

No. _____

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 GEORGIA SUPREME COURT

APPENDIX

Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (E-1 210B)

1412 Plunkett Road

Unadilla, Georgia 31091

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SUPREME COURT OF GEORGIA

Case No. S22H0255

September 07, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

AMOS WESTMORELAND v. AIMEE SMITH, WARDEN.

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

All the Justices concur.

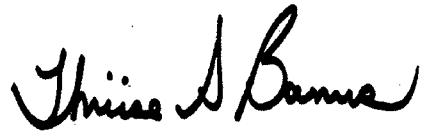
Trial Court Case No. 21DV-0021

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

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


Thavis N. Barnes, Clerk

APPENDIX A-

**Dooly County Superior Court Dismissal of Habeas Corpus
Petition as Untimely and/or Successive,**

Westmoreland v. Smith/Ward No. 21DV-0021,

Judgement entered October 4, 2021.

APPENDIX B-

Docket Notice: [10/13/2021] Georgia Supreme Court,
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APPENDIX C-

**Constitutional provisions, treaties, statutes, ordinances,
and regulations involved in the case; [Rule 14.1(i)];**

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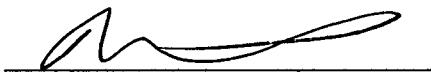
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**State and Federal Habeas Corpus- Trial Counsel
Ineffectiveness Claims**

APPENDIX E-

CERTIFICATE OF MAILING

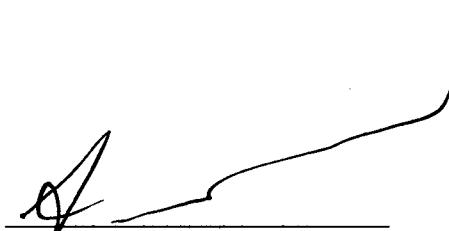
I hereby certify that, on the 3 day of September, 2022, this pleading was served on the Court via U.S. mail courier.



Mr. Amos Westmoreland, Jr., Pro Se

CERTIFICATE OF SERVICE

I hereby certify that, on the 3 day of September 2022, a true and correct copy of this Petition and Appendix was sent to Georgia Attorney General Christopher M. Carr, at the Georgia Department of Law, 40 Capitol Square, S.W., Atlanta, Georgia 30334-1300.



Mr. Amos Westmoreland, Jr., Pro Se

G.D.C. #1041629

Dooly State Prison (E-1 210B)

1412 Plunkett Road

Unadilla, Georgia 31091

IN THE SUPERIOR COURT OF DOOLY COUNTY
STATE OF GEORGIA

AMOS WESTMORELAND, JR.,
GDC #0001041629,

Petitioner,

v.

**AIMEE SMITH, Warden,
DOOLY STATE PRISON,**

Respondent.

CIVIL ACTION NO. 21DV-0021

OCT 04, 2021 11:05 AM

CLERK OF SUPERIOR COURT
DOOLY COUNTY, GEORGIA

BOLDY COUNTY, GEORGIA
31DV 0031

21DV-0021

OCT 04, 2021 11:05 AM

Rosa Childs

Rosa Childs, Clerk
Dooly County, Georgia

**FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AS UNTIMELY
AND/OR SUCCESSIVE**

Petitioner Amos Westmoreland, Jr., an inmate at Dooly State Prison, filed an Application for Writ of Habeas Corpus in the Superior Court of Dooly County on February 15, 2021. Respondent filed a Return and Answer and a Motion to Dismiss as Untimely and/or Successive on February 24, 2021. An evidentiary hearing was held in this case on June 15, 2021, via a virtual Webex hearing that the parties agreed to and was a result of the still ongoing COVID-19 pandemic. During the hearing, Petitioner appeared *pro se* and Assistant Attorney General Michael Oldham represented the Respondent. Based on the record established at the hearing, this Court hereby grants Respondent's Motion to Dismiss as Untimely and/or Successive.

