IN THE

SUPREME COURT OF THE UNITED STATES

DOCKET NO. _____

TERRY WADE

Petitioner,

v.

STANLEY WILLIAMS, WARDEN

Respondent.

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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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12143-B

TERRY ALEXANDER WADE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Terry Wade has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's January 15, 2020, order denying him a certificate of appealability to appeal the district court's order denying his 28 U.S.C. § 2254 petition. Upon review, Wade's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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January 15, 2020

Clerk - Middle District of Georgia
U.S. District Court
475 MULBERRY ST
MACON, GA 31201

Appeal Number: 19-12143-B
Case Style: Terry Wade v. Warden
District Court Docket No: 5:18-cv-00038-TES-MSH

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Craig Stephen Gantt, B
Phone #: 404-335-6170

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12143-B

TERRY ALEXANDER WADE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ORDER:

Terry Wade moves for a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 petition. To merit a COA, Mr. Wade must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

First, reasonable jurists would not debate that Mr. Wade was not entitled to relief on his claim that the state failed to prove that he had a gun during his armed robbery offense, thereby violating due process, pursuant to *Alleyne v. United States*, 570 U.S. 99 (2013). Mr. Wade improperly attempts to raise this claim for the first time in his counseled COA motion. *See Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994).

Second, reasonable jurists also would not debate that the state court properly determined that trial counsel's cumulative conduct did not amount to ineffective assistance. Here, the evidence at trial included that: (1) two individuals robbed a bank, one of whom strongly resembled Mr. Wade; (2) Mr. Wade's fingerprints were found on the getaway vehicle; (3) Mr. Wade's wife's cellular phone was used near the bank within minutes of the robbery; and (4) Mr. Wade had three prior armed robbery convictions. Given this evidence, he cannot show that, but for counsel's conduct, the result of the trial would have been different. *See Strickland v. Washington*, 466 U.S. at 668, 694 (1984). Consequently, the state court's decision was a reasonable application of *Strickland.*

Third, reasonable jurists also would not debate that Mr. Wade was not entitled to relief on his claim that trial counsel failed to request an alibi jury instruction, and appellate counsel failed to raise this issue. Mr. Wade raised this claim in his counseled COA motion, but did not raise it in his § 2254 petition before the district court. Consequently, he waived appellate review of this claim. *See Walker*, 10 F.3d at 1572.

Fourth, reasonable jurists would not debate that the state court properly determined that appellate counsel was not ineffective for failing to argue that Mr. Wade's right to a speedy trial was violated.[1] First, there was an approximate delay of two years between Mr. Wade's arrest and his trial, so, presumably, the delay was prejudicial. *See United States v. Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006). The delay was at least partially attributable to Mr. Wade, however, because he twice requested a continuance. Additionally, he failed to assert his right to a speedy trial until the first day of trial and claimed that the delay prevented him from calling a potential alibi witness

[1] To the extent that Mr. Wade, in his counseled COA motion, raised this claim as an ineffective-trial-counsel claim, he did not raise it in his § 2254 petition and, thus, waived appellate review of this claim. *See Walker*, 10 F.3d at 1572.

who had died before the trial, but he acknowledged that he had failed to make counsel aware of that witness at any point during the two years' prior. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (to determine whether an inordinate delay constitutes a due process violation, courts should look to the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"). Accordingly, three of the *Baker* factors weighed against Mr. Wade and, thus, he cannot show that the state court's determination was factually or legally unreasonable.

Because Mr. Wade has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

TERRY ALEXANDER WADE,	:	
	:	
Petitioner,	:	
	:	
v.	:	NO. 5:18-CV-00038-TES-MSH
	:	
STANLEY WILLIAMS,	:	
	:	
Respondent.	:	

ORDER AND
REPORT AND RECOMMENDATION

Pending before the Court are Petitioner's original and amended applications for habeas corpus relief (ECF Nos. 1, 14) under 28 U.S.C. § 2254, and his motion seeking appointment of counsel (ECF No. 18).[1] For the reasons explained below, it is recommended that Petitioner's request for habeas relief be denied. Petitioner's motion for appointment of counsel is denied.

BACKGROUND

On May 24, 2007, Petitioner was convicted of armed robbery in the Superior Court of Putnam County, Georgia, and sentenced to life in prison without parole. Resp't's Ex. 6(a), at 163, ECF No. 17-6; Resp't's Ex. 6(b), at 288, ECF No. 17-7.[2] Petitioner appealed,

[1] Because all documents have been electronically filed, this Order and Report and Recommendation cites to the record by using the document number and electronic screen page number shown at the top of each page by the Court's CM/ECF software.

[2] Petitioner was also found guilty of kidnapping, but that conviction was set aside by the trial court under the authority of *Garza v. State*, 284 Ga. 696 (2008). Resp't's Ex. 6(b), at 278.

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and on April 19, 2012, the Georgia Court of Appeals upheld his conviction. *Wade v. State*, 315 Ga. App. 668 (2012).

On October 10, 2013, Petitioner filed a *pro se* state habeas petition in the Superior Court of Tattnall County, Georgia. Resp't's Ex. 1, ECF No. 17-1. On July 8, 2015, after the case was transferred to the Superior Court of Ware County, Petitioner, through counsel, filed an amended state habeas petition. Resp't's Ex. 2, ECF No. 17-2. The state habeas court held an evidentiary hearing on September 10, 2015, and denied relief on July 18, 2016. Resp't's Ex. 3, ECF No. 17-3. Petitioner applied for a certificate of probable cause to appeal, which the Supreme Court of Georgia denied on December 11, 2017. Resp't's Ex. 5, ECF No. 17-5. He then filed this federal habeas petition (ECF No. 1) on December 27, 2017. Petitioner amended his petition on May 14, 2018 (ECF No. 14). Respondent, as directed, responded to the petition (ECF No. 16) and filed exhibits in support of his answer (ECF Nos. 17-1, 17-2, 17-3, 17-4, 17-5, 17-6, 17-7, 17-8, 17-9, 17-10, 17-11, 17-12, 17-3, 17-14, 17-15, 17-16). Petitioner did not submit a reply.

DISCUSSION

I. Motion to Appoint Counsel

Petitioner argues he should be appointed counsel because he "lack[s] the full understanding" of the rules of federal procedure. Mot. to Appoint Counsel 1, ECF No. 18.

Petitioners are not generally entitled to appointment of counsel for collateral proceedings. *See, e.g., Johnson v. Avery*, 393 U.S. 483, 487 (1969) ("In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a

petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing."). Under Rule 8(c) of the Rules Governing Section 2254 Proceedings for the United States District Courts, "[i]f an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A." According to that code section, a movant seeking relief under 28 U.S.C. § 2254 may be provided counsel if they are financially eligible and "the United States magistrate judge or the court determines that the interests of justice so require[.]" 18 U.S.C. § 3006A(a)(2).

Here, the Court finds that an evidentiary hearing is not warranted. The facts stated in Petitioner's § 2254 motion are not unusually complicated, and the law governing his claims is neither novel nor complex. While Petitioner has alleged unfamiliarity with the federal rules, he has coherently set forth his grounds for relief such as to allow review by the Court. The interests of justice, therefore, do not require that Petitioner be appointed counsel. Accordingly, Petitioner's motion seeking appointed counsel (ECF No. 18) is denied.

II. Petition for Writ of Habeas Corpus

Petitioner raises four grounds in his petition. Specifically, he contends that: 1) he was illegally sentenced to life without parole; 2) the trial court improperly allowed an in-court identification of Petitioner; 3) he received ineffective assistance of trial counsel; and 4) he received ineffective assistance of appellate counsel. Am. Pet. 2-6, ECF No. 14.

