No: _____

IN THE SUPREME COURT OF THE UNITED STATES

MR. AMOS WESTMORELAND, JR. -*PETITIONER*

vs.

MR. GLEN JOHNSON, WARDEN, AND

COMMISSIONER OF THE DEPARTMENT OF CORRECTION -*RESPONDENT(S)*

ON A PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (H-1 109M)

1412 Plunkett Road

Unadilla, Georgia 31091

QUESTIONS PRESENTED

QUESTION #1:

Does the 11th Circuit decision conflicts with this Court's decision in **Martinez v. Ryan, (2012)**, since it ignores that in **Martinez v. Ryan, 566 U.S. 1 (2012)**, the Court held: [t]hat where, under state law, ineffective assistance of trial counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, counsel in that proceeding was ineffective pursuant to **Strickland v. Washington**, 466 U.S. 668 (1984)?

QUESTION #2

Does the 11th Circuit procedural bar conflicts with this Court's decision in **Cuyler v. Sullivan**, (1980), since it ignores that in **Cuyler v. Sullivan**, 446 U.S. 335 (1980), the Court established that [t]o show ineffectiveness, a petitioner must demonstrate that his defense attorney had an actual conflict of interest, and that this conflict adversely affected the attorney's performance?

QUESTION #3:

The **6th Amendment** right guarantees conflict-free effective assistance of counsel and *does not* afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel, while the **Georgia Rule of Professional Conduct 1.7** prohibits a representation involving a potential conflict of interest unless and until the attorney has disclosed the potential conflict, in writing, to his client and thereafter received the client's written consent to undertake or continue that representation. The question is:

When a defendant is represented by multiple circuit defender's and subsequently files a pro se post-conviction collateral attack raising substantial ineffectiveness federal constitutional claims for failure of a succession of attorney's from the same circuit defender's office to raise it; Should the principles underlying this **Rule** be discounted in a criminal proceeding, where **6th Amendment** right to conflict-free effective assistance of counsel is involved?

QUESTION #4:

Does the constitutional protections of effective assistance of counsel on only appeal as of right in **Evitts v. Lucey**, (1985) and **Douglas v. California**, (1963), extend to filing a timely Motion for Reconsideration on only appeal of right?

If so, and appellate circuit defender does not withdraw in writing to allow petitioner to file a pro se Motion for Reconsideration on direct appeal to resolve his constitutional questions, can such noncompliance, if substantiated, procedurally bar a pro se habeas petitioner from having substantial claim(s) heard by a federal court?

QUESTION #5:

The State elected to indict and try Petitioner on 3 Felony Murder counts and Vehicular Homicide for the same victim. Georgia is a *proximate cause* state, and in virtually all of Georgia's many homicide statutes, including vehicular homicide statutes, the General Assembly has employed the same or very similar causation phrasing; The question is:

Does the 11th Circuit procedural bar conflicts with **Jackson v. Virginia, 443 U.S. 307 (1979)**, since it ignores that in **Jackson v. Virginia**, this Court held: in a challenge to a state court conviction under 28 U.S.C. § 2254, the applicant is entitled to habeas corpus relief...if it is found that upon the record evidence adduced at trial no rational trier of facts could have found proof of guilt beyond a reasonable doubt in terms of the substantive elements of the criminal offense as defined by state law?

QUESTION #6:

Under the procedural aspects of the **14th Amendment** Due Process Clause, when a state habeas judge verbatim adoption prepared by a prevailing party contains internal evidence suggesting that the judge may not have read them; Is the state court's fact-finding procedure, hearing, and proceeding full, fair, and adequate if [t]he order is an artifact of [the State's] having drafted [it] with specific intent of not producing a fair and impartial assessment of the facts and law, and deliberately glossed over and camouflaged significant attorney errors in order to ensure that those errors are shielded from any meaningful review?

QUESTION #7:

If a state court omits context from a statutory provision utilizing quotations and ellipsis while simultaneously applying clearly established federal law, and the omission, if submitted, would alter the entire decision in the proceeding; Does this implicates Constitutional Guarantees to Due Process and Equal Protection?

LISTS OF PARTIES

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

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from federal courts:

The order of the United States court of appeals appears at Appendix (A) to the petition and

[X] reported at No. 19-13759; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The Order of the United States District Court appears at Appendix (C) to the petition and is

[X] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was February 25, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely motion for reconsideration was denied by the United States Court of Appeals on the following date: June 11, 2020, and a copy of the order denying reconsideration appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment** to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The **Sixth Amendment** to the United States Constitution provides, in pertinent part:

> 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; . . . to have compulsory process for obtaining witnesses in his favor, and to have the **assistance of counsel for his defence.**

The **Fourteenth Amendment** to the United States Constitution provides, in pertinent part:

> ***No state shall . . . 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***.

28 U.S.C. § 2254(d) provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim-- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

O.C.G.A. § 9-14-47 provides:

> [w]ithin 20 days after the filing and docketing of petition...or within such further time as the court may set; the respondent shall answer...the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

O.C.G.A. § 9-14-48 provides in pertinent 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 miscarriages of justice.

O.C.G.A § 9-14-49 provides:

> After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case ***shall*** make written findings of fact and conclusions of law upon which the judgment is based. The findings of fact and conclusions of law shall be recorded as part of the record of the case.

O.C.G.A. § 16-5-1 (c) provides in pertinent part: "[a] person also commits the offense of murder when, *in the commission* of a felony, he causes the death of another human being irrespective of malice....."

O.C.G.A. § 16-7-1 provides in pertinent part: [a] person commits the offense of Burglary when, without authority and with the intent to commit a felony or theft therein, he or she *enters* or remains within the dwelling house of another.

O.C.G.A. § 40-6-390(a) provides in pertinent part: Any person who drives any vehicle in reckless disregard for the safety of persons or property commits the offense of reckless driving.

O.C.G.A. § 40-6-393 (a) provides in pertinent part:

> [a]ny person who without malice aforethought, causes the death of another person through the violation of {illegally overtaking a school bus, *'driving recklessly'*, driving under the influence, or *'fleeing or attempting to elude an officer'*} commits the offense of homicide by vehicle in the first degree...."

O.C.G.A. § 40-6-6 (d)(1) provides in pertinent part: the foregoing provisions shall not relieve the driver ***of an authorized emergency vehicle*** from the duty to drive with due regard for the safety of all persons.

O.C.G.A. § 40-6-6 (d)(2) provides:

> "[w]hen a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect *unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit.* Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect."

STATEMENT OF THE CASE

On the morning of May 17, 2007, a witness was driving home, when she observed two young black males in a blue, older model station wagon, with an "*blue tarp tied to the roof*", and "*no license plate displayed*". The neighbor became suspicious and followed the vehicle. She observed it minutes later parked in a driveway, with *the doors open and no occupants visible*. The neighbor *called her mother* (non witness), who called the witness' friend -- whom contacted the neighborhood watch and eventually law enforcement authorities.

Incognizant of potential detection, the vehicle passively exited the neighborhood. After casually passing a law enforcement vehicle, the officer made a U-turn and followed the vehicle. The officer's eventually attempted to effectuate a traffic stop for a "*drive-out tag*" or "*possible burglary*". The driver of the vehicle failed to accede to the officer's signals and drove his vehicle onto the Interstate, as additional patrol cars joined the pursuit. The driver continued his attempt to elude the police. After the police attempted a box maneuver to stop the fleeing vehicle, the vehicle executed a U-turn in the median to the southbound lane where it collided with a Buick. The Buick rolled over twice, killing the driver and seriously injuring the front seat passenger. Both the driver and the passenger of the vehicle fled on foot and was soon apprehended. Items taken from two burglarized homes were found in their possession as well as in the station wagon.

I. PRETRIAL STAGE:

Westmoreland was arrested on May 17, 2007 on (6) charges stemming from burglary and vehicular homicide, among other accusations; after determined to be indigent, a judge assigned the circuit defender office to represent him through circuit defender representative ("Martin" or "Marty" Pope). On November 30, 2007, Westmoreland was co-indicted in a 17-count indictment (HT. 153-61). On January 10, 2008, Westmoreland was escorted to the superior court for a scheduled Arraignment[1], and was *held in a confinement cell during the proceeding*, without further communication with attorney on the contents or results of the hearing (HT. 113-14)[2]. Roughly 2 weeks later, an undisclosed "***conflict occurred***" and circuit defender was removed from the case. Westmoreland was consequently appointed several different circuit defender, until trial commenced on 10-20-08. (HT. 120-24; 984-85)[3].

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[1] O.C.G.A. § 17-7-93(a) states in pertinent part: "Upon the arraignment of a person accused of committing a crime, the indictment or accusation shall be read to him and he shall be required to answer whether he is guilty or not guilty of the offense charged, which answer or plea shall be made orally by the accused person or his counsel."

[2] ("HT"), refers hereinafter to State Habeas Transcripts;

(a) Pretrial Motion Hearing(s):

1. On 10-14-08, during initial pretrial motion hearing, codefendant circuit defender requested a severance of defendants, arguing "*as of the other counts in the case, the defenses are that it was him not me, so those are completely antagonistic in these cases*"; the motion was denied; ("MH.")[4]

2. An additional pretrial motion hearing was conducted prior to trial, with circuit defenders, trial court and prosecutors to discuss evidence and stipulations to be used at felony murder trial. Westmoreland was not present at hearing; (HT. 1043-44; 1188).

II. THE TRIAL:

(a) First Plea Recommendation:

On October 20, 2008, the morning of felony murder trial, prior to jury selection, *fourth* circuit defender communicated the States first plea offer which included a guilty plea to Felony Murder, dismissal of remaining counts and offer testimony against codefendant. Westmoreland subsequently rejected the plea offer and elected to be tried by a jury. (HT. 1180-81; 2534-35).

(b) Motion In Limine:

Minutes prior to jury selection, the State filed a motion in limine "to move the court to preclude the Defense from cross-examining officers or detectives of any possible departmental policy violations, [or] Disciplinary actions that may have arisen from the traffic fatality on May 17, 2007, as those matters are irrelevant; and cross-examining any witnesses regarding any civil lawsuit against the Cobb County Police Department, if any in fact does exist as these matters are irrelevant." (HT. 1043; 1182-1186).

In response to the motion, trial counsel argued that he did think the defense had a right to go into the whole issue of the pursuit and ask about what the policy was for the officer's to follow the vehicle. He stated that he did not have a copy of the policy. Codefendant counsel stated that he had "copies of the policy somewhere in my archives. I think one of the questions would be whether this accident, which would be a defense for both defendants potentially, or an intervening act that if they violated the policy could go to their credibility as to whether they followed correct procedures on the chase and arrest". Trial

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[3] O. C. G. A. § 17-12-22(a) states in pertinent part: "[t]he council shall establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest. This procedure may be by appointment of individual counsel on a case-by-case basis or by the establishment of a conflict defender office in those circuits where the volume of cases may warrant a separate conflict defender office."

[4] ("MH") refers hereinafter to Pretrial Motion Hearing; {*not part of the State's evidence*};

counsel added that he would expect that it would explain the officer's conduct in the pursuit. The judge reserved the ruling and advised the defense that they would have it properly certified and lay the proper foundation for what the policy was. The court said that she didn't know anything about the facts and until she hear the facts, it needs to be brought back to her attention. She further stated counsel couldn't ask what the policy is because that wouldn't be the highest and best evidence; the policy would be the highest and best evidence of what the policy is. (HT. 1186-88).

During trial, both circuit defenders (Marotte and Christian) were advising Westmoreland that they were attempting to obtain the policy from the Cobb county police department. (HT. 2519-20)

(c) Cross-Examination/ Confrontation Clause:

During cross-examinantion of the initiating pursuing officer, he testified that *he turned around to follow it* (Westmoreland's vehicle); as a certified officer, he *receive a certain amount of training in procedures and policies of the Department*; and *there are certain procedures and policies that are set out that would govern how you would react to various situations*. When witness was cross-examined on ***the policy for pursuing a vehicle under the circumstances with the call that he got,*** This examination was objected to on relevance grounds by the State. The prosecutor interjected that the question should be about attempting to elude a police officer. The trial court sustained the objection and ruled that "*the policy would be the highest and best evidence*." Counsel moved on to an entirely different line of questioning, inquiring "when did you turn on your emergency equipment?" (HT. 1576-77).

(d) Expert Witness Testimony:

(1) The states expert witness, law enforcement officer/accident reconstructor', testified that the victim's vehicle initially tripped when the front right wheel "furrowed" into the "tilled dirt", in the grass where fiber optics had been laid days leading to the accident. (HT. 1698-1722; 1868-69; 163 §2; 168; 175).

(2) Medical Examiner testified, that the victim's death was caused by injuries sustained during the car incident; and

(3) Physician Brian Frist testified that "the unlawful injury inflicted ['*blunt force trauma*'] accounted as the efficient, proximate cause of death.

(e) Defense Evidence:

After the close of the States case, the defense didn't present any evidence. (HT. 1878).

(f) Closing Arguments:

(1) **Trial Counsel:** advised the jury to find Westmoreland guilty of several felonies without securing Westmoreland's permission. *"But the bottom line is that I suggest to you that the evidence in this case indicates that what he be found guilty of is vehicular homicide, serious injury by motor vehicle, the burglary charges, the attempting to elude charges...[A]nd that's what we would ask you to consider doing in your verdict."* (HT. 1896-1901).

(2) **Codefendant's Counsel:** argued to the jury that: (i) "Believe it or not, I represent John Williams. That's me."; (ii) That his client "was just the passenger in the vehicle that [Westmoreland] was driving"; (iii) ***"Amos Westmoreland was driving his vehicle, Amos made a mess out of May 17, 2007"***; (iv) ***"the law is we have the guy that caused that death here, we sure do. Right there!"*** **(pointing at Westmoreland)*...'that was the guy that caused the death. That was the guy that turned left. That was the guy that struck that car."***; (v) ***"we got to separate out who pays for what in this case. Who caused the death of this lady? Who injured these people's kin? Who did that? Amos did that, not Williams";*** and (vi) "I will not say that...Mr. Westmoreland didn't drive recklessly, didn't careen the car across 575 into this lady and flip her car over twice...but I will not say that to **anybody's fault but Westmoreland.**" (HT. 1902-1911).

(3) **State's Closing Arguments:** prosecutors argued that: (i) *"there was no question that these officer's were engaged in their job,* ***they were doing what we expect officers to do****"*. (HT. 1888); (ii) "we have agreed that Barbra Jean Robbins, she's the human being that died, ***with or without malice****. We have agreed to that in the stipulation*". (HT. 1016-18 § 7; 1916); (iii) "we have to look at the burglary itself, *determine whether a burglary felony existed; if it does exist, then go back and add the death* of Barbra Jean Robbins." (HT. 1917); (iv) ***"but here's what's important, it was a continuous act because they were in Cobb County, 'OUR COUNTY'"***. (HT. 1932).; (v) "the basis for count number 8 is burglary, count 1 and 2...*when you determine the burglary was committed, then go back and add the death of the victim*"; (ix) *"you took an oath, that you will apply the law...when you find they committed the burglaries, that they helped each other with the burglaries, that's felony murder, ladies and gentleman. That's an oath, that's your job"*. (HT. 1933); and (x) "When you get to exhibit (177), this is what they did...[b]ecause you know, if we could have called her today, she would have said 'All I was doing was spending time with my family, having breakfast. I wasn't speeding. I wasn't speeding at all. I had my daughter, my granddaughter... and *when you look at the death certificate, this Friday, she would have had a birthday. And because Tatiana doesn't have Me-Maw for a birthday, we ask that you find them guilty of felony murder, because that's what it is*". (HT. 1936).

(g) Motion for Directed Verdict:

Trial Counsel requested a directive verdict on felony murder count, arguing that there was no evidence presented that Westmoreland was in commission of a burglary. The trial court denied the motion, leaving the determination up to the jury. (HT. 1835; 1864); Trial court also denied defense request for accident instruction, stating that Westmoreland "was *driving all over the place',* assuming that it was him" (HT. 1868-69)

(h) Jury Instructions On Felony Murder-Burglary:

The trial court charged the jury on Felony Murder, in that:

> "In order for a homicide to have been done in commission of a particular felony {Burglary}, there must be a connection between the felony and the homicide. The homicide must have been done in carrying out the unlawful act and not collateral to it. *It is not enough that the homicide occurred soon, or presently, after the felony was attempted or committed.* There must be such a legal relationship between the homicide and the felony so as to cause you to find that the homicide occurred *before* the felony was at an end or *before* any attempt to avoid conviction or arrest for the felony.
>
> The felony must have a legal relationship to the homicide, be at least concurrent with it, in part, and be part of it in an actual sense. A homicide is committed in carrying out of a felony when it is committed by the accused while engaged in performance of any act required for the *full execution of the felony.*" (HT. 1964-66; 2021-23).

(i) Jury Questions:

During jury deliberations, the jury inquiry consisted of: "a recharge on the points of the law as it relates to the charges"; their ***"main challenge is how conspiracy weighs in felony murder and homicide charges"***; clarification of the essential basis of the offense"; and ***"when did the commission of the burglary conclude"***; (HT. 1984).

(i) Verdict, Conviction and Sentence:

As a result of convictions on several counts, Westmoreland was sentenced to Life imprisonment on Felony Murder (Burglary), 15 years consecutive for Serious injury by motor vehicle, and 12 months concurrent for obstruction and failure to secure a load; the remaining counts were merged or vacated by the operation of law. (HT. 1069-71; 1090-92);

III. MOTION FOR NEW TRIAL:

Circuit defender Marotte filed a standard Motion for New Trial. Subsequently, circuit defender Louis Turchiarelli was appointed to represent the case on appeal, and eventually amended the motion for new trial twice. (HT. 1095; 1099; 1128)

(A) At motion for new trial hearing trial counsel testified that:

> a) *he had never sat down and read the policy* (HT. 2514); b) the first time the issue of the policies came up was when Westmoreland brought it up on the ***second*** day of trial, the day the evidence would have started (HT. 2515-17); c) "Mr. Christian, he wasn't really associated as co-counsel. *He was basically through the circuit defenders office going to* ***observe*** and he did assist me...if I asked him to do something"; d) he did ask Mr. Rife -- it was his *understanding* that he had a copy, but at that time the court had ruled it was irrelevant; e) *"I did not obtain the policy. We checked with the police department, they said that it would take several days for them to comply with that...I did not personally go...I had Mr. Christian check on it for me while he was more or less assisting me in trial...[and] I think he had his secretary or his assistant call"* (HT. 2519-20); f) in his trial strategy, he didn't think the policies and procedures would help him in arguing whether the case was a vehicular homicide verses a felony murder case; g) Mr. Rife had basically told him that "*he had gotten a copy of the policy*"; h) he "felt it was relevant to ask the officer's about the policies to lay some kind of foundation for their actions and whatever was going on, I did not think of was a good idea for me to get the policy and try to put it into evidence...[a]s a defense, I felt that would probably have a negative reaction with the jury"; i) *he did not ask the court for any money for any kind of private investigator, or any kind of expert and he never consulted with any expert witness concerning the procedures and policies of the Cobb county police department.*; j) it was not part of his argument to the jury to try to convince them dealing with lesser charge of vehicular homicide verses felony murder, dealing with O.C.G.A. § 40-6-6(d)(2) and proximate cause of the collision and murder; he stated from a factual standpoint it was difficult for him "to try to tell the jury that the officer conduct in the chase was the proximate cause"; k) **he "believe [he] discussed with [Westmoreland] we just didn't have a defense for us to put on under the circumstances of this case, and [he] believe [he] told [Westmoreland] at that point and time, unless he thought otherwise there wasn't any real need for us to discuss because we didn't really have a trial strategy in terms of us presenting a defense** (HT. 2527); l) *he* ***didn't present any evidence in the cases*** (HT. 2522); m) he was *previously the law clerk for Milton Grubbs* (trial courts late-husband) (HT. 2529); and n) "***when I got the file, and I don't know how long this case had been going on... "I believe he asked-- at one point in time, I asked him-- understand, there was another lawyer prior to me in this case. And I didn't know what he had or had not done. At some point in time, Mr. Westmoreland told me that he'd never seen his Indictment. I know I sent him a copy of the indictment."*** (HT. 2513)

(B) Also during the hearing, initial appellate circuit defender advised the court that:

> "...for the purpose of clarification, I attached a certified copy of the Cobb County Police Department's **policy 5.17**[5], Vehicle Pursuits, to my original first Amendment...'and I've got another copy here and I had...*Lt.* ***Alexander [u]nder subpoena to be here today and the State said that they realized I've got a certified copy of the policy."*** (HT. 1107-24; 2538-39).

(C) In denying Motion for New Trial, trial court ruled that she:

> "did not allow trial counsel to cross examine officer Rosine on the Cobb County Police Department Policy on vehicle pursuits. First there was no certified copy of the policy tendered into evidence. The policy itself would be the best evidence of what it contained. Secondly, there was absolutely no evidence of reckless disregard by the police officer's ***during*** the chase and the policy, a certified copy of which was attached to the motion for new trial, would not have revealed any. The policy was not relevant." (emphasis added). (HT. 1138).

(i) Also in denying motion for new trial, the court, for the first time, applied "***res gestaes***" in support of the "escape phase" of the burglary. (HT. 1142).

