No. 24-

IN THE

Supreme Court of the United States

THANQUARIUS R. CALHOUN,

Petitioner,

v.

WARDEN, BALDWIN STATE PRISON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal court must review a habeas petition de novo if the state court's adjudication on the merits was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1). When conducting a de novo review, the federal court defers to the state court's interpretation of state law.

Petitioner Thanquarius Calhoun sought habeas relief based on ineffective assistance of counsel. An Eleventh Circuit panel denied his claim, finding that the Supreme Court of Georgia's statement and application of Georgia law on intervening and proximate cause were automatically correct and beyond federal court review. Those issues, both elements of the crimes for which Calhoun was convicted, were never presented to or decided by a jury during the state-court proceedings.

This Court has long recognized that the Fifth and Sixth Amendments entitle a criminal defendant to have a jury find him guilty of all the elements of the crime with which he is charged. *Erlinger v. United States*, 144 S. Ct. 1840, 1851–52 (2024); *United States v. Gaudin*, 515 U.S. 506, 510 (1995). There is now a circuit split about whether a federal court conducting a habeas review may constitutionally defer to the state court's findings when the state court, not a jury, has decided an indispensable element of a crime.

The question thus presented is:

Does a federal court's unconditional deference to a state supreme court's purported findings on an essential element of a crime violate a habeas petitioner's Fifth and Sixth Amendment right to a trial by jury?

LIST OF PARTIES

All parties appear in this case's caption, located on the cover page of this Petition for a Writ of Certiorari.

RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), the cases below relate to this Petition:

1. Trial

A. *State of Georgia v. Thanquarius Rashawn Calhoun*, Case No. 14-FR-0134M (Superior Court of Franklin County, Georgia)

Judgment Entered: March 19, 2015 (convicted and sentenced); April 1, 2019 (motion for new trial denied)

2. Direct Appeal

A. *Thanquarius R. Calhoun v. State of* Georgia, Case No. S17A0005 (Supreme Court of Georgia)

Judgment Entered: September 12, 2016 (remand granted for motion for new trial on ineffective assistance of counsel claim)

B. *Thanquarius R. Calhoun v. State of Georgia*, Case No. S19A1411 (Supreme Court of Georgia)

Judgment Entered: February 28, 2020 (denial of motion for new trial affirmed)

3. Federal Court Habeas Proceedings

A. *Thanquarius R. Calhoun v. State of Georgia*, Case No. 5:21-cv-0072-CDL (M.D. Ga.)

Judgment Entered: September 8, 2021 (report and recommendation denying habeas petition); November 29, 2021 (habeas petition denied)

4. Eleventh Circuit Court of Appeals

A. *Thanquarius Calhoun v. Ronald Brawner, et al.*, Case No. 22-10313-C (11th Cir.)

Judgment Entered: May 19, 2024 (certificate of appealability granted); February 15, 2024 (affirmed); May 20, 2024 (petition for rehearing en banc denied)

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STATUTES AND OTHER AUTHORITIES:

Petitioner Thanquarius Calhoun respectfully urges this Honorable Court to issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported and appears as *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338 (11th Cir. 2024). It is reproduced in the Appendix ("App.") at Appendix A, 1a–33a. The U.S. District Court for the Middle District of Georgia's order adopting the magistrate judge's report and recommendation is unreported but available at *Calhoun v. Brawner, et al.*, No. 3:21-cv-000190-CDL-CHW, 2021 WL 12217623 (M.D. Ga. Nov. 29, 2021). It is reproduced in the Appendix at Appendix D, 51a–52a. The Report and Recommendation filed by the United States Magistrate Judge is reproduced in the Appendix at Appendix E, 53a–68a.

The Supreme Court of Georgia's order denying Calhoun's state court petition for habeas corpus appears as *Calhoun v. State*, 308 Ga. 146 (2020), and is reproduced in the Appendix at Appendix C, 36a–50a.

JURISDICTION

The Eleventh Circuit issued its opinion on February 15, 2024, and denied a timely petition for rehearing en banc on May 20, 2024. App. G, 72a–73a. Justice Thomas then extended the time to petition for certiorari to September 18, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. V.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

U.S. CONST. amend. VI.

