No. 22-5718

IN THE SUPREME COURT OF THE UNITED STATES

MR. AMOS WESTMORELAND, JR. -*PETITIONER*

vs.

MS. AIMEE SMITH, WARDEN, ET.AL., -*RESPONDENT(S)*

ON A PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (E-1 210B)

1412 Plunkett Road

Unadilla, Georgia 31091

QUESTIONS PRESENTED

Question One:

Prior to February 10, 2020, Georgia [Supreme Court] had repeatedly held that although the combined effects of trial counsel's errors should be considered together as one issue, it remains the case that *"[t]his State does not recognize the cumulative error rule"*, [and] 'it do not consider the collective prejudicial effect of multiple errors by the trial court, or the collective prejudicial effect of trial court error and ineffective assistance of counsel"; The Question is:

- ***If a State court overrule all of its prior precedent forbidding courts from consideration of the cumulative prejudice of multiple errors at trial which conflicted with (Strickland v. Washington), should a State prior blatant disregard for clearly established federal law be discounted at the expenses of Petitioner's Federal Due Process, Conflict-free Assistance of Counsel and Equal Protection guarantees?***

Question Two:

- ***Did the state court violate federal Due Process and Equal Protections guarantees in dismissing habeas petition as untimely and / or successive, when evidence is presented during the proceeding that Petitioner acted in a reasonable and diligent manner to uncover the legal grounds upon which he seeks to rely in an allegedly successive petition?***

Question Three:

- ***Does the state court dismissal of habeas petition as untimely and/or successive 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 Four:

- ***Did the state court decision to dismiss petition as untimely and/or successive infringe on Petitioner's Due Process and Equal Protection guarantees, and conflict with Strickland v. Washington, 466 U.S. 669, 698***

(1984), *since it blatantly disregarded that in Strickland v. Washington, the Court held that if defendant shows that counsel's "ERRORS" were so serious as to deprive him of a fair trial, he is entitled to a reversal of convictions on ineffectiveness grounds?*

Question Five:

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

- ***Does the state habeas court decision to dismiss petition as untimely and/or successive conflicts with*** Jackson v. Virginia, **443 U.S. 307 (1979), *since it blatantly disregard that in*** Jackson v. Virginia, ***this Court held that relief is available 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?***

LISTS OF PARTIES

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

[X] 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:

- **Mr. Timothy Ward,** *Commissioner of Georgia Department of Corrections*

RELATED CASES

- **State v. Westmoreland**, Indictment No. 09-6020, Cobb County Superior Court; (decided October 23, 2008/April 14, 2009).
- **Westmoreland v. State**, 287 Ga. 688 (2010), Georgia Supreme Court; (decided June 28, 2010).
- **State v. Westmoreland**, Indictment No. 09-6020, Cobb County Superior Court; Extraordinary Motion for New Trial; (decided June 2011).
- **State v. Westmoreland**, Indictment No. 09-6020, Cobb County Superior Court: Extraordinary Motion In Arrest of Judgment; (decided July 2011; April 2012).
- **Westmoreland v. State**, Case No. S11D1736, Georgia Supreme Court; (decided September 1, 2011).
- **Westmoreland v. State**, Case No. S12D1465, Georgia Supreme Court; (decided May 24, 2012).
- **Westmoreland v. Grubbs et.el.**, No. 2012 U.S. Dist. LEXIS 118733 (N.D. Ga. 2012). United States District Court, Northern District of Georgia; (decided July 23, 2012).
- **Westmoreland v. Johnson**, Case No. 11-HC-034, Hancock County Superior Court; (decided June 27, 2014; vacated and Re-Entered October 6, 2015).
- **Westmoreland v. Johnson**, Case No. S16H0557, Georgia Supreme Court; (decided September 6, 2016).
- **Westmoreland v. Johnson et.el.**, 817 F.3d 751 (11th Cir. 2016), United States Court of Appeals for the 11th Circuit; (decided March 30, 2016)
- **Westmoreland v. Johnson et.el.**, Case No. 1:14-cv-01315-TWT-CMS, United States District Court, Northern District of Georgia; (decided July 31, 2019).
- **Westmoreland v. Johnson et.el**, Case No. 19-13759, United States Court of Appeals for the 11th Circuit; (decided February 25, 2020).
- **Westmoreland v. Johnson et.el.**, Case No. 20-5729, United States Supreme Court; (decided November 2, 2020).
- **Westmoreland v. Smith / Ward**, Case No. 21DV-0021, Dooly County Superior Court; ((decided October 4, 2021).
- **Westmoreland v. Smith / Ward, Docket** No. S22H0255, Georgia Supreme Court; (decided July 29, 2022)

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APPENDIX B- Docket Notice: [10/13/2021] Georgia Supreme Court, **Westmoreland v. Smith/Ward** No. **S22H0255**. Certificate of Probable Cause (***pending***)

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

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

TABLE OF EVIDENCE / ATTACHMENT (RECORD)

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 **state courts**:

The [**docket**] of the highest state court to review the merits appears at Appendix [**B**] to the petition and is

[X] pending at ***Westmoreland v. Smith / Ward*** **S22H0255**;

The opinion of the **Superior Court of Dooly County** appears at Appendix [**A**] to the petition and [***Westmoreland v. Smith / Ward*** **21DV-0021**] is

[X] is unpublished.

JURISDICTION

[X] For cases from **state courts**:

The date on which the highest state court failed to decide my case was **July 15, 2022**.

A copy of that [**docket**] appears at Appendix [**B**]

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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 U.S. 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 U.S. 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***.

Article VI. Section IX. Paragraph II., of the Georgia Constitution provides in pertinent part: "[t]he Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term."

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*". 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. On January 10, 2008, Westmoreland was escorted to the superior court for a scheduled Arraignment, and was *held in a confinement cell during the proceeding*, without further communication with attorney on the contents or results of the hearing. 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.

(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;

2. On or about 10-17-08, 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.

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.

(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."

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 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.

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.

(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?

(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.

(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.

(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."*

(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.**"

(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***"; (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 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*".

(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; Trial court also denied defense request for accident instruction, stating that Westmoreland "was *driving all over the place'*, assuming that it was him".

(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*."

(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"***;

(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.

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.

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

> a) *he had never sat down and read the policy*; 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; 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"*; 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**; l) ***he didn't present any evidence in the cases***; m) he was *previously the law clerk for Milton Grubbs* (trial courts late-husband); 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."

(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**[1], 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."***

(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).

(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.

