

IN THE  
SUPREME COURT OF THE UNITED STATES

DOCKET NO. \_\_\_\_\_

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**TERRY WADE**

**Petitioner,**

**v.**

**STANLEY WILLIAMS, WARDEN**

**Respondent.**

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**On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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Linda S. Sheffield  
*Counsel of Record*  
LINDA S. SHEFFIELD  
ATTORNEY AT AW  
P.O. Box 682136  
Marietta, GA 30068  
(770) 671-1234  
[lindasheffield@gmail.com](mailto:lindasheffield@gmail.com)  
*Counsel for Petitioner*

**QUESTION PRESENTED**

1. A CERTIFICATE OF APPEALABILITY WAS WRONGFULLY DENIED BY THE ELEVENTH CIRCUIT AS TO THE ISSUES OF CONFLICTED, INEFFECTIVE TRIAL AND APPELLATE/POST CONVICTION COUNSEL, AND ERRORS BY THE TRIAL COURT WHO FAILED TO INSTRUCT THE JURY AS TO LESSER INCLUDED OFFENSE AND ALIBI, WHICH DENIED WADE A FAIR TRIAL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE U.S. CONSTITUTION. THE ELEVENTH CIRCUIT ERRED IN DENYING THE COA, AFTER WADE DEMONSTRATED THAT THERE WAS A DENIAL OF ONE OR MORE SUBSTANTIAL CONSTITUTIONAL RIGHTS, WHICH CAUSED HIS CONVICTION, AND WHICH WOULD GIVE THE REASONABLE JURIST PAUSE TO QUESTION THE RELIABILITY OF THE CONVICTION AND THE ULTIMATE VERDICT.

II. THE LAW IN GEORGIA HAS CHANGED AS OF FEBRUARY 10, 2020, *STATE V. LANE*, 308 Ga. 10 (2020). THE CUMULATIVE EFFECT OF TWO OR MORE INDIVIDUALLY HARMLESS ERRORS ARE NOW RECOGNIZED TO PREJUDICE A DEFENDANT TO THE SAME EXTENT AS A SINGLE REVERSIBLE ERROR. WADE'S CASE SHOULD BE REMANDED TO THE STATE COURTS FOR A CUMULATIVE ERROR EVALUATION, CONSIDERING THE NEW LAW.

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

## **RELATED CASES**

There are no related cases.

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**IN THE SUPREME COURT  
OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

Appendix A: United States Court of Appeals for the Eleventh Circuit 19-12143, denying petition for rehearing, 03/09/2020.

Appendix B: United States Court of Appeals for the Eleventh Circuit 19-12143, denying application for Certificate of Appealability, 01/15/2020.

Appendix C: U.S. District Court for the Middle District of Georgia (Macon Division), 18-CV-00038-TES-MSH, Order and Report and Recommendation denying 28 U.S.C. §2254 motion, 01/25/2019.

Appendix D: Supreme Court of Georgia, S17H0073, Order denying certificate of probable cause to appeal, 12/11/2017.

Appendix E: Superior Court of Ware County, State of Georgia, 15V1207, Final Order denying petition for writ of habeas corpus, 07/18/2016.

Appendix F: Court of Appeals of Georgia denying direct appeal A12A0150, 04/19/2012.

## **JURISDICTION**

The United States Court of Appeals for the Eleventh Circuit decided this case on 01/15/2020 and the petition for rehearing was decided on 03/09/2020.

The deadline to file any petition for a writ of certiorari due on or after the date of this order (03/19/2020) is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **Constitutional Provisions**

Fifth Amendment to the U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the State of Georgia

Article I, Section 1, paragraphs XI-XVI

Paragraph XI. Right to trial by jury; number of jurors; selection and compensation of jurors. (a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

(b) A trial jury shall consist of 12 persons; but the General Assembly may prescribe any number, not less than six, to constitute a trial jury in courts of limited jurisdiction

and in superior courts in misdemeanor cases.

(c) The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors.

Paragraph XII. Right to the courts. No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.

Paragraph XIII. Searches, seizures, and warrants. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.

Paragraph XIV. Benefit of counsel; accusation; list of witnesses; compulsory process. Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel; shall be furnished with a copy of the accusation or indictment and, on demand, with a list of the witnesses on whose testimony such charge is founded; shall have compulsory process to obtain the testimony of that person's own witnesses; and shall be confronted with the witnesses testifying against such person.

