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

APPENDIX

Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (H-1 109M)

1412 Plunkett Road

Unadilla, Georgia 31091

TABLE OF CONTENTS

APPENDIX A-

Eleventh Circuit Court of Appeals, **Westmoreland v. Johnson et.el.,** No. 19-13759. Order entered February 25, 2020.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[illegible] COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia [illegible]

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

February 25, 2020

Amos Westmoreland
Dooly SP - Inmate Legal Mail
PO BOX 750
UNADILLA, GA 31091

Appeal Number: 19-13759-B
Case Style: Amos Westmoreland v. Warden, et al
District Court Docket No: 1:14-cv-01315-TWT

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

Sincerely,

DAVID J. SMITH, Clerk of Court

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

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13759-B

AMOS WESTMORELAND,

Petitioner-Appellant,

versus

WARDEN,
COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

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

ORDER:

To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Amos Westmoreland's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

APPENDIX B-

Eleventh Circuit Court of Appeals, **Westmoreland v. Johnson et.el.,** No. Judgement entered June 11, 2020.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13759-B

AMOS WESTMORELAND,

Petitioner-Appellant,

versus

WARDEN,
COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

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

Before: GRANT and LUCK, Circuit Judges.

BY THE COURT:

Amos Westmoreland has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 25, 2020, order denying a certificate of appealability in his appeal from the denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Westmoreland's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C-

Northern District of Georgia Order, **Westmoreland v. Johnson et.el.,** No. 1:14-CV-1315-TWT.
Judgement entered July 31, 2019.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, JR.,

Petitioner,

v.

GLEN JOHNSON
WARDEN, et al.,

Respondent.

CIVIL ACTION FILE
NO. 1:14-CV-1315-TWT

ORDER

This is a pro se habeas corpus action by a state prisoner. It is before the Court on the Report and Recommendation [Doc. 99] of the Magistrate Judge recommending denying the Petition. The Petitioner is serving a life sentence for felony murder. The Georgia Supreme Court summarized the facts of the Petitioner's case as follows:

> *Viewed in a light most favorable to the verdict, the evidence shows that on the morning of May 17, 2007, homes belonging to Alison Murphy and Jeanne and George Wern were burglarized in Marietta, Georgia. Among the numerous items taken were jewelry and a large screen television set. That morning a neighbor driving in the vicinity of the Wern home observed two young males in a blue, older model station wagon, with a blue tarp tied to the roof, and no license plate displayed. The neighbor became suspicious and followed the car. She observed it minutes later parked in the Werns' driveway; the car doors were open*

> and no occupants were visible inside. The police were notified and a marked patrol car arrived in the area as the blue station wagon was leaving the neighborhood. The officer activated his blue emergency lights and siren in an effort to stop the vehicle; however, the driver of the station wagon failed to accede to the officer's signals, and instead drove his vehicle onto Interstate 575 northbound. Additional patrol cars joined in pursuit. The driver of the station wagon continued his attempt to elude the police, and in the process, a large screen television taken from the Wern home dislodged from under a tarp on the roof and crashed onto the roadway. After the police attempted a box maneuver to stop the fleeing vehicle, the station wagon executed a U-turn in the median and drove into the southbound lanes of Interstate 575 where it collided with a Buick being driven by Robins and occupied by four passengers. The Buick rolled over twice and landed on its side, killing Robins and seriously injuring the front seat passenger. Both the driver and passenger in the station wagon fled on foot and were pursued by the police and soon apprehended. Georgia identification cards in the pockets of both suspects identified the driver as appellant Westmoreland and the passenger as appellant Williams. Items taken from the two burglarized homes were found in their possession as well as in the station wagon.

Westmoreland v. State, 287 Ga. 688, 688–89, 699 S.E.2d 13, 17 (2010). The grounds for relief stated in the Petition are set forth in the Report and Recommendation. The Petitioner has filed Objections to the Report and Recommendation but fails to provide any basis for the Objections. For example, the Petitioner objects to the Magistrate Judge considering the Order of the State habeas corpus court. His claims of ineffective assistance of counsel based upon a "conflict of interest" are totally without merit. He 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. The Court approves and adopts the Report and Recommendation as the judgment of the Court. The Petition is DENIED. *No Certificate of Appealability* will be issued.

SO ORDERED, this 31 day of July, 2019.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

Orders on Motions

1:14-cv-01315-TWT Westmoreland v. Johnson et al

Suspense,2254,CMS,HABEAS,REOPEN,SLC4,SUBMDJ

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 8/1/2019 at 12:08 PM EDT and filed on 7/31/2019
Case Name: Westmoreland v. Johnson et al
Case Number: 1:14-cv-01315-TWT
Filer:
Document Number: 104

Docket Text:
ORDER adopting [103]Final Report and Recommendation. No Certificate of Appealability will be issued. Signed by Judge Thomas W. Thrash, Jr. on 7/31/19. (bmm)

1:14-cv-01315-TWT Notice has been electronically mailed to:

Matthew Blackwell Crowder mcrowder@law.ga.gov, psmith@law.ga.gov

1:14-cv-01315-TWT Notice has been delivered by other means to:

Amos Westmoreland, Jr
GDC 1041629
Dooly State Prison
PO BOX 750
Unadilla, GA 31891

The following document(s) are associated with this transaction:

Document description:Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1060868753 [Date=8/1/2019] [FileNumber=10191480-0
] [0399b66408407d63418d81082c7fa2a32c5ff28e17cf1d3186f2bc566f21bf78c7e
2030d3ed6eb6ba11e899d12c4c76d8d38117ec2840559e5c48593447c0e6]]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, JR.,
Petitioner,

vs.

GLEN JOHNSON, *Warden*, and BRIAN OWENS, *G.D.O.C. Commissioner*,
Respondents.

CIVIL ACTION FILE

NO. 1:14-cv-1316-TWT

JUDGMENT

This petition for a writ of habeas corpus having come before the court, Honorable Thomas W. Thrash, United States District Judge, for consideration of the Magistrate Judge's Final Report and Recommendation, and the Court having **APPROVED** and **ADOPTED** said recommendation, it is

Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is, **denied and dismissed**. No Certificate of Appealability will be issued.

Dated at Atlanta, Georgia, this 1st day of August, 2019.

JAMES N. HATTEN
CLERK OF COURT

By: s/ B. Walker
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
August 1, 2019
James N. Hatten
Clerk of Court

By: s/ B. Walker
Deputy Clerk

Other Events

1:14-cv-01315-TWT Westmoreland v. Johnson et al

0months,2254,CMS,HABEAS,REOPEN,SLC4,SUBMDJ

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 8/1/2019 at 12:10 PM EDT and filed on 8/1/2019
Case Name: Westmoreland v. Johnson et al
Case Number: 1:14-cv-01315-TWT
Filer:
Document Number: 105

Docket Text:
CLERK'S JUDGMENT :It is Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is, denied and dismissed. No Certificate of Appealability will be issued. (bnw)--Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist--

1:14-cv-01315-TWT Notice has been electronically mailed to:

Matthew Blackwell Crowder mcrowder@law.ga.gov, psmith@law.ga.gov

1:14-cv-01315-TWT Notice has been delivered by other means to:

Amos Westmoreland, Jr
GDC 1041629
Dooly State Prison
PO BOX 750
Unadilla, GA 31891

The following document(s) are associated with this transaction:

Document description:Main Document
Original filename:n/a
Electronic document Stamp:
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] [23780a5a22f1f125fffc97b73749ac067387dad8a8555a6691bf1b0b1baee1d62f5
b88f09a3bb0bca658d1a85fdbe7871a0c83ab85148c533d5e349a8a751506]]

APPENDIX D-

Northern District of Georgia, **Westmoreland v. Johnson et.el.**, No. 1:14-cv-01315-TWT-CMS.
Report and Recommendation entered June 26, 2019.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, JR., GDC ID 1041629, Petitioner,	:	HABEAS CORPUS 28 U.S.C. § 2254
v.	:	CIVIL ACTION NO. 1:14-CV-1315-TWT-CMS
GLEN JOHNSON, Warden, Respondent.	:	

FINAL REPORT AND RECOMMENDATION

This is a *pro se* habeas corpus action brought by Amos Westmoreland, Jr., a state prisoner. For the reasons stated below, I **RECOMMEND** that Westmoreland's petition [1], as supplemented [87], be **DENIED** because he is not entitled to federal habeas relief on any of the 62 grounds for relief that he raised, and I further **RECOMMEND** that a Certificate of Appealability be **DENIED.**

The Georgia Supreme Court summarized the facts that led to Westmoreland's conviction and incarceration as follows:

> [O]n the morning of May 17, 2007, homes belonging to Alison Murphy and Jeanne and George Wern were burglarized in Marietta, Georgia. Among the numerous items taken were jewelry and a large screen television set.
>
> That morning a neighbor driving in the vicinity of the Wern home observed two young males in a blue, older model station

> wagon, with a blue tarp tied to the roof, and no license plate displayed. The neighbor became suspicious and followed the car. She observed it minutes later parked in the Werns' driveway; the car doors were open and no occupants were visible inside. The police were notified and a marked patrol car arrived in the area as the blue station wagon was leaving the neighborhood. The officer activated his blue lights and siren in an effort to stop the vehicle; however, the driver of the station wagon failed to accede to the officer's signals, and instead drove his vehicle onto Interstate 575 northbound. Additional patrol cars joined the pursuit. The driver of the station wagon continued his attempt to elude the police, and in the process, a large screen television taken from the Wern home dislodged from under a tarp on the roof and crashed onto the roadway. After the police attempted a box maneuver to stop the fleeing vehicle, the station wagon executed a U-turn in the median and drove into the southbound lanes of Interstate 575 where it collided with a Buick being driven by [Barbara Turner] Robins and occupied by four passengers. The Buick rolled over twice and landed on its side, killing Robins and seriously injuring the front seat passenger. Both the driver and passenger in the station wagon fled on foot and were pursued by the police and soon apprehended. Georgia identification cards in the pockets of both suspects identified the driver as appellant Westmoreland and the passenger as appellant [John Edgar] Williams. Items taken from the two burglarized homes were found in their possession as well as in the station wagon.

Westmoreland v. State, 699 S.E.2d 13, 16-17 (Ga. 2010) (footnote omitted). In addition, "[t]he evidence at trial established that the pursuing vehicles did not exceed the posted speed limit." *Id.* at 18 n.3.

Westmoreland and Williams were jointly indicted, tried, and convicted. *See id.* at 16. Both were found guilty of burglary (two counts), attempting to elude a pursuing police officer (two counts), operating a

vehicle without a secure load, felony murder predicated on burglary, felony murder predicated on attempting to elude, and obstruction of a police officer. *See id.* at 17 n.1. Westmoreland was also found guilty of reckless driving, homicide by motor vehicle, and serious injury by motor vehicle. *See id.* Both defendants were sentenced to life in prison for felony murder while in the commission of a burglary, and Westmoreland received a consecutive 15-year sentence for serious injury by motor vehicle and concurrent 12-month terms on the misdemeanor counts. *See id.* "The remaining counts were merged or vacated by operation of law." *Id.*

Westmoreland filed a motion for new trial through his trial counsel, David Marotte. This motion was amended twice to raise additional issues by new counsel, Louis Turchiarelli. When that motion was denied, Westmoreland appealed through a third attorney, Carter Clayton.

On direct appeal, Westmoreland contended that (1) "the evidence adduced at trial was insufficient to prove felony murder because the death of the victim was not committed 'in the commission' of the burglary, but after the burglary was completed and he was attempting to flee," (2) "the trial court abused its discretion because it improperly abridged his right to cross-examine one of the investigating officers concerning Cobb County's vehicle

pursuit policy," and (3) "he was denied effective assistance of counsel at trial and on motion for new trial" because (A) "trial counsel was ineffective in failing to properly investigate and present evidence of Cobb County's policy concerning pursuit of a fleeing suspect" and (B) "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." *Id.* at 17-19.

The Georgia Supreme Court rejected Westmoreland's first argument because, as a matter of state law, the burglary was deemed ongoing "during the escape phase of the felony" and the pursuit could not be considered an "intervening cause of the collision." *See id.* at 17-18 (citing O.C.G.A § 40-6-6). The Georgia Supreme Court rejected Westmoreland's second argument because trial counsel did not preserve an objection to this limitation on cross-examination in the manner required by state law, thus waiving the issue as a basis for appeal. *See id.* at 18. And the Georgia Supreme Court rejected Westmoreland's third argument based on its determinations that (A) trial counsel made an "informed strategic decision" not "to suggest to the jury that the conduct of the officers was the proximate cause of the fatality because he was attempting to convince the jury to acquit on the felony murder charges

and to find Westmoreland guilty of a lesser offense" and (B) post-conviction counsel's failure to attach the Cobb County vehicle pursuit policy had not prejudiced Westmoreland because there was "no reasonable probability that such evidence, had it been introduced, would have resulted in a favorable ruling on the motion for a new trial." *Id.* at 19.

After "Westmoreland's conviction became final on October 25, 2010, . . . he filed an extraordinary motion for a new trial in the Georgia trial court on May 2, 2011." *Westmoreland v. Warden*, 817 F.3d 751, 754 (11th Cir. 2016). Shortly after "[t]he state trial court denied the motion on the merits on June 9, 2011," Westmoreland "filed his state habeas petition on October 28, 2011." *Id.* And, while his state habeas petition was still pending, Westmoreland initiated this case by signing and "filing" a federal habeas petition on April 25, 2014. *See* [1] at 68.

Warden Johnson moved to dismiss Westmoreland's federal habeas petition on the grounds that it was untimely and/or that he had failed to exhaust all available state remedies. *See* [11].

In October 2014, Magistrate Judge E. Clayton Scofield III entered a Final Report and Recommendation recommending that the case be dismissed as untimely, without reaching the issue of exhaustion. *See* [22].

In December 2014, the Honorable Thomas W. Thrash, Jr. dismissed this case, stating that:

> Although the Petitioner appears to argue that the one year limitations period was tolled while his *pro se* extraordinary motion for new trial was pending, he does not address the Respondent's claim that this action was filed while the Petitioner's state habeas corpus action was still pending . . . . Indeed, that is undisputed. Therefore, this action should be dismissed for lack of exhaustion of state court remedies.

[26] at 1.

In March 2016, the Eleventh Circuit reversed and remanded, concluding that "[t]he District Court held that the petition was untimely based on the limitations period in 28 U.S.C. § 2244(d)(1)." *Westmoreland*, 817 F.3d at 752. The Eleventh Circuit concluded that "[t]he District Court dismissed Mr. Westmoreland's petition without properly considering the effect of the extraordinary motion for a new trial" and observed that "[t]he state bears much responsibility for this mistake," because the state omitted that pleading when filing the record and then objected when Mr. Westmoreland twice moved to have that motion added to the record before this Court. *Id.* at 754.

The Eleventh Circuit noted that, on appeal, the state "concede[d] that 'the petition was timely filed' because the 'one-year [federal limitations]

period should have been tolled while the extraordinary motion for new trial was pending in the Georgia courts.'" *Id.* (quoting the state's Brief). And the Eleventh Circuit further noted that "[i]f the state had made this concession back in 2014, when Mr. Westmoreland repeatedly pointed the state's attention to his state-court motion, then the District Court would have had the means to decide the timeliness issue correctly the first time around." *Id.*

The Eleventh Circuit "decline[d] the state's invitation to consider the exhaustion issue" on appeal. *Id.* at 755. Rather, the Eleventh Circuit directed this Court, "[w]hen considering the exhaustion issue on remand, . . . [to] determine whether cause and prejudice excuse any possible failure to exhaust," and, "[i]f not, [whether] a stay and abeyance is proper while Mr. Westmoreland exhausts state remedies." *Id.*

Judge Thrash ordered that the mandate of the Eleventh Circuit be made the judgment of this Court, *see* [41], and denied Warden Johnson's Motion to Dismiss, *see* [43].

Warden Johnson filed a Renewed Motion to Dismiss Petition for Lack of Exhaustion. *See* [44]. I entered a Final Report and Recommendation recommending that the motion to dismiss be granted, but subsequently vacated my recommendation when Warden Johnson filed a notice

acknowledging that Westmoreland's state habeas case had finally reached its end. *See* [47], [49] & [50].

This matter is now before me on Westmoreland's petition [1], as supplemented to add three additional grounds for relief [87], Warden Johnson's Second Amended Answer-Response [91] and Brief [91-1], and Westmoreland's 103-page singled-spaced "Rebuttal and Supporting Brief" (*i.e.*, Traverse) [92].

I have construed Westmoreland's filings liberally because he is proceeding *pro se*. *See, e.g., Dupree v. Warden*, 715 F.3d 1295, 1299 (11th Cir. 2013). Nonetheless, it is useful to begin by quoting Westmoreland's 62 grounds for relief verbatim.