A. Standard of Review

The Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254,

governs a district court's jurisdiction over federal habeas corpus petitions brought by state prisoners. 28 U.S.C. § 2254(d). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court of the United States set forth the AEDPA-established federal habeas review standard for claims adjudicated on the merits in state courts. The *Williams* court held that § 2254(d)(1) limits the issuance of the writ to two specific situations, namely where "the relevant state-court decision was either (1) *contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States, or (2) *involved an unreasonable application of* . . . clearly established Federal law as determined by the Supreme Court of the United States." *Id.* at 404-05 (emphasis in original). The Court added that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. Further, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

B. Sentencing

Petitioner contends the trial court erred in sentencing him to life without parole under Georgia's recidivist statute, O.C.G.A. § 17-10-7. Am. Pet. 5. This ground is procedurally barred. While Petitioner's trial counsel objected to Petitioner being sentenced as a recidivist, the issue was not raised in Petitioner's motion for new trial or on direct appeal. Resp't's Ex. 6(f), at 132, ECF No. 17-11; Resp't's Ex. 6(a), at 184-93; Resp't's Ex. 6(g), at 185-236, ECF No. 17-12. Petitioner challenged the sentence in his

state habeas petition, but the court ruled the issue was procedurally defaulted under O.C.G.A. § 9-14-48(d) and *Black v. Hardin*, 255 Ga. 239 (1985). Resp't's Ex. 3, at 15-16.[3]

The Eleventh Circuit has held that "[a] state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) (per curiam) (citing *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977)). Furthermore, "where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that petitioner's federal claims are barred, *Sykes* requires the federal court to respect the state court's decision." *Id.*

Ineffective assistance of counsel may constitute cause to excuse a default. *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010). In his state habeas petition, Petitioner did allege that appellate counsel was ineffective by not challenging his sentence on direct appeal. Resp't's Ex. 2, at 6-7.[4] At the hearing on the state habeas petition, appellate

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[3] O.C.G.A. § 9-14-48(d) states in relevant part:

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice.

[4] Petitioner also alleged trial counsel was ineffective for not objecting to him being sentenced as a recidivist, but trial counsel did object. Resp't's Ex. (6)(f), at 132.

counsel testified that he believed the sentence was legally authorized due to Petitioner having a prior armed robbery conviction. Resp't's Ex. 6(a), at 46. The state habeas court rejected Petitioner's ineffectiveness claim. Resp't's Ex. 3, at 9, 12-13.

The Court finds Petitioner has not shown ineffective assistance of counsel sufficient to excuse the default, nor has he shown prejudice. At sentencing, the prosecution introduced three prior felony convictions, including at least one for armed robbery. Resp't's Ex. 6(f), at 123-25; Resp't's Ex. 6(g), at 38-40, 53-61, 77-102, 111-13.[5] Under either sentencing statute applicable at the time of Petitioner's sentencing, a sentence of life without parole for his armed robbery conviction was authorized.[6] Petitioner, therefore, cannot show appellate counsel's decision to not raise the issue fell "outside the wide range of professionally competent assistance," nor can he show prejudice arising from that decision. *See Henry v. Warden, Georgia Diagnostic Prison*, 750 F.3d 1226, 1230-31 (11th Cir. 2014) (rejecting claim that default could be excused based on ineffective assistance of appellate counsel where appellate counsel's actions were reasonable and

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[5] The other two convictions were federal convictions for bank robbery under 18 USC § 2113(a), (d). The Court need not address whether these convictions would qualify as a "serious violent felony" under O.C.G.A. § 7-10-7(b)(1) (2005) and O.C.G.A. § 17-10-6.1(a)(2) (2005).

[6] Under O.C.G.A. § 17-10-7(b)(2) (2005), a person who has previously been convicted of a "serious violent felony" "under the laws of [any] state" and who is convicted of a "serious violent felony" "shall be sentenced to imprisonment for life without parole." A "serious violent felony" includes armed robbery. O.C.G.A. § 7-10-7(b)(1) (2005); O.C.G.A. § 17-10-6.1(a)(2) (2005). Under O.C.G.A. § 17-10-7(c) (2005), a person who, after having been previously convicted of three felonies, commits a fourth felony, must "serve the maximum time provided in the sentence of the judge" and "shall not be eligible for parole until the maximum sentence has been served." The maximum sentence for armed robbery is life. O.C.G.A. § 16-8-41(b).

petitioner could not establish prejudice).

Because Petitioner has not shown the cause or actual prejudice necessary to relieve his procedural default, this Court is barred from considering his claim that his sentence is illegal. It is recommended that Petitioner's first ground for relief be denied.

C. In-Court Identification

Petitioner contends the trial court erred by allowing an in-court witness identification of Petitioner over trial counsel's objection. Am. Pet. 5. This ground is also procedurally defaulted. "The AEDPA requires a state prisoner to exhaust all available state court remedies, either on direct appeal or in a state post-conviction proceeding[,] thereby giving the state the opportunity to correct its alleged violations of federal rights[.]" *Pearson v. Sec'y, Dept. of Corr.*, 273 F. App'x 847, 849 (2008) (per curiam). In order to exhaust his remedies, a petitioner must "fairly present his federal claims to the state courts in a manner to alert them that the ruling under review violated a federal constitutional right." *Id.* at 849-50 (quotation mark omitted).

Petitioner did not raise the issue of in-court identification in his motion for new trial or on direct appeal. Resp't's Ex. 6(a), at 184-93; Resp't's Ex. 6(g), at 185-236. He raised it in his original state habeas petition, but not in his amended state habeas petition. Resp't's Ex. 1, at 6; Resp't's Ex. 2, at 1-7. At the hearing on his amended state petition, Petitioner abandoned the claims raised in his original state petition and did not address the issue of in-court identification. Resp't's Ex. 6(a), at 47. Petitioner thus failed to exhaust his state remedies.

Typically, a district court should dismiss without prejudice a habeas petition containing unexhausted claims. *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998). "But, when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, [a district court] can forego the needless judicial ping-pong and just treat those claims now barred by state law as no basis for federal habeas relief." *Id.* (punctuation omitted). Under Georgia's successive petition rule, a petitioner is required to raise all grounds for relief in his first state habeas petition or they are deemed waived in a subsequent petition. *Stevens v. Kemp*, 254 Ga. 228, 230 (1985); O.C.G.A. § 9-14-51. While Petitioner asserted the issue of in-court identification in his original state petition, he abandoned it. It is, therefore, procedurally defaulted. "A habeas petitioner can escape the procedural default doctrine either through showing cause for the default and prejudice or establishing a 'fundamental miscarriage of justice.'" *Bailey*, 172 F.3d at 1306 (citation omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 324-27 (1995)). Petitioner has not made such a showing, and this claim should accordingly be denied.

D. Ineffective Assistance of Trial Counsel

Petitioner alleges trial counsel was ineffective for not objecting to the prosecutor quoting the Bible during closing argument, not objecting to comments by the prosecutor and investigating officer as to Petitioner's right to remain silent, and failing to be an advocate for his client. Am. Pet. 2-4. These claims should all be denied.

1. Legal Standard

A successful claim of ineffective assistance of counsel requires a showing that (1)

the attorney's conduct fell below an objective standard of reasonableness and (2) the attorney's deficient conduct actually prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 688-92 (1984). In determining whether counsel's conduct was reasonable, "the Court must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). To show actual prejudice resulting from counsel's conduct, a petitioner must show "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.

"When the claim at issue is one for ineffective assistance of counsel, ... AEDPA review is 'doubly deferential,'" with federal courts affording "both the state court and the defense attorney the benefit of the doubt." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citations omitted). Thus, a petitioner "must also show that in rejecting his ineffective assistance of counsel claim the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) (quoting *Bell v. Cone*, 535 U.S. 685, 699 (2002)).

2. Biblical Reference

Petitioner alleges trial counsel was ineffective in not objecting to the prosecutor quoting the Bible. During closing argument, the prosecutor stated, "The good book, it has been written, and it has been said, '[l]et him that stole steal no more.' It's time to put a stop to it." Resp't's Ex. 6(f), at 91. Trial counsel did not object to the reference, and appellate counsel did not include the issue among his allegations of ineffective assistance of trial

counsel. Resp't's Ex. 6(a), at 184-93; Resp't's Ex. 6(g), at 185-236. Petitioner first raised the issue in his amended state habeas petition. Resp't's Ex. 2, at 4.