Paragraph XV. Habeas corpus. The writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety may require it.

Paragraph XVI. Self-incrimination. No person shall be compelled to give testimony tending in any manner to be self-incriminating.

## **STATEMENT OF THE CASE**

### **Course of Proceedings Below.**

Terry Wade was charged in the Superior Court of Putnam County, State of Georgia, with armed robbery. There was a video of the crime, which did not show a weapon brandished, but it did show that one of the participants in the robbery had his hand in his pocket and pointed his pocketed hand at those he was attempting to control as the others took other actions in the course of the crime. No other person purported to have a weapon. One man had a crutch, which was utilized as a catapult to clear the teller's counter. There was a trial by jury where Wade was convicted. New counsel appeared after the conviction and filed a motion for new trial, held a hearing, then, upon the denial of the motion for a new trial, filed an appeal to the Georgia Court of Appeals. The opinion of the Court of Appeals can be found at Appendix F. Wade then filed a petition for writ of habeas corpus in the Superior Court of Ware County, an evidentiary hearing was held and the petition was denied. The opinion of the habeas court in Ware County can be found at Appendix E. Wade sought a certificate of probable cause to appeal the habeas denial from the Supreme Court of Georgia and that certificate was denied, at Appendix D. Wade filed a motion pursuant to 28 U.S.C. §2254 in the United States District Court for the Middle District of Georgia, Macon Division. That denial of that petition appears at Appendix C. Wade sought a

certificate of appealability from the Eleventh Circuit Court of Appeals, which was denied, see Appendix B. Wade then filed a motion for reconsideration to the Eleventh Circuit Court of Appeals from the denial of a Certificate of Appealability, which was also denied at Appendix A. Wade timely filed a motion to proceed *in forma pauperis* together with this petition for writ of certiorari, in an effort to secure relief from this wrongful conviction.

### **Statement of the Facts**

The district court and all courts before have wrongly decided this portion of the case. A review of the facts of the case show the following. Wade has always maintained his innocence and has refused to name any person he knows to have been complicit in the charges brought in this case. But for the errors made by trial counsel, and his failure to advocate for his client – in fact, trial counsel advocated *against* Mr. Wade – there is a substantial probability that the result of the trial could have been very different.

**Identification: Wade was not identified by any witness until the case came to trial. Trial counsel made no inquiry as to contact with law enforcement or suggestibility by law enforcement which could have influenced the witness's newly claimed ability to identify Wade as one of the robbers.**

Mr. Long did not see the faces of and could not identify either perpetrator. Trial Transcript (hereinafter “T”) .21-22

Ms. Donita Roberts testified that she could see the perpetrators distorted features through his mask, did not identify Mr. Wade until trial because he had similar facial features, having not previously identified him. T. 103-105, 112-113. Ms. Roberts stated that if another person had similar features, she would have identified that person as well. T. 114

Ms. Ginny Lowe initially told the jury that Mr. Wade was the robber. On cross examination she admitted that while the defendant resembled the robber, she could not positively state that he was the robber. T. 134-136

Ms. Roberts could not identify the voice of the perpetrator. T. 93

Ms. Roughton could not identify either of the perpetrators. T. 140-141

Ms. Mask could not identify either of the perpetrators. T. 157 She testified that the defendant had similar features (long jaw line) but she had no idea whose face was behind the mask. T. 160 Ms. Mask identified photos of the vehicle she saw and associated with the robbers. T. 151, 152, 156

Mr. Jack Graham, who heard about the robbery on a radio, saw and identified

the vehicle, an older model black Honda<sup>1</sup>. T. 170 He followed the Honda until it was abandoned in a driveway some distance from the bank. T. 176-184 He was unable to identify anyone in the Honda.

A crutch was used by a robber to jump the counter. There were no prints on the crutch which was found in the Honda. T. 261-262

Mr. Charles Quinlan, the man from whom the Cadillac was purchased (in cash), was unable to identify Wade as the purchaser.