3. 28 U.S.C. § 2254 provides in relevant part:

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

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

28 U.S.C. § 2254.

STATEMENT OF THE CASE

In 2013, rather than pull over when law enforcement attempted to stop him as he was driving on Interstate 85 in Georgia, Thanquarius Calhoun fled. App. 36a–38a. His flight led to a high-speed pursuit that ended when the Georgia State Patrol performed a PIT maneuver[1] on

1. To execute the PIT ("Precision Immobilization Technique") maneuver, an officer matches the speed of the fleeing vehicle with his patrol car and "tap[s]" its left or right rear bumper, causing the vehicle to spin out. *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338, 1342 (11th Cir. 2024).

Calhoun's car at 111 miles per hour. The PIT maneuver caused Calhoun's vehicle to careen off the road, strike a ditch, and flip over. *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338, 1343 (11th Cir. 2024) (hereinafter "11th Cir. Op."). Calhoun survived the crash, but Marion Shore, who was seated in the front passenger seat, was killed. *Id.*

Calhoun was tried and convicted in Georgia state court of eight crimes, including felony murder and homicide by vehicle for Shore's death, and sentenced to life in prison without the possibility of parole. 11th Cir. Op. at 1342–44. After his conviction, Calhoun retained new counsel and moved for a new trial because he did not receive effective assistance of counsel at trial as required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 1344. Among other deficiencies, Calhoun's trial counsel failed to present a proximate or intervening cause defense to the felony murder charge and did not request a jury instruction on it. 11th Cir. Op. at 1344. Trial counsel's failure to prepare and adequately present the defense that the PIT maneuver was an intervening cause in Shore's death prejudiced Calhoun under *Strickland*. *Id.* The trial court denied the motion. App. 69a–71a.

The Supreme Court of Georgia affirmed the trial court's decision, holding Calhoun failed to establish prejudice resulting from his trial counsel's deficient performance. 11th Cir. Op. at 1345. In doing so, the Georgia Supreme Court held that "nothing presented at the hearing on the motion for new trial would have established that the use of the PIT maneuver was an intervening cause" of Shore's death. *Calhoun v. State*, 308 Ga. 146, 152, 839 S.E.2d 612, 618 (2020) (hereinafter "Ga. Op."). In the Georgia

Supreme Court's view, Calhoun's arguments merely challenged the GSP trooper's judgment in performing the PIT. *Id.* at 150. The Georgia Supreme Court then summarily held that "it was reasonably foreseeable—and not abnormal—that Calhoun's high-speed antics might cause another car—whether law enforcement or not—to strike Calhoun's vehicle or otherwise cause Calhoun to lose control of his vehicle," injuring Calhoun, his passengers, or passers-by. *Id.* Because the jury, in the Georgia Supreme Court's view, "was adequately instructed on causation with respect to felony murder," the Court held that specific jury instructions on proximate and intervening cause were unnecessary. *Id.* at 151 n.3. The Georgia Supreme Court did not substantively address Calhoun's argument that proximate cause and intervening cause are independent jury questions, or that Calhoun's trial counsel failed to present these questions to the jury. *See generally, id.*

As for the jury instruction, the Georgia Supreme Court rejected Calhoun's argument that trial counsel was deficient because he failed to request a jury instruction on proximate or intervening cause. 11th Cir. Op. at 1347. Instead, it decided that "the jury was adequately instructed on causation with respect to felony murder," and "even if the jury had been presented with Calhoun's additional evidence and these [proposed] jury instructions, [the Court could not] say that a reasonable jury would have reached a different verdict." *Id.* (quoting Ga. Op. at 617 n.3.)

Calhoun timely applied for a writ of habeas corpus under 28 U.S.C. § 2254 in the U.S. District Court for the Middle District of Georgia. The district court adopted the Magistrate Judge's recommendation to deny Calhoun's

application and deny him a certificate of appealability. 11th Cir. Op. at 1346; App. 51a–52a. The Eleventh Circuit, however, granted Calhoun a certificate of appealability to determine:

> Whether the Georgia Supreme Court's rejection of Mr. Calhoun's ineffective assistance of counsel claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the state court record, see 28 U.S.C. § 2254(d).

11th Cir. Op. at 1346; App. 34a–35a.

On appeal, the Eleventh Circuit resolved the 28 U.S.C. § 2254(d) issue in Calhoun's favor, agreeing with Calhoun that the Supreme Court of Georgia "applied a stricter prejudice standard than the one mandated by the United States Supreme Court for claims of ineffective assistance of counsel." 11th Cir. Op. at 1347. As a result, the Eleventh Circuit found that the Georgia Supreme Court's decision was contrary to clearly established federal law under 22 U.S.C. § 2254(d)(1).