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[5] "...the policy of the Department is to use *all reasonable means* in order to apprehend a fleeing violator" Effective December, 2004;

IV. INITIAL POST CONVICTION PROCEEDINGS:

The motion for new trial was denied on April 14, 2009 (HT. 1138). Literally, within a week, Westmoreland received a Civil Summons filed by the family and victims of the car accident, naming [him], (his codefendant), and (5) Cobb County Governmental Officials as parties in the action[6]. Exhibits in the pleadings included Cobb county's pursuit policy 5.17, attached to amended motion for new trial and ***Restricted Pursuit Procedures*** (Memorandum Order) *which was effective on the date of the accident (5/17/07)*[7]. [HT. 2590-93]. Simultaneously, through an Open Records Act request, Westmoreland received available case records from Cobb County Superior Court Clerk.

(a) Lawyer/Client Communication:

After reviewing records and transcripts of felony murder proceeding, Westmoreland sent numerous potential claims to initial appellate counsel for consideration on only appeal as of right. Correspondence raised *ineffectiveness of trial counsel* claims including, but not limited to--:

> * state interference; * outdated policy issue; * first time seeing discovery material (received from the clerk); * *no transcripts of:* ***arraignment*** *or* ***second pretrial motion hearing, in which Westmoreland was involuntarily absent from; * conflict of interest with Public Defenders Office (i.e., Michael Syrop, Gary Walker, Kenneth Sheppard, David Marotte and Rick Christian); *** *trial lawyer* ***never stood a case in front of trial court and was the clerk for her husband; * recusal*** because ***judges daughter was killed in a car related incident;*** ** Motion to hire an independent investigator filed by Michael Syrop wasn't pursued;* **** codefendant counsels and Marotte improperly instructing the jury to find Westmoreland guilty of numerous crimes; *** lack of communication; * Brady violation; * double jeopardy; **** prosecutor's improper comments in closing arguments; * improper influence to sign indictment during trial under the understanding of pleading not guilty, and not intentionally waiving formal arraignment; * ineffective assistance based on attorney being appointed at the "last minute"; *** numerous statutes, case law, and constitutional violations were presented for consideration; See (Pet. Ev. 24)[8];

(b) Conflict and Substitution of Appellate Circuit Defender:

Consequently, a *conflict of interest* occurred between Westmoreland and Turchiarelli for *"client-lawyer understanding"* (Pet. Ev. 25) (Appendix O); and resulted in Circuit Defender William Carter Clayton being appointed (substituted) to the case. At that point, Motion for New Trial had been denied and the

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[6] **Kinney et.al., v. Westmoreland** Case No. 2009CV04437D (Clayton County State Court, Georgia);

[7] Effective [12/14/06], vehicular pursuits are prohibited unless there is probable cause to believe that the person(s) being pursued have committed or are committing any one or combination of the following acts: 1) Murder, armed robbery, rape, kidnapping, aggravated battery, and aggravated assault; or (2) Any act that creates an immediate threat of death or serious bodily injury to another person (circumstances equivalent to deadly force being authorized)... *This memorandum constitutes a* ***lawful order*** *advising employees of a change of department practice.* **Employees are hereby ordered to adhere to this change in policy**.

[8] **("Pet. Ex.")** refers hereinafter to ***exhibit(s)/evidence filed*** **by Westmorland** in state habeas proceeding.

direct appeal had already been docketed in the Georgia Supreme Court. Substitute Circuit Defender enumerated four errors, including ***one*** claim of ineffective assistance of trial counsel on direct appeal, in that, counsel failed to properly investigate and present evidence of the Cobb County Police Department's vehicle pursuit policy; and he received ineffective assistance of counsel at motion for new trial in that his first post-conviction counsel failed to present evidence of the Cobb County Police Department's vehicle chase policy as reflected by the December 14, 2006, memorandum order banning police vehicle pursuits except in certain limited situations.

None of the potential claims presented to initial appellate circuit defender were pursued on direct appeal by substitute circuit defender.

(c) State Supreme Court Decision:

The Georgia Supreme Court affirmed Westmoreland's convictions and sentences on June 28, 2010. **Westmoreland v. State**, 287 Ga. 688, 699 S.E.2d 13 (2010). (HT. 2556; 2267-68) (12-1 at 2-4);

In Division 1 of the court's decision, the court opined that: "[f]irst, the policy ***alluded to***[9] *was not presented to the jury and is* ***not contained in the record of appeal***. Accordingly that *material* ***does not factor into our evidentiary review***." In Division 3 of the decision, the court went on to conclude: "Westmoreland asserts that his first post-conviction counsel was ineffective because he failed to attach to his motion for new trial a written addendum to Cobb County's vehicle pursuit policy which restricts vehicle chases in cases involving crimes such as burglary. ***We find no reasonable probability that such evidence, had it been introduced, would have resulted in a favorable ruling on the motion for new trial.***" Id. (emphasis supplied).

In Division 2, the court held that:

> "A party who complains about a restriction on cross-examination '"must either ask the question he desires to ask or state to the court what questions he desires to ask and then interpose timely objection to the ruling of the court denying him the right to propound thge question '[Cit.]'. However, after trial court sustained the prosecutor's objection, *Westmoreland abandoned his line of questioning and posed no objection to the trial court's ruling on the scope of his cross-examination.* "Because '[e]rrors not raised in the trial court will not be heard on appeal [cit.], [*Westmoreland*] has waived this [issue].'"Id. (emphasis in *italics* added).

V. PRO SE MOTION FOR RECONSIDERATION:

Westmoreland received the decision on direct appeal in the U.S. mail, with less than a week to timely challenge the ruling. Substitute appellate circuit defender advised [Westmoreland] through

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[9] **Allude**- to refer casually or indirectly; make an allusion. [t]o contain a causal or indirect reference. Random House Webster's Edition Dictionary;

correspondence, that *the case was "**final**" and [he] had "**4 years to challenge the conviction by way of filing habeas corpus**"*. (Pet. Ev. 29). (Appendix P.)

Westmoreland immediately filed a pro se Motion for Reconsideration[10] in the state supreme court, raising several claims of error, omission and constitutional violations. (Pet. Ev. 31);

Subsequently, the clerk corresponded that as long as [Westmoreland] was represented by any counsel, the court was unable to accept a filing for [him], and the *attorney must withdraw in writing to be removed as counsel in [the] case.* (Pet. Ev. 32). See Georgia Supreme Court Rule 4[11]. (Appendix Q)

VI. POST TRIAL COLLATERAL ATTACK(S):

(A) EXTRAORDINARY MOTION FOR NEW TRIAL:

The Extraordinary Motion for a New Trial, filed in the convicting court, is a post-conviction remedy in Georgia. Motion must be directed to the trial court at the first instance[12].

In May 2011, Westmoreland filed an Extraordinary Motion for New Trial and raised pertinent evidentiary issues. Westmoreland presented a copy of the updated policy along with affidavit and other exhibits, advising the court: *"the evidence was explicitly included in a lawsuit in a separate court on the same issue. The evidence was analyzed and admitted herein"*. (Pet. Ev. 36).

In June 2011, trial court ruled that:

> "The Defendant alleges that he is entitled to a new trial because evidence of the "*Cobb County Police Departments' **Restricted** Pursuit Procedures*" were not introduced into evidence. However this is not newly discovered evidence. The record shows that Cobb County Police Pursuit Procedures were argued at trial and at Motion for New Trial, even though a copy was not submitted. The Supreme Court in its decision in this case @ 287 Ga. 688 discussed these procedures in Divisions 1 and 2 of their decision. The Defendant cannot show that the Cobb County Police ***Restricted*** Pursuit Procedures were not known about until after trial. Therefore Defendant's Motion for New Trial is denied." (Pet. Ev. 37). (Appendix M)

(i) Discretionary Appeal:

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[10] Ga. Sup. Ct. Rule 27: A motion for reconsideration may be filed regarding any matter in which the Court has ruled within 10 days from the date of decision. A copy of the opinion or disposition to be reconsidered shall be attached. [N]o second or subsequent motion for reconsideration by the same party after a first motion has been denied shall be filed except by permission of the Court. The Clerk may receive any later motion and deliver it to the Court for direction as to whether it shall be filed.

[11] Any withdrawal, discharge, or substitution of attorneys of record in the Court shall be communicated to the Court in writing via the e-file system and shall include the name and number of the case in this Court and the name and address of counsel's client....Counsel shall provide a copy of the notification to the client, substituted counsel, and opposing counsel, including the Attorney General where required by law.

[12] See D. Wilkes, State Post Conviction Remedies and Relief Handbook §§ 13:1, 13:103, pp. 626-27, 686 (2013-2014 Ed.)

In Application for Discretionary Appeal, the state supreme court passed an order that:

> "Because applicant did not file until July 22, 2011 his application for discretionary appeal from the June 9, 2011 order denying his extraordinary motion for new trial, the application is untimely and hereby is dismissed....The applicant is granted ten days from the date of this order, [September 1, 2011], to file a motion for reconsideration." (Pet. Ev. 38).

(ii) Motion for Reconsideration

A timely motion for reconsideration was filed. An **original** lawyer-client letter from initial appellate circuit defender Turchiarelli was attached as an exhibit, to show that counsel had advised Westmoreland that *the defensive witness subpoenaed to testify at motion for new trial hearing could only testify that the policy admitted was effective on the date of the accident.* In October 2011, after considering the Reconsideration, the state supreme court denied the motion. (Pet. Ev. 38).

(B) EXTRAORDINARY MOTION OF ARREST IN JUDGEMENT and AMENDMENT:

On June 30, 2011, Westmoreland filed an Extraordinary Motion of Arrest in Judgement, challenging the sufficiency of the records and pleadings and raised pertinent evidentiary issues (Pet. Ev. 39). However, by the time the 1st Amendment to the motion was filed, the trial court had ruled on original motion. (Pet. Ev. 40; 41; 42);

The trial court ruled that:

> "[T]here are no non-amendable defects appearing on the face of the record or pleadings. -- 1) The indictment returned by the Grand Jury in the correct manner; 2) Each count of the Indictment charges the essential elements of the crimes charged; 3) The Sentences imposed are correct as a matter of law; 4) The contention regarding the Cobb County Police Department Pursuit to Policy was previously rejected by the Supreme Court in Section 3 of its decision; and 5) There is no error in the charge and no *"conflict of interest"*; Therefore Defendant's Motion in Arrest of Judgement is denied."' (July 1, 2011). (Pet. Ev. 40); (Appendix N).

(i) 1st Amendment to Extraordinary Motion In Arrest of Judgement:

The 1st Amendment specifically attacked the validity of the Felony Murder conviction and sentence, with direct reference to the record and pleadings, including the jury instructions. On April 9, 2012, the trial court adjudged the motion, ruling that: "The 1st Amendment to Extraordinary Motion In Arrest of Judgement having been reviewed...it is hereby denied." (Pet. Ev. 43);

(ii) Discretionary Appeal/ Motion for Reconsideration:

On May 4, 2012, the state supreme court received application for discretionary review. However, the *clerk declined to accept the application and returned it for lack of filing cost or a sufficient pauper's affidavit* (S.Ct. R. 5). (Pet. Ev. 44);

Without delay Westmoreland immediately complied, and the application was docketed on May 11, 2012. Consequently, on May 24, 2012, the court dismissed the application as untimely, ruling: *"the application seeks review of an order entered April 10, 2012, thus making the application* ***one day late.***" (Pet. Ev. 44).

V. STATE HABEAS CORPUS PETITION:

Westmoreland filed pro se state habeas corpus petition in Hancock County on October 28, 2011, along with two amended petitions, in which he challenged his Cobb County convictions and sentences and raised a total of 122 --5th, 6th and 14th Amendment of the U.S. Constitutional -- claims {including Due Process, Equal Protection, and Ineffective Assistance of *trial and appellate* counsel(s)} (Appendix E). Westmoreland maintained among other claims, that substitute appellate circuit defender was constitutionally ineffective for failing to raise the grounds raised in the instant petition on appeal and failing to withdraw in writing so that [Westmoreland] could properly present [his] constitutional claims in Motion for Reconsideration to the State's highest court. On 12/15/11, Westmoreland filed a **"Motion for Appointment of Special Assistance of Counsel."**(12-2 at 34-36).

(a) TRIAL COUNSEL'S SWORN AFFIDAVIT: (INTERROGATORIES):

During the pendency of the state habeas corpus proceeding, in a sworn affidavit administered under oath on [June 19, 2012], Circuit Defender Marotte attested:

> * He didn't know how many felony murder cases he'd handled prior to Westmoreland's case; * *he was an* ***associate*** *in Milton Grubbs office during 77-78;* **** he presumed that the Circuit Defenders Office was responsible for appointing him to the case;*** * he had a ***short pretrial inquiry with the district attorney in the judge's office,*** where the judge asked if there were any pretrial issues to be addressed; **** this was a case where he was appointed at the last minute. Judge Grubbs gave one continuance and he had to get ready as best he could within that time frame; * he had less than 30 days to prepare but he had no choice in the matter. That was the order of court and the schedule directed by the judge; * when he took the case, he did not recollect seeing any motions filed by previous Circuit Defenders; the file that was turned over to him had very little information in it, other than some discovery material; he had one telephone conversation with the previous attorney who updated him on what little had been done on the case;*** ** he did not see a* ***motion for funds to hire independent investigator to assist the defense***[13]*; he did not have formal training in criminal investigations and accident reconstruction; he did not have an expert or private investigator to assist in preparing a defense,* ***"but a private investigator would have been nice to have"***; ** he did not recollect another pretrial conference being conducted after 10-14-08; * that* ***prior to trial he had never read*** *the Cobb County Police Department Vehicle Pursuit Policy; he was* ***not aware*** *of a December 14, 2006*

[13] (HT. 64-66)

Restricted** Pursuit Policy;* * the issue of the policy was **first broached on the morning of trial**; ** he **advised Westmoreland during trial that he was attempting to obtain the policy from the police department**; * he asked Rick Christian, who was sitting in on the case to try and get a copy of it; he didn't know who actually went to the police department to attempt to obtain the policy between Christian, his personal assistant or his secretary; * Counsel for co-defendant who had been in the case for some period of time made him **aware** of the policy*; he asked counsel if he could produce the copy that he had; And he "did this mainly because defendant requested it.***"; neither him nor counsel for the co-defendant ***believed*** that the policy constituted a valid criminal defense and making that the main issue of the case might well have prevented a jury from considering the lesser included offense; * it was ***his opinion*** that the policy may have been a bearing on a wrongful death action, but he ***didn't believe*** that it was a *defense to vehicular homicide or felony murder;* * he did not recollect specifically of advising Westmoreland that he feared alienating the jury by attempting to blame police on account of losing credibility, but it was possible; * he had *stood/**tried a case in front of Judge Grubbs**, prior to Westmoreland's non-death penalty capital felony murder trial; * he was aware of trial courts daughter dying in an auto-related accident; stating that Westmoreland brought this issue up for the first time on the morning of trial. He considered this a frivolous issue and as a matter of morality, ethics, and professionalism, he **had no intention on filing such**;* * he believed co-defendant trial strategy was that it was all Westmoreland's fault; * he *did not object to codefendants counsel closing argument blaming Westmoreland for everything;* * he did the best he could with what he had to work with; (Pet. Ev. [filed 6/21/12]) See OCGA § 9-14-48 (b) and (c).

(b) State Habeas Hearing:

(i) During the pendency of the state habeas corpus petition, Westmoreland filed several pleadings (including, but not limited to, Motion for Production of Documents, Interrogatories and several Amendments to Briefs) and numerous articles of evidence (exhibits #1-58). This fact was alluded to by the Respondent's attorney at the hearing: ***"there is, as your honor is probably well aware, there is I'll say voluminous pleadings in this case filed by Westmoreland, many motions, many Amendments"***. (HT. 4). (Appendix L)

(ii) At the evidentiary hearing on April 3, 2013, Westmoreland's substitute appellate circuit defender testified and was subjected to cross-examination. Clayton testified that:

(a) there was some sort of ***conflict with previous counsel*** but he couldn't remember exactly what it was; (b) his appointment to Westmoreland case was after motion for new trial had been heard and denied and *case was docketed-- pending appeal in the Georgia Supreme Court*; (c) being appointed so late in the case, ***"in a sense"*** presented special and unique challenges to his representation and **it was unusual to be appointed at this part of the proceeding**; (d) the belated appointment **did have a bearing on his legal analysis regarding ineffective assistance of counsel claims**; (e) he **would have done things differently than the prior attorney had he had the case from the Motion for New Trial;** (f) **he was sure that he would have raised question of ineffective assistance of trial counsel claims differently than he would if he had been appointed counsel at the beginning of Motion for New Trial;** (g) **he did not have a chance to make the record for appeal and had to essentially write his brief based on the record that was made by the prior public defender**; (h) in preparing for the appeal, he spoke to Westmoreland's former attorney, discussed the case with Westmoreland, and researched the Cobb County pursuit policy; (i) *he did not see a way to file an extraordinary motion for new trial based on the outdated vehicle pursuit policy* being included in the original motion for new trial *because by the time he came into the case, the appeal had already been docketed in the georgia supreme court and trial court was without jurisdiction to hear such a motion at that point*; and (j) *he felt that he raised the most viable and meritorious issues on appeal.* (HT 7-15).

(iii) During the hearing, the Respondent presented the court with the states post-trial briefs which Westmoreland had seen for the first time, but didn't object to the delay at the hearing. (HT 22-23). The state habeas judge requested post hearing briefs from both parties. (HT 32-33).

(iv) At the conclusion of the hearing, *the court informed Westmoreland, that* ***he had the file of everything that had been stamped and filed in the case,*** *and it included a particular brief. He acknowledged the he was looking at it right then and noted that it was very thick, and that he was going to take it with him that day (4-3-13) and* ***go through everything that's filed in the case*** *and once he was done, he would then make a decision.* (HT 30-33). (Appendix L)

(v) A week after the hearing, Westmoreland received Respondent's "**Return and Answer**" through the U.S. mail, addressing (103) of (122) constitutional claims. Grounds **68** and **105-122** were not addressed or defended (procedurally defaulted) by the Respondent.

(vi) Westmoreland filed his post hearing brief suggested by the habeas judge, along with a motion for a hearing pursuant to State Habeas Corpus Act[14]. A hearing was subsequently set for Novemeber 20, 2013. However, while present at the courthouse awaiting scheduled hearing, the *'correctional officer'* advised Westmoreland that the judge said [the] case was ***"rescheduled" or "postponed"*** to another date. Westmoreland insisted that the correctional officer advise the habeas judge that as a pro se litigant, [he] wished to address the court. The officer declined the request.

(c) Final Order on Claims Raised in Petition:

In *the final order drafted by the state and adopted by the state habeas court as its own*, on ground(s): **[(1-2), (5-8), (11-21), (23-29), (31-68), (71-80), (94-95), (97-107), (109-110), {*112}, (114), (116-118), (120), {*122}]**, the habeas court concluded that "regardless of whether these claims were timely raised at trial under the relevant procedure rule, these claims were not raised as error on appeal. Thus, they are procedurally defaulted under O.C.G.A. 9-14-48 (d)". The order also concluded that:

> "***Westmoreland has failed to offer any evidence*** and has thus not met his burden to show cause in the form of ineffective assistance of counsel at the appellate level for failure to raise these on appeal and to establish prejudice based on the procedural [rule]. Westmoreland has thus failed to overcome the procedural bar to consideration of these issues. Accordingly, ground{s} provide no basis for relief".

The order also acknowledges that "Westmoreland filed a motion for reconsideration, which was denied on July 26, 2010". Id.

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[14] O.C.G.A. § 9-14-47 provides in pertinent part: [w]ithin 20 days after the filing and docketing of petition...or within such further time as the court may set the respondent shall answer...the petition. The court shall set the case for a hearing on the issues within a reasonable time ***after the filing of defensive pleadings***. ("defensive pleading" filed two days after the hearing);

(c)(1) The *adopted* order further found that "Westmoreland failed to question appellate counsel on the issue of failing to withdraw in writing at the evidentiary hearing. Thus, he failed to meet his burden of proof to show that appellate counsel was ineffective....Accordingly, ground [] provides no basis for relief."

(c)(2) Evidence filed in state habeas proceeding included, but was not limited to: All pro se post-conviction collateral attacks and dispositions of actions, ***Sworn Affidavit/Interrogatories*** from trial counsel David S. Marotte (Pet. Ex [filed 6/21/12]), client-lawyer correspondence between Turchiarelli and Westmoreland (Pet. Ex. 23-25), client-lawyer correspondence from Clayton to Westmoreland enclosed with denial of direct appeal (Pet. Ex. 29), Westmoreland's correspondence to the state supreme court clerk including Motion for Reconsideration (Pet. Ex. 30-31) and response from the clerk advising that counsel had to withdraw in writing. (Pet. Ex. 32).

