

No: **22-5718**

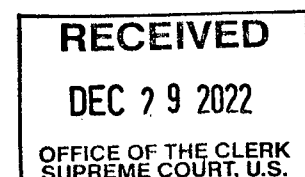
IN THE SUPREME COURT OF THE UNITED STATES

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 REHEARING 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



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PETITION FOR REHEARING FOR WRIT OF CERTIORARI

Pursuant to **Rule 44** of this Court, Mr. Amos Westmoreland, Jr., Pro se, hereby respectfully petitions for rehearing of this case before a full nine-Member Court.

1. This case involves a challenge of state prior precedence which arguably conflicted and disregarded this Courts law in **Strickland v Washington** and Federal Constitutional guarantees to **Due Process** and **Equal Protection**.
2. Mr. Westmoreland strongly submits that he has presented ample evidence and shown clear constitutional violations of his right to a fair trial, due to denial of counsel and the collective prejudicial effect thereof.
3. Mr. Westmoreland has raised cumulative error at "every" practical convenience. The State has not, to this point denied claims per se, however, the state has continued to arbitrarily rely on procedural default.
4. Mr. Westmoreland has raised Federal Law and Constitution in both State and Federal Courts.
5. Mr. Westmoreland submits that a rehearing by this Court is the final legal remedy available, considering the painstaking litigation history of the case. (i.e., life sentence for vehicular homicide related offense, in Cobb County, Georgia).
6. Mr. Westmoreland further submit that all claims raised are supported by evidence and attached to some federal law, code of conduct, policy, regulation, case, constitutional

provision or clearly established rule.

7. The Lane case removed an impediment for Mr. Westmoreland to raise a full Strickland claim accumulating errors and the errors as they directly related to constitutional guarantee to fair trial.

8. Mr. Westmoreland is humbly requesting a rehearing by a full panel to reconsider its decision in denying writ of certiorari on December 5, 2022.

9. It's clear that if this Court does not rehear this case, Mr. Westmoreland will serve multiple more decades in prison, even after arguably serving 98.3% of the time for the crimes actually committed under convictions, excluding felony murder convictions which carries an automatic life sentence.

In support of his position, Mr. Westmoreland challenged his conviction in a second habeas corpus petition relying on clear and ambiguous language from both the federal constitution (Due Process, Equal Protection) and this Courts holding in Strickland v. Washington. This Court has technically used the generic terms "*cumulative effect*" or "*collective prejudice*", however, so much confusion flows from the Court not addressing the "*cumulative error*" analysis, especially when they are virtually one in the same. Also considering the facts that:

- 1). Strickland is federal law; 2). Strickland utilizes errors in the plural form; and,
- 3). Strickland was indeed a habeas corpus case.

The state of Georgia adopted the cumulative error analysis in 2020, and it was directed that all courts of the state adhere to the new rule. However, at that moment, Westmoreland was in the process of his first full round of post conviction relief, as the case was pending in federal habeas stage. Mr. Westmoreland has been unsuccessful in taking advantage of the new rule because the state courts now relies on state successive and untimely laws to dismiss substantial non-frivolous habeas petition.

Technically, during the first state habeas petition, ensuing federal petition and initial writ of certiorari in this Court, Mr. Westmoreland consistently raised cumulative error and the collective prejudiced due to ineffectiveness of trial counsels (circuit defenders) and errors of trial court. However, no Court addressed the issue for unknown reasons. But the state court's and the federal court heavily relied on procedural default that court appointed substitute appellate circuit defender did not preserve claim on direct appeal. Nonetheless,

Mr. Westmoreland has presented ample evidence that he:

- a. Raised several claims to initial appellate counsel that he wanted raised on his only appeal.
- b. Wasn't satisfied with the representation of initial appellate counsel.
- c. A conflict occurred and another circuit defender was substituted for appellate counsel.
- d. Substitute appellate circuit defender was appointed after case had been docketed in the Georgia Supreme Court.
- e. None of the claims urged by Mr. Westmoreland were raised on appeal.
- f. Substitute appellate circuit defender testified that there were challenges in his appointment and he basically had to make a brief based on the record made by previous circuit defender.
- g. After direct appeal, substitute appellate circuit defender advised Westmoreland that his case was final and he had 4 years to file a habeas petition.
- h. Mr. Westmoreland filed a pro se motion for reconsideration of direct appeal, and the court did not consider it because circuit defender had to withdraw in writing.
- i. The State declined to address claims of cumulative error. (*The cumulative error doctrine provides that the aggregation of non-reversible errors, i.e., plain errors that do not individually necessitate a reversal and harmless errors, can yield denial of the constitutional right to a fair trial, thereby necessitating a reversal of the conviction.*)
- j. There is no other legal remedy.

