetheless, Tate’s brother filed “next friend” habeas petitions challenging his death sentence in state and federal court, and Tate eventually took up those challenges on his own behalf. He raises three of his federal constitutional claims—two involving the conduct of his own counsel and one alleging prosecutorial misconduct at sentencing—in this appeal. At this stage, we can grant federal habeas corpus relief only if we determine that the state court’s denial of those claims involved an objectively unreasonable determination of the facts or of clearly established federal law. It did not.

The Georgia Supreme Court reasonably determined that trial counsel’s recommendation to waive a jury trial for sentencing did not fall below the level of competence guaranteed by the Sixth Amendment, based on the information available to counsel at the time. Because Tate instructed his attorneys not to present evidence of his abusive childhood, drug abuse, and psychological issues at the bench trial, the state court also reasonably determined that he was not prejudiced by counsel’s alleged failure to

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investigate his background and discover that sort of mitigating evidence. And the state court's denial of Tate's prosecutorial-misconduct claim was reasonable because the Supreme Court has never held that a prosecutor's argument for different interpretations of the evidence in different codefendants' cases violates due process or the Eighth Amendment.

I.

One morning in December 2001, 21-year-old Nicholas Tate and his two younger brothers—Dustin, 18, and Chad, 15—set out from their mother's house with plans to rape Chrissie Williams. *Ford v. Tate*, 307 Ga. 383, 384 (2019). They knew that Chrissie's husband was a drug dealer, so they also hoped to find drugs and money in her home. *Id.* They carried a stun gun, several handguns, a shotgun, and an AR-15 semi-automatic rifle. *Id.* On the way to Chrissie's house, they stopped at a sporting goods store to top off their arsenal with ammunition, a diver's knife, duct tape, and zip ties. *Id.*

The brothers expected to find Chrissie home alone. *Id.* But her three-year-old daughter, Katelyn, answered the door when they arrived, and her two-year-old son was asleep with Chrissie in her room. *Id.*

Dustin shocked Chrissie with the stun gun as she slept, thinking it would render her unconscious. *Id.* She awoke screaming. *Id.* He dragged her across the hall to another bedroom, where Tate and Chad helped him tie her to the bed. *Id.*

Meanwhile, little Katelyn started screaming too. *Id.* Tate tried covering her mouth with duct tape, putting her in the crib with her brother, and telling her to shut up, but he could not get her to stop. *Id.* at 384–85. He told Chad to take her in the back bedroom and make her be quiet. *Id.* at 385. Chad took Katelyn in the back bedroom and strangled her with a telephone cord until she lost consciousness. *Id.* When she woke up and started crying again, Chad got Tate’s knife and slit her throat multiple times. *Id.* She eventually bled to death. *Id.* She was found naked, though she had been wearing footie pajamas when she was dropped off earlier that morning. *Id.* At his change-of-plea hearing, Tate admitted that he took off her pajamas “for his sexual gratification.” *Id.*

When Dustin found out that Chad had murdered Katelyn, he “went ape” and insisted that they leave. *Id.* (alteration adopted). Tate told him to go wait outside. *Id.* Chrissie, who was still bound to the bed with her eyes and mouth covered with duct tape, became hysterical. *Id.* Tate put a cushion over her face and shot her in the head, killing her. *Id.* He and Chad then followed Dustin out, locking the door behind them and leaving Chrissie’s two-year-old son inside. *Id.*

The Tate brothers fled the state. *Id.* They kidnapped a woman in Mississippi and held her overnight before driving her car to Oklahoma, where they finally surrendered to law enforcement. *Id.*

Several months after the brothers’ arrest, Dustin and Chad each pleaded guilty to two counts of malice murder, child

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molestation, and numerous other charges related to the events surrounding the deaths of Chrissie and Katelyn Williams. They received negotiated sentences of life in prison with the possibility of parole. *Id.* at 387.