The state habeas court ruled the ground was procedurally defaulted under O.C.G.A. § 9-14-48(d) and *Black* due to not having been raised at the trial court level or on direct appeal when Petitioner had new counsel. Resp't's Ex. 3, at 15-16. The state habeas court recognized that under Georgia law, constitutional ineffective assistance of counsel could constitute cause to excuse a default under O.C.G.A. § 9-14-48(d). *Id.* at 16 (citing *Turpin v. Todd*, 268 Ga. 820, 826 (1997)). It also noted that prejudice could be shown by satisfying either the prejudice standard of *Strickland* or the actual prejudice standard of *U.S. v. Frady*, 456 U.S. 152 (1982).[7] *Id.* For reasons which will be discussed below, however, the state habeas court found that Petitioner had failed to establish such cause and prejudice. Likewise, this Court finds that Petitioner has failed to establish cause and prejudice to overcome the procedural bar to federal review. *See Ward*, 592 F.3d at 1157. Further, he has not shown a fundamental miscarriage of justice sufficient to excuse the default. It is recommended that this claim be denied.

3. Invocation of Right to Remain Silent

Petitioner contends trial counsel was ineffective for not objecting to the prosecutor and chief investigating officer commenting on Petitioner's invocation of his right to remain silent. Am. Pet. 2-3. During the direct examination of the investigating officer, the

[7] The actual prejudice standard of *Frady* requires a petitioner to show "not merely that errors at his trial created the *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170 (emphasis in original).

prosecutor specifically asked if Petitioner had requested to stop making a statement and asked for an attorney. Resp't's Ex. 6(d), at 170-71, ECF No. 17-9. The witness responded that Petitioner had stopped the interview and requested an attorney. *Id.* at 171, 173, 177. No objection was made by trial counsel.

Trial counsel's failure to object to the questioning was raised in the trial court and on direct appeal. Resp't's Ex. 6(a) at 187-88; Resp't's Ex. 6(g), at 224. The Georgia Court of Appeals analyzed this issue and other allegations of ineffectiveness under the *Strickland* standard. *Wade*, 315 Ga. App. at 669-70. The court declined to address the deficiency prong of *Strickland* because it concluded Petitioner had failed to show prejudice. *Id.* at 670. It defined prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The court held that Petitioner could not meet this burden based on "overwhelming evidence of [Petitioner's] guilt," which the court concluded "would have been presented to the jury regardless of the alleged deficiencies of [trial] counsel." *Id.* The court outlined the evidence against Petitioner, which included a fingerprint on the get-away car that matched Petitioner's, a cell phone belonging to Petitioner's wife that was used in the bank's vicinity within minutes of the robbery, witness testimony regarding Petitioner's facial similarity to one of the robbers, a telephone conversation in the weeks prior to the robbery in which Petitioner (who resided in Ohio) told a friend he was planning a trip to Atlanta for "work," post-arrest conversations between Petitioner and his sister in which he referred to "green stuff" being "all right where it's at," and similar transactions in which Petitioner committed armed robberies of financial institutions. *Id.* at 668-69.

The Georgia Court of Appeals' conclusion that Petitioner was not prejudiced by counsel's performance was reasonable under *Strickland*. *See, e.g., Baldwin v. Johnson*, 152 F.3d 1304, 1315-16 (11th Cir. 1998) (affirming denial of § 2254 petition alleging ineffective assistance of counsel due to overwhelming evidence of guilt); *Sears v. Warden*, No., 2017 WL 7726680, at *5 (11th Cir. Oct. 25, 2017) (unpublished) (denying certificate of appealability of denial of § 2254 petition on grounds state court had reasonably concluded lack of prejudice due to overwhelming evidence of guilt). This claim is without merit.

4. *Failure to Advocate*

Petitioner contends trial counsel failed to act as an advocate. Petitioner cites trial counsel's statement during closing argument that he had difficulty in representing Petitioner. Am. Pet. 4; Resp't's Ex. 6(f) at 56. He also argues trial counsel's comments to the jury indicated a belief that the evidence was sufficient to support a conviction. Am. Pet. 4. Finally, he criticizes trial counsel's statements to the jury that certain prosecution witnesses were credible. *Id.*; Resp't's Ex. 6(f) at 41-51.

Petitioner's argument appears to be that trial counsel's performance was so deficient as to constitute a constructive denial of counsel. The Supreme Court has held that "the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate" and "effective assistance of counsel is [] the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *U.S. v. Cronic*, 466 U.S. 648, 656 (1984). Where such advocacy is absent, there is "the complete denial of counsel," and prejudice is presumed. *Id.* at 659.

Petitioner, through appellate counsel, raised this issue on appeal. Citing *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), he argued that Petitioner's trial counsel "failed to honor his role as an advocate for Appellant and instead, became a prosecutor sitting at the defense table." Resp't's Ex. 6(g), at 232, 235. The Georgia Court of Appeals rejected the argument. Instead, it found the record demonstrated "that throughout the trial [Petitioner's] counsel attempted to 'hold the prosecution to its heavy burden of proof beyond a reasonable doubt.'" *Wade*, 315 Ga. App. at 671 (quoting *Cronic*, 466 U.S at 656 n.19). The court noted trial counsel's "numerous objections to testimony and evidence introduced during the prosecutor's direct examination of the state's witnesses." *Id.* The court specifically cited trial counsel's objection to the in-court identification of Petitioner, his attack on the fingerprint evidence, his attack on the cellular telephone records, and his objection to the similar transaction evidence. *Id.* The court concluded that Petitioner's trial counsel "challenged the prosecution's case and the trial did not 'lose its character as a confrontation between adversaries.'" *Id.* (quoting *Cronic*, 466 U.S. at 656-66).

The Georgia Court of Appeals' refusal to presume prejudice under *Cronic* was not a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1); *see Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1253 (11th Cir. 2011) (holding that Florida Supreme Court's refusal to presume prejudice under *Cronic* was not unreasonable). As such, Petitioner was required to show actual prejudice under the *Strickland* standard, which he failed to do. This claim of error, therefore, should be rejected.

E. Ineffective Assistance of Appellate Counsel

Petitioner alleges appellate counsel was ineffective for not raising the trial court's refusal to charge on the lesser included offense of robbery by intimidation, not alleging a violation of Petitioner's constitutional right to a speedy trial, and failing to argue trial counsel was ineffective for not objecting to the prosecutor's biblical reference. Am. Pet. 2-4.

1. Legal Standard

The standard for ineffective assistance of appellate counsel is a "slight variation" on the *Strickland* test. *Hall v. Warden, Lee Arrendale State Prison*, 686 F. App'x 671, 677 (11th Cir. 2017) (per curiam). To prevail, a petitioner "must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal." *Id.* He must then "show a reasonable probability that, but for his counsel's unreasonable failure [] he would have prevailed *on his appeal*." *Id.* at 677-78 (emphasis in original). As with claims of ineffective assistance of trial counsel, a state court's rejection of a claim of ineffective assistance of appellate counsel is entitled to deference. *Butts v. GDCP Warden*, 850 F.3d 1201, 1204 (11th Cir. 2017).

"[A] criminal defendant's appellate counsel is not required to raise all nonfrivolous issues on appeal" and "experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Payne v. U.S.*, 566 F.3d 1276, 1277 (11th Cir. 2009) (per curiam) (citations omitted). As such, "it is difficult for a defendant to show his counsel was ineffective for failing to raise certain issues on appeal, particularly if counsel did present other strong issues." *Id.*

2. Lesser Included Offense

Petitioner alleges appellate counsel was ineffective for not raising the trial court's refusal to charge the jury on the lesser included offense of robbery by intimidation.[8] Am. Pet. 2. Petitioner's indictment alleged he committed armed robbery by taking property from a bank employee "by use of a device having the appearance of an offensive weapon, to wit: a handgun[.]" Resp't's Ex. 6(a), at 118. Petitioner contends the jury should have been given an instruction on the lesser offense of robbery by intimidation because no witness testified to actually seeing a gun and the prosecutor admitted in closing arguments that he did not know if the robber had a gun as opposed to a stick or a finger. Am. Pet. 2; Resp't's Ex. 6(f), at 87.

Trial counsel requested the jury be charged on robbery by intimidation, but the trial court refused. Resp't's Ex. 6(a), at 161. Appellate counsel did not raise the issue in his motion for new trial or on direct appeal. Resp't's Ex. 6(a), at 184-93; Resp't's Ex. 6(g), at 185-236. In his state habeas petition, Petitioner alleged appellate counsel was ineffective for not pursuing this issue on appeal. Resp't's Ex. 2, at 1-2. At the hearing on the state petition, appellate counsel testified he did not raise the issue because, based on the evidence introduced at trial, he did not believe it would be successful. Resp't's Ex. 6(a), at 29-30.

