No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Mr. Amos Westmoreland Jr. — PETITIONER
(Your Name)

VS.

Mr. Glen Johnson and Commissioner of GDOC — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in *forma pauperis*.

Please check the appropriate boxes:

☑ Petitioner has previously been granted leave to proceed in *forma pauperis* in the following court(s):
Northern District of Georgia Court, U.S. Court of Appeals for the 11th Circuit, Hancock County Superior Court.

☐ Petitioner has not previously been granted leave to proceed in *forma pauperis* in any other court.

☑ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is not attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____
_____ or

☐ a copy of the order of appointment is appended.

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, [illegible], am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ Ø	$ Ø	$ Ø	$ Ø
Self-employment	$ Ø	$ Ø	$ Ø	$ Ø
Income from real property (such as rental income)	$ Ø	$ Ø	$ Ø	$ Ø
Interest and dividends	$ Ø	$ Ø	$ Ø	$ Ø
Gifts	$ Ø	$ Ø	$ Ø	$ Ø
Alimony	$ Ø	$ Ø	$ Ø	$ Ø
Child Support	$ Ø	$ Ø	$ Ø	$ Ø
Retirement (such as social security, pensions, annuities, insurance)	$ Ø	$ Ø	$ Ø	$ Ø
Disability (such as social security, insurance payments)	$ Ø	$ Ø	$ Ø	$ Ø
Unemployment payments	$ Ø	$ Ø	$ Ø	$ Ø
Public-assistance (such as welfare)	$ Ø	$ Ø	$ Ø	$ Ø
Other (specify): _____	$ Ø	$ Ø	$ Ø	$ Ø
Total monthly income:	$ Ø	$ Ø	$ Ø	$ Ø

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ 0
			$ 0
			$ 0

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ 0
			$ 0
			$ 0

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
N/A	$ 0	$ 0
	$ 0	$ 0
	$ 0	$ 0

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value 0

☐ Motor Vehicle #2
Year, make & model N/A
Value 0

☐ Other assets
Description N/A
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$ Ø	$ Ø
N/A	$ Ø	$ Ø
	$ Ø	$ Ø

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ Ø	$ Ø
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ Ø	$ Ø
Home maintenance (repairs and upkeep)	$ Ø	$ Ø
Food	$ Ø	$ Ø
Clothing	$ Ø	$ Ø
Laundry and dry-cleaning	$ Ø	$ Ø
Medical and dental expenses	$ Ø	$ Ø

	You	Your spouse
Transportation (not including motor vehicle payments)	$ Ø	$ Ø
Recreation, entertainment, newspapers, magazines, etc.	$ Ø	$ Ø
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ Ø	$ Ø
Life	$ Ø	$ Ø
Health	$ Ø	$ Ø
Motor Vehicle	$ Ø	$ Ø
Other: _____	$ Ø	$ Ø
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ Ø	$ Ø
Installment payments		
Motor Vehicle	$ Ø	$ Ø
Credit card(s)	$ Ø	$ Ø
Department store(s)	$ Ø	$ Ø
Other: _____	$ Ø	$ Ø
Alimony, maintenance, and support paid to others	$ Ø	$ Ø
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ Ø	$ Ø
Other (specify): _____	$ Ø	$ Ø
Total monthly expenses:	$ Ø	$ Ø

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

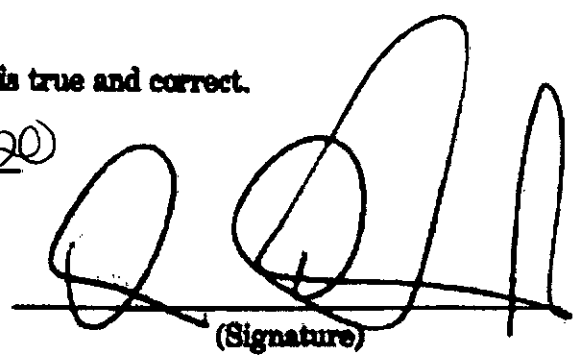
If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

N/A

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 31 August, 2020



(Signature)

Account Statement

WEST IRELAND, AMOS

Printed By: ASKEW, BARBARA

ODC ID: 1841629

Spendable Amount	Received Amount	Receipts On Hold	Funds Balance	Obligations/Court Charges
$0.00	$10.00	$0.00	$10.00	$1,504.74