Initially, Tate worked with his attorneys to negotiate a similar plea agreement. *Id.* at 387–88, 389–90. He received a plea offer for a life sentence, but he rejected it because he did not want to plead guilty to the child-molestation charge. *Id.* at 388, 389–90.

Over time, however, Tate’s attitude changed. He dedicated himself to reading the Bible in jail and became a “fairly intense biblical scholar.” His religious studies convinced him that death was the only appropriate penalty for his crimes. He told his attorneys that he wanted to plead guilty and did not want to present mitigating evidence at sentencing. He asked his lead trial counsel, Marc Cella, to negotiate a guilty plea with a sentence of death.

Cella refused. He tried to convince Tate that his religious convictions were misplaced—and when that failed, he told him that it was not possible to simply plead guilty and accept a death sentence. He told him that he would have to have a jury trial whether he wanted one or not. He also told Tate that he had to present some mitigating evidence because “that was what [he] was appointed for” and if he didn’t present any evidence in mitigation they would “end up having to do this all over again.”

Cella changed his mind about insisting on a jury trial after spending three weeks in jury selection and finding that prospective

jurors in Paulding County, Georgia overwhelmingly favored the death penalty for Tate's crimes. After that experience, Cella accepted Tate's decision to enter a guilty plea and advised him to request a bench trial for sentencing.

Tate agreed and elected to have the judge alone decide his sentence. But he and his attorneys disagreed about what their goal should be at sentencing. Tate strongly believed that God required him to confess his crimes, and that "the punishment should fit the crime, life for life." He did not want his attorneys to present evidence designed to generate sympathy for him so that he could avoid a death sentence.

At the sentencing bench trial, Tate "tolerated" the presentation of some mitigating evidence, only because his counsel told him he had no choice. But he made clear that he did not want to present evidence related to his mental health, drug and alcohol abuse, or childhood sexual abuse by his older brother. He also did not want his mother or his brothers to testify at sentencing, partly because of his religious beliefs and partly to spare them from cross-examination.

Tate's lawyers were "exasperated" by his intractable position because they thought facts about his "horrible, horrible" childhood made for an effective mitigation case—that evidence featured parental abuse and neglect, lack of education, repeated rape and molestation by his older brother Curtis, and "psychological issues" that were related to all of the above. But

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because of his religious views, Tate would not budge: “[n]one of that could come out.”

Ultimately, Tate called two witnesses to testify at the sentencing trial: his father, who testified that Tate should receive the same life-with-the-possibility-of-parole sentence as his brothers because all three were equally guilty of the murders; and a volunteer chaplain at the county jail, who testified about Tate’s Bible study and desire to accept responsibility for his crimes. With Tate’s permission, counsel also submitted the indictment and conviction of his brother Curtis for sexually molesting him when he was a child—information already known to the judge—and several cards and letters from his mother and his brother Dustin.

The court sentenced Tate to death for the two murders. *Id.* at 383. At a status hearing several years after sentencing, Tate waived the opportunity to file a motion for new trial, informing the court that he did not wish to challenge his death sentence. He did not want to file an appeal either, but he acknowledged that a direct appeal was mandatory in any capital case under Georgia law. The Georgia Supreme Court affirmed his convictions and sentences. *Tate v. State*, 287 Ga. 364 (2010).

After the trial court scheduled Tate’s execution, his brother Dustin filed a “next friend” habeas corpus petition in state court on his behalf. Tate successfully moved to dismiss that petition, but shifted gears and filed his own state habeas petition on the day his execution was to take place. *Tate*, 307 Ga. at 402. He claimed, among other things, that his trial counsel were ineffective for

failing to discover and present at the sentencing trial extensive evidence of childhood physical and sexual abuse, drug and alcohol abuse, mental illness, and brain damage. The state habeas court denied Tate's petition with respect to his convictions but granted relief from his death sentence on the ground that he had received ineffective assistance of counsel at sentencing. *Id.* at 383. The Georgia Supreme Court reversed, reimposing Tate's death sentence and denying his cross-appeal. *Id.*

Meanwhile, Dustin also filed a "next friend" habeas corpus petition on Tate's behalf in federal court. Tate later filed an amended federal habeas petition on his own behalf, raising many of the same claims he had litigated in state court. The district court denied Tate's habeas petition but granted a certificate of appealability on selected claims.