Even so, the Eleventh Circuit upheld the district court's denial of Calhoun's habeas petition, deciding that the Georgia Supreme Court's findings on proximate cause and intervening cause were "necessarily (one might say automatically) correct." 11th Cir. Op. at 1347. In the Eleventh Circuit's view, "proximate cause and intervening cause issues" are "pure issues of Georgia law." *Id*. at 1349. Those issues, the court found, "are at the heart

of the prejudice component of the federal constitutional claim." *Id.* at 1349. The Eleventh Circuit then construed the Supreme Court of Georgia's opinion as having decided "that Calhoun proximately caused Shore's death under Georgia law, and that the use of the PIT maneuver was not an intervening cause of her death." *Id.* at 1351. The Supreme Court of Georgia's decision on those issues, the Eleventh Circuit concluded, requires "absolute" federal court deference. *Id.* at 1352. As a result, the Eleventh Circuit found that Calhoun could not satisfy the prejudice prong of *Strickland*.[2] *Id.*

The Eleventh Circuit then treated Calhoun's arguments about trial counsel's failure to request a jury charge on either proximate or intervening cause the same. 11th Cir. Op. at 1354–55. It deferred to the Georgia Supreme Court's determination that the jury charge was sufficient, because—in the Eleventh Circuit's view—the determination of the adequacy of the jury instruction was a state-court determination of a state-law question. *Id.* at 1355 (citing *Waddington v. Sarausad*, 555 U.S. 179, 192 n.5 (2009)). It thus denied Calhoun habeas relief.

Calhoun filed a Petition for Rehearing En Banc. App. 72a–73a. That petition was denied. *Id.*

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2. At oral argument before the Eleventh Circuit, the State conceded that Calhoun's trial counsel satisfied the deficient performance prong set out in *Strickland*. Panel Arg. 17:40–17:57 (Q: Counselor, is it correct to say that there's already been a concession that Mr. Calhoun received – at least that his counsel was not as effective as he should have been at trial? Is that correct? A: On the deficient performance prong of *Strickland*, yes, your honor.).

REASONS FOR GRANTING THE PETITION

This case presents a fundamental federalism question about whether federal courts must defer to state court decisions that supplant a jury's factfinding function under the Fifth and Sixth Amendments. The Eleventh Circuit's decision below—that federal courts owe absolute, unconditional deference to state supreme courts on issues of proximate and intervening cause—diverges from this Court's holdings that the Fifth and Sixth Amendments give a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Erlinger v. United States*, 144 S. Ct. 1840, 1851–52 (2024) ("Judges may not assume the jury's factfinding function for themselves . . . . To hold otherwise . . . would intrude on a power the Fifth and Sixth Amendments reserve to the American people."). The Eleventh Circuit's opinion below also splits with other circuit court decisions about federal court deference. This case is ideal for resolving that circuit split and clarifying the proper scope of federal court deference to state supreme courts. The Court should thus grant the Petition.

I. The Eleventh Circuit's opinion conflicts with this Court's precedent.

Although this case presents in the context of a petition for habeas corpus, *Gaudin* applies here for the straightforward reason that criminal defendants have "the historical and constitutionally guaranteed right . . . to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." *Gaudin*, 515 U.S. at 513. Proximate cause, as an element

of the crime for which Calhoun was convicted and a mixed question of law and fact, cannot be decided by a court as a matter of law without defying *Gaudin*. Because the Eleventh Circuit decided otherwise (and held that Calhoun could not satisfy *Strickland's* prejudice requirement as a result) this Petition should be granted and the decision below reversed.

The Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 275–78 (1993)). Both constitutional provisions "ensure that a judge's power to punish would 'deriv[e] wholly' from, and remain always 'control[led]' by, the jury and its verdict." *: Erlinger*, 144 S.Ct. at 1849 (Gorsuch, J.). "These principles represent not 'procedural formalit[ies]' but 'fundamental reservation[s] of power' to the American people." *Id.* at 1850.

In *Gaudin*, the defendant was accused of making false statements to a federal agency under 18 U.S.C. § 1001, which required the government to prove the statements' materiality. 515 U.S. at 508. The trial court instructed the jury that the government needed to prove materiality, but that the issue of materiality "is not submitted to you for your decision but rather is a matter for the decision of the court." *Id.* On direct appeal, this Court held that the district court could not determine the materiality element, because "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *Id.* at 511.