[8] O.C.G.A. § 16-8-40(a)(2) provides: "[a] person commits the offense of robbery when, with intent to commit theft, he takes property of another person from the person or immediate presence of another ... by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another[.]" Under O.C.G.A. § 16-8-41(a), robbery by intimidation is a lesser included offense of armed robbery.

In denying Petitioner's claim, the state habeas court identified the appropriate standards for analyzing claims of ineffective assistance of counsel, citing both *Strickland* and *Phillips v. Williams*, 276 Ga. 691 (2003). Resp't's Ex. 3, at 8. In *Phillips*, the Georgia Supreme Court stated that in regards to an allegation of deficient representation by appellate counsel, "the controlling principle is 'whether appellate counsel's decision was a reasonable tactical move which any competent attorney in the same situation would have made." *Phillips*, 276 Ga. at 691 (punctuation omitted). As to the prejudice prong, the Georgia Supreme Court held that "the [petitioner] must show a reasonable probability that the outcome of the appeal would have been different." *Id.* (punctuation omitted).

The state habeas court determined that appellate counsel's performance was not deficient, stating it "credited" his testimony that he saw no basis for raising the issue. Resp't's Ex. 3, at 8. The court also concluded that Petitioner could not show prejudice since the evidence admitted at trial did not support a charge on the lesser offense. *Id.* at 9. The court noted the bank teller's testimony that the robber poked something into her side and threatened her if she did not cooperate, the belief of witnesses that the robbers had weapons, that one perpetrator kept his hand in his pocket, creating the perception he had a gun, the robbers' threats of death if their instructions were not obeyed, and similar transaction evidence in which Petitioner used a gun. *Id.* at 10-11. Citing *Hill v. State*, 228 Ga. App. 362, 363 (1997), the state habeas court explained that "the fact that no gun was seen or recovered by police is not evidence authorizing a charge on a lesser included offense." *Id.* at 10. The court also observed that Petitioner's trial defense was that he was in Ohio at the time of the robbery, and that if his testimony was believed, the evidence

would not have supported a conviction of robbery by intimidation but would have required an acquittal. *Id.* at 11.

The state habeas court's ruling is entitled to deference. In *Hill*, the Georgia Court of Appeals held that "it is not error in an armed robbery case to fail to charge on robbery by intimidation where there is evidence of robbery by use of an offensive weapon, but no evidence of robbery by intimidation." *Hill*, 228 Ga. App. at 363. Here, there was no evidence of robbery by intimidation but only of armed robbery. Accordingly, it is recommended that this ground for relief be denied.

3. Speedy Trial

Petitioner contends appellate counsel should have argued on direct appeal that his right to a speedy trial was violated. Am. Pet. 3-4. On the trial's first day, Petitioner moved to dismiss the indictment due to the delay in bringing him to trial. Resp't's Ex. 6(a), at 155; Resp't's Ex. 7(a) at 15-17, ECF No. 17-13. The trial court denied the motion. Resp't's Ex. 7(a) at 17. Appellate counsel included the issue in the motion for new trial. Resp't's Ex. 6(a), at 184. However, at the hearing on that motion, trial counsel testified that the delay in Petitioner's case was due to an inability to get funds for an expert witness. Resp't's Ex. 6(g), at 118-20.[9] Appellate counsel did not to pursue the issue on direct

[9] Petitioner alleged both in his state habeas petition and in his petition to this Court that appellate counsel was deficient for not confronting trial counsel with a receipt showing that funds for an expert had been provided. Am. Pet. 3; Resp't's Ex. 2, at 5. At the hearing on the state habeas petition, a receipt was shown to appellate counsel but not admitted into evidence. Resp't's Ex. 6(a), at 5, 41-42. Petitioner has attached a copy of a money order receipt to his petition, but it is dated May 17, 2017, which is only four days prior to the start of his trial. Am. Pet. Ex. 2, ECF No. 14-3. This document would not refute trial counsel's testimony that the delay in going to trial was the lack of funds for an expert. Even if trial counsel was responsible for the pre-trial delay, moreover, Petitioner does not explain how this would provide grounds for dismissal of the

appeal. Resp't's Ex. 6(g), at 185-236.

In his state habeas petition, Petitioner alleged appellate counsel was ineffective for not raising the speedy trial issue on direct appeal. Resp't's Ex. 2, at 4-6. He asserted the pre-trial delay prejudiced his defense because an alibi witness died before trial. *Id.* at 6. Appellate counsel testified at the state habeas hearing that he saw the denial of a speedy trial as an issue, but that after reading case law, did not feel it "had any power in the appellate court." Resp't's Ex. 6(a), at 45. Specifically, he did not feel he could show prejudice under *Barker v. Wingo*, 407 U.S. 514 (1972). *Id.* at 43-44. He cited Petitioner's admission at trial that he had not provided the name of the alibi witness to trial counsel until shortly before trial, by which time the witness had died. *Id.*; Resp't's Ex. 6(f), at 33-36.

The state habeas court concluded that Petitioner had failed to establish deficient performance or prejudice arising from appellate counsel's decision. Resp't's Ex. 3, at 8, 9, 11-12. Citing the four-factor test of *Barker*, the court concluded that Petitioner could not show an appeal on the issue would have been successful.[10] The state habeas court acknowledged the two-year delay between arrest and trial, but concluded that the other three factors weighed against Petitioner. Resp't's Ex. 3, at 11-12. It observed that the reason for the delay was partly attributable to the defense, as trial counsel waited on funds

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indictment on speedy trial grounds.

[10] Under *Barker*, a court balances four factors to determine if a defendant's constitutional right to a speedy trial has been violated—the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant. *Barker,* 407 U.S. at 530-32.

for an expert witness and twice moved for a continuance to review discovery provided by the prosecutor. *Id.* at 12; Resp't's Ex. 6(a), at 115-16, 126. The court noted that Petitioner had not asserted his right to a speedy trial until the first day of trial. Resp't's Ex. 3, at 12; Resp't's Ex. 6(a), at 155; Resp't's Ex. 7(a), at 16. Finally, it concluded Petitioner could not show prejudice from the delay since "he did not inform counsel of [the] alibi witness during the two-year long preparation for trial, thus casting doubt on the criticality of the witness." Resp't's Ex. 3, at 12. The state habeas court ruled that Petitioner had not shown that "but for appellate counsel's decision not to raise [the speedy trial] ground, the outcome of Petitioner's appeal would have been different." *Id.*

Petitioner has not shown that the state habeas court's denial of his ineffective-assistance claim was contrary to, or an unreasonable application of, clearly established federal law. It is evident from appellate counsel's testimony that his decision not to pursue the speedy trial issue was reached after careful research and consideration of its likelihood of success on appeal. This type of decision is best left to the reasoned professional judgment of appellate counsel and entitled to deference. Additionally, the state habeas court's decision that Petitioner could not show prejudice, given the relative weight of the *Barker* factors, is also entitled to deference. Accordingly, it is recommended that this claim be denied.

4. Biblical Reference

Petitioner alleges appellate counsel was ineffective for not raising, on appeal, trial counsel's failure to object to the prosecutor quoting the Bible in closing argument. Am. Pet. 3. As noted above, trial counsel did not object to the prosecutors' remarks, and

appellate counsel did not include the issue among his allegations of ineffective assistance of trial counsel.

Petitioner did raise this issue to the state habeas court. Resp't's Ex. 2, at 4. That court, however, noted that Petitioner did not question appellate counsel about the issue during the hearing on the petition. Resp't's Ex. 6(a), at 20-50; Resp't's Ex. 3, at 9. The state habeas court concluded, therefore, that Petitioner had failed to "overcome the 'strong presumption' that appellate counsel's actions fell within the range of reasonable professional conduct." Resp't's Ex. 3, at 9 (quoting *Griffin v. Terry*, 291 Ga. 326, 328 (2012)). It also concluded Petitioner could not show prejudice since Georgia Supreme Court cases disapproving of biblical references in death penalty trials did not apply to Petitioner. *Id.* at 13-14.

The state habeas court's reasoning was consistent with federal law. As the court noted, appellate counsel was not asked about the issue during the hearing. "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption of effective representation" and "where the record is incomplete or unclear about counsel's actions, [a reviewing court] will presume that [appellate counsel] did what he should have done, and that he exercised reasonable professional judgment." *Grayson v. Thompson*, 257 F.3d 1194, 1218 (11th Cir. 2001).