PROCEDURAL HISTORY

On October 23, 2008, Petitioner was found guilty by a jury in the Superior Court of Cobb County of felony murder, serious injury by motor vehicle, operating a vehicle without a secure load, and obstruction of an officer. Petitioner's convictions and sentences were affirmed on appeal in *Westmoreland v. State*, 287 Ga. 688 (2010). Following the denial of his direct appeal, Petitioner filed an extraordinary motion for new trial in the trial court on May 2, 2011, which the court denied on

June 9, 2011. Petitioner next filed a motion in arrest of judgment in the trial court on June 30, 2011, which it denied on July 1, 2011. Petitioner then challenged for the first time his convictions and sentences by way of habeas corpus in *Westmoreland v. Johnson*, No. 11-HC-034 (Hancock Super. Ct. Jun. 27, 2014) in which relief was denied. Petitioner is now challenging his convictions and sentences a second time by filing this current habeas corpus petition on February 15, 2021, in the Superior Court of Dooly County.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Untimely

This Court finds that Petitioner's application for habeas corpus relief is untimely. In 2004, the Georgia legislature enacted a revision to the procedural aspects of habeas corpus law. Effective since July 1, 2004, persons convicted of felonies are required to file any petition for habeas corpus relief within four years of the "judgment of conviction becoming final." O.C.G.A. § 9-14-42(c).

The judgment of conviction becom[es] final by the conclusion of direct review or the expiration of the time for seeking such review; provided, however, that any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until ... July 1, 2008, in the case of a felony to bring an action pursuant to this Code section.

O.C.G.A. § 9-14-42(c)(1). As to the time for seeking review, parties have thirty days to file a notice of appeal. O.C.G.A. § 5-6-38. Following a ruling by the Georgia Supreme Court in a case such as this, a defendant has ninety days from the date of such decision to file a certiorari petition in the United States Supreme Court pursuant to Rule 13 of the Rules of the United States Supreme Court. The Georgia Supreme Court has held that a conviction is "final" under existing state law when direct review, including the time to file for certiorari to the United States Supreme Court, has concluded or where the time for seeking further appellate review has expired. *See, e.g., Turpin v. Todd*, 268 Ga. 820, 830 (1997); *Taylor v. State*, 262 Ga. 584, 586 (1992).

In the case at hand, Petitioner was found guilty in the Superior Court of Cobb County on October 23, 2008 and was sentenced on November 6, 2008. A timely notice of appeal was filed in the Supreme Court of Georgia following Petitioner's convictions and sentences. Petitioner's convictions and sentences were affirmed on June 28, 2010. *Westmoreland v. State*, 287 Ga. 688 (2010). Petitioner then filed a motion for reconsideration, which was denied by the Supreme Court of Georgia on July 26, 2010. Under United States Supreme Court Rule 13, Petitioner had ninety days from that date to file a petition for a writ of certiorari in the United States Supreme Court. It does not appear from the record that Petitioner ever filed a petition for a writ of certiorari in the United States Supreme Court. Thus, Petitioner's convictions were "final" on October 25, 2010, when the ninety-day period in which to file a certiorari petition expired.

Because Petitioner's convictions and sentences were "final" on October 25, 2010, he had four years, or until October 25, 2014, to file a habeas corpus petition. The petition in this case shows that it was filed with the Clerk of the Superior Court of Dooly County on February 15, 2021, which is more than six years after the limitations period expired. This is true even if the Court took into account the period of time that may have been tolled as a result of Petitioner filing his extraordinary motion for new trial and motion in arrest of judgment, along with the period of time to appeal the denials of such filings. Accordingly, Petitioner's current petition is deemed untimely under the procedural guidelines established by the Georgia legislature and is to be dismissed as such, barring a change in the law.

II. Successive

Additionally, this Court finds the Petitioner's Application successive. Petitioner previously challenged the same Cobb County convictions and sentences in *Westmoreland v. Johnson*, No. 11-HC-034 (Hancock Super. Ct. Jun. 27, 2014), in which relief was denied.

Georgia statutory law specifically provides that successive petitions are not valid barring special circumstances. O.C.G.A. § 9-14-51 states as follows:

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.

The Petitioner has failed to show that the claims in this Application for Habeas Corpus Relief could not have reasonably been raised in his prior habeas petition. O.C.G.A. § 9-14-51; *Bruce v. Smith*, 274 Ga. 432, 553 S.E.2d 808 (2001); *Stevens v. Kemp*, 254 Ga. 228, 327 S.E.2d 185, (1985); *Smith v. Zant*, 250 Ga. 645, 301 S.E.2d 32 (1983). There has been no change in the facts or law since relief was denied in Petitioner's prior habeas corpus case. Accordingly, all of the grounds raised in the present habeas Petition are dismissed, alternatively, as successive.