On appeal, Tate argues that his trial counsel provided ineffective assistance by persuading him to waive his right to a jury trial for sentencing and by failing to adequately investigate and present mitigating evidence at the sentencing bench trial, and that the prosecution violated his Eighth and Fourteenth Amendment rights by presenting conflicting arguments about who killed Katelyn Williams at his sentencing trial and at his brothers' plea hearings.

II.

We review a district court's ruling on a state prisoner's habeas corpus petition de novo. *Allen v. Sec'y, Florida Dep't of Corr.*, 611 F.3d 740, 745 (11th Cir. 2010). Under the Antiterrorism and

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Effective Death Penalty Act, federal courts may grant habeas corpus relief to a state prisoner whose constitutional claims were denied on the merits in state court only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We must presume that the state court's factual findings are correct, unless the petitioner rebuts that presumption by clear and convincing evidence. *Id.* § 2254(e)(1). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

III.

When a convicted defendant seeks to overturn his death sentence on the ground that he received ineffective assistance of counsel at sentencing, he must make two showings. He first must show that his attorney's performance was deficient, meaning that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). And second, he must prove that counsel's deficient performance prejudiced his defense. *Id.* at 687, 693. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. If a petitioner fails to satisfy either component of the *Strickland* inquiry, his ineffective-assistance claim fails. *Id.* at 697, 700.

Tate claims that his trial counsel provided ineffective assistance at sentencing in two ways: by convincing him to waive his right to a jury trial for sentencing, and by failing to discover and present extensive mitigating evidence related to his background and mental health.

A.

Tate contends that advising him to place the sentencing decision in the hands of the trial judge was unreasonable because it was based on “courthouse small talk” and “rumors” that the judge was unlikely to impose the death penalty. We reject that characterization.

In fact, Cella endeavored to predict how the trial judge would rule at sentencing in the same way lawyers everywhere—and perhaps especially in small towns—make those judgments: by speaking with colleagues who knew the judge in and out of the courtroom and measuring their experience against his own impressions. Cella spoke to other lawyers “who had seen [the judge] presiding and seen the decisions that he had made over the course of his career.” And “every single person” he spoke to—including “people in the DA’s office”—thought the judge would not sentence Tate to death. Cella also consulted with his co-counsel, Bradley Reed, who had appeared before the trial judge in

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other criminal cases. In Reed’s experience, the judge tended to be more lenient in sentencing, and perhaps more fair or “open-minded” than other judges. These impressions were reinforced by counsel’s observations of the trial judge during pretrial proceedings and voir dire. Based on what they learned about the judge, both defense attorneys were convinced that he would return a life sentence for Tate.

What’s more, the information Cella gathered about the trial judge was not the only reason he recommended that Tate waive his right to a jury for sentencing; his negative experience trying to select an unbiased Paulding County jury also played a role. During voir dire, Cella read the indictment to the prospective jurors and asked if they could give “fair consideration” to a sentence of life with the possibility of parole for those crimes. Out of about 200 prospective jurors, only a handful—less than half the number needed for the sentencing jury—gave positive responses. Day after day for three weeks, juror after juror said they could not consider any sentence other than death if Tate were found guilty of the murders charged in the indictment.

One observer, a paralegal working for defense counsel, said many of the jurors expressed “hate and anger” toward Tate after hearing Cella read the charges; the “venom in their voices” when they declared that death was the only appropriate penalty surprised the paralegal and upset Tate. When they had exhausted the pool of jurors, Tate was relieved to not have to hear from any more of them. “To him it seemed like a lost cause trying to get enough

jurors to hear the case,” and he was glad the first round of jury selection was over.

