

No. _____

In the
Supreme Court of the United States

RODERICK JONES,

Petitioner,

v.

TOMMY BOWEN, WARDEN,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA**

PETITION FOR WRIT OF CERTIORARI

Leigh Stevens Schrophe
Counsel of Record
LAW FIRM OF SHEIN,
BRANDENBURG & SCHROPE
2392 North Decatur Road
Decatur, GA 30033
(404) 633-3797
leigh@msheinlaw.com

Counsel for Petitioner

GibsonMoore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED

Whether *McCoy v. Louisiana*, 584 U.S. 414 138 S. Ct. 1500 (2018) permits counsel to concede his client's guilt in direct contradiction of his testimony that he is not guilty of the crimes charged and whether counsel is ineffective in making such a concession in contradiction of his client's testimony and when such a concession can lead to a finding of guilt on all charges.

Whether a criminal conviction following inaccurate and confusing jury instructions can stand in light of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

Roderick Jones, petitioner on review, was the petitioner-applicant below.

Tomy Bowden (Warden), was the respondent below.

CORPORATE DISCLOSURE STATEMENT

There are no known corporate entities associated with this case.

RELATED PROCEEDINGS

Counsel is not aware of any directly related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Roderick Jones respectfully petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court in this case.

INTRODUCTION

In Georgia, state prisoners are entitled to pursue state habeas review, but Georgia courts routinely summarily deny these petitions regardless of the merits, depriving state prisoners of meaningful review at what is often the last real opportunity to challenge a criminal conviction. This case clearly presents the problem with this approach as the Georgia courts decisions upholding Petitioner's conviction resulted in a complete decimation of this Court's decision in *McCoy v. Louisiana*, 584 U.S. 414 138 S. Ct. 1500 (2018) and allowed Petitioner to be convicted even though the jury was never accurately or adequately explained the law. Given how courts, including Georgia, have chipped away at this Court's decision in *McCoy* until its holding has almost no impact and the damage to the public's trust in our judicial system that will result if jury verdicts that were not based on a proper instruction of the law are allowed to stand, it is of critical national and Constitutional importance that this Court step in and provide guidance on protecting these important, existing, Constitutional rights.

OPINIONS BELOW

Petitioner's conviction was affirmed on direct appeal by the Georgia Court of Appeals in an unpublished opinion (A17A0696).¹ The Dodge County

¹ Petitioner is not raising any issues raised in the direct appeal.

Superior Court denied Petitioner's habeas petition on November 3, 2023. Pet. App. 2a-38a. The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal on July 16, 2024. Pet. App. 1a.

JURISDICTION

The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal on July 16, 2024. Thus, a petition for certiorari is due in this Court by Tuesday, October 15, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

USCS Const. Amend. V, provides:

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.

USCS Const. Amend. VI, provides:

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 defence.

USCS Const. Amend. XIV, provides in relevant part:

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner was convicted of kidnapping, terroristic threats, battery (family violence), assault on an unborn child and cruelty to children in the third degree and was sentenced to twenty-eight years to serve in prison as a recidivist. After Petitioner's direct appeal was denied, he filed a timely habeas petition raising, in relevant part,

1. Petitioner was Denied His Constitutional Right to Maintain his Innocence and Due Process.
2. Counsel was Ineffective in Conceding Petitioner's Guilt.
3. The Trial Court Plainly Erred in Instructing the Jury and Counsel was Ineffective in Failing

to Object to the Instructions or Raise this on Appeal.

On November 3, 2023, the Dodge County Superior Court denied Petitioner habeas relief. Pet. App. 2a-38a Petitioner filed a timely Application for Certificate of Probable Cause to appeal in the Georgia Supreme Court raising these same issues. Pet. App. 111a-112a. On July 16, 2024, the Georgia Supreme Court denied Petitioner's Application. Pet. App.1a.