RECEIPTS

Receipt Date	Transaction ID	Receipt Type	Receipt Details	Receipt Amount
10/17/2017	17304923	JPAY DEPOSIT RECEIPT	JPAY - MORGAN, ARLENE - 77508513	$20.00
03/13/2016	15274223	JPAY DEPOSIT RECEIPT	JPAY - THOMAS, TENEKA - 95309494	$40.00
09/27/2011	9387330	JPAY DEPOSIT RECEIPT	JPAY - COOK, SHIRLEY - 15181482	$20.00
09/21/2011	9272227	WESTERN UNION QUICK COLLECT RECEIPT	WESTERN UNION ELECTRONIC TRANSFER - 1124277732028153	$25.00
08/17/2011	8228971	JPAY DEPOSIT RECEIPT	JPAY - COOK, SHIRLEY - 14611566	$100.00
07/07/2011	9086212	JPAY DEPOSIT RECEIPT	JPAY - COOK, SHIRLEY - 14037461	$40.00
06/08/2011	8868312	JPAY DEPOSIT RECEIPT	JPAY - SMITH, JOHN - 13873444	$19.05
04/20/2011	8786837	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, KENYA - 13004535	$60.00
03/30/2011	8715880	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, KENYA - 12710694	$20.00
03/23/2011	8682434	JPAY DEPOSIT RECEIPT	JPAY - COOK, SHIRLEY - 12828035	$30.00
03/16/2011	8668184	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, KENYA - 12531329	$40.00
03/08/2011	8637881	TOUCHPAY DEPOSIT RECEIPT	TOUCHPAY - COOK, SHIRLEY - 3754632	$35.00
02/22/2011	8572569	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, KENYA - 12210492	$60.00
02/08/2011	8523789	TOUCHPAY DEPOSIT RECEIPT	TOUCHPAY - COOK, SHIRLEY - 3560866	$25.00
01/21/2011	8445844	WESTERN UNION QUICK COLLECT RECEIPT	WESTERN UNION ELECTRONIC TRANSFER - 1102076568728228	$25.00
01/20/2011	8443363	TOUCHPAY DEPOSIT RECEIPT	TOUCHPAY - COOK, SHIRLEY - 3450850	$25.00
12/15/2010	8327704	TOUCHPAY DEPOSIT RECEIPT	TOUCHPAY - COOK, SHIRLEY - 3261624	$30.00
11/08/2010	8202618	JPAY DEPOSIT RECEIPT	JPAY - COOK, SHIRLEY - 10833632	$40.00
11/02/2010	8173123	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, KENYA - 10735081	$30.00
09/20/2010	8015709	JPAY DEPOSIT RECEIPT	JPAY - DOE, ASHLEY - 10214450	$20.00
09/14/2010	7986890	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, KENYA - 10140629	$60.00
08/30/2010	7838240	JPAY DEPOSIT RECEIPT	JPAY - BRIDGES, SHERNITTA - 9864183	$60.00
08/03/2010	7644271	JPAY DEPOSIT RECEIPT	JPAY - MORGAN, BETTY - 9579195	$43.00
07/19/2010	7795108	BANK OF AMERICA RECEIPT	BOA-00002484 - 1081840	$24.25
07/09/2010	7754877	JPAY DEPOSIT RECEIPT	JPAY - WILLIAMS, TAMIKO - 9411087	$20.00
06/08/2010	7646805	JPAY DEPOSIT RECEIPT	JPAY - PUGH, MARIO - 9095777	$60.00
04/12/2010	7436495	JPAY DEPOSIT RECEIPT	JPAY - SPENCER, BETTY - 8478863	$50.00
04/08/2010	7417755	JPAY DEPOSIT RECEIPT	JPAY - COLE, LILLIAN - 8418035	$60.00
04/01/2010	7398280	JPAY DEPOSIT RECEIPT	JPAY - CARTER, ANTAVIOUS - 8353711	$15.00
03/30/2010	7388505	JPAY DEPOSIT RECEIPT	JPAY - COLDY, MARGIE - 8328612	$30.00
02/14/2010	7217262	WESTERN UNION QUICK COLLECT RECEIPT	WESTERN UNION ELECTRONIC TRANSFER - 1004572761233834	$75.00

[redacted]

CERTIFICATION

I hereby certify that the Plaintiff herein, Amos Westmoreland # 104629

has an average monthly balance for the last twelve (12) months of $ 0 on account at

the Dooly State Prison

institution where confined. (If not confined for a full twelve (12) months, specify the number of months confined. Then compute the average monthly balance for that number of months.)