(d) Certificate of Probable Cause:

Under circumstances, Westmoreland filed multiple Certificate of Probable Cause's (CPC) in the state supreme court. Claims included (1) the state habeas court failed to meet the requirements of **O.C.G.A § 9-14-49**, ***when it adopted the state's proposed final order verbatim which was arbitrary and capricious***; and Westmoreland (2) reliance on the court's well-reasoned and established habeas precedent in **Ryan v. Thomas,** 261 Ga. 661 (409 S.E.2d 507)(1991), where the court made it clear that different attorneys from the same public defender's office are not to be considered "**new**" counsel for the purpose of raising ineffective assistance claims. Therefore, a defendant's right to raise such a claim may not be barred by failure of a succession of attorneys from the same public defender's office to raise it. (Appendix I). Subsequently, Westmoreland raised claims, including, but not limited to:

(i) ***Conflict of Interest*** *with the Circuit Defenders Office; (ii)* **Violation of Right to be Present at Critical Stage** *("Makeshift"* ***Arraignment****); (iii)* ***Conflict of Interest*** *-- Trial Court and Trial Counsel; (iv)* ***Conflict of Interest*** *-- Trial Counsel and Codefendant Circuit Defender; (v) Prosecutorial Misconduct/**Brady** Violation (Trial); (vi)* **6th Amendment Confrontation Clause** *Violation; (vii) Merger/Void Sentence {Serious Injury by Vehicle}; (viii)* ***Ineffective Assistance*** *of Initial and Substitute Appellate Circuit Defender; (ix)* **Insufficiency of Evidence**/*Felony Murder (Burglary) (cite--* **Jackson v. Virginia***); (x)* **Due Process and Equal Protection** *Violation when court omitted unambiguous language from state statutory provision O.C.G.A. § 40-6-6(d)(2); (xi) Trial Court Abuse of Discretion -- Extraordinary Motion for New Trial; (xii)* **Cumulative Error/Spoliation (Due Process)***; (xiii)* **Conflict of Interest** *-- Respondent's Attorney (Attorney General Samuel S. Olens); (xiv) Violation of Habeas Corpus Act -- O.C.G.A. § 9-14-47; (xv) Ineffective Assistance of Counsel -- Inadequate Preparation and Investigation for Trial (cite--* **Strickland v. Washington***); (xvi) Habeas Court Final Order Verbatim was Arbitrary and Capricious (***Due Process***); (xvii)* **Violation of Right to be Present at Critical Stage** *(Undisclosed Pretrial Hearing); (xviii)* **Double Jeopardy and Due Process** *Violation (Burglary,*

*Eluding a Officer and Vehicular Homicide -- Felony Murder); (xix) Inadequate Notice; (xx) Trial Court Error (Applying **res gestae** in Order Denying Motion for New Trial); (xxi)* **Double Jeopardy/Due Process** *(cite-- Apprendi v. New Jersey); (xxii) Trial Court Error -- Extraordinary Motion for New Trial; (xxiii) Denial of Counsel at a Critical Stage (Trial); (xxiv) Inadequate Investigation and Preparation for Trial; (xxv)* **Cumulative Errors/Due Process** *Violation; (xxvi) Prosecutorial Misconduct/* **Brady** *Violation --* **State Interference** *(Motion for New Trial);*

The (CPC) was denied by the Supreme Court of Georgia, without particularly addressing any of the issues raised therein. (Appendix H).

VI. FEDERAL HABEAS CORPUS PROCEEDING:

In May 2014[15], Westmoreland filed pro se 28 Section 2254 petition in the United States Northern District Court of Georgia, which was amended to add a total of (62) claims maintaining - **5th, 6th and 14th Amendment of the U.S. Constitution violation (i.e., Due Process, Equal Protection, and Ineffective Assistance of Trial and Initial Appellate Counsel(s)**). See (Appendix R). Grounds maintained among other claims, that substitute appellate circuit defender was constitutionally ineffective for failing to (i) raise conflict of interest with circuit defender's office -- as the 7th appointee in case; (ii) failing to review the entire record to raise core constitutional violations on Westmoreland's only appeal as of right; and (iii) failing to withdraw in writing so that [Westmoreland] could properly present [his] Motion for Reconsideration to the State's highest court.

(a) In filing federal petition, among other pleadings, Westmoreland again requested "Appointment of Counsel" and an "Evidentiary Hearing".

(b) Respondents responded to these claims arguing that Westmoreland's claims were procedurally defaulted, meritless and untimely.

(c) A United States Magistrate Judge prepared a Report and Recommendation ("R&R") 6/26/19, which took the position that the state habeas court similarly determined Westmoreland's grounds ***(6-22 and 26-47)*** to be procedurally defaulted, and ruled, "again Westmoreland has demonstrated no basis for overcoming his (**own**) procedural default." (Appendix D).

(d) Westmoreland submitted written objections to Magistrate's ("R & R"), among other contentions, that the Magistrate mis-characterized [his] Brief as raising additional facts and argument and [his] "Reply" untimely (Doc. 99 @21). The (R&R) noted that "Westmoreland offered no other factual support for grounds in his petition." Westmoreland objection was based on the fact that after the case was remanded

[15] State habeas petition was "pending" in state court when Petitioner filed U.S.C. §2254 petition.

back to the District Court[16], the Respondents filed a Second Amended Answer-Response and Brief (Doc. 91 and 91-1). In response, Westmoreland filed his *103-page* **'Rebuttal and Supporting Brief'" (Doc. 92),** and at the time of the filing, the Magistrate clearly did not make any reference to the timing, factual content or format as it did in the (R & R). In fact, she stated in a previous Order (Doc. 93) that she would ***"review and consider"*** the Rebuttal and Supporting Brief submitted by Westmoreland. Westmoreland also asserted that all grounds in the petition raised federal analogous provisions of the U.S. Constitutional guarantees that were violated, while the "*supporting facts*" clearly articulated what a pro se layman, believe to be the facts that establish the claim(s) independently. Furthermore, the brief set forth a more detailed legal argument and citation of constitutional authority for each ground.

(e) On 8/1/19, the United States District Court, overruled Westmoreland's objections and approved and adopted the (R & R) as the opinion of the Court. The District Judge further held that Westmoreland "has filed Objections to the Report and Recommendation but fails to provide any basis for the Objections. '[Westmoreland] claims of ineffective assistance of counsel based upon a *'"conflict of interest"'* are totally without merit." "[H]e fails to state any basis for overcoming the Magistrate Judge's findings of procedural default as to the vast majority of his claims. 'Claims of errors of state law by the Georgia Supreme Court and the state habeas corpus court fail to furnish grounds for habeas relief...[T]he Petition is Denied." (Appendix C),

(f) Westmoreland requested a COA and the District Court denied this motion on 8/1/19. A timely notice of appeal was filed and Westmoreland was permitted to proceed In Forma Pauperis.

(g) A timely application for a certificate of appealability was filed in the U.S. Court of Appeals for the 11th Circuit. This application essentially submitted that COA should've been granted because reasonable jurist could've debated and agreed that Westmoreland stated basis for overcoming the District Judge's findings of procedural default as to the vast majority of his claims, and that issues presented were adequate to deserve encouragement to proceed further, because:

> (i) The U.S. Supreme Court precedent in **Martinez v. Ryan,** 182 L.Ed.2d 272, 566 U.S. 1 (2012); (ii) Ineffective Assistance of Initial Appellate Circuit Defender; (iii) **STATE INTERFERENCE** during motion for new trial; (iv) **PRETRIAL IMPUTED CONFLICT OF INTEREST:** [Cit.] **Powell v. Alabama**, 287 U.S. 45 (1932), **(Georgia Rule of Professional Conduct 1.7), Rule 1.10(a), and Gideon v. Wainwright,** 372 U.S. 335 (1963); (iv) Cause and Prejudice Analysis; **Avery v. Alabama**, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940); (v) **Ryan v. Thomas**, 261 Ga. 661 (409 S.E.2d 507)(1991), for the proposition that, a defendant's right to raise such a claim may not be barred by failure of a succession of attorneys from the same public defender's office to raise it; (vi) **Sixth Amendment** rights violated when trial counsel entirely failed to subject the prosecutor's case to a meaningful adversarial testing; (vii) **Brady** violation; (viii) ***the state court's 'fact-finding procedure,' 'hearing,' and 'proceeding' were not 'full, fair, and adequate;*** (ix) ***the state habeas court adopted the state's proposed final order verbatim***

[16] Cf. **Westmoreland v. Warden et.el.**, 817 F.3d 751 (11th Cir. 2016).

which was arbitrary and capricious; (x) inconsistent application of the state procedural default rule because the extraordinary motion for new trial is a post -conviction collateral attack filed *after* the case has been affirmed on direct appeal; (xi) **RIGHT TO BE PRESENT AT CRITICAL STAGE (ARRAIGNMENT);** (xii) **INSUFFICIENCY OF EVIDENCE [FELONY MURDER-BURGLARY];** (xiii) On direct appeal, the adjudication resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court of the United States (**Jackson v. Virginia**, supra. and **Strickland v. Washington**, supra.); (xiv) the **state supreme court dilatory omitting "crucial" context from statute utilizing quotations and ellipsis;** (xv) **SPOLIATION**[17]; and (xvi) **Equal Protection** inquiry when an individual of a different race-- in the same county-- committed crimes substantially indistinguishable from convictions challenged, and the disposition of the case was shockingly contrast.

(g)(1) On 9/9/19, the District Court (Judge Thomas W. Thrash) denied the C.O.A. explaining that "Westmoreland has not made a substantial showing of a denial of his constitutional rights. Therefore, the Westmoreland's Motion for Certificate of Appealability [Doc. 107] is DENIED."

(h) On 2/25/20, the Eleventh Circuit (Judge Robert J. Luck) denied the application for a certificate of appealability and explained:

> "To merit certificate of appealability, an appellant must show that reasonable jurists would find it 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). Amos Westmoreland's motion for certificate of appealability is DENIED because he failed to make the requisite showing." (Appendix A).

(i) Westmoreland filed a timely Motion To Reconsider, Vacate Or Modify Order Denying Certificate Of Appealability virtually emphasizing the same points as the Application for C.O.A. and reiterated several of this Courts holdings, including, but not limited to **Martinez v. Ryan, (2012), Jackson v. Virginia (1979), Davis v. Alaska,** 415 U.S. 308 (1974), **Pension v. Ohio,** 488 U.S. 75 (1988), **Powell v. Alabama,** 287 U.S. 45 (1932), **Strickland v. Washington (1985), (Due Process, Equal Protection, Ineffective Assistance of Counsel and Conflict of Interest)** and this Court's interpretation **of Article VI** of the U.S. Constitution. Westmoreland points out that the **Supremacy Clause** dictates that his claims were ripe to be heard as well as granted because any conflicting provisions of state constitution or law could have been easily resolved.

(ii) **The Motion To Reconsider, Vacate Or Modify Order Denying Certificate Of Appealability** was denied on **June 11, 2020.** Upon review, Before Circuit Judges Grant and Luck, by the Court, Westmoreland's motion for reconsideration was DENIED ruling "he has offered no new evidence or arguments of merit to warrant relief". (Appendix B).

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[17] The intentional destruction, mutilation, alteration, or ***concealment of evidence usually a document.*** If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible. Black's Law Dictionary (9th Ed. 2009)

(iii) Prior to receiving denial of Motion to Reconsider, Westmoreland filed an ***Indigent Petitioner's Request For Documents Without Cost (and Attachment), pursuant to 28 U.S.C § 2250.*** *The Attachment included consisted of Appendix documentation, referenced in Application for Writ of Certiorari.*

Q1. Does the 11th Circuit decision conflicts with this Court's decision in **Martinez v. Ryan, (2012)**, since it ignores that in **Martinez v. Ryan, 566 U.S. 1 (2012)**, the Court held: [t]hat where, under state law, ineffective assistance of trial counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, counsel in that proceeding was ineffective pursuant to **Strickland v. Washington**, 466 U.S. 668 (1984)?

ARGUMENT:

Under Georgia law, to preserve the issue of ineffective assistance of previous counsel, new counsel must raise the issue at the earliest practical opportunity of post-conviction review or the issue is waived. But [w]here the issue of trial counsel's effectiveness has been raised on motion for new trial, any claims of ineffective assistance of counsel not raised at trial level are procedurally barred. Failure to object or to enumerate as error on appeal any alleged error results in a procedural bar to its consideration in habeas corpus absent a showing of cause and actual prejudice to overcome the default. **Black v. Hardin**, 336 S.E.2d 754 (1985). "Cause" to overcome a default may be constitutional ineffective assistance of counsel under the **Sixth Amendment** standard of **Strickland v. Washington**, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of *Strickland* or satisfying the actual prejudice test of **United States v. Frady**, 456 U.S. 152, 170 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

In the instant case, the State appointed a new attorney to represent Westmoreland in his direct appeal. Counsel amended the motion for new trial twice to raise additional issues, including claims of ineffective assistance of trial counsel. After motion for new trial hearing, Westmoreland requested and received his transcripts and records from the superior court clerk to research the law and attempt to assist in marshalling his own defense at the appellate level by presenting numerous potential claims to counsel for consideration on his only appeal as of right. Consequently, a **conflict of interest** occurred between Westmoreland and first post-conviction counsel, and as a result a second post-conviction counsel was substituted for direct appeal after the case had been docketed in the state supreme court. After trivial

communication with substitute counsel, only ***one*** claim of ineffectiveness of trial and initial appellate counsel's were raised at the earliest practical opportunity, and claims was exclusively dependent on the police pursuit policy. As a matter of fact, none of the substantial constitutional claims presented to initial appellate counsel were raised on direct appeal, even considering that in preparing for the appeal, *he talked to previous attorney, whom communicated to him about his investigation and preparation for Westmoreland's case.* (HT. 7-15). Counsel did not revisit any other trial counsel ineffectiveness issues broached during motion for new trial or present any trial level ineffectiveness claims after reviewing the record.

In his pro se state habeas petition, among other claims, Westmoreland claimed that his trial counsel had been ineffective for failing to subject the prosecution to a meaningful adversarial challenge and was acting under an actual **conflict of interest**. He argued for example, "*trial counsel failed to subject the prosecution to an adversarial process by not offering any evidence*", "[trial counsel] *was appointed at a time that he couldn't possibly and adequately prepare a defense for* [Westmoreland] *who was facing* [] *mandatory life imprisonment,* [and] *counsel* [...] *had practically less than 30 days to prepare, for a case that needed complex defensive strategies*", and "*trial counsel was ineffective when he testified at motion for new trial hearing, that he was attempting to obtain the Cobb county pursuit policy during trial, and in same line of questioning he revealed that he never attempted to obtain the policy and never read the policy.*" See (Appendix R). Westmoreland also faulted trial counsel for not *"request[ing] a jury charge on proximate cause for felony murder and vehicular homicide."* The state habeas petition was denied, in part in reliance on procedural default that Westmoreland failed to raise these claims on appeal and **failed to offer any evidence** and thus not met his burden to show cause in form of ineffective assistance of counsel at the appellate level for failure to raise these issues on appeal and to establish prejudice based on {standard}. The court concluded that "grounds "**10 through 21**" [and] "**31 through 68**" provide no basis for relief".

In CPC, Westmoreland submitted that *"ground(s) are automatically exempt from the procedural rule under O.C.G.A. § 9-14-48(d)- for failure of succession of attorney's from the same circuit defenders office to properly raise it; Wherefore all (7) appointed attorneys involved in various stages of Westmoreland's legal proceedings were employed by the Cobb County Circuit Defenders Office.* **Ryan v. Thomas**, *[] (409 S.E.2d 507)(1991)."* (Appendix I). The C.P.C was denied without explanation. (Appendix H).

Westmoreland sought relief by filing a 28 U.S.C § 2254 petition, again raising several ineffective-assistance-of-trial-counsel claims, among numerous other claims, acknowledging the state court denied his claims by relying on a state procedural rule, which, under the doctrine of procedural default, would prohibit a federal court from reaching the merits of the claims. See, e.g., **Wainwright v. Sykes**, 433 U.S.

72, (1977). He could overcome this hurdle to federal review, Westmoreland argued, because he had cause for the default: [ineffective assistance of both post-conviction counsel's and conflict of interest with the Cobb County Circuit Defenders Office]. In support of theses claims, the record reflects, and substitute appellate counsel conceded that:

> (i) *he talked to previous attorney, whom communicated to him about his investigation and preparation for Westmoreland's case*; (ii) *he was limited to the record made by former appellate counsel*; (iii) *he would have done things differently than the prior attorney had he had the case from the Motion for New Trial*; (iv) *he was sure that he would have raised question of ineffective assistance of trial counsel claims differently than he would if he had been appointed counsel at the beginning of Motion for New Trial*; (v) *he did not have a chance to make the record for appeal and had to essentially write his brief based on the record that was made by the prior public defender;* (vi) he raised all the viable and meritorious issues; and (vii) as part of his practice, he "*usually would have contacted trial counsel to find out his opinion of the case*[18]".

A U.S. Magistrate Judge took the position that the state habeas court similarly determined Westmoreland's grounds (**"6-22"** [and] **"26-47"**) to be procedurally defaulted, and ruled, "*again Westmoreland has demonstrated no basis for overcoming his **(own)** procedural default.*" (Appendix D). Westmoreland submitted written objections to Magistrate's (R&R) and a U.S. District Judge, overruled the objections and approved and adopted the (R&R) as the opinion of the Court. (Appendix C).

In timely filed C.O.A. in the U.S. Court of Appeals for the 11th Circuit, Westmoreland essentially magnified and maintained virtually the same issues and arguments previously stated. The Circuit Judge denied the C.O.A. (Appendix A).

In denying Motion to Reconsider, the Circuit Appeals Court did not mention **Martinez v. Ryan, (2012).** (Appendix B).

When an attorney errs in initial-review proceedings, it is likely that no state court at any level will hear the prisoner's claim. Where, as here, the motion for new trial is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the claim" of ineffective assistance, no other court has addressed the claim, and "defendant pursuing first-tier review...are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. **Halbert v. Michigan**, 545 U.S. 605 (2005); see **Douglas v. California**, 372 U.S. 353 (1963). Cf. **Pension v. Ohio**, 488 U.S. 75 (1988).

As **Coleman** recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default: for if the attorney is appointed by the State to pursue the direct appeal is

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[18] there was no indication that substitute counsel contacted trial counsel to find out his opinion on the case.

ineffective, the prisoner has been denied fair process and opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. See 501 U.S., at 754; **Evitts v. Lucey,** 469 U.S. 387 (1985); **Douglas**, supra, at 357-58. Without the help of an adequate attorney, a prisoner will, have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. **Halbert**, 545 U.S., at 619. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, prisoner likely needs an effective attorney. The results would be the same if the State did not appoint an attorney to assist the prisoner in the motion for new trial proceeding. The prisoner, unlearned in law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., e.g. at 620-21 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

A prisoner's inability to represent a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." **Gideon v. Wainwright,** 372 U.S. 335 (1963). Indeed, the right to counsel is the foundation for our adversarial system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See e.g., **Powell v. Alabama**, 287 U.S. 45 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he may be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on [federal habeas proceedings], **Edward v. Carpenter**, 529 U.S. 446 (2000).

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors caused a procedural default in an initial review collateral proceeding acknowledges, an equitable matter, that the initial review collateral proceeding, if undertaken with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a initial collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in [] circumstances...where the appointed counsel in the initial-review collateral proceeding, where the claim

should have been raised, as ineffective under the standard of **Strickland v. Washington**, supra. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must also demonstrate that the claim has some merit. Cf. **Miller-El v. Cockrell**, 537 U.S. 322 (2003) (describing standards for certificate of appealability to issue).

Most jurisdictions have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims. In Georgia, the State appoint counsel for first appeal as of right. It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceeding.

A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted. In this case, for example, Westmoreland "ground for relief" is his ineffective-assistance-of-trial-counsel claim, a claim that AEDPA does not bar. Westmoreland relied on the ineffectiveness of his post-conviction attorney to excuse his failure to comply with Georgia's procedural rules, not as an independent basis for overturning his conviction. (i.e., that substitute appellate circuit defender was constitutionally ineffective for failing to (i) raise conflict of interest with circuit defender's office -- as the 7th appointee in case; (ii) failing to review the entire record to raise core constitutional violations on Westmoreland's only appeal as of right; and (iii) failing to withdraw in writing so that [Westmoreland] could properly present [his] Motion for Reconsideration to the State's highest court.) In short, while § 2254(i) precludes Westmoreland from relying on the ineffectiveness of post-conviction attorney as a "ground for relief," it does not stop Westmoreland from using it to establish "cause." **Holland v. Florida**, 560 U.S. ____, ____ (2010) (slip op., at 18).

A. MARTINEZ APPLY TO PROCEDURAL DEFAULTED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The principles underlying **Martinez** lead to the conclusion that ineffective assistance of substitute appellate counsel establishes cause for a failure to raise an ineffective initial appellant counsel claim at the state court level. This Court has identified three factors which compel the conclusion that ineffective appellate counsel excuses a procedural default for the failure to raise ineffective trial counsel claims. First, the right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . Indeed, the right to counsel is the foundation for our adversary system." **Trevino v. Thaler**, 133 S. Ct.

1911 at 7 (2013) (quotations omitted). Second, taking into account that ineffective counsel on direct appeal is cause, it only makes sense that ineffective assistance of substitute appellate counsel should be cause for claims that cannot be raised on direct appeal. Third, where a state channels review of certain claims into earliest practical opportunity of post-conviction review, the lawyer's failure to raise those claims on the direct appeal could deprive a person of any review at all.

All three factors apply straightforwardly to ineffective appellate counsel claims. This Court held over thirty years ago that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." **Evitts v. Lucey**, 469 U.S. 387, 396 (1985). Indeed, **Evitts v. Lucey** was decided upon the intersection of the Due Process Clause found in the **Fourteenth Amendment** and the **Sixth Amendment**'s right to effective counsel. 105 S.Ct. 830, 835-36 (1985). It is hard to imagine two more "bedrock principles" in our criminal justice system than Due Process and the Right to Counsel. Surely the legal parameter, to say nothing of desideratum, that courts do not convict a man, or in this case, imprison a man for life without due process of law is a bedrock principle in America. Second, seeing as ineffective assistance of appellate counsel is cause to excuse a procedural default, and seeing as it is literally impossible for someone other than appellate counsel to raise this issue in the first instance, it only makes sense that ineffectiveness of substitute appellate counsel should excuse a Westmoreland's failure to raise his ineffective of trial and initial appellate counsel claim on direct review proceedings. Indeed, if ineffectiveness of substitute counsel is not cause, then quite literally, no court would ever be able to review even the most powerful ineffective trial and initial appellate counsel claim when substitute appellate counsel failed to raise the claim. The rationale behind **Martinez** apply straightforwardly to finding cause and prejudice in the instant case.