IV. INITIAL POST CONVICTION PROCEEDINGS:

The motion for new trial was denied on April 14, 2009. 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[2]. 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)*[3]. [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:

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

[2] **Kinney et.al., v. Westmoreland** Case No. 2009CV04437D {Clayton County State Court, Georgia};

[3] 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.**

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;

(b) Conflict and Substitution of Appellate Circuit Defender:

Consequently, a *conflict of interest* occurred between Westmoreland and Turchiarelli for *"client-lawyer understanding"*; 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 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. 686, 699 S.E.2d 13 (2010);

In Division 1 of the court's decision, the court opined that: "[f]irst, the policy ***alluded to***[4]

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

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 the 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 correspondence, that *the case was "**final**" and [he] had "**4 years to challenge the conviction by way of filing habeas corpus**".*

Westmoreland immediately filed a pro se Motion for Reconsideration[5] in the state supreme court, raising several claims of error, omission and constitutional violations.

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.* See Georgia Supreme Court Rule 4[6].

VI. POST TRIAL COLLATERAL ATTACK(S):

[5] 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.

[6] 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.

(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[7].

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".*

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."

(i) Discretionary Appeal:

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."

(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.

(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

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

issues. However, by the time the 1st Amendment to the motion was filed, the trial court had ruled on original motion.

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).

(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."

(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).

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.**"*

VII. Initial State Habeas Corpus Petition (October 2011 - September 2016)

Mr. Westmoreland filed pro se state habeas corpus petition in Hancock County Superior Court 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. These claims primarily consisted of a plethora of evidentiary and non-evidentiary errors, constitutional issues and substantial claims of the combined prejudicial effect of multiple errors by trial court and ineffective assistance of Circuit Defender. 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[8] 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 also filed a **"Motion for Appointment of Special Assistance of Counsel."**.

(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* ***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

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[8] Cf. **Ryan v. Thomas**, 261 Ga. 661, 662, 409 S.E.2d 507 (1991) ("[A]ttorneys 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 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.")

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;[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"***.

(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.*

(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. The state habeas judge requested post hearing briefs from both parties.

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

(v) A week after the hearing, Westmoreland received Respondent's "**Return and Answer**" through the U.S. mail, addressing (105) of (122) constitutional claims. Grounds **68** and **105-122** were not addressed or defended 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[9]. 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 acknowledged that "Westmoreland filed a motion for reconsideration,

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[9] **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);

which was denied on July 26, 2010". Id.

(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 Circuit Defender David S. Marotte, client-lawyer correspondence between Turchiarelli and Westmoreland client-lawyer correspondence from Clayton to Westmoreland enclosed with denial of direct appeal, Westmoreland's correspondence to the state supreme court clerk including Motion for Reconsideration and response from the clerk advising that counsel had to withdraw in writing. **Westmoreland v. Johnson, Case No. 11-HC-034** Hancock County Superior Court: (decided June 27, 2014; Re-Entered October 6, 2015)

(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. 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. **Westmoreland v. Johnson**, Case No. S16H0557. (decided September 6, 2016).

VIII. FEDERAL HABEAS CORPUS PROCEEDING:

In May 2014[10], Westmoreland filed pro se 28 U.S.C. § 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))**. 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."

(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. 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 back to the District Court[11], the Respondents filed a Second Amended Answer-Response and Brief. In response, Westmoreland filed his

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

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

103-page "**Rebuttal and Supporting Brief**", 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 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." **Westmoreland v. Johnson et.el.** Case No. 1:14-cv-01315-TWT-CMS (decided July 31, 2019),

(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 prosecution'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 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**[12]; and (xvi) **Equal Protection** inquiry when an individual of a different race– in the same county– committed crimes substantially indistinguishable from convictions challenged, and the disposition of the case was shockingly contrast.

(g)(1) On 9/9/19, the District Court (Judge Thomas W. Thrash) denied the C.O.A. explaining that "Westmoreland has not made a substantial showing of a denial of his constitutional rights. Therefore, the Westmoreland's Motion for Certificate of Appealability is DENIED." **Westmoreland v. Johnson et.el.**, Case No. 1:14-cv-01315-TWT-CMS (decided July 31, 2019),

(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."

Westmoreland v. Johnson et.el., Case No. 19-13759 (decided February 25, 2020

(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.

(j) **The Motion To Reconsider, Vacate Or Modify Order Denying Certificate Of Appealability** was denied on **June 11, 2020.** Upon review, Before Circuit Judges Grant

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[12] 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)

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".

IX. INITIAL WRIT OF CERTIORARI IN THIS COURT

Mr. Westmoreland filed a Writ of Certiorari in this Court, challenging the decision of the United States Court of Appeals for the Eleventh Circuit. Several pertinent Federal Constitutional Questions were presented, along with arguments and evidence supporting federal claims. Both ***Strickland*** and **Lane** were cited in Writ. Subsequently, the Writ was denied. See **Westmoreland v. Johnson et.el., Case No. 20-5729** (decided November 2, 2020).

X. SECOND STATE HABEAS CORPUS PETITION

In February 2021, Mr. Westmoreland filed a petition for writ of habeas corpus in Dooly County Superior Court -- raising numerous distinct instances of deficient performance by trial Circuit Defender and error by the trial court -- relying primarily on unambiguous holding in ***Lane*** and the jurisprudence of clearly established federal law (i.e., Due Process, Equal Protection and Effective Assistance of Conflict-free Counsel). Westmoreland's cumulative error claims were supported by (*verified petition, **traverse**, trial counsel's sworn affidavit, attachments, substitute appellate circuit defenders sworn testimony at first habeas corpus evidentiary hearing, discovery requests, attorney-client correspondences, written questions/depositions), pertinent case law, and other case related documentary evidence*), incorporated by reference in his petition. The Respondents filed a Motion To Dismiss the petition as untimely and successive, asserting that "that motion need[ed] to be heard and disposed of before any merits . . . consideration can be done in this matter."

At the state habeas hearing, on the Respondents Motion to Dismiss as Untimely and/or Successive, Mr. Westmoreland maintained that his constitutional claims were presented in accords with **State v. *Lane*** 838 S.E. 2d 808 (2020) and the accumulation of errors. The Respondents argued this Court's precedent in **Strickland v. Washington** for the proposition that Georgia Court's have always considered the accumulation of errors. The state habeas judge limited the hearing to addressing the Respondents motion to dismiss, and wanted to conduct his "own research", compare both cases (i.e., **Strickland** and **Lane**) and arguments, before further ruling (i.e., a "*merits hearing*"). Subsequently, the state habeas court dismissed the petition as successive and/or untimely. The adverse ruling was entered in this action on **October 4, 2021**. **Westmoreland v. Smith / Ward** Case No. 21DV-0021. Dooly County Superior Court;

XI. Certificate of Probable Cause Georgia Supreme Court (* October, 13, 2021 - July 15, 2022; *pending*)

Mr. Westmoreland timely and adequately filed a Notice of Appeal with the Dooly County Superior Court Clerk (to transmit it's ENTIRE file in the case, to the clerk of Georgia Supreme Court) **Westmoreland v. Smith / Ward** (Civil Action No. ***21DV-0021***). On **October 13, 2021**, the Certificate of Probable Cause was docketed in the Georgia Supreme