I further certify that Plaintiff likewise has the following securities according to the records of said institution: N/A

Authorized Officer of Institution

5-20-20
Date

[redacted]

No: _____

IN THE SUPREME COURT OF THE UNITED STATES

MR. AMOS WESTMORELAND, JR. -*PETITIONER*

vs.

MR. GLEN JOHNSON, WARDEN, AND

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

ON A PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (H-1 109M)

1412 Plunkett Road

Unadilla, Georgia 31091

QUESTIONS PRESENTED

QUESTION #1:

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

QUESTION #2

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

QUESTION #3:

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

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

QUESTION #4:

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

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

QUESTION #5:

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

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

QUESTION #6:

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

QUESTION #7:

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

LISTS OF PARTIES

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

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

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

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

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

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.

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

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

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.

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

APPENDIX I- **Ryan v. Thomas,** 409 S.E.2d 507 (1991).

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

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

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

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

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.

APPENDIX O- Client-Lawyer Letter(s) from Louis Turchiarelli.

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

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

APPENDIX R- State and Federal Habeas Corpus- Trial Counsel Ineffectiveness Claims.

TABLE OF AUTHORITIES CITED

CASE PAGE NUMBER

FEDERAL CASES

FEDERAL STATUTES AND CONSTITUTION

STATE CASES

STATE STATUTES

OTHER

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from federal courts:

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

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

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

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

JURISDICTION

[X] For cases from federal courts:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . . to have compulsory process for obtaining witnesses in his favor, and to have the **assistance of counsel for his defence.**

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

> ***No state shall . . . deprive any person of life, liberty, or property, without due process of law***; nor deny to any person within its jurisdiction the ***equal protection of the laws***.

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

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

O.C.G.A. § 9-14-47 provides:

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

O.C.G.A. § 9-14-48 provides in pertinent part:

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

O.C.G.A § 9-14-49 provides:

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

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

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

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

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

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

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

O.C.G.A. § 40-6-6 (d)(2) provides:

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

STATEMENT OF THE CASE

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

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

I. PRETRIAL STAGE:

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

---

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

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

(a) Pretrial Motion Hearing(s):

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

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

II. THE TRIAL:

(a) First Plea Recommendation:

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

(b) Motion In Limine:

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

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

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

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

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

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

(c) Cross-Examination/ Confrontation Clause:

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

(d) Expert Witness Testimony:

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

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

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

(e) Defense Evidence:

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

(f) Closing Arguments:

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

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

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

(g) Motion for Directed Verdict:

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

(h) Jury Instructions On Felony Murder-Burglary:

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

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

(i) Jury Questions:

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

(i) Verdict, Conviction and Sentence:

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

III. MOTION FOR NEW TRIAL:

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

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

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

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

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

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

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

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

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

IV. INITIAL POST CONVICTION PROCEEDINGS:

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

(a) Lawyer/Client Communication:

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

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

(b) Conflict and Substitution of Appellate Circuit Defender:

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

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

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

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

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

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

(c) State Supreme Court Decision:

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

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

In Division 2, the court held that:

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

V. PRO SE MOTION FOR RECONSIDERATION:

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

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

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

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

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

VI. POST TRIAL COLLATERAL ATTACK(S):

(A) EXTRAORDINARY MOTION FOR NEW TRIAL:

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

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

In June 2011, trial court ruled that:

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

(i) Discretionary Appeal:

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

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

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

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

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

(ii) Motion for Reconsideration

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

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

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

The trial court ruled that:

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

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

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

(ii) Discretionary Appeal/ Motion for Reconsideration:

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

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

V. STATE HABEAS CORPUS PETITION:

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

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

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

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

[13] (HT. 64-66)

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

(b) State Habeas Hearing:

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

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

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

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

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

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

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

(c) Final Order on Claims Raised in Petition:

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

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

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

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

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

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

(d) Certificate of Probable Cause:

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

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

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

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

VI. FEDERAL HABEAS CORPUS PROCEEDING:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. SPECIFIC SUBSTANTIAL TRIAL INEFFECTIVENESS FEDERAL CONSTITUTIONAL CLAIMS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jury Instructions On Felony Murder-Burglary:

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

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

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

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

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

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

III. Proximate Cause Jury Instruction [Defense]:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Policy (Intervening Cause) [Defense]:

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

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

Codefendant counsel stated that:

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

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

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

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

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

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

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

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

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

(ii) Proposed Intervening Cause Request of Charge:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Breakdown of the Adversarial Process/ Closing Arguments:

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

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

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

I. Closing Arguments:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q3:

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

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

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

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

ARGUMENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Post-Trial Circuit Defender Appointments:

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

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

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

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

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

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

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

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

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

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

(c) Circuit Defenders Post-Direct Appeal Correspondence:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT:

A. LAWS OR CONSTITUTIONAL PROVISIONS:

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

I. **Georgia Law On Felony Murder/Burglary:**

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

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

II. **Evidence Adduced at Felony Murder Trial:**

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

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

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

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

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

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

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

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

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

(b) **Jury Question:**

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

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

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

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

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

IV. Georgia Law On Vehicular Homicide:

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

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

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

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

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

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

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

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

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

C. Direct Appeal:

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

D. State and Federal Habeas Petitions:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT:

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

I. STATE COURT'S 'FACT-FINDING PROCEDURE', 'HEARING', AND 'PROCEEDING' WERE NOT 'FULL, FAIR, AND ADEQUATE.'"

The question whether state procedures are 'adequate' involves two distinct inquiries. The first is whether the procedure employed in a particular case in fact afforded the defendant a full and fair hearing. The second is whether the procedure itself comports with due process of law." **Cabana v. Bullock**, 474 U.S. 376 (1986). With respect to the latter inquiry, the **Fourteenth Amendment** of the United States Constitution forbids states from depriving any person of life or liberty without due process of law. **Roberts v. Louisiana**, 428 U.S. 325 (1976). This Court has stated that notice and an opportunity to be heard in a manner appropriate to the nature of the case are essential requirements of procedural due process. See **Brodie v. Connecticut**, 401 U.S. 371 (1971) (citation omitted).

(i). EVIDENCE FILED IN STATE HABEAS PROCEEDING:

While state habeas corpus was pending, Westmoreland filed several motions (including, but not limited to, Motion for Special Assistance of Counsel and Request for Documents), Amendments to Brief and numerous articles of *Supporting Evidence* (Exhibits #1-58). Also included in the pleadings filed by Westmoreland was a Sworn Affidavit (Interrogatories) by trial counsel (David Marotte).

During the habeas hearing, the Respondent's attorney advised the court that "there is, as your honor is probably well aware, there is I'll say voluminous pleadings in this case filed by Petitioner, many motions, many Amendment". At the conclusion of the hearing, *the court informed Westmoreland, that* ***he had the file of everything that had been stamped and filed in the case,*** *and it included a particular brief. He acknowledged that he was looking at it right then and noted that it was very thick, and that he was going to take it with him that day (4-3-13) and* ***go through everything that's filed in the case*** *and once he was done, he would then make a decision*[49]. (HT 30-33). (Appendix L).

(ii). FULL AND FAIR HEARING:

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

Subsequently, Westmoreland filed Post-Hearing Brief suggested by the habeas judge, along with a motion for a hearing pursuant to *O.C.G.A. § 9-14-47* of the State Habeas Corpus Act[50]. A hearing was

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[49] **O.C.G.A § 9-14-49** states "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."

[50] see footnote 14 (above)

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

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

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

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

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

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

(iv) EXTRAORDINARY MOTION FOR NEW TRIAL:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. DUE PROCESS:

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

II. EQUAL PROTECTION:

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

ARGUMENT:

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

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

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

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

i. Direct Appeal

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

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

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

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

ii. Pro Se Motion For Reconsideration:

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

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

iii. Pro Se Post Conviction Collateral Attacks

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

iv. State Habeas Corpus

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

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

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

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

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

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

v. Federal Habeas Corpus

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

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

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

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

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

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

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

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

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

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

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

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

(a) Relevant Omitted Context:

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

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

[shall not in and of itself establish causation.]