Cella too was dismayed by the jurors’ responses, and concluded that a bench trial might offer a better chance for a life sentence. During a recess to summon a new pool of jurors, Cella conceded to Tate’s desire to enter a guilty plea, and they jointly decided to request a bench trial for sentencing. They each had different reasons for seeking a bench trial: Cella and his co-counsel believed that a bench trial was Tate’s best hope for avoiding the death penalty. Tate may have believed the opposite, based in part on his discussions with Cella. Knowing that Tate believed he should get the death penalty, Cella had told him, “If you give me twelve jurors all I need to do is get one of them on my side. You have to get all twelve on your side. If you want to get what you want and beat me at this trial you’re better off having just one person, one mind to persuade.”

Tate also had personal experience with the trial judge, who had sentenced him as a juvenile to an in-patient psychiatric evaluation. In explaining his decision to waive a jury trial for sentencing, Tate reminded the judge about his experience in juvenile court and said he thought the judge was “a very fair person” who would impose “the appropriate sentence.”

Under these circumstances, Tate cannot overcome the presumption that Cella’s recommendation for a bench trial “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (quotation omitted). Counsel recommended the option he

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thought most likely to save his client's life, based on the information available to him about the trial judge and the jury pool. Even if he was wrong about the trial judge in hindsight, we cannot say that he "took an approach that no competent lawyer would have chosen" based on the same information. *Dunn v. Reeves*, 594 U.S. 731, 739 (2021). So the Georgia Supreme Court's decision that counsel's performance was adequate was not objectively unreasonable, and Tate cannot obtain federal habeas corpus relief on this claim. *See Bell v. Cone*, 535 U.S. 685, 698–99 (2002).

B.

Tate also challenges the Georgia Supreme Court's decision on his claim that trial counsel provided ineffective assistance by failing to discover and present mitigating evidence of childhood physical and sexual abuse, drug and alcohol use, mental illness, PTSD, and brain damage. He points to evidence presented during state habeas proceedings that his parents abused him physically and emotionally: his father beat him and his siblings "with belts, extension cords, and his fists," and his mother "flew into sudden rages, whipped Tate for wetting the bed, hit Tate and his siblings with her fists, whipped them with belts, routinely yelled at them, called them profane names, berated them, and forced them to kneel and hold their ankles, sometimes while nose to nose." *Tate*, 307 Ga. at 407. The evidence also showed that his mother's live-in boyfriend "not only physically abused Tate's mother but also abused Tate and his brothers by force-feeding them, holding them at gunpoint, and forcing them to kneel for 24 to 36 hours at a time

on frozen rice scattered on the floor with only bread to eat and water to drink.” *Id.* at 408.

In addition to this physical and emotional abuse, Tate was also sexually abused as a child. When he was about nine years old, his mother reported that his older brother Curtis had been molesting him and his younger siblings. *Id.* at 407. Tate later told a social worker that he had been anally raped for a year. *Id.* Curtis was sent to juvenile detention, but when he was released, he again molested Tate and raped his sister. *Id.* at 408. And when Tate was 13 years old, he was sexually molested by his paternal aunt’s husband. *Id.*

The horrific abuse Tate endured as a child took a psychological toll. Experts testified during state habeas proceedings that Tate exhibited symptoms consistent with a severe form of PTSD from repeated childhood trauma. *Id.* at 411. One expert conducted neuropsychological testing and concluded that Tate had right parietal lobe and frontal lobe brain damage that might have been caused either by being hit in the head or by chronic traumatic stress. *See id.* at 411–12. Tate’s medical records also contained reports that he had attempted to commit suicide at least once. *Id.* at 416.