2. At trial, the facts relevant to this Petition were established as follows:

- Sondrica and Petitioner were involved in a domestic dispute.
- Petitioner admitted that he hit Sondrica, but it was because she ran at him hitting him and after he pushed her away, she ran at him again. Petitioner testified as to his justification defense at trial. Pet. App. 43a-54a.
- Shortly after Petitioner's testimony, counsel specifically waived the right to have a justification charge and, without any forewarning, conceded Petitioner's guilt on family violence/battery, assault on an unborn child, cruelty to children in the third degree, and perhaps terroristic threat. Counsel admitted he made these admissions without consultation with Petitioner and Petitioner had no way to object after the admission was made. Pet. App. 54a-61a, 102a.
- The court's instructions to the jury were muddled, incomplete, and inaccurate. Pet.

App. 62a-87a. Counsel admitted that the instructions were confusing, misstated the law, and overemphasized finding guilt and he had no reason for failing to object at trial or raise this issue on direct appeal. Pet. App. 90a-109a.

3. In denying relief, the state habeas court found, in relevant part:

- Petitioner was not denied his right to due process because his defense was not a justification defense according to his testimony because he admitted some provocation on his part, which indicated some willingness to accept responsibility for battery family violence, assault on an unborn child, and cruelty to children, the three charges that counsel expressly conceded his guilt on.
- Trial counsel's strategy was reasonable in regard to conceding Petitioner's guilt and there was no reasonable probability that the verdict would have been different had he not conceded guilt and, therefore, counsel was not ineffective in waiving the justification charge.
- Plain errors cannot be considered in habeas and in any event, the trial court did not plainly err in instructing the jury and counsel was not ineffective in failing to object to the instructions because it was not likely the jury was confused when considering the instructions as a whole.

Pet. App. 2a-38a. The habeas court did not discuss the substance of a single one of the erroneous instructions in reaching its conclusion.

4. The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal without explanation. Pet. App. 1a.

REASONS TO GRANT THE PETITION

While states are free to fashion their appellate or corrective procedures, an avenue of review must be provided and when it is the review must entail meaningful review. *See e.g. Carter v. Illinois*, 329 U.S. 173, 175-76, 67 S. Ct. 216 (1946); *Conn. Bd. of Pardons v. Dymschat*, 452 U.S. 458, 463, 101 S. Ct. 2460 (1981) (“A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right ... Plainly, however, the underlying right must have come into existence before it can trigger due process protection.”). Too often, however, Georgia superior courts simply rubber stamp prisoners’ convictions and the Georgia Supreme Court refuses to review the case. This case presents a perfect example of this sort of rubber stamping.

In rubber stamping Petitioner’s conviction, the Georgia courts’ decisions conflict with decision from other circuits, while continuing the trend of yet other circuits of undercutting this Court’s decision in. *McCoy v. Louisiana*, 584 U.S. 414, 138 S. Ct. 1500 (2018). Georgia’s decision pushes this undermining of this Court’s recognition of a defendant’s right to maintain his innocence throughout trial to the point that it now rings hollow. It is of critical national importance that the lower courts receive guidance from this Court regarding the extent that they are

able to chip away at this fundamental Constitutional right.

Further, in order to rubber stamp the conviction, Georgia courts overlooked inaccurate critical jury instructions, thus seriously undermining the public's confidence in our judicial system. It is critical that courts around this country understand the importance of meaningful review and that this Court correct these clear and serious Constitutional violations.

I. Does *McCoy v. Louisiana*, 584 U.S. 414 138 S. Ct. 1500 (2018) permit counsel to concede his client's guilt in direct contradiction of his testimony that he is not guilty of the crimes charged and is counsel effective in making such a concession in contradiction of his client's testimony and when such a concession can lead to a finding of guilt on all charges.