(b) Legislature's Intention:

Legislature intended by former Code **1933, § 68-301** to do two things: (1) to give the drivers of certain authorized emergency vehicles the right to travel when occasion required it at a speed in excess of the limit fixed by the provision applicable to motor vehicles generally; and (2) to protect the public on highways, and even those riding in the vehicles thus favored, from reckless disregard of their safety by the drivers of these privileged vehicles. **Archer v. Johnson**, 83 S.E.2d 314 (1954).

Ga. L. 1953, Nov. - Dec. Sess. p. 556 grants special privileges in operation of emergency vehicles, but sets out conditions for operation (which include the use of sirens lights), and provides for liability when there has been a reckless disregard for the safety of others. Violation does not necessarily make the driver of the emergency vehicle liable, but it keeps open the issue of causation, which otherwise would be disclosed. **City of Winterville v. Strickland**, 194 S.E.2d 623 (1972).

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Submitted this 31 day of August, 2020

Respectfully Submitted,

Mr. Amos Westmoreland, Jr., Pro Se
G.D.C. #1041629
Dooly State Prison (H-1 109M)
1412 Plunkett Road
Unadilla, Georgia 31091

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

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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

56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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*

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> 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 [illegible] v. Johnson et al

[illegible],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: [illegible] v. Johnson et al
Case Number: 1:14-cv-01315-TWT
Filer:
Document Number: [illegible]

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

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

Matthew Blackwell Crowder [illegible]@law.ga.gov, [illegible]@law.ga.gov

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

[illegible], Jr
GDC 1041629
Dooly State Prison
P.O. BOX 750
Unadilla, GA 31091

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] [illegible]]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AMOS WESTMORELAND, JR., **Petitioner,**	
vs.	**CIVIL ACTION FILE**
GLEN JOHNSON, *Warden*, and BRIAN OWENS, *G.D.O.C. Commissioner*, **Respondents.**	**NO. 1:14-cv-1315-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

Omonowa,2254,CMS,HABEAS,REOPEN,SLC4,SUBMOJ

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:
[STAMP dcecfStamp_ID=1060868753 [Date=8/1/2019] [FileNumber=10191486-0
] [23780a5a22f1f125ffc97b73749ac067387dad8a8555a6691bf1b0b1baee1d62f5
b88899a3bb0bca6584d1a85fdba7871a0c83ab85148c533d5e349a8a751506]]

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 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.

(c) 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 pertinent judgment or claim is pending." Id. § 2244(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,	:	PRISONER CIVIL RIGHTS
GDC No. 1041629,	:	42 U.S.C. § 1983
Plaintiff,	:	
	:	
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. S16A0557

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.

Lee 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 to shield his fellow member against accusations of ineffectiveness 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 proximate cause state. When another meaning is not indicated by specific definition or context, the term "cause" is customarily interpreted in almost all legal contexts to mean "proximate cause"—"[t]hat which, in a natural and continuous sequence, unbroken by 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 "[w]e would, if allowed a choice, favor the construction which 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. 93, 616 S.E.2d 857 (2005), the defendant, who was under 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 something else—what we said such language meant in *Crane,* 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 would otherwise be murder and if he acts solely as the result 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 1411, 1412 (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).

Supreme Court of Georgia.

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 Rule 1.10(a) and the comments thereto, circuit 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

Mr. Omos Westmoreland Ishuna
petitioner/Movant

v.

Mr. Glenn Johnson
respondent

FILED IN OFFICE
TIME 9:00 A.M.
AUG 8 1 2012

CLERK SUPERIOR COURT
HANCOCK COUNTY, GA

Civil Action # 11-HC-034

Evidence Supporting Allegations in Habeas Proceeding

Movant, in above styled case and action, hereby presents/attach thereunto 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.

Movants Evidentiary Package In Support of Habeas Corpus

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

35.) ★
36.) ★
40.) ★
41.) ★
42.) ★
43.) ★
44.) ★
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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 1041629

7/11/12
Date:

Hancock Superior Court Clerk
Hancock County Superior Court
P.O. Box 457
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.**

K Carroll-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.

Jay C Stephenson CJ

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

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

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	CRIMINAL
vs.	FILE NO: 07-9-6020-42
AMOS WESTMORELAND, JR.,	
Defendant.	