#### **Possession of a weapon:**

Mr. Long did not see a gun but believed the robbers had a gun. T. 14-15

Ms. Roberts did not see a gun but believed the second perpetrator may have had a gun in his pocket. T. 55-57

Ms. Lowe never saw a weapon the perpetrator never told her he had a weapon, but she believed he had a weapon. T. 126

#### **Fingerprint evidence:**

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<sup>1</sup> The Honda was purchased under the name of Jay Dragon, whose identify had been stolen. \$34,000 was stolen from Mr. Dragon's account. T. 459-460 Mr. Dragon did not purchase the vehicle. T. 457-461

Detective Bowen took fingerprints from the crime scene and the Honda. There were no identifiable prints at the scene but although the Honda had been wiped down, there was one identifiable print, found by Detective Robert Langford on the door of the Honda which belonged to Mr. Wade. T. 221-229; T. 264 Trial counsel at the MNT admitted that there was no strategy in his not hiring a fingerprint expert, and that he should have objected when the state asked its expert whether the defense had contacted the state's fingerprint expert. (MNT 16)

**Phone Calls:**

Phone call between Wade and inmate Henderson. Wade said he was going to Atlanta to work.

According to Wade's telephone records, a call was placed from his phone to the phone of Charles Quinlan, the man from whom the Cadillac was purchased. T. 608-609 The telephone in question is actually the telephone of Wade's wife, Marcy Bondurant. T. 365-366, 468-421

Wade told Henderson he purchased a 1995 Cadillac Seville (a then 10-year-old vehicle) and sent Henderson \$200 to his prison account.

In a recorded conversation with his wife, Marcy Bondurant, where they discussed green stuff. Bondurant stated she would leave the key to the safe deposit

box with his mother and would take the stuff out. T. 473-475 The sheriff located the safe deposit box but there was no evidence in the box to link him to the crime. T. 542-543

There was a failure by counsel to hire a fingerprint expert, which resulted in a failure to investigate the lynchpin evidence of the case against Wade, a fingerprint, when money was provided for this service to be provided. Wade's wife, Marcy Bondurant, had provided a check to trial counsel in the sum of \$870.00 to pay for expert witness Robert D. Whritenour, certified latent print examiner. (Exhibit in district court ECF 1-2) Mr. Sheppard kept the money (in addition to his \$7000.00 trial fee) and never hired a fingerprint expert.<sup>2</sup> Wade's attorney claimed he wanted to hire a fingerprint expert to review the evidence in the case. T. 860-861 The Georgia Supreme Court has held that the failure to hire an expert to explain to the jury information to better understand the expert testimony introduced by the prosecution can result in ineffective assistance of counsel. *Barlow v. State*, 270 Ga. 54, 507 S.E.2d 416 (1998) was a child molestation case which involved forensic interviews of children. *Barlow* alleged ineffective assistance of counsel because his attorney did not secure an expert for the purpose of providing the jury with information about proper

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<sup>2</sup> The fingerprint was on the black Honda, which purportedly matched Wade's The sheriff chose to link it to the robbery due to the fingerprint in the vehicle, even though the vehicle was never identified as the vehicle used in the robbery.

techniques for interviewing children and the possible effects of the interviewing techniques actually utilized. Petitioner was denied his Sixth Amendment right to effective assistance of counsel when **both trial and appellate counsel** acted contrary to the instructions and interests of Wade by failing to follow a defense strategy of which they were both aware, failure to raise issues in a motion for new trial and on appeal, which were suggested by Wade and supported by Georgia law, in complete disregard of their professional duties to the defendant. Even though the evidence presented at trial may have been sufficient to support Wade's convictions, the Georgia Supreme Court has held that courts can now find that a defendant received ineffective assistance of counsel due to counsel's failure to present evidence which would have resulted in his acquittal and, as a result, his conviction should be overturned and the case remanded for a new trial. *Darst v. State*, 323 Ga. App. 614 (2013), *cert. denied*, 2014 Ga. LEXIS 16 (2014), so counsel's stated intent to hire an expert was grounded in sound reasoning, a definite strategic decision which would have benefitted his client, yet counsel not only did not hire the expert, he kept the \$870 intended to be used for the expert, without telling the Wade or his wife.