Further, the state habeas court's ruling that appellate counsel's omission of the issue on appeal does not show prejudice is supported by Georgia case law. The Georgia Supreme Court has disapproved of biblical references in death penalty cases "which invite jurors to base their verdict on extraneous matters not in evidence." *Taylor v. State*, 296

Ga. App. 212, 216 (2009). Even in death penalty cases, however, the "[Georgia] Supreme Court has held that "passing religious references may not be so prejudicial as to require resentencing." *Buchanan v. State*, 282 Ga. App. 298, 301 (2006). A prosecutor, moreover, "may bring to his use in the discussion of the case well-established historical facts and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case." *Id.* Petitioner's trial was not a death penalty trial, and the prosecutor's biblical reference was brief. There is no reasonable probability Petitioner would have prevailed on this issue on appeal. Therefore, this claim should be denied.

III. Certificate of Appealability

Rule 11(a) of Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may be issued only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as is recommended here, a court denies a habeas petition on the merits, this standard requires a petitioner to demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner cannot meet this standard and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the foregoing reasons, it is recommended that Petitioner's original and amended applications for a writ of habeas corpus under 28 U.S.C. § 2254 (ECF Nos. 1, 14) be denied and a certificate of appealability not issued. Petitioner's motion for appointment of

counsel (ECF No. 18) is denied. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The district judge shall make a *de novo* determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO ORDERED and RECOMMENDED this 25th day of January, 2019.

/s/ Stephen Hyles
UNITED STATES MAGISTRATE JUDGE

SUPREME COURT OF GEORGIA
Case No. S17H0073

Atlanta, December 11, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

TERRY ALEXANDER WADE v. STANLEY WILLIAMS, WARDEN

From the Superior Court of Ware County.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 15V-0207

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sue C. Fulton, Chief Deputy Clerk

D

IN THE SUPERIOR COURT OF WARE COUNTY
STATE OF GEORGIA

TERRY A. WADE,	*	CIVIL ACTION NO.
GDC #1248360,	*	15V-0207
	*	
Petitioner,	*	
	*	
v.	*	HABEAS CORPUS
	*	
STANLEY WILLIAMS,	*	
	*	
Respondent.	*	

FINAL ORDER

Petitioner, Terry Wade, filed this habeas corpus petition challenging his 2007 Putnam County armed robbery conviction, affirmed in 2012. Upon consideration of the record as established at the September 10, 2015, evidentiary hearing in this case,[1] the Court denies relief based upon the following findings of fact and conclusions of law.

PROCEDURAL HISTORY

Petitioner was indicted by a Putnam County grand jury on March 21, 2005, for armed robbery (count 1) and kidnapping (count 2). (HT. 67-69). At a May 21-24, 2007, jury trial, the jury found him guilty of both charges. (HT. 162, 1588).

[1] Citations to the sequentially-numbered transcript of the September 10, 2015, evidentiary hearing are designated "HT" followed by the page number(s). The first two volumes of the trial transcript were inadvertently not tendered at the evidentiary hearing, but were admitted and included in a supplemental transcript, not yet prepared by the drafting of this final order. Thus, citations to the first two volumes of the trial transcript are designated "T" followed by the page number.

E

The trial court initially sentenced Petitioner as a recidivist to life without parole on each count, to run concurrently. (HT. 1603).

Petitioner was represented at trial by William H. Sheppard. (HT. 162). Brian Steel represented Petitioner post-trial and on appeal. (HT. 177, 2006).

The trial court granted Petitioner's motion for new trial to the extent that the court vacated the conviction and sentence for kidnapping, pursuant to Garza v. State, 284 Ga. 696, 670 S.E.2d 73 (2008), but denied the motion for new trial on the other claims. (R. 568, 578).

On direct appeal Petitioner raised one enumeration of error, alleging trial counsel was ineffective in nine instances when counsel:

(i) expressed disapproval of Petitioner's core values;

(ii) presented evidence of a third armed robbery committed by Petitioner that the prosecution had not sought to introduce;

(iii) made extensive references to Petitioner's involvement in a "culture of crime";

(iv) failed to request a jury instruction on the sole defense of alibi;

(v) "cross-examined" Petitioner and violated attorney client privilege concerning why Petitioner had failed to provide to counsel with the name of an alibi witness for years and then gave him a then-deceased witness' name right before trial;

(vi) introduced the fact that Petitioner was a country-wide illegal drug trafficker and dealt in stolen mink coats;

(vii) failed to object to the prosecution's unlawful comments on Petitioner's invocation of his right to remain silent and right not to waive extradition;

(viii) violated attorney-client privilege by revealing to the petit jury that counsel wanted to hire a fingerprint expert (who was not produced at trial) and that the fingerprint and cell phone evidence presented by the prosecution were enough to support a guilty verdict in counsel's opinion, and;

(ix) expressed his admiration and firm belief that critical prosecution witnesses presented truthful testimony at trial.

(HT. 2006-07).

The appellate court found those contentions lacked merit and affirmed Petitioner's conviction and sentence for armed robbery. Wade v. State, 315 Ga. App. 668, 727 S.E.2d 275 (2012), cert. denied, No. S12C1439, 2012 Ga. LEXIS 911 (Ga. Oct 29, 2012).

Petitioner originally filed this petition pro se on October 10, 2013 in Tattnall County and raised seven grounds. This case was transferred to this Court on March 19, 2015. Through counsel, Petitioner filed an amended petition on July 13, 2015, raising five grounds.

An evidentiary hearing was held on September 10, 2015, at which Petitioner's former appellate counsel, Brian Steel, testified. At the hearing, Petitioner verified that he was only proceeding on the five grounds raised in the amended petition. (HT. 46). Thus, the Court deems the claims raised in the original petition to be abandoned.

The Court will address similar grounds together.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL
(Ground 4; Parts of Grounds 1, 2, 3, and 5)

In ground 4 and in parts of grounds 1, 2, 3, and 5 of his amended petition, Petitioner alleges that he received ineffective assistance of appellate counsel in five instances, in that appellate counsel did not:

(1) raise trial court error in not charging the jury on the lesser included offense of robbery by intimidation;

(2) raise trial counsel ineffectiveness for not objecting to the prosecutor's and the investigating detective's comments on Petitioner's right to remain silent;

(3) raise trial counsel ineffectiveness for not objecting to the State's use of biblical quotes during closing argument;

(4) introduce evidence during the motion for new trial and on appeal that refuted trial counsel's testimony regarding the long delay in the receipt of discovery affecting Petitioner's right to a fast and speedy trial; and

(5) raise that Petitioner received an illegal term of imprisonment.

Findings of Fact

Following his May 2007 jury trial, Petitioner was represented post-trial and on appeal by new counsel, Brian Steel (hereinafter "appellate counsel" or "Mr. Steel"), who filed an entry of appearance on June 30, 2008. (HT. 177). Appellate counsel, an attorney since 1991, was retained to represent Petitioner on his direct appeal. (HT. 21-23). Appellate counsel practiced exclusively criminal defense during his career and had handled state and federal criminal cases across the country, including in the United States Supreme Court. (HT. 21-22).

To prepare for appeal, Mr. Steel will generally first get the file from the trial lawyer, then get the trial transcript, as well as any motions transcripts, and create a digest of potential issues, ranging from weak to strong issues. (HT. 23). Mr. Steel would then send a letter with this information to his client and would maintain constant communication with his client, and travel to the prison for meetings. (HT. 23). He would ask his client about potential witnesses or any issues in the case that could be helpful. (HT. 23). Mr. Steel would meet with the prosecutor in the case, law enforcement agents, and would review the clerk's record. (HT. 24). Mr. Steel would then conduct legal research and hire any experts, as needed. (HT. 24). Appellate counsel was certain he followed his standard course of practice in Petitioner's case. (HT. 23).

Mr. Steel additionally reviewed the discovery with Petitioner, listened to tapes pertinent to the case, and met with Petitioner's trial counsel. (HT. 23). Mr. Steel also interviewed jurors to vet for potential juror misconduct issues. (HT. 24). He communicated with Petitioner's sister and other family members often. (HT. 26).