The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the **Sixth Amendment**, including the Counsel Clause:

> "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."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the **Sixth Amendment**, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. **Adams v. United States ex rel. McCann**, 317 U. S. 269 (1942); see **Powell v. Alabama**, supra, at 287 U. S. 68-69. **State v. Lane**, 838 S. E. 2d 808 (2020).

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See **Algersinger v. Hamlin**, 407 U. S. 25 (1972); **Gideon v. Wainwright,** supra; **Johnson v. Zerbst**, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The **Sixth Amendment** recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." **McMann v. Richardson**, 397 U. S. 759 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., **Geders v. United States**, 425 U. S. 80 (1976); **Herring v. New York**, 422 U. S. 853 (1975); **Brooks v. Tennessee**, 406 U. S. 605 (1972); **Ferguson v. Georgia,** 365 U. S. 570 (1961). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," **Cuyler v. Sullivan**, 446 U. S. 344 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

Under Georgia law, claims of ineffective assistance of trial counsel must be raised at the earliest practical convenience, in this instance, that's motion for new trial proceeding. Therefore, as Westmoreland maintains, a procedural default cannot bar the federal habeas court from hearing his **substantial claims of ineffective assistance at trial**, since during motion for new trial proceeding, [] counsel in that proceeding was ineffective. See **Martinez v. Ryan**, supra.,

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the class of cases that presents claims of "actual ineffectiveness." In giving meaning to the requirement, however, the Court must take its purpose -- to ensure a fair trial -- as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

B. SPECIFIC SUBSTANTIAL TRIAL INEFFECTIVENESS FEDERAL CONSTITUTIONAL CLAIMS:

In **Strickland v. Washington**, 466 U.S. 668 (1984), this Court held:

"[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged; [And] in every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results"

I. Failure to Properly Investigate and Adequately Prepare for Non-Death Penalty Capital Felony Murder Trial:

Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair and impartial tribunal. The defendant had obviously been disadvantaged relative to the state, which had substantial resources and skilled lawyers (including appointed circuit defenders) -- Westmoreland principally raises a legitimate constitutional question of fairness. A trial should be arranged in such a way that the government does not enjoy an unreasonable advantage over those it acts against.

In both state and federal habeas petitions, *Westmoreland alleged constitutional ineffectiveness of trial counsels for meeting with him on (3) separate occasions for (3) hours respectfully, and failed to go over **ANY** discovery material, **ANY** evidence, **ANY** trial strategies or tactics, **ANY** defense or the indictment. Westmoreland saw all of the states evidence for the first time during capital felony murder trial. Counsels did not offer any evidence in aid of the defense, considering Westmoreland facing life imprisonment.*

Westmoreland was arrested in May 2007 and determined to be indigent, subsequently through Circuit Defender Representative ("Martin" or "Marty" Pope), Circuit Defender (Michael Syrop) was appointed to the case. On January 10, 2008, Westmoreland was escorted to the Cobb County Superior Court for a scheduled Arraignment (HT. 113-14), and was held in a cold confinement cell during the proceeding. After multiple undisclosed conflicts occurred with several circuit defenders, in September 2008, a few days prior to scheduled trial date, *fourth* Circuit Defender (David Marotte) was appointed "***per Judge Grubbs***" and Pope. (HT. 120-124; 984-85).

Trial counsel had less than 30 days to prepare for non-death penalty capital felony murder trial. (HT. 984-85). Counsel testified that he visited Westmoreland on 3 separate occasions for an hour each visit. However, counsel didn't go over any discovery material, States evidence, trial strategies or tactics, defense, indictment or any other case related material. (HT. 2511; 2513; 2516-17). Westmoreland advised counsel that he had never seen his indictment, counsel sent the document 2 weeks prior to trial, through the U.S. mail. (HT. 2513). During trial, counsel *"...just didn't have a defense for us to put on under the circumstances of this case, and didn't really have a trial strategy in terms of us presenting a defense."*

(HT. 2527). And all evidence in possession of the State was seen during trial. At the close of the States evidence however, counsel did not present any evidence or defense. (HT. 1878; 2522).

At the motion for new trial hearing, counsel summed his trial strategy as influencing the jury to find Westmoreland not guilty of (3) counts of Felony Murder and guilty of the Vehicular homicide, he also considered his strategy as the only defense available, and that he wanted the jury to believe the evidence would show that the vehicular homicide was the proper charge. (HT. 2513-27).

In a sworn affidavit administered under oath, trial counsel attested that:

> * He didn't know how many felony murder cases he'd handled prior to Westmoreland's case; * this was a case where he was appointed at the last minute. Judge Grubbs gave one continuance and he had to get ready as best he could within that time frame; * he had less than 30 days to prepare but he had no choice in the matter. That was the order of court and the schedule directed by the judge; * when he took the case, he did not recollect seeing any motions filed by previous Circuit Defenders; the file that was turned over to him had very little information in it, other than some discovery material; he had one telephone conversation with the previous attorney who updated him on what little had been done on the case; * he did not see a motion for funds to hire independent investigator to assist the defense; he did not have formal training in criminal investigations and accident reconstruction; he did not have an expert or private investigator to assist in preparing a defense, "but a private investigator would have been nice to have[19]"; * that prior to trial he had never read the Cobb County Police Department Vehicle Pursuit Policy; he was not aware of a December 14, 2006 Restricted Pursuit Policy; * he believed co-defendant trial strategy was that it was all Westmoreland's fault; * he did the best he could with what he had to work with. (Pet. Ev. [filed 6/21/12]).

Counsel's failure to properly investigate and adequately prepare prejudiced Westmoreland because counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and keep the defendant informed of important developments in the course of the prosecution.

> "[D]uring perhaps the most critical period of the proceedings against [the] defendant, that is to say, from the time of [his] arraignment until the beginning of [his] trial, when consultation, thoroughgoing investigation and preparation were vitally important, [defendant] did not have the aid of counsel in any real sense, although [he is] as much entitled to such aid during that period as at the trial itself." Cf. **Powell v. Alabama** 287 U.S. 45 (1932); See Also **Avery v. Alabama**, 308 U.S. 444 (1940).

Westmoreland submits that he was denied **Sixth Amendment** rights when counsel entirely failed to subject the prosecutor's case to a meaningful adversarial testing, and errors at trial worked to his actual and substantial disadvantage, infecting the entire felony murder trial with error of constitutional dimension.

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[19] O. C. G. A. § 17-12-28(a), states in pertinent part: "...the circuit public defender in each judicial circuit is authorized to appoint one investigator to assist the circuit public defender in the performance of his or her official duties in the preparation of cases for trial.

Defense counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. U.S.C.A. Const. **Amend. 6**. Therefore, minimally, the ***legal completion of the burglary defense***, the ***policy strategy, proximate cause*** or ***intervening cause strategy/tactic*** were all viable defenses, and could have aided counsel's chosen strategy. Logically, if counsel strategy was to influence the jury to find Westmoreland not guilty of (3) counts of Felony Murder and guilty of the Vehicular homicide, *first, there was absolutely no evidence to substantiate this claim.* Secondly, any defense would have been more effective than no defense at all, and finally, considering the fact that four (4) circuit defender's were present, it was obvious that the non-death penalty capital felony murder trial was 'like' a game in which the participants were expected to enter the ring with a near match in skills. It was an exhibit of sacrifice of unarmed prisoner to gladiators. Cf. **U.S. v. Cronic**, supra. This Court has explained that a "failure to investigate thoroughly [that stems] from inattention, not strategic judgment," serves to "underscore[] the unreasonableness of counsel's conduct." **Wiggins v. Smith,** 539 U.S. 510 (2003)

In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness, and that the deficiency prejudiced the defense. **Strickland v. Washington,** supra; See **Hinton v. Alabama,** 134 S. Ct. 1081 (2014) (Failure to investigate a point of law that is fundamental to a case combined with failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland rule.) **State v. Lane,** 838 S. E. 2d 808 (2020).

II. Legal Completion of the Burglary Under State Law [Defense]:

Keeping in mind that during felony murder trial, defense counsel "...just didn't have a defense [] to put on under the circumstances of th[e] case, and didn't really have a trial strategy in terms of [] presenting a defense" (HT. 2527), not presenting the legal completion of the burglary defense, is a substantial claim because:

Felony Murder: Georgia law provides that (A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice....) O.C.G.A. 16-5-1 (c); Count 8 of the indictment alleged that Westmoreland *"did unlawfully, without malice, cause the death of Barbra Robbins, a human being, while in commission of the felony, Burglary."* (HT. 153-61).

Burglary: Georgia law provides that: [A person commits the offense of Burglary when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within the dwelling house of another.] (O.C.G.A. 16-7-1);

Under Georgia law, a burglary is completed when a person "**enters**" the dwelling house of another without authority and with intent to commit a felony or a theft therein, regardless of whether or not he accomplishes his apparent purpose. **Ricks v. State**, 341 S.E.2d 895 (1986). Cf. **Clark v. State**, 658 S.E.2d. 190 (2008) (The crime is completed upon entry, and does not require that any property actually be taken.) See also **Childs v. State**, 357 S.E.2d 48 (1987); **Alexander v. State**, 620 S.E.2d 792 (2005);

Roberts v. State, 314 S.E.2d 83 (2005); **Whittlesey v. State**, 385 S.E.2d 757 (1989); **Jones v. State,** 78 S.E. 474 (1913); **Williams v. State**, 46 Ga. 212 (1872); **Crawford v. State**, 292 Ga. 463 (2008);

There's a reasonable probability that the outcome of the felony murder trial would've been different, if not for counsel's unprofessional error, because the state offered evidence that law enforcement authorities were notified by a third party, when the "suspicious vehicle" was backed in at a resident with the doors open and occupants not visible -- which the jury could infer that Westmoreland "**entered**" 'the dwelling house of another without authority and with intent to commit a theft therein.'" The legal completion of burglary strategy would be viable defense and could potentially result in a hung jury or a not guilty verdict on the felony murder in commission of a burglary count. There was evidence ample for the jury to consider that, unbeknownst to potential detection Westmoreland actually attempted and peacefully left the *scene of the crime* and was *not in flight from the scene* immediately after the burglary was completed. Furthermore the jury may have considered that after casually passing a law enforcement vehicle, the officer initiated a U-turn and followed the vehicle. The officer's attempted to effectuate a traffic stop for a "drive-out tag" or "possible burglary".

Jury Instructions On Felony Murder-Burglary:

> "In order for a homicide to have been done in commission of a particular [Burglary], there must be a connection between the [Burglary] and the homicide. The homicide must have been done in carrying out the unlawful act and not collateral to it. *It is not enough that the homicide occurred soon, or presently, after the [Burglary] was attempted or committed.* There must be such a legal relationship between the homicide and the [Burglary] so as to cause you to find that the homicide occurred *before* the [Burglary] was at an end or *before* any attempt to avoid conviction or arrest for the [Burglary].
>
> The [Burglary] must have a legal relationship to the homicide, be at least concurrent with it, in part, and be part of it in an actual sense. A homicide is committed in carrying out of a [Burglary] when it is committed by the accused while engaged in performance of any act required for the full execution of the [Burglary]." (HT. 1964-66; 2021-23).

In pursuing completion of the burglary defense, there's very sharp contrasts between felony murder jury instructions and the evidence presented by the State: The only connection between the burglary and the homicide, was the homicide occurred soon "**AFTER**" the burglary was committed, which was not enough; The homicide was "NOT DONE IN CARRYING OUT" the burglary because the burglary was technically and legally completed, *implicating the vehicular homicide predicated on reckless driving was collateral to it;* There was no legal relationship between the homicide and the burglary, to cause a reasonable juror to find that the homicide occurred *before* the burglary was at an end or *before* an attempt to avoid arrest for the burglary; *To the contrary, the homicide occurred: "**AFTER**" the burglary was at an end and "**AFTER**" an attempt to avoid arrest for the burglary;* There was no legal relationship between the burglary and the homicide. The homicide happened "**AFTER**" the burglary, and not part of it in an actual sense; The homicide was not committed in carrying out of the burglary, because it was not committed while engaged in performance of any act required for the full execution of the burglary. *{[A]s*

a matter of fact, evidence suggests that the (vehicular) ***homicide was committed while engaged in the performance of Reckless Driving.***} Cf. **Jackson v. Virginia**, supra.

During deliberations, the jury asked "when did the commission of the burglary conclude"; (HT. 1984). The significant question was never particularly answered and allowed to dissipate, while the trial court gave a partial recharge from the previous day.

With a strategy for the completion of the burglary, the jury would be equipped with knowledge for consideration that under Georgia law, the act required to fully execute the burglary, a perpetrator need only enter the dwelling house of another without authority and with intent to commit a theft therein. At the motion for new trial hearing, counsel summed his trial strategy as influencing the jury to find Westmoreland not guilty of (3) counts of Felony Murder and guilty of the Vehicular Homicide, he also considered his strategy as the only defense available, and that he wanted the jury to believe the evidence would show that the vehicular homicide was the proper charge. Indeed, the legal completion of the burglary defense would better facilitate chosen strategy.

Trial counsel failure to pursue such a defense, no competent attorney under the same circumstances would make this decision, especially when the client is facing automatic life imprisonment. At the time of trial, there were ample case laws to support the argument that burglary was complete upon entry of the dwelling. Proper investigation and adequate preparation would have revealed potential defense and virtually supported counsel's chosen strategy. **Strickland v. Washington,** supra. **Hinton v. Alabama** 134 S. Ct. 1081 (2014), supra.

III. Proximate Cause Jury Instruction [Defense]:

In both state and federal habeas petitions, Westmoreland *alleged constitutional ineffectiveness of trial counsels for neglecting to request a proximate cause or intervening cause jury instruction, in regards to felony murder and vehicular homicide.*

Under **Strickland**, decisions on requests to charge involve trial tactics to which a reviewing court must afford substantial latitude, and they provide no grounds for reversal unless such tactical decisions are so patently unreasonable that no competent attorney would have chosen them.

The State elected to try Westmoreland on 3 *Felony Murder* counts and *Vehicular Homicide* for the same victim. *Burglary* carries 1-20 years, *Vehicular Homicide* carries 3-15 years and *Felony Murder* carries automatic life imprisonment. Cf. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

During trial, defense counsel "...just didn't have a defense for us to put on under the circumstances of th[e] case, and didn't really have a trial strategy in terms of [] presenting a defense." (HT. 2527). Trial counsel's failure to request a **proximate cause** or **intervening cause** jury instruction, in regards to felony murder and vehicular homicide was so patently unreasonable that no competent attorney would have chosen not to pursue it, which was deficient performance. The deficiency prejudiced Westmoreland because counsel offered absolutely no defense or evidence and the jury didn't have a fair opportunity to make a decision based on established principles of law.

Theres a reasonable probability that the outcome of the felony murder trial would've been different, if not for counsel's error, because Georgia is a **proximate cause** state; and [w]hen another meaning is not indicated by specific definition or context, the term "***cause***" is customarily interpreted in almost all legal contexts to mean "**proximate cause**" - "[t]hat which, in a natural and continuous sequence, unbroken by an **efficient intervening cause**, produces injury, and without which the result would not have occurred." Black's Law Dictionary 1103 (5th ed. 1979).

Thus, [the Georgia Supreme Court] has explained that **proximate cause** is the standard for criminal cases and homicide cases in general. Cf. **State v. Jackson et al.**, 697 S.E.2d. 757 (2010). See (Appendix J). Indeed, in virtually all of Georgia's many homicide and feticide statutes, including the frequently charged voluntary and involuntary manslaughter and vehicular homicide statutes, *the General Assembly has employed the same or very similar causation phrasing* to the extent those statutes have been interpreted by Georgia's appellate courts, once again the term "***cause***" has been regularly construed as requiring **proximate causation.** Id.

Vehicular Homicide and Felony Murder may be defined in "entirely different" statutes, in terms of their Code sections, but the relevant *causation* language is indistinguishable, compare O.C.G.A. 40-6-393 (a) ("Any person who without malice aforethought, ***'causes'*** the death of another person through the violation of [various code sections] commits the offense of homicide by vehicle in the first degree...." (emphasis supplied)), with O.C.G.A. 16-5-1 (c) ("A person also commits the offense of murder when, in the commission of a felony, he ***'causes'*** the death of another human being irrespective of malice...." (emphasis supplied)). Id. (Appendix J). Cf. **Burrage v. United States**, 571 U.S. ___, 134 S.Ct. 881 (2014). **Jackson v. Virginia**, 443 U.S. 307 (1979).

(i) Proximate Cause In Context Of A Felony Murder Prosecution Defined: where one commits a felony upon another, such felony is to be accounted as the efficient, **proximate cause** of the death whenever it, shall appear that the felony directly and materially contributed to the happening of a subsequently accruing immediate ***cause*** of the death, or that the injury materially accelerated the death, although proximately occasioned by a preexisting cause;

(i)(A) ...or if the homicide is committed within the *res gestae*[20] of the felony and is one of the incidental, probable consequences of the execution of the design to commit the felony.

(ii) Proximate Cause In Context Of A Vehicular Homicide Prosecution Defined: where one inflicts an unlawful injury, such injury is to be accounted as the efficient, **proximate cause** of the death whenever (1) the injury itself constituted the sole **proximate cause** of the death; or (2) the injury directly and materially contributed to the happening of a subsequently accruing immediate ***cause*** of the death; or (3) the injury materially accelerated the death, although proximately occasioned by a preexisting cause. See **Swailes v. State**, 709 S.E.2d 825 (1998); Cf. **Johnson v. State**, 317 S.E.2d 213 (1984).

(ii)(A) In order to be convicted of vehicular homicide by recklessly driving in violation of O.C.G.A. § 40-6-390, the evidence must be sufficient to prove beyond a reasonable doubt not only that the accused committed the predicate traffic offence but also the predicate offense was the **proximate cause** of the death of the [victim]. "This requires showing that "the defendant's conduct was the 'legal' or **'proximate' cause**, as well as the cause in fact, of the death.""

Counsels decision not to request charge on **proximate cause** was unreasonable tactical move which no competent attorney in the same circumstances would've made, especially with Westmoreland facing a automatic life sentence. The **proximate causation** strategy would be viable defense because: (1) what constitutes **proximate cause** is undeniably a jury question and is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent; and (2) the jury could potentially return in a hung jury or a not guilty verdict on the felony murder in commission of a burglary and/or eluding an officer, had they been properly charged because, it is reasonably probable that they would have accepted the substantial evidence that, as the Medical Examiner testified, that the victim's death was ***caused*** by ['blunt force trauma'] injuries sustained during the car incident; and the Physician testimony that "the unlawful injury inflicted ['blunt force trauma'] accounted as the efficient, **proximate cause** of death.

During deliberations, the jury stated that their "*main challenge is how conspiracy weighs in felony murder and homicide charges*"; and they inquired about "*when did the commission of the burglary conclude*"; If not for counsels deficient performance, the jury may have concluded that the vehicular homicide predicate on reckless driving alone may have been found to have constituted a **proximate cause** of the driver's death, as alleged in the indictment.

At the motion for new trial hearing, counsel stated that his trial strategy was to influence the jury to find Westmoreland not guilty of (3) counts of Felony Murder and guilty of the Vehicular homicide. Trial

[20] *res gestae* was not instructed to the jury

counsel was asked whether his trial strategy of influencing the jury on the lesser offense, the vehicular homicide rather than felony murder, using the **proximate cause** standards (O.C.G.A. § 40-6-6(d)(2)), and trial counsel responded, "No". (HT. 2520-24). Trial counsel considered his strategy as the only defense available, and that he wanted the jury to believe the evidence would show that the vehicular homicide was the proper charge. Indeed, the **proximate cause** jury instruction would better facilitate chosen strategy. **Clayton County v. Segrest,** 775 S. E. 2d. (2015) (non-binding precedent).

In failing to properly investigate, adequately research and understand the defenses available to his client, defense counsel rendered assistance that fell way below the minimum standard set forth in **Strickland**, supra. **Hinton v. Alabama**, (2014), supra. "The record indicates that the appearance was rather pro forma than zealous and active." Under the circumstances disclosed, Westmoreland was not afforded the right to counsel in any substantial sense.

IV. Policy (Intervening Cause) [Defense]:

In both state and federal petitions, Westmoreland alleged *constitutional ineffectiveness of trial counsels for failure to obtain the police chase policy requested by Westmoreland prior to trial. Both circuit defenders were advising Westmoreland during trial that they were attempting to obtain the document. After trial, counsel revealed that he sent co-counsel, then co-counsel's secretary or assistant to retrieve the policy, and he revealed that he never read the policy, codefendant counsel had the policy, and he didn't plan to get the policy.*

During trial, defense counsel "...just didn't have a defense for us to put on under the circumstances of this case, and didn't really have a trial strategy in terms of us presenting a defense." (HT. 2527). Minutes prior to jury selection, the State filed a Motion in Limine "to move the court to preclude the Defense from *cross-examining* officers or detectives of any possible departmental policy violations....that may have arisen from the traffic fatality on May 17, 2007, as those matters are irrelevant" (HT. 1043); In response to the motion, trial counsel argued *"I do think we have a right to go into the whole issue of the pursuit, or whatever.... and ask about what the policy was for them to follow him.... "* (HT. 1182-86). Counsel stated that he did not have a copy of the policy.