(1) "Substitute Appellate Circuit Defender failed to raise conflict of interests with the Cobb County Circuit Defender's Office." [1] at 6;

(2) "Substitute Appellate Circuit Defender failed to review the entire record to raise core constitutional violations on Petitioner's only appeal as of right." [1] at 7;

(3) "Substitute Appellate Counsel sent Petitioner a letter stating that as of 6/28/10 Petitioner's case was final and Petitioner had 4 years to challenge conviction by way of Habeas Corpus. Petitioner filed an unsuccessful Motion for Reconsideration to the Georgia Supreme Court. Counsel failed to withdraw in writing and Petitioner had 10 days to file the motion." [1] at 8;

(4) "Throughout the habeas proceeding, Petitioner has raised several grounds and/or claims of constitutional dimension (Due Process) in which the Georgia Supreme Court affirmed the lower court's decision. Petitioner filed a 42 U.S.C. § 1983 Civil Rights Action against (13) public officials, including the 7 Georgia Supreme Court Justices standing on 6/28/2010. Due Process claims raised include grounds raised in State and Federal habeas corpus." [1] at 9;

(5) "After makeshift arraignment on January 10, 2008, Petitioner was appointed several public defenders until trial commenced on 10/20/08. On 1/30/08 an impermissible conflict of interest was imputed to the Cobb County Circuit Defender's Office." [1] at 10;

(6) "Trial Court did not adequately appoint effective assistance of counsel during pre-trial detainee stage. Petitioner was appointed multiple Cobb County Circuit Defenders assisted by (Mary Pope) <Circuit Defender Representative> prior to Petitioner's capital felony trial. Trial Court failed to initiate an inquiry into the existence of conflict." [1] at 11;

(7) "Petitioner was denied the right to be present at critical stage when he was held in a small, cold confinement cell on 1-10-08 while initial public defender waived formal arraignment. Days later, an undisclosed conflict occurred and initial public defender was abruptly removed from the case. Consequently, after multiple undisclosed impermissible conflicts of interest occurred with the Cobb County Circuit Defender's Office, Petitioner saw his Indictment 2 weeks prior to capital trial." [1] at 12;

(8) "On 1-10-08 Petitioner was absent from makeshift arraignment which was waived by initial appointed circuit defender. On 1-30-08, a conflict occurred and Gary Walker was appointed to the case. On 4-30-08, counsel requested and was granted a withdrawal citing 'personal problems.' Counsel never established any type of communication with petitioner or provide[d] petitioner with discovery, indictment, or his conflict." [1] at 13;

(9) "Counsel was appointed less than 30 days prior to Petitioner's capital felony trial: At the time of counsel's appointment, all previously filed motions by Circuit Defender's Office (including Motion to Hire an Independent Investigator to aid in preparation of the defense) were disregarded. Counsel was 4th Circuit Defender in 8 months due to conflict." [1] at 14;

(10) "Trial counsel was previous law clerk for Milton Grubbs (Trial Court's husband), and the conflict or possibility of a conflict was never properly raised by Trial Court or counsel. The issue was elicited by Trial Counsel after trial during Motion for New Trial Hearing. Exercising due diligence, Petitioner found counsel was previously an associate @ Grubbs & Grubbs with Trial Court and husband." [1] at 15;

(11) "Trial counsel practiced law and was an officer of the Court for 30+ years in Cobb County and had never, until Petitioner's case, stood a case in front of Trial Court. Issue was never properly raised to assess the possibility of a conflict; especially considering the limited time to prepare, 40% of counsel's cases were criminal, the complexity of the possible defenses and severity of the punishment." [1] at 16;

(12) "After trial counsel's appointment, Petitioner advised counsel that he had never s[een] his Indictment. Counsel sent Indictment by U.S. Mail. Petitioner received Indictment 2 weeks prior to his capital felony trial. Counsel never went over the Indictment with Petitioner." [1] at 17;

(13) "Trial Court neglected to disclose several possible conflicts on record that might reasonably be questioned or considered relevant for disqualification purposes. a). Trial Court's daughter was killed in a[n] auto-related accident + b). Trial Court and her late husband were previous law associates with Trial Counsel." [1] at 18;

(14) On 10/14/08 a pretrial motion hearing was conducted. On 10/17/08 a secret, undisclosed pretrial hearing was convened with Trial Court, Prosecutors and (4) Defense Counsel[] (Circuit Defenders) to discuss capital trial related issues. Petitioner was absent from such hearing, and the results of the hearing w[ere] not made known to Petitioner, verbally, through either Trial Counsel[], Trial Court, the State, or through valid transcripts. Transcripts show that hearing did in fact take place." [1] at 19;

(15) "Prosecutors stated in pretrial motion hearing that the state [would] not plac[e] any medical examiner photos into evidence. The medical examiner photos were later placed into evidence by the prosecution during trial (over defens[e] objections)." [1] at 20;

(16) "Trial counsel reluctantly adopted special demurrer challenging a void count in the Indictment. During initial pretrial hearing, counsel adopted withdrawal of said motion for tactical purposes. Counsel offered absolutely no evidence or defense to substantiate the tactic to influence the jury to find petitioner guilty of a lesser offense." [1] at 21;

(17) "Trial counsel[] were advised at motion hearing by trial court that no (2) counsel[] could argue an issue with their respective co-counsel. During closing arguments, both trial counsel[] showed their confusion on the ruling. Petitioner's co-counsel, Rick Christian, never verbally, constructively or sufficiently assist[ed] the defense." [1] at 22;

(18) Both of petitioner's trial counsel[] (circuit defenders) fail[ed] to raise conflict of interest; with the circuit defenders being the 4th and 5th court appointe[d] to represent petitioner within 8 months due to conflicts with the Cobb County Circuit Defenders Office. Rick Christian was petitioner's 5th circuit defender, sent through the Circuit Defender's Office to observe trial. Nonetheless, counsel[] were inexperienced in capital felony cases." [1] at 23;

(19) Trial counsel[] failed to raise conflict of interest considering the burden to represent petitioner without expert or private investigator or such experience or funds to hire such assistance to propel petitioner's defense. State expert witness (Cobb County Police Officer/accident reconstructor) Incident Report was part of discovery. Petitioner was provided incident report after Motion for New Trial was denied." [1] at 24;

(20) "Trial counsel met with petitioner on (3) separate occasions for (3) hours respect[ive]ly and failed to go over *any* discovery material, *any* evidence, *any* trial strategies or tactics, or the Indictment. Petitioner saw all of the state's evidence for the first time during capital felony trial. Counsel[] did not offer any evidence in aid of the defense, considering petitioner facing life imprisonment." [1] at 25;

(21) "Minutes prior to trial prosecutors violated petitioner's due process by failing to disclose exculpatory evidence which was requested prior to trial by several court appointed circuit defenders. The policy evidence at issue was favorable to petitioner because it was exculpatory, was suppressed by way of motion in limine and it prejudiced petitioner because it deprived the Judges of the Law and the Facts of weighing the sufficiency of the evidence." [1] at 26;

(22) "Trial court neglected to inquire into whether the jurors were exposed to pre-trial publicity in the case. Petitioner's case was exposed by media (newspaper and news station outlets). Separate articles concerning 8 auto-related fatalities included Petitioner's name and description of the charges." [1] at 27;

(23) "Trial court ruled minutes prior to trial that the Pursuit Policy would be the highest and best evidence. During cross-examination concerning the policy and procedure for pursuing a vehicle with the call that they received. The examination was objected to by the state and sustained on relevancy issue. The trial court ruled the policy would be the highest and best

evidence. The trial court failed to order disclosure of evidence." [1] at 28;

(24) "Trial court abused discretion and allowed the prosecutors (state) to dictate the entire trial. Trial court allowed evidence to be presented during the state's opening statement, over objection. The entire videotape of the police pursuit was played during the state's opening, and evidence was admitted into evidence later, during capital felony trial." [1] at 29;

(25) "Trial counsel[] failed to obtain the Police Chase Policy requested by petitioner prior to trial. Both circuit defenders were advising petitioner during trial that they were attempting to obtain the document. After trial, counsel revealed he sent co-counsel, then co-counsel['s] secretary or assistant to retrieve the policy, and he had never read the policy. Co-defendant['s] counsel had the policy: and he didn't plan to get the policy." [1] at 30;

(26) "Trial counsel neglected to request a proximate cause or intervening cause jury instruction in regards to felony murder and vehicular homicide." [1] at 31;

(27) "Trial counsel instructed the jury during defensive closing arguments to find petitioner guilty of several serious felonies without securing petitioner's consent, permission or approval of this tactic (including 11 of 14 indicted crimes)." [1] at 32;

(28) "Trial counsel changed his reasonable doubt requested charge 'to help the jury commissioners out.'" [1] at 33;

(29) "Trial counsel[] failed to make timely objections to several improper statements made by the prosecutors and co-defendant's counsel (circuit defender) during closing arguments. Disparaging Petitioner at a critical stage. Co-defendant's counsel Circuit Defender used defense closing argument to disparage Petitioner by blaming the entire case on Petitioner in front of jury." [1] at 34;

(30) "During closing arguments, the prosecutors improperly influenced the jury on 1) what consist of felony murder (burglary), 2) about police expectancy, and 3) about the continuation of the acts because Petitioner was in Cobb County "our county." Also during closing arguments, the prosecutor misled the jury on what consist of felony murder predicated on burglary." [1] at 35;

(31) "Trial court abused discretion when she denied Petitioner's [motion for a] direct[ed] verdict on felony murder (burglary) count because it was clearly [in]sufficient evidence to support a conviction that the burglary continued until the homicide occurred. The burglary was clearly and legally complete when Petitioner entered the dwelling without authority with the intent to commit a felony or a theft." [1] at 36;

(32) "During trial, the trial court advised attorneys not to object or interrupt her charge to the Judges of the Law and Facts. The charge was extremely long and counsel[] failed to object to several objectionable issues. The jury asked for a recharge, a written interpretation of the law and how it pertains to a case, and when did the commission of the burglary conclude. Trial court gave a partial recharge advising jury to remember charge from the previous day." [1] at 37;

(33) "Trial court abused discretion when she charged the Judges of the Law and Facts on felony murder predicate[d] on burglary. The charge was clearly confusing. The jury asked for written interpretation of the law and 'when did the commission of the burglary conclude?' The inquiry wasn't answered and trial court allowed it to dissipate. The confusing charge was distinguishable from the evidence presented in the case." [1] at 38;

(34) "The charge of law to the triers of fact on Felony Murder (Burglary): 'The homicide must have been done in carrying out the unlawful act. . . . It is not enough that the homicide occurred soon, or presently, after the burglary was attempted or committed. A homicide is committed in carrying out burglary

when it is committed by the accused while engaged in the performance of any act required for the full execution of the burglary.' The jury asked when did the commission of the burglary conclude. The burglary was complete when petitioner entered dwelling." [1] at 39;

(35) "Indictment (076020) alleges (2) counts of Attempting to Elude, and a count of Felony Murder predicate[d] on Attempting to Elude. The Indictment do[es] not [illegible] which Attempting to Elude serves as the underlying felon[y] for the Felony Murder. Petitioner was convicted on all (3) counts." [1] at 40;

(36) "Indictment (076020) alleges (2) counts of Burglary, and a Count of felony murder predicate[d] on Burglary. The Indictment does not el[]icit which Burglary serves as the underlying felony for Felony Murder. Petitioner was convicted on all (3) counts." [1] at 41;

(37) "Vehicular homicide count void where it fails to establish each and every essential element of the crime charged, predicate[d] on 'Reckless Driving as in Count 11.' The Indictment fail[ed] to establish a violation of statutory law, fail[ed] to establish what degree, fail[ed] to establish felony or misdemeanor, failed to establish each and every essential element in a single count." [1] at 42;

(38) "Vehicular homicide predicate[d] on Count 11 (Reckless Driving); Serious Injury by Motor Vehicle predicate[d] on Count 11 (Reckless Driving); Reckless Driving Count was merged into 15 year consecutive sentence on Serious Injury by Motor Vehicle, predicate[d] on Reckless Driving. Vehicular Homicide predicate[d] on same Reckless Driving Count was merged into Life Sentence (Felony Murder)." [1] at 43;

(39) "Petitioner was indicted, tried, and convicted on (2) counts of Felony Murder, all underlying felonies supporting Felony Murder counts, and Vehicular Homicide and there was only one death involved." [1] at 44;

(40) "Petitioner was indicted, tried, convicted, and sentenced on 7 counts of Title 40 (Uniform Road Rules); O.C.G.A.; and all 7 times spurred from the vehicle pursuit; valid statute 40-6-6(d)(1) & d(2) applies to policies and causation, and proper law enforcement procedures. The proper law enforcement procedure on 5-17-07 was vehicle pursuits were prohibited for burglary." [1] at 45;

(41) "During Motion for New Trial hearing, trial court threatened initial appellate counsel that she would recess proceeding to a later date. When appellate counsel was actively examining trial counsel about failing to obtain the pursuit policy after the court had ruled it to be the highest and best evidence. Trial Court also openly expressed and intimate[d] her personal opinions on the scope of what a high speed chase consisted of to her." [1] at 46;

(42) "During Motion for New Trial, prosecutor advised initial appellate counsel that the state realized that counsel had a certified copy of the policy. So defense-subpoenaed witness testimony was not necessary. The witness was initially subpoenaed to testimony to the validity and effectiveness of the policy presented. The evidence presented was outdated and did not reflect the policy active on 5-17-07." [1] at 47;

(43) "Initial appellate Circuit Defender was ineffective when he advised the Court that the state told him that they realize[d] that he had a certified copy of the policy, i[mplying] that defense-subpoenaed witness testimony was not necessary. Counsel proceeded with the state's concession without countervailing proof or argument. The witness (Record Custodian) was initially subpoenaed to testify to the validity and effectiveness of the evidence attached to Motion; which was subsequently outdated." [1] at 48;

(44) "In denying Petitioner's Motion for New Trial, Trial Court applied 'res gestae[],' to continue the commission of the burglary until the homicide occurred. 'Res Gestae[]' was not instructed to

the Judges of the Law and Facts. The elements in the 'res gestae[]' application are very distinguishable from the Felony Murder in Commission of Burglary Charge/Instructions to the Judges of the Law and Facts. Conclusion of Burglary was questionable." [1] at 49;

(45) "Denying Petitioner's Motion for New Trial, the judge ruled she 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. The policy in effect on 05-17-07 prohibited officers to initiate or continue a pursuit." [1] at 50;

(46) "In Order denying Petitioner's Motion for New Trial, Trial Court ruled that the chase videos were admissible; the question wasn't an admissibility issue per se, the error raised was that the videotape of the chase was improperly played during the state's opening statements. The video, along with several others, w[as] admitted later in capital trial." [1] at 51;

(47) "After denial of Motion for New Trial, Petitioner discovered evidence and presented it to the initial appellate counsel. A conflict arose and Petitioner constructively questioned counsel's performance. Counsel was substituted for lawyer/client understanding prior to direct appeal. Attorney failed to provide Petitioner with transcripts, post conviction investigative reports, or what issue[s] were being raised on appeal." [1] at 47;

(48) "The Georgia Supreme Court abused discretion by adopting and applying 'res gestae[]' to continue the burglary until the homicide. 'Res gestae[]' was not instructed to the jury during trial and is very distinguishable from the Felony Murder predicate[d] on the Burglary charge to the Judges of the Law and Facts." [1] at 48;

(49) "The Georgia Supreme Court abused discretion by quoting a case law to confuse a layman 'to adopt the argument that the burglary was complete when defendant left the building would eliminate burglary as an underlying felony . . . .' Petitioner has adopted this argument to the Georgia Supreme Court." [1] at 54;

(50) "The Georgia Supreme Court neglected to properly interpret (2) state statutory laws by strategically omitting unambiguous language, using ellipsis and quotations to distort [the] legislature's intent and confuse a layman. The Court has never omitted language when applying either state statutory law[] in any case prior to Petitioner's." [1] at 55;

(51) "The Georgia Supreme Court applied cases in which the factual and essential elements of the crimes differentiated from the facts of Petitioner's case, with distinguishable evidence respectfully. The stare decisis/case law does not el[]icit a police pursuit policy violation or intervening cause defense. Unreasonabl[y] applied Federal Law according to the facts and evidence in the case." [1] at 56;

(52) "The Court abused its discretion when it equivocally ruled in Division 1 that "the policy alluded to was not presented to the jury and is not contained on the record of appeal. Accordingly, that material does not factor into our evidentiary review." In Division 3, the Court ruled "we found no reasonable probability that such evidence . . . would've resulted in a favorable ruling." [1] at 57;

(53) "The Court abused discretion by ruling <in Footnote> 'that evidence at trial established that the pursuing vehicles did not exceed the posted speed limit.' The Footnote was equivocally used in a statute that stated the officers could disregard certain specified rules of the road, but the officer must drive with due regard for safety of all persons. The chase exceeded posted speed limit. Policy[']s not in statute. Speed of the chase was not elicited as a proper law enforcement procedure on updated policy." [1] at 58;

(54) "The Georgia Supreme Court abused its discretion by holding that trial court did not err when it limited Petitioner's ability to cross examine officers regarding the policy; the Court exposed an ineffective assistance of counsel claim for abandoning line of questioning. The Motion in Limine filed minutes prior to trial automatically preserved objection for appeal." [1] at 59;

(55) "The Georgia Supreme Court made an unreasonable decision by holding that trial counsel testified he was familiar with the policy and was not ineffective for failing to properly investigate the pursuit policy: counsel testified that he was attempting to obtain the policy during trial; he also revealed he never read the policy and didn't attempt to obtain it." [1] at 60;

(56) "The Georgia Supreme Court made an unreasonable decision by holding that trial counsel was not ineffective for failing to obtain a copy of the pursuit policy for defensive purposes; Petitioner requested that policy. Co-defendant['s] counsel had a copy of the policy in his archives. Counsel offered no evidence to substantiate his trial strategy." [1] at 61;

(57) "The Georgia Supreme Court made an unreasonable decision by ascertaining that initial appellate counsel was not ineffective for attaching an incomplete policy to Petitioner's Motion for New Trial; the updated policy which was attached to appellate Brief by Substitute counsel prohibited chases for burglary and clearly state[d] Policy 5.17 was being modified to reflect a change." [1] at 62;

(58) "Trial Court and the Georgia Supreme Court unscrupulously abused their discretion because through discretionary review, they cannot prove beyond a reasonable doubt that had the correct policy been properly presented by any attorney, that the outcome of capital felony trial or Motion for New Trial would still be in favor of jury's verdict on Felony Murder (Burglary)." [1] at 63;

(59) "After the Georgia Supreme Court decided that the policy 'alluded' to was not presented at trial or on the record of appeal, therefore it did not factor into their evidentiary review, Petitioner filed Extraordinary Motion for New Trial based on newly discovered evidence; the Trial Court ruled that Petitioner didn't prove that evidence was newly discovered, and relied on the Georgia Supreme Court's decision in Division 1 and 2 on Petitioner's direct appeal." [1] at 64;

(60) "Petitioner was deprived of the right to a hearing after 1st defensive pleading pursuant to state law. The state habeas court failed to meet the requirements of O.C.G.A. § 9-14-47." [87] at 15;

(61) "The state habeas court failed to meet the requirements of O.C.G.A. §§ 9-14-48 and 9-14-49, when it adopted the proposed final order verbatim which was arbitrary and capricious." [87] at 15;

(62) "SPOLIATION." [87] at 15.

Having just quoted verbatim Westmoreland's numerous grounds for relief, it is worth noting that he offered no other factual support for them in his petition. This is significant because "[h]abeas corpus petitions must meet heightened pleading requirements." *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citing 28 U.S.C. foll. § 2254, Rule 2(c)). "The § 2254 Rules . . . mandate 'fact pleading' as opposed to 'notice pleading,' as authorized under Federal Rule of Civil Procedure 8(a). Coupled with the form petition . . . , the federal rules give the petitioner . . . ample notice of this difference." *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011).

> The reason for the heightened pleading requirement–fact pleading–is obvious. Unlike a plaintiff pleading a case under Rule 8(a), the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterward. . . . Whatever the claim, . . . the petitioner is, or should be, aware of the evidence to support the claim before bringing his petition.