**Improper comment by the Sheriff and district attorney not objected to by trial counsel.** The District Attorney improperly commented on the fact that Wade ended an in-custody conversation with Sheriff Sills by invoking his rights. T. 512

Without any objection from Wade's trial counsel, Sheriff Sills improperly commented on Wade's invocation of his right to counsel within the first 5-minutes of interrogation. T. 515-516

**Failures of Trial Counsel. The following facts demonstrate instances where trial counsel utterly failed to advocate for his client at trial, failed to honor the attorney client privilege and appeared to be conflicted about representing a defendant who was accused of the crimes contained in the indictment, which created a conflict of interest.**

(a) Asked Wade whether he was involved in a culture of crime. T. 943; Asked Wade why he never told him about his alibi ten days prior to trial. T. 956-957

(b) Trial counsel grilled Wade on why he would not provide his trial counsel with the name of the person to whom he gave his cell phone at the time of the robbery. T. 938

(c) Trial counsel specifically violated the attorney client privilege when he questioned Wade about his refusal to provide the name of his alibi witness to trial counsel in a timely manner. T. 956-958

(d) Trial counsel further breached the attorney client privilege when he “cross examined” Wade in an effort to illustrate how uncooperative he had been with his trial lawyer. T. 938-939, 956-958

(e) Trial counsel sabotaged and undermined Wade and violated the attorney client privilege when he introduced at trial the fact that Wade had been convicted of an armed robbery which the prosecution had NOT sought to introduce at trial. T. 823-824, 835-837; MNT 18-22, 27-28

(f) Trial counsel elicited from Sheriff Sills, for the first time (prosecution had not elicited this information) the fact that Wade was trafficking illegal drugs and stealing mink coats. T. 824 (Sills was called as a defense witness)

(g) Trial counsel asked Sheriff Sills about Wade’s three prior bank robberies, even though only two of those were entered as similar transactions. T. 823-824

(h) Counsel told the jury the fact of the fingerprint evidence and the telephone evidence were enough in trial counsel’s mind to convict Wade of the crimes charged in the indictment. T. 938-9, 943, 956, 957-958 Counsel became a prosecutor sitting at the defense table.

(I) Trial counsel graded Detective Bowen, who processed the Honda, as a “ten and a half”, and on the credibility scale, “she was very, very credible.” T. 972

(j) Told the jury that the fingerprint evidence and telephone evidence connected Wade to the crime. T. 962-3

(k) Told the jury that the FBI fingerprint expert who testified at trial was very credible. (Note counsel kept the money Wade gave him to hire a fingerprint expert, and he failed to investigate whether the fingerprint evidence was even reliable.) T. 970-971

(l) Told the jury that Detective Bowen, who lifted the fingerprint from the Honda, was very credible. T. 972

(m) Trial counsel also graded Detective Cummings, who obtained Wade's known fingerprints, "...was valuable. Give him a ten also." T. 971

(n) Told the jury Wade "matriculated in a culture of crime" and that trial counsel had a difficult time representing him. T. 977-989

(o) Told the jury that if Wade was "on the street" they would not be friends as they had different lifestyles, that he was a difficult client, who had different core values, different beliefs. T. 977-980

(p) There was a question which arose at trial concerning the defendant's competence to stand trial, and not his sanity. Cognitive issues with Wade became apparent and were not called to the attention of the trial court. Specifically, such a plea

concerned the defendant's ability to comprehend the proceedings against him and his ability to assist his counsel. At the MNT, Mr. Sheppard testified that Wade was not feeling well at trial. (MNT 20-21) Sheppard believed it was not a good situation for Wade to be at trial, and admitted that even though Wade was not able to assist him or understand the proceedings, he allowed the case to go to trial because Wade told him he wanted to go to trial. (MNT 21) Sheppard never considered informing the judge that there was possibly a cognitive impairment with Wade. Wade gave rambling testimony at trial; he was constantly talking to Sheppard at trial and he became distracted. (MNT 29, 31, 33-34) At that point there was a real question as to whether or not Wade was able to comprehend the proceedings or to assist counsel in his defense. Surely, based on the insults to Wade and counsel's distancing from Wade as a pariah to the jury, it would have helped Wade had he not suffered from this potential cognitive malfunction at trial. ABA Rule 1.14 states:

**American Bar Association Rule 1.6(8), Disclosure of the Client's Condition.** Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. *When taking protective action pursuant*

*to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.* The lawyer's position in such cases is an unavoidably difficult one. (Emphasis added)

In Wade's case, he had been ill, he produced documents showing his illness in subsequent hearings and his lawyer had a duty to inquire into why his client was unable to assist him at the time of trial, and to notify the Court that there was a problem.