CONCLUSION

For all the reasons stated above, Respondent's Motion to Dismiss as Untimely and/or Successive is granted, and Petitioner's Application for Writ of Habeas Corpus is dismissed.

If the Petitioner desires to appeal this Order, the Petitioner must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court of Georgia within 30 days from the date of the filing of this Order and also file a notice of appeal with the Clerk of the Superior Court of Dooly County within the same 30-day period.

SO ORDERED, this 4th day of October, 2021.



T. CHRISTOPHER HUGHES
JUDGE, SUPERIOR COURTS
CORDELE JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE

I have this day served the following with a copy of the foregoing Final Order Granting Respondent's Motion to Dismiss as Untimely and/or Successive by transmitting same by electronic service or by placing same in the U.S. Mail, with sufficient postage affixed thereon, and addressed as follows:

Amos Westmoreland, Jr.
GDC # 0001041629
Dooly State Prison
P.O. Box 750
Unadilla, GA 31091

Matthew B. Crowder
Michael Oldham
ASSISTANT ATTORNEY GENERAL
GEORGIA DEPARTMENT OF LAW
mcrowder@law.ga.gov
moldham@law.ga.gov

Aimee Smith, Warden
Dooly State Prison
P.O. Box 750
Unadilla, GA 31091

This 4th day of October, 2021.


BRENDA WARD, ASSISTANT TO
T. CHRISTOPHER HUGHES
JUDGE, SUPERIOR COURTS
CORDELE JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF DOOLY COUNTY
STATE OF GEORGIA

AMOS WESTMORELAND, JR.,
GDC #0001041629,

Petitioner,

v.

AIMEE SMITH, Warden,
DOOLY STATE PRISON,

Respondent.

* * * * *
CIVIL ACTION NO. 21DV-0021

* * * * *
HABEAS CORPUS

FILED IN OFFICE
CLERK OF SUPERIOR COURT
DOOLY COUNTY, GEORGIA
21DV-0021

OCT 04, 2021 11:05 AM

Rosa Childs
Rosa Childs, Clerk
Dooly County, Georgia

**FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AS UNTIMELY
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Additionally, this Court finds the Petitioner's Application successive. Petitioner previously challenged the same Cobb County convictions and sentences in *Westmoreland v. Johnson*, No. 11-HC-034 (Hancock Super. Ct. Jun. 27, 2014), in which relief was denied.

PREME COURT of GEORGIA

Nathan Deal Judicial Center
330 Capitol Avenue S.E., Room 1100
Atlanta, Georgia 30334
(404) 656-3470

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

Docketing Date: October 13, 2021

Amos Westmoreland Jr.
GDC# 1041629
Dooly State Prison
1412 Plunkett Road
Unadilla, Georgia 31091

**Case No. S22H0255 AMOS WESTMORELAND v. AIMEE SMITH,
WARDEN**

This is to notify you that your application for certificate of probable cause to appeal denial of the writ of habeas corpus has been received and docketed in this Court and assigned the docketing date and case number shown above.

You must also file a notice of appeal with the habeas trial court clerk if you have not already done so. See OCGA § 9-14-52. That clerk will transmit the record in your case to this court so that it can consider the application.

When your application is ruled on, you will be notified immediately.

Important Rule Requirements and Information

Notice of Amended Rules – Effective immediately, the Supreme Court of Georgia amended its Court Rules by revising Rule 4 (Requirements for Attorneys Practicing Before the Supreme Court), Rule 10 (Briefs of the Parties: Time of Filing), Rule 20 (Briefs: Page Limitations), Rule 23 (Amicus Briefs), Rule 24 (Supplemental Briefs), Rule 50 (Oral Argument), and Rule 51 (Requests for Oral Argument) and by adding new Rule 96 (Appearance

CERTIFICATE OF SERVICE

I have this day served the following with a copy of the foregoing Final Order Granting Respondent's Motion to Dismiss as Untimely and/or Successive by transmitting same by electronic service or by placing same in the U.S. Mail, with sufficient postage affixed thereon, and addressed as follows:

Amos Westmoreland, Jr.
GDC # 0001041629
Dooly State Prison
P.O. Box 750
Unadilla, GA 31091

Matthew B. Crowder
Michael Oldham
ASSISTANT ATTORNEY GENERAL
GEORGIA DEPARTMENT OF LAW
mcrowder@law.ga.gov
moldham@law.ga.gov

Aimee Smith, Warden
Dooly State Prison
P.O. Box 750
Unadilla, GA 31091

This 4th day of October, 2021.