Id. I have accordingly focused on those facts included in Westmoreland's petition, and not those he added for the first time in his 103-page Traverse, see [92], which he untimely filed, *see* LR 7.1(C), NDGa., only after Warden Johnson had submitted his Second Amended Answer-Response and Brief, *see* [91 & 91-1]. *See Auvenshine v. Davis*, No. 4:17-CV-294-Y, 2018 WL 2064704, at *4 (N.D. Tex. May 3, 2018) ("[N]ew legal theories and/or factual issues raised for the first time in a reply brief need not be considered on federal habeas review."); *Foster v. Sec'y, DOC*, No. 2:12-CV-128-FTM-38CM, 2015 WL 518807, at **5, 7 (M.D. Fla. Feb. 9, 2015) ("Petitioner's arguments contained in the Reply were not presented in the Petition and therefore did not provide Respondent the opportunity to respond. It is well established that arguments raised for the first time in a reply are improper. . . . [T]he Petition does not contain any additional facts or argument supporting Ground Two. Instead, Petitioner raises additional facts and argument

improperly in his Reply, which should not be considered." (citing *Herring v. Secretary, Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir.2005))); *see also United States v. Sangs*, 31 F. App'x 152, 2001 WL 1747884, at *1 (5th Cir. Dec.11, 2001) (affirming, in § 2255 proceedings, district court's refusal to consider issue raised for the first time in reply to government's answer-response).

For Westmoreland's benefit, I will summarize some other general principles of federal habeas review that are particularly salient in this case.

"[A] writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" may be granted "*only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Consequently, claims that a state trial, a state appellate court, or a state habeas court erred in applying state law is beyond the scope of federal habeas review. *See, e.g., Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations of state-law questions.") (quoting *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)).

A prisoner who wishes to seek federal habeas review must generally first "exhaust[] the remedies available in the courts of the State." 28 U.S.C.

§ 2254(b)(1)(A). As an initial matter, "the prisoner must 'fairly present' his claim[s] in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). And a prisoner must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "If a petitioner does not satisfy the procedural requirements for bringing an error to the state court's attention–whether in trial, appellate, or habeas proceedings, as state law may require–procedural default will bar federal review." *Magwood v. Patterson*, 561 U.S. 320, 340 (2010).

Even where a prisoner has exhausted all available state remedies, federal habeas review is subject to further statutory constraints. Chief among these is that a federal court owes deference to a state court decision on the merits of the prisoner's federal constitutional claims. Under federal law,

> 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 in 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.

28 U.S.C. § 2254(d).

Notably, when § 2254(d) applies in tandem with a Supreme Court case that itself requires a deferential standard of review, including, for example, *Strickland v. Washington*, 466 U.S. 668 (1984), which governs ineffective assistance of counsel claims, the state court's decision on the prisoner's constitutional claim is subject to "doubly deferential judicial review" by the federal habeas court. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Moreover, in a § 2254 proceeding in federal court, "a determination of a factual issue made by a State court shall be presumed to be correct," unless the prisoner rebuts that "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e).

"If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The federal habeas statute, including the provisions described above, serves as "a guard against extreme malfunctions in the state criminal justice systems, not as a substitute for

ordinary error correction through appeal." *Id.* at 102-03 (internal quotation marks omitted). Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

With that in mind, I turn to each of Westmoreland's grounds for relief.

Westmoreland's grounds 1, 2 & 3 were considered and denied on the merits by the state habeas court. *See* [45-6] at 8-9. Each is an ineffective assistance of appellate counsel claim, where Westmoreland needed to demonstrate deficient performance and prejudice. *See Strickland*, 466 at *passim*. The state habeas court determined that Westmoreland offered no evidence in support of these grounds during state habeas proceedings and thus did not meet the *Strickland* standard. *See* [45-6] at 7-8. Because the *Strickland* standard applies in conjunction with § 2254(d), my review must be "doubly" deferential and "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. The state habeas court's decision easily passes that threshold.

Westmoreland's ground 4 is not one he presented to the state courts, so it is procedurally defaulted and thus no basis for federal habeas relief. *See Magwood*, 561 U.S. at 340.[1]

The state habeas court determined that Westmoreland's ground 5 was procedurally defaulted because he failed to raise it on direct appeal as required by state procedural rules. *See* [45-6] at 9-10. Consequently, the state habeas court denied relief on this ground. In his federal filings, Westmoreland has not demonstrated that the state habeas court erred in its decision, or that "cause" and "prejudice" or a "fundamental miscarriage of justice" entitle him to overcome his procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). *See also Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1996) (A fundamental miscarriage of justice occurs when "a constitutional

[1] At this stage, Westmoreland does not have the option of returning to state court to exhaust this claim, because it would be deemed successive under state habeas law. *See* O.C.G.A. § 9-14-51; *Tucker v. Kemp*, 351 S.E.2d 196 (Ga. 1987). And the United States Court of Appeals for the Eleventh Circuit has held that Georgia's bar on successive petitions "should be enforced in federal habeas proceedings against claims never presented in state court, unless there is some indication that a state court judge would find the claims in question 'could not reasonably have been raised in the original or amended [state habeas] petition.'" *Chambers v. Thompson*, 150 F.3d 1324, 1327 (11th Cir. 1998) (quoting O.C.G.A. § 9-14-51). There is no such indication here, so the bar should be enforced.

violation has probably resulted in the conviction of one who is actually innocent.").

The state habeas court similarly determined Westmoreland's grounds 6-22 to be procedurally defaulted. *See* [45-6] at 9-21, 23, 25 & 45-46. And, again, Westmoreland has demonstrated no basis for overcoming his procedural default.

The Georgia Supreme Court determined that Westmoreland's ground 23 was not preserved for appellate review, and thus procedurally defaulted. *See Westmoreland*, 699 S.E.2d at 18. Again, Westmoreland has demonstrated no basis for overcoming that procedural default.

The state habeas court determined that Westmoreland's ground 24 was procedurally defaulted. *See* [45-6] at 21-25. Westmoreland has demonstrated no basis for overcoming that procedural default.

The Supreme Court denied Westmoreland's ground 25 on the merits. *See Westmoreland*, 699 S.E.2d at 19. This was another ineffective assistance of counsel claim, governed by *Strickland*. Again, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard," *Richter*, 562 U.S. at 105. The Georgia Supreme Court concluded that Westmoreland's trial counsel's decision not to pursue a

'blame the police' defense was an "informed strategic decision" that did not, in any event, prejudice Westmoreland. *See Westmoreland*, 699 S.E.2d at 19. Thus, the Georgia Supreme Court concluded that Westmoreland had satisfied neither the performance, nor the prejudice prong of *Strickland*'s two-part standard for demonstrating ineffective assistance. Applying the doubly-deferential review described in *Richter*, it is clear that Westmoreland is not entitled to federal habeas relief on this ground.

The state habeas court denied Westmoreland's grounds 26-47 as procedurally defaulted. *See* [45-6] at 19, 23-29 & 39-40. Again, Westmoreland has not demonstrated any basis to overcome his own default.

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 its discretion" in making a factual finding or applying state caselaw or statutes. *See* [1] at 48-62. To the extent these grounds assert violations 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 determinations 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).

The state habeas court determined that Westmoreland's grounds 58-59 were procedurally defaulted. *See* [45-6] at 32-34 & 38-39. Westmoreland has not demonstrated any basis to overcome this finding of procedural default.

Warden Johnson contends that Westmoreland's grounds 60 and 61 do not state claims upon which relief may be granted. *See* [91-1] at 26. Each of these grounds purports to identify a defect in Westmoreland's state habeas proceedings. Even assuming that Westmoreland can raise these claims for the first time in this Court without having first presented and exhausted them in state proceedings, neither is a basis for federal habeas relief. *See, e.g., Quince v. Crosby*, 360 F.3d 1259, 1262 (11th Cir. 2004) ("an alleged defect in a collateral proceeding does not state a basis for [federal] habeas relief").

Westmoreland stated his ground 62 in one, capitalized word: "SPOLIATION." [87] at 15. This was inadequate to state a basis for federal habeas relief. *See McFarland*, 512 U.S. at 856; *Borden*, 646 F.3d at 810.

Because Westmoreland has stated no ground upon which he is entitled to federal habeas relief, I have recommended that his petition be denied.

And because Westmoreland does not meet the requisite standard, I have recommended that a certificate of appealability be denied as well. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (requiring a two-part showing (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," *and* (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"); *see also Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc) (holding that the *Slack v. McDaniel* standard will be strictly applied prospectively).

I DIRECT the Clerk to terminate the referral of this case to me.

SO RECOMMENDED AND DIRECTED, this 26th day of June, 2019.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, JR., GDC ID 1041629, Petitioner,	:	HABEAS CORPUS 28 U.S.C. § 2254
v.	:	CIVIL ACTION NO. 1:14-CV-1315-TWT-CMS
GLEN JOHNSON, Warden, Respondent.	:	

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within fourteen (14) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District

Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings and conclusions of law will be limited to a plain error review. *See* 11th Cir. R. 3-1.

The Clerk is **DIRECTED** to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED, this 26th day of June, 2019.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

APPENDIX E-

Constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, (set out verbatim with appropriate citation.) [*Rule 14.1(i)*];

APPENDIX E-

Constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, (set out verbatim with appropriate citation.)

Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

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

Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses. Ratified 12/15/1791.

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.

Amendment 14 - Citizenship Rights. Ratified 7/9/1868.

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

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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 in 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.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

O.C.G.A. § 9-14-47. Time for answer and hearing:

Except as otherwise provided in Code Section 9-14-47.1 with respect to petitions challenging for the first time state court proceedings resulting in a sentence of death, within 20 days after the filing and docketing of a petition under this article or within such further time as the court may set, the respondent shall answer or move to dismiss 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. Hearing; evidence; depositions; affidavits; determination of compliance with procedural rules; disposition

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence. No other forms of discovery shall be allowed except upon leave of court and a showing of exceptional circumstances.

(b) The taking of depositions or depositions upon written questions by either party shall be governed by Code Sections 9-11-26 through 9-11-32 and 9-11-37; provided, however, that the time allowed in Code Section 9-11-31 for service of cross-questions upon all other parties shall be ten days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least ten days in advance of the date set for a hearing in the case. The affidavit so served shall include the address and telephone number of the affiant, home or business, if known, to provide the opposing party a reasonable opportunity to contact the affiant; failure to include this information in any affidavit shall render the affidavit inadmissible. The affidavit shall also be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

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

In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper.

(e) A petition, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death, may be dismissed if there is a particularized showing that the respondent has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows by a preponderance of the evidence that it is based on grounds of which he or she could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the respondent occurred. This subsection shall apply only to convictions had before July 1, 2004.

O.C.G.A § 9-14-49. Findings of Fact and Conclusions of Law

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 Murder; Felony Murder

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.

(d) A person commits the offense of murder in the second degree when, in the commission of cruelty to children in the second degree, he or she causes the death of another human being irrespective of malice.

(e)(1) A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life.

(2) A person convicted of the offense of murder in the second degree shall be punished by imprisonment for not less than ten nor more than 30 years.

O.C.G.A. § 16-7-1 Burglary

(a) A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term "railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

(b) Upon a second conviction for a crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than two nor more than 20 years. Upon a third conviction for the

crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than five nor more than 20 years. Adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld for any offense punishable under this subsection.

O.C.G.A. § 40-6-6. Authorized emergency vehicles

(a) The driver of an authorized emergency vehicle or law enforcement vehicle, when responding to an emergency call, when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this Code section.

(b) The driver of an authorized emergency vehicle or law enforcement vehicle may:

(1) Park or stand, irrespective of the provisions of this chapter;

(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(3) Exceed the maximum speed limits so long as he or she does not endanger life or property; and

(4) Disregard regulations governing direction of movement or turning in specified directions.

(c) The exceptions granted by this Code section to an authorized emergency vehicle shall apply only when such vehicle is making use of an audible signal and use of a flashing or revolving red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle, except that a vehicle belonging to a federal, state, or local law enforcement agency and operated as such shall be making use of an audible signal and a flashing or revolving blue light with the same visibility to the front of the vehicle.

(d)(1) 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.

(2) When 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.

(3) The provisions of this subsection shall apply only to issues of causation and duty and shall not affect the existence or absence of immunity which shall be determined as otherwise provided by law.

(4) Claims arising out of this subsection which are brought against local government entities, their officers, agents, servants, attorneys, and employees shall be subject to the procedures and limitations contained in Chapter 92 of Title 36.

(e) It shall be unlawful for any person to operate an authorized emergency vehicle with flashing lights other than as authorized by subsection (c) of this Code section.

O.C.G.A. § 40-6-390 - Reckless driving

(a) Any person who drives any vehicle in reckless disregard for the safety of persons or property commits the offense of reckless driving.

(b) Every person convicted of reckless driving shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $1,000.00 or imprisonment not to exceed 12 months, or by both such fine and imprisonment, provided that no provision of this Code section shall be construed so

as to deprive the court imposing the sentence of the power given by law to stay or suspend the execution of such sentence or to place the defendant on probation.

O.C.G.A. § 40-6-393. Homicide by vehicle:

(a) Any person who, without malice aforethought, causes the death of another person through the violation of subsection (a) of Code Section 40-6-163, Code Section 40-6-390 or 40-6-391, or subsection (a) of Code Section 40-6-395 commits the offense of homicide by vehicle in the first degree and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than 15 years.

(b) Any driver of a motor vehicle who, without malice aforethought, causes an accident which causes the death of another person and leaves the scene of the accident in violation of subsection (b) of Code Section 40-6-270 commits the offense of homicide by vehicle in the first degree and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than 15 years.

(c) Any person who causes the death of another person, without an intention to do so, by violating any provision of this title other than subsection (a) of Code Section 40-6-163, subsection (b) of Code Section 40-6-270, Code Section 40-6-390 or 40-6-391, or subsection (a) of Code Section 40-6-395 commits the offense of homicide by vehicle in the second degree when such violation is the cause of said death and, upon conviction thereof, shall be punished as provided in Code Section 17-10-3.

(d) Any person who, after being declared a habitual violator as determined under Code Section 40-5-58 and while such person's license is in revocation, causes the death of another person, without malice aforethought, by operation of a motor vehicle, commits the offense of homicide by vehicle in the first degree and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 20 years, and adjudication of guilt or imposition of such sentence for a person so convicted may be suspended, probated, deferred, or withheld but only after such person shall have served at least one year in the penitentiary.

40-6-395. Fleeing or attempting to elude police officer; impersonating law enforcement officer

(a) It shall be unlawful for any driver of a vehicle willfully to fail or refuse to bring his or her vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer when given a visual or an audible signal to bring the vehicle to a stop. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such signal shall be in uniform prominently displaying his or her badge of office, and his or her vehicle shall be appropriately marked showing it to be an official police vehicle.

(b)(1) Any person violating the provisions of subsection (a) of this Code section shall be guilty of a high and aggravated misdemeanor and:

> (A) Upon conviction shall be fined not less than $500.00 nor more than $5,000.00, which fine shall not be subject to suspension, stay, or probation and imprisoned for not less than ten days nor more than 12 months. Any period of such imprisonment in excess of ten days may, in the sole discretion of the judge, be suspended, stayed, or probated;
>
> (B) Upon the second conviction within a ten-year period of time, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, shall be fined not less than $1,000.00 nor more than $5,000.00, which fine shall not be subject to suspension, stay, or probation and imprisoned for not less than 30 days nor more than 12 months. Any period of such imprisonment in excess of 30 days may, in the sole discretion of the judge, be suspended, stayed, or probated; and for purposes of this paragraph, previous pleas of nolo contendere accepted within such ten-year period shall constitute convictions; and

(C) Upon the third or subsequent conviction within a ten-year period of time, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, shall be fined not less than $2,500.00 nor more than $5,000.00, which fine shall not be subject to suspension, stay, or probation and imprisoned for not less than 90 days nor more than 12 months. Any period of such imprisonment in excess of 90 days may, in the sole discretion of the judge, be suspended, stayed, or probated; and for purposes of this paragraph, previous pleas of nolo contendere accepted within such ten-year period shall constitute convictions.

(2) For the purpose of imposing a sentence under this subsection, a plea of nolo contendere shall constitute a conviction.

(3) If the payment of the fine required under paragraph (1) of this subsection will impose an economic hardship on the defendant, the judge, at his or her sole discretion, may order the defendant to pay such fine in installments and such order may be enforced through a contempt proceeding or a revocation of any probation otherwise authorized by this subsection.

(4) Notwithstanding the limits set forth in any municipal charter, any municipal court of any municipality shall be authorized to impose the punishments provided for in this subsection upon a conviction of violating this subsection or upon conviction of violating any ordinance adopting the provisions of this subsection.

(5)(A) Any person violating the provisions of subsection (a) of this Code section who, while fleeing or attempting to elude a pursuing police vehicle or police officer in an attempt to escape arrest for any offense other than a violation of this chapter, operates his or her vehicle in excess of 30 miles an hour above the posted speed limit, strikes or collides with another vehicle or a pedestrian, flees in traffic conditions which place the general public at risk of receiving serious injuries, or leaves the state shall be guilty of a felony punishable by a fine of $5,000.00 or imprisonment for not less than one year nor more than five years or both.

(B) Following adjudication of guilt or imposition of sentence for a violation of subparagraph (A) of this paragraph, the sentence shall not be suspended, probated, deferred, or withheld, and the charge shall not be reduced to a lesser offense, merged with any other offense, or served concurrently with any other offense.

(c) It shall be unlawful for a person:

(1) To impersonate a sheriff, deputy sheriff, state trooper, agent of the Georgia Bureau of Investigation, agent of the Federal Bureau of Investigation, police officer, or any other authorized law enforcement officer by using a motor vehicle or motorcycle designed, equipped, or marked so as to resemble a motor vehicle or motorcycle belonging to any federal, state, or local law enforcement agency; or

(2) Otherwise to impersonate any such law enforcement officer in order to direct, stop, or otherwise control traffic.

Rule 1.7 of the Georgia Rules of Professional Conduct

(a) 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, except as permitted in (b).

(b) If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent confirmed in writing to the representation after:

(1) consultation with the lawyer pursuant to Rule 1.0(c);

(2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and

(3) having been given the opportunity to consult with independent counsel.

(c) Client informed consent is not permissible if the representation:

(1) is prohibited by law or these Rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Rule 1.10 of the Georgia Rules of Professional Conduct

(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: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9(c): Conflict of Interest: Former Client that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7: Conflict of Interest: General Rule.

Rule 1.16 of the Georgia Rules of Professional Conduct provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Georgia Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When a lawyer withdraws it shall be done in compliance with applicable laws and rules. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(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 and refunding any advance payment of fee that has not been earned.

Uniform Superior Court Rule 4.3. Withdrawal

(1) An attorney appearing of record in any matter pending in any superior court, who wishes to withdraw as counsel for any party, shall submit a written request to an appropriate judge of the court for an order permitting such withdrawal. The request shall state that the attorney has given written notice to the affected client setting forth the attorney's intent to withdraw, that 10 days have expired since notice, and there has been no objection, or that withdrawal is with the client's consent. The request will be granted unless in the judge's discretion to do so would delay the trial or otherwise interrupt the orderly operation of the court or be manifestly unfair to the client.