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 [illegible] 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 Marbett, 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 2[illegible]

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
MAILED FROM ZIP CODE

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

E2

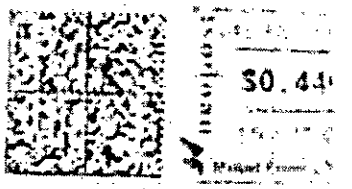
$0

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

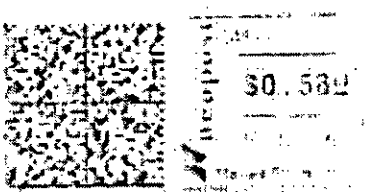
Mr. Amos Westmoreland
GDC ID #1041629
Hancock State Prison
P.O. Box 339
Sparta, GA 31087

31057+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
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31057+0339 5004

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

Telephone No. (770) 418-1500
Facsimile No. (770) 403-0163

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

E1

RECD SEP 22 2

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

31087+0339

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

SEASON'S GREETINGS

RECD DEC 22 2009

E2

ADDRESS CORRECTION REQUESTED

W. CARTER CLAYTON
ATTORNEY AT LAW
SPECIALIZED LEGAL RESEARCH
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

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Mr. Amos Westmoreland
101629 E-2

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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

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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.

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

REC'D JUL 12 2010

Amos Westmoreland

SUPREME COURT of GEORGIA
CLERK'S OFFICE
244 Washington Street, Room 572
Atlanta, Georgia 30334

DATE: July 15, 2020

CASE NO. S20A0365

_____Thank you for sending us your change of address. We have updated our records accordingly.

_____I am sorry that I can not help you with the answers to your questions. Employees of this Court may not give legal advice to litigants.

_____This Court is unable to supply copies without charge. If you will remit the cost of copying, we will send you the documents you requested. The charge for these documents is $_____.
A pauper's affidavit cannot be accepted in lieu of payment for copying charges. Pauper's affidavits can only be used for costs for filing an appeal or an application for appeal.
Filing of a pauper's affidavit requires a finding by the trial court judge of pauper status and entry of an order so stating. This is not automatic with the filing of your affidavit.

_____Neither this Court nor any other court in this state is subject to the open records act.

_____The Court has directed me to notify you that this Court does not issue orders regarding oral arguments. It is up to you to arrange your own permission to attend and your own transportation to the Court. A calendar will be sent to you at least twenty days before the argument date.

_____This Court does not have oral argument for applications for certificate of probable cause. If your application is granted, you may then request oral argument

__✓__As long as you are represented by counsel, we are unable to accept a filing from you. Phillips v. The State, 238 Ga. 497, 233 S.E.2d 758. Your attorney must withdraw in writing to be removed as counsel in your case.

_____Appointment of counsel is a matter that should be addressed to the trial court.

_____As a pro se appellant you may file only the number of copies you are able to provide.

_____The record and transcript from the habeas trial court were received by this Court on _____ and your application is under consideration. This office is unable to tell you when there will be a decision from the Court, but when there is one, you will be mailed a copy immediately.

_____The record and transcript from the habeas trial court have not been received by this Court. This office is unable to tell you when the trial court will send these documents or when there will be a decision from this Court.

over

APPENDIX R-

State and Federal Habeas Corpus- Trial Counsel Ineffectiveness Claims.

APPENDIX R-

STATE AND FEDERAL HABEAS CORPUS- TRIAL COUNSEL INEFFECTIVENESS CLAIMS (*apercu*)

I. STATE HABEAS CORPUS PROCEEDING:

***(a)* In filing State Habeas Corpus Petition, Westmoreland raised several 5th, 6th and 14th Amendment of the U.S. Constitution Due Process, Equal Protection, and Ineffective Assistance of Trial Counsel(s) claims, in that:**

(8) On 1-30-08 "a conflict occurred" and [he] was appointed another public-circuit defender and he was not adequately informed of the conflict by his attorney, the trial court, or the circuit defenders office.

(13) he had a fourth trial attorney appointed, and all previously filed motions were not ruled upon, and because he was not provided a copy of his indictment.

(14) [trial counsel] was appointed to represent him too close to his trial to allow counsel to adequately prepare petitioner's defense.

(16) trial counsel filed "very limited" motions on petitioner's behalf, "disregarded all previously filed motions," and failed to provide petitioner with a copy of the indictment or a list of witnesses.

(20) trial counsel did not provide him with a copy of the indictment until two weeks before trial and because did not provide him with a list of witnesses.