Codefendant counsel stated that:

> [he had] "copies of the policy somewhere in my archives. I think one of the questions would be whether this accident, which would be a defense for both defendants potentially, or an **intervening act** that if they violated the policy could go to their credibility as to whether they followed correct procedures on the chase and arrest". (HT. 1186-87)

Trial counsel added that *he would expect that it would explain the officer's conduct in the pursuit.* The judge reserved the ruling and advised the defense that they would have to have it properly certified and lay the proper foundation for what the policy was. The court said that she didn't know anything about the facts and until she hear the facts, it needs to be brought back to her attention. She further stated counsel couldn't ask what the policy is because that wouldn't *be the highest and best evidence; the policy would be the highest and best evidence of what the policy is.* (HT. 1187-88)

During trial, both circuit defenders (Marotte and Christian) were advising Westmoreland that they were attempting to obtain the policy from the Cobb County Police Department. [HT. 2519-20]; On cross-examinantion of the initiating pursuing officer, counsel asked: [W]as witness trained in procedures and policies of the Department, and was there certain procedures and policies set out that would govern how he would react to various situations; the witness affirmatively replied. Counsel then examined witness about "**what was *the policy for pursuing a vehicle under the circumstances with the call that [he] got***." This examination was objected to on relevance grounds by the State. The prosecutor interjected that the question should be about attempting to elude a police officer. The trial court sustained the objection and ruled that "*the policy would be the highest and best evidence*." Counsel moved on to an entirely different line of questioning, inquiring "when did you turn on your emergency equipment?" (HT. 1576-77).

First, Westmoreland was prejudiced by this deficiency because it infringed on his **6th Amendment** Confrontation Clause guarantee of the U.S. Constitution. Cf. **Davis v. Alaska**, 415 U.S. 308 (1974). Secondly, potential answer to objected examination would've been to the effect, that ***[t]he policy effective on the date in question, prohibited officer's from pursuing a vehicle under circumstances such as "possible burglary" or "drive-out tag."*** Thirdly, trial counsel's nor codefendant's counsel made any of the arguments made during the States filing of the Motion in Limine. Lastly, codefendant's counsel did not produce the copy from his archives, and neither trial counsels were able to retrieve a copy from the police department, as they were advising Westmoreland.

Counsels decision not to pursue the policy as the **intervening cause** defense was unreasonable tactical move which no competent attorney in the same circumstances would've made, especially with Westmoreland facing an automatic life sentence. There's a reasonable probability that the outcome of the felony murder trial would've been different, if not for counsel's unprofessional error, because there was evidence from which a jury could've found that law enforcement officer's chase may have been the **intervening cause** of the death *caused* by the fleeing suspect since the officers disregarded proper law enforcement procedures in *initiating* [and] *continuing* the pursuit. The proper law enforcement procedure for the officer's prohibited pursuits except for certain specified crimes known to the officer. Since officer's

allegedly responded to a "possible-burglary in progress" and testified that he was attempting to effectuate a stop based on a traffic violation, a pursuit was not authorized. See **Footnote (7);**

Legal causation is the limit for which one is culpable for the harm caused. In order to show legal causation, the prosecution must prove that the defendant's conduct was the **proximate cause** of the victim's harm. A defendant is generally the **proximate cause** of harm if his conduct set in motion a chain of events that ultimately resulted in the victim's death. Courts put a limit on this "links in a chain" theory by excusing defendants from responsibility when an **intervening superseding**[21] event occurs, thereby breaking the chain between defendants culpable act and the victim's injury. An **intervening cause** is generally an unforeseeable extraordinary occurrence. In cases of felony murder, "for example, legal cause will not be present where there **intervenes** (1) a coincidence that is not reasonably foreseeable...or (2) an abnormal response[22]."

Properly instructed, the jury could have inferred that (2) two men agreed to commit a burglary, which was accomplished. After the burglary was complete, the perpetrators left the scene of the crime and were subsequently engaged in a police pursuit. However, during the pursuit, an accident occurred fatally injuring the driver of another vehicle. The homicide was not a natural and probable consequence of the conspiracy to commit burglary. The question is one of reasonable foreseeability and the chase and subsequent vehicular homicide was not reasonable foreseeable at the time defendants conspired to commit burglary. *Cf.* **Everritt v. State**, 277 Ga. 457 (2003);

(i) Intervening Cause: An event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury[23].

(ii) Proposed Intervening Cause Request of Charge:

> "If you find that the defendant was negligent, but that the acts or omissions of a third person also contributed to causing [] injuries, damage to property or death, then you have to decide whether the third person's acts or omissions were reasonably foreseeable. If under the circumstances a reasonably prudent person would have reasonably foreseen the third person's acts or omissions and protected against them, then the defendant may be liable for the [] injuries, damage to property or death. If, however, a reasonably prudent person would not have foreseen the third person's acts or omissions and protected against them, then the defendant is not liable for the [] injuries, damage to property or death."

(iii) Contributing Proximate Cause[24]**:** O.C.G.A. § 40-6-6 (d)(2) provides:

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[21] ***superseding cause***- an unforeseeable intervening cause that interrupts the chain of causation and becomes the proximate cause of the event.

[22] 1 Lafave, Substantive Criminal Law, § 6.4 (h), p. 495 (2d. 2003).

[23] Black's Law Dictionary (9th Ed. 2009).

[24] ***Contributing cause***: "[a] factor that—though not the primary cause— plays a part in producing a result"). Black's Law Dictionary 250 (9th ed. 2009)

> "[w]hen a law enforcement officer *in* ***a law enforcement vehicle*** is pursuing a fleeing suspect in another vehicle and the ***fleeing*** suspect ***damages any property or*** injures or kills any person during the pursuit, the ***law enforcement*** officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death ***caused by the fleeing suspect*** unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures ***in the officer's decision to initiate or continue the pursuit***. Where such reckless disregard exists, ***the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard*** shall not in and of itself establish causation." (emphasis added).[25]

During deliberations, the jury stated that their "*main challenge is how conspiracy weighs in felony murder and homicide charges*"; and they inquired about "*when did the commission of the burglary conclude*"; The inquiry was never particular answered and was allowed to dissipate, while trial court gave a partial instruction from the previous day.

The outcome of the trial may have also been different because the jury could have considered proof of *causation* in fact- that if the law enforcement officer's would have "***never***" decided to **initiate or continue** the pursuit pursuant to effective prohibited vehicle pursuit policy, there is a reasonable probability that Westmoreland would not have drove recklessly and the collision in which the victim was killed, may not have "***never***" happened.

At the motion for new trial hearing, trial counsel testified that it was not part of his argument to the jury to try to convince the jury dealing with lesser charge of vehicular homicide verses felony murder, dealing with **O.C.G.A. § 40-6-6(d)(2)** and **proximate cause** of the collision and murder; he stated from a factual standpoint it was difficult for him "to try to tell the jury that the officer conduct in the chase was the **proximate cause**", which was contrary to his arguments on the states motion in limine, where he stated *he "would expect that it would explain the officer's conduct in the pursuit."*

In sworn interrogatories made by trial counsel during the pendency of the state habeas proceeding, he attested:

> * *he did not see a motion for funds to hire independent investigator to assist the defense; he did not have formal training in criminal investigations and accident reconstruction; he did not have an expert or private investigator to assist in preparing a defense, "but a private investigator would have been nice to have"; * he did not recollect another pretrial conference being conducted after 10-14-08; * that prior to trial he had never read the Cobb County Police Department Vehicle Pursuit Policy; he was not aware of a December 14, 2006 Restricted Pursuit Policy;* * the issue of the policy was **first** broached on the morning of trial[26]; * *he advised Westmoreland during trial that he was attempting to obtain the policy from the police department;* * Counsel for co-defendant who had been in the case for some period of time made him aware of the policy; he asked counsel if he could produce the copy that he had; And he "did this mainly because defendant requested it."; neither him nor counsel for the co-defendant believed that the policy constituted a valid criminal defense and making that the main issue of the case might well have prevented a jury from considering the lesser included offense; * it was his opinion that the policy may have been a bearing on a wrongful death action, but he didn't believe that it was a defense to

[25] The state supreme court *omitted clear and unambiguous language from statutory provision using quotations and ellipsis*. **Westmoreland v. State**, 699 S.E.2d at 17-19. **See** (***bold/italics emphasis***)

[26] During motion for new trial, counsel testified that the first time the issue of the policies came up was when Westmoreland brought it up on the ***second*** day of trial, the day the evidence would have started (HT. 2515-17)

vehicular homicide or felony murder; * he did not recollect specifically of advising Westmoreland that he feared alienating the jury by attempting to blame police on account of losing credibility, but it was possible; (Pet. Ev. [filed 6/21/12])

Although the statute is not an affirmative defense in Georgia to vehicular homicide, felony murder, eluding an officer or burglary, **O.C.G.A. § 40-6-6(d)(2)** is material to the element of causation and may be found to have negated or mitigated it. Notwithstanding the plain meaning of the statute **(12 Ga. St. U. L. Rev. 295, 298 (1995))**, the relevant conduct is the decision to initiate or continue the pursuit, not how [officer's] drove [their] own vehicle during the course of the pursuit. According to the issue of **proximate causation** and duty under the statute.

Trial counsel deficiency in failing to obtain the evidence became even more skewed during direct appeal when the state supreme court rejected Westmoreland's assertion that the evidence was insufficient to support his convictions because the vehicle pursuit in this case violated Cobb County Police Department policy and was an intervening cause of the collision. To this argument, the court ruled that "*the policy alluded to was not presented to the jury and is not contained on the record of appeal, [a]ccordingly, that material [did] not factor into [their] evidentiary review.*" The court also held that counsel's decision not to obtain the policy was "*informed strategy*".

This opinion from the state highest court was contrary to the record. Counsels decision was unreasonable tactical move which no competent attorney in the same circumstances would've made, especially not having hired an expert or independent investigator to aid the defense which was requested by initial circuit defender, and client facing an automatic life sentence. Even more detrimental to the defense, both trial counsel's (Marotte and Christian) were advising Westmoreland that they were attempting to obtain the policy during trial -- and never stated otherwise until after trial -- during motion for new trial hearing. The jury could have concluded that the officers decision to initiate and continue the pursuit admist the lawful order restricting such, was an **intervening cause** singularizing the burglary and the subsequent vehicular homicide. **Clayton County v. Segrest**, 775 S. E. 2d. 579 (2015) (*non-binding precedent*).

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See **Cuyler v. Sullivan**, supra. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. **Powell v. Alabama**, supra., **Hinton v. Alabama**, (2014), supra. **Davis v. Alaska**, 415 U.S. 308 (1974).

Substitute appellate also raised claim on appeal, as trial court error in not allowing officer's testimony about the policy. Nonetheless, the argument made no specific mention of Westmoreland's **6th Amendment** Confrontation Right under the U.S. Constitution.

V. Breakdown of the Adversarial Process/ Closing Arguments:

In both state and federal petitions, Westmoreland alleged *constitutional ineffectiveness of trial counsel for instructing the jury, during defensive closing arguments to find Westmoreland guilty of several serious felonies without securing Westmoreland's consent, permission or approval of this tactic;* [and] *failure to make timely objections to several improper statements made by the prosecutors and codefendant's counsel (circuit defender) during closing arguments, disparaging Westmoreland at a critical stage. Codefendant's circuit defender used defense closing argument to disparage Westmoreland by blaming the entire case on Westmoreland in front of the jury.*

To meet the ineffectiveness standard of Strickland, the performance of defense counsel must be the functional equivalent of no defense at all.

During capital felony murder trial, counsel just didn't have a defense to put on under the circumstances of th[e] case, and unless [Westmoreland] thought otherwise there wasn't any real need [] to discuss because we didn't really have a trial strategy in terms of [] presenting a defense. (HT. 2527); Codefendant's defense was it was all Westmoreland's fault and he was just alone for the ride. Westmoreland first saw all of the State's evidence during trial. At the close of the States evidence, neither of the (4) circuit defenders representing the trial offered any evidence or defense (HT. 1878; 2522).

I. Closing Arguments:

(A) During defensive closing arguments, **trial circuit defender** advised the jury that:

> "the bottom line is that I suggest to you that the evidence in this case indicates that what he be found guilty of is vehicular homicide, serious injury by motor vehicle, the burglary charges, the attempting to elude charges...[a]nd that's what we would ask you to consider doing in your verdict." (HT. 1896-1901).

(B) Also during defensive closing arguments, **codefendant's circuit defender** argued to the jury that:

> (i) **"Believe it or not, I represent John Williams. That's me.";** (ii) That his client **"was just the passenger in the vehicle that** [Westmoreland] **was driving";** (iii) **"Amos Westmoreland was driving his vehicle, *Amos made a mess out of May 17, 2007*";** (iv) ***"the law is we have the guy that caused that death here, we sure do. Right there!"*** (pointing at Westmoreland)***...'that was the guy that caused the death. That was the guy that turned left. That was the guy that struck that car.***"; (v) **"we *got to separate out who pays for what in this case. Who caused the death of this***

***lady? Who injured these people's kin? Who did that? Amos did that, not Williams"*; and** (vi) **"I will not say that...Mr. Westmoreland didn't drive recklessly, didn't careen the car across 575 into this lady and flip her car over twice...but I will not say that to anybody's fault but Westmoreland."** (HT. 1902-11)

(C) During the **States** closing arguments, the prosecutors commented that:

> (i) "there was no question that these officer's were engaged in their job, they were *doing what we expect officers to do*"; (ii) "*we have agreed* that Barbra Jean Robbins, she's the human being that died, *with or without malice.* We have agreed to that in the stipulation"; (iii) "we have to look at the burglary itself, determine whether a burglary felony existed; if it does exist, then go back and add the death of Barbra Jean Robbins."; (iv) "but here's what's important, it *was a continuous act because they were in Cobb County, **'OUR COUNTY***"; (v) "the basis for count number 8 is burglary, count 1 and 2...when you determine the burglary was committed, then go back and add the death of the victim"; (ix) "*you took an oath, that you will apply the law...when you find they committed the burglaries, that they helped each other with the burglaries, that's felony murder, ladies and gentleman. That's an oath, that's your job*"; and (x) "when you look at the death certificate, this Friday, she would have had a birthday. And *because Tatiana doesn't have Me-Maw for a birthday, we ask that you find them guilty of felony murder, because that's what it is*[27]". (HT. 1936)

The right to reasonably effective counsel is violated when the omission charged to trial counsel results from inadequate preparation rather than from unwise choices of trial tactics and strategy. The deficient performance prejudiced Westmoreland because counsel did not secure Westmoreland's consent or approval of his tactic to suggest to the jury to find him guilty of any crimes, which amounts to a total breakdown in the adversarial process. The exhibition was structurally flawed because the cumulative effect of not offering evidence or a defense, and using a critical stage in the capital felony murder trial to inflame the minds of the jury caused irreparable prejudice to Westmoreland. Even more detrimental to the adversarial testing, counsel failed to object to codefendants counsels defensive closing arguments disparaging Westmoreland at critical stage in the trial, and to allow the prosecution to follow up with the impropriety was devastating.

If counsel would have refrained from making such arguments and objected to egregious statements made by both prosecutors and codefendants circuit defender, theres a reasonable probability that the outcome of the felony murder trial would've been different, if not for counsel's unprofessional error, because trial court could have given a limiting or curative instructions or declared a mistrial for the blatant comments. The outcome of the proceedings may have also been different because, not only was this a critical point in trial, but the jury was competent enough to make their own determination of guilt and innocence based on the evidence. Even considering that trial counsel did not tell the jury to find Westmoreland guilty of felony murder, crimes admitted included vehicular homicide and four underlying felonies for the felony murder counts.

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[27] During Pretrial Detainee Stage, two (2) days after a "conflict occurred" with Petitioner's 3rd circuit defender, the trial court "specially set" the case for trial for the week of October 20, 2008; (HT. 982).

As for codefendants circuit defender improper comments, the structural error undeniably manifested an actual *conflict of interest* because during the course of the representation, Westmorelands' interests diverged with respect to a course of action-- when codefendants best strategy was to blame Westmoreland for all of the crimes, while being jointly represented by the same defense and circuit defenders office[28]. These statements were made exclusively and explicitly without objection from counsel which he conceded in written interrogatories, along with clarifying that codefendants defense was that it was all Westmoreland's fault. Westmoreland diligently presented claim to initial post-conviction counsel to potentially raise on direct appeal. However, after conflict of interest and Westmoreland was appointed substitute post-conviction counsel, error of ineffectiveness wasn't properly raised.

This Court's decisions in Cuyler establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the **Fourteenth Amendment**. See **Lisenba v. California**, 314 U. S. 219, 314 U. S. 236-237 (1941); **Moore v. Dempsey**, 261 U. S. 86, 261 U. S. 90-91 (1923). The Court recognized as much in **Gideon v. Wainwright**, 372 U. S. 335 (1963), when it held that a defendant who must face felony charges in state court without the assistance of counsel guaranteed by the **Sixth Amendment** has been denied due process of law. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. Id. at 372 U. S. 344; see **Johnson v. Zerbst,** 304 U. S. 458 (1938). When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. See **Argersinger v. Hamlin,** supra at 407 U. S. 29-33. **Cuyler v. Sullivan**, supra, at 446 U. S. 343 (citations omitted).

The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Prejudice is presumed where counsel entirely fails to subject the prosecution to a meaningful adversarial testing. It was readily apparent at that point that the non-death penalty capital felony murder trial was 'like' a game in which the participants were expected to enter the ring with a near match in skills. It was an exhibit of sacrifice of unarmed prisoner to gladiators. Cf. **U.S. v. Cronic**, supra.. The constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. See **Holmes v. South Carolina**, 547 U.S. 319 (2006); **Crane v. Kentucky**, 476 U.S. 683 (1986). **State v. Lane,** 838 S. E. 2d 808 (2020).

The **Sixth Amendment** right to counsel exists to protect the right to a fair trial. *Strickland*, 466 U.S. at 684. It is common sense that the accumulation of multiple errors can render a trial fundamentally unfair.

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[28] During pretrial motion hearing, codefendant circuit defender requested a severance of defendants, arguing "as of the other counts in the case, the defenses are that it was him not me, so those are completely antagonistic in these cases"; the motion was denied.

Strickland thus instructs that counsel's errors must be considered together, requiring courts to assess "counsel's *errors*" (plural) and analyze "the *totality of the evidence* before the judge or jury." *Id.* at 695 (emphasis added).

The writ should be granted based on **Sup.Ct. R. 10 (a) and (c)**, in that the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; and has decided an important federal question in a way that conflicts with relevant decisions of this Court, (i.e., **Martinez v. Ryan**, 566 U.S. 1 (2012)) and **Strickland v. Washington**, 466 U.S. 668 (1984)).

Q2: Does the 11th Circuit procedural bar conflicts with this Court's decision in **Cuyler v. Sullivan**, (1980), since it ignores that in **Cuyler v. Sullivan**, 446 U.S. 335 (1980), the Court established that [t]o show ineffectiveness, a petitioner must demonstrate that his defense attorney had an actual conflict of interest, and that this conflict adversely affected the attorney's performance?

ARGUMENT:

The **Sixth Amendment** to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel, and effective assistance includes a right to counsel "unimpaired by conflicting loyalties." **Duncan v. Alabama**, 881 F.2d 1013 (11th Cir.1989). The duty of unfettered loyalty to one's clients is among the most central of a criminal defense attorney's responsibilities. See **Strickland v. Washington**, 466 U.S. 668, 692 (1984).

Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by this Court in **Cuyler v. Sullivan**, supra. Cuyler establishes a two-part test that we use to evaluate whether an attorney is constitutionally ineffective due to a conflict of interest. To show ineffectiveness under Cuyler, a petitioner must demonstrate: (a) that his defense attorney had an actual conflict of interest, and (b) that this conflict adversely affected the attorney's performance. To satisfy the "actual conflict" prong, a defendant must show something more than "a possible, speculative, or merely hypothetical conflict." **Lightbourne v. Dugger**, 829 F.2d 1012 (11th Cir.1987). In **Smith v. White**, 815 F.2d 1401 (11th Cir.1987), the court developed a test that enables them to distinguish actual from potential conflicts of interest:

The Court there noted that it would not find an actual conflict of interest unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests. The Court concluded that [a]ppellants must make a factual showing of inconsistent interests and must demonstrate

that the attorney made a choice between possible alternative causes of action. [ ]. Assuming a defendant can demonstrate that his attorney labored under an actual conflict of interest, the Cuyler test demands that he show that this conflict adversely affected the representation he received. To prove adverse effect, a defendant needs to demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategiy was not followed because it conflicted with the attorney's external loyalties. See **Freund v. Butterworth,** 165 F.3d 839 (11th Cir. 1999). **State v. Lane,** 838 S. E. 2d 808 (2020)

I. Conflict of Interest (Trial Counsel and Trial Court):

(i) In Ground 22 of original state habeas petition, Westmoreland allege his *federal constitutional rights were violated when trial counsel (David Marotte) was previous law clerk*[29] *for the trial judge's husband (Milton Grubbs); and conflict or possible conflict wasn't properly raised by trial court or trial attorney. It was indeed acknowledged in trial counsel's testimony at motion for new trial hearing. Westmoreland was never, until that point, apprised of such possibility of conflict.* (Appendix R).