Court, ***including proposition of several very critical Federal Constitutional Questions.*** Mr. Westmoreland also immediately requested oral arguments and motion to exceed page limitation on brief; Though no official notice had been provided by the court of last resort, the online docket on the Georgia Supreme Court website apparently showed Mr. Westmoreland's case was placed on the **February 2022 "Calendar"**. Mr. Westmoreland *also timely filed* (47-page) Brief in Support of Certificate of Probable Cause, "argu[ing] to ***the reviewing court*** that [he] is entitled to a ***new trial*** based on the ***cumulative effect of errors*** outside of the evidentiary context, ***explain[ing] why the approach that [the Georgia Supreme Court] adopt[ed] should be extended beyond the evidentiary context....[and] explain[ing] to the reviewing court just how Westmoreland was prejudiced by the cumulative effect of multiple errors" (Lane, supra); including proposition of several very critical Federal Constitutional Questions.***

The Georgia Supreme Court did not make a decision on Mr. Westmoreland's Certificate of Probable Cause within the two-term limitation mandated by **Art. VI, Sec. IX, Para. II** of the Georgia Constitution. The last day to render a decision was *July, 15, 2022,* at that point, the Georgia Supreme Court lost jurisdiction to review and decide Mr. Westmoreland's Certificate of Probable Cause. The state court non-attentive decision-making approach still fail to address whether Mr. Westmoreland adequately took advantage of the rule that *the court adopted in* ***Lane, as it directly relates to both evidentiary and non-evidentiary contexts', and federal constitutional claims.*** Therefore, it's clear that there is no other place to seek remedy, because the state court of last resort no longer has jurisdiction to hear Westmoreland's Certificate of Probable Cause. **Westmoreland v. Smith / Ward** Case No. **S22H0255**. (* July 15, 2022).

Question One:

Prior to February 10, 2020, Georgia [Supreme Court] had repeatedly held that although the combined effects of trial counsel's errors should be considered together as one issue, it remains the case that *"[t]his State does not recognize the cumulative error rule"*, [and] 'it do not consider the collective prejudicial effect of multiple errors by the trial court, or the collective prejudicial effect of trial court error and ineffective assistance of counsel";

The Question is: **If a State court overrule all of its prior precedent forbidding courts from consideration of the cumulative prejudice of multiple errors at trial which conflicted with (Strickland v. Washington), *should a State prior blatant disregard for clearly established federal law be discounted at the expenses of Petitioner's Federal Due Process, Conflict-free Assistance of Counsel and Equal Protection guarantees?***

ARGUMENT

Mr. Westmoreland seeks review of a state court's dismissal of his ineffective assistance of counsel claim, and the decision was "contrary to; involved an unreasonable application of," Strickland and its progeny; and rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

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. 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).

I. Georgia's Adoption of "Cumulative Error" Rule:

On 2/10/2020, the Georgia Supreme Court held in **State v. Lane**, 858 S.E. 2d 668 (2020):

> (1) To date, we have considered the cumulative effect of certain types of errors, in particular counsel's errors that amount to deficient performance — because ineffective assistance of counsel is a federal constitutional claim, and the United States Supreme Court has told us that we must. See **Strickland v. Washington**, 466 U.S. 668, 687 (104 SCt 2052, 80 LE2d 674) (1984) (explaining that reversal on ineffective assistance of counsel grounds "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial" (emphasis added)). But we have said repeatedly that "this State does not recognize the cumulative error rule" — meaning that we do not consider the collective prejudicial effect of multiple errors by the trial court, or the collective prejudicial effect of trial court error and ineffective assistance of counsel. See, e.g., **Grant v. State**, 305 Ga. 170, 179 (5) (h) (824 SE2d 255) (2019);

merit", provided there has been compliance with procedural requirements. **Ga. Sup. Ct. R. 36. The Georgia Supreme Court shall either grant or deny the application within a reasonable time after filing. O.C.G.A. § 9-14-52(b)[15]. (emphasis added)**

On **October 13, 2021**, Mr. Westmoreland Certificate of Probable Cause was docketed in the Georgia Supreme Court, ***including proposition of several very critical Federal Constitutional Questions.*** Mr. Westmoreland also immediately requested oral arguments and motion to exceed page limitation on brief; Though no official notice had been provided by the court of last resort, the online docket on the Georgia Supreme Court website apparently showed Mr. Westmoreland's case was placed on the **February 2022 "Calendar"[16]**. Mr. Westmoreland also timely filed (47-page) brief in Support of Certificate of Probable Cause[17], "argu[ing] to ***the reviewing court*** that [he] is entitled to a ***new trial*** based on the ***cumulative effect of errors*** outside of the evidentiary context, ***explain[ing] why the approach that [the Georgia Supreme Court] adopt[ed] should be extended beyond the evidentiary context....[and]explain[ing] to the reviewing court just how Westmoreland was prejudiced by the cumulative effect of multiple errors" (Lane, supra); including proposition of several very critical Federal Constitutional Questions.***

Mr. Westmoreland has properly and adequately alleged violation of federal law (i.e., **Strickland v. Washington (1985); Jackson v. Virginia (1979)), Federal Constitution (i.e., Due Process, Equal Protection, Effective Assistance of Conflict-free Counsel)** and this Court's interpretation **of Article VI** of the U.S. Constitution. Westmoreland points out that the **Supremacy Clause** dictates that his claims are ripe to be heard as well as granted because any conflicting provisions of state constitution or law could have been easily resolved.

V. PREJUDICE FLOWING FROM COUNSEL'S ERRORS UNDERMINES THE RIGHT TO A FAIR TRIAL

The accumulation of multiple errors by trial counsel undermines a defendant's right to a fair trial. The Georgia state courts thus erred in declining to consider the cumulative prejudice flowing from counsel's many errors.

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[15] *See* **Brown v. Crawford**, 289 Ga. 722, 715 S.E.2d 132, 85 A.L.R. 6th 699 (2011) (Prison Litigation Reform Act requires Supreme Court to engage in a discretionary review process concerning an appeal from the habeas court's denial of relief to a prisoner held under sentence of a state court of record, thereby making unauthorized a direct appeal from the denial of a post-trial habeas petition);

[16] Based on this information, appeal was entered on the court's docket for hearing (i.e., "calendar") during the *December 2022 term*, and the last working day of the next term – the April 2022 term – was ***July 15, 2022***. Thus, the exact deadline for an opinion was ***July 15, 2022***, and final decision was ***July 29, 2022.***

[17] ("But in the rare case in which the application of different standards makes a difference in the outcome, the parties should brief the issue of how the standards interact in that particular case.") **Lane**, supra.