A psychiatrist specializing in substance abuse assessed Tate’s chronic drug and alcohol use, which the expert opined “began wholly as an effort to self medicate for the serious depression, extreme anxiety, and feelings of shame” resulting from childhood trauma and sexual abuse. *Id.* at 412. According to the expert,

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Tate's drug use leading up to and on the day of the murders exacerbated his cognitive impairments and mental health symptoms and diminished his ability "to control his impulses, to think clearly, and to cope with a chaotic and downward spiraling situation, especially after his brother Chad killed the child." *Id.* The expert also opined that it was "unlikely that the situation would have occurred without the substance abuse." *Id.*

The Georgia Supreme Court held that, even assuming trial counsel were at fault for failing to discover all this evidence, Tate was not entitled to relief from his death sentence because he could not establish that the allegedly deficient performance prejudiced him. *Id.* at 406, 417–18. Applying *Schriro v. Landrigan*, 550 U.S. 465 (2007), the court concluded that because Tate "made an informed and knowing decision when he instructed trial counsel not to present mitigating evidence at his sentencing trial," he could not establish a reasonable probability that he would not have been sentenced to death if counsel had conducted a more thorough investigation. *Id.* at 417–18; *see* 550 U.S. at 477–78.

This decision was based in part on the state habeas court's findings that Tate "did not want trial counsel to present mitigating evidence" and "wanted to receive the death penalty," and the Georgia Supreme Court's own findings that Tate understood what mitigating evidence was, understood what it was for, and generally understood what kinds of mitigating evidence could be used in his case. *Tate*, 307 Ga. at 395, 405–18. Those findings are well supported in the record.

Tate and his trial attorneys all testified that he told them he did not want them to present mitigating evidence, and that he wanted to be sentenced to death. Counsel tried to talk him out of this position, which arose from “fervent” religious beliefs formed during years of Bible study in jail, but he did not waver. Tate told his attorneys that he believed in “an eye for an eye” and that he deserved the death penalty because he had committed a “sin worthy of death.” He explained his religious beliefs in similar terms to the psychologist who evaluated him twice for competency before he pleaded guilty—and found both times that he was competent—and again to the trial court at his guilty-plea hearing. He told the trial judge that he believed he had committed a “crime worthy of death,” so he was “refusing not to die.” And when the trial court tried to clarify whether Tate “want[ed]” the death penalty or just thought that he deserved it, Tate responded, “No. Let’s stick with want. We’ll stick with want.”

Because of these beliefs, Tate did not want counsel “to even try to save his life.” “Basically,” his lawyer recalled, “he did not want to really put anything up.” In particular, he made clear that he did not want his attorneys to present mental health evidence, evidence of his drug and alcohol abuse, or evidence of childhood sexual abuse. He also did not want them to call his mother or his brothers to testify at sentencing.

The record also supports the Georgia Supreme Court’s finding that Tate made a knowing and informed decision to forgo this kind of mitigating evidence. *See Tate*, 307 Ga. at 417–18. As

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the state court found, “the record shows that trial counsel were aware of the vast majority of this evidence and discussed presenting it as mitigating evidence with Tate.” *Id.* at 408. Tate’s attorneys met with him many times and talked to him about his childhood, his relationship with his parents, physical and sexual abuse he experienced, his mental health history and any mental health issues in his family, substance abuse, and more. And they had him evaluated by a psychologist, Dr. Kevin Richards, not just to verify that he was competent to stand trial, but also to evaluate “any mitigating factors regarding mental status” at the time of the crimes. Counsel reviewed the psychologist’s report—which described Tate’s history and noted that he experienced “physical and sexual abuse at the hands of multiple perpetrators” during his childhood and adolescence—and discussed it with both Dr. Richards and Tate.

Tate knew this background information could be mitigating. He was opposed to emphasizing it at sentencing specifically because it would weigh in favor of a life sentence, and “that’s not what he wanted.” Cella’s “most vivid memory” of discussing mitigating evidence with Tate was of a long conversation about how helpful evidence of the violent sexual assaults by his brother would be for sentencing, and how important it was for the judge or jury making the sentencing decision to have that information. But Tate “was absolutely firm in his order” that counsel “not go into that.” Cella’s “best recollection” was that Tate’s instruction “seemed to be more driven by his desire to receive the death penalty than by embarrassment.” Tate himself

testified at a post-sentencing status hearing that he had “wanted to just leave out any mitigating evidence and all.” In fact, he was angry because he believed his lawyers lied to him when they insisted that they had to present at least some mitigating evidence at sentencing.