In the proposed final order drafted by the state and signed by the state habeas judge, it concluded that:

> "Westmoreland failed to raise this claim post-trial and on appeal. Thus, they are procedurally defaulted under O.C.G.A. 9-14-48 (d)"...."[A]ppellate counsel did not recall seeing any testimony from trial counsel about the latter's purportedly serving as law clerk for the judge's husband. The transcript of the motion for new trial hearing shows that during the course of answering a question about his professional background, trial counsel stated that he had previously worked for Milton Grubbs for about a year and a half. Hon. Adele P. Grubbs presided over Westmoreland's trial."

On merits, the order cited **Cuyler v. Sullivan**, 446 U.S. 335 (1980), and concluded that:

> "[A] mere mention of having worked for the husband of the judge presiding over the trial at some point in trial counsel's legal career does not show that trial counsel operated under a conflict of interest....Westmoreland has thus failed to overcome the procedural bar to consideration of this issue. Accordingly, ground provide no basis for relief."

(ii) In Ground 10 of federal habeas petition, Westmoreland allege that *he was denied the constitutional rights to effective conflict-free trial counsel when he was previous law clerk for trial courts husband, and conflict or possibility of a conflict was never properly raised....[t]he issue was elicited by trial counsel during motion for new trial hearing. Exercising due diligence Westmoreland discovered that counsel was previously an associate at Grubbs and Grubbs with trial court and her late-husband.*

A U.S. Magistrate Judge ("R&R") determined, "again Westmoreland has demonstrated no basis for overcoming his procedural default." (Appendix D). However, the federal court denied claim in a aggregate

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[29] ***Law clerk***- one (as a law school graduate) who provides a judge, magistrate, or lawyer with assistance in such matters as research and analysis. Merriam-Webster's Dictionary of Law (2016).

of other grounds and did not mention the **Cuyler** case at all or the merits that the state court made reference to in the adopted proposed final order.

The record reflects, though not verbatim, that trial counsel testified that he was previous *law clerk* for the judge's husband, and issue was alluded to during motion for new trial hearing. [HT. 2529]. However, in a sworn affidavit filed in state habeas proceeding, counsel attested that he was an "*associate*[30] in Milton Grubbs office during 77-78"; It was later discovered through public records that Marotte was actually an associate in the firm, along with trial court and her husband.

II. Other Similar Constitutional *Conflict of Interest* Claims Made in Both State and Federal Habeas Petitions.

(a) Trial counsel was specifically appointed to Westmoreland's case "*per Judge Grubbs*" and circuit defender representative, a day before second scheduled trial date, at a time when previous attorney had conflict. [HT. 984-85];

During first pretrial motion hearing, trial court acknowledged that *"I know that Mr. Marotte hadn't been in the case very long. I also know he is a quick learn."* (MH. 5).

In a sworn affidavit administered under oath, filed in state habeas proceeding, counsel stated that (i) *he presumed that the Circuit Defenders Office was responsible for appointing him to the case;* (ii) *this was a case where he was appointed at the last minute. Judge Grubbs gave one continuance and he had to get ready as best he could within that time frame;* (iii) *he had less than 30 days to prepare but he had no choice in the matter. That was the order of court and the schedule directed by the judge;* (iv) *when he took the case, he did not recollect seeing any motions filed by previous Circuit Defenders; the file that was turned over to him had very little information in it, other than some discovery material;* (v) *he had one telephone conversation with the previous attorney who updated him on what little had been done on the case; and* (vi) *he had a short pretrial inquiry with the district attorney in the judge's office, where the judge asked if there were any pretrial issues to be addressed.* (Pet. Ev. [filed 6/21/12]).

(b) Trial counsel practiced law and was an officer of the court for 30+ years in Cobb County, and had never, until Westmoreland's case, stood a case in front of trial court.

This fact was alluded to during trial when the judge stated that *"Mr. Marotte hasn't tried a case before me for some reason, we don't follow up."* [HT. 1235-36]; However, in sworn affidavit filed in state habeas

[30] ***Associate***- a lawyer employed by a law firm. Merriam-Webster's Dictionary of Law (2016).

proceeding, counsel stated that he *had stood/tried a case in front of Judge Grubbs, prior to Westmoreland's felony murder trial.* (Pet. Ev. [filed 6/21/12]).

(c) Trial counsel failed to file a for a judicial recusal requested by Westmoreland, since he had been made aware that trial court's daughter had been previously killed in an auto related accident[31], and trial consisted of an auto related accident. (Pet. Ev. #58)

In a sworn affidavit filed in state habeas proceeding, counsel attested that he *was aware of trial courts daughter dying in an auto-related accident, stating that Westmoreland brought this issue up for the first time on the morning of trial*, concluding that he *considered this a frivolous issue and as a matter of morality, ethics, and professionalism, he had no intention on filing such.* (Pet. Ev. [filed 6/21/12]) and 58); See **United States v. Sayan**, 296 U.S. App. D.C. 319 (D.C. Cir. 1992) (upholding application of **Cuyler's** adverse effect test to alleged conflict created by lawyer's fear of antagonizing judge).

Attorney labored under an actual conflict of interest with the trial court and this conflict adversely affected the representation Westmoreland received because, (a) **"believe [he] discussed with [Westmoreland] we just didn't have a defense for us to put on under the circumstances of this case, and [he] believe [he] told [Westmoreland] at that point and time, unless he thought otherwise there wasn't any real need for us to discuss because we didn't really have a trial strategy in terms of us presenting a defense** (HT. 2527); (b) counsel could have pursued a plausible alternative strategy (i.e., the legal completion of the burglary, the policy tactic, proximate cause or intervening cause strategies); (c) any of these alternative strategies were reasonable considering the punishment and lack of defence or evidence presented during capital felony murder trial; and (d) the alternative strategies were not followed because it conflicted with the attorney's external loyalties with the trial court (and/or circuit defenders representative), whom personally appointed counsel to represent Westmoreland's case. (HT. 984-85); Cf. **Avery v. Alabama**, 308 U.S. 444, (1940), supra. ***Powell***, supra. The (internal) conflict affected the entire representation because court appointed counsel took no substantial actions on behalf of Westmoreland. The record reflects that Westmoreland (1) **specifically requested his indictment**, stating that he never saw it, and counsel sent document through the mail without going over it with client (HT. 2513); (2) **specifically requested the police pursuit policy,** which counsel led him to believe that he was attempting to obtain, but equivocally didn't (HT. 2514-20) and (Pet. Ev. [filed 6/21/12]); and (3) **specifically requested counsel to file for a judicial recusal,** which counsel disregarded (Pet. Ev. [filed 6/21/12]). Being apprised of such potential conflicts at the outset, could have provided Westmoreland an opportunity to agree to the representation or have the benefit of appointment of conflict-free counsel from another circuit (and/or

[31] Under state law, motions to recuse must be timely filed, i.e., made "as soon as the facts demonstrating the basis for disqualification become known." See **Pope v. State**, 256 Ga. 195, 202 (7)(e)(345 S.E.2d 831)(1986)

another judge, for that matter). Westmoreland non-existant waiver deprived him of the benefit of proper preparation and investigation, by competent attorney and rights guaranteed under the federal constitution. The conflicts were too remote to rely on Westmoreland's acquiesce. Cf. **Von Moltke v. Gillies**, 332 U.S. 708 (1948); **Woods v. Georgia**, (1981) supra.; **Holloway v. Arkansas**, 435 U.S. 475 (1978);

The writ should be granted based on **Sup.Ct. R. 10 (a) and (c)**, in that the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; and has procedurally barred an important federal question in a way that conflicts with relevant decisions of this Court, (i.e., **Cuyler v. Sullivan**, 446 U.S. 335 (1980)). **State v. Lane,** supra. (2020)

Q3:

The **6th Amendment** right guarantees conflict-free effective assistance of counsel and *does not* afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel, while the **Georgia Rule of Professional Conduct 1.7** prohibits a representation involving a potential conflict of interest unless and until the attorney has disclosed the potential conflict, in writing, to his client and thereafter received the client's written consent to undertake or continue that representation. The question is:

When a defendant is represented by multiple circuit defender's and subsequently files a pro se post-conviction collateral attack raising substantial ineffectiveness federal constitutional claims for failure of a succession of attorney's from the same circuit defender's office to raise it; Should the principles underlying this **Rule** be discounted in a criminal proceeding, where **6th Amendment** right to conflict-free effective assistance of counsel is involved?

Q4: Does the constitutional protections of effective assistance of counsel on only appeal as of right in **Evitts v. Lucey**, (1985) and **Douglas v. California**, (1963), extend to filing a timely Motion for Reconsideration on only appeal of right?

If so, and appellate circuit defender does not withdraw in writing to allow petitioner to file a pro se Motion for Reconsideration on direct appeal to resolve his constitutional questions, can such noncompliance, if substantiated, procedurally bar a pro se habeas petitioner from having substantial claim(s) heard by a federal court?

ARGUMENT:

The **Sixth Amendment** to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." It is well established that

the right to counsel protected by the **Sixth Amendment** is "the right to effective assistance of counsel" See **McMann v. Richardson**, 397 U.S. 759 (1970); One component of the right to effective assistance of counsel is the right to representation that is free of actual conflicts of interest. See **Wood v. Georgia**, 450 U.S. 261 (1981). Ineffective assistance of counsel claims are generally evaluated under the two-part deficient performance and resulting prejudice test announced by this Court in **Strickland v. Washington**, supra. However, as this Court recognized in *Strickland* itself, this two-part test is inapposite under certain unusual circumstances. In some cases, "prejudice... is so likely that case by case inquiry into prejudice is not worth the cost." Thus, prejudice is presumed where there has been an "[a]ctual or constructive denial of the assistance of counsel altogether" and where "various kinds of state interference with counsel's assistance" are present. A more limited presumption of prejudice arises where an attorney represents a client despite an actual conflict of interest. In this situation, the attorney "breaches the duty of loyalty, perhaps the most basic of counsels duties. Moreover, the precise effect on the defense of representation corrupted by conflicting interests can be exceedingly difficult to determine. See **Holloway v. Arkansas**, 435 U.S. 475 (1978); Requiring a showing of Strickland prejudice - i.e., a reasonable probability that but for the conflict of interest, the outcome of the proceeding would have been different - would set the bar for such claims too high. Thus, a defendant or habeas petitioner asserting ineffective assistance of counsel based on an actual conflict of interest need only demonstrate that the conflict of interest existed and that it "significantly affected counsel's performance." See **Mickens v. Taylor**, 535 U.S. 162 (2002). Accord **Cuyler v. Sullivan**, supra.

I. **Conflict of Interest**[32]: Cobb County Circuit Defenders Office ("CCCDO") performs the essential private function of representing criminal defendants.

Public Defenders working in the same judicial circuit are "firms" subject to prohibition.... [w]hen a conflict exists pursuant to the conflict of interest rules listed therein, including in particular **Rule 1.7.**[33] [And] if it is determined that a single public defender in the circuit defenders office of a particular judicial circuit has an impermissible conflict of interest concerning the representation of co-defendants, then that conflict of interest is imputed to all of the public defenders working in the circuit public defender office of that particular judicial circuit. **Rule 1.10**[34] does not become relevant or applicable until after an

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[32] ***Conflict of Interest*** - There is a possibility of conflict, then, if the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties. There is an actual conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action.

[33] Georgia Rule of Professional Conduct 1.7 (a) provides: ("A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client....")

impermissible conflict of interest has been found to exist. It is only when it is decided that a public defender has an impermissible conflict in representing multiple defendants that the conflict is imputed to the other attorneys in that public defender's office. Even then, multiple representations still may be permissible in some circumstances.

(a) Pre-Trial and Trial Circuit Defender Appointments:

Westmoreland was arrested in May 2007; after he was determined to be indigent, a Cobb County Superior Court judge appointed the CCCDO to represent him under Uniform Superior Court Rule 29.2; and Circuit Defender Representative ("Martin" or "Marty" Pope) assigned *first* Circuit Defender (Michael Syrop). See Indigent Defense Act of 2003, O.C.G.A. § 17-12-1 et.seq.[35]

On January 10, 2008, Westmoreland was escorted to the Cobb County Superior Court for a scheduled Arraignment[36], and was held in a confinement cell during the proceeding. (HT. 113-14). The contents of the proceedings were not communicated to Westmoreland. In May 2008, *third* appointed Circuit Defender (Kenneth Sheppard) came to visit Westmoreland and advised him that not only had Syrop been removed from the case for ***conflict of interest***[37], but yet a *second* Circuit Defender (Gary O. Walker) had been appointed and subsequently *withdrew.*[38]

In September 2008, a few days prior to scheduled trial date, *fourth* appointed Circuit Defender (David Marotte) came to visit Westmoreland and advised him that Sheppard had been removed from the case for ***conflict of interest***, and that he had requested a continuance, but had less than 30 days to prepare for trial. Westmoreland advised Marotte that he had not seen his indictment up to that point, and circuit defender

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[34] Georgia Rules of Professional Conduct- RULE 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest;")

[35] (***I.D.A***) *formerly* referred to the Georgia Public Defender Standard Council, which I.D.A. established as an independent agency within the judicial branch of the state government. I.D.A. Committee works with indigent defense to help provide representation and equal justice to all, and coordinates efforts of the legal profession and other agencies to achieve these goals.

[36] ***Arraignment***- is a critical time in the proceedings; [t]hat initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea. (Black's Law Dictionary 9th Edition 2009, pg. 123).

[37] Georgia Rule of Professional Conduct 1.7: [cmt. 1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[38] Ga. Rule of Professional Conduct; RULE 1.16 states in pertinent part: [w]hen a lawyer withdraws it shall be done in compliance with applicable laws and rules; Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled... [Cmt. 3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority.

sent document through the U.S. Mail (2) weeks prior to capital felony murder trial[39]. (HT. 120-124; 984). This was the first time that Westmoreland was apprised that he was indicted on 17-counts and had to prepare for trial on (3) counts of murder and vehicular homicide, when there was only one death. A few days prior to trial, the CCCDO sent *fifth* appointed Circuit Defender (Rick Christian) "*to observe*" as co-counsel. (4) Four Circuit Defenders represented the defense during trial.

"[D]uring perhaps the most critical period of the proceedings against [the] defendant, that is to say, from the time of [his] arraignment until the beginning of [his] trial, when consultation, thoroughgoing investigation and preparation were vitally important, [defendant] did not have the aid of counsel in any real sense, although [he is] as much entitled to such aid during that period as at the trial itself." Cf. **Powell v. Alabama,** 287 U.S. 45 (1932).

(b) Post-Trial Circuit Defender Appointments:

After conviction and sentence, Circuit defender Marotte filed a standard Motion for New Trial. Subsequently, *sixth* appointed Circuit Defender (Louis Turchiarelli) was appointed to represent the case on appeal, and eventually amended the motion for new trial twice. Turchiarelli represented Westmoreland at motion for new trial hearing, raising ineffective assistance of trial counsel claims and trial court errors.

During motion for new trial hearing, trial counsel testified that:

> a) "Mr. Christian, he wasn't really associated as co-counsel. He was basically through the circuit defenders office going to observe and he did assist me...if I asked him to do something"; b) he did not ask the court for any money for any kind of private investigator, or any kind of expert and he never consulted with any expert witness concerning the procedures and policies of the Cobb county police department.; c) he "*believe [he] discussed with [Westmoreland] we just didn't have a defense for us to put on under the circumstances of this case, and [he] believe [he] told [Westmoreland] at that point and time, unless he thought otherwise there wasn't any real need for us to discuss because we didn't really have a trial strategy in terms of us presenting a defense*" (HT. 2527); d) he didn't present any evidence in the cases (HT. 2522); and e) "***when I got the file, and I don't know how long this case had been going on***... *"I believe he asked-- at one point in time, I asked him--* ***understand, there was another lawyer prior to me in this case. And I didn't know what he had or had not done. At some point in time, Mr. Westmoreland told me that he'd never seen his Indictment. I known I sent him a copy of the indictment.***" (HT. 2513)

Nonetheless, in a sworn affidavit, during the pendecy of the state habeas corpus petition, counsel attested:

> * He didn't know how many felony murder cases he'd handled prior to Westmoreland's case; * he *presumed* that the Circuit Defenders Office was responsible for appointing him to the case; * he had a *short pretrial inquiry with the district attorney in the judge's office*, where the judge asked if there were any pretrial issues to be addressed; * *this was a case where he was* ***appointed at the last minute****. Judge Grubbs gave one continuance and he had to get ready as best he could within that time frame;* * he *had less than 30 days to prepare but he* ***had no choice in the matter.*** *That*

[39] Since arraignment is a critical stage in a criminal proceeding under Georgia law, an accused in a (capital) case in a Georgia state court is entitled, as a matter of federal constitutional law, to counsel at his arraignment, and that, if he is without counsel at the arraignment, he may obtain relief from his conviction without showing that he suffered disadvantage by such denial. **Hamilton v. Alabama**, 368 U.S. 52 (1961); **Wilson v. State**, 212 Ga. 73 (1955); See, e.g., **Brewer v. Williams**, 430 U.S. 387 (1977).

was the order of court and the schedule directed by the judge; * when he took the case, he *did not recollect seeing any motions filed by previous Circuit Defenders;* ***the file that was turned over to him had very little information in it,*** other than some discovery material; he ***had one telephone conversation with the previous attorney who updated him on what little had been done on the case;*** * he did not see a motion for funds to hire independent investigator to assist the defense; he did not have formal training in criminal investigations and accident reconstruction; he did not have an expert or private investigator to assist in preparing a defense, *"but a private investigator would have been nice to have"*; * he had stood/tried a case in front of Judge Grubbs, prior to Westmoreland's felony murder trial; * he believed co-defendant trial strategy was that it was all Westmoreland's fault; * he did not object to codefendants counsel closing argument blaming Westmoreland for everything; * *he did the best he could with what he had to work with*; (Pet. Ev. [filed 6/21/12]).

After motion for new trial was denied, through Open Records Act, Westmoreland requested and received transcripts and case records from Cobb County Superior Court Clerk. After reviewing records and transcripts and researching the law, Westmoreland was attempting to assist in marshalling his own defense at the appellate level by sending numerous potential constitutional claims and errors to initial appellate circuit defender for consideration on only appeal as of right, including, but not limited to:

* state interference; * first time seeing discovery material (received from the clerk); * **no transcripts of:** probable cause hearing; bond hearing; **arraignment**; **second pretrial motion hearing, in which Westmoreland was involuntarily absent from; * conflict of interest with Public Defenders office (i.e., Michael Syrop, Gary Walker, Kenneth Sheppard, David Marotte and Rick Christian)**; * inadequacy and inconsistency in pleadings filed by the circuit defenders; * Motion to hire an independent investigator filed by Michael Syrop wasn't pursued; * codefendant counsels and Marotte improperly instructing the jury to find Westmoreland guilty of numerous crimes; * **improper influence to sign indictment during trial under the understanding of pleading not guilty, and not intentionally waiving formal arraignment;** * ineffective assistance based on attorney being appointed at the "*last minute*"; * right of indigent defendant in criminal case to aid of the state by appointment of investigator or expert; See (Pet. Ev. 24).

Consequently, a ***conflict of interest*** occurred between Westmoreland and Turchiarelli citing "lawyer-client understanding". However, after ***conflict*** arose, Circuit Defender did not provide Westmoreland with transcripts, evidence provided by Westmoreland's family, post-conviction investigative reports or what issues were being raised on only appeal as of right. As a result of the **conflict**, *seventh* Circuit Defender (William Carter Clayton) was appointed (*substituted*) to the case by the CCCDO. At that point, direct appeal had already been docketed in the Georgia Supreme Court. On direct appeal, substitute appellate circuit defender raised (4) claims that were all entirely dependent on the police pursuit policy, including one claim of ineffective assistance of counsel against both trial and initial appellate circuit defender's.

(c) Circuit Defenders Post-Direct Appeal Correspondence:

Westmoreland received the decision denying his direct appeal in the U.S. mail approximately a week after it was rendered. Enclosed with the copy of the courts decision was a letter from substitute appellate circuit defender advising [him] that as of the date of the decision [6/28/10], ***"the conviction is final"*** *and [he] had*

"4 years from that date to challenge [the] conviction by way of Habeas Corpus." (HT. Pet. Ev. 29). (App. P.)

(d) Pro Se Motion for Reconsideration in the Georgia Supreme Court:

At the time Westmoreland recieve the courts decision and correspondence from substitute appellate circuit defender, he had less than a week remaining to timely challenge the ruling of the Georgia Supreme Court. Westmoreland immediately filed a timely pro se Motion for Reconsideration, raising several claims of error, omission and constitutional violations. Subsequently, the clerk corresponded that as long as [he] *was represented by any counsel, the court was unable to accept a filing for [him], and the attorney must withdraw in writing to be removed as counsel in [the] case*[40]. (Pet. Ev. 32). (App. Q). See Georgia Rules of Professional Conduct: Rule 1.16(d) (Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled....)