The *Gaudin* Court further held that a jury, rather than the judge, has the responsibility "to apply the law to th[e] facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514–15. And if there are either factual questions or mixed questions of law and fact related to any element of an offense, a defendant's constitutional rights are violated if those questions are not submitted to the jury for application of the law to the facts. *Id.*

Under Georgia law, proximate cause is an essential element of a felony murder conviction. *Wilson v. State*, 315 Ga. 728, 733 (2023) ("The causation element requires proof of proximate cause."). Proximate cause and intervening cause are also mixed questions of law and fact for the jury to decide. *See Morris v. State*, 317 Ga. 87, 92–93 (2023) ("[W]hat constitutes proximate cause is undeniably a jury question and is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent.") (quoting *Robinson v. State*, 298 Ga. 455, 458 (1) (2016)). Despite that, the Eleventh Circuit declared that the state-court determination of the "proximate cause and intervening cause issues" requires absolute federal court deference as "pure issues of Georgia law." 11th Cir. Op. at 1349. The opinion thus squarely clashes with *Gaudin*.

II. The Eleventh Circuit's opinion creates a circuit conflict.

The Eleventh Circuit's opinion not only contradicts this Court's precedent but also conflicts with the other circuits that have considered the same or similar issues. For example, in a very similar case, the Sixth Circuit granted a habeas petitioner a new trial, holding that the

state appellate court had erred in upholding the trial court's jury instructions by failing to properly inform the jury on the element of proximate cause. The Ninth Circuit, applying *Gaudin*, has held similarly. By granting this Petition, this Court could resolve the current split.

A. The Sixth Circuit

In *Patterson v. Haskins*, 316 F.3d 596, 599 (6th Cir. 2003), the Sixth Circuit granted habeas relief to a petitioner convicted of involuntary manslaughter under Ohio law. The petitioner claimed that his due process rights were violated when the state trial court omitted the necessary element of proximate cause from its jury instructions. *Patterson*, 316 F.3d at 604. Like the Supreme Court of Georgia here, the state appellate court nevertheless upheld the conviction because it held the jury instruction on causation to be "sufficiently detailed" and a correct statement of state law. *Id.* at 605.

The Sixth Circuit disagreed. Noting this Court's "clear" holding in *Gaudin* that a defendant has the right to have a jury determine, beyond a reasonable doubt, his guilt of every "element of the crime with which he is charged," *id.* at 608 (quoting *Gaudin*, 515 U.S. at 522–23), the Sixth Circuit found that the state appellate court's holding was "contrary to clearly established Supreme Court precedent" under 28 U.S.C. § 2254(d)(1). *Id.* And it granted the petitioner a conditional writ of habeas corpus subject to a new trial. *Patterson* is still good law in the Sixth Circuit.

B. The Ninth Circuit

In *Medley v. Runnels*, 506 F.3d 857 (9th Cir. 2007) (en banc), a California jury convicted the petitioner of murder and of discharging a firearm during the commission of a felony. *Id.* at 860. At trial, the judge instructed the jury that a flare gun is a firearm. *Id.* On direct appeal, the California appellate courts rejected the petitioner's claim that the trial court erred by instructing the jury that a flare gun was a firearm. *Id.* at 860–61. After the petitioner petitioned for writ of habeas corpus in federal court, the district court denied the petitioner's habeas petition because—much like the Eleventh Circuit held here—the definition of "firearm" is a question of state law unreviewable on a federal habeas petition. *Id.* at 861.

A Ninth Circuit panel initially affirmed in a memorandum opinion, but the Ninth Circuit granted the petitioner's request for an en banc rehearing, reversed the district court's judgment, and granted habeas relief. *Id.* at 859–60. The en banc Ninth Circuit held that because "designed to be used as a firearm" is an element of the crime of discharge of a firearm during commission of a felony and an issue of fact, the trial court erred in instructing the jury that a flare gun is a firearm. *Id.* at 867. Citing *Gaudin*, the en banc Ninth Circuit concluded that the instruction "took a critical issue of fact away from the jury in violation of clearly established constitutional law." *Id.*

That decision has not been overruled. And in the recent case of *United States v. Burns*, 790 F. App'x 93, 94 (9th Cir. 2020), the Ninth Circuit—applying *Gaudin* and *Medley*—held that the district court "violated the Fifth and Sixth Amendments when it decided that

[the defendant] provided elementary education under California law and therefore satisfied the school-zone element of 18 U.S.C. § 922(q)(2)(A), rather than submitting that question to the jury." *Burns*, 790 F. App'x. at 94.