Mr. Steel recalled that evidence of three of Petitioner's prior armed robberies with a gun came in at trial. (HT. 28). One person who was accosted in this case testified that an object that felt like a gun was placed against his body. (HT. 28). Two other tellers testified that they believed the person had a gun, either placed against the person's body or in the person's pocket. (HT. 29). Mr. Steel recalled evidence of the robber saying, "Get down or you'll be killed," and he factored this information into his determination to not raise a ground concerning a failure to charge on the lesser included robbery by intimidation—he did not think he could meet the test to establish error in the trial court declining to give the charge. (HT. 29, 36, 160).

Mr. Steel recalled that discovery was served late in the case, but also recalled that there was a reason behind it. (HT. 43). Mr. Steel analyzed the potential speedy trial issue under Barker v. Wingo[2], but determined he could not establish prejudice. (HT. 43). Mr. Steel recalled that it came out at trial that Petitioner had a

[2] 407 U.S. 514 (1972).

witness who had recently died, but it did not come up until ten days before trial. (HT. 43-44). Mr. Steel also recalled that only two years passed from the time of arrest until trial. (HT. 44). From reading case law, he ultimately determined at the time that this ground would not have merit. (HT. 44).

Mr. Steel recalled that because Petitioner had previously been convicted of a capital crime, i.e., armed robbery, the sentence of life without parole was triggered, thereby making his sentence legal. (HT. 45).

Conclusions of Law

Petitioner has the burden under Strickland v. Washington, 466 U.S. 668, 687 (1984), to show that appellate counsel's performance was deficient and that this deficient performance prejudiced the defense. Unless Petitioner satisfies both prongs of the Strickland test, he is not entitled to relief. Id. at 687, 697.

As to the attorney performance prong, the "controlling principle" is whether appellate counsel's decision was a reasonable, tactical decision that any competent attorney in the same situation would have made. Shorter v. Waters, 275 Ga. 581, 585, 571 S.E.2d 373 (2002). A petitioner can raise a Strickland claim based on an appellate attorney's failure to raise a particular claim "but it is difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). A defendant does not have a right to compel counsel to press non-frivolous points if counsel decides, as a matter of professional judgment, that those

issues should not be raised. Jones v. Barnes, 463 U.S. 745, 751 (1983). The proper prosecution of an appeal involves a "winnowing process," with appellate counsel separating the weaker issues from the strong and focusing on the stronger issues in an effort to maximize the chances of success on appeal. Smith v. Robbins, 528 U.S. at 288; Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661 (1986); Barnes, 463 U.S. at 751-52.

As to prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with "reasonable probability" defined as "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Where the claim is that appellate counsel was ineffective for not raising a particular issue, a petitioner must show there is a reasonable probability that the outcome of his appeal would have been different had the issue been raised. Phillips v. Williams, 276 Ga. 691, 583 S.E.2d 4 (2003); Nelson v. Hall, 275 Ga. 792, 573 S.E.2d 42 (2002).

Here, Petitioner has failed to establish that appellate counsel's performance was deficient under Strickland in regards to any of the claims of appellate counsel ineffectiveness raised in the amendment.

As to ground 1, this Court has credited appellate counsel's testimony that he saw no basis to challenge the trial court's denial of giving the robbery by

intimidation charge based on the ample evidence at trial that Petitioner had a gun on him during the bank robbery.

In regards to ground 2, appellate counsel in fact raised a ground concerning Petitioner's invocation of his right to remain silent, and cannot thereby be deficient for failing to raise a ground that he in fact raised. A

Petitioner did not question Mr. Steel about the issue raised in ground 3 alleging counsel's failure to raise a ground pertaining to a biblical reference made during closing arguments, and thus made no attempt to overcome the "strong presumption" that appellate counsel's actions fell within the range of reasonable professional conduct. Griffin v. Terry, 291 Ga. 326, 328, 729 S.E.2d 334 (2012) (citations omitted). "In the absence of testimony to the contrary, counsel's actions are presumed strategic." Crider v. State, 246 Ga. App. 765, 769, 542 S.E.2d 163 (2000).

As to ground 4, this Court has credited appellate counsel's testimony that any delay in Petitioner's trial had a reason behind it, and found that he could not show prejudice under the Barker v. Wingo factors. This Court has also credited counsel's testimony that he saw no basis to challenge Petitioner's sentence, as alleged in ground 5.

Petitioner has also failed to establish the requisite prejudice in regards to any of the appellate counsel ineffectiveness claims raised in grounds 1-5. Petitioner

has not shown that, but for appellate counsel's failure to raise these issues on direct appeal, a reasonable probability exists that the outcome of the appeal would have been different.

As to ground 1, complaining about the trial court's refusal to charge on the lesser included offense of robbery by intimidation, the charge conference was held off record, but it is clear that the defense requested a charge on robbery by intimidation that was declined by the trial court, and excepted to by the defense following the charge to the jury. (HT. 160, 1509, 1581). The evidence did not support such a request. One of the two bank robbers, who bared a strong resemblance to Petitioner, jumped over the counter and poked a bank teller in the side with something and told her she would be hurt if she did not cooperate. Wade v. State, 315 Ga. App. at 668. (T. 107, 117, 126,135, 160). The teller complied and led the perpetrator to the vault for fear of being hurt. (HT. 117-18). Testimony from trial showed that the perpetrators were believed to have weapons. (T. 14, 55-56, 126-27). The perpetrators also made various statements threatening death if their orders were not obeyed. (T. 52-53). One perpetrator kept his hand in his pocket, which was perceived as holding a possible gun. (HT. 55-57). The fact that no gun was seen or recovered by police is not evidence authorizing a charge on a lesser included offense. Hill v. State, 228 Ga. App. 362, 363, 492 S.E.2d 5 (1997). Similar transaction evidence was also presented showing that Petitioner robbed

banks at least twice before using a gun, which was admitted to by Petitioner during his testimony. (T. 640, 683-85, 855-57). Petitioner denied any involvement in the armed robbery, and presented an alibi defense, i.e., that he was in Ohio. (T. 915, 958-59). Petitioner's testimony, if believed, would further not support a conviction of robbery by intimidation but rather would require an acquittal. See Hill v. State, 228 Ga. App. at 363.

As to ground 4, Petitioner has not shown how he was prejudiced by a lack of evidence elicited from appellate counsel concerning the delay in trial counsel receiving discovery, resulting in an alleged speedy trial violation. As counsel determined, pursuant to Barker v. Wingo in which inordinate delay is analyzed under four speedy trial factors—the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant—Petitioner has not established that a violation occurred in order for appellate counsel's actions to have caused prejudice. Chatman v. Mancill, 280 Ga. 253, 256-57, 626 S.E.2d 102 (2006); Boseman v. State, 263 Ga. 730, 731, 438 S.E.2d 626 (1994). Looking to the first Barker factor, the length of delay, it appears roughly two years elapsed between the time of Petitioner's arrest and his trial date in May 2007. (HT. 154). This exceeds more than one year, which has been determined to be "presumptively prejudicial" and triggers analysis of the three other factors. Ruffin v. State, 284 Ga. 52, 55, 663 S.E.2d 189 (2008). However, the three remaining factors all weigh

against Petitioner. First, it appears from the record that Petitioner asserted his right to a speedy trial on the first day of trial. (HT. 154). Second, it appears that part of the delay was attributed to the defense, as trial counsel wanted to hire a fingerprint expert but was never provided with the funds by Petitioner. (HT. 1901-03). Additionally, the last seven months before trial were a result of the defense wanting more time to review discovery provided by the State in October of 2006. (114, 125). Lastly, Petitioner has not shown how he was prejudiced by any delay. Though he claims that a critical alibi witness died a month before trial, he did not inform counsel of such alibi witness during the two-year long preparation for trial, thus casting doubt on the criticality of this witness. (HT. 43-44, 1504-05). For these reasons, Petitioner has not shown that but for appellate counsel's decision to not raise this ground, the outcome of Petitioner's appeal would have been different.