(2) The attorney requesting an order permitting withdrawal shall give notice to opposing counsel and shall file with the clerk and serve upon the client, personally or at that client's last known mailing and electronic addresses, the notice which shall contain at least the following information:

(A) the attorney wishes to withdraw;

(B) the court retains jurisdiction of the action;

(C) the client has the burden of keeping the court informed where notices, pleadings or other papers may be served;

(D) the client has the obligation to prepare for trial or hire new counsel to prepare for trial, when the trial date has been scheduled and to conduct and respond to discovery or motions in the case;

(E) if the client fails or refuses to meet these burdens, the client may suffer adverse consequences, including, in criminal cases, bond forfeiture and arrest;

(F) dates of any scheduled proceedings, including trial, and that holding of such proceedings will not be affected by the withdrawal of counsel;

(G) service of notices may be made upon the client at the client's last known mailing address;

(H) if the client is a corporation, that a corporation may only be represented in court by an attorney, that an attorney must sign all pleadings submitted to the court, and that a corporate officer may not represent the corporation in court unless that officer is also an attorney licensed to practice law in the state of Georgia or is otherwise allowed by law; and

(I) unless the withdrawal is with the client's consent, the client's right to object within 10 days of the date of the notice, and provide with specificity when the 10th day will occur.

The attorney requesting to withdraw shall prepare a written notification certificate stating that the notification requirements have been met, the manner by which notification was given to the client and the client's last known mailing and electronic addresses and telephone number. The notification certificate shall be filed with the court and a copy mailed to the client and all other parties. Additionally, the attorney seeking withdrawal shall provide a copy to the client by the most expedient means available due to the strict 10-day time restraint, i.e., e-mail, hand delivery, or overnight mail. After the entry of an order permitting withdrawal, the client shall be notified by the withdrawing attorney of the effective date of the

withdrawal; thereafter all notices or other papers shall be served on the party directly by mail at the last known mailing address of the party until new counsel enters an appearance.

(3) When an attorney has already filed an entry of appearance and the client wishes to substitute counsel, it will not be necessary for the former attorney to comply with rule 4.3 (1) and (2). Instead, the new attorney may file with the clerk of court a notice of substitution of counsel signed by the party and the new attorney. The notice shall contain the style of the case and the name, address, phone number and bar number of the substitute attorney. The new attorney shall serve a copy of the notice on the former attorney, opposing counsel or party if unrepresented, and the assigned judge. No other or further action shall be required by the former attorney to withdraw from representing the party. The substitution shall not delay any proceeding or hearing in the case.

APPENDIX F-

Eleventh Circuit Court of Appeals, **Westmoreland v. Warden et.el.**, 817 F.3d 751 (11th Cir. 2016). Judgement entered March 30, 2016.

United States Court of Appeals,Eleventh Circuit.

Amos WESTMORELAND, Petitioner–Appellant, v. WARDEN, Commissioner, Georgia Department of Corrections, Respondents–Appellees.

No. 14–15738

Decided: March 30, 2016

Before TJOFLAT, MARTIN, and JILL PRYOR, Circuit Judges. Amos Westmoreland, Leesburg, GA, pro se. Matthew Crowder, Paula Khristian Smith, Samuel Scott Olens, Andrew George Sims, Attorney General's Office, Atlanta, GA, for Respondents–Appellees.

Amos Westmoreland appeals the dismissal of his pro se federal habeas petition. The District Court held that the petition was untimely based on the limitations period in 28 U.S.C. § 2244(d)(1). Mr. Westmoreland told the court that his limitations period was tolled (which is to say paused) by the pendency of an extraordinary motion for new trial he filed in Georgia state court. He also repeatedly asked the state to turn over a copy of this motion. Each time Mr. Westmoreland asked, the state insisted that it had given the District Court all the records the court needed. The court decided the issue without seeing Mr. Westmoreland's state-court motion. This Court then granted a certificate of appealability (COA) on these issues:

(1) Whether the proper filing of a Georgia extraordinary motion for new trial tolls the time period for filing a 28 U.S.C. § 2254 petition, see 28 U.S.C. § 2244(d)(2); and if so, whether Westmoreland's Georgia extraordinary motion for new trial was properly filed; and

(2) If a Georgia extraordinary motion for new trial is a tolling motion under 28 U.S.C. § 2244(d)(2), and Westmoreland properly filed his extraordinary motion, whether the district court erred by dismissing his 28 U.S.C. § 2254 petition as time-barred.

After our Court granted this COA, the state acknowledged that it had been wrong all along. The state now agrees that Mr. Westmoreland's petition is timely. We agree too. We thus reverse and remand.[1]

I.

We review de novo a district court's dismissal of a habeas petition as untimely. Day v. Hall, 528 F.3d 1315, 1316 (11th Cir.2008) (per curiam). Federal habeas petitions that challenge state-court judgments must be filed within a year of "the latest of" one of four triggering dates, including "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). This one-year limitations period is tolled while "a properly filed application for State post-conviction or other collateral review

with respect to the pertinen gment or claim is pending." Id. § 2 d)(2). An application is considered "for" collateral review if it seeks "a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." Wall v. Kholi, 562 U.S. 545, 553, 131 S.Ct. 1278, 1285, 179 L.Ed.2d 252 (2011). And an application is considered "properly filed" if "its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8, 121 S.Ct. 361, 364, 148 L.Ed.2d 213 (2000). Also, if a properly filed state application is denied, then the time for appealing this denial tolls the federal filing deadline. See Cramer v. Sec'y, Dep't of Corr., 461 F.3d 1380, 1383 (11th Cir.2006) (per curiam). This is true "regardless of whether the inmate actually files the notice of appeal." Id. So long as the applicant was allowed to appeal, the limitations period is tolled "until the time to seek review expires." Id.

In Georgia, a motion for new trial filed more than 30 days after a judgment is entered is called an "extraordinary" motion for new trial. O.C.G.A. § 5–5–41(b). This Court has never decided whether a Georgia extraordinary motion for new trial is an application for collateral review, though we have said such a motion is "in the nature of a collateral proceeding." Mize v. Hall, 532 F.3d 1184, 1191 n. 5 (11th Cir.2008). And the Georgia Supreme Court has explained that an extraordinary motion for new trial is one of three ways to "challenge a conviction after it has been affirmed on direct appeal." Thomas v. State, 291 Ga. 18, 727 S.E.2d 123, 123 (Ga.2012). (The other two are "a motion in arrest of judgment" and "a petition for habeas corpus." Id.) We thus hold that a Georgia extraordinary motion for new trial can be an "application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2).

II.

Mr. Westmoreland's § 2254 petition is timely. Mr. Westmoreland's conviction became final on October 25, 2010. He thus had until October 25, 2011, to file his federal petition. Mr. Westmoreland properly filed an extraordinary motion for new trial in the Georgia trial court on May 2, 2011. This was a motion for collateral review, so while it was pending the one-year clock froze at 189 days (the number of days between October 25, 2010 and May 2, 2011). The state trial court denied the motion on the merits on June 9, 2011. Mr. Westmoreland had 30 days to appeal this denial. See O.C.G.A. § 5–6–35(d). This means the clock did not start again until at least July 9, 2011. Mr. Westmoreland then properly filed his state habeas petition on October 28, 2011. This was 111 days after July 9. 189 plus 111 is 300, so his filing was within § 2244(d)'s one-year period and further tolled this period. Mr. Westmoreland then filed his federal petition on May 1, 2014, before his state petition was denied on June 27, 2014. This means he was still within his one-year time for filing when he filed his federal petition.

The District Court dismissed Mr. Westmoreland's petition without properly considering the effect of the extraordinary motion for new trial. The state bears much responsibility for this mistake. Shortly after Mr. Westmoreland filed his federal petition, the District Court ordered the state to file all

"pleadings, transcripts and decisions as are available and required to determine the issues raised." The state responded by moving to dismiss the petition as untimely. Mr. Westmoreland then asked the court to order the state to make his extraordinary motion for new trial a part of the district court record. The state objected, claiming it had "already filed all relevant exhibits that are germane to resolving the issue of the timeliness of this petition." Mr. Westmoreland then filed a 28 U.S.C. § 2250 request for a copy of the same motion. The state again objected, repeating that it had "already filed all relevant exhibits that are germane to resolving the issue of the timeliness of this petition."

In this Court, the state reports that it "has examined the trial court's public record in Petitioner's criminal case and does not dispute Petitioner's contentions." The state thus concedes that "the petition was timely filed" because the "one-year period should have been tolled while the extraordinary motion for new trial was pending in the Georgia courts." If the state had made this concession back in 2014, when Mr. Westmoreland repeatedly pointed the state's attention to his state-court motion, then the District Court would have had the means to decide the timeliness issue correctly the first time around. Instead, the state repeatedly told the District Court that it had given the court everything "germane to resolving" the timeliness issue, the District Court relied on this representation, Mr. Westmoreland was delayed two more years in prison, and this Court had to issue an apparently unnecessary COA and decide an unnecessary appeal.

III.

Even with its admission that Mr. Westmoreland's federal petition is timely, the state says we should affirm the District Court anyway because Mr. Westmoreland failed to exhaust state remedies. The COA did not cover the exhaustion issue. To the contrary, the COA order expressly stated that, "should this Court ultimately conclude that [Mr. Westmoreland's] § 2254 petition was timely filed, the district court will determine any issues of exhaustion, procedural default, and cause and prejudice in the first instance." We thus decline the state's invitation to consider the exhaustion issue now. When considering the exhaustion issue on remand, the District Court must determine whether cause and prejudice excuse any possible failure to exhaust. If not, then the court must determine if a stay and abeyance is proper while Mr. Westmoreland exhausts state remedies. See Rhines v. Weber, 544 U.S. 269, 277–78, 125 S.Ct. 1528, 1535, 161 L.Ed.2d 440 (2005).

REVERSED AND REMANDED.

FOOTNOTES

1. The state also filed a motion asking this Court to expand the appellate record to include Mr. Westmoreland's extraordinary motion for new trial and the order denying that motion, plus documents that purported to show Mr. Westmoreland's failure to exhaust state remedies. We grant the motion as to the extraordinary motion for new trial (Exhibit 5) as well as the order denying the

motion (Exhibit 6). We deny it as to all the other exhibits because, as explained in part III, we are not addressing exhaustion at this time.Mr. Westmoreland also filed a pro se motion for leave to file a reply brief out of time. We grant this motion.

MARTIN, Circuit Judge:

APPENDIX G-

Northern District of Georgia, **Westmoreland v. Grubbs et.el.,** No. 2012 U.S. Dist. LEXIS 118733 (N.D. Ga. 2012). Judgement entered July 23, 2012.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, GDC No. 1041629, Plaintiff,	:	PRISONER CIVIL RIGHTS 42 U.S.C. § 1983
v.	:	CIVIL ACTION NO. 1:12-CV-2080-TWT-ECS
ADELE GRUBBS et al., Defendants.	:	

FINAL REPORT AND RECOMMENDATION AND ORDER

Proceeding pro se, state prisoner Amos Westmoreland filed a civil rights complaint under 42 U.S.C. § 1983 against his public defenders, several police officers, a trial judge, and seven members of the Georgia Supreme Court. [Doc. No. 1]. Because most of his claims are time-barred and the remainder seek relief from defendants who are immune from suit under § 1983, Mr. Westmoreland's complaint should be dismissed. See 28 U.S.C. § 1915A.

For purposes of this Final Report and Recommendation, the undersigned accepts as true Mr. Westmoreland's history of his criminal trial and direct appeal in Georgia state court:

> The crimes were committed allegedly on May 17, 2007. On November 30, 2007, Movant was charged in a multi-count indictment. After makeshift arraignment on January 10, 2008, Movant was appointed several public defenders until trial commenced on October 20, 2008. On October 23, 2008, Movant was found guilty of (2 counts) of Burglary, (2) counts of fleeing and attempting to elude a pursuing officer, (2) counts of felony murder (predicated on burglary and attempting to elude), obstruction, operating a vehicle w/o a secure load, reckless driving, homicide by motor

> vehicle (predicated on reckless driving), and serious injury by motor vehicle (predicated on reckless driving. Movant recieved a sentence of life imprisonment for felony murder while in the commission of a burglary, and 15 years consecutive for serious injury by motor vehicle, plus 12 months concurrent for the misdemeanor counts. Movant appealed from the denial of Motion for New Trial (3-12-09). On direct appeal to the Georgia Supreme Court, the Court made its decision on June 28, 2010 and affirmed the lower court's decision, all Justices concurred.

[Id. at 21 (spelling and punctuation as in original)].

Mr. Westmoreland complains that (1) his public defenders (sometimes acting alone and sometimes in concert with police officers) violated his rights because they had conflicts of interest, did not aggressively enough seek or use a copy of a police pursuit policy, ignored evidence he wanted presented, and were generally ineffective [id. at 1-7, 12-14, 22-23, 25-26]; (2) a state court trial judge ignored conflicts of interest, failed to protect his rights, made errors of law, and showed prejudice [id. at 8-11, 22]; and (3) seven members of the Georgia Supreme Court, "showing total disregard for Due Process and Constitutional Rights," issued an "equivocated decision" [id. at 15-20, 24-25]. Mr. Westmoreland is seeking hundreds of millions of dollars in damages. See [id. at 27].

A two-year statute of limitations applies to § 1983 actions in Georgia. See Crowe v. Donald, 528 F.3d 1290, 1292 (11th Cir. 2008). Therefore, all claims that arose more that two years before Mr.

Westmoreland filed this suit on June 13, 2012, see [Doc. No. 1-1 at 1], are now time-barred. That includes all of the claims he seeks to bring against the defendants except for the claims against the Georgia Supreme Court justices.

Although Mr. Westmoreland's claims against the members of the Georgia Supreme Court arising out of their June 28, 2010, decision fall just within the two-year limitations period, those claims must also be dismissed. "[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 80 U.S. 335, 13 Wall. 335, 347 (1872). Thus, a judge is entitled to absolute judicial immunity from damages arising from acts taken in his judicial capacity, unless he acts in the clear absence of all jurisdiction. Sibley v. Lando, 437 F.3d 1067, 1070 (11th Cir. 2005). "[T]he nature of the act itself, i.e., whether it is a function normally performed by a judge, and . . . the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity," determine whether an act was within a judge's judicial capacity. Stump v. Sparkman, 435 U.S. 349, 362 (1978); see also Mireles v. Waco, 502 U.S. 9, 12 (1991). And a judge acts in the clear absence of jurisdiction only where he is entirely without subject matter

jurisdiction, not merely because he may have acted in a manner that was erroneous, malicious, or in excess of authority. Dykes v. Hosemann, 776 F.2d 942, 947-48 (11th Cir. 1985) (en banc). See also Pierson v. Ray, 386 U.S. 547, 554 (1967) ("Immunity applies even when the judge is accused of acting maliciously and corruptly.")

It is beyond question that the decision rendered in Mr. Westmoreland's direct appeal by the Georgia Supreme Court was within that court's subject matter jurisdiction and that it was a normal judicial act. The Georgia Supreme Court justices that Mr. Westmoreland named as defendants in this case are therefore entitled to judicial immunity from suit under § 1983 for that decision.

For the foregoing reasons, the undersigned **RECOMMENDS** that Mr. Westmoreland's complaint be **DISMISSED**. See 28 U.S.C. § 1915A.

The undersigned **GRANTS** Mr. Westmoreland' request for permission to proceed in forma pauperis. [Doc. No. 3].

The Clerk is **DIRECTED** to transmit a copy of this Order to the warden of the institution where Mr. Westmoreland is confined. The warden of that institution, or his designee, is **ORDERED** to remit the $350 filing fee due from Mr. Westmoreland for this case in "monthly payments of 20 percent of the preceding month's income credited to . . . [his] account . . . each time the amount in the account exceeds $10 until the filing fee[]" is paid in full. 28 U.S.C. § 1915(b)(2).

The Clerk is **DIRECTED** to terminate the reference of this case to the undersigned.

SO RECOMMENDED, ORDERED, and DIRECTED, this 23rd day of July, 2012.

S/ E. Clayton Scofield III
E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, GDC No. 1041629, Plaintiff,	:	PRISONER CIVIL RIGHTS 42 U.S.C. § 1983
v.	:	CIVIL ACTION NO. 1:12-CV-2080-TWT-ECS
ADELE GRUBBS et al., Defendants.	:	

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within fourteen (14) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain

error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983).

The Clerk is **DIRECTED** to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED, this 23rd day of July, 2012.

S/ E. Clayton Scofield III
E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE

APPENDIX H-

Georgia Supreme Court, **Westmoreland v. Johnson**, No. **S16H0557**. Certificate of Probable Cause denied September 6, 2016.

SUPREME COURT OF GEORGIA
Case No. S16H0557

Atlanta, September 06, 2016

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

AMOS WESTMORELAND v. GLEN JOHNSON, WARDEN

From the Superior Court of Hancock County.

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

Trial Court Case No. 11-HC-034

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

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

Sue C. Fulton, Chief Deputy Clerk

APPENDIX I-

Ryan v. Thomas, 409 S.E.2d 507 (1991).

409 S.E.2d 507 (1991)
261 Ga. 661

RYAN
v.
THOMAS, Warden.

No. S91A0952.

Supreme Court of Georgia.

October 18, 1991.
Reconsideration Denied November 7, 1991.

508 *508 Steve Ryan, pro se.

Michael J. Bowers, Atty. Gen., C.A. Benjamin Woolf, Atty., State Law Dept., Atlanta, for Thomas.

CLARKE, Chief Justice.

Petitioner Steve Ryan was convicted of numerous crimes including armed robbery and kidnapping. At trial he was represented by a public defender from the Fulton County Public Defender's Office (Public Defender's Office). His motion for new trial was filed by a second public defender from the Public Defender's Office, and a third attorney from this office represented him on direct appeal.

Following the affirmance of his appeal, *Ryan v. State*, 191 Ga.App. 477, 382 S.E.2d 196 (1989), Ryan filed a *pro se* habeas corpus petition, maintaining that his trial counsel had rendered ineffective assistance. At the hearing on this petition, Ryan's appellate counsel testified that prior to filing Ryan's appeal, he evaluated potential claims of ineffective assistance of trial counsel, but determined that any such claims would be without merit. The habeas court concluded that since the ineffective assistance claim was not raised on direct appeal, it was procedurally barred under *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985).

We granted Ryan's application for probable cause to determine whether, as a matter of law, a *pro se* petitioner is procedurally barred from raising the issue of ineffective assistance where this issue is not raised on direct appeal, and both trial and appellate counsel are members of the same public defender's office.