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." **Strickland v. Washington**, 466 U.S. 668, 684 (1984). Accordingly, "[t]he benchmark for judging any claim of ineffectiveness [is] 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." Id. at 686. To succeed on a claim of ineffective assistance, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Id. at 687. The first component "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. The second component "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

"[C]ommon sense dictates that cumulative errors can render trials fundamentally unfair." **Williams v. Anderson**, 460 F.3d 789, 816 (6th Cir. 2006). The accumulation of multiple errors can undermine confidence in the outcome of a trial to the same extent as a single reversible error. See **Cumulative Effect of Errors, 5 Am. Jur. 2d Appellate Review § 668 (May 2013).**

Because the cumulative effect of several errors can render a trial unreliable, Strickland repeatedly instructs courts to consider counsel's "errors," "deficiencies," "acts," and "omissions"—all in the plural[18]. This language makes clear that courts must assess the prejudice flowing from counsel's errors, in the aggregate, in determining whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694 (emphasis added).

Strickland further states that in weighing whether the factfinder would have had a reasonable doubt respecting guilt absent counsel's errors, courts must consider "the totality of the evidence before the judge or jury." 466 U.S. at 695 (emphasis added). Again,

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[18] See, e.g., 466 U.S. at 687 (demonstrating deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (emphasis added)); id. (demonstrating prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" (emphasis added)); id. at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." (emphasis added)); id. ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (emphasis added)); id. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (emphasis added)); id. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.") (emphasis added); id. at 696 ("Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." (emphasis added)); id. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (emphasis added)).

this instruction requires courts to take a wholistic view of the proceedings and the effect of counsel's errors on those proceedings.

Two factors make this petition an ideal vehicle through which this Court can clarify the necessity of cumulative review under Strickland. First, the question is cleanly presented because (i) the Georgia Supreme Court declined to cumulate prejudice and (ii) cumulative review would have made a decisive difference in this case. Second, because this petition comes to the Court directly from the Georgia state courts rather than through federal habeas proceedings, AEDPA does not complicate the Court's review.

Question Two:

Did the state court violate federal Due Process and Equal Protections guarantees in dismissing habeas petition as *untimely and / or successive*, when evidence is presented during the proceeding that Petitioner acted in a reasonable and diligent manner to uncover the legal grounds upon which he seeks to rely in an allegedly successive petition?

ARGUMENT

a) Consideration of "Due Diligence," "Reasonable Diligence," or Whether Facts Were "Reasonably Available".

Georgia Habeas Corpus Act (i.e., O.C.G.A §§ 9-14-1(c); 9-14-40 to 9-14-53) makes direct reference to terms such as "due diligence", "reasonable diligence" and "could not reasonably have been raised."[19] So liberally construed, consideration of "due diligence," "reasonable diligence," or whether facts were "reasonably available" involves the same basic analysis: whether a Westmoreland has acted in a reasonable and diligent manner to uncover the legal or factual grounds upon which he or she seeks to rely in an allegedly untimely or successive petition.

To the Respondents claim of successiveness under O.C.G.A § 9-14-51[20], Mr. Westmoreland maintained that looking to analogous federal law and holding that overcoming procedural bar of O.C.G.A § 9-14-51 requires showing that factual or legal basis for claim

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[19] See Black's Law Dictionary (11th ed. 2019) (defining "due diligence" in part as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. — Also termed reasonable diligence; common diligence.").

[20] "All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, *finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.*"

was "not reasonably available" or "not readily discoverable" to Westmoreland. ***Lane (2020)*** holding was the legal basis for federal constitutional claims raised in second habeas petition. Likewise, to the Respondents claim of untimely under O.C.G.A § 9-14-42 (c) (1)[21], Mr. Westmoreland maintained that ***Lane (2020)*** holding presupposes subsections (c) (4), which provides that the limitation period begins at "the date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence." O.C.G.A § 9-14-42 (c) (4). See generally, (c) (2) and (3). All claims raised in second petition were included in initial habeas petition, with the exception of primary "**cumulative error**" argument. The habeas order also held "[t]here has been no change in the facts or the law since relief was denied in Petitioner's prior habeas corpus case. Accordingly, all grounds raised in the present habeas petition are dismissed, alternatively, as successive.

Mr. Westmoreland submits that the record in this case shows that [he] has alleged sufficient facts to survive a motion to dismiss. Taking Mr. Westmoreland's allegations as true, [he] has made a sufficient showing at this stage that he could not have discovered the facts underlying his cumulative error claim at an earlier time through the exercise of due or reasonable diligence. The habeas court therefore erred in dismissing this claim.

Westmoreland further contends that his pro se' continuous pursuit of trial court errors and trial Circuit Defender's ineffectiveness, since immediately after direct appeal -- up until roughly a year after **State v. Lane**[22] and no other proceedings were pending challenging the Cobb County conviction and sentence, – constituted due diligence within the meaning of OCGA § 9-14-42 (c) (4), and that this claim could not reasonably have been raised in his original petition under OCGA § 9-14-51.

Mr. Westmoreland submits that [he] has alleged facts showing grounds for relief which could not reasonably have been raised in his original habeas petition and which could not have been discovered by the reasonable exercise of due diligence. This is sufficient to satisfy the requirements of O.C.G.A §§ 9-14-42 (c) (4) and 9-14-51, to withstand a motion to dismiss, and to entitle him at least to an evidentiary hearing on these allegations.

Question Three:

Does the state court dismissal of habeas petition as untimely and/or successive 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,

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[21] O.C.G.A § 9-14-42 (c), enacted in 2004, provides a four-year limitation period on petitions for habeas corpus from felony convictions, with four potential dates from which the time may begin to run.

[22] (Lane was ruled on February 10, 2020; Petitioner filed instant petition February 15, 2021, in Dooly County Superior Court, Georgia.)

and that this conflict adversely affected the attorney's performance?

ARGUMENT

Substantial Cumulative Errors[23]

I. Undisclosed Impermissible Imputed Conflict of Interest: Cobb County Circuit Defenders Office // Trial Court and Trial Circuit Defender:

The right to a fair trial is a bedrock principle of the American criminal justice system. See **Strickland v. Washington**, 466 U.S. 668, 684-85 (1984). The right to the assistance of counsel incorporates — and depends on — the right to conflict-free counsel. As this Court held in **Bonin v. California**, 494 U.S. 1039, 1044 (1990), "[t]he right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial." See **McMann v. Richardson**, 397 U.S. 759 (1970); **Wood v. Georgia**, 450 U.S. 261 (1981); **Holloway v. Arkansas**, 435 U.S. 475 (1978); **Mickens v. Taylor**, 535 U.S. 162 (2002).

Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by this Court in **Cuyler v. Sullivan**, 446 U.S. 335 (1980). Cuyler establishes a two-part test that used 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." This Court 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 strategy was not followed because it conflicted with the attorney's external loyalties.