(22) trial counsel operated under a possible conflict of interest because he had previously served as a law clerk for the trial judge's late husband, which possible conflict was never revealed to petitioner until the motion for new trial hearing.

(23) trial counsel operated under a conflict of interest due to the fact that he had been practicing law for more than (30) years in Cobb County but had never tried a case before trial court.

(24) trial counsel failed to argue that there was a conflict because Rick Christian was thrust into the case without the proper procedures of the circuit defenders office, the trial court, or petitioner.

(25) trial counsel failed to file a motion to recuse the trial judge on the basis that the trial judge's daughter had been killed in an automobile related accident and he was being tried for an automobile related accident despite petitioner's request that he do so.

(26) trial counsel failed to raise a possible conflict of interest concerning co-counsel Rick Christians appointment, since he later testified that Christian was through the circuit defenders office to observe. Nonetheless, Christian was inexperienced in capital trials.

(27) trial counsel failed to raise any possible conflict of interest issues concerning the fact that trial counsel could not obtain independent experts to aid petitioner's defense and failed to

adequately prepare to cross-examine the state's expert witnesses concerning the elements of accident reconstruction.

(28) trial counsel only met with petitioner three times for an hour each time and refused each time to discuss with petitioner the discovery materials, evidence, trial tactics, or defense strategy.

(32) trial counsel failed to subject the prosecution to an adversarial process by not offering any evidence.

(33) trial counsel failed to subject the prosecution to a meaningful adversarial challenge when he failed to object to several improper comments made by the prosecutor and petitioner's codefendant's counsel during closing arguments.

(34) trial counsel failed to subject the prosecution to a meaningful adversarial challenge when he failed to obtain the Cobb county vehicle pursuit policy to rebut the prosecution's motion in limine.

(35) trial counsel failed to subject the prosecution to a meaningful adversarial challenge when he attempted to cross examine the pursuing officer concerning the vehicle pursuit policy only to draw an objection from the prosecution which was sustained by trial court.

(36) trial counsel neglected to request a jury charge on proximate cause for felony murder.

(37) trial counsel failed to subject the prosecution to a meaningful adversarial challenge when he instructed the jury during closing arguments to find petitioner guilty of several serious felonies.

(38) trial counsel "changed his reasonable doubt requested charge to help the jury commissioners out."

(68) trial counsel testified at motion for new trial hearing, that he was attempting to obtain the Cobb county pursuit policy during trial, and in same line of questioning he revealed that he never attempted to obtain the policy and never read the policy.

(114) trial counsel failed to investigate and present the Cobb county vehicle pursuit policy, which deprived the trial court of the opportunity to consider that the pursuing officers could have been the proximate cause of the victim's death.

(117) co-counsel Rick Christian was only appointed to represent petitioner for the purpose being placed on the murder case docket and did not contribute anything to the defense.

II. FEDERAL HABEAS CORPUS PROCEEDING:

(a) **In filing Federal Habeas Corpus Petition, Westmoreland specifically raised several Due Process, Equal Protection, and Ineffective assistance of Trial Counsel(s) claims, in that:**

Ground 9: Counsel was appointed less than (30) days prior to Petitioners capital felony trial; At the time of counsels appointment, all previous motions filed by circuit defenders 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.

Ground 10: That he was previous law clerk for trial courts husband, and conflict or possibility of a conflict was never properly raised....[t]he issue was elicited by trial counsel during motion for new trial hearing. Exercising due diligence petitioner found counsel was previously an associate at Grubbs and Grubbs with trial court and her late-husband.

Ground 11: That he practiced law and was an officer of the court for 30+ years in Cobb County, and had never, until petitioners 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 the severity of the punishment.

Ground 12: After trial counsels appointment, petitioner advised counsel that he had never saw 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... [17 count indictment].

Ground 14: On 10/14/08, a Pre-Trial motion hearing was conducted. On 10/17/08, a secret undisclosed pretrial hearing was convened with trial court, prosecutors and (4) defense counsels (Circuit Defenders), to discuss capital trial related issues. Petitioner was absent from such hearing, and the results of the hearing was not made known to petitioner, verbally, through either trial counsels, trial court, the state or through valid transcripts. Transcripts show that hearing did in fact take place.