Under these facts, the Georgia Supreme Court’s application of *Landrigan* to determine that Tate could not establish prejudice for his ineffective-assistance claim was not objectively unreasonable. Contrary to Tate’s argument, this case is more like *Landrigan* than *Porter v. McCollum* or *Rompilla v. Beard*. In *Porter* and *Rompilla*, the Supreme Court held that the failure of petitioners’ attorneys to conduct a thorough mitigation investigation constituted deficient performance despite their clients’ “fatalistic,” “uncooperative,” or even “actively obstructive” behavior during the investigation. *Porter v. McCollum*, 558 U.S. 30, 40 (2009); *Rompilla v. Beard*, 545 U.S. 374, 381–84 (2005). And in both cases, a reasonable probability existed that the mountain of mitigating evidence presented during state postconviction proceedings would have outweighed the aggravating circumstances and made a difference at sentencing. *Porter*, 558 U.S. at 40–44; *Rompilla*, 545 U.S. at 393.

In *Landrigan*, by contrast—as in this case—the issue was not whether counsel’s investigation was deficient or whether the available mitigation might have outweighed the aggravating circumstances, but that the “failure to investigate further could not have been prejudicial under *Strickland*” if the petitioner instructed

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his attorneys not to present mitigating evidence at sentencing. 550 U.S. at 475. To show prejudice from an allegedly deficient investigation, a petitioner who told trial counsel not to present mitigating evidence must first establish “a reasonable probability that, had he been more fully advised about the available mitigation evidence, he would have allowed counsel to present it on his behalf” at the penalty phase. *Krawczuk v. Sec’y, Florida Dep’t of Corr.*, 873 F.3d 1273, 1296 (11th Cir. 2017). And “the petitioner’s burden to prove prejudice, as required under *Strickland* and *Landrigan*, cannot be met with evidence showing merely that the petitioner cooperated with counsel’s efforts to investigate his personal background and that he at one point was open to presenting some mitigation evidence.” *Id.*

As we’ve said, the record before the Georgia Supreme Court supported its finding that Tate instructed his attorneys not to present mitigating evidence. When counsel told him that he did not have the option to forgo all mitigation, he reluctantly agreed to allow some evidence—but he drew the line at evidence of childhood abuse, mental health history, substance abuse, or other evidence designed to avoid the death penalty by generating sympathy for him.

These facts do not precisely correspond to the facts in *Landrigan*, but it is reasonable to apply the same principle. Because Tate sharply limited the kinds of mitigating evidence his lawyers could present—eliminating broad categories of evidence related to his background and mental health—he cannot show that he was

prejudiced by their alleged failure to investigate those areas unless he first establishes a reasonable probability that he would have allowed counsel to present the undiscovered evidence at sentencing. *See id.*; *Pope v. Sec’y, Florida Dep’t of Corr.*, 752 F.3d 1254, 1266 (11th Cir. 2014).

He has not met that burden. He has never testified that he would have consented to the introduction of the evidence from state habeas proceedings at sentencing. To the contrary, statements he made on the record before and after sentencing favor the opposite conclusion. At the guilty plea hearing, he explained that because of his religious beliefs, he would not oppose the death penalty. At a status hearing after sentencing, he confirmed that he had discussed mitigating evidence with his attorneys before trial and told them that he did not want to present any of it, and he informed the court that he still did not want to challenge his death sentence.

And his certainty on that front was not fleeting. Years later, at a hearing on his brother’s attempt to file a state habeas petition on his behalf, he told the court, “I have held my same position since the very beginning that, you know, I have done something horrible, heinous, malicious. It was an aforethoughted [sic] act of violence. And it should be dealt with the utmost punishment, which is capital punishment.” He confirmed that he had “made this very well clear to everyone” who represented him, including his trial attorneys. “I mean, I pled guilty. I had a chance to accept life without parole,” he said. “I do not want life without parole.”