**ALIBI.** Wade was denied a substantial constitutional right due to the failure of trial counsel to request an alibi jury instruction, and motion for new trial/appellate counsel was ineffective for failure to raise this issue. Wade's sister testified that he was not even in the state of Georgia at the time of the robbery, yet the Court did not charge on alibi and counsel for Wade did not address it or seek a jury instruction as to alibi.



## **REASONS FOR GRANTING THE WRIT**

**1. A CERTIFICATE OF APPEALABILITY WAS WRONGFULLY DENIED BY THE ELEVENTH CIRCUIT AS TO THE ISSUES OF CONFLICTED, INEFFECTIVE TRIAL AND APPELLATE/POST CONVICTION COUNSEL, AND ERRORS BY THE TRIAL COURT WHO FAILED TO INSTRUCT THE JURY AS TO LESSER INCLUDED OFFENSE AND ALIBI, WHICH DENIED WADE A FAIR TRIAL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE U.S. CONSTITUTION. THE ELEVENTH CIRCUIT ERRED IN DENYING THE COA, AFTER WADE DEMONSTRATED THAT THERE WAS A DENIAL OF ONE OR MORE SUBSTANTIAL CONSTITUTIONAL RIGHTS, WHICH CAUSED HIS CONVICTION, AND WHICH WOULD GIVE THE REASONABLE JURIST PAUSE TO QUESTION THE RELIABILITY OF THE CONVICTION AND THE ULTIMATE VERDICT.**

Wade has demonstrated a denial of a substantial constitutional right, in that trial counsel was not only ineffective, trial counsel was conflicted. A certificate of appealability should have been issued by the Eleventh Circuit. Wade has fought these

issues from the state courts through timely federal filings and it appears that nobody is listening. The facts of this case cry out to be heard and examined. Not only did Wade show sixteen errors made by trial counsel, twelve of which he admitted, there were also errors by the trial court and by appellate counsel which chipped away at this man's constitutional rights. Further, trial counsel failed to raise the affirmative defense of alibi, he failed to seek a jury instruction on alibi and contradicted himself when he testified, claiming alibi was the principal defense, then saying he did not rely on an alibi defense because he was concerned about perjurious testimony. Trial counsel did seek a jury instruction on lesser included offense, since there was a real question as to whether or not a handgun was used in the robbery. A tape of the crime did not reveal a gun, nor did it show any of the robbers stating there was a gun present. After testimony was presented, there was a real question of fact as to whether or not a gun was used in the robbery.

In this document, the three main constitutional errors have been addressed: 1) ineffective and conflicted counsel, 2) failure of the trial court to charge lesser included offense of robbery by intimidation and 3) failure of counsel to pursue the issues of the trial court's failures on appeal and habeas.

This writ should be granted and the case remanded to the Eleventh Circuit Court of appeals with instruction to allow a certificate of appealability so Wade can appeal the denial of his 28U.S.C. §2254 motion can be appealed.

**I. Prejudiced attitudes of defense counsel do not fit within any existing exception to the *Strickland* rule or the principles for making an exception.**

The Supreme Court's landmark precedent in *Strickland v. Washington*, 466 U.S. 668 (1984) establishes the general rule for ineffective assistance claims. *See Mickens v. Taylor*, 535 U.S. 162, 166 (2002). "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 166 (quoting *Strickland*, 466 U.S. at 694). The cases "spar[ing] the defendant the need of showing probable effect upon the outcome" are exceptions to the general rule. *Id.*

The relationship between Wade and trial counsel was antagonistic, lacking in trust, and quarrelsome. *See United States v. Williams*, 594 F.2d 1258 at 1260 (9<sup>th</sup> Cir 1979), HN12 (sufficient conflict where defendant chose to proceed pro se because the "client-attorney relationship had been a stormy one with quarrels, bad language, threats, and counter-threats"); *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)(sufficient conflict where defendant "was forced into trial with a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with

whom he would not, in any manner whatsoever, communicate"). There was an irreconcilable conflict between Wade and the trial counsel Sheppard which substantially interfered with the counsel's ability to provide adequate representation.

#### *A. The Exceptions.*

The exception cases fall into the categories of denial of counsel, conflicts of interest, and loss of an entire proceeding. If a habeas corpus petitioner establishes a claim within one of these categories, he need not show prejudice meeting the usual *Strickland* standard of reasonable probability of a different result. However, in some cases a different additional showing is required.