BRENDA WARD, ASSISTANT TO
T. CHRISTOPHER HUGHES
JUDGE, SUPERIOR COURTS
CORDELE JUDICIAL CIRCUIT

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CONCLUSION

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SO ORDERED, this 4th day of October, 2021.



T. CHRISTOPHER HUGHES
JUDGE, SUPERIOR COURTS
CORDELE JUDICIAL CIRCUIT

argument before the Georgia Supreme Court). The amended rules are available on the Supreme Court of Georgia website: www.gasupreme.us.

Counsel - Unless exempted, all counsel are required to submit documents to the Court electronically. Submitting documents electronically is not a substitute for service on the opposing party. Counsel listed in this case may view the lower court record through the e-file system.

Lower Court Case Number(s): 21DV-0021

Therese S. Barnes, Clerk

APPENDIX C-

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

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

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

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

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

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

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

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

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

O.C.G.A § 9-14-42. Grounds for writ; waiver of objection to jury composition

(a) Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute a proceeding under this article.

(b) The right to object to the composition of the grand or trial jury will be deemed waived under this Code section unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final.

(c) Any action brought pursuant to this article shall be filed within one year in the case of a misdemeanor, except as otherwise provided in Code Section 40-13-33, or within four years in the case of a felony, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death, from:

(1) The judgment of conviction becoming final by the conclusion of direct review or the expiration of the time for seeking such review; provided, however, that any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until July 1, 2005, in the case of a misdemeanor or until July 1, 2008, in the case of a felony to bring an action pursuant to this Code section;

(2) The date on which an impediment to filing a petition which was created by state action in violation of the Constitution or laws of the United States or of this state is removed, if the petitioner was prevented from filing such state action;

(3) The date on which the right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of Georgia, if that right was newly recognized by said courts and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.

(d) At the time of sentencing, the court shall inform the defendant of the periods of limitation set forth in subsection (c) of this Code section.

O.C.G.A. § 9-14-43. Hearing; evidence; depositions; affidavits; determination of compliance with procedural rules; disposition

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

showing of exceptional circumstances.

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

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

(d) The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper.

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

O.C.G.A § 9-14-51.

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.

O.C.G.A § 9-14-52. Appeals .

(a) Appeals in habeas corpus cases brought under this article shall be governed by Chapter 6 of Title 5 except that as to final orders of the court which are adverse to the petitioner no appeal shall be allowed unless the Supreme Court of this state issues a certificate of probable cause for the appeal.

(b) If an unsuccessful petitioner desires to appeal, he must file a written application for a

certificate of probable cause to appeal with the clerk of the Supreme Court within 30 days from the entry of the order denying him relief. The petitioner shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and shall stay the judgment of the superior court until there is a final adjudication by the Supreme Court; provided, however, that, while such case is on appeal, the petitioner may be released on bail as is provided in criminal cases except when the petitioner has been convicted of a crime which the Supreme Court has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court in which the sentence successfully challenged under this article was originally imposed.

O.C.G.A. § 16-5-1 Murder; Felony Murder

- (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
- (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
- (c) A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.
- (d) A person commits the offense of murder in the second degree when, in the commission of cruelty to children in the second degree, he or she causes the death of another human being irrespective of malice.
- (e)(1) A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life.
- (2) A person convicted of the offense of murder in the second degree shall be punished by imprisonment for not less than ten nor more than 30 years.

O.C.G.A. § 16-7-1 Burglary

- (a) A person commits the offense of burglary when, without authority and with the intent

to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term "railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

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

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

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

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

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

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

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

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

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

(d)(1) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons.

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

(3) The provisions of this subsection shall apply only to issues of causation and duty and

shall not affect the existence or absence of immunity which shall be determined as otherwise provided by law.