As to ground 5, Petitioner has not shown prejudice from appellate counsel's failure to challenge the sentence. The State gave its notice of intent to introduce three prior armed robberies committed by Petitioner. (HT. 110). Certified copies of each conviction was admitted at trial. (HT. 1803-06; 1818-26; 1842-67; 1885-87). Under former O.C.G.A. § 17-10-7(c)(2007), "any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within

this state *other than a capital felony* must, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served." (emphasis added). Though Petitioner contends that armed robbery is a capital felony, thereby exempting it from this Code section, armed robbery is not considered a capital felony for the purposes of recidivist sentencing. See Demsey v. State, 279 Ga. 546, 549(4), 615 S.E.2d 522 (2005). Thus, Petitioner's life without the possibility of parole sentence was proper.

Petitioner has not shown prejudice for ground 2, as appellate counsel did raise an issue on appeal pertaining to Petitioner's invocation of his right to remain silent, and the Court of Appeals found that it lacked merit. That ruling is binding in this Court.

Finally, Petitioner has not established prejudice as to ground 3, his claim that trial counsel did not object to the prosecutor's use of biblical quotes in closing argument, when the prosecutor stated that the "good book" said, "'Let him that stole steal no more.'" (HT 1561). The Supreme Court has disapproved of the use of biblical authority during closing arguments in death penalty trials, particularly direct references that urge that the teachings of a particular religion "commend the imposition of a death penalty." See Carruthers v. State, 272 Ga. 306, 308(2), 528

S.E.2d 217 (2000). This was not a death penalty trial, and the prosecutor made a fleeting reference "the good book" in urging the jury to find Petitioner guilty.

Accordingly, Petitioner has failed to satisfy either prong of Strickland in regards to any of his claims of appellate counsel ineffectiveness. The claims of appellate counsel ineffective raised in each ground lack merit.

CLAIMS DECIDED ADVERSELY TO PETITIONER ON APPEAL
(Remainder of Ground 2)

In the remainder part of ground 2, Petitioner claims that trial counsel was ineffective for not objecting to comments by the prosecution and investigating detective concerning Petitioner's right to remain silent.

Findings of Fact and Conclusions of Law

This issue was previously raised and decided adversely to Petitioner on direct appeal. Wade v. State. Therefore, this issue may not be relitigated in habeas corpus, as there has been no intervening change in the applicable facts or law. Bruce v. Smith, 274 Ga. 432, 434 (2), 553 S.E.2d 808 (2001). This subpart of ground 2 provides no basis for relief.

PROCEDURALLY DEFAULTED GROUNDS
(Remainder of Grounds 1, 3, and 5)

In this final group of grounds, Petitioner raises claims that are procedurally defaulted under O.C.G.A. § 9-14-48(d), as these claims were not raised at the trial court level under the relevant procedural rule and on direct appeal.

In part of ground 1, Petitioner alleges that the trial court erred in not charging the jury on the lesser included offense of robbery by intimidation.

In part of ground 3, Petitioner contends that trial counsel was ineffective in failing to object to the use of biblical quotes in closing argument.

In part of ground 5, Petitioner alleges that the trial court erred in sentencing Petitioner to an illegal term of imprisonment and trial counsel was ineffective in failing to object.

Findings of Fact and Conclusions of Law

The claims raised in the remainder of grounds 1,3, and 5 are procedurally defaulted under O.C.G.A. § 9-14-48(d), as Petitioner did not timely raise these claims at the trial court level under the relevant procedural rule and on direct appeal when he had new counsel. Chatman v. Mancill, 278 Ga. 488, 489, 604 S.E.2d 154 (2004); Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996); White v. Kelso, 261 Ga. 32, 40 S.E.2d 733 (1991); Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985).

O.C.G.A. § 9-14-48(d) of Georgia's habeas corpus statute provides:

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

Cause to excuse a default under O.C.G.A. § 9-14-48(d) may be constitutional ineffective counsel under the standard of Strickland v. Washington, 466 U.S 668 (1984). Turpin v. Todd, 268 Ga. 820, 826, 493 S.E.2d 900 (1997). Actual prejudice can be shown by satisfying either the prejudice standard of Strickland or the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982). Todd, 268 Ga. at 829. Frady requires that a petitioner show not merely that errors at trial created a possibility of prejudice, but that the errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170.

Here, Petitioner has failed to establish cause and actual prejudice as defined in Turpin v. Todd to overcome the default of grounds 1,3, and 5, as discussed thoroughly above, and incorporated herein, in assessing Petitioner's grounds of ineffective assistance of appellate counsel.

Accordingly, grounds 1, 3, and 5, are defaulted and provide no basis for relief.

CONCLUSION

Wherefore, the petition for a writ of habeas corpus is DENIED.

If Petitioner desires to appeal this order, Petitioner must file an application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of the filing of this order. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Ware County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby DIRECTED to mail a copy of this order to counsel for Petitioner, Respondent, and the Office of the Georgia Attorney General.

Clarence D. Blount

CLARENCE D. BLOUNT, Senior Judge
Sitting by Designation

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FILED IN OFFICE THIS 18 DAY
OF Dec 2016
CLERK
WARE COUNTY

SECOND DIVISION
BARNES, P. J.,
ADAMS and MCFADDEN, JJ.

April 19, 2012

In the Court of Appeals of Georgia

A12A0150. WADE v. THE STATE.

MCFADDEN, Judge.

Terry Alexander Wade was convicted of armed robbery. See OCGA § 16-8-41. He appeals from the denial of his motion for new trial on the ground that he received ineffective assistance of trial counsel. Because he has not demonstrated that trial counsel's performance was both deficient and prejudicial to his defense, we affirm.

The trial evidence, viewed most favorably to the jury's verdict, see *Hinton v. State*, 292 Ga. App. 40, 41 (663 SE2d 401) (2008), demonstrated that around 11 a.m. on January 27, 2005, two masked men entered a Putnam County bank. One yelled: "This is a bank robbery. Everybody on the floor or we'll kill you." One of the men used an orthopedic crutch to jump over the teller counter, while the other man remained in the bank lobby. The man who had jumped over the counter poked a bank

teller in the side with something and told her she would be hurt if she did not cooperate. He demanded to be taken to the vault and for money to be placed in a duffle bag. The two men then left the bank, having taken approximately $243,000.

The men fled in a car that was found abandoned a short time later. When law enforcement officers searched the abandoned car they found a fingerprint that an analyst with the Federal Bureau of Investigations determined belonged to Wade. Other evidence was presented that also linked Wade to the bank robbery. Several eyewitnesses to the robbery described the man who jumped over the teller counter as having a distinctive facial structure that could be discerned through his sheer mask – a narrow face, long jaw bone, and protruding mouth – and they testified that Wade's facial structure resembled that of the robber. A cellular telephone belonging to Wade's wife and sometimes used by Wade had been used in the bank's vicinity within minutes of the robbery. In early January 2005, Wade (a resident of Ohio) had told a friend that he was planning a trip to Atlanta to "work." Less than a week after the bank robbery, Wade purchased a car for $2,900; the person who sold him the car testified that Wade paid for it in cash using hundred dollar bills that he pulled out of a bag in the seller's presence. After his arrest, Wade told his sister in a telephone conversation that "green stuff" was "all right where it's at." A search of Wade's house

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STRAIGHT LIE, "NO TAPE RECORDING GIVEN" TO US IN DISCOVERY HAS SUCH CONVERSATION NOW SGT. HORN TESTIFY AT M.F.N. THAT HIS TAPE WAS DESTROYED ??

produced, among other things, a bill for service for the cellular telephone that had been used near the bank, which was missing the specific page reflecting the date of the bank robbery, and a composition notebook containing notes about "armed robbery, robbery, statu[t]es, [and] enhancements." And similar transaction evidence was presented that Wade had committed prior bank robberies, including one in which he had jumped over the teller counter.

In motions for new trial, Wade contended that he received ineffective assistance of counsel and asserted numerous instances of allegedly deficient performance by his trial counsel. Pertinent to this appeal, Wade argued that counsel expressed disapproval of him and impugned his character before the jury through various comments and arguments, elicited evidence of another similar transaction that the court earlier had excluded from evidence, improperly disclosed matters subject to attorney-client privilege, failed to object to references to Wade's invocation of certain constitutional rights, and opined on the strength of the state's case, including the credibility of certain state's witnesses. (Although Wade also argues on appeal that trial counsel was deficient in failing to request a jury instruction on alibi, the record shows only that he claimed to the trial court that the court's failure to give such

instruction was a ground for a new trial, not that the lack of the instruction supported a finding of ineffective assistance of counsel.)