II. **Conflict of Interest**[24]: Cobb County Circuit Defenders Office ("CCCDO") Performs The

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[23] ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.") Cf. Strickland. Id.

[24] ***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.

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.***[25] *[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***[26] *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.*

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

- Westmoreland was arrested on May 17, 2007 on (6) charges stemming from burglary and vehicular homicide, among other accusations; 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)**[27] assigned first Circuit Defender (Michael Syrop). See Indigent Defense Act of 2003, O.C.G.A. § 17-12-1 et.seq.[28]

- On January 10, 2008, Westmoreland was escorted to the Cobb County Superior Court

[25] 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....")

[26] 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;")

[27] Appellant requested Discovery in instant habeas petition, including request for: (i) Documentary Evidence (official confirmation) from the Respondents showing the withdrawal and/or termination of representation from the Cobb County Circuit Defenders Office (i.e., William Carter Clayton), after direct appeal; and (ii) Documentary Evidence (official confirmation) on the identity of ex-Cobb County Circuit Defender Representative "Martin Pope" AKA "Marty Pope".

[28] (***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.

for a scheduled Arraignment[29], and was held in a confinement cell during the proceeding. 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***[30], but yet a *second* Circuit Defender (Gary O. Walker) had been appointed and subsequently *withdrew*.[31]

In September 2008, a day of prior 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 sent document through the U.S. Mail (2) weeks prior to capital felony murder trial[32]. 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

[29] ***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). **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."

[30] 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.

[31] 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.

[32] 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).

trial[33].

Trial Circuit Defender was specifically appointed to Westmoreland's case "***per Judge Grubbs***" and Cobb County Circuit Defender Representative ("Marty"/"Martin" Pope), a day before second scheduled trial date, at a time when previous attorney had a conflict. At the time of the appointment, trial Circuit Defender had 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.

At 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.***" During capital felony murder trial, trial court stated that: ***"Mr. Marotte hasn't tried a case before me for some reason, we don't follow up."*** However, in subsequent collateral proceeding, in a sworn affidavit, Circuit Defender stated that he ***had stood/tried a case in front of Judge Grubbs, prior to Westmoreland's felony murder trial.*** **Trial counsel was requested by Westmoreland to file for a judicial recusal, since he had been made aware that trial court's daughter had been previously killed in an auto related accident**[34], and trial consisted of an auto related accident.

Trial Circuit Defender testified at motion for new trial hearing that he was previous *law clerk*[35] for Milton Grubbs (trial court's husband) and he didn't present any evidence in the cases. However, in a sworn affidavit filed in state habeas proceeding, Circuit Defender attested that he was an "*associate*[36] in Milton Grubbs office during 77-78"; It was later discovered through diligent case research that Marotte was actually an associate in the firm, along with trial court and her husband. *Westmoreland was never, until that point, apprised of such possibility of conflict.*

Westmoreland presented numerous claims to initial appellate circuit defender to raise on direct appeal, 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***

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[33] **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."

[34] 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)

[35] ***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).

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

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**; * 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; * 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;

Subsequently, during state habeas proceeding, trial Circuit Defender in his sworn affidavit further attested that * **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 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 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***

[37] **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.

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 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;** *and* * 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***[38]. *(emphasis added).*

Attorney labored under an actual conflict of interest with the trial court and this conflict adversely affected the representation Westmoreland received because, circuit defender conceded that: (a) he *met with Westmoreland 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; (b) he did not present any evidence;* (c) *Westmoreland saw all of the states evidence for the first time during capital felony trial; (d)* **"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's 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**; (i) 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)***; (ii) any of these alternative strategies were reasonable considering the punishment and lack of defence or evidence presented during capital felony murder trial; and (iii) the alternative strategies were not followed because it conflicted with the attorney's external loyalties with the trial court (and/or **circuit defenders representative Marty/Martin Pope**), whom personally appointed counsel to represent Westmoreland's case; (emphasis added).

The (internal) conflict affected the entire representation because court appointed Circuit Defender took no substantial actions on behalf of Westmoreland. The record reflects that Westmoreland **specifically requested Circuit Defender to file for a judicial recusal,** which Circuit Defender disregarded[39]. Being apprised of such potential conflict 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 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

[38] 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).

[39] See **Rose v. Lundy**, 455 U.S. 509 (1982).

Westmoreland's acquiesce. Cf. **Avery v. Alabama** 308 U.S. 444, (1940), supra. **Powell**, supra. Cf. **Von Moltke v. Gillies** 332 U.S. 708 (1948);

Claims were presented to initial appellate Circuit Defender, however, a conflict occurred. Westmoreland was appointed a substitute circuit defender to finish the appeal, and claims weren't raised on appeal. However, at the initial habeas corpus hearing, substitute appellate Circuit Defender conceded that *he did not recall reading in the transcript where trial counsel testified that he was previous clerk of the judges husband.*

Question Four:

Did the state court decision to dismiss petition as untimely and/or successive infringe on Petitioner's Due Process and Equal Protection guarantees, and conflict with Strickland v. Washington, 466 U.S. 669, 698 (1984), since it blatantly disregarded that in Strickland v. Washington the Court held that if defendant shows that counsel's "ERRORS" were so serious as to deprive him of a fair trial, he is entitled to a reversal of convictions on ineffectiveness grounds?

ARGUMENT

Mr. Westmoreland seeks review of a state court's dismissal of his ineffective assistance of counsel claim, and the decision was "contrary to; involved an unreasonable application of," Strickland and its progeny; and rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

I. Trial Circuit Defender Entirely Failed To Subject The Prosecution To An Adversarial Process when Circuit Defenders Failed To Obtain The Police Pursuit Policy Requested By Westmoreland Prior To Capital Felony Murder Trial.

In **Strickland v. Washington**, this Court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he amount of pretrial investigation that is reasonable defies precise measurement." Id. at 1251.

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.

Prior to capital felony trial, Westmoreland advised both trial circuit defenders that he wanted the Cobb County pursuit policy presented to the jury. 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", in response to the motion, trial Circuit Defender 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...."* Circuit Defender stated to the Court that he did not have a copy of the policy.

Codefendant Circuit Defender 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 Circuit Defender 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 judge 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.*

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. On cross-examinantion of the initiating pursuing officer, Circuit Defender 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. Circuit Defender 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 again that "*the policy would be the highest and best evidence*." Circuit Defender moved on to an entirely different line of questioning, inquiring *"when did you turn on your emergency equipment?"*.