A. PETITIONER WAS DENIED OF HIS CONSTITUTIONAL RIGHT TO MAINTAIN HIS INNOCENCE AND DUE PROCESS

During closing, without any forewarning, defense counsel conceded Petitioner's guilt on battery/family violence, assault on an unborn child, cruelty to children in the third degree, and, perhaps, terroristic threats. Pet. App. 57a-61a. Petitioner had decided to exercise his Constitutional right to a jury trial and testified that he only hit Sondrica because she was running at him a second time – i.e., that he was justified. Pet. App. 43a-54a. Despite recognizing this and conceding that is what his client testified too, counsel unilaterally, and despite Petitioner's clear wish to maintain his innocence on all charges,

admitted his guilt, thus depriving him of his Constitutional right to maintain his innocence. Counsel admits that this was a unilateral decision and one that, even had Petitioner complained after it was done, there was no way to rectify. Pet. App. 92a-94a, 102a-103a. The state habeas court posited that this was not error because Petitioner admitted some provocation on his part, which indicated some willingness to accept responsibility for battery family violence, assault on an unborn child, and cruelty to children, the three charges that counsel expressly conceded his guilt on. Pet. App. 10a-16a. A look at the testimony, however, belies this conclusion.

First, as this Court recognized in *McCoy v. Louisiana*, 584 U.S. 414, 138 S. Ct. 1500 (2018), it is an unconstitutional structural error for defense counsel to concede his client's guilt over his clear objection. In reaching this conclusion, the Court concluded that the Sixth Amendment guarantees that a defendant can decide the objective of his defense, including whether to maintain his innocence.

Since that decision, however, Georgia has quickly begun to chip away at this rule. For example, in *Harris v. State*, 358 Ga. App. 802 (2021), the Georgia Court of Appeals held that defense counsel does not need to get express consent to concede guilt. Further, the Court of Appeals has held that entering a not guilty plea and testifying is not enough to qualify as an unambiguous objection to conceding guilt. *Id.* at 808-09. See also e.g., *Anthony v. State*, 311 Ga. 293, 300 (2021) (counsel's strategy to concede guilt was reasonable and not only did the defendant not object, but it was consistent with his testimony); *Pass v. State*, 361 Ga. App. 350, 356 (2021) (while defendant was not happy with the strategy, he did not forbid

counsel to use it and did not object when the trial court inquired if he agreed with one of the proposed stipulations). In each of these cases, however, the concession has at least been consistent with the defendant's testimony if he testified. Here, Georgia took it one step further because Petitioner's testimony was not consistent with the concession.

The question then is whether the defendant's clear testimony maintaining his innocence to the crimes charged (whether through justification or otherwise) is sufficient to indicate his clear objection to conceding guilt during trial. Or, does an untrained criminal defendant have to utter magic words in order to preserve this important Constitutional right? In this case, Georgia has now placed the onus on the untrained defendant to do more than make his wishes known through his testimony and words. This is in direct conflict with the Southern District of California, however, in *Esponoza v. Hatton*, 202 U.S. Dist. LEXIS 13942 (S.D. Ca. 2020). In that case, the district court found that presenting witnesses that contradicted defendant's self-defense testimony:

would have raised a colorable claim of a violation of Petitioner's Sixth Amendment 'autonomy' right. ... Once Petitioner chose this objective, to concede guilt on the actus reus, he was entitled under the Sixth Amendment to a lawyer who would represent and attempt to further the object of that defense, namely self-defense and accident. ... Were Ronis not to further Petitioner's goal of self-defense and accident, but rather present evidence that another person committed the actus reus, such conduct by Ronis would have been a violation

of Petitioner's Sixth Amendment right and constituted structural error.

Id. at ___. *Cf. Rivera v. Rhode Island*, 2020 R.I. Super. LEXIS 110 (2020) (explaining that defendant's Constitutional rights were violated when counsel failed to pursue the defendant's desired self-defense defense by not having him testify). *Compare e.g., Commonwealth of Mass v. Miranda*, 484 Mass. 799, 821-22 (2020) (finding no structural error because counsel and defendant agreed on the same objective – outright acquittal – even if they disagreed on how to get there).

While the need for the defendant to make his desire to maintain his innocence or pursue a claim of self-defense known to defense counsel makes sense, requiring a defendant, untrained in criminal proceedings, to make a specific on record objection does not. Where, as it was here, it is apparent from the defendant's actual testimony what his desire is and almost immediately after that testimony defense counsel ignores the defendant's clear desire, the record is complete and shows a violation of his Sixth Amendment rights and a structural error.