In *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991), we were faced with a similar issue. In that case one attorney was appointed by the court to represent the petitioner at trial. A second attorney, not professionally related to the first, was appointed to represent the petitioner on appeal. Following the affirmance of his conviction, the petitioner filed a *pro se* habeas petition in which he alleged that his trial counsel had been ineffective. We noted that ineffective assistance claims are often entertained for the first time on habeas corpus where a petitioner has had only one attorney throughout his legal proceedings because "an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness." 261 Ga. 32, 401 S.E.2d 733. However, we held that where there is new counsel appointed or retained, he must raise the ineffectiveness of previous counsel at the first possible instance in the legal proceedings. Thus, in *White,* the claim of ineffectiveness of trial counsel was waived because appellate counsel had failed to raise it.

Were we to look no further than the rule set out in *White,* we would agree that Ryan's claim is procedurally barred because the second attorney from the Public Defender's Office who represented Ryan on motion for new trial failed to raise an ineffective assistance claim. However, in this case, unlike in *White,* all three attorneys involved in the various stages of Ryan's legal proceedings were attorneys with the same Public Defender's Office.

As stated above, we noted in *White* that an attorney cannot reasonably be expected to assert his or her own ineffectiveness. Likewise, it would not be reasonable to expect one member of a law firm to assert the ineffectiveness of another member, where one represented a defendant at trial and the other represented him on motion for new trial or appeal. On the other hand, a member of a law firm may not by his or her failure to raise an ineffective assistance claim
509 against a fellow member of his firm bar the rights of a defendant to ever raise that issue. To hold otherwise *509 would

permit one member of the firm . ield his fellow member against accusations o ectiveness at the expense of the rights of the defendant. This the courts cannot allow. See, e.g., *First Bank & c. Co. v. Zagoria*, 250 Ga. 844, 302 S.E.2d 674 (1983); *Roper v. State*, 258 Ga. 847 (1)(a), 375 S.E.2d 600 (1989).

Regardless of whether an attorney has been appointed to act for the client or retained by the client, the client is entitled to fidelity from the attorney and every member of the attorney's law firm. To that end we hold that attorneys in a public defender's office are to be treated as members of a law firm for the purposes of raising claims of ineffective assistance of counsel. As such different attorneys from the same public defender's office are not to be considered "new" counsel for the purpose of raising ineffective assistance claims under *White v. Kelso*. Therefore, a defendant's right to raise such a claim may not be barred by the failure of a succession of attorneys from the same public defender's office to raise it.

This case is remanded to the habeas court for a determination of the merits of Ryan's ineffective assistance of counsel claims.

Judgment reversed and remanded.

All the Justices concur.

APPENDIX J-

State v. Jackson et al., 697 S.E.2d. 757 (2010).

697 S.E.2d 757 (2010)

The STATE
v.
JACKSON et al.

No. S10A0070.
Supreme Court of Georgia.

June 28, 2010.

Patrick H. Head, District Attorney, Dana J. Norman, Jesse D. Evans, Asst. Dist. Atty., for appellant.

Tony L. Axam, Calvin A. Edwards, Jr., Atlanta, for appellees.

NAHMIAS, Justice.

Appellees, defendants Carlester Jackson and Warren Woodley Smith, allegedly conspired *758 with Jerold Daniels to rob a drug dealer at gunpoint. The victim, however, also turned out to be armed, and he shot and killed Daniels in self-defense. A Cobb County grand jury indicted Jackson and Smith on three counts of felony murder along with other offenses. The defendants moved to dismiss the felony murder counts pursuant to *State v. Crane,* 247 Ga.779, 279 S.E.2d 695 (1981). The trial court granted the motion to dismiss, and the State now appeals, asking us to overrule *Crane.* After thorough review, we conclude that *Crane* should be overruled, and we therefore reverse. The causation issue presented should be decided by a properly instructed jury at trial, using the customary proximate cause standard.

This should be an easy case for a Georgia appellate court. The question presented is what the term "causes" means as used in the felony murder statute. See OCGA § 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."). In cases both before and after *Crane,* this Court interpreted that very term to require "proximate causation." In addition, there are dozens of other cases from this Court and the Court of Appeals, before and after *Crane,* that hold that the same term as used in other homicide statutes and in many other criminal and civil contexts means proximate cause.

This case is difficult only because of *Crane.* There, in a short opinion that did not mention any of Georgia's extensive causation case law, the Court held that the word "causes" in the felony murder statute requires not proximate causation, but that the death be "caused directly" by one of the parties to the underlying felony. Id. at 779, 279 S.E.2d 695. Applying this new and more restrictive conception of causation, the Court concluded that a defendant cannot be found guilty of felony murder when the intended victim of the underlying felony kills the defendant's accomplice, because that death is "caused directly" by the victim rather than the defendant. See id.

As shown below, the opinion in *Crane* was poorly reasoned, and perhaps because it is so incongruous with the rest of Georgia law, it has not been consistently applied by this Court or the Court of Appeals in the ensuing three decades. Its holding has not been applied uniformly in the specific context of felony murder, nor has its reasoning been followed in construing the same causation language in other homicide statutes. The relevant facts of this case, however, are almost identical to *Crane*'s, and so today we must either reaffirm *Crane* or reject it. After careful consideration, we have concluded that *Crane* must be overruled. Stare decisis is an important doctrine, but it is not a straightjacket. *Crane*'s age and statutory nature are outweighed by the other factors undermining its precedential authority, and it is important that the Court refute its reasoning to insure that the case can no longer be cited in efforts to pollute other streams of our law.

The Factual and Procedural Background of This Case

1. The parties stipulated, for purposes of the motion to dismiss, that Jackson, Smith, and Daniels conspired to commit an armed robbery of someone who the defendants believed was a drug dealer. Daniels approached the intended victim armed with a handgun, with Jackson nearby and Smith waiting in the getaway vehicle. The victim, who was also armed, exchanged gunfire with Daniels, and he ultimately shot and killed Daniels in self-defense. Jackson and Smith were later arrested. The indictment charged the defendants with, among others offenses, felony murder. Tracking the statutory language, Count 1 alleged that both Jackson and Smith "did cause the death of Jerold Daniels, a human being, ... while in the commission of a felony, to wit: Aggravated Assault." The indictment charged Smith with two more counts, alleging that he caused Daniels's death while in the commission of the felony of possession of a firearm by a convicted felon.

The defendants moved to dismiss the felony murder charges. They argued that because the victim fired the shot that killed their co-conspirator, they did not directly cause Daniels's death. The trial court, bound by this Court's decision in *Crane,* granted the motion to dismiss. The State *759 filed this direct appeal under OCGA § 5-7-1(a)(1), asking us to overrule *Crane.*

"Cause" in Georgia's Homicide Statutes Means Proximate Cause

2. The felony murder statute 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." OCGA § 16-5-1(c) (emphasis added). As in *Crane,* the question in this case is whether a defendant who commits a felony whose intended victim kills a co-conspirator "causes" that death. The answer should

be straightforward. Georgia is a proxime use state. When another meaning is not indic by specific definition or context, the term "cause" is customarily interpreted in almost all legal contexts to mean "proximate cause"—"that at which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." Black's Law Dictionary 1103 (5th ed. 1979).

Thus, this Court has explained that proximate cause is the standard for criminal cases in general. See, e.g., *Skaggs v. State,* 278 Ga. 19, 19-20, 596 S.E.2d 159 (2004) ("In a criminal case, proximate cause exists when the accused's `"act or omission played a substantial part in bringing about or actually causing the (victim's) injury or damage and... the injury or damage was either a direct result or a reasonably probable consequence of the act or omission."'" (citations omitted)). We have also said that proximate cause is the standard for homicide cases in general. See, e.g., *James v. State,* 250 Ga. 655, 655, 300 S.E.2d 492 (1983) ("In *Wilson v. State,* 190 Ga. 824, 829, 10 S.E.2d 861 (1940), we set out the following test for determining causation in homicide cases: `Where one inflicts an unlawful injury, such injury is to be accounted as the efficient, proximate cause of death, whenever it shall be made to appear, either that (1) the injury itself constituted the sole proximate cause of the death; or that (2) the injury directly and materially contributed to the happening of a subsequent accruing immediate cause of the death; or that (3) the injury materially accelerated the death, although proximately occasioned by a pre-existing cause.'").

Consistent with this general rule, we have held in many cases and for many decades that proximate causation is the standard for murder cases prosecuted under the murder statute, now codified as OCGA § 16-5-1. Thus, we have long held, in numerous cases, that proximate causation is the test for malice murder, a crime defined using the identical "he ... causes" phrasing. See OCGA § 16-5-1(a) ("A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.").[1] Finally, with respect to the statutory text at issue in this case, and in full accord with the general rule for criminal and homicide cases and with our construction of the identical language in subsection (a) of the same statute, we have repeatedly held, before and after *Crane,* that the phrase "he causes" in OCGA § 16-5-1(c) establishes proximate causation as the standard for liability in felony *760 murder cases.[2]

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.[3]*761 And 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.[4]

As an original matter, therefore, we would decide this case simply by applying the customary legal meaning of "cause," which is supported by the ample precedent interpreting the felony murder provision at issue, its identical sister provision in the murder statute, and identical or substantially similar provisions in many other homicide statutes. We would hold that the phrase "he causes" as *762 used in OCGA § 16-5-1(c) requires the State to prove that the defendant's conduct in the commission of the underlying felony *proximately caused* the death of another person. In the context of this case, proximate causation would exist if (to use "the rule" for felony murder that the Court stated a year after deciding *Crane*) the felony the defendants committed "directly and materially contributed to the happening of a subsequent accruing immediate cause of the death," *Durden,* 250 Ga. at 329, 297S.E.2d 237, or if (to use language from a case decided 16 years before *Crane*) "`the homicide [was] committed within the res gestae of the felony' ... and is one of the incidental, probable consequences of the execution of the design to commit the robbery," *Jones,* 220 Ga. at 902, 142 S.E.2d 801 (citations omitted).

Whether the evidence in this case would establish such proximate causation beyond a reasonable doubt is a harder question, in part because the stipulated facts we have before us are summary and the issue of proximate causation is so fact-intensive. That is why proximate cause determinations are generally left to the jury at trial. See *McGrath,* 277 Ga.App. at 829, 627 S.E.2d 866 ("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.'" (citation omitted)).

The defendants here planned an armed robbery of someone they believed to be a drug dealer, who also turned out to be armed, an occurrence not unusual among drug dealers. When their co-conspirator Daniels approached the victim with a handgun to execute the robbery, the victim defended himself and killed Daniels. Perhaps more detailed evidence would show that, despite the dangerous and violent nature of armed robbery and drug dealing, circumstances existed that made the fatal result of the defendants' felonious conduct improbable in this case, or made the drug dealer victim's actions an "efficient intervening cause." On the limited record before us, however, a jury could rationally conclude that the defendants' felonies played a "substantial part in bringing about" their accomplice's death when they confronted at gunpoint a drug dealer, whose deadly response could be viewed as a "reasonably probable consequence" of their acts. *Skaggs,* 278 Ga. at 19-20, 596 S.E.2d 159 (citations and punctuation omitted). Thus, as an original matter, we would have little hesitation reversing the trial court's order and remanding the case for trial and decision by a jury properly charged on causation using language adapted from our proximate cause homicide cases.

State v. Crane

3. This is not, however, an original matter. The same legal issue was presented, in much the same factual scenario, nearly 30 years ago in *Crane.* In that case, Crane and three confederates were burglarizing a home when the homeowner shot and killed one of them in defense of himself and his property. See 247 Ga. at 779, 279 S.E.2d 695. The Court recognized that the case turned on whether the term "he causes," as used in the felony murder statute, can extend to the death of an accomplice killed by the intended victim. Id. In its one-and-a-half page opinion, however, the *Crane* Court did not consider the customary legal meaning of "cause" or look to our then-existing case law interpreting that term as used in the felony murder statute, the malice murder statute, and homicide and other criminal statutes in general. Instead, the Court baldly asserted that it was faced with the choice between limiting felony murder to deaths "caused *directly* by one of the parties to the underlying felony" or construing the statute "to include also those deaths *indirectly* caused by one of the parties." Id. (footnote omitted; emphasis supplied). Reflecting on the only two interpretations of "he causes" that it

considered, the Court stated that "[v ould, if allowed a choice, favor the constructio. ich would criminalize the conduct involved in the present case." Id. at 780, 279 S.E.2d 695. Because a criminal statute was being interpreted, however, the Court concluded that "we are constrained by principle to rule in behalf of the accuseds." Id.

We agree that the rule of lenity would require the Court to adopt the interpretation that favored the accuseds if, after applying *763 all other tools of statutory construction, the Court determined that "directly causes" and "indirectly causes" were the only possible meanings of the word "causes" in OCGA § 16-5-1(c) and that equally strong reasoning supported either interpretation, leaving the statute ambiguous. See *Banta v. State,* 281 Ga. 615, 617-618, 642 S.E.2d 51 (2007) ("`The rule of lenity ... applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.'" (quoting *United States v. Shabani,* 513 U.S. 10, 17, 115S. Ct. 382, 130 L. Ed. 2d 225 (1994))). But the *Crane* Court did *not*apply the traditional canons of statutory construction before jumping to that conclusion, and the binary reading of the causation element proposed by the *Crane* Court finds no foundation in our legal tradition or our case law, none of which the Court mentioned.[5] Indeed, other than *Crane* and cases discussing *Crane,* we have found not a single instance in our extensive causation case law where the Court has suggested that the word "causes" can mean only "directly causes" or "indirectly causes."

To the contrary, we have consistently employed the more nuanced concept of proximate causation, which does not track the binary, and often unhelpful, direct-indirect dichotomy of *Crane.* Proximate causation imposes liability for the reasonably foreseeable results of criminal (or, in the civil context, tortious) conduct if there is no sufficient, independent, and unforeseen intervening cause. That definition would include, at least in some factual scenarios, a deadly response against one of the perpetrators by the intended victim of a dangerous felony like burglary or armed robbery.

The Inconsistent Application of Crane's Holding

4. No later cases have bolstered *Crane*'s reasoning, nor do the dissents today make any effort to do so. Indeed, neither this Court nor the Court of Appeals has consistently applied *Crane*'s holding that the words "he causes" in the felony murder statute "require the death to be caused directly by one of the parties to the underlying felony." 247 Ga. at 779, 279 S.E.2d 695 (footnote omitted). In nearly three decades, the Court has applied *Crane* wholeheartedly on just two occasions. The first came a year after *Crane,* when the Court reversed a felony murder conviction where a police officer killed a bystander during a shootout with the defendant. See *Hill v. State,* 250 Ga. 277, 278-280, 295 S.E.2d 518 (1982).[6] The second *764 time was in *Hyman v. State,* 272 Ga. 492, 531 S.E.2d 708 (2000). Police came to Hyman's home looking for a murder suspect, and he falsely told them that the suspect was not there. When the police were allowed to search the house, the suspect shot and killed one of the officers. See id. at 493, 531 S.E.2d 708. Hyman was charged with murder while in the commission of the felony of making a false statement, but the Court held that the "direct cause" of the officer's death was the suspect, with whom Hyman was not acting in concert, and so under *Crane* his felony murder conviction was reversed. See 272 Ga. at 493, 531 S.E.2d 708. It is possible that the same result would have been reached under the proximate cause test, consideration of which the *Hyman* Court pretermitted. See id.

In another case, however, the Court upheld the defendant's felony murder conviction based upon the death of a bystander killed by someone who was engaging in a gunfight with the defendant. See *Smith v. State,* 267 Ga. 372, 375-376, 477 S.E.2d 827 (1996). To reach that result, the Court had to redefine the *Crane* test as whether the death of the bystander was "directly caused" by "a willing participant" (rather than a co-party) in the gunfight. 267 Ga. at 375, 477 S.E.2d 827. The Court struggled to distinguish *Crane* and *Hill* as cases in which "the homicides were not committed by either the defendant or someone acting in concert with him." 267 Ga. at 376, 477 S.E.2d 827. The shooter in *Smith,* however, was plainly "one of the parties to the [defendant's] underlying felony," *Crane,* 247 Ga. at 779, 279 S.E.2d 695 (footnote omitted), and it is questionable whether someone charged with committing an aggravated assault *against* the defendant by shooting at him, see *Smith,* 267 Ga. at 372, n. 1, 477 S.E.2d827, can really be said to be "acting in concert with him," id. at 376, 477 S.E.2d 827.

In other cases since *Crane,* we have upheld felony murder convictions where the death could hardly be said to have been "caused directly" by the defendant's acts. See *McCoy v. State,* 262 Ga. 699, 700, 425 S.E.2d 646, 647-48 (1993) (upholding felony murder conviction by finding that the death of a firefighter who fell into a well behind a burning house and died of asphyxiation was "directly attributable" to the defendant's felonious conduct in setting fire to the house); *Durden,* 250 Ga. at 329, 297 S.E.2d 237 (affirming felony murder conviction where a storeowner responding to a burglary died of a heart attack after exchanging shots with the defendant). In several other felony murder cases, we have simply ignored *Crane* and applied the proximate cause test. See, e.g., the post-1981 cases cited in footnote 2 above.

Moreover, if *Crane*'s reasoning is solid and its holding deserving of precedential value, as Justice Thompson's dissent suggests, see Dissenting Op. at 769, then the term "causes" and the identical or substantially similar causation language used in Georgia's other homicide statutes should also be susceptible to the same "directly causes" versus "indirectly causes" ambiguity posited in *Crane.* And because all those statutes are also penal, the rule of lenity should require that the "directly causes" interpretation be applied in those contexts as well. But that *765 has not happened. To the contrary, this Court and the Court of Appeals have continued to apply the traditional proximate cause standard in those situations. See, e.g., the post-1981 cases cited in footnotes 1 and 4 above.

Crane has caused the most tension in vehicular homicide cases, which, like felony murder cases, sometimes involve deaths that are "directly" caused by innocent third parties acting as a result of the defendant's precipitating criminal acts. Thus, in *Hill,* this Court held that, under *Crane,* a defendant did not "cause" the death of another person and so was not guilty of felony murder when a police officer at whom the defendant was shooting shot back and killed an innocent bystander. See 250 Ga. at 280, 295 S.E.2d 518. Yet the Court of Appeals, in a case involving almost the same causation language and a similar fact pattern, held that a defendant was guilty of vehicular homicide when a police officer from whom he was illegally fleeing bumped his truck in an effort to stop it (much like an officer returning fire to stop an ongoing felony) and caused the truck to crash, killing an innocent bystander (a baby riding in the truck). See *Pitts,* 253 Ga.App. at 374, 559 S.E.2d 106. The *Pitts* court reached this conclusion by simply ignoring *Crane* and applying the usual proximate cause test. See id. at 374-375, 559 S.E.2d 106.