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

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

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

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

(b) Every person convicted of reckless driving shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$1,000.00 or imprisonment not to exceed 12 months, or by both such fine and imprisonment, provided that no provision of this Code section shall be construed so as to deprive the court imposing the sentence of the power given by law to stay or suspend the execution of such sentence or to place the defendant on probation.

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

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

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

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

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

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

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

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

(A) Upon conviction shall be fined not less than \$500.00 nor more than \$5,000.00, which fine shall not be subject to suspension, stay, or probation and imprisoned for not less than ten days nor more than 12 months. Any period of such imprisonment in excess of ten days may, in the sole discretion of the judge, be suspended, stayed, or probated;

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

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

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

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

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

(5)(A) Any person violating the provisions of subsection (a) of this Code section who, while fleeing or attempting to elude a pursuing police vehicle or police officer in an attempt to escape arrest for any offense other than a violation of this chapter, operates his or her vehicle in excess of 30 miles an hour above the posted speed limit, strikes or collides with another vehicle or a pedestrian, flees in traffic conditions which place the

general public at risk of receiving serious injuries, or leaves the state shall be guilty of a felony punishable by a fine of \$5,000.00 or imprisonment for not less than one year nor more than five years or both.

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

(c) It shall be unlawful for a person:

- (1) To impersonate a sheriff, deputy sheriff, state trooper, agent of the Georgia Bureau of Investigation, agent of the Federal Bureau of Investigation, police officer, or any other authorized law enforcement officer by using a motor vehicle or motorcycle designed, equipped, or marked so as to resemble a motor vehicle or motorcycle belonging to any federal, state, or local law enforcement agency; or
- (2) Otherwise to impersonate any such law enforcement officer in order to direct, stop, or otherwise control traffic.

Rule 1.7 of the Georgia Rules of Professional Conduct

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

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

- (1) consultation with the lawyer pursuant to Rule 1.0(c);
- (2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and
- (3) having been given the opportunity to consult with independent counsel.

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

- (1) is prohibited by law or these Rules;
- (2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding; or
- (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Rule 1.10 of the Georgia Rules of Professional Conduct

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.

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

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9(c): Conflict of Interest: Former Client that is material to the matter.

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

Rule 1.16 of the Georgia Rules of Professional Conduct provides:

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

- (1) the representation will result in violation of the Georgia Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

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

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

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

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Uniform Superior Court Rule 4.3. Withdrawal

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

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

- (A) the attorney wishes to withdraw;
- (B) the court retains jurisdiction of the action;
- (C) ~~the client has the burden of keeping the court informed where notices, pleadings or other papers may be served;~~
- (D) the client has the obligation to prepare for trial or hire new counsel to prepare for trial, when the trial date has been scheduled and to conduct and respond to discovery or motions in the case;
- (E) if the client fails or refuses to meet these burdens, the client may suffer adverse consequences, including, in criminal cases, bond forfeiture and arrest;
- (F) dates of any scheduled proceedings, including trial, and that holding of such proceedings will not be affected by the withdrawal of counsel;
- (G) service of notices may be made upon the client at the client's last known mailing address;
- (H) if the client is a corporation, that a corporation may only be represented in court by an attorney, that an attorney must sign all pleadings submitted to the court, and that a corporate officer may not represent the corporation in court unless that officer is also an attorney licensed to practice law in the state of Georgia or is otherwise allowed by law; and
- (I) unless the withdrawal is with the client's consent, the client's right to object within 10 days of the date of the notice, and provide with specificity when the 10th day will occur.

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

(3) When an attorney has already filed an entry of appearance and the client wishes to substitute counsel, it will not be necessary for the former attorney to comply with rule

4.3 (1) and (2). Instead, the new attorney may file with the clerk of court a notice of substitution of counsel signed by the party and the new attorney. The notice shall contain the style of the case and the name, address, phone number and bar number of the substitute attorney. The new attorney shall serve a copy of the notice on the former attorney, opposing counsel or party if unrepresented, and the assigned judge. No other or further action shall be required by the former attorney to withdraw from representing the party. The substitution shall not delay any proceeding or hearing in the case.

APPENDIX D-

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

I. INITIAL STATE HABEAS CORPUS PROCEEDING:

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

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

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

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

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

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

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

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

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

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

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

capital trials.