While the Georgia habeas court tried to say that Petitioner made some concessions, the only thing Petitioner admitted to doing to provoke the situation for which he was standing trial was trying to take the keys to leave. Pet. App. 12a-13a, 55a. Petitioner testified that he only touched the alleged victim because she would not stop attacking him. Pet. App. 45a-55a. The habeas court's statement that there is no evidence that Mr. Jones was in fear of receiving an injury is somewhat perplexing given that he said:

I'm going. I was fixing to go and that's when she ran behind me, started hitting me, so first time I pushed her off and she came back at me again.

And second time I turned around like, really man, it had me upset when she came at me, but when I turned around I hit my wife...

Pet. App. 47a-48a. Georgia law does not require Petitioner to allow himself to be struck again and again without defending himself. Georgia law provides that “[a] person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force.” O.C.G.A. § 16-3-21. Petitioner's use of force was necessary to defend himself against his wife's imminent use of unlawful force against him (again).²

The Georgia courts failed to address that trial counsel's concession also likely was used by the jury to find Petitioner guilty of kidnapping as well because if he had abused his wife and was making terroristic threats the jury likely concluded that she did not feel

² Further, it is entirely irrelevant if Petitioner may have been amenable to taking a plea to some of the charges at some point in time pretrial as the Georgia habeas court highlighted. When Petitioner did not enter a plea and exercised his right to go to trial and testified as to what happened he was evincing a clear intention to maintain his innocence at the time of trial, something he has a Constitutional right to do.

free to refuse to get into the car and, therefore, she did not go willingly.³

Immediately following his own client maintaining his innocence, counsel unexpectedly admitted that Petitioner was guilty of almost everything, even telling the jury that his client did not know he was about to make this admission.⁴ Pet. App. 58a. He in essence called his own client a liar and one who was not to be believed by the jury. This admission could have led the jury to conclude he was not credible and was guilty of everything. In fact, the State made this exact argument during closing. Pet. App. 61a-62a. Without being told counsel's intentions of doing such a serious act the client could not even object much less know the consequences of such attorney misconduct.

This admission, done without Petitioner's permission resulted in a denial of Petitioner Sixth Amendment constitutional rights. As courts have continued to chip away at a criminal defendant's right to maintain their innocence recognized by this Court in *McCoy v. Louisiana*, 584 U.S. 414, 138 S. Ct. 1500 (2018) and this case presents a clear example of the lower courts crossing the line and infringing on this right, Petitioner respectfully requests that this court grant his Petition for a Writ of Certiorari and address this serious Constitutional error.

³ Petitioner does not concede his guilt on the kidnapping charges. Merely, he is pointing out that his counsel's admission on the other charges was enough to lead the jury to convict him on all of the charges.

⁴ The Georgia courts also seemingly imply Petitioner should have objected. The concession, however, was made without his knowledge during closing without any inquiry of him and without any ability to object. Pet. App. 102a.

B. COUNSEL WAS INEFFECTIVE IN CONCEDING PETITIONER'S GUILT

Petitioner decided to exercise his Constitutional right to a jury trial and counsel did not have permission to concede that he was guilty of anything. While it may have been a spur of the moment decision by counsel, it was not one that he had permission to make and directly contradicted his client's clear wish to maintain his innocence as demonstrated by his testimony immediately before the unauthorized admission. Assuming *arguendo* that making this concession was not a structural error because Petitioner did not object using some magic language, then Certiorari is still appropriate in this case to provide guidance to lower courts around the country regarding counsel's effectiveness in conceding guilt in direct contradiction of his own client's testimony.

The requirement that a defendant receive effective assistance of counsel is constitutionally mandated. U.S. CONST. Amend VI; *Reece v. Georgia*, 350 U.S. 85, 90, 76 S. Ct. 167 (1955) ("The effective assistance of counsel...is a constitutional requirement of due process of law"); *McMann v. Richardson*, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441 (1970). To prevail on a claim of ineffective assistance, a petitioner must show that his attorney's performance or omissions fell below an objective standard of reasonableness, and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

In *Strickland*, this Court held that in order to establish a constitutional violation of the right to effective assistance of counsel, a petitioner must meet two prongs. First, he must show that counsel's

performance was *deficient*. This requires a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. This prong is met by showing that counsel’s acts and omissions did not meet an objective standard of reasonableness. Second, a petitioner must show that he was *prejudiced* by counsel’s performance. This second prong of the test is met by showing the existence of a reasonable possibility that, but for counsel’s deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. 2068. This is the same standard that applies to counsel on appeal. See e.g., *Pinkey v. Sec’y, DOC*, 876 F.3d 1290 (11th Cir. 2017).