Similarly, in *Ponder v. State,* 274 Ga.App , 616 S.E.2d 857 (2005), the defendant, who nder the influence and recklessly fleeing the police, caused a pursuing police car to veer into oncoming traffic, where the police car collided with a Buick, killing the officer. See id. at 94-96, 616 S.E.2d 857. Like the homeowner who fired the fatal shot in *Crane,* the "direct cause" of the officer's death was the driver of the Buick. But the Court of Appeals, again without mention of *Crane,* upheld the conviction because the evidence supported the jury's finding that the defendant's criminal conduct was the proximate cause of the officer's death. See 274 Ga.App. at 95-96, 616 S.E.2d857.

In *McGrath v. State,* 277 Ga.App. 825, 627 S.E.2d 866 (2006), the chain of causation was even more indirect. McGrath, who was driving recklessly and under the influence on 1-85, crashed into a car driven by Kar. Both vehicles were wrecked, and McGrath and Kar were injured. Burroughs-Brown, a nurse, saw the wreck and stopped to assist. Another car driven by Ramirez, who could not see Burroughs-Brown until it was too late due to poor visibility, hit her. She was pinned briefly between Kar's and Ramirez's cars, but then she fell onto the highway, where two other vehicles ran over her. See id. at 826-827, 627 S.E.2d 866. Citing *Crane,* McGrath argued that he did not directly cause Burroughs-Brown's death, and faithful application of *Crane*'s reasoning would indeed have required reversal. But the Court of Appeals again upheld the conviction under the proximate cause test. See *McGrath,* 277 Ga.App. at 828-830, 627 S.E.2d 866. In a footnote, the court distinguished *Crane* on the ground that it "involved the felony murder statute, which was subject to two interpretations" and asserted that "[s]uch is not the case here, since the vehicular homicide statute has been consistently interpreted and applied." Id. at 830 n. 4, 627S.E.2d 866. The Court of Appeals distinguished *Crane* similarly in an earlier vehicular homicide case. See *Johnson,*170 Ga.App. at 434, 317 S.E.2d 213 ("*Crane* is clearly inapposite to the instant case where there is no evidence of indirect causation and which involves construction of an entirely different statute.").

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 OCGA § 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 OCGA § 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)). If *Crane* is good law, then this Court's construction of the causation language in OCGA § 16-5-1(c) should be binding on the Court of Appeals when it interprets the virtually identical causation *766 language in the vehicular homicide statute. See Ga. Const. of 1983, Art. VI., Sec. VI, Par. VI ("The decisions of the Supreme Court shall bind all other courts as precedents."). *Crane* is, however, no longer good law.

Stare Decisis Considerations

5. Stare decisis is an important principle that promotes the rule of law, particularly in the context of statutory interpretation, where our incorrect decisions are more easily corrected by the democratic process. See *Smith v. Salon Baptiste,* 287 Ga. 23, 30, 694 S.E.2d 83(2010) (Nahmias, J., concurring specially). However, stare decisis is not an "`inexorable command,' nor `a mechanical formula of adherence to the latest decision.' ... Stare decisis is instead a `principle of policy.'" *Citizens United v. Fed. Election Commn.,* 558 U.S. ___, 130 S. Ct. 876, 920, 175 L. Ed. 2d 753 (2010) (Roberts, C.J., concurring) (citations omitted). In considering whether to reexamine a prior erroneous holding, we must balance the importance of having the question *decided* against the importance of having it *decided right.* Id. In doing so, we consider factors such as the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning. See *Montejo v. Louisiana,* 556 U.S. ___, 129 S. Ct. 2079, 2088-2089, 173 L. Ed. 2d 955 (2009).

As demonstrated above, *Crane*'s reasoning is unsound and contrary to the body of our law. *Crane*'s holding may be workable in its specific context—the death of a co-party directly caused by the intended victim of the underlying felony. As just discussed, however, this Court and the Court of Appeals have been unable or unwilling to apply *Crane*'s reasoning to all felony murder cases, much less to the many other homicide statutes that use the same causation language. In addition, *Crane* affects no property or contract issues and establishes no substantive rights, so it creates no meaningful reliance interests. (To be sure, the potential conspiring felon who is well-read in the law might be slightly less deterred from committing a dangerous felony by the belief that if one of his co-conspirators is killed by the intended victim or a police officer, he will not face a murder charge, but that is not the sort of reliance the law usually recognizes in the stare decisis analysis.)

That leaves, on the side of reaffirming *Crane,* only its age and its statutory nature. That is all Justice Thompson's dissent relies upon. See Dissenting Op. at 769-70. *Crane* is indeed nearly three decades old, and in *Crane* and the only two subsequent cases in which we actually applied its holding, the Court expressly noted that the General Assembly could correct the result. See *Crane,* 247 Ga. at 780, 279 S.E.2d 695 ("The choice of whether or not the conduct in the present case should be violative of our criminal statutes lies with the General Assembly."); *Hyman,* 272 Ga. at 493, 531 S.E.2d 708 ("If this result be viewed as a defect in our felony murder statute, the remedy lies with the legislature." (quoting *Hill,* 250 Ga. at 280, 295 S.E.2d 518)).[7] "Without strong reason to set aside a long-standing interpretation," Justice Thompson's dissent says, "we will not do so in the face of legislative acquiescence." Dissenting Op. at 769. But see *Durrence v. State,* 287 Ga. 213, 216, n. 5, 695 S.E.2d 227 (2010) (Thompson, J.) (unanimously overruling a 26-year-old statutory interpretation case in a footnote, briefly explaining why the precedent was decided incorrectly but not mentioning "legislative acquiescence").

We have explained at length the strong reasons that exist to overrule *Crane,* which the dissents do not refute. Moreover, *Crane*'s odd reasoning and the inconsistent application of its holding by both appellate courts make resort to "legislative acquiescence" particularly dubious.[8] In large part *767because our Court and the Court of Appeals have not consistently applied *Crane,* it has not had the sort of obviously far-reaching effects that are likely to stimulate a legislative response. Moreover, prosecutors will only rarely go to the trouble of charging felony murder where *Crane* appears to apply, much less appealing the issue when the trial court follows our precedent (as the trial courts must). Consequently, most of *Crane's* direct effect—the felony murder prosecutions that are never brought—goes unseen.

Furthermore, it is not clear how the General Assembly would go about correcting *Crane.* If the legislature revised the "he causes" language in OCGA § 16-5-1(c) to say "he *proximately* causes," without simultaneously revising all the other homicide statutes that use similar causation language (including the malice murder provision in subsection (a) of the same statute), the effort could backfire. We could expect to see appeals by defendants arguing that the legislature's revision of one provision indicates that the language remaining

in all the other provisions means sor. ıg else—what we said such language meant ı. ane, that is, "directly causes." Nor do legislatures commonly undertake to enact the highly detailed amendment that would be required to respond very specifically to *Crane*—assuming that, in light of the inconsistent application of *Crane,* the General Assembly could even tell for sure what it needed to correct.

In light of these considerations, we do not believe "that we can properly place on the shoulders of [the General Assembly] the burden of the Court's own error." *Girouard v. United States,* 328 U.S. 61, 69, 66 S. Ct. 826, 90 L. Ed. 1084 (1946). "Certainly, stare decisis should not be applied to the extent that an error in the law is perpetuated," *Etkind v. Suarez,* 271 Ga. 352, 357, 519 S.E.2d 210 (1999), and it would not foster the objectives of predictability, stability, and consistent development of legal principles to reaffirm a decision that branched away from the path of prior and subsequent causation law, has rarely been followed, and if truly followed would disrupt many areas of settled law.

Conclusion

6. For these reasons, we hereby overrule *State v. Crane,* 247 Ga. 779, 279 S.E.2d 695, and our subsequent cases relying upon *Crane.* We hold that the felony murder statute requires only that the defendant's felonious conduct proximately cause the death of another person. We therefore reverse the order of the trial court and remand the case for the jury to decide the causation question at trial.

Judgment reversed and case remanded.

All the Justices concur, except HUNSTEIN, C.J., and BENHAM and THOMPSON, JJ., who dissent.

HUNSTEIN, Chief Justice, dissenting.

The State charged appellees Jackson and Smith with the felony murder of Daniels, who was shot and killed in self-defense by Hogan after Daniels, together with appellees, attempted to rob Hogan at gunpoint. Relying on *State v. Crane,* 247 Ga. 779, 279 S.E.2d 695 (1981), the trial court dismissed the felony murder charges. In *Crane,* this Court held that a defendant is not criminally liable for felony murder in those cases where *768 the murder victim was killed by someone other than the defendant or another party to the commission of the underlying felony. Focusing on certain language in the felony murder statute,[9] the majority overrules *Crane* and reverses the trial court. I cannot agree with the majority for the reason that the holding in *Crane* is compelled by the plain and unambiguous language in OCGA § 16-2-20, the statute that identifies those persons who may be charged with and convicted of the commission of a crime.

OCGA § 16-2-20 provides:

> (a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.
>
> (b) A person is concerned in the commission of a crime only if he:
>
> (1) Directly commits the crime;
>
> (2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;
>
> (3) Intentionally aids or abets in the commission of the crime; or
>
> (4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

(Emphasis supplied.)

This Court recognized the effect of OCGA § 16-2-20 on the felony murder statute in *Hill v. State,* 250 Ga. 277(1)(b), 295S.E.2d 518 (1982).[10] Hill was convicted of the malice murder of police officer Mullinax and the felony murder of Darryl Toles, a bystander who was inadvertently shot by Mullinax when the officer fired back in response to Hill's attack. Citing *Crane,* this Court reversed the felony murder conviction because the evidence was clear that Hill "did not directly cause the death of Darryl Toles and may not be convicted therefor." Id. at 280(1)(b), 295 S.E.2d 518. In the accompanying footnote this Court pointed out that OCGA § 16-2-20 (former Code Ann. § 26-801)

> provides that under certain circumstances, one may be held responsible for a crime one did not directly commit. A review of that Code section shows none of the circumstances to be applicable here. The closest, perhaps, is [OCGA § 16-2-20](b)(2) which allows a finding of criminal liability where one "*intentionally* causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity." (Emphasis supplied.) There is, however, in this case no allegation or evidence that [Hill] intentionally caused Officer Mullinax to shoot Darryl Toles.

Regardless whether or not appellees directly or proximately *caused* the death of Daniels, as *Crane* held, there is no question under the facts stipulated by the parties that appellees did not directly *commit* the alleged crime; hence, they cannot come within the ambit of OCGA § 16-2-20(b)(1). A review of the indictment establishes that the State does not allege that appellees "intentionally cause[d]" Hogan, the intended armed robbery victim, to shoot and kill Daniels,[11] so that OCGA § 16-2-20(b)(2) is not applicable. Finally, the facts and allegations present no basis for considering Hogan to be a "person concerned in the commission of" the alleged felony murder under any other provision in OCGA § 16-2-20.

By reinterpreting OCGA § 16-5-1(c) to authorize defendants such as appellees to be charged with and convicted of felony murder *769 when a defendant unintentionally but "proximately" causes some other person to commit the murder, the majority has judicially rewritten OCGA § 16-2-20(b) to add a fifth category of criminal liability. Contrary to the majority's note, neither "[o]ur traditional proximate cause law" nor the questionable case law interpreting OCGA § 40-6-393(a) authorizes the majority's cavalier expansion of OCGA § 16-2-20(b). Maj. Op., fn. 6. I understand that many members of this Court are frustrated that the Legislature, despite our repeated exhortations, see, e.g., *Hyman v. State,* 272 Ga. 492, 493, 531 S.E.2d 708 (2000) (authored by Carley, J.), has declined to amend OCGA § 16-2-20 to provide for criminal liability in situations of this nature. As currently enacted *nothing* in OCGA § 16-2-20 makes a person criminally liable when that person unintentionally but proximately causes some other person to commit a crime. But creating this fifth theory of criminal liability all on our own is blatant judicial activism. The Legislature, not this Court, gets to decide whether a person in this type of situation is a party to a crime. I cannot agree to this judicial usurpation of the legislative prerogative. Instead, because OCGA § 16-2-20(b) expressly provides that a person is concerned in the commission of a crime "only if" he comes within one of its four categories, thereby unambiguously setting forth *all* legally recognized theories of criminal liability in this State, and there is no allegation or evidence that appellees qualified under any of those four categories as parties to the crime of felony murder, I would hold that the trial court's dismissal of the felony murder charges against appellees was correct and should be affirmed. Accordingly, I respectfully dissent to the majority's opinion.

I am authorized to state that Justice BENHAM joins in this dissent.

THOMPSON, Justice, dissenting.

The Georgia felony murder statute 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." OCGA § 16-5-1(c). In *State v. Crane,* 247 Ga. 779, 279 S.E.2d695 (1981), this Court unanimously held that a "death of one of the would-be felons at the hand of the intended victim of the underlying felony" does not invoke the felony murder rule because the phrase "he causes" in the statute must be strictly construed to mean one of the defendants directly caused the death. *Crane,* supra at 779, 279 S.E.2d 695. The State concedes that *Crane* is factually on all fours and accurately states the law in Georgia, but it urges this Court to overrule it.

The meaning of "causes" was open to two possible interpretations in *Crane,* and we chose the one that favored the accused rather than the State. Id. As we have already said twice in the nearly 30 years since *Crane,* "`[i]f this result be viewed as a defect in our felony murder statute, the remedy lies with the legislature.'" *Hyman v. State,* 272 Ga. 492, 493, 531 S.E.2d 708 (2000) (quoting *Hill v. State,* 250 Ga. 277, 280, 295 S.E.2d 518 (1982)).

> "[E]ven those who regard `stare decisis' with something less than enthusiasm recognize that the principle has even greater weight where[, as here,] the precedent relates to interpretation of a statute." [Cit.] A reinterpretation of a statute after the General Assembly's implicit acceptance of the original interpretation would constitute a judicial usurpation of the legislative function.

Smith v. Baptiste, 287 Ga. 23, 30, 694 S.E.2d 83 (2010), (Nahmias, J., concurring specially), quoting *Abernathy v. City of Albany,* 269 Ga. 88, 90, 495 S.E.2d 13 (1998). Without strong reason to set aside a long-standing interpretation, we will not do so in the face of legislative acquiescence. "If this Court has been wrong from the beginning, on this subject, let the legislative power be invoked to prescribe a new rule for the future; until altered by that power, we are disposed to adhere to the rule which has been so long applied by our Courts and is so well known to the legal profession." *Etkind v. Suarez,* 271 Ga. 352, 358(5), 519 S.E.2d 210 (1999). Thus, unless and until the General Assembly declares that the element of causation in the felony murder statute actually means proximate causation, we should adhere to our interpretation of the statute as set forth in *Crane.*

> *770 "[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. (Cit.) ... The application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence. In most instances, it is of more practical utility to have the law settled and to let it remain so, than to open it up to new constructions, as the personnel of the court may change, even though grave doubt may arise as to the correctness of the interpretation originally given to it. (Cits.)" [Cit.]

Etkind, supra at 356-357(5), 519 S.E.2d 210.

"Certainly, stare decisis should not be applied to the extent that an error in the law is perpetuated. [Cit.] However, [*Crane*] is not an erroneous statement of the law of Georgia, but merely a pronouncement by a majority of this Court as to the proper construction of the [criminal] law of this state on a matter of first impression." *Etkind,* supra at 357(5), 519 S.E.2d 210. "`Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Smith v. Baptiste,* supra at 31, 694 S.E.2d 83, (Nahmias, J., concurring specially).

The identical fact pattern that was considered in *Crane* is now again before the Court, and the statute has remained unaltered by the General Assembly despite the passage of 29 years. All that has changed is the composition of the Court. We cannot and should not take it upon ourselves to expand upon the statutory language to achieve a result not expressed and not intended by the legislature. To do so is to eliminate predictability, stability, and continuity that is essential to a well-ordered judicial system. For these reasons, I must respectfully dissent.

I am authorized to state that Chief Justice HUNSTEIN and Justice BENHAM join in this dissent.

NOTES

[1] See, e.g., *Wilson,* 190 Ga. at 829, 10 S.E.2d 861 (upholding proximate cause instruction and malice murder conviction where the defendant smashed the victim's skull with a hatchet and the victim died nine months later from infection and gangrenous lung abscess); *Ward v. State,* 238 Ga. 367, 369, 233 S.E.2d 175 (1977) (holding that, even if the defendant's act of throwing the drunken victim off a bridge into a river "did not directly cause" the victim's death, "the jury was authorized to find that this act either materially contributed to the death ... or materially accelerated it" under the proximate cause test set forth in *Wilson* and other cases); *Fleming v. State,* 240 Ga. 142, 145, 240 S.E.2d 37 (1977) (affirming the trial court's refusal to instruct the jury to acquit on malice murder if it found that the defendant mortally shot the victim but also found that the "immediate cause" of the victim's death was drowning, because "[t]he evidence established that the wounds were the proximate cause of the death"); *Bishop v. State,* 257 Ga. 136, 140, 356 S.E.2d 503 (1987) (holding in a malice murder case that "`[w]here one inflicts an unlawful injury, such injury is the proximate cause of death if the injury "directly and materially contributed to the happening of a subsequent accruing immediate cause of the death,"'" noting that "[t]his court has held evidence of death by pulmonary embolism resulting from treatment after wounds were inflicted by a defendant can present a question for a jury as to whether the wound was the proximate cause of death." (citations omitted)).

[2] See, e.g., *Jones v. State,* 220 Ga. 899, 902, 142 S.E.2d 801 (1965) ("`A murder may be committed in perpetration of a felony, although it does not take place until after the felony itself has been technically completed, if the homicide is committed within the res gestae of the felony.' Certainly the killing is a part of the res gestae of the robbery in this case ... and is one of the incidental, probable consequences of the execution of the design to commit the robbery." (citations omitted)); *Dupree v. State,* 247 Ga. 470, 470-471, 472, 277 S.E.2d 18 (1981) (holding, where the victim died of heart failure brought on by stress and injuries incurred during a robbery, that the evidence was sufficient to find that "the conduct of the appellant in perpetrating the robbery constituted the proximate cause of the death of the deceased"); *Larkin v. State,* 247 Ga. 586, 587, 278 S.E.2d 365 (1981) (upholding felony murder conviction against the defendant's claim that the evidence was insufficient to show that "he caused his mother-in-law's death" when he stabbed her while assaulting his wife and she later died from a pulmonary embolus as a complication of surgery to re-stitch the knife wound, explaining that "[w]here one inflicts an unlawful injury, such injury is the proximate cause of death if the injury `directly and materially contributed to the happening of a subsequent accruing immediate cause of the death'" (citation omitted)); *Durden v. State,* 250 Ga. 325, 329, 297 S.E.2d 237 (1982) (affirming felony murder conviction where a store owner responding to a burglary died of a heart attack after exchanging shots with the defendant, explaining that "the rule may be stated as follows: Where one commits a felony upon another, such felony is to be accounted as the efficient, proximate cause of the death whenever it shall be made to appear either that the felony directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or that the injury materially accelerated the death, although proximately occasioned by a pre-existing cause."); *Williams v. State,* 255 Ga. 21, 22, 334 S.E.2d 691 (1985) (relying on *Durden* to uphold felony murder conviction where the defendant shot the victim in the leg, causing him to fall out of his vehicle, which then rolled over and killed him, because the aggravated assault "directly and materially contributed to his death by asphyxiation"); *State v. Cross,* 260 Ga. 845, 847, 401 S.E.2d 510 (1991) (holding that "OCGA § 16-5-1(c), defining felony murder, requires that the death need only be *caused* by an injury which occurred during the res gestae of the felony" and upholding an indictment that charged the death of a baby more than a year after the defendant shook her (emphasis in original)); *Skaggs,* 278 Ga. at 19-20, 22, 596 S.E.2d 159 (applying the general test for proximate causation in a felony murder case and holding that the defendant's aggravated assault by hitting and kicking the victim proximately caused the victim's death by causing him to fall and fatally hit his head on the ground, rejecting the argument based upon *Crane* that the proximate cause jury instruction erroneously "failed to include additional language expounding upon proximate cause when the accused does `not directly cause the death'").