Complete denial of counsel is the most obvious exception. *See United States v. Cronic*, 466 U.S. 648, 659 (1984). Interference with counsel such that there is a complete failure "to subject the prosecution's case to be meaningful adversarial testing," such as denial of effective cross-examination, falls in the same category. *See id.* So is absence of counsel, either totally or during a critical stage. *See id.* at 659 n.25. In this category, once the denial is shown the conviction is overturned without a showing of prejudice. *See id.* at 659 & n.25.

Cases where "defendant's attorney actively represented conflicting interests" may be of the same magnitude as denial of or major interference with counsel, *see*

*Mickens v. Taylor*, 535 U.S. 162, 166 (2002), but they are a different category. In Wade's case the conflicting interest appeared on the record to be counsel's conflict within himself for representing a man counsel perceived to be a reprehensible defendant, such as Wade. He insulted Wade to the jury, he violated attorney client privilege, he admitted to facts which could have been disproved - sixteen errors in all, twelve of which he admitted to at the habeas corpus hearing, before he refused to respond to any more questions from habeas counsel.

Wade has claimed he was innocent from the very first interview in police custody, with Sheriff Sills. T. 511-512 He has never strayed from that position. The Supreme Court has repeatedly counseled that habeas courts must show special consideration to a petitioner's claims that state a colorable claim of actual innocence. See *Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (noting the "'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons"); *Sawyer v. Whitley*, 505 U.S. 333, 335-336, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

**II. The failure to give an alibi instruction after alibi testimony was presented a trial is an error of constitutional magnitude which the Eleventh Circuit failed to recognize in denying Wade permission to appeal.**

**ALIBI: Wade had an alibi for the time in question but an alibi instruction was not requested by trial counsel.**

Wade had an alibi for the date and time in question for the indicted crime. Wade provided an alibi for himself, specifically he was in Cincinnati with a now-deceased cousin<sup>1</sup>. T. 958-959 Trial counsel did not request an alibi instruction to the jury. Trial counsel testified at the MNT trial hearing that he had a two-pronged approach for trial: the alibi and the fingerprint. (MNT at 47) Ms. Toni Smith, Wade's younger sister, testified at trial. Ms. Smith did not know Wade's whereabouts on the day of the robbery but she did know that, shortly before that date, he was in Columbus, Ohio and was not in Georgia. T. 944, 946-947 Wade testified that, at the time of the robbery, he was in Cincinnati. T. 958-959 By failing to request an alibi instruction, when the alibi was the sole defense of the accused, as was the case here, then trial counsel has failed to advocate for his client, he has failed to know the law and follow the law by seeking to have the court give an alibi instruction to the jury.

At the habeas hearing, trial counsel testified that it was always the defense position that Wade was not in Georgia at the time of the bank robbery. (District Court

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<sup>1</sup> The defense of alibi was not charged by the trial judge. T. 1014-1035 Unless an alibi instruction is requested by the accused, even when it is the sole defense of the accused, need not be charged to the petit jury. *Matthews v. State*, 285 Ga. App. 859 (2007).

ECF 6f, motion for new trial hearing at 15) the request to charge on alibi because he believed any potential alibi witnesses would have been more harmful than beneficial to the defense, and he had concerns about offering potentially perjurious testimony."

This statement totally contradicted what he testified was his principal theory of the case. An appellate court evaluates counsel's performance from counsel's perspective at the time of trial. As a general rule, matters of reasonable tactics and strategy, whether wise or unwise, [do] not amount to ineffective assistance of counsel." *Grier v. State*, 273 Ga. 363, 365 (4) (541 S.E.2d 369) (2001). Counsel's explanation for electing to abandon an alibi defense and withdrawing the relevant request to charge as an unreasonable tactical decision. See *McGhee v. State*, 237 Ga. App. 541 (1) (a) (515 S.E.2d 656) (1999). In failing to consider and credit trial counsel's proffered explanation, the habeas court misapplied the applicable law. *Grier, supra*; *McGhee, supra*.