Here, as is discussed in Issue I, *supra*, counsel conceded Petitioner’s guilt to numerous charges without Petitioner’s permission, which under the law can lead to a finding of guilt on the kidnapping. Petitioner did not admit to any of these crimes. Rather, his testimony was that his actions were justified as he was being attacked. The Georgia courts posit that counsel’s strategy was reasonable and that any error was harmless. Conceding guilt at times can be a reasonable strategy in certain circumstances, but given the fact that this concession was in direct contradiction of Petitioner’s testimony and in clear violation of Petitioner’s wish to maintain his innocence, it was not a reasonable strategy in this instance. There can be no reasonable strategic reason for making an admission that could lead to a

conviction on all charges under the law and that directly contradicts your client's testimony.⁵

Further, while there may have been sufficient evidence to support the verdict, it was not overwhelming. The alleged victim herself denied that she was forced into the car, that any threats were made, and that she was dragged by the hair, all consistent with Petitioner's testimony. Further, the Georgia courts ignore the harmful impact that resulted from counsel essentially calling his client a liar when he conceded his guilt, contradicting his own client's testimony. Additionally, the harm in conceding guilt here in violation of Petitioner's clear desire is also a denial of his Constitutional right.

Therefore, Petitioner received ineffective assistance of counsel and Petitioner respectfully requests that this court grant the Petition for a Writ of Certiorari to address this serious Constitutional question and provide guidance on examining the deficiency and prejudice prong when counsel's makes a concession in direct contradiction of his client's own testimony.

II. A criminal conviction following inaccurate and confusing jury instructions cannot stand in light of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution

During jury instruction there were several critical errors that were not objected to, amounting to a plain

⁵ It is perhaps because of a misplaced strategy that counsel specifically waived the justification charge. Pet. App. 54a-56a. It was critical that the jury be instructed on Petitioner's sole defense, so the strategy in conceding guilt which included waiving the justification charge was ineffective.

error and a violation Petitioners' right to due process of the law. Counsel was ineffective in not objecting to the instructions or raising the plain error on appeal. The Georgia courts summarily denied Petitioner any relief on this ground, without citing a single specific instruction. Where the instructional error is as pervasive as it was here, however, and counsel does not object, courts need to step in and protect a criminal defendant's fundamental rights. The record in this case is undisputed regarding the substance of the incorrect instructions and, therefore, this case presents a clear opportunity for this Court to clarify to the lower courts their duties to correct these sorts of errors when they occur during one of the most critical parts of a criminal trial.

This is not a case where there was a slip of the tongue or an instruction that was corrected by later instructions. Rather, the errors in the instructions were pervasive. For example, the trial (a) used the term "terroristic threats" to define the term terroristic threats; (b) expanded the threat for terroristic threats; (c) explained the harm part of a battery without explaining that it was talking about battery; (d) misstated the definition of battery family violence; and (e) read the cruelty to children in the third degree charge to the jury when it said it was defining battery. Specifically, the court instructed the jury as follows:

A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence for the purpose of terroristic threat. No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated. So intentionally causes substantial physical harm or visible bodily harm and bodily harm

may include but not limited to blackened eyes, swollen lips or other facial and body parts.

A person commits the offense of battery, family violence, when such a person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery; or such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery.

Pet. App. 72a-73a, 85a. Other portions of the instruction were nonsensical. For example, the court instructed the jury that:

You should not be concerned whether evidence is direct or circumstantial, which may be seen or heard or otherwise directly sense and such as by smell or taste or touch. It may be brought into court by the . to of exhibits where the testimony of direct evidence. So it is evidence that points immediately to the issue at question...