[3] See, all with emphasis supplied, OCGA § 6-2-5.2 ("*Any person who,* without malice aforethought, *causes the death of another person* through the violation of Code Section 6-2-5.1 [operating aircraft under the influence] commits the offense of homicide by aircraft...."); § 16-5-2(a) ("A person commits the offense of voluntary manslaughter when *he causes the death of another human*

being under circumstances which woul ɘrwise be murder and if he acts solely as the ɩ of a sudden, violent, and irresistible passion...."); § 16-5-3(a) ("A person commits the [felony] offense of involuntary manslaughter in the commission of an unlawful act when *he causes the death of another human being* without any intention to do so by the commission of an unlawful act other than a felony."), (b) ("A person commits the [misdemeanor] offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner when *he causes the death of another human being* without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death or great bodily harm."); § 16-5-80(b) ("A person commits the offense of feticide if *he or she* willfully and without legal justification *causes the death of an unborn child* by any injury to the mother of such child...."), (d) ("A person commits the offense of voluntary manslaughter of an unborn child when *such person causes the death of an unborn child* under circumstances which would otherwise be feticide and if such person acts solely as the result of a sudden, violent, and irresistible passion...."); § 40-6-393(a) ("*Any person who,* without malice aforethought, *causes the death of another person* through the violation of [various motor vehicle statutes] commits the offense of homicide by vehicle in the first degree...."), (b) ("*Any driver of a motor vehicle who,* without malice aforethought, *causes an accident which causes the death of another person* and leaves the scene of the accident in violation of subsection (b) of Code Section 40-6-270 commits the offense of homicide by vehicle in the first degree...."), (c) ("*Any person who causes the death of another person,* without an intention to do so, by violating any [other] provision of this title ... commits the offense of homicide by vehicle in the second degree *when such violation is the cause of said death*...."); § 40-6-393.1(b)(1) ("A person commits the offense of feticide by vehicle in the first degree if *he or she causes the death of an unborn child* by any injury to the mother of such child which would be homicide by vehicle in the first degree...."), (c)(1) ("A person commits the offense of feticide by vehicle in the second degree if *he or she causes the death of an unborn child* by any injury to the mother of such child by violating any [other] provision of this title ... which would be homicide by vehicle in the second degree...."); § 40-6-396(a) ("*Any person who,* without malice aforethought, *causes the death of another person* through the violation of subsection (a) of Code Section 40-6-26 commits the offense of homicide by interference with an official traffic-control device or railroad sign or signal...."); § 52-7-12.2(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 vessel in the first degree."), (b) ("*Any operator of a vessel who,* without malice aforethought, *causes a collision or accident which causes the death of another person* and leaves the scene of the collision or accident in violation of subsection (a) of Code Section 52-7-14 commits the offense of homicide by vessel in the first degree...."), (c) ("*Any person who causes the death of another person,* without an intention to do so, by violating any [other] provision of this title ... commits the [misdemeanor] offense of homicide by vessel in the second degree *when such violation is the cause of said death.*"); § 52-7-12.3(b)(1) ("A person commits the offense of feticide by vessel in the first degree if *he or she causes the death of an unborn child* by any injury to the mother of such child through the violation of [various code sections]...."), (c)(1) ("A person commits the offense of feticide by vessel in the second degree if *he or she causes the death of an unborn child* by any injury to the mother of such child by violating any [other] provision of this title....").

[4] See, e.g., *Cain v. State,* 55 Ga.App. 376, 381-382, 190 S.E. 371 (1937) ("In a case of manslaughter, the negligence of the defendant must be the proximate cause of the death, in order to constitute such crime.... `Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrong-doer, or was in reality only a condition on or through which the negligent act operated to induce the injurious result.'" (citations omitted)); *Coley v. State,* 117 Ga.App. 149, 151, 159 S.E.2d 452 (1968) ("To convict for the offense of involuntary manslaughter in the commission of an unlawful act, it is necessary, among other things, that the death be the proximate result of the unlawful act. Or, as it may otherwise be stated, the unlawful act must be found by the jury to be the proximate cause of the homicide." (citations omitted)); *Cook v. State,* 134 Ga.App. 357, 359, 214 S.E.2d 423 (1975) (approving detailed proximate cause instruction on murder, voluntary manslaughter, and involuntary manslaughter charges); *Johnson v. State,* 170 Ga.App. 433, 434, 317 S.E.2d 213 (1984) ("The term and concept of proximate cause has been applied in vehicular homicide cases in this state for many years."); *Hickman v. State,* 186 Ga.App. 118, 119, 366 S.E.2d 426 (1988) (rejecting claim in voluntary manslaughter case that the victim did not die "as a direct, proximate result of the strike or strikes inflicted by defendant because the cause of death was due to an intervening factor: pulmonary embolism," citing *Heath v. State,* 77 Ga.App. 127, 130-131, 47 S.E.2d 906(1948)); *Anderson v. State,* 226 Ga. 35, 37, 172 S.E.2d 424 (1970) (approving charge on involuntary manslaughter in the commission of an unlawful act, explaining that the "excerpt complained of when considered with the entire charge plainly instructed the jury that the act of the defendant must have been the proximate cause of the death of the deceased"); *Miller v. State,* 236 Ga.App. 825, 828, 513 S.E.2d 27 (1999) ("In vehicular homicide cases, the State must prove that the defendant's conduct was the `legal' or `proximate' cause, as well as the cause in fact, of the death." (citations omitted)); *Walker v. State,* 251 Ga.App. 479, 481, 553 S.E.2d 634 (2001) (upholding voluntary manslaughter conviction, stating that " [t]he test for determining causation in homicide cases is" whether the unlawful injury is "`the efficient, proximate cause of death'" (citation omitted)); *Pitts v. State,* 253 Ga.App. 373, 374, 559 S.E.2d 106 (2002) ("In order to be convicted of vehicular homicide under OCGA § 40-6-393, the conduct of the defendant must have caused the death. This requires showing that `the defendant's conduct was the "legal" or "proximate" cause, as well as the cause in fact, of the death.'" (citations omitted)); *McGrath v. State,* 277 Ga.App. 825, 828-829, 627 S.E.2d 866(2006) ("[I]n order to be convicted of vehicular homicide by recklessly driving in violation of OCGA § 40-6-390, [the defendant's] conduct must have caused 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."'" (citations omitted)).

[5] The only other support the *Crane* Court offered for its holding was that "[o]ther jurisdictions apparently are split on this issue, the numerical majority favoring a negative answer," citing an ALR annotation without any analysis of whether the felony murder statutes and case law in those jurisdictions mirror Georgia's. See *Crane,* 247 Ga. at 779 & n. 3, 279 S.E.2d 695 (citing 56 ALR3d 239). The *Crane* Court's perfunctory analysis of the felony murder statute to reach a holding that limits the scope of felony murder liability is not unique. See *Ford v. State,* 262Ga. 602, 602, 423 S.E.2d 255 (1992) (holding, based largely on case law from other states, and despite the felony murder statute's use of the unrestricted term "a felony," that "dangerousness is a prerequisite to the inclusion of a felony as an underlying felony under the felony murder statute of this state"). See also *Shivers v. State,* 286 Ga. 422, 425-428 & n. 3, 688 S.E.2d 622 (2010) (Nahmias, J., concurring specially) (criticizing the *Ford* Court's holding and reasoning, including its misstatement about the common law history of Georgia's felony murder statute).

[6] It may be noted that this holding had no immediate effect on the case, because the defendant killed the police officer during the shootout, and his malice murder conviction and death sentence for that crime were affirmed. See *Hill,* 250 Ga. at 279, 281, 284, 287, 295 S.E.2d 518. However, the Eleventh Circuit later vacated the capital conviction based upon violations of Hill's due process rights

at trial. See *Hill v. Turpin,* 135 F.3d 141 2 (11th Cir.1998).

Looking to a footnote in *Hill,* see 250 Ga. at 280, n. 3, 295 S.E.2d 518, Chief Justice Hunstein's dissent argues that "the holding in *Crane* is compelled by the plain and unambiguous language in OCGA § 16-2-20, the statute that identifies those persons who may be charged with and convicted of the commission of a crime." Dissenting Op. at 768. The *Crane* Court did not suggest that its holding was compelled by § 16-2-20, mentioning the predecessor version of that statute only in passing, see 247 Ga. at 779, n. 4, 279 S.E.2d 695, and the Chief Justice does not try to defend the causation reasoning on which *Crane* did rely. Moreover, in its footnote, the *Hill* majority was not explaining why felony murder liability was limited by OCGA § 16-2-20. The Court instead had accepted *Crane*'s limitation of liability to deaths "directly cause[d]" by the defendant and was looking to the party-to-a-crime statute to see if it might be used to expand liability to "a crime one did not directly commit." 250 Ga. at 280 & n. 3, 295 S.E.2d 518. On the incorrect "direct causation" assumption, the answer was no. The Chief Justice cites no authority for the proposition that the party-to-a-crime statute imposes a *limitation* on proximate causation. To the contrary, OCGA § 16-2-20 *expands*criminal liability from a defendant's own criminal acts (and their proximate consequences) to the criminal acts of his accomplices and agents (and their proximate consequences). Thus, the question in this case is not whether the defendants intentionally caused their *victim* to commit a crime by killing their co-conspirator; the victim acted in self-defense and committed no crime. The question is whether a jury could reasonably find that the predicate felonies the *defendants* intentionally committed, alone or as co-parties under OCGA § 16-2-20(b)(3) and (4), proximately caused Daniels' death when their intended victim defended himself against the armed robbery. Our traditional proximate cause law answers that question affirmatively. Finally, we note that the effort to limit felony murder liability based on OCGA § 16-2-20 runs into the same problem as the effort to limit liability based on a constricted view of causation: the same reasoning should apply to all similar criminal and homicide cases, but that has never been done, as the discussion below demonstrates. In short, this opinion does nothing to alter or expand OCGA § 16-2-20. We are simply interpreting the language of the felony murder statute.

[7] Contrary to the assertion in Chief Justice Hunstein's dissent, the Court has never suggested that the General Assembly needs to "amend OCGA § 16-2-20 to provide for criminal liability in situations of this nature." Dissenting Op. at 769. Indeed, that dissent argues for the first time ever that OCGA § 16-2-20, as opposed to the causation element in OCGA § 16-5-1 (c), requires the result reached in *Crane.* See footnote 6 above.

[8] Even aside from these peculiar circumstances, it can be perilous to rely heavily on legislative silence and inaction to conclude that a court's interpretation of a statute is correct.

Legislative silence is a poor beacon to follow in discerning the proper statutory route.... The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by [the legislature]. [Legislative] inaction frequently betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in [legislative] silence alone the adoption of a controlling rule of law." *Girouard v. United States,* 328 U.S. 61, 69 [, 66 S. Ct. 826, 90 L. Ed. 1084] (1946).... Where, as in the case before us, there is no indication that a subsequent [General Assembly] has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone... approval....

Zuber v. Allen, 396 U.S. 168, 185 & n. 21, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969). See also *Helvering v. Hallock,* 309 U.S. 106, 119-120, 60 S. Ct. 444, 84 L. Ed. 604 (1940) ("To explain the cause of non-action by [the legislature] when [the legislature] itself sheds no light is to venture into speculative unrealities.").

[9] Under OCGA § 16-5-1(c), "[a] person ... commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice."

[10] The majority cites to *Hill* "albeit with no significant discussion." *Thornton v. Ga. Farm Bureau Mut. Ins. Co.,* 287 Ga. 379, 695 S.E.2d 642 (2010). See Majority Opinion, p. 763.

[11] The pertinent language in the indictment charges appellees "with the offense of MURDER for that [appellees] ... while in the commission of a felony, to wit: AGGRAVATED ASSAULT as alleged in Count 4 of this Indictment, did cause the death of Jerold Daniels, a human being." Count 4 alleged that appellees "did unlawfully make an assault upon the person of Arthur Hogan, with a firearm ..." The parties stipulated that Hogan was the person appellees intended to rob.

APPENDIX K-

Georgia Supreme Court, **In Re: Formal Advisory Opinion 10-1**, 744 S.E.2d 798 (2013).

IN RE: FORMAL ADVISORY OPINION 10–1.

No. S10U1679.

Decided: July 11, 2013

Dennis R. Dunn, Deputy A.G., Stefan Ernst Ritter, Senior A.A.G., Samuel S. Olens, A.G., Department of Law, J. Randolph Evans, Mckenna, Long & Aldridge, LLP, Paula J. Frederick, General Counsel, Robert E. McCormack III, State Bar of Georgia, John Joseph Shiptenko, Office of The General Counsel, Michael Lanier Edwards, Eastern Judicial Circuit Public Defender's Office, Savannah, James B. Ellington, Hull Barrett, PC, Augusta, for In re Formal Advisory Opinion 10–1.

Responding to a letter from the Georgia Public Defender Standards Council (GPDSC), the State Bar Formal Advisory Opinion Board (Board) issued Formal Advisory Opinion 10–1 (FAO 10–1), in which the Board concluded that the standard for the imputation of conflicts of interest under Rule 1.10(a) of the Georgia Rules of Professional Conduct applies to the office of a circuit public defender as it would to a private law firm. FAO 10–1 was published in the June 2010 issue of the Georgia Bar Journal and was filed in this Court on June 15, 2010. On July 5, 2010, the GPDSC filed a petition for discretionary review which this Court granted on January 18, 2011. The Court heard oral argument on January 10, 2012. For reasons set forth below, we conclude, as did the Board, that Rule 1.10(a) applies to a circuit public defender office as it would to a private law firm, and pursuant to State Bar Rule 4.403(d), we hereby approve FAO 10–1 to the extent it so holds.[1]

1. At the heart of FAO 10–1 is the constitutional right to conflict-free counsel and the construction of Rule 1.10(a) of the Georgia Rules of Professional Conduct. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (101 SC 1097, 67 LE2d 220) (2008). Indeed, this Court has stated in no uncertain terms that, "Effective counsel is counsel free from conflicts of interest." Garland v. State, 283 Ga. 201 (657 S.E.2d 842) (2008). In keeping with this unequivocal right to conflict-free representation, Rule 1.10(a) provides as follows:

> 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 Rule 1.7: Conflict of Interest: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.

(Emphasis in original.) Comment [1] concerning Rule 1.10 defines "firm" to include "lawyers . in a legal services organization." Comment [3] further provides "Lawyers employed in the same unit of a legal service organization constitute a firm,."

Under a plain reading of Ru .10(a) and the comments thereto, uit public defenders working in the circuit public defender office of the same judicial circuit are akin to lawyers working in the same unit of a legal services organization and each judicial circuit's public defender's office[2] is a "firm" as the term is used in the rule. This construction is in keeping with our past jurisprudence. Cf. Hung v. State, 282 Ga. 684(2) (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); Kennebrew v. State, 267 Ga. 400 (480 S.E.2d 1) (1996) (appellate counsel who was from the same public defender office as appellant's trial lawyer could not represent appellant on appeal where appellant had an ineffective assistance of counsel claim); Ryan v. Thomas, 261 Ga. 661 (409 S.E.2d 507) (1991) (for the purpose of raising a claim of ineffective assistance of counsel, "attorneys in a public defender's office are to be treated as members of a law firm ."); Love v. State, 293 Ga.App. 499, 501 at fn. 1 (667 S.E.2d 656) (2008). See also Reynolds v. Chapman, 253 F3d 1337, 1343–1344 (11th Cir.2001) ("While public defenders' offices have certain characteristics that distinguish them from typical law firms, our cases have not drawn a distinction between the two."). Accordingly, FAO 10–1 is correct inasmuch is it concludes that public defenders working in the same judicial circuit are "firms" subject to the prohibition set forth in Rule 1.10(a) when a conflict exists pursuant to the conflict of interest rules listed therein, including in particular Rule 1. 7.[3] That is, if it is determined that a single public defender in the circuit public defender's 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. See Restatement (Third) of the Law Governing Lawyers § 123(d)(iv) ("The rules on imputed conflicts . apply to a public-defender organization as they do to a law firm in private practice .").

2. Despite the unambiguous application of Rule 1.10(a) to circuit public defenders, GPDSC complains that FAO 10–1 creates a per se or automatic rule of disqualification of a circuit public defender office. We disagree. This Court has stated that "[g]iven that multiple representation alone does not amount to a conflict of interest when one attorney is involved, it follows that counsel from the same [public defender office] are not automatically disqualified from representing multiple defendants charged with offenses arising from the same conduct." Burns v. State, 281 Ga. 338, 340 (638 S.E.2d 299) (2006) (emphasis in the original). Here, Rule 1.10 does not become relevant or applicable until after an 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. See, e.g., Rule 1.10(c) ("A disqualification prescribed by this rule may be waived by the affected client under the

conditions stated in Rule 1.7 (Conflict of Interest: General Rule.) Thus, FAO 10–1 does not create a per se rule of disqualification of a circuit public defender's office prior to the determination that an impermissible conflict of interest exists and cannot be waived or otherwise overcome.

Although a lawyer (and by imputation his law firm, including his circuit public defender office) may not always have an impermissible conflict of interest in representing multiple defendants in a criminal case, this should not be read as suggesting that such multiple representation can routinely occur. The Georgia Rules of Professional Conduct explain that multiple representation of criminal defendants is ethically permissible only in the unusual case. See Rule 1.7, Comment [7] ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."). We realize that 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, 373 U.S. 335 (83 SC 792, 9 LE2d 799) (1963). But the problem of adequately funding indigent defense cannot be solved by compromising the promise of Gideon. See Garland v. State, 283 Ga. 201, 204 (657 S.E.2d 842) (2008).

Since FAO 10–1 accurately interprets Rule 1.10(a) as it is to be applied to public defenders working in circuit public defender offices in the various judicial circuits of this State, it is approved.[4]

Formal Advisory Opinion 10–1 approved.