The Court is morally requested to inquire into the case and rehear writ of certiorari based on a substantial ground not previously presented: **SPOLIATION**:

Spoliation: is defined as "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)

While the **Sixth Amendment** encompasses several important rights, the right "to have the assistance of counsel" is paramount among them. As this Court has made clear, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most

pervasive, for it affects his ability to assert any other rights he may have.”

Through the **Fourteenth Amendment**, states are required to provide due process and equal protection of the laws -- including the **Sixth Amendment** -- to all people. It says in part: “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.”

Constitutional Demand for Effective Representation:

It is not enough for states to merely provide what some have referred to as a warm body with a bar card to stand beside an indigent person. Instead, this Court has held that the lawyer provided to represent an indigent person must also be effective. The Court has never directly considered whether it is unconstitutional for a state to delegate this constitutional responsibility to its counties and cities, but if a state does delegate the responsibility then it must guarantee that its local governments are not only capable of providing effective representation, but that they are in fact doing so¹.

Duly noted that in initial habeas corpus petition and ensuing state and federal legal actions, Westmoreland raised **Spoliation**.

Westmoreland seeks rehearing review of his ineffective-assistance-of-counsel claim, and the decision was "contrary to, [and] 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." Under **Strickland v. Washington**, the Court held that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

Indeed effective assistance of conflict free counsel is a federal constitutional guarantee. Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair and impartial tribunal. Mr. Westmoreland had obviously been disadvantaged relative to the state, which had substantial resources and skilled lawyers (including Cobb County Circuit Defenders) -- Westmoreland principally raises a legitimate constitutional question of

¹ *Cobb County Circuit Defenders Office performs the essential private function of representing criminal defendants;*

fairness. It is very clear that the trial was arranged in such a way that the state enjoyed an unreasonable advantage over Mr. Westmoreland. The cumulative error doctrine focuses mainly on the fundamental fairness of the trial. In case in chief, the state elected to indict and try Mr. Westmoreland for (3) counts of **capital** Felony Murder and Vehicular Homicide predicated on reckless driving, for the same victim, and several other traffic related offenses and Burglary.

It's very obvious that the state (including state appointed circuit defenders) could have properly conducted a fair trial without inclusion of three felony murder charges and still secured convictions for crimes committed (i.e., (2) Burglaries, (2) Eluding an Officer, Vehicular Homicide predicated on Reckless Driving, Reckless Driving and Serious Injury by Motor Vehicle predicated on Reckless Driving), and secured sentencing aggregating well over 30 years. Instead, the state use the (3) felony murder counts to constructively secure a **capital** murder trial and punishment of an **automatic life sentence** (with parole *eligibility* after serving 30 years imprisonment). The **capital** felony murder trial was conducted like a death penalty case, in a sense (i.e., aggravating factors)². (See *Res Gestas*)

For lack of better term, Mr. Westmoreland was clearly "**RAILROADED**"³ (emphasis added). The trial was totally not fair, attributed to deficiency of counsel. Considering the evidence that the state possessed (multiple officer's dashcams videos of the pursuit and over 200 pictures of individualized pieces of jewelry and medical examiner/autopsy photos), appointed circuit defender was appointed "at *the last minute*" and had one conversation with previous circuit defender who advised him "*on what little had been done on the case*". Furthermore, Westmoreland asked for both a judicial recusal and the policy as a defense prior to trial. Circuit Defender maintained throughout that he never read either police pursuit policy prior to, during or after trial. Circuit Defender conceded that

² Under clearly established Georgia law, there is no distinction between "capital felonies" and felonies "punishable by death or life imprisonment"; they have the same meaning.