Two years after that, at the evidentiary hearing on his state habeas petition—after his habeas attorneys had collected the mitigation evidence he now says should have been presented at sentencing—he told the court that he had carefully considered his claims, “deliberat[ed]” with his attorneys, and wished to withdraw his habeas petition to “allow the State’s sentence of death to be carried out without any further protests on [his] behalf.” *Tate*, 307 Ga. at 437–38 & n.27 (Blackwell, J., concurring).

Tate repeatedly and consistently expressed that he did *not* want mitigating evidence presented at sentencing. The Georgia Supreme Court reasonably concluded that he almost certainly would have taken the same position at trial if his attorneys had conducted the more thorough investigation he now contends was mandatory. *See id.* at 402.

IV.

Tate also argues that the prosecution violated his Eighth and Fourteenth Amendment rights by arguing at his sentencing trial that he killed three-year-old Katelyn Williams, after taking the position in his brother Chad’s case that Chad killed the child.¹ He argues that the prosecutor’s use of “inherently factually

¹ Tate also argues that trial counsel were ineffective for failing to adequately counter the prosecutor’s argument that he killed Katelyn. We decline to consider that argument because the district court did not grant Tate a certificate of appealability on the issue, and we denied his motion to expand the certificate of appealability to include it. *See* 28 U.S.C. § 2253(c)(1)(A); *Hodges v. Att’y Gen., State of Florida*, 506 F.3d 1337, 1340 (11th Cir. 2007).

contradictory theories” in his and his codefendants’ cases meant that his death sentence was unfair and based in part on “materially inaccurate” evidence, in violation of due process and the constitutional prohibition against cruel and unusual punishment.

The Georgia Supreme Court rejected this claim on the ground that the State never fully endorsed the Tate brothers’ position that Chad killed Katelyn, though the prosecutors acknowledged their statements to that effect in all three cases. *Tate*, 307 Ga. at 428–31. That is a reasonable interpretation of the record: at Chad’s plea hearing, the prosecutor recounted the brothers’ story that after taking Katelyn in the back room and strangling her with a telephone cord, Chad got Tate’s knife and—“*according to his version*”—cut the child’s throat with it. The prosecutor also pointed out that Tate told the police, “I gave that child every chance to shut up, but she wouldn’t shut up,” and that there were discrepancies between Chad’s and Tate’s stories about how Chad got Tate’s knife—implying that Tate may have had more to do with the child’s murder than Chad’s “version” indicated.

At Tate’s guilty-plea hearing, the prosecutor again acknowledged that “[*b*]y Chad’s statement,” Chad cut Katelyn’s throat with Tate’s knife. But he noted that some evidence suggested that that was “not necessarily what happened.” And indeed, Tate admitted for the first time at his plea hearing that he, not Chad, took Katelyn into the bedroom and removed her clothing. He also confessed for the first time that, after his brother

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Dustin told him that he could not kill her, he intentionally shot Chrissie Williams in the head—not by accident, as he and his brothers had previously maintained.

At Tate’s sentencing trial, the prosecutor once again recognized that the brothers claimed that Chad had killed Katelyn, but that only they knew for sure how the murders really happened. He went on to suggest the “possibility” that they may have falsely blamed Chad because he was too young for the death penalty. He also capitalized on Tate’s new confessions to propose that Tate may have cut Katelyn’s throat after Chad failed to kill her with the telephone cord—just like he killed her mother when Dustin was unable to do it. And he noted that even under the brothers’ version of events, Chad killed Katelyn after Tate told him to take her in the back and make her be quiet. In other words, if Chad did kill Katelyn, he did it on Tate’s orders.