(27) trial counsel failed to raise any possible conflict of interest issues concerning the fact that trial counsel could not obtain independent experts to aid petitioner's defense and failed to adequately prepare to cross-examine the state's expert witnesses concerning the elements of accident reconstruction.

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

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

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

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

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

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

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

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

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

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

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

the defense.

II. FEDERAL HABEAS CORPUS PROCEEDING:

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

Ground 9: Counsel was appointed less than (30) days prior to Petitioners capital felony trial; At the time of counsels appointment, all previous motions filed by circuit defenders office (including motion to hire an independent investigator to aid in preparation of the defense), were disregarded. Counsel was 4th circuit defender in (8) months due to conflict.

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

Ground 11: That he practiced law and was an officer of the court for 30+ years in Cobb County, and had never, until petitioners case, stood a case in front of trial court. Issue was never properly raised to assess the possibility of a conflict; especially considering the limited time to prepare; 40% of counsel's cases were criminal, the complexity of the possible defenses and the severity of the punishment.

Ground 12: After trial counsels appointment, petitioner advised counsel that he had never saw his indictment. Counsel sent indictment by U.S. Mail. Petitioner received indictment (2) weeks prior to his capital felony trial. Counsel never went over the indictment with petitioner....[17.count.indictment].

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

Ground 16: Trial counsel reluctantly adopted special demurrer challenging a void count in the indictment. During initial pretrial hearing, counsel adopted withdrawal of said motion, for tactical purposes. Counsel offered absolutely no evidence or defense to substantiate tactic to influence the jury to find petitioner guilty of lesser

offense.

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

Ground 19: Trial counsels failed to raise conflict of interest considering the burden to represent petitioner without expert or private investigator or such experience or funds to hire such assistance to propel petitioners defense. State expert witness (Cobb County Police Officer/ Accident Reconstructor) incident report was part of discovery. Petitioner was provided incident report after motion for new trial was denied.

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

Ground 25: Trial counsels failed to obtain the police chase policy requested by petitioner prior to trial. Both circuit defenders were advising petitioner during trial that they were attempting to obtain the document. After trial, counsel revealed that he sent co-counsel, then co-counsel's secretary or assistant to retrieve the policy, and he revealed that he never read the policy, codefendant counsel had the policy, and he didn't plan to get the policy.

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

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

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

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

III. SECOND STATE HABEAS CORPUS PROCEEDING:

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

GROUND ONE: *Cumulative Errors*

- a) Trial counsel was ineffective for failing to properly investigate and adequately prepare for capital felony trial, in that he failed to raise issue that on 1-30-08 an undisclosed impermissible imputed "conflict occurred" and [Petitioner] was appointed another public-circuit defender and was not adequately informed of the conflict by his attorney, the trial court, or the circuit defenders office.
- b) Trial counsel was ineffective for failing to raise conflict of interest as being the 4th circuit defender within (8) months appointed due to undisclosed impermissible imputed conflict. Counsel was appointed less than (30) days prior to trial, [at] that time all previous motions filed by circuit defenders office (including motion to hire an independent investigator to aid in preparation of the defense), were disregarded.
- c) Trial counsel was ineffective for failing to raise conflict or possibility of a actual conflict of interest concerning relationship with trial court. Trial Counsel was previous law clerk for trial courts husband, and conflict or possibility of a conflict was never properly raised before, during or after trial. Nonetheless, exercising due diligence petitioner discovered that counsel was previously an associate with trial court and her husbands firm.
- d) Trial counsel was ineffective for failing to raise conflict or possibility of a actual conflict of interest concerning relationship with trial court. In 30+ years of legal practice in Cobb County, counsel has never before Petitioners case, stood a case in front of trial court. Issue was never properly raised to assess the possibility of a conflict, especially considering the limited time to prepare, 40% of counsel's cases were criminal, the complexity of the possible defenses and the severity of the punishment.
- e) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsel failed to file a motion to recuse the trial judge on the basis that the trial judge's daughter had been killed in an automobile related accident and Petitioner asked counsel to raise issue because capital felony trial consisted of an automobile related accident;
- f) Trial counsel entirely failed to subject the prosecution to an adversarial process when, after Petitioner advised counsel that he had never saw his indictment, counsel sent indictment by U.S. Mail (2) weeks prior to capital felony trial, without going over the [17 count instrument] with Petitioner.
- g) Trial counsel entirely failed to subject the prosecution to an adversarial process when [on] 10/14/08, a Pre-Trial motion hearing was conducted and on 10/17/08, a secret undisclosed pretrial hearing was convened with trial court, prosecutors and defense (Circuit Defenders), to discuss capital trial related issues. Petitioner was involuntarily absent from such hearing, and the results of the hearing was not made known to petitioner, verbally, through either trial counsels, trial court, the state, nor through valid transcripts. However, transcripts show that hearing

did in fact take place.