At hearings on Wade's motions for new trial, his trial counsel testified that some of the complained-of actions were oversights. But trial counsel explained that other actions were part of a strategy of acknowledging the credibility of the state's witnesses and the problems in Wade's past but arguing that the state had not shown that Wade had committed this particular crime. He stated that he had succeeded with this strategy in the past. He also testified that he and Wade had specifically prepared for Wade to give limited trial testimony in support of this strategy, but that at trial Wade lost focus and unexpectedly began discussing his involvement in other criminal activities, leading trial counsel to try to "rebuild" Wade's testimony through some of the complained-of actions.

To prevail on his claim that he received ineffective assistance of trial counsel, Wade must establish that counsel's performance was deficient and that the deficient performance was prejudicial to his defense. *Conaway v. State*, 277 Ga. 422, 424 (2) (589 SE2d 108) (2003). The trial court concluded that Wade did not make either showing. As to deficient performance, the court found that

> [c]ounsel was apparently prepared and knowledgeable about the subject matter. His motions were appropriate and well-presented. Cross examination was thorough and consistent with the over-arching theme posited by the defense. Choices that now seem to have been less effective in light of the jury's verdict[ ] all appear to have been strategically chosen to fit with the facts and that defense theme. Mr. Wade's representation at trial, taken as a whole, was above the standards expected in the community of trial lawyers.

As to prejudice, the court found that there was "no real likelihood . . . that a different verdict would have flowed from a change in counsel's actions or strategies." In reviewing the trial court's determination, we uphold the court's factual findings unless they are clearly erroneous and review the court's legal conclusions de novo. *Suggs v. State*, 272 Ga. 85, 88 (4) (526 SE2d 347) (2000).

We need not consider whether counsel performed deficiently, because Wade has not shown that he was prejudiced. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citation and punctuation omitted.) *Hardeman v. State*, 281 Ga. 220, 221 (635 SE2d 698) (2006). Overwhelming evidence of Wade's guilt was presented at trial, and this evidence would have been presented to the jury regardless of the alleged deficiencies of counsel asserted by Wade. Consequently, we

find no reasonable probability that, but for the alleged deficiencies, the trial would have resulted in a different outcome. See *Hardeman*, 281 Ga. at 221-222; see also *Glass v. State*, 289 Ga. 542, 548 (6) (c) (712 SE2d 851) (2011) (finding defendant could not demonstrate prejudice from counsel's deficient performance in light of overwhelming evidence substantiating his guilt).

Wade contends, however, that prejudice should be presumed because his trial counsel's actions amounted to a constructive denial of counsel. See *Hardeman*, 281 Ga. at 222 (constructive denial of counsel is one of a narrow range of circumstances in which the prejudice component of a claim of ineffective assistance of counsel can be presumed); *Turpin v. Curtis*, 278 Ga. 698, 699 (1) (606 SE2d 244) (2004) (same). "[A] constructive denial is not present unless counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. The attorney's failure must be complete and must occur throughout the proceeding and not merely at specific points." (Citations and punctuation omitted.) *Turpin*, 278 Ga. at 699 (1); see *United States v. Cronic*, 466 U. S. 648, 659 (III) (104 SC 2039, 80 LE2d 657) (1984).

The record in this case does not show an entire failure of counsel to meaningfully test the prosecution's case. To the contrary, the record demonstrates that throughout the trial Wade's counsel attempted to "hold the prosecution to its heavy

burden of proof beyond reasonable doubt." *Cronic*, 466 U. S. at 656 n. 19 (II). To this end, counsel, who had spent a significant amount of time preparing for trial, made numerous objections to testimony and evidence introduced during the prosecutor's direct examinations of the state's witnesses. He objected to the eyewitnesses' in-court identifications of Wade as resembling the robber. He objected to the introduction of various pieces of evidence, including the fingerprint evidence, evidence related to the cellular telephone records, and evidence regarding Wade's telephone conversations with others leading up to the bank robbery and after Wade's arrest. He challenged and moved to exclude expert testimony regarding the scientific validity of fingerprint evidence. He attacked on cross-examination the expert fingerprint witness's methodology and the precision of her work. He challenged the chain of custody of the car in which the fingerprint was found and raised other questions about the manner in which law enforcement officers investigated the bank robbery. He attacked on cross-examination the evidence regarding the use of the cellular telephone on January 27, 2005, including evidence regarding where and when the telephone had been used and the premise that Wade was the person who used the telephone. He challenged the admission of the similar transaction evidence. He highlighted in cross-examinations differences between the similar transactions and the Putnam County bank robbery.

"MY REQUEST – TO ATTORNEY TO 3-TIMES!

And he challenged the trial court's exclusion of the Putnam County Sheriff from the rule of sequestration. The record thus shows that, throughout the trial, Wade's counsel challenged the prosecution's case and the trial did not "lose[ ] its character as a confrontation between adversaries." *Cronic*, 466 U. S. at 656-657 (II).

Citing *Rickman v. Bell*, 131 F3d 1150 (6th Cir. 1997), Wade argues that he nevertheless experienced a constructive denial of counsel because his counsel acted as a "second prosecutor" by eliciting testimony about Wade's criminal history not otherwise in evidence and by disparaging him in closing argument. But the conduct of Wade's counsel is not comparable to that of counsel in *Rickman*. The court in *Rickman* found that, throughout the trial of that case, counsel repeatedly depicted his client as "vicious and abnormal" and a "hated and violent freak," id. at 1160 (III), conduct that the court described as "worse than no representation at all." Id. at 1159. Here, in contrast, counsel's allegedly disparaging remarks were made only after Wade, through his own testimony, had depicted himself as a person deeply involved in criminal activities and a criminal culture; counsel's closing argument acknowledging this testimony sought to persuade the jury to look past Wade's other criminal conduct and focus solely on whether Wade had committed the particular crime for which he was charged. Wade blames his counsel for eliciting some of his

WHO ASK THE QUESTION IF DEFENDANT WITNESS STAND?

testimony about his criminal activities. But the record shows that, although some of the testimony followed an ambiguous question by his counsel, most of Wade's testimony about his criminal activities was not responsive to any questions posed by his counsel. And although Wade complains of counsel's arguments in closing regarding the credibility of various state's witnesses, the record demonstrates that counsel used those credibility assessments to argue that, even taken as true, the witnesses' testimony left room for reasonable doubt. The record fails to show that Wade's counsel "aligned himself with the prosecution against his own client," as did the counsel in *Rickman*. Id. at 1159 (III).

Further decisions from other jurisdictions cited by Wade in support of his contention are also distinguishable, because in those cases trial counsel took positions directly contrary to the defendants' interests. See *United States v. Swanson*, 943 F2d 1070, 1074 (9th Cir. 1991) (counsel conceded no reasonable doubt existed as to defendant's guilt); *Osborn v. Shillinger* , 861 F2d 612, 628 (III) (10th Cir. 1988) (counsel made public statements that defendant was not amenable to rehabilitation, did not present at sentencing hearing available evidence contradicting state's contention that defendant was criminal ringleader, and at sentencing stressed the brutality of defendant's crimes), disapproved on other grounds, *Shafer v. Stratton*,

906 F2d 506, 509 (1) (10th Cir. 1990); *King v. Superior Court*, 132 Cal. Rptr. 2d 585, 600-601 (III) (Cal. Ct. App. 2003) (counsel offered no argument on defendant's behalf but instead actively argued and presented evidence against defendant in hearing on whether defendant had forfeited his right to counsel); *State v. Carter*, 14 P3d 1138, 1148 (Kan. 2000) (counsel overrode defendant's plea of not guilty and pursued a theory that defendant had committed a lesser crime, against defendant's wish to pursue an innocence defense). Here, in contrast, Wade's counsel consistently argued to the jury that the state had not met its heavy burden of showing beyond a reasonable doubt that Wade had committed the Putnam County bank robbery.

In summary, Wade "has not demonstrated a breakdown in the adversarial process that would justify a presumption that his conviction was insufficiently reliable to satisfy the Constitution." (Citation and punctuation omitted.) *Lyons v. State*, 271 Ga. 639, 640 (2) (522 SE2d 225) (1999). Because Wade failed to prove that he was prejudiced by any alleged deficiency, the trial court did not err in denying his motion for new trial.

Judgment affirmed. Barnes, P. J., and Adams, J., concur.