³ "*Railroad is a term used to describe a legal proceeding that knowingly and strategically disregards the Due Process and Equal Protection Clauses of the United States Constitution, guaranteed to all American citizens.*

The Railroad is effectuated by two or more actors under code, color of law and the guise of justice. The results are always the same, an individual receiving severely disproportionate sentences not balanced against the nature of the crime or circumstances involved." excerpts from Anonymous Author amazon.com © 2021.

prior to trial, 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"**; his subsequent testimony was that his strategy was to get the jury to find Westmoreland guilty of vehicular homicide and not guilty of three felony murder counts. However, there was absolutely no evidence or defense presented to substantiate presumed strategy.

Initial appellate circuit defender placed an outdated policy into motion for new trial, and argued such evidence. The memorandum explicitly states that **"...the policy of the Department is to use all reasonable means in order to apprehend a fleeing violator"** Effective December, 2004;

The trial court denied motion for new trial holding that there was absolutely no reckless disregard of policy, by the pursuing officer **"during"** the pursuit. The trial court also denied completion of underlying felony arguments by attaching **"res gestae"**, which was broached for the first time in denial of motion for new trial.

After Motion for New Trial was denied, Westmoreland was made aware of the policy effective on 05/17/2007⁵ through the a wrongful death action against him and Cobb County officials, in a separate court⁶. Westmoreland also obtained his trial transcripts via open records to the superior court clerk. After going through the transcripts and researching law and constitution, Westmoreland presented numerous legal claims and newly discovered pursuit policy to initial appellate circuit defender to be presented on appeal. Subsequently, counsel withdrew from the case and another circuit defender was substituted for the appeal, which was already docketed in the state supreme court. None

⁴ Cf. O.C.G.A. § 40-6-6(d)(2); 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.

⁵ 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."**

⁶ **Kinney et.al., v. Westmoreland** Case No. 2009CV04437D {Clayton County State Court, Georgia};

of the claims raised to initial appellate circuit defender were raised on appeal. After the state supreme court denied the direct appeal, Westmoreland immediately and timely filed a motion for reconsideration. The court refused to review motion stating that counsel had to withdraw on record⁷. ***To date, there has been absolutely no evidence or legal documentation of a withdrawal of Cobb County Circuit Defenders Office (i.e., William Carter Clayton) from the case, to Westmoreland's knowledge.***

It's pertinent to note that after discovering the policy effective on the date of his arrest, Westmoreland immediately informed initial appellate circuit defender. As a result, circuit defender corresponded with Westmoreland—that the witness that was subpoenaed to testify at motion for new trial hearing could have only testified that the policy presented was the policy at the time of Westmoreland's arrest. Subsequently, the original correspondence was filed in the Georgia Supreme Court in a Motion for Reconsideration of appeal on Extraordinary Motion for New Trial. To date, Westmoreland has been very unsuccessful in retrieving pertinent document from the Georgia Supreme Court. The documentary evidence clearly exhibits a pervasive ineffectiveness claim, mainly because the defensive subpoenaed witness (Cobb County Police Department Records Custodian) provided the family and victims a copy of the updated policy roughly a month after the accident, therefore if he was presented at the hearing, he could only logically testify that the policy presented ***was not*** the policy on the date of Westmoreland's arrest. This was also classical State Interference and a Brady violation, mainly because at that particular point, the prosecution including law enforcement officials, were aware of the policy effective on the date of the accident.

The courts decision on direct appeal has been profusely challenged in Pro Se Motion for Reconsideration of direct appeal⁸ and in a 42 U.S.C. § 1983 Civil Rights Action.

Westmoreland v. Grubbs et.al. No. 2012 U.S. Dist. LEXIS 118733 (N.D. Ga. 2012). One of the important allegations made was the court omitted clear and ambiguous context from a statutory provision utilizing quotations and ***ellipsis*** while simultaneously applying clearly established federal law (Jackson v. Virginia supra. O.C.G.A. § 40-6-6 (d)(2) provides:

⁷ The record shows that Westmoreland filed a motion for reconsideration, which was denied.