Assuming that trial counsel was deficient in failing to request a charge on identity, Wade has not shown that he is entitled to habeas corpus relief based on that omission. When the asserted error of failure to charge is reached indirectly through a claim of ineffective assistance of counsel the test is whether, had the charge been requested, authorized, and given, there is a reasonable probability it would have changed the outcome of the trial. *Bush v. State*, 271 Ga. 156 (2) (517 S.E.2d 509)

(1999); *Lucas v. State*, 265 Ga. 514 (3) (458 S.E.2d 103) (1995); *Wadley v. State*, 258 Ga. 465 (2) (369 S.E.2d 734) (1988)

Trial counsel placed the burden on Mr. Wade to get the alibi witnesses together for him. Mr. Wade was in jail awaiting trial when he was asked to do this. "I had asked Mr. Wade for serve [sic] [several] months to provide me names, addresses and telephone numbers of alibi witnesses. I had talked with his sister and I think perhaps his brother. And it was difficult for him to pull that information together for me." (MNT at 36) Sheppard testified that telling the jury that Mr. Wade had a hard time getting alibi witnesses was trial strategy. (MNT 36-37) Wade's sister, Toni Smith, testified at trial as to his alibi. (Trial Transcript 944-954) By the time the case reached trial, 27 months after the robbery took place, the cousin who was his direct alibi witness had died.

There was evidence in the record that Wade had an alibi for the time the bank robbery was committed and trial counsel failed to seek this instruction. Both Wade and his sister testified that he was in Ohio at the time of the robbery. Alibi was the linchpin of the defense, according to trial counsel, which combated the fingerprint evidence in the Honda and the presence of Wade at the robbery. (MNT 46-48) Wade has shown that he was prejudiced by counsel failing to ask for the alibi instruction.

**III. The failure of the Eleventh Circuit to grant a certificate of appealability as to the failure of trial counsel to give a charge on lesser included offense, was error, when this was preserved on the record, and it constituted a substantial denial of a constitutional right.**

In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it is entitled to an instruction which would permit a finding of guilt of a lesser offense. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *United States v. Gonzalez*, 122 F.3d 1383 (11<sup>th</sup> Cir. 1997). The trial court erred in not giving the requested charge on lesser included offense, to which exception was taken by defense counsel. Tr. 1032. The state failed to prove with direct or circumstantial evidence the charge in the indictment, that Wade had a gun. By failing to instruct the jury on the lesser included offense of robbery by intimidation, the trial court committed an error of constitutional magnitude. Further, the penalty was increased to a mandatory sentence of life without parole with no finding by the jury or even by the trial court. Wade has demonstrated a substantial showing of the denial of a constitutional right, the denial of due process of law, since it was not proven at trial that he used a handgun to commit the crime of armed

robbery. Wade should have been convicted of the lesser included offense of robbery by intimidation. Appellate counsel was ineffective for failing to raise this ground as error.

**IV. The failure of the Eleventh Circuit to grant a certificate of appealability as to errors by trial counsel and appellate counsel were ineffective for failure to raise the speedy trial issue, after Wade made a record at the trial court level, after his lawyer failed and refused to respond to Wade's continued pleas that this demand be filed.**

The rule that the Supreme Court adopted in *Barker v. Wingo*, 407 U.S. 514 (1972) and used as a factor in determining whether the speedy trial right had been denied was whether or not he had asserted his right. However, a waiver of that right could not be presumed, except as to delay caused by petitioner. The conduct of both the prosecution and petitioner were to be balanced, taking into account petitioner's assertion of the right, prejudice to petitioner, the length of delay, and the reasons for the delay. From the time of arrest until the time of trial, twenty-seven months elapsed, nineteen of those months, without the requested discovery. During that time, Wade's alibi witness died (March before May 2007 trial). It is Wade's position that from the time Mr. Sheppard was hired, he asked him to file a motion for a speedy trial, and to persist in securing discovery from the state. Trial counsel failed to do this. It is Wade's

position that he suffered substantial prejudice from counsel's failure to file a speedy trial demand, as he lost the one witness who could have shown that he was in Ohio, with him, at the time the crime charged in this indictment was committed.