FOOTNOTES

1. In FAO 10–1, the Board purported to answer a broader question—whether "different lawyers employed in the circuit public defender office in the same judicial circuit [may] represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so"—and we asked the parties to address a similar question in their briefs to this Court. That statement of the question, however, is too broad. The real issue addressed by the Board—and addressed in this opinion—is solely a question of conflict imputation, that is, whether Rule 1.10(a) applies equally to circuit public defender offices and to private law firms. No doubt, the question of conflict imputation under Rule 1.10(a) is part of the broader question that the Board purported to answer and that we posed to the parties. But whether multiple representations are absolutely prohibited upon imputation of a conflict—even with, for instance, the informed consent of the client or the employment of "screening" measures within an office or firm—is a question that goes beyond Rule 1.10(a), and it is one that we do not attempt to answer in this opinion. To the extent that FAO 10–1 speaks to the broader question, we offer no opinion about its correctness.

2. There are 43 circuit public defender offices in Georgia.

3. Rule 1.7 of the Georgia Rules of Professional Conduct provides:(a) 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, except as permitted in (b).(b) If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent confirmed in writing to the representation after: (1) consultation with the lawyer pursuant to Rule 1.0(c); (2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and (3) having been given the opportunity to consult with independent counsel.(c) Client informed consent is not permissible if the representation: (1) is prohibited by law or these Rules; (2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding; or (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients. The maximum penalty for a violation of this Rule is disbarment.

4. Our opinion cites several precedents that concern the constitutional guarantee of the assistance of counsel, and it is only fitting that we think about the constitutional values that Rule 1.10 promotes as we consider the meaning of Rule 1.10. We do not hold that the imputation of conflicts required by Rule 1.10 is compelled by the Constitution, nor do we express any opinion about the constitutionality of any other standard for imputation. Rule 1.10 is a useful aid in the fulfillment of the constitutional guarantee of the right to the effective assistance of counsel, but we do not hold today that it is essential to fulfill the constitutional guarantee. We do not endorse any particular alternative to Rule 1.10(a), but we also do not foreclose the possibility that Rule 1.10(a) could be amended so as to adequately safeguard high professional standards and the constitutional rights of an accused—by ensuring, among other things, the independent judgment of his counsel and the preservation of his confidences—and, at the same time, permit circuit public defender offices more flexibility in the representations of co-defendants. As of now, Rule 1.10 is the rule that we have adopted in Georgia, FAO 10–1 correctly interprets it, and we decide nothing more.

PER CURIAM.

All the Justices concur.

APPENDIX L-

Hancock County Superior Court, **Westmoreland v. Johnson,** No. 11-HC-034. Docket Report.

In the Superior Court of Hancock County
The State of Georgia

4 Feet

FILED IN OFFICE
TIME 9:00 A.M.
AUG 0 1 2012
CLERK SUPERIOR COURT
HANCOCK COUNTY, GA

Mr. Dennis Westmoreland 1041129
petitioner/Movant

v.

Mr. Glenn Johnson
respondent

Civil Action # 11-HC-034

Evidence Supporting Allegations in Habeas Proceeding

Movant in above styled case and action, hereby presents/attach thereonto records, affidavits, and including but not limited to evidence supporting allegations contained in Habeas Corpus filed in Hancock Superior Court, and any documents filed by Movant from 10-28-11 until the date that this document is filed in Court. (Hancock Superior Court.)

The contained evidence is being submitted in accordance with O.C.G.A § 9-14-44; Contents and Verification of Petition which states "... the petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not included/attached.

Movant's Evidentiary Package In Support of Habeas Corpus
Table of Contents

Evidence #

FILED IN OFFICE
TIME 9:00 A.M.
AUG 01 2012
CLERK SUPERIOR COURT
HANCOCK COUNTY, GA

35.) ★
36.) ★
40.) ★
41.) ★
42.) ★
43.) ★
44.) ★
45.) AJC.- Pre Trial Publicity (article extracted from Internet) <5-18-07> 131
46.) MDJ- Post-Conviction Publicity (2 articles) 133
47.) ★

Note: <★> Evidence is not included in Initial Evidentiary Package In Support of Habeas Corpus <★>

Signed before me this 10th day of July 2012

notary Public: Ashlea Lewis

Mr. Amos Westmoreland 1004629

7/11/12
Date:

Hancock Superior Court Clerk
Hancock County Superior Court
P.O. Box 451
Sparta Georgia 31087

Movant: pro se
Hancock State Prison
701 Prison Blvd.
Sparta Georgia 31087

APPENDIX M-

Cobb County Superior Court, **Westmoreland v. State,** No. 07-9-6020, Extraordinary Motion for New Trial- Order entered June 9, 2011.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	CRIMINAL
	*	FILE NO: 07-9-6020-42
vs.	*	
	*	
AMOS WESTMORELAND,	*	
	*	
Defendant.	*	
	*	

ORDER

The Defendant having filed an Extraordinary Motion for New Trial based on newly discovered evidence and the Court having reviewed the same and the record in this case;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1.

O.C.G.A. §5-5-23 states:

"A new trial my be granted in any case where any material evidence - - - - relating to new and material facts is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the Court within the time allowed by law for entering a Motion for New Trial"

O.C.G.A. §5-5-41 a) expands the time beyond 30 days if some good reason is shown, as judged by the Court.

2.

The Defendant was convicted by a jury of thirteen of the sixteen counts against him, including felony murder, on October 23, 2008 and was sentenced on November 6, 2008.

3.

A timely Motion for New Trial was denied and the Supreme Court affirmed the conviction on August 10, 2010 – 287 Ga. 688.

4.

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.

5.

However this is not newly discovered evidence. The record shows that Cobb County Police Pursuit Procedures where 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.

6.

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.

SO ORDERED this 9 day of June 2011.

JUDGE ADELE P. GRUBBS
Superior Court of Cobb County
State of Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served all interested parties in the within and foregoing matter by depositing a copy of this ***Order*** dated the 9th day of June, **2011** in the Cobb County Mail System in the properly addressed envelopes with adequate postage thereon addressed as follows:

Jason Marbutt, Esq.
Bruce Hornbuckle, Esq.
Assistant District Attorney
Cobb Judicial Circuit
Interdepartmental Mail

Amos Westmoreland #1041629
Hancock State Prison
701 Prison Blvd.
Sparta, GA 31087

This 9th day of June, **2011.**

KCarroll-Hawkins

Kimberly Carroll-Hawkins
Judicial Administrative Assistant to
Judge Adele P. Grubbs

APPENDIX N-

Cobb County Superior Court, **Westmoreland v. State**, No. 07-9-6020, Extraordinary Motion in Arrest of Judgement- Order entered July 1, 2011; April 9, 2012.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

vs.

AMOS WESTMOELAND, JR.,

Defendant.

CRIMINAL
FILE NO: 07-9-6020-42

ORDER

The Court issued an Order denying the Defendant's Extraordinary Motion in Arrest of Judgment, a copy of which is attached and made a part hereof, and the Defendant filed a Notice of Appeal to that Order.

The Defendant filed a "1st Amendment to the Extraordinary Motion in Arrest of Judgment." The Court did not rule on said amendment because the Appeal was pending.

The 1st Amendment to the Extraordinary Motion in Arrest of Judgment having been reviewed;

IT IS HEREBY ORDERED AND ADJUDGED that the 1st Amended Extraordinary Motion in Arrest of Judgment is denied.

SO ORDERED this 9 day of April 2012.

JUDGE ADELE P. GRUBBS
Superior Court of Cobb County
State of Georgia

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

vs.

AMOS WESTMORELAND, JR.,

Defendant.

CRIMINAL
FILE NO: 07-9-6020-42

ORDER

The Defendant having filed an "Extraordinary Motion in Arrest of Judgment" and the same having been read and considered;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1.

The Defendant was convicted by a jury of thirteen of the sixteen counts for which he was indicted including felony murder, on October 23, 2008 and was sentenced on November 6, 2008.

2.

After the Trial Court denied the Motion for New Trial, the Supreme Court affirmed the conviction on June 28, 2010 – 287 Ga. 688. A copy of that decision is incorporated into this Order and attached hereto.

3.

In order to challenge a conviction after it has been affirmed on direct appeal, criminal defendants is required to file an extraordinary motion for new trial, a motion in arrest of judgment or a petition for habeas corpus. *Harper v State* 286 Ga. 216.

4.

A motion for arrest of judgment lies for a non-amendable defect which appears on the face of the record or pleadings. It must be made during the term at which the judgment was obtained.

5.

The remitter from the Supreme Court of Georgia was made the Judgment of the Court on August 10, 2010. This Motion in Arrest of Judgment was filed June 30, 2011. It is too late.

6.

However, there are no non-amendable defects appearing on the face of the record or pleadings.

i) The Indictment returned by the Grand Jury in the correct manner.

ii) Each count of the Indictment charges the essential elements of the crimes charged.

iii) The Sentences imposed are correct as a matter of law.

iv) The contention regarding the Cobb County Police Department Pursuit to Policy was previously rejected by the Supreme Court in Section 3 of its decision.

v) There is no error in the charge and no "conflict of interest".

THEREFORE Defendant's Motion in Arrest of Judgment is denied.

SO ORDERED this 1 day of July 2011.

JUDGE ADELE P. GRUBBS
Superior Court of Cobb County
State of Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served all interested parties in the within and foregoing matter by depositing a copy of this Order dated the 5th day of July, 2011 in the Cobb County Mail System in the properly addressed envelopes with adequate postage thereon addressed as follows:

Jason Marbutt, Esq.
Bruce Hornbuckle, Esq.
Assistant District Attorney
Cobb Judicial Circuit
Interdepartmental Mail

Amos Westmoreland #1041629
Hancock State Prison
701 Prison Blvd.
Sparta, GA 31087

This 5th day of July, 2011.

Kimberly Carroll-Hawkins
Judicial Administrative Assistant to
Judge Adele P. Grubbs

APPENDIX O-

Client-Lawyer Letter from Louis Turchiarelli.

Clerk's Office
SUPREME COURT of GEORGIA
244 Washington Street, SW
572 State Office Annex
Atlanta, Georgia 30334

RECD JUL 19 2E

Mr. Amos Westmoreland #1041629
Hancock State Prison
701 Prison Blvd.
Sparta, GA 31087

E1

Lt. T. R. Alexander
Cobb County Police Dept.
140 North Marietta Pkwy
Marietta Ga. 30060

RETURN SERVICE
REQUESTED

PRESORTED
FIRST CLASS

UNITED STATES POSTAGE

$ 0

E1

Amos Westmoreland 1041629
Hancock State Prison
701 Prison Boulevard
Sparta, Georgia 31087

RECD SEP 23 2010

GBXDS11 31087

Louis M. Turchiarelli
Attorney at Law
416 Roswell Street,NE
Suite 200
Marietta, GA 30060

DO NOT FORWARD
ADDRESS CORRECTION REQUESTED

$0

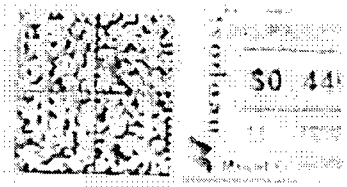
E2

RECD MAY 12 2009

Mr. Amos Westmoreland
#1041629

Louis M. Turchiarelli
Attorney at Law
416 Roswell Street,NE
Suite 200
Marietta, GA 30060

DO NOT FORWARD
ADDRESS CORRECTION REQUESTED



RECD NOV 25 2009

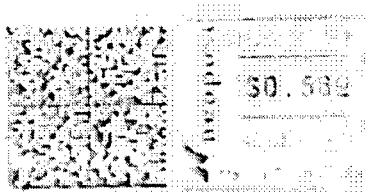
Mr. Amos Westmoreland
GDC ID #1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

31087+0339

Louis M. Turchiarelli
Attorney at Law
416 Roswell Street,NE
Suite 200
Marietta, GA 30060

DO NOT FORWARD
ADDRESS CORRECTION REQUESTED

RECD DEC 10 2009



Mr. Amos Westmoreland
GDC ID #1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

LOUIS M. TURCHIARELLI
Attorney at Law
Suite 200
410 Roswell Street, N.E.
Marietta, Georgia 30060
Email: louis@turchiarellilaw.com

Telephone No. (770) 426-7500
Facsimile No. (770) 423-0103

December 4, 2009

Mr. Amos Westmoreland
GDC ID #1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

RE: Amos Westmoreland v. State of Georgia
Appeal No. S10A0365

Dear Mr. Westmoreland:

I am in receipt of your letter dated November 26, 2009 and would like to inform you on the current situation regarding your case.

You had mentioned in your letter that you needed to have an attorney-client understanding, the problem is that you continually have put in your letters that you feel I am not vigorously defending your case nor did you approve of my handling of the Motion for New Trial, even though with your latest letter you indicated you felt I was a good lawyer and was doing a good job. I have explained that we introduced both of the Cobb County Policies and Procedures for high speed chases at the Motion for New Trial and they will be included in the appeal. The civil lawsuit you mentioned in your letter has no bearing on your case since it was not mentioned at trial and thus it has no probative value in the Appeal.

As I explained in my previous correspondence I made sure there was an order in place at the trial court level to guarantee the "complete" record was transmitted to the higher court which included all of the DVD/video recordings

evidence that the State presented at trial, this after giving a thorough legal presentation to the trial Court of all the errors that were made during the trial.

I feel that your baseless allegations against me in your November 16, 2009 letter certainly raised a conflict in our attorney client relationship therefore I contacted the Circuit Defenders office in Cobb County and made them aware of your concerns. The director, Randy Harris and myself feel that it is in your best interest to assign a new attorney for the purposes of your appeal and they will file a substitution of counsel. Your new counsel of record is Carter Clayton, 404 658-1670.

As you requested in your letter of November 26, 2009 I am returning the original letter and all attachments therein.

Very truly yours,

Louis M. Turchiarelli

LMT/bj

APPENDIX P-

Client-Lawyer Letter from William Carter Clayton June 29, 2010.

STATE BAR OF GEORGIA
104 Marietta Street NW
Suite 100
Atlanta, GA 30303

Mr. Amos Westmoreland
1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

31087+0339

E1

RECD SEP 22 2

JONES, MORRISON & WOMACK, P.C.
ATTORNEYS AT LAW
1250 PEACHTREE CENTER TOWER
230 PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30303

SEASONS GREETINGS

RECD DEC 22 2009

E2

ADDRESS CORRECTION REQUESTED

W. CARTER CLAYTON
ATTORNEY AT LAW
SPECIAL MAIL - OPEN ONLY IN THE PRESENCE OF INMATE

Amos Westmoreland
GDC# 1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

31087+0339 B004

STATE BAR OF GEORGIA
104 Marietta Street NW
Suite 100
Atlanta, GA 30303

RECD DEC 29 2009

E2

Mr. Amos Westmoreland
101629 E-2

JONES, MORRISON & WOMACK, P.C.
ATTORNEYS AT LAW
1250 PEACHTREE CENTER TOWER
230 PEACHTREE ST., N.W.
ATLANTA, GA 30303

LEWIS N. JONES
WILLIAM A. MORRISON
JANET L. WOMACK
W. CARTER CLAYTON

P.O. BOX 56247
ATLANTA, GA 30343
PHONE (404) 658-1670
FAX (404) 584-5994

December 17, 2009

Amos Westmoreland
GDC# 1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

RE: Amos Westmoreland v. State of Georgia
Appeal No. S10A0365

Dear Mr. Westmoreland,

I have been appointed to replace your former attorney Mr. Turchiarelli to represent you regarding the appeal of your conviction for murder. I have reviewed your file, and familiarized myself we the facts of your case and the issues to be raised on appeal. I have also filed for and received an extension of time to file the brief in your case until January 23, 2010.

I look forward to working with you. If you have any particular questions or concerns regarding your case please do not hesitate to contact me.

Yours Very Truly

W. Carter Clayton
Attorney At Law

JONES, MORRISON & WOMACK, P.C.
ATTORNEYS AT LAW
1250 PEACHTREE CENTER TOWER
230 PEACHTREE ST., N.W.
ATLANTA, GA 30303

LEWIS N. JONES
WILLIAM A. MORRISON
JANET L. WOMACK
W. CARTER CLAYTON

P.O. BOX 56247
ATLANTA, GA 30343
PHONE (404) 658-1670
FAX (404) 584-5994

June 29, 2010

Amos Westmoreland
GDC# 1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

RE: Amos Westmoreland v. State of Georgia
Appeal No. S10A0365

Dear Mr. Westmoreland,

I regret to inform you that the Supreme Court of Georgia has rejected your Appeal. I have enclosed a copy of the court's decision. As of the date of this decision June 28, 2010 your conviction is final. You have four years from that date to challenge your conviction by way of Habeas Corpus. If you have any questions please do not hesitate to contact me.

Yours Very Truly

W. Carter Clayton
Attorney At Law

APPENDIX Q-

Response from the Georgia Supreme Court Clerk July 15, 2010.

7/12/10

To the clerk of Georgia Supreme Court:

Greetings: My name is Mr Amos Westmoreland and I'm writing you in reference to the document that's enclosed with this letter. I request for a stamped filed copy of this document; because I cant get copies in a timely matter. The decision on my case was made on the 28 of June 2010. My attorney sent it on the 29 of June 2010; and the holiday pushed my reception date back even further because the Georgia Prison system have very limited operation on Fridays (no mail is received by population or taken out). I received the Appeal Order on the 6th of July 2010. In order to get to the Prison Law Library you have to sign-up a week in advance, So I had to put this together with minimum preparation & research. Nevertheless, I would like this letter to get filed also for future references, because I am forced to send my ONLY copy of important documents, that by court standards I might not get back - So atleast send me a stamped filed copy of this letter for my records. I'm forced to send this document A.S.A.P to avoid any legal technicality I need a stamped filed back. In Forward. Thanks.

Amos Westmoreland 7/12/10

Signed before me Ashkea Askew, Notary Public
This 12th day of July 2010.

ASHIKEA ASKEW
NOTARY PUBLIC
HANCOCK COUNTY
STATE OF GEORGIA
My Commission Expires September 25, 2011

REC'D JUL 12 2010

CERTIFICATE OF MAILING

I hereby certify that, on the 31 day of August, 2020, this pleading was served on the Court via U.S. mail courier.

Mr. Amos Westmoreland, Jr., Pro Se

CERTIFICATE OF SERVICE

I hereby certify that, on the 31 day of August 2020, a true and correct copy of this Petition and Appendix was sent to Georgia Attorney General Christopher M. Carr, at the Georgia Department of Law. 40 Capitol Square, S.W., Atlanta, Georgia 30334-1300.

Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (H-1 109M)

1412 Plunkett Road

Unadilla, Georgia 31091