So while the prosecutor did not explicitly contest the brothers’ statements about who killed Katelyn until Tate’s guilty-plea hearing, he did not adopt their version of events either. And as long as prosecutors do not “use ‘necessarily contradictory’ evidence” against different codefendants, they are free to make inconsistent, “alternative arguments” about “what inference the [factfinder] should draw from the same evidence.” *United States v. Hill*, 643 F.3d 807, 832–33 (11th Cir. 2011) (quoting *Parker v. Singletary*, 974 F.2d 1562, 1578 (11th Cir. 1992)). That is what

happened here—the only new or contradictory evidence was introduced by Tate himself at his guilty-plea hearing.

Our precedents aside, “[w]hat matters under § 2254(d)(1)—the standard relevant here—is whether a decision is contrary to, or involves an unreasonable application of, [the Supreme] Court’s holdings.” *Klein v. Martin*, 607 U.S. 213, 221 (2026). Tate has not identified any Supreme Court precedent holding that a prosecutor’s use of conflicting theories in different codefendants’ cases violates due process or the Eighth Amendment. And for good reason—the “Supreme Court has never held that a state violates due process or the Eighth Amendment when it presents contradictory theories at separate capital trials.” *Raleigh v. Sec’y, Florida Dep’t of Corr.*, 827 F.3d 938, 952 (11th Cir. 2016); *see also Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Thomas, J., concurring) (“This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories.”).

Conceding that the “Supreme Court has not expressly held that the use of inconsistent theories at the sentencing phase violates due process,” Tate falls back on a general principle: that “prosecutors’ prejudicial or misleading statements violate due process if they render a trial or capital sentencing fundamentally unfair.” *See Andrew v. White*, 604 U.S. 86, 92–93 (2025). But this reframing of the issue as a broad general rule does not help Tate, because he has not shown that the prosecutor’s arguments rendered his sentencing trial fundamentally unfair.

First, we have already explained that the prosecutor’s alternative arguments in Tate’s and his brothers’ cases were not improperly prejudicial or misleading. *See Hill*, 643 F.3d at 832–33. The prosecutor did misstate the evidence at one point during his argument by stating that only Tate’s jeans had Katelyn’s blood on them, but he corrected himself a few minutes later and acknowledged that a second pair of jeans (apparently Chad’s) also bore a smaller amount of Katelyn’s blood.²

And *second*, Tate has not shown that the prosecution’s theory that he may have killed Katelyn himself rendered his sentencing trial fundamentally unfair. His contention here is that his death sentence was arbitrary and unfair because it was based in part on “materially inaccurate” evidence—by which he presumably means the prosecutor’s argument that he may have cut the child’s throat himself. But Tate’s death sentence was not predicated on evidence that he killed Katelyn. Before imposing the sentence, the trial court found that Tate “caused and directed Chad Everett Tate to commit the murder of Katelyn Paige Williams.” In other words, the sentencing court found that Chad killed Katelyn, but he did so on Tate’s orders. That finding takes a view of the facts that is consistent with the proffer made at Chad’s guilty-plea

² During the sentencing trial, a law enforcement officer also initially testified that only one pair of jeans—a pair marked with an “N” on the label—had Katelyn’s blood on them. But after defense counsel refreshed his recollection on cross-examination, the witness corrected his testimony and agreed that a second pair of jeans that apparently belonged to Chad also had Katelyn’s blood on them.

hearing and does not incorporate the prosecutor’s alternative argument that Tate killed the child himself. Even under Tate’s proposed general principle, therefore, the prosecutor’s argument did not violate his due process rights by making his sentencing proceeding “fundamentally unfair,” and the Georgia Supreme Court’s decision on this claim was not contrary to or an unreasonable application of clearly established federal law. *See Andrew*, 604 U.S. at 92–93.

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Tate has not shown that the Georgia Supreme Court’s decision on any federal claim was “contrary to, or involved an unreasonable application of, clearly established Federal law,” or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). We therefore affirm the district court’s denial of his petition for federal habeas corpus relief.

AFFIRMED.