**II. THE LAW IN GEORGIA HAS CHANGED AS OF FEBRUARY 10, 2020,  
STATE V. LANE, 308 Ga. 10 (2020) . THE CUMULATIVE EFFECT OF TWO  
OR MORE INDIVIDUALLY HARMLESS ERRORS ARE NOW  
RECOGNIZED TO PREJUDICE A DEFENDANT TO THE SAME EXTENT  
AS A SINGLE REVERSIBLE ERROR. WADE'S CASE SHOULD BE  
REMANDED TO THE STATE COURTS FOR A CUMULATIVE ERROR  
EVALUATION, CONSIDERING THE NEW LAW.**

The United States Supreme Court has told us explicitly that we must consider prejudice collectively in the context of ineffective assistance of counsel and other errors to prosecutorial misconduct claims (in Wade's case the prosecution asking the jury to allow a higher authority to guide them, improperly using a quote from the Bible). See *Kyles v. Whitley*, 514 U.S. 419, 436-437 (115 S. Ct 1555, 131 LE2d 490) (1995); *Strickland v. Washington*, 466 U.S. at 687; *Schofield v. Holsey*, 281 Ga. 809, 811 (II) n.1 (642 SE2d 56) (2007) (relying on *Strickland* language to disapprove Court of Appeals holdings that cumulative effect of counsel's errors should not be considered). And — although not binding on our consideration of nonconstitutional

errors — the authority from the United States Supreme Court appears to favor a cumulative error approach even in other contexts. See *Taylor v. Kentucky*, 436 U.S. 478, 486-488 (98 S. Ct 1930, 56 LE2d 468) (1978) (considering defendant's argument about trial court's refusal to give requested instruction on presumption of innocence in the light of questionable closing argument by prosecutor)(In Wade's case the court refused to charge te jury on the lesser included offense of robbery by intimidation); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 298 (93 S. Ct 1038, 35 LE2d 297) (1973) (considering harm caused by trial court's error in refusing to treat witness as adverse to the defendant in conjunction with trial court's refusal to permit defendant to call other witnesses); *Berger v. United States*, 295 U.S. 78, 89 (55 S. Ct 629, 79 LE 1314) (1935) (considering “probable cumulative effect” of “persistent” misconduct by prosecutor). Finally, the delay of the case, for no apparent reason by the State, who did not present discovery until shortly before the delayed trial, caused Wade's alibi witness, Derek Lipsey, to be unavailable due to the fact that he died in March, just before the beginning of trial.

“[T]he appropriate legal standard for a cumulative-error claim depends on the harmless-error standard that would apply to the constituent errors.”); see also *U.S. v. Marchan*, 935 F3d 540 at 549 (7<sup>th</sup> Cir. 2019)(“To establish cumulative error a defendant must show that (1) at least two errors were committed in the course of the

trial; (2) considered together along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial.” (citations and punctuation omitted)). Prejudice from ineffective assistance of counsel requires a showing by the defendant of “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. And, again, a nonconstitutional trial court error is harmless if the State shows that it is “highly probable that the error did not contribute to the verdict,” an inquiry that involves consideration of the other evidence heard by the jury. *Bannister v. State*, 306 Ga. 289 at 301 (5) (b) (2019)(citation and punctuation omitted); *Williams v. State*, 302 Ga. 147 at 154-155 (3)(2017).

## CONCLUSION

WHEREFORE, it is respectfully requested :

- 1) that this Court find that the Eleventh Circuit erred in failing to grant a certificate of appealability and that this case be remanded to that Court with instructions to grant Wade permission to appeal on the issues stated herein;
- 2) that this Court remand the case to the state courts to consider the case in light of *State v. Lane*.

Respectfully submitted,

*/s/ Linda S. Sheffield*

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LINDA S. SHEFFIELD  
GA BAR NO. 639725

P.O. Box 682136  
Marietta, GA 30068  
770-671-1234  
lindasheffield@gmail.com

IN THE  
**SUPREME COURT OF THE UNITED STATES**

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**TERRY WADE**

**Petitioner,**

**v.**

**STANLEY WILLIAMS, WARDEN**

**Respondent.**

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**On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit**

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**APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI**

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Linda S. Sheffield  
*Counsel of Record*  
LINDA S. SHEFFIELD  
ATTORNEY AT AW  
P.O. Box 682136  
Marietta, GA 30068  
(770) 671-1234  
lindasheffield@gmail.com  
*Counsel for Petitioner*

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Appendix C: U.S. District Court for the Middle District of Georgia (Macon Division) Order and Report and Recommendation denying 28 U.S.C. §2254 motion, 01/25/2019.

Appendix D: Supreme Court of Georgia, Order denying certificate of probable cause to appeal, 12/11/2017.

Appendix E: Superior Court of Ware County, State of Georgia, Final Order denying petition for writ of habeas corpus, 07/18/2016.

Appendix F: Court of Appeals of Georgia denying direct appeal A12A0150, 04/19/2012.