Pet. App. 66a (this is a direct quote)). And:

the proved fact must not only be consistent with the theory of guilt, but also *include* every other reasonable theory other than the guilt of the accused that does not require a higher or greater degree of certainty based circumstantial evidence than on direct evidence.

Pet. App. 67a (emphasis supplied). The court also instructed the jury twice in a row that the defendant

will not be presumed to have acted with criminal intent, but it can so find based on other facts. Pet. App. 70a-71a.

Then, the court reiterated again and again how the jury could return a guilty verdict but did not so emphasize the potential for a not guilty verdict. Specifically, the court instructed the jury:

If after considering the testimony and evidence presented to you together with the charge of the Court, you find and believe beyond a reasonable doubt that the defendant in the state of Georgia and in the county of Coweta, on or about November 27th, 2013, did commit the offense of Count one, kidnapping, that's alleged in the indictment you would be authorized to find the defendant guilty in that event, and the form of your verdict would be, we the jury find the defendant guilty.

If after considering the testimony and evidence presented to you, you find and believe beyond a reasonable doubt that the defendant in the state of Georgia and in the county of Coweta, did on or about the 27th day of November commit the offense of terroristic threats as alleged in the indictment, you would be authorized to find the defendant guilty and in that event, and the form of your verdict would be, we the jury find the defendant guilty.

If you do not believe the defendant is guilty after considering the testimony and evidence presented to you with the charge of the Court, you should find and believe beyond a reasonable doubt that the defendant in the state of Georgia and in the county of Coweta,

did on or about November 27th, 2013, commit the act of family violence, battery as alleged in the indictment, you would be authorized to find the defendant guilty. And the form of your verdict would be, we, the jury, find the defendant guilty.

If after considering the evidence and testimony presented to you together with the charge of the Court you should find and believe beyond a reasonable doubt that the defendant in the state of Georgia and in the county of Coweta, did on or about the 27th day of November, 2013, commit the offense of assault on an unborn child as alleged in the indictment, you would be authorized to find the defendant guilty, and in that event, and the form of your verdict would be, we, the jury find the defendant guilty.

And if after considering together with the charge of the Court, you should find beyond a reasonable doubt that the defendant in the state of Georgia and in the county of Coweta, on or about the 27th day of November, 2013, did commit the offense of cruelty to children in the third degree as alleged in the indictment, you would be authorized to find the defendant guilty of that offense, and the form of your verdict would be, we the jury find the defendant guilty.

If you do not believe the defendant is guilty of Count one, two, three, four or five: kidnapping; terroristic threats; battery, family violence; cruelty to children in the third degree or assault on an unborn child, or if you have

any reasonable doubt as to defendant's guilt, then, it would be your duty to acquit the defendant, in which event the form of the verdict would be, we, the jury, find the defendant not guilty to kidnapping as alleged in the indictment, not guilty to terroristic threats as alleged in the indictment, not guilty to battery, family violence, or not guilty to assault on an unborn child or not guilty to cruelty to children in the third degree. Your verdict should be a true verdict based upon the evidence.

Pet. App. 74a-76a.

No objections were lodged and the Georgia courts have refused to redress the error in these instructions.

While federal courts will not address simple errors in state law in jury instructions, they will step in when the errors amount to a denial of due process and it does address claims of ineffective assistance of counsel. *See e.g. Estelle v. McGuire*, 502 U.S. 62, 72-73, 112 S. Ct. 475 (1991). Here, the Georgia courts ignored both the plain error in the jury instructions that amounted to a due process violation and the ineffective assistance of counsel. This case presents a clear opportunity for this Court to clarify to the state courts their duties to correct these sorts of errors when they occur during one of the most critical parts of a criminal trial. If this sort of error is allowed to stand, the public's confidence in the judicial system will be shattered.

Georgia courts recognize a plain error as an error "which is obvious and affects the appellant's substantial rights and 'where exceptional

circumstances make it necessary to avoid a clear miscarriage of justice.” *Rogers v. State*, 247 Ga. App. 219, 227 (2000) (finding no plain error) (citations omitted). “[I]n order to apply the plain error rule, there must be (1) error that has not been waived, (2) error that is plain, and (3) error which affects the substantial rights of the appellant.” *Id. citing United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770 (1993) (discussing plain error under Federal Rule of Criminal Procedure 52(b)). If the foregoing requirements are met, the moving party must show that the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 736. Georgia courts are authorized to correct plain errors in jury instructions when there is a due process violation. *See e.g. Martin v. State*, 3030 Ga. App. 117, 120 n.1 (2010).