- h) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsel reluctantly adopted special demurrer challenging a void count in the indictment. During initial pretrial hearing, counsel adopted withdrawal of demurrer motion, for tactical purposes. However, counsel offered absolutely no evidence or defense to substantiate tactic to influence the jury to find petitioner guilty of lesser offense.
- i) Trial counsels entirely failed to subject the prosecution to an adversarial process when both of Petitioner's trial (circuit defenders) failed to raise conflict of interest with the Cobb County Circuit Defenders Office. Rick Christian was petitioners 5th circuit defender, sent through the circuit defenders office to observe trial. Nonetheless, both counsels' were inexperienced in capital felony trials.
- j) Trial counsel entirely failed to subject the prosecution to an adversarial process by representing Petitioner without an expert or private investigator or such experience or funds to hire such assistance to aid petitioner's defense. During trial, circuit defenders wasn't adequately prepared to cross-examine the state's expert witnesses concerning the elements of accident reconstruction. State expert witness (Cobb County Police Officer/ Accident Reconstructor) incident report was part of discovery. Petitioner was provided incident report after motion for new trial was denied.
- k) Trial counsel was ineffective for failing to properly investigate and adequately prepare for capital felony trial when he met with petitioner on (3) separate occasions for (3) hours respectfully, and failed to go over ANY discovery material, ANY evidence, ANY trial strategies or tactics, ANY defense or the indictment. Petitioner saw all of the states evidence for the first time during capital felony trial. Counsels did not offer any evidence in aid of the defense, considering petitioner facing life imprisonment.
- l) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsels failed to obtain the police chase policy requested by petitioner prior to trial, or to retrieve it for purposes of rebutting the prosecution's motion in limine. Both circuit defenders were advising petitioner during trial that they were attempting to obtain the document. Counsel attempted to cross examine the pursuing officer concerning the vehicle pursuit policy only to draw an objection from the prosecution which was sustained by trial court. After trial, counsel revealed that he sent co-counsel, then co-counsel's secretary or assistant to retrieve the policy, and he revealed that he never read the policy, codefendant counsel had the policy, and he didn't plan to get the policy.
- m) Trial counsel entirely failed to subject the prosecution to an adversarial process by not offering any evidence during capital felony trial.
- n) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsel neglected to request a proximate cause or intervening cause jury instruction, in regards to felony murder and vehicular homicide.
- o) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsel instructed the jury, during defensive closing arguments, to find petitioner guilty of several serious felonies without securing petitioner's consent, permission or approval of this tactic.

- p) Trial counsel entirely failed to subject the prosecution to an adversarial process when he changed his reasonable doubt requested charge "to help the jury commissioners out".
- q) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsel(s) failed to make timely objections to several improper statements made by the prosecutors and codefendant's counsel (circuit defender) during closing arguments. Codefendant's circuit defender used defense closing argument ("critical stage") to disparage petitioner by blaming the entire case on petitioner in front of the jury.
- r) Trial counsel entirely failed to subject the prosecution to an adversarial process when counsel failed to advance the Rule of Lenity argument. Petitioner re-asserts that since felony murder carries an automatic life sentence and vehicular homicide carries a maximum of 15 years imprisonment for virtually the same conduct ("cause"), the Rule Of Lenity required that he be subjected to the lesser of the two penalties.
- s) [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]. Petitioner 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*. Appellate counsel was ineffective for failing to "properly" preserve claim on Petitioner's only appeal as of right.

GROUND TWO:

Substitute Appellate Circuit Defender violated Petitioner's [federal constitution], after direct appeal, for failing to withdraw from Petitioner's capital felony appeal in writing, so that Petitioner could file a timely and substantial motion for reconsideration of the Georgia Supreme Court's affirmation of the lower courts judgement.