⁸ **Westmoreland v. State** 699 S.E.2d at 17-19 (2010)

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

One reason this is crucial is because the omission, if submitted, would not only alter the Courts entire decision in the proceeding, but also substantiate claim made on direct appeal and clarify legislation intent on the statute. This form of arbitrary construction of legislation directly implicates Westmoreland 's federal Constitutional Guarantees to **Due Process and Equal Protection**.

The **Lane** Court held that the proper approach [] is to consider collectively the prejudicial effect, if any, of trial court errors, along with the prejudice caused by any deficient performance of counsel. Westmoreland followed the unambiguous instructions in **Lane** on how to take advantage of the states adoption of the cumulative error rule; [i]n particular, since: (1) it was a future case [after February 10, 2020]; (2) seeking to argue to the reviewing court (Dooly County Superior Court and the Georgia Supreme Court) that he was entitled to a new trial based on the cumulative effect of errors; (3) both in evidentiary and non-evidentiary contexts'; (4) explaining why the approach the Georgia Supreme Court adopted should be extended in Westmoreland's case; and, (5) meticulously explaining just how he was prejudiced by the cumulative effect of multiple errors. A Writ of Habeas Corpus is the only available remedy to seek a new trial, based on violation of the United States Constitution. It's clear that there is no other place to seek remedy because at this juncture, the Georgia Supreme Court has refused to review and reverse Westmoreland's conviction based on newly established cumulative error

approach or order a new trial or any other State remedy.

In first habeas petition, Westmoreland raised 122 claims of constitutional violations. The vast majority of the claims were ineffective assistance of counsel, trial court error and prosecutorial misconduct. During initial habeas corpus petition and ensuing certificate of probable cause, Westmoreland actually raised the cumulative error argument. However, the errors were never addressed by the courts, presumably because prior to State v. Lane, Georgia courts were prohibited from reviewing cumulative errors of trial court and trial counsel's ineffectiveness. Westmoreland emphasizes that cumulative error analysis involves a "Fourteenth Amendment Due Process inquiry," and therefore technically Lane didn't create new law, but merely applied that which was secured to the accused over two hundred years ago.

Even though Westmoreland raised counsel's errors were so serious as to deprive the him of a fair trial (i.e., cumulative error) in previous habeas petition, the Georgia courts virtually hasn't recognized the rule from the 70's to 2020'. Under the Supremacy Clause of the U.S. Constitution, Strickland became federal law in 1984, and in 1985 via Smith v. Francis, 325 S.E.2d 362 (1985), Strickland standards were adopted into Georgia law. Nonetheless, in support of Westmoreland's contentions, in Humphrey v. Lewis, 728 S.E.2d 603 (2012) (overruled in Lane), 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. In a plethora of similar cases overruled in Lane, which particularly hinged on claims of cumulative effect of trial counsel ineffectiveness, the Courts of this state had explicitly and repeatedly held that 'ilt remains the case that this State does not recognize the cumulative error rule.

So if the jurisprudence changes on how cumulative error claims should be assessed, it's only fair (**due process / equal protection**) that 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**).

- i. In 2012, Mr. Westmoreland instituted a **42 U.S.C. § 1983 Civil Rights Action**⁹ against (7) Georgia Supreme Court Justices, including Chief Justice, *circa* 2010¹⁰. The Civil Rights Action was exclusively based on federal Due Process violations, implicated the decision of the Georgia Supreme Court. Exceptional circumstances exist because the United States Constitution and clearly established federal laws are at the center of the case, and it's highly unlikely that the Georgia Supreme Court would reverse the conviction due to the substantial claims raised.
- ii. Adequate relief cannot be obtained in any other form or from any other court; because Westmoreland has pro se litigated these same post conviction claims thoroughly through the criminal justice system (i.e., Superior Court's, State Supreme Court, Federal Divisional District Court and 11th Circuit Appellate Court). Prior to initial habeas petition, Mr. Westmoreland used up his "only available" Extraordinary Motion for New Trial, on the updated policy issues and no other substantial remedy exist.
- iii. 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 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 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).

The **Lane** case removed an impediment for Mr. Westmoreland to raise a full Strickland claim accumulating errors and the errors as they directly related to constitutional guarantee to fair trial. 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.