Here, this standard has been met. The issues with the instructions are replete and substantial and seriously affect the fairness and reputation of the judicial proceedings. Some instructions do not make sense, some provided incorrect definitions, and others provided incomplete definitions, all serious errors. *See e.g. Patterson v. State*, 328 Ga. App. 111 (2014) (reversing because charge allowed for conviction without consideration of an essential element and its failure to charge); *United States v. Daniels*, 685 F.3d 1237, 1244 (11th Cir. 2012) (implicitly recognizing that there can be an error with an instruction that misstates the law or misleads the jury). Cf. also *United States v. Gumbs*, 964 F.3d 1340, 1350 (11th Cir. 2020) (a supplemental jury instruction also cannot misstate the law or confuse the jury).

Here, some of the charges do not make sense and others are confusing and mis-define the crimes

charged. Pet. App. 66a-67a, 72a-73a, 83a. Further, the charge implied the jury could convict Petitioner for terroristic threats if the State had proved blackened eyes, swollen lips or other facial and body parts, but the indictment specifically outlined the threat as a threat to murder, thus incorrectly and illegally expanding the possible basis for a conviction.⁶ Pet. App. 72a-73a. *Milner v. State*, 297 Ga. App. 859 (2009) (reversing conviction because the charge allowed for the defendant to be convicted of terroristic threats in a manner not alleged in the indictment); *United States v. Gray*, 94 F.4th 1267, 1270 (11th Cir. 2024) (“An instruction that broadens the possible bases for conviction beyond what is contained in the indictment’ is a constructive amendment and ‘constitutes reversible error per se.’” *citation omitted*).

Additionally, the repeated direction as to what the jury should do if it believed the State had established Petitioner’s guilt beyond a reasonable doubt, without providing repeated companion instructions about what they must do if the State had not met its burden of proof, placed such an undue emphasis on the finding of guilt that it likely prejudiced the minds of the jury. *See e.g. Brown v. State*, 182 Ga. App. 682, 682-83 (1987) (“A mere repetition of a principle of law, while unnecessary, will not work a reversal unless it appears from the charge as a whole that there was such undue emphasis as to result in an unfair statement of the law in relation to the defendant’s right”); *Patterson v. State*, 207 Ga. 357, 360-61 (1950) (“It is pointed out in the brief of the able solicitor-

⁶ The recharge on terroristic threats did nothing to clean up the errors in this instruction. Pet. App. 85a.

general for the State that in the present case ‘the law with reference to reasonable doubt . . was charged eleven times.’ There was no such repetition in the charge of the law favorable to the State, and omission to charge principles favorable to the defendant, as would require the grant of a new trial.”).

While the Georgia courts should have caught these plain errors that amounted to a due process violation, counsel also should have noticed the repeated errors in the jury instructions and objected, but he failed to do so. Pet. App. 77a, 80a. The failure to object to these instructions replete with errors amounted to deficient performance and reasonably likely affected the outcome of the case as the jury was misinstructed as to the actual law, the guilt of Petitioner was emphasized, and the jury was very likely confused.

Counsel did not offer any reason for failing to object to the instructions. Specifically, as to the charge where the trial court a) used the term “terroristic threats” to define the term terroristic threats; (b) expanded the threat for terroristic threats; (c) explained the harm part of a battery without explaining that it was talking about battery; (d) misstated the definition of battery family violence; and (e) read the cruelty to children in the third degree charge to the jury when it said it was defining battery, counsel said “[t]here is no question that is confusing as it can get. I should’ve objected to that. That is - - I’ve never heard a jury charge, that I can recall, after you said that, it is extremely confusing to the jury.” Pet. App. 95a. As to the entirely nonsensical charge, counsel said “[t]hat is equally confusing I can’t understand how I missed that. That is clearly confusing.” Pet. App. 95a. As to the instruction that “the proved fact must not only be consistent with the