(e) Circuit Defender's Testimony On Substitution And Conflict:

> (a) there was some sort of ***conflict with previous counsel*** but he couldn't remember exactly what it was; (b) his appointment to Westmoreland case was after motion for new trial had been heard and denied and *case was docketed-- pending appeal in the Georgia Supreme Court*; (c) being appointed so late in the case, ***"in a sense"*** presented special and unique challenges to his representation and **it was unusual to be appointed at this part of the proceeding**; (d) the belated appointment **did have a bearing on his legal analysis regarding ineffective assistance of counsel claims**; (e) he **would have done things differently than the prior attorney had he had the case from the Motion for New Trial;** (f) **he was sure that he would have raised question of ineffective assistance of trial counsel claims differently than he would if he had been appointed counsel at the beginning of Motion for New Trial;** (g) **he did not have a chance to make the record for appeal and had to essentially write his brief based on the record that was made by the prior public defender**; (h) in preparing for the appeal, he spoke to Westmoreland's former attorney, discussed the case with Westmoreland, and researched the Cobb County pursuit policy; (i) *he did not see a way to file an extraordinary motion for new trial based on the outdated vehicle pursuit policy* being included in the original motion for new trial *because by the time he came into the case, the appeal had already been docketed in the georgia supreme court and trial court was without jurisdiction to hear such a motion at that point*; and (j) *he felt that he raised the most viable and meritorious issues on appeal.* (HT 7-15).

The **Sixth and 14th Amendment** right to counsel is a fundamental right. **United States v. Cronic,** 66 U.S. 648 (1984) (describing the **Sixth Amendment** right to effective assistance of counsel); **Evitts v. Lucey**, 469 U.S. 387 (1985) (recognizing due process and equal protection right to counsel on direct appeal requires effective assistance of counsel).

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[40] To date, Westmoreland hasn't received any confirmation, in **writing**, that Circuit Defender's Office has withdrawn or been removed from [the] case. See Rule 4.3. Withdrawal;

Furthermore, as Westmoreland noted in his objections to U.S. Magistrate R&R, in 2009, at the time the case was in the "pipeline" -- pending direct review, the death penalty prosecution of Brian Nichols was costing the state approximately $2 million, making it difficult for the state to provide funding for indigent defense in other cases. See Death Penalty Information Center, Smart on Crime: Reconsideration of the Death Penalty in a Time of Economic Crisis, p. 13 (October 2009)-- **Bun v. State** 296 Ga. 549 (2015).

The Georgia Supreme Court in **Williams v. State**, held that conflicts of interest are imputed among the attorneys in a single public defender's office for purposes of evaluating conflicts of interest in joint representations under the **Sixth Amendment**. 807 S.E.2d 418 (2017); see also **In re Formal Advisory Op. 10-1**, 744 S.E.2d 798 (2013). (Appendix K). Cf. **Hung v. State,** 653 S.E.2d 48 (2007) (attorney who filed motion for new trial was not considered to be "new" counsel for the purpose of an ineffective assistance of counsel claim where he and trial counsel were from the same public defender's office);

(f) Federal District Court Ruling On Conflict Of Interest:

In the District Court's Order, the U.S. District Judge held that *"*[Westmoreland] ***claims of ineffective assistance of counsel based upon a "conflict of interest" are totally without merit."*** (Appendix C).

The record shows that the conflict of interest significantly affected the representation Westmoreland received from his trial and appellate circuit defender's. It is undisputed that all of Westmoreland's attorney's did not pursue the course of action as diligently as they otherwise would have because of the impermissible conflict of interest imputed on the Cobb County Circuit Defenders Office. Westmoreland is not required to prove anything more to demonstrate a significant affect on his trial and appellate attorney's representation of him. There is nothing in the record to suggest that Westmoreland validly waived his right to conflict-free representation at trial or on appeal, and his acquiescence in the decision not to raise the issue on appeal did not render his representation by circuit defenders any less defective. See **Wheat v. United States**, 486 U.S. 153 (1988) ("[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.")

The professional responsibility of lawyers to avoid even imputed conflicts of interest in criminal cases pursuant to **Rule 1.10(a)** imposes real costs on Georgia's indigent defense system, which continually struggles to obtain the resources needed to provide effective representation of poor defendants as the Constitution requires. See **Gideon v. Wainwright,** 372 U.S. 335 (1963). But the problem of adequately funding indigent defense cannot be solved by compromising the promise of **Gideon**. (Appendix K). Cf. **Douglas v. California**, 372 U.S. 353 (1963); **Ryan v. Thomas,** 409 S.E.2d 507 (1991). (Appendix I).

Under Georgia law, a convicted defendant is not authorized to assert a pro se claim of ineffective assistance while represented by counsel. "'(T)he **Sixth Amendment** right does not afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel. (Cit.)' [Cit.]" **Hance v. Kemp**, (373 S.E.2d 184 (1988), and under the 1983 Georgia Constitution, "a layperson does not have the right to represent himself and also be represented by an attorney...." Cf. **Cargill v. State**, 340 SE2d 891 (1986); **Seagraves v. State**, 376 S.E. 2d. 670 (1989); This Court in **Martinez v. Court of Appeals**, 528 U.S. 152 (2000)... concluded there was no constitutional right to self representation on direct appeal from a criminal conviction because historical evidence and the 6th Amendment did not provide any basis for the right. The government's interest in the fair administration of justice outweighed any invasion of petitioners self representation interest. Cf. **Cotton v. State**, 279 Ga. 358 (2005); **Tolbert v. Toole**, 296 Ga. 357 (2014).

If an indigent defendant is appointed circuit defender for appellate purposes, and that circuit defender fails to raise substantial claim(s) of ineffectiveness of trial counsel at the earliest practical convenience, this would be the first disadvantage to the defendant. Mainly because at that moment, the same substantial claim(s) of ineffectiveness of trial counsel has technically been procedurally barred, something that an effective appellate circuit defender has been schooled and trained to understand, while the indigent defendant may have the slightest clue.

A second major challenge may arise with the representation if (or when) a lay defendant researches the law and the case and presents (non-frivolous/frivolous) claims of error for circuit defender to raise on direct appeal, after motion for new trial has been denied. Nonetheless, if that communication manifest a potential conflict of interest and circuit defender withdraws-- at a critical moment when case is docketed in the appellate courts --quite naturally the substitute counsel would have to be well trained and experienced in appellate practices and conflict-free representation to navigate the case in the best interest of the client. This is true because new circuit defender would not only have to review the court records and transcripts, but he or she would also have to communicate with both former circuit defender and client to make an informed strategy for appeal, under time limitations of the appellate court. The new circuit defender would have the duty to review substantial claim(s) of ineffectiveness of two fellow circuit defender's.

If the substantial error(s) of trial counsel are overlooked on direct appeal, the hurdle begins to be insurmountable because indigent petitioner may have to overcome state procedural default if he or she decides to challenge the constitutionality of the conviction and sentence in a timely filed post-conviction collateral proceeding. This forces the indigent prisoner to either hire an attorney or expeditiously become educated and trained in state and federal laws to comply with procedural rules in order to bring claims that should've been raised potentially years earlier at initial-review collateral proceeding. This particular situation calls for an exercise of this Court's supervisory power.

In certain situations, indigent defendants represented by multiple appointed counsels from the same public defenders office --at different phases of a criminal proceeding --will virtually be disadvantaged by not

knowing or understanding the law and how to properly discern intricate counsel errors and constitutional claims. Even though the constitution contemplates that accused defendants cannot do these very things.

As a result, substantial ineffective assistance claims may be foregone at trial and on direct review, and this would permit one member of the circuit defenders office to shield his fellow member ['s] against accusations of ineffectiveness at the expense of the rights of defendant. Additionally, a pro se habeas petitioner would have to overcome insurmountable hurdles and risk claim(s) being barred by failure of a succession of attorneys from the same public defender's office to raise it as error on appeal;

This is of more critical concern when its considered that under the federal constitution (1) [t]he State is required to appoint effective assistance of counsel for indigent defendants pursuing first appeals as of right; (2) [t]he 6th Amendment right does not afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel; and (3) Pro Se filings by represented parties are unauthorized and without effect.

The Respondent has not offered any supportable evidence in the record that suggest that any of Westmoreland's seven (7) court appointed circuit defenders informed Westmoreland, at any point, of a potential or impermissible conflict of interest imputed on the Cobb County Circuit Defender's Office, nor of the right to alternative counsel and urge Westmoreland to secure separate representation if he so desired and there's no showing that Westmoreland actively waived his constitutional right to effective, conflict-free representation of counsel during pretrial, trial or on appeal. Westmoreland has diligently presented constitutional errors at the earliest practical moment (i.e., when substitute appellate circuit defender corresponded that the case was ***final*** and Westmoreland had 4 years to file a habeas corpus.)

The writ should be granted based on **Sup.Ct. R. 10 (a) and (c)**, in that the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; and has procedurally defaulted an important federal question in a way that conflicts with relevant decisions of this Court, (i.e., **Cuyler v. Sullivan**, 446 U.S. 335 (1980)).

Q5: Does the 11th Circuit procedural bar conflicts with **Jackson v. Virginia, 443 U.S. 307 (1979)**, since it ignores that in **Jackson v. Virginia**, this Court held: in a challenge to a state court conviction under 28 **U.S.C. § 2254**, the applicant is entitled to habeas corpus relief...if it is found that upon the record evidence adduced at trial no rational trier of facts could have found proof of guilt beyond a reasonable doubt in terms of the substantive elements of the criminal offense as defined by state law?

ARGUMENT:

A. LAWS OR CONSTITUTIONAL PROVISIONS:

[T]here was not sufficient evidence to justify a rational trier of fact to find Westmoreland's guilt beyond a reasonable doubt of Felony Murder [Burglary]. Westmoreland submits that his conviction on Count (8) of the indictment violated his Federal Due Process rights because there was insufficient evidence to support the jury's verdict as required by **Jackson v. Virginia**, supra.

I. Georgia Law On Felony Murder/Burglary:

Count 8 of the indictment alleged that Westmoreland "did unlawfully, without malice, cause the death of Barbra Robbins, a human being, while in commission[41] of the felony, Burglary." (HT. 153-61). Georgia law provides that (A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice....) **O.C.G.A. § 16-5-1 (c);** -- thus subjecting Westmoreland to an automatic life sentence.

Counts 1 and 2 of the indictment allege that Westmoreland, without authority and with the intent to commit a theft, entered the dwelling house of the [victim(s)]. (HT. 153-61). Georgia law provides that: [A person commits the offense of Burglary when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within the dwelling house of another.] (**O.C.G.A. 16-7-1**); -- thus subjecting Westmoreland to 1-20 years.

II. Evidence Adduced at Felony Murder Trial:

On the morning of May 17, 2007, after committing burglary and unbeknownst to any potential detection, the vehicle driven by Westmoreland civilly exited the neighborhood. After casually passing a law enforcement vehicle, the officer initiated a U-turn and followed the vehicle. The officer subsequently attempted to effectuate a traffic stop for a "drive-out tag" or "possible burglary". The driver of the vehicle failed to accede to the officer's signals and drove his vehicle onto the Interstate, as additional patrol cars joined the pursuit. The driver continued his attempt to elude the police. During the pursuit, the police attempted a box maneuver to stop the fleeing vehicle and the vehicle executed a U-turn in the median to the southbound lane where it collided with a Buick. The Buick rolled over twice, fatally injuring the driver and seriously injuring the front seat passenger. Both the driver and the passenger of the pursued vehicle fled on foot and was soon apprehended.

The Medical Examiner testified that at trial regarding the cause of the victim's death, which was caused by injuries sustained during the car incident [i.e., *'blunt force trauma'*]. Dr. Brian Frist, the county's

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[41] ***Commission*** [n.]: The act of committing, doing, or performing; the act of perpetrating.

Physician, came to similar conclusions, testifying that "the unlawful injury inflicted [i.e., *'blunt force trauma'*] accounted as the efficient, proximate cause of death".

III. **Jury Instructions On Felony Murder-Burglary:**

The trial court charged the jury on Felony Murder, in that:

> "In order for a homicide to have been done in commission of a particular felony, there must be a connection between the felony and the homicide. The homicide must have been done in carrying out the unlawful act and not collateral to it. *It is not enough that the homicide occurred soon, or presently, after the felony was attempted or committed.* There must be such a legal relationship between the homicide and the felony so as to cause you to find that the *homicide occurred before the felony was at an end* or *before any attempt to avoid conviction or arrest for the felony.*
>
> The felony must have a legal relationship to the homicide, be at least concurrent with it, in part, and be part of it in an actual sense. A homicide is committed in carrying out of a felony when it is committed by the accused while engaged in performance of any act required for the full execution of the felony." (HT. 1964-66; 2021-23).

(a) **Sharp Contrast Between Instructions and Evidence Presented:**

* The homicide was not done in carrying out the burglary, and was *collateral to it.* * It was *not enough* that the homicide occurred soon after the burglary was committed. * There was no legal relationship between the homicide and the burglary, to cause a reasonable juror to find that the homicide occurred *before* the burglary was at an end or *before* an attempt to avoid arrest for the burglary. To the contrary, the homicide occurred: "**AFTER**" the burglary was at an end, and "**AFTER**" an attempt to avoid arrest for the burglary.[42]

(b) **Jury Question:**

During deliberations, the jury asked for "a recharge on the points of the law as it relates to the charges"; their "main challenge [was] how conspiracy weighs in felony murder and homicide charges"; and "when did the commission of the burglary conclude"; (HT. 1984).

(c) **Answer To Jury's Inquiry:**

The substantial question's were never particularly answered and allowed to dissipate, while the trial court gave a partial recharge from the previous day. Under Georgia law, a burglary is completed when a person "**enters**" the dwelling house of another without authority and with intent to commit a felony or a theft therein, regardless of whether or not he accomplishes his apparent purpose[43]. **Ricks v. State**, supra., **Clark v. State**,supra. **Childs v. State**, supra., **Alexander v. State**, supra., **Roberts v. State**, supra., **Whittlesey v. State**, supra., **Williams v. State**, (1872) supra. **Crawford v. State**, supra.;

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[42] {*[A]s a matter of fact, evidence suggests that the (vehicular)* ***homicide was committed while engaged in the performance of Reckless Driving, on interstate-575.***}

[43] The homicide was not a natural and probable consequence of the conspiracy to commit burglary. The reckless driving (pursuit) and subsequent vehicular homicide was not reasonable foreseeable at the time defendants conspired to commit burglary.

IV. **Georgia Law On Vehicular Homicide:**

Georgia law provides that ("Any person who without malice aforethought, causes the death of another person through the violation of [illegally overtaking a school bus, *'driving recklessly'*, driving under the influence, or *'fleeing or attempting to elude an officer'*] commits the offense of homicide by vehicle in the first degree....") O.C.G.A. §§ 40-6-393(a); 40-6-390. -- thus subjecting Westmoreland to 3-15 years.

Count 12 of the indictment allege that Westmoreland, *"did without malice, cause the death of Barbra Robbins, a human being, by driving reckless as alleged in 'count 11' of this indictment", and* Count 11 allege that Westmoreland *"did unlawfully drive a certain Chevrolet motor vehicle on interstate-575, in reckless disregard for safety of persons and property..."*

(a) **Essential Elements Of Vehicular Homicide:**

A homicide caused solely through violation of the reckless driving statute, must be prosecuted under the vehicle homicide statute, and not as for murder or involuntary manslaughter. Recklessness can only form the basis of a prosecution for homicide by vehicle in the first degree, that it cannot form the basis for a charge of murder. See **State v. Foster**, 233 S.E.2d 215 (1977)[44] and **Foster v. State**, 236 S.E.2d 644 (1977). In order to be convicted of vehicular homicide by recklessly driving in violation of O.C.G.A. § 40-6-390, the evidence must be sufficient to prove beyond a reasonable doubt not only that the accused committed the predicate traffic offence but also the predicate offense was the proximate cause of the death of the [victim]. "This requires showing that "the defendant's conduct was the 'legal' or 'proximate' cause, as well as the cause in fact, of the death.""

B. "*CAUSE*" in Georgia's Homicide Statutes Means Proximate Cause:

Georgia is a proximate cause state, and though Vehicular Homicide and Felony Murder may be defined in "entirely different" statutes, in terms of their Code sections, the relevant causation language is indistinguishable. The General Assembly has employed the same or very similar causation phrasing to the extent those statutes have been interpreted by Georgia's appellate courts, once again the term "cause" has been regularly construed as requiring proximate causation. **State v. Jackson**, supra. See (Appendix J);

The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. H. Hart & A. Honoré, Causation in the Law 104 (1959). When a crime requires "not

[44] "which involved an interpretation of vehicular homicide statute as enacted by the General Assembly in 1974. See Ga. L. 1974, pp. 633, 674. As so enacted, the statute provides: "Whoever shall, without malice aforethought, cause the death of another person through the violation of Section 68A-901 of this Title, 'Reckless Driving,' shall be guilty of homicide by vehicle in the first degree..."

merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result." 1 W. LaFave, Substantive Criminal Law §6.4(a), pp. 464–466 (2d ed. 2003); see also ALI, Model Penal Code §2.03, p. 25 (1985).

C. Direct Appeal:

(i) On direct appeal, substitute appellate counsel enumerated as error that the verdict of guilty as to felony murder was contrary to the law and without evidentiary support because the state failed to prove that the death was caused during the commission of the burglary[45]; The state supreme court applied **Jackson v. Virginia**, to conclude that the evidence was ample for any rational trier of fact to find Westmoreland guilty beyond a reasonable doubt of the crimes for which he was convicted. To support its decision, the court applied *res gestae*. ***Res Gestae***[46] was not instructed to the jury or merely even mentioned during felony murder trial[47], and embodies critically different elements from felony murder charge to the jury. *Cf.* **O.C.G.A. § 40-6-6(d)(2).**

D. State and Federal Habeas Petitions:

Petitoner has consistently raised claims challenging the jury instructions and felony murder conviction(s) in both state and federal petitions (and, all post conviction collateral proceedings, including pro se Motion for Reconsideration of direct appeal and exclusively in Extraordinary Motion of Arrest of Judgement). However, both state and federal habeas courts have relied on procedural bar, without addressing the federal constitutional claim, even though issue **clearly was enumerated on appeal**.

E. This Court should Grant the Petition for Writ of Certiorari:

This Court or Georgia courts has not previously addressed the particular issue challenging the legal completion of a burglary when the offense is predicated on felony murder statute; and even the more complex issue of construction of *proximate cause* when simultaneously applying two separate homicide statutes, when there's only one death involved.

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[45] The court mischaracterized the conclusion of Westmoreland's argument by adding *"but after the burglary was completed and he was attempting to flee."* Enumeration or brief did not expressly assert such language or contention;

[46] The application implies that a murder may be committed in the commission of a felony, "although it does not take place until after the felony itself has been technically completed."

[47] [i]n denying motion for new trial, the court, for the first time, applied "***res gestaes***" in support of the "escape phase" of the burglary. (HT. 1142).

At common law, burglary was confined to unlawful breaking and entering a dwelling at night with the intent to commit a felony[48]. However, in tandem with the statute itself, there is ample case law in support of the proposition that in the state of Georgia, Burglary is complete when the perpetrator ***enters*** the dwelling. Furthermore, there's no evidence that suggests that Westmoreland was discovered **during** the burglary by pursuing authority. As a matter of fact, when law enforcement authorities were notified, the "suspicious vehicle" was backed in at a resident with the doors open and occupants not visible -- which a reasonable jury could infer that Westmoreland had "**entered**" 'the dwelling house of another without authority and with intent to commit a theft therein'" -- therefore completing/executing the act of burglary. Furthermore, Westmoreland, unaware of any actions by third parties, peacefully left the **scene of the crime** and was **not in flight immediately after the burglary was complete**. **Jones v. State,** (1913), supra.

The homicide was caused under law by Reckless Driving as indicated in the indictment on interstate-575. The Burglary (or Eluding an Officer) was not the ***cause*** of the Vehicular Homicide in commission of Reckless Driving. The ambiguous words of a criminal statute are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem. **State v. Lyons,** 568 L.E.d 533 (2002). The injury itself (blunt force trauma) -- constituted the sole proximate cause of the death AND directly and materially contributed to the happening of a subsequent accruing immediate cause of death.

Whether the underlying felony had been abandoned or completed prior to the homicide so as to remove it from the ambit of the felony-murder rule is ordinarily a question of fact for the jury to decide. This Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), requires specific findings by a jury, since the statutory maximum sentence for a Vehicular Homicide predicated on Reckless Driving (*15 yrs.*), Burglary (*20 yrs.*) [and {Attempting to Elude (*1-5 yrs.*)}] is increased to Felony Murder (*automatic life imprisonment*) by virtue of some other fact ("*res gestae*").

> Under the due process clause of the Federal Constitution's **Fourteenth Amendment**- and under the Constitution's **Sixth Amendment** guarantee of a right to a jury trial -a criminal defendant is entitled to a jury determination that the defendant is guilty beyond a reasonable doubt of every element of the crime with which the defendant is charged, where the historical foundation for this Court's recognition of these principles extends down centuries into common law; a state cannot circumvent these protections by redefining the elements that constitute different crimes by characterizing them as factors that bear[ed] solely on the extent of punishment. **Apprendi**, supra.

"In any event, for substantive double-jeopardy purposes, neither a burglary conviction nor a murder conviction is a lesser included offense within the other "since proof of additional elements must

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[48] See, e.g., 4 W. Blackstone, Commentaries on the Laws of England 224 (1769).

necessarily be shown to establish each crime. See **Cash v. State,** 368 S.E.2d 756 (1988); **Oglesby v. State**, 256 S.E.2d 371 (1979)]." **Williams v. State**, 300 S.E.2d 301 (1983). *Accord* **Alvin v. State**, 325 S.E.2d 143 (1985).