(A) During motion for new trial hearing trial Circuit Defender testified that:

> a) ***he had never sat down and read the policy***; 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, 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"; 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(a)(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; and,** l) *he **didn't present any evidence in the cases***;

(B) Also during the hearing, initial appellate circuit defender[40] advised the court that:

> *"...for the purpose of clarification, I attached a certified copy of the Cobb County Police Department's **policy 5.17**[41], 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**[42]."*

(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

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[40] Westmoreland requested discovery in habeas petition to retrieve an original document submitted to the state supreme court. i.e., Westmoreland v. State, [S11D1736]. Client-Lawyer Letter from Louis Turchiarelli. Attached to Discretionary Appeal for Extraordinary Motion for New Trial- Motion for Reconsideration.

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

[42] *STATE INTERFERENCE*;

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).

(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.

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 certain circumstances.*** Thirdly, trial Circuit Defender's and codefendant's Circuit Defender abandoned their arguments made during the States filing of the Motion in Limine. Lastly, codefendant's Circuit Defender did not produce the copy from his archives, and neither trial Circuit Defenders were able to retrieve a copy from the police department, as they were advising Westmoreland. See **Cuyler v. Sullivan** supra, at 446 U. S. 346. 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 to 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. See **Powell v. Alabama**, 287 U.S. at 287 U. S. 68-69.

Circuit Defenders 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 Circuit Defender'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 if 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. **Benham v. State**, supra.

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**[43] event occurs, thereby breaking the chain between defendants culpable act and the victim's injury. An **intervening cause** is

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

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[44]."

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.

(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[45]

(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[46]: 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

[44] 1 Lafave, Substantive Criminal Law, § 6.4 (h), p. 495 (2d. 2003).

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

[46] ***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)

establish causation." (emphasis added).[47]

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**[48] 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.

(D) In sworn interrogatories made by trial Circuit Defender 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[49]; * 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 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***

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[47] The Georgia Supreme Court "craftily" *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*)**

[48] **Ellipsis** (noun) {Merriam-Webster}; 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.

[49] 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.

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; (emphasis added).

Westmoreland submits that 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 Circuit Defender deficiency in failing to obtain the evidence became even more skewed during appeal stage, because initial appellate circuit defender presented and argued an outdated pursuit policy at Motion for New Trial hearing, and substitute appellate circuit defender attached updated copy to appellate brief. The challenge became exclusive on direct appeal when the Georgia 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 Circuit Defender's decision not to obtain the policy was "*informed strategy*".

This opinion from this Georgia Supreme Court was contrary to the record, respectfully. Circuit Defenders 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 Circuit Defender's (Marette 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[50]. 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 felony and the subsequent vehicular homicide. **Clayton County v. Segrest**, 775 S. E. 2d. 579 (2015) (*non-binding precedent*).

Claims were presented to initial appellate Circuit Defender, however, a conflict occurred. Mr. Westmoreland was appointed a substitute circuit defender to finish the appeal, and Circuit Defender raised a less descriptive claim on appeal, that trial court erred in not allowing officer's testimony about the policy. Nonetheless, the argument made no specific mention of Westmoreland's **6th Amendment** Confrontational Guarantee under the U.S. Constitution. Subsequently, at the initial habeas corpus hearing, substitute appellate

[50] **McCoy v. Louisiana**, 584 U.S. ___, 2018

Circuit Defender conceded that (a) ***had no specific recollection of first post-conviction counsel advising the trial court during motion for new trial hearing that the testimony of the records custodian would not be necessary because Petitioner's attorney had a certified copy of the vehicle pursuit policy.***

Question Five:

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

Does the state habeas court decision to dismiss petition as untimely and/or successive conflicts with Jackson v. Virginia, 443 U.S. 307 (1979), since it blatantly disregard that in Jackson v. Virginia, this Court held that relief is available 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[51] of the felony, Burglary." 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)]. Georgia law provides that: [A person commits the offense of Burglary when, without authority and

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

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[52].

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". 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 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

[52] 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**, 289 Ga. App. 612, (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); **Roberts v. State**, 314 S.E.2d 83 (2005); **Conner v. Bowen**, 842 F.2d 279 (1988); **Carter v. State**, 238 Ga. App. 632 (1999); **Crawford v. State**, 292 Ga. App. 163 (2008); **Green v. State**, 133 Ga. App. 802 (1975); **Johnson v. State**, 75 Ga. App. 581 (1947); **James v. State**, 12 Ga. App. 813 (1913); **Martin v. State**, 285 Ga. App. 375 (2007); **Maddox v. State**, 277 Ga. App. 580 (2006); **Smith v. State**, 250 Ga. App. 465 (2001); **Whitlesey v. State**, 192 Ga. App. 667 (1989); **Bogan v. State**, 177 Ga. 614 (1989); **Craft v. State**, 152 Ga. App. 486 (1979); **Bryant v. State**, 60 Ga. 358 (1878); **Williams v. State**, 46 Ga. 212 (1872); **Moyer v. State**, 275 Ga. App. 366 (2005); **Turner v. State**, 331 Ga. App. 78 (2015); **Felton v. State**, 270 Ga. App. 449 (2004); **Hillman v. State**, 296 Ga. App. 30 (2009); **Alexander v. State**, 279 Ga. 683 (2005); **State v. Fuller**, 267 Ga. App. 40 (2004); **Maxey v. State**, 239 Ga. App. 638 (1999); **Hardegree v. State**, 230 Ga. App. 111 (1998); **Bohannon v. State**, 208 Ga. App. 576 (1993); **Gould v. State**, 168 Ga. App. 605 (1983); **Smith v. State**, 287 Ga. App. 222 (2007); **Adams v. State**, 284 Ga. App. 534 (2007); **Ford v. State**, 234 Ga. App. 301 (1998); **Ingle v. State**, 223 Ga. App. 498 (1996); **Roberts v. State**, 252 Ga. 227 (1984); **Johnson v. State**, 207 Ga. App. 34 (1993); **Sexton v. State**, 268 Ga. App. 736 (2004);

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."

(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.[53]

(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";**

(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.

The potential answer to the inquiry on the conclusion of the burglary should have been [U]nder Georgia law, a burglary is completed (concluded) 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[54] . **Williams v. State**, (1872) supra.

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.

[53] {*[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.***}

[54] 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.

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)[55] 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**, (697 S.E.2d. 757) (2010);

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 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 Circuit Defender 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

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[55] "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..."

commission of the burglary[56]; the Georgia 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***[57] was not instructed to the jury or merely even mentioned during felony murder trial[58], and embodies critically different elements from felony murder charge to the jury. *Cf.* **O.C.G.A. § 40-6-6(d)(2).**

At common law, burglary was confined to unlawful breaking and entering a dwelling at night with the intent to commit a felony[59]. 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 allegedly 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. Culpably, Westmoreland, unaware of any actions by any 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

[56] 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;

[57] 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."

[58] [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.

[59] See, e.g., 4 W. Blackstone, Commentaries on the Laws of England 224 (176

(Attempting to Elude (1-5 yrs.))[60] is increased to Felony Murder (*mandatory life imprisonment*) by virtue of some other fact ("*cause*" or "*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 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[61], 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).