theory of guilt, but also *include* every other reasonable theory other than the guilt”, counsel said “[t]hat is not a correct statement of law. Also, that would be completely confusing to the jury. I have no idea how I missed that, but I did.” Pet. App. 96a As to the instruction that iterated again and again what the jury should do if they found Petitioner guilty, thus improperly emphasizing the finding of guilt, counsel said that there was no question that it unduly emphasized guilt and he “just missed it.” Pet. App. 97a. Overall, counsel simply missed these critical instructional errors and as they likely impacted the outcome of the trial, this was ineffective.

Further, once counsel had the transcript and was preparing the appeal, he should have again noticed the errors in the instruction and raised this as plain error on appeal. While he reviewed the transcript, he offered no reason for failing to raise these issues on appeal and said he had missed several appellate issues on appeal, that he agrees errors occurred that should have been raised that he missed, and that he had a bad day at trial. Pet. App. 95a-97a, 103a-104a. When he read the transcript, he “just didn’t notice those errors.” Pet. App. 104a. This was likewise ineffective.

These instructional issues are meritorious; the issue he raised on appeal was not.⁷ Had he raised these issues, it is likely the result of the appeal would have been different and counsel was, therefore ineffective in not objecting at trial and in not raising this on appeal.

⁷ And, even if it was, this issue could have been raised in conjunction with the issue raised on appeal.

The Georgia courts do not discuss the substance of a single one of the instructional errors and only conclusively claimed that the instructions as a whole did not confuse the jury. While sometimes reading jury instructions as a whole can correct a minor error, that is not the case here. The errors are replete and confusing and reading the jury instructions as a whole it is clear that the jury was not accurately or adequately instructed on the law *ever*. This is not a mere slip of the tongue or an instance where the other charges adequately cover the topic. The jury here received incorrect, incomplete, and confusing instructions. You cannot presume that the jury knew what a terroristic threat was when the term terroristic threat was used to define terroristic threat. You cannot presume the jury knew it could not consider blackened eyes, swollen lips or other facial and body parts even though it was instructed that it could as it relates to terroristic threats. You cannot presume the jury understood that the court jumped from explaining terrorist threats to the harm portion of battery without any mention of battery at all. You cannot presume the jury knew that the court really was defining cruelty to children when it specifically said it was defining battery. You cannot presume the jury understood what the court meant when trained professionals cannot understand after reading the instruction over and over again. You cannot presume that the jury understood that the court meant *exclude* even though it said *include*. You cannot presume that the jury was not influenced by the emphasis the court placed on finding guilt. The instructions as a whole do not adequately or correctly explain the law at all

Where, as here, the jury is not adequately instructed on the law so as to be able to make the

required legal determination of a defendant's guilt, and counsel misses this critical error at trial and on appeal, it is essential that the state courts step in and not rubber stamp the conviction. Here, Georgia courts refused to do so. This case provides an opportunity where the substance of the instructions has not and cannot be disputed to make clear that a criminal conviction based on incomplete, incorrect, confusing jury instructions which counsel failed to catch cannot stand.⁸ Therefore, a Petition of Certiorari is appropriate to address these important and critical Constitutional errors in order to maintain the public's trust in our judicial system.

CONCLUSION

Petitioner respectfully requests that this Court GRANT this Petition for a Writ of Certiorari.

/s/ Leigh Stevens Schrope
 Leigh Stevens Schrope
Counsel of Record
 LAW FIRM OF SHEIN,
 BRANDENBURG & SCHROPE
 2392 North Decatur Road
 Decatur, GA 30033
 (404) 633-3797
 leigh@msheinlaw.com

Counsel for Petitioner

⁸ The cumulative effect of the violation of Petitioner's Constitutional rights also warranted relief in the Georgia courts and in this Court. *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) ("[T]he court must consider the cumulative of [the alleged errors and determine whether, viewing the trial as a whole, [petitioner] received a fair trial as is [his] due under our Constitution."); *Waits v. State*, 282 Ga.1, 5-6 (2007).