The conviction for Felony Murder violates Federal Due Process. Viewed in the light most favorable to the prosecution, the evidence is not sufficient for any rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. This Court has held that in the interpretation of a criminal statute subject to the rule of lenity, where there is room for debate, one should not choose the construction that disfavors the defendant. see **Moskal v. United States**, 498 U. S. 103 (1990). Cf. **Burrage v. United States**, 571 U.S. ___, 134 S.Ct. 881 (2014); **United States. v. Lanier**, 520 U.S. 259 (1997).

The writ should be granted based on **Sup.Ct. R. 10 (a) and (c)**, in that the United States Court of Appeals has procedurally defaulted an important question of federal law that has not been, but should be, settled by this Court, *and* has decided an important federal question in a way that conflicts with relevant decisions of this Court, (i.e., **Jackson v. Virginia**, 443 U.S. 307 (1979)). Even absent a conflict in the decision, the federal courts has "so far departed from the accepted and usual course of judicial proceedings [] as to call for an exercise of this Court's supervisory power,".

Q6: Under the procedural aspects of the **14th Amendment** Due Process Clause, when a state habeas judge verbatim adoption prepared by a prevailing party contains internal evidence suggesting that the judge may not have read them; Is the state court's fact-finding procedure, hearing, and proceeding full, fair, and adequate if [t]he order is an artifact of [the State's] having drafted [it] with specific intent of not producing a fair and impartial assessment of the facts and law, and deliberately glossed over and camouflaged significant attorney errors in order to ensure that those errors are shielded from any meaningful review?

ARGUMENT:

Westmoreland has repeatedly raised an issue before state and federal courts that required further factual development -- whether the state habeas court's factual findings warrant deference, in light of what Westmoreland claim was a deficient procedure employed by the state habeas corpus court in reviewing the ineffective assistance claims. Westmoreland essentially argues that the state court's 'fact-finding procedure,' 'hearing,' and 'proceeding' were not 'full, fair, and adequate.'"

subsequently set for Novemeber 20, 2013. However, while present at the courthouse awaiting scheduled hearing, the *'correctional officer'* advised Westmoreland that the judge said [the] case was ***"reschedule" or "postponed"*** to another date. Westmoreland insisted that the correctional officer advise the habeas judge that as a pro se litigant, [he] wished to address the court. The officer declined the request.

Eventually, the habeas court adopted the Respondent's proposed order verbatim and did not omit any portions of the proposed order or insert any additional findings of its own. There is no genuine proof that the habeas court conducted an independent inquiry of the facts and laws of this case proceedings. There is no record or mere mention of the evidence (i.e., pending motions, exhibits, document requests, sworn affidavits, conflict resolution letters, briefs, amendments or post-conviction collateral attacks) filed by Westmoreland- in the states proposed order. (Appendix L)

(iii). SUBSTITUTE APPELLATE COUNSEL FAILURE TO WITHDRAW IN WRITING:

In both petitions Westmoreland raised claim of ineffectiveness of substitute appellate counsels for failure to withdraw in writing so that [he] could file a timely motion of reconsideration of [his] direct appeal. This claim stemmed from a *very uncommon withdrawal practice of circuit defender's in Georgia*, after denial of direct review by the state appellate courts. Westmoreland filed a timely Pro Se Motion for Reconsideration of his direct appeal, which was rejected by the clerk of court because counsel was required to withdraw in writing. (Appendix P, Q)

In the order drafted by the State and adopted by the state habeas judge, on merits, the order concluded that "Petitioner failed to question appellate counsel on this issue at the evidentiary hearing. Thus, he failed to meet the burden of proof to show that appellate counsel was ineffective based on the standard....[A]ccordingly, ground [] provides no basis for relief."

Westmoreland concedes that he did not question appellate counsel on this issue. However, included in the habeas files, attached to denial of direct appeal is a client-lawyer letter from Clayton purportedly showing counsel stating that case was ***final*** on the date of the Georgia Supreme Court's decision [6/28/10] and advising [Westmoreland] that [he] had 4 years to challenge [] conviction by way of habeas corpus. Also in evidence was Westmoreland's correspondence to the state supreme court clerk attached to pro se Motion for Reconsideration and response from the clerk advising that counsel had to withdraw in writing. (Pet. Ex. 29-32). Id.

(iv) EXTRAORDINARY MOTION FOR NEW TRIAL:

In both state and federal habeas courts, Westmoreland raised significant claim that his rights were violated because the trial court denied his extraordinary motion for new trial on the ground that he did not prove the Cobb County vehicle pursuit policy was newly discovered.

After the state supreme court ruled that the policy alluded to was not presented to the jury and not on the record of appeal therefore it did not factor into their evidentiary review, Westmoreland filed extraordinary motion in the trial court at the first instance. Westmoreland made the court aware of how the evidence was discovered after motion for new trial was denied. (Appendix M). The updated policy would change the rulings in denial of original motion for new trial.

At the State Habeas hearing, substitute appellate circuit defender Clayton testified that:

(a) being appointed so late in the case, ***"in a sense"*** presented special and unique challenges to his representation and **it was unusual to be appointed at this part of the proceeding...**; (b) in preparing for the appeal, he spoke to Westmoreland's former attorney, discussed the case with Westmoreland, and researched the Cobb County pursuit policy...; and (c) *he did not see a way to file an extraordinary motion for new trial based on the outdated vehicle pursuit policy* being included in the original motion for new trial *because by the time he came into the case, the appeal had already been docketed in the georgia supreme court and trial court was without jurisdiction to hear such a motion at that point...*; (HT 7-15). Cf. **Bivins v. McDonald,** 177 S.E. 829 (1934).

However, the order drafted by the State and adopted by the state habeas judge ruled that "petitioner failed to raise claim[] on appeal and was therefore procedurally defaulted under (9-14-48 (d)." The verbatim adoption contained internal evidence suggesting that the judge may not have read it because the extraordinary motion for new trial is a post conviction collateral attack filed in the trial court **after** the the case has been affirmed on direct appeal.

This demonstrated inconsistent application of the state procedural default rule. See **Corner v. Hall**, 645 F.3d. 1277 (11th Cir. 2011) (habeas review not precluded).

II. ADOPTION OF STATE'S PROPOSED FINAL ORDER WHICH WAS ARBITRARY AND CAPRICIOUS:

The state court merely signed an order drafted by the state without revision of a single word, even though the order cites **Strickland v. Washington**, 466 U.S. 668 (1984). The order signed by state habeas court with respect to Westmoreland's grounds: [(1-2), (5-8), (11-21), (23-29), (31-68), (71-80), (94-95), (97-107), (109-110), {*112}, (114), (116-118), (120), {*122}], conveniently denied the allegations and continually stated that "regardless of whether these claims were timely raised at trial under the relevant

procedure rule, these claims were not raised as error on appeal. Thus, they are procedurally defaulted under O.C.G.A. 9-14-48 (d)". **Petitioner has failed to offer any evidence** and has thus not met his burden to show cause in the form of ineffective assistance of counsel at the appellate level for failure to raise these on appeal and to establish prejudice based on the procedural [rule]. Petitioner has thus failed to overcome the procedural bar to consideration of these issues. Accordingly, grounds [] provide no basis for relief."

[T]he verbatim adoption from the State's proposed order critically incorporates [the State's] selective use of evidence and mischaracterization of the evidentiary record. [T]he order is an artifact of [the State's] having drafted [it] with specific intent of not producing a fair and impartial assessment of the facts and law, and deliberately glossed over and camouflaged significant attorney errors in order to ensure that those errors are shielded from any meaningful review. Cf. **Anderson v. City of Bessemer City**, 470 U.S. 564 (1985). See **Jefferson v. Sellers**, 250 F.Supp. 3d. 1340 (2017) and **Johnson v. Holt et.al.** U.S. Dist. LEXIS 29244 (2017).

In laying out its concerns, this Court noted that, while the verbatim adoption by a court of findings of fact prepared by a prevailing party is often permissible, the use of such a practice might be procedurally problematic "where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them." [Cit.] [Cit.]. "[A] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." **United States v. United States Gypsum Co.**, 438 U.S. 422 (1978).

The writ should be granted based on **Sup.Ct. R. 10 (a) and (c)**, in that the United States Court of Appeals has ignored an important question of federal law that has not been, but should be, settled by this Court, because Georgia Habeas Corpus Court Judges have a long history of adopting the State Attorney General's proposed final orders' in state prisoners' habeas corpus cases. A vast majority of pro se incarcerated litigants are not schooled or trained in law and the prison officials no longer provide legal aide assistance in the State of Georgia-- cases that results in habeas corpus denials.

Q7: If a state court omits context from a statutory provision utilizing quotations and ellipsis[51] while

simultaneously applying clearly established federal law, and the omission, if submitted, would alter the entire decision in the proceeding; Does this implicates Constitutional Guarantees to Due Process and Equal Protection?

I. DUE PROCESS:

'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 14th Amendment.

II. EQUAL PROTECTION:

'Equal Protection' emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."

ARGUMENT:

A. The state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States (Jackson v. Virginia);

Jackson v. Virginia, 443 U.S. 307 (1979), this Court held: the applicant is entitled to habeas corpus relief if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

> The Constitution protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. The reasonable doubt standard plays a role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bed-rock "axiomatic and elementary" principles whose "enforcement lies at the foundation of the administration of our criminal law" **Coffin v. United States**, 156 U.S. 432 (1895).

B. The state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

i. Direct Appeal

On direct appeal, substitute appellate circuit defender raised claim that the evidence was insufficient to support Westmorland's convictions because the vehicle pursuit in this case violated Cobb County Police Department policy and was an intervening cause of the collision. The policy effective on the date of the accident was not presented at trial or properly at the motion for new trial hearing. However, updated policy was attached to appellate brief on direct appeal. The court rejected the argument, holding that "*the*

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[51] ***Ellipsis*** [n.]: Omission; a figure of syntax, by which one or more words, which are obviously understood, are omitted;

policy alluded to was not presented to the jury and is not contained on the record of appeal, [a]ccordingly, that material do not factor into our evidentiary review." The court also held that counsel's decision not to obtain the policy was "*informed strategy*". Meanwhile the court applied O. C. G. A § 40-6-6(d)(1) and (d) (2), for the proposition that:

> "[w]hen a law enforcement officer [] is pursuing a fleeing suspect in another vehicle and the [] suspect [] injures or kills any person during the pursuit, the [] "'officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death [...] unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures.'" [...]. And even where such reckless disregard exists, it [] shall not in and of itself establish causation." Id.

ii. Pro Se Motion For Reconsideration:

Westmoreland received the decision on direct appeal in the U.S. mail, with less than a week to timely challenge the ruling. Substitute appellate circuit defender advised [Westmoreland] through correspondence, that the case was "final" and [he] had "4 years to challenge the conviction by way of filing habeas corpus". (Pet. Ev. 29) (Appendix P) Westmoreland immediately filed a pro se Motion for Reconsideration in the state supreme court, raising several claims (including construction of statutes as federal constitutional violations). (Pet. Ev. 31);

Subsequently, the clerk corresponded that as long as [Westmoreland] was represented by any counsel, the court was unable to accept a filing for [him], and the attorney must withdraw in writing to be removed as counsel in [the] case. (Pet. Ev. 32). (Appendix Q)

iii. Pro Se Post Conviction Collateral Attacks

Westmoreland specifically raised the state supreme courts construction of the statute in both **Extraordinary Motion for New Trial** and **Extraordinary Motion in Arrest of Judgement,** including **Amendments** and **Discretionary Appeals** in both actions, in the state supreme court. (Appendix M, N)

iv. State Habeas Corpus

In Ground 83 of original state habeas petition, Westmoreland raised [***Spoliation*; Equal Protection violation of the 5th and 14th Amendment of the U.S. Const.;** 14th Amendment statutory classification violation; 5th Amendment Due Process of statute violation.'

> *'The Georgia Supreme Court abused it's discretionary duties in [Division 1] of Movants case; the court neglected to properly interpret 2 Georgia statutory laws, by omitting language in quoted context. (a scheme to confuse a layman with the lack of legal knowledge to understand through due diligence that the omitted elements goes strictly to Movants defense, concerning proximate cause) Because it forces the policy to be an issue. The Prohibited Policy."*

In Ground 115 of amended habeas petition, Westmoreland raised [***Spoliation***; **Equal Protection violation of the 5th and 14th Amendment of the U.S. Const.**; 14th Amendment statutory classification violation; **14th Amendment Due Process of statute violation**.]'

> *"[E]qual protection rights were violated because the Supreme Court of Georgia, in its opinion in [Westmoreland's] appeal, omitted certain language from a statute that was relevant to the entire case."*

The order drafted by the State and adopted by the habeas judge concluded that:

> "A habeas corpus action is not to be used as a means of obtaining a second appeal and it is not the function of State Habeas courts to review issues already decided by an appellate court. **Brown v. Ricketts** [Cit.] (1975). Moreover, the rulings of the Supreme Court are binding on this Court. **Roulain v. Martin** [Cit.] (1996). Accordingly, grounds 81 through 93 [and 115] provide no basis for relief."

v. Federal Habeas Corpus

In Ground 50, *of* original federal habeas petition, Westmoreland raised [**5th and 14th Amendment Due Process Violation; 14th Amendment Equal Protection Violation; Spoliation**; Miscarriage of Justice.] and stated as supporting facts that:

> *"The Georgia Supreme Court neglected to properly interpret (2) state laws, by strategically omitting unambiguous language, using quotations and ellipsis' to distort legislatures intent and confuse a layman. The Court has never omitted language when applying either state statutory laws in any case prior to Petitioner's"* (Doc. 1 @ 55).

The Magistrate (R&R), which became the ruling of the District Court held:

> Warden Johnson contends that Westmoreland's grounds 48-57 "do not state claims for relief, as they do not allege violations of constitutional rights." [91-1] at 23. Each of those grounds asserts that "[t]he Georgia Supreme Court abused it's discretion" in making a factual finding or applying state caselaw or statutes. See [1] at 48-62. To the extent these grounds assert violation of state law, they are no basis for Federal Habeas relief. See **Wilson v. Corcoran**, 562 U.S. at 5; **Estelle v. McGuire**, 502 U. S. at 67. And to the extent these "grounds" are Westmoreland's attempt to overcome the presumption of correctness that state court factual determination are entitled to on federal habeas review, he has not proffered the "clear and convincing evidence" necessary to do so. 28 U.S.C. § 2254(e)"'

Westmoreland objected to the Magistrate's (R&R), because (1) Ground raised significant Due Process and Equal Protection claim of constitutional dimension and, abuse of discretion wasn't elicited in all grounds as stated by Respondents and the federal courts.

C. 40-6-6 is found in Official Codes of Georgia Annotated (O.C.G.A.) under Title 40 of the Uniform Road Rules of Georgia.

(i) O.C.G.A. § 40-6-6 (d)(1) provides in pertinent part: the foregoing provisions shall not relieve the driver *of an authorized emergency vehicle* from the duty to drive with due regard for the safety of all persons.

(ii) O.C.G.A. § 40-6-6 (d)(2) provides:

> [w]hen a law enforcement officer *in a law enforcement vehicle* is pursuing a fleeing suspect in another vehicle and the *fleeing* suspect *damages any property or* injures or kills any person during the pursuit, the *law enforcement* officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death *caused by the fleeing suspect* unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures *in the officer's decision to initiate or continue the pursuit*. Where such reckless disregard exists, *the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard* shall not in and of itself establish causation.

(iii) Ellipsis (noun) {Merriam-Webster}; *(Cf. Footnote 51 above)*

1a : the omission of one or more words that are obviously understood but that must be supplied to make a construction grammatically complete; b : a sudden leap from one topic to another.

2 : marks or a mark (such as ...) indicating an omission (as of words) or a pause.

(a) Relevant Omitted Context:

"...in the officer's decision to initiate or continue the pursuit...."

[Where such reckless disregard exists,] ***the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard***

[shall not in and of itself establish causation.]

(b) Legislature's Intention:

> Legislature intended by former Code **1933, § 68-301** to do two things: (1) to give the drivers of certain authorized emergency vehicles the right to travel when occasion required it at a speed in excess of the limit fixed by the provision applicable to motor vehicles generally; and (2) to protect the public on highways, and even those riding in the vehicles thus favored, from reckless disregard of their safety by the drivers of these privileged vehicles. **Archer v. Johnson**, 83 S.E.2d 314 (1954).
>
> **Ga. L. 1953, Nov. - Dec. Sess. p.** 556 grants special privileges in operation of emergency vehicles, but sets out conditions for operation (which include the use of sirens lights), and provides for liability when there has been a reckless disregard for the safety of others. Violation does not necessarily make the driver of the emergency vehicle liable, but it keeps open the issue of causation, which otherwise would be disclosed. **City of Winterville v. Strickland**, 194 S.E.2d 623 (1972).

Westmoreland submits that the state supreme court omitted crucial context from O.C.G.A. 40-6-6 (d)(2) utilizing ellipsis quotations. It's not the interpretation as much, but issues of constitutional concern arises with the dilatory omitting context from a state law. The context that was omitted, is crucial to any proximate or intervening cause or proper law enforcement procedures argument. Most significantly, it

specifically references an officer's decision in "initiating and continuing" a pursuit. The trial court's rulings on the outmoded policy and the statute forces the effective policy to be considered, which may offer just enough reasonable doubt to undermine felony murder charge.

The outmoded policy ruled on during motion for new trial stated that an officer "could use all reasonable means in order to apprehend a fleeing violator". Consequently, the denial stated that court "didn't allow counsel to cross examine officers concerning the policy because there wasn't a copy presented to the jury, and there was absolutely no disregard by the officers ***during*** the chase. A certified copy attached to the motion for new trial would not have revealed any. The policy was not relevant. The policy was the highest and best evidence of what it contained."

To the contrast, the updated policy was a "***lawful order***" stating that chasing is prohibited unless certain specified crimes are known to the pursuing officer. "Possible-burglary" or "drive-out tag" were not listed in the policy to authorize an officer to "initiate or continue" the pursuit.

The understanding of the statute in layman terms makes it clear that a law enforcement officer's chase may be the proximate cause of the injury or death caused by a fleeing suspect if the officers disregarded proper law enforcement procedures in initiating or continuing a pursuit. The law enforcement procedure for the officer's prohibited pursuits except for certain specified crimes known to the officer. Since officer's allegedly responded to a "possible-burglary in progress", a pursuit was not authorized. Furthermore, the officer testified that he attempting to effectuate a stop based on a traffic violation. Over half of all indicted crimes fall under Title 40 as vehicle-related instances. The state and federal courts and Respondents has never contended that the statute was enacted for criminal verses civil cases.

D. Hypothetically, If Ground Doesn't Raise A Claim For Relief, --as the State and Federal courts and the Respondents has maintained, --the logical question posed is: Why Would That Particular Context Need To Be Omitted And What Affect The Construction Has On The Entire Case And Potentially The Integrity Of The Judiciary?

The answer is simple. The omitted context supports Westmoreland's argument that the pursuit may potentially be the proximate or intervening cause of the accident in the officers decision disregarding law enforcement procedures in "initiating or continuing" the pursuit.

Notwithstanding the plain meaning of the statue (i.e O.C.G.A. § 40-6-6(d)(1)(2)) **(12 Ga. St. U.L. Rev. 295, 298 (1995))**, [t]he relevant conduct is the decision of the [officer's] to initiate or continue the pursuit, not how [they] drove [their] own vehicle during the course of the pursuit. Cf. **In Re Winship,** 397 U.S. 358 (1970) (As the dissenters in the New York Court of Appeals observed, and [this Court] agree[d], "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.")[52]

As for the Georgia Supreme Courts decision, the court below did not particularly address the clear substantive and procedural Due Process implications by disregarding the omission of words from the law. Whether it was state or federal judicial construction, the strategic use of ellipsis and quotations along with the contextual omission brought the judiciary into refute. Mainly because of how the unambiguous context of the provision not only plays to the felony murder defense, but its the law.

Westmoreland is aware that violations of state law are not cognizable in a 2254 proceeding "unless such violations are of constitutional magnitude." However, Due Process and Equal Protection are both claims "of constitutional magnitude". When state opts to act in the field where its action has significant discretionary elements, it must nonetheless act in accord with dictates of Constitution and, in particular, in accord with due process of law. **U.S.C.A. Const. Amend. 14.**

The court applied statute, sections (d) (1) and (d) (2) and omitted explicit language; The omitted context of the state statutory law provision was relevant to the entire case, concerning officers disregard for proper law enforcement procedures in initiating and continuing the pursuit. The mis-construction of the provision disregarded Legislature intention. Nevertheless, there was a due Due Process and Equal Protection Clause issue because the Georgia Supreme Court, has never, in any case, omitted language when applying the statute, in the history of the court, until Westmoreland's case.

The writ should be granted based on **Sup.Ct. R. 10 (a) and (c)**, in that the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; and has decided an important federal question in a way that conflicts with relevant decisions of this Court, (i.e., Jackson v. Virginia, supra.). There remain doubt about the constitutional stature of the reasonable-doubt standard, and this Court has previously -explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

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[52] 24 N. Y. 2d, at 205, 247 N. E. 2d, at 259.

CONCLUSION

The petition for a writ of certiorari should be granted.

Submitted this 31 day of August, 2020

Respectfully Submitted,

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