⁹ **Westmoreland v. Grubbs et.al.**, No. 2012 U.S. Dist. LEXIS 118733 (N.D. Ga. 2012). Judgement entered July 23, 2012;

¹⁰ Also named in the civil rights action as defendants were Trial Court, (3) Cobb County Circuit Defenders and (2) state prosecutors.

In closing, Mr. Westmoreland presumes the Court may disagree with his methodology in presenting his claims of constitutional magnitude. Nonetheless, it's apparent that a bona fide **railroad** ("farce and mockery") took place under the guise of justice and the pretext of Due Process of law. Furthermore, as to the clear and concise Questions presented to the Court, their potential answers would tremendously shift the outcome of the entire course of the capital felony murder case, in terms of "fundamental fairness" and uniform constitutional concerns. See **Attachment A**.

CONCLUSION

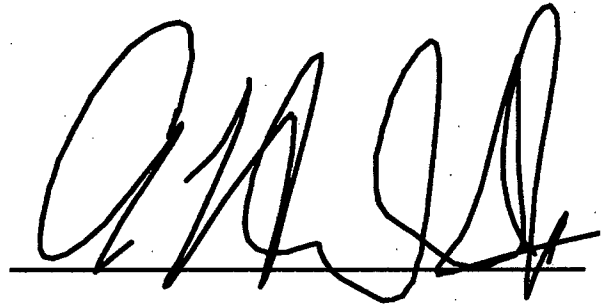
For the foregoing reasons, the petition for rehearing should be granted.

This 27th day of December, 2022.

Respectfully Submitted,
Mr. Amos Westmoreland, Jr.
Mr. Amos Westmoreland, Jr., Pro Se

CERTIFICATE OF PRO SE COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

A handwritten signature in black ink, appearing to read 'AMOS WESTMORELAND, JR.', written over a horizontal line.

Mr. Amos Westmoreland, Jr., Pro Se

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PROOF OF SERVICE

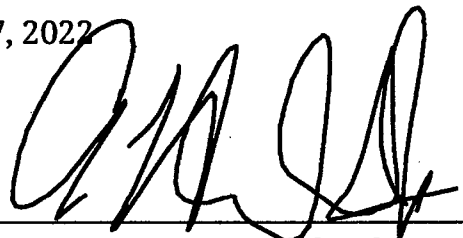
I, Mr. Amos Westmoreland, Jr., do swear or declare that on this date, December 27, 2022, as required by Supreme Court Rule 29 I have served the enclosed **PETITION FOR REHEARING FOR WRIT OF CERTIORARI and ATTACHMENT "A"** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing to each of them and with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Georgia Attorney General, Christopher M. Carr
Georgia Department of Law
40 Capitol Square, S.W.,
Atlanta, Georgia 30334-1300

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

Executed on December 27, 2022



Mr. Amos Westmoreland, Jr., Pro Se
1412 Plunkett Road
Unadilla, Georgia 31091

ATTACHMENT "A"

UnEqual Justice: *Same County, Similar Circumstances, Different Race, Different Results.*
Mr. Fuller v. Mr. Westmoreland: **Similar Circumstances:** *a person died, and another one seriously injured, following a high-speed car crash in Cobb County.*

"As police responded to a disturbance call on Milford Church Road, officers saw an orange Dodge Challenger leaving the area. When officers attempted to pull over the driver to investigate, the motorist, who was later identified as 31-year-old David Fuller, of Locust Grove, refused to stop and accelerated onto Windy Hill Road. As officers pursued at high speeds, they learned that there were several outstanding warrants against Mr. Fuller, including one for allegedly absconding from probation (failing to report or fulfill other requirements) in 2005. As the chase continued eastbound on Windy Hill, speeds eventually reached 100 mph. The pursuit ended when Mr. Fuller crashed into a Monte Carlo; the force of the collision split the Monte Carlo in half and its driver, 26-year-old Guadalupe Osnorio, of Smyrna, was killed instantly. A passenger in the Charger, 22-year-old Dillion Gallion, of Locust Grove, was seriously injured and rushed to a nearby hospital. After the chase, police discovered a gun in Mr. Fuller's car.

Authorities charged Mr. Fuller with several criminal charges, including serious injury by vehicle, vehicular homicide, and eluding arrest."