Did The State Court Failure To Follow Its Own Newly Adopted Cumulative Error Rule Violate Equal Protection And Due Process Constitutional Guarantees?

Because of counsel's ineffective assistance, Mr. Westmoreland was convicted of capital murder, and sentenced to life imprisonment. On post-conviction review, Mr. Westmoreland alleged numerous errors by his trial counsel and other Circuit Defenders. Both the state trial and appellate courts dismissed his petition, concluding that it was untimely and/or successive. Therefore, Mr. Westmoreland did not even have an opportunity to prove his claims. But neither court properly considered the effect of counsel's errors cumulatively. Had the Georgia courts appropriately considered the cumulative prejudice flowing from counsel's multiple errors, Mr. Westmoreland would

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[60] Cf. **Mack v. State**, 283 Ga. App. 172 (2007) ("offense of eluding the officers was complete at the moment [Petitioner] refused... to stop his vehicle despite the visual and audible signals to bring the vehicle to a stop".)

[61] **Rule of Lenity:** "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." Black's Law Dictionary (10th ed. 2014)

state law; vehicular homicide predicated on reckless driving was the proximate cause of the victims death; and most importantly, (3) the jury wasn't presented with any evidence or argument by the defense – to challenge the adversarial process, in capital felony murder trial – to substantiate presumed strategy. (emphasis added).

In **Strickland v. Washington**, 466 U.S. 668 (1984), this Court explained that reversal on ineffective assistance of counsel grounds requires showing that counsel's "***errors***[63]" were so serious as to deprive the defendant of a fair trial" (emphasis added))[64]; The Court reasoned that 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. In **United States v. Cronic**, 466 U.S. 648 (1984), this Court considered such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," ante at 466 U. S. 661. Likewise, the Court also observed that: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

In **Lane**, the Georgia Supreme Court overruled it's prior decisions and those of the Court of Appeals that held that the prejudicial effect of multiple trial court errors may not be considered cumulatively in determining whether a criminal defendant is entitled to a new trial. The court also disapproved any decisions with language to that effect. Some effects of that language included primarily ineffective assistance of counsel claims. Likewise, under **Lane**, "reversal of convictions is warranted because of the cumulative prejudice arising from trial court evidentiary error and the deficient performance on the part of trial counsel". ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.") Cf. **Strickland**. *Id.*

Even though Mr. Westmoreland made several claims in the initial state habeas petition regarding Circuit Defender's errors being so serious as to deprive him of a fair trial (i.e., *cumulative error*)[65], the Georgia courts virtually hasn't recognized the rule from the 1970's[66]

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[63] Courts have defined error "*generically to refer to any violation of an objective legal rule, ... [and] there must be violation of a constitutional, statutory, or common law, or a violation of an administrative regulation or an established rule of court.*"

[64] In **Smith v. Francis**, 253 Ga. at 783(1), 325 S.E.2d 362 (1985), *Strickland* standards were adopted into Georgia law. The standards included in order to find actual prejudice, [the] court must conclude that "there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

[65] In **Humphrey v. Lewis**, 291 Ga. 202, 210 (IV) (728 S.E.2d 603) (2012), the Georgia Supreme Court held that the habeas court erred in vacating [Lewis'] convictions based upon a finding of cumulative error... '[i]t remains the case that this State does not recognize the cumulative error rule.

[66] **Hess Oil & Chem. Corp. v. Nash**, 177 SE2d 70 (1970) ("Any error shown upon the record must stand or fall on its own merits and is not aided by the accumulative effect of other claims of error." (citation and punctuation omitted)), quoted in **Haas v. State**, 247 SE2d 507 (1978).

to February 2020[67]. Likewise, under the Supremacy Clause of the U.S. Constitution, ***Strickland*** became federal law in 1984. It's apparent that the State of Georgia has long maintained over a decade prior to **Strickland v. Washington** that reviewing *cumulative errors* is not the law in this state. Cf. **Schofield v. Holsey**, 281 Ga. 809, 811 (II) n.1 (642 SE2d 56) (2007).[68] Moreover, if Georgia courts unreasonably applied Strickland, then it implicated federal law and simultaneously violate principles of both the 6th and 14th Amendment of the United States Constitution. Likewise, when jurisprudence changed on how *cumulative error* claims should be assessed **(due process)**, it's only fair **(equal protection)** that Mr. Westmoreland's federal constitutional rights be assessed as well, according to clearly established federal law and rule adopted in comport with that law of the land **(supremacy clause)**.

The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless error) can yield a denial of the constitutional right to a fair trial, which calls for reversal. Courts address claims of cumulative error by first considering the validity of each claim individually, and then examining any errors that we find in the aggregate and in light of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial. **United States v. Benjamin**, 958 F3d 1124, 1137 (11th Cir. 2020).

Rather, the court should have evaluated the circumstances surrounding Westmoreland's trial to determine that the state had denied Westmoreland fundamental fairness as guaranteed by the **Due Process** Clause of the Fourteenth Amendment. Similar to the Sixth Amendment right to effective assistance of counsel and the Fourteenth Amendment **Due Process** rights asserted in **Kimmelman**[69] and **Jackson**[70], a Fourteenth Amendment **Due Process** right to a fair trial is a fundamental, trial, and personal right, since it alleges that defendant has been denied fundamental fairness.[71] A trial is fundamentally unfair if *"there is a reasonable probability that the verdict might have been different had the trial been properly conducted."*

[67] ("[A]lthough consideration of the combined prejudicial effects of different types of errors may sometimes be more challenging than considering errors in isolation, it certainly is not impossible.") **Lane**, supra.

[68] "The Supreme Court of the United States has held that it is the prejudice arising from "counsel's errors" that is constitutionally relevant, not that each individual error by counsel should be considered in a vacuum. *Strickland*, 466 U.S. at 687(III), 104 S.Ct. 2052. Although the combined effects of trial counsel's errors should be considered together as one issue, it remains the case that "[t]his State does not recognize the cumulative error rule." **Bridges v. State**, 268 Ga. 700, 708(9), 492 S.E.2d 877 (1997).'

[69] **Kimmelman v. Morrison**, 477 U.S. 365, 380 (1986) (noting that "[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike").

[70] 443 U.S. 307 (99 SCt 2781, 61 LE2d 560) (1979),

[71] In **Strickland v. Washington**, 466 U.S. 669, 698 (1984), the Court describes an ineffective assistance of counsel claim as an "attack on the fundamental fairness" of the trial. The Court then states that "fundamental fairness is the central concern of the writ of habeas corpus." Id.