Ground 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 tactic to influence the jury to find petitioner guilty of lesser offense.

Ground 18: Both of petitioners trial counsels (circuit defenders), failed to raise conflict of interest with the circuit defenders being the 4th and 5th appointee to represent petitioner within (8) months due to conflicts with the Cobb County Circuit defenders office, Rick Christian was petitioners 5th circuit defender, sent through the circuit defenders office to observe trial. Nonetheless, counsel's were inexperienced in capital felony trials.

Ground 19: Trial counsels 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 petitioners 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.

Ground 20: Trial counsel met with petitioner on (3) separate occasions for (3) hours respectfully, and failed to go over ANY discovery material, ANY evidence, ANY trial strategies or tactics, ANY defense or the indictment. Petitioner saw all of the states evidence for the first time during capital felony trial. Counsels did not offer any evidence in aid of the defense, considering petitioner facing life imprisonment.

Ground 25: Trial counsels 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 that he sent co-counsel, then co-counsel's secretary or assistant to retrieve the policy, and he revealed that he never read the policy, codefendant counsel had the policy, and he didn't plan to get the policy.

Ground 26: Trial counsel neglected to request a proximate cause or intervening cause jury instruction, in regards to felony murder and vehicular homicide.

Ground 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).

Ground 28: Trial counsel changed his reasonable doubt requested charge "to help the jury commissioners out".

Ground 29: Trial counsel(s) failed to make timely objections to several improper statements made by the prosecutors and codefendant's counsel (circuit defender) during closing arguments. Disparaging petitioner at a critical stage. Codefendant's circuit defender used defense closing argument to disparage petitioner by blaming the entire case on petitioner in front of the jury.

G. D. Hatfield
Chief of Police

R. D. Storey
Deputy Chief of Police

Bill Mull
Deputy Chief of Police

140 North Marietta Parkway
Marietta, Georgia 30060-1454
770-499-3900

June 21, 2007

Terry D. Jackson
600 Edgewood Avenue
Atlanta, Georgia 30312

RE: Open Records Request / Pursuit Policy Information

The following is in response to your Open Records Request received in our department June 13, 2007. Per our June 15th phone conversation, my reply was delayed due to research needs. Your request included four sections. I will address each below:

1. Department Policy 5.17 Vehicle Pursuits and the December 2006 memorandum are included.
2. Department Policy 5.17 Vehicle Pursuits is included (the effective date of this policy was December 19, 2004).
3. I have included e-mails from Sgt. Drew Marchetta (CALEA Manager). I am unaware at this time of other correspondence.
4. A "list of names" does not exist and will not be created pursuant to 50-18-70(d). However, Sgt. Drew Marchetta was instrumental in coordinating the writing of the policy.

Available reports may be viewed and/or copied in the Central Records Unit Monday through Friday 8:00 AM to 5:00 PM by appointment. Pages copied are $0.25 each. The first fifteen minutes of review and/or copying is free. After fifteen minutes, a fee of $10.83 will be assessed per hour in addition to copying fees. This request includes 22 pages. I will waive the preparation fee due to the delay of response. Please remit $5.50 upon receipt.

Sincerely,

T. R. Alexander

Lieutenant T. R. Alexander
Records Custodian

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

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)*

PROOF OF SERVICE

I, Mr. Amos Westmoreland, Jr., do swear or declare that on this date, August 31, 2020, as required by Supreme Court Rule 29 I have served the enclosed **MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, PETITION FOR A WRIT OF CERTIORARI and APPENDIX, and Motion For Leave to Exceed Page Limitation:** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing to each of them and with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Georgia Attorney General, Christopher M. Carr

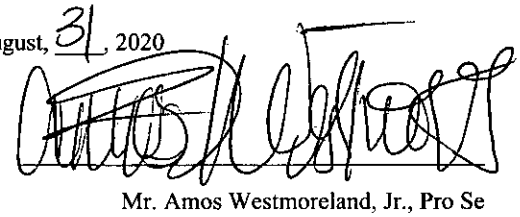
Georgia Department of Law

40 Capitol Square, S.W.,

Atlanta, Georgia 30334-1300

I declare under penalty of perjury that the following is true and correct.

Executed on August, 31, 2020



Mr. Amos Westmoreland, Jr., Pro Se

1412 Plunkett Road

Unadilla, Georgia 31091