Mr. Westmoreland emphasize that cumulative error analysis involves a "Fourteenth Amendment **Due Process** inquiry," and therefore it's not creating new law, but merely "*applying that which was secured to the accused over two hundred years ago.*" Explaining the application of cumulative error analysis, Mr. Westmoreland reasons that *[t]here is no set formula and each case must be independently examined.* The reviewing court must determine "*whether the trial taken as a whole is fundamentally unfair.*" While this does not mean that Mr. Westmoreland is entitled to a perfect trial, if "there is a reasonable probability that the verdict might have been different had the trial been properly conducted," then the trial lacked fundamental fairness.

This Court has stated that fundamental fairness is a very narrow concept and has described denials of **due process** as "the failure to observe that fundamental fairness essential to the very concept of justice"[72]. In order to declare a denial of it, this Court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[73] Due Process and fundamental fairness are constitutional doctrines.

Of course, the general rule is that habeas corpus review is available to remedy only constitutional defects. However, as discussed, a constitutional deprivation may result from several errors, each of which individually did not impair Westmoreland's constitutional protections, but when considered in the aggregate denied Westmoreland a fair trial. ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.") Cf. **Strickland**. *Id.*

> "***Prejudicial circumstances***" consist of those events to which the petitioner failed to object, and cannot meet the "*cause and prejudice*" standard, but otherwise constituted errors. Courts should consider such circumstances not as part of the aggregation of error, but rather as part of their evaluation of the overall fairness of [Mr. Westmoreland]'s trial.

As to the overall fairness, while completely eliminating hindsight and assessing counsel at the time of capital felony murder trial, Circuit Defender conceded that 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***[74]; and 'he ***did not present any evidence.***"

[72] (quoting **Dowling v. United States**, 493 U.S. 342, 352 (1990).

[73] **Lisenba v. California**, 314 U.S. 219, 236 (1941).

[74] See Strickland, supra., ("Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.")

In sworn deposition in initial habeas petition, trial Circuit Defender further stated that:

> ***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";***

("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.") Cf. **Strickland**. *Id.*

A. PRESERVATION OF RELIEF: EXTRAORDINARY WRIT

i. The petition shows that the writ will be in aid of the Court's appellate jurisdiction, as it's within 90 days of July 15, 2022, the date the states highest court of the last resort (i.e., Georgia Supreme Court) failed to render a decision within the two-term constitutional limitation for reviewing application for certificate of probable cause to appeal state court's dismissal of habeas corpus petition.

ii. Several exceptional circumstances exist to warrant the exercise of the Court's discretionary powers; (1) On February 10, 2020, the Supreme Court of Georgia unanimously ruled that reviewing courts are to consider the cumulative effect of trial court and counsel errors, overturning 40+ years of prior jurisprudence; (2) Cumulative errors of trial court and ineffectiveness of trial Circuit Defender was raised in initial habeas corpus petition, including several constitutional claims directly related to the direct appeal decision of the Georgia Supreme Court. The "equivocated" decison on direct appeal, creates additional exceptional circumstances warranting the exercise of the Court's discretionary powers, sharply because the state highest court arbitrarily and strategically utilized ellipsis[75] to omit ambiguous language from a statute, while simultaneously applying federal law. The omitted context alters the entire case, therefore Due Process protections were judicially eradicated. Furthermore, in 2012, Mr. Westmoreland filed a 42 U.S

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

C § 1983 Civil Rights Action[76] against (7) Georgia Supreme Court Justices, including Chief Justice, *circa* 2010[77]. The Civil Rights Action was exclusively based on federal Due Process violations and explicitly implicated the conflicting decision of the Georgia Supreme Court, and; (3) Exceptional circumstances also exist because the United States Constitution and clearly established federal laws are at the center of the case. It is highly unlikely that the Georgia Supreme Court would reverse the conviction due to the substantial claims raised. The Georgia Supreme Court no longer has jurisdiction of the case; and,

iii. Adequate relief cannot be obtained in any other form or from any other court; because: (In the state of Georgia a writ of habeas corpus is the principle post-conviction remedy to challenge a conviction and sentence after direct appeal based on trial related errors and Constitutional violations. Through the proceeding, a petitioner may obtain different forms of relief, including a motion for new trial. Westmoreland has pro se litigated these same post conviction claims thoroughly through the Georgia criminal justice system (i.e., Superior Court's, Supreme Court, Federal District Court and Circuit Appellate Court). Mr. Westmoreland has used up his "only available" Extraordinary Motion for New Trial and no other substantial remedy exist. Mr. Westmoreland submits that both "***cumulative error***" and **State v. Lane**, and federal constitutional violations were effectively presented in both federal 28 U.S.C. § 2254 habeas petition, as well as Writ of Certiorari denied in this Court November 2020. Furthermore, Mr. Westmoreland's substantial federal *Questions* were properly and exclusively raised below and should have been decided for an appropriate resolution of a case. So too here, the accumulation of multiple errors by trial Circuit Defender can deprive Westmoreland of the effective representation guaranteed by the Sixth Amendment and undermine confidence in the outcome of the trial. This case presents the opportunity to confirm that basic proposition and answer important questions of federal law and Constitution. The Georgia Supreme Court no longer has jurisdiction of the case.

The Georgia Supreme Court created a conflict by undermining the desired uniformity of clearly established federal law by acknowledging that although the combined effects of trial counsel's errors should be considered together as one issue; that it remained the case that Georgia "does not recognize the cumulative error rule." The collateral history of this case heavily relies on violation of **Strickland v. Washington (1984), (Due Process, Equal Protection, Effective Assistance of Conflict-free Counsel)** 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

[76] **Westmoreland v. Grubbs et.el.**, No. 2012 U.S. Dist. LEXIS 118733 (N.D. Ga. 2012). Judgement entered July 23, 2012;

[77] Also named in the civil rights action as defendants were Trial Court, (3) Cobb County Circuit Defenders and (2) state prosecutors.

resolved. Resolution is needed by this Court because, absent such review, they will persist, having been decided by a court whose rulings are otherwise definitive within the territorial jurisdiction absent this Court's review. See **Redmon v. Johnson**, 2018 Ga. LEXIS 1 (2018).

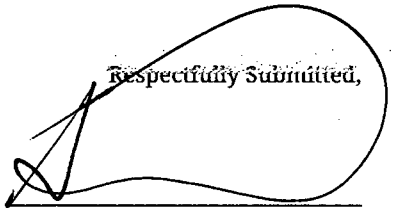
As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. Mr. Westmoreland declares that the absence of that fairness fatally infected the trial and the acts complained of are of such quality as necessarily prevents a fair trial. The obvious conflict with Strickland and the Due Process Clause implication, this Court's resolution will control the outcome of the case in which the petition is filed.

The writ should be granted based on **Sup.Ct. R. 10 (c)**, in that a state court has declined to decide 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Submitted this 3 day of September, 2022



Respectfully Submitted,

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