C. The Fourth Circuit

In *Lyons v. Weisner*, 247 F. App'x. 440 (4th Cir. 2007) (per curiam), the Fourth Circuit considered the defendant's *Alford* plea to first-degree sexual offense and first-degree kidnapping. In support of the *Alford* plea, the prosecution offered a statement of facts that the defendant neither objected to nor admitted. *Id.* at 441–42. Relying on the prosecution's statement of facts, the trial court applied an aggravating factor to the defendant's sentence that increased the mandatory sentence from 288 to 355 months to 360 to 441 months. *Id.* at 442–43.

The defendant appealed to the Court of Appeals for the State of North Carolina, arguing the trial court lacked sufficient factual basis to apply the aggravating factor to his sentence. *Id.* at 443. The defendant also argued that, under the U.S. Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), only a jury could find the existence of the aggravating factor that increased his sentence. *Id.* The North Carolina Court of Appeals rejected the defendant's arguments and upheld his sentence, holding the prosecution's facts were "undisputed." *Id.* After exhausting his state court remedies, the defendant moved for federal habeas relief, which the district court denied. *Id.*

Citing the *Apprendi* Court's holding that "the Sixth Amendment requires that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for

a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,'" the Fourth Circuit reversed the district court's findings with an order to issue a writ of habeas corpus. *Id.* at 446. The Fourth Circuit concluded that the trial judge's (rather than a jury) finding "by a preponderance of the evidence (rather than beyond a reasonable doubt) [of] aggravating factors that increase the maximum penalty for a crime" violated the defendant's constitutional rights. *Id.* at 444.

D. Other Circuits

Other federal courts of appeal have addressed constitutional questions arising from the issuance of jury instructions relevant to Calhoun's Petition and highlight the unresolved circuit split here. For example, in *Watkins v. Murphy*, 292 F.3d 70 (1st Cir. 2002), the defendant was convicted of robbery and felony murder. On appeal, the defendant argued his due process rights were violated because the trial court failed to instruct the jury about his withdrawal from the attempted robbery, an element relevant to the defendant's felony murder conviction. *Id.* at 73. The defendant argued that the trial court "effectively removed from the jury both the issue of withdrawal and the issue of the degree of murder in violation of his due process rights." *Id.* Relevant to Calhoun's Petition, the First Circuit held that "[w]hile it is axiomatic that it is for state courts to say what state law is, it does not logically follow, as the Commonwealth appears to suggest, that all claims that touch upon state law are barred from federal habeas review." *Id.* at 74 (internal citation omitted). Thus, "[a]lthough it is true that jury instructions are inherently a question of state law, that does not mean that they are completely unreviewable." *Id.*

The Third Circuit reached a similar conclusion in *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997). In *Smith*, the defendant argued that the trial court's jury instructions "erroneously informed the jury that he could be convicted of first-degree murder even if he did not have a specific intent to kill." *Id.* at 410. The Third Circuit held that such an instruction contradicted Pennsylvania law, which required that "an accomplice or co-conspirator in a crime during which a killing occurs may not be convicted of first-degree murder unless the Commonwealth proves that he harbored the specific intent to kill." *Id.* The Third Circuit then held that "there is a reasonable likelihood that the jury convicted [the defendant] of first-degree murder without finding beyond a reasonable doubt that he intended that [the decedent] be killed." *Id.* Because "these jury instructions had the effect of relieving the Commonwealth of its burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law," their use at trial violated the defendant's constitutional right to a fair trial under the Due Process Clause of the Fourteenth Amendment. *Id.* Both *Smith* and *Watkins* make clear that federal appellate courts need not decline to evaluate any issues even remotely related to a state law. Doing so violates a criminal defendant's constitutional rights.

E. The Eleventh Circuit (this case)

The Eleventh Circuit's opinion contradicts *Gaudin* and the holdings of its sister courts, causing a circuit split. In denying Calhoun's appeal, the Eleventh Circuit relied on the Supreme Court's decision in *Waddington v. Sarausad*, 555 U.S. 179, 192 n.5 (2009), for the proposition that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law

questions." 11th Cir. Op. at 1355. But *Waddington* is distinguishable. The *Waddington* petitioner argued that the Washington state court's instruction on accomplice liability, which directly quoted the state's accomplice liability statute, was ambiguous. *Waddington*, 555 U.S. at 190–91. The *Waddington* Court rejected this argument, finding that the state court's review of the possibly ambiguous instruction was not objectively unreasonable. *Id.* at 191–92. But unlike this case (and *Gaudin*, *Patterson*, *Medley, Lyons, Watkins,* and *Smith*), *Waddington* did not involve a decision by the state supreme court on a required element of the convicted offense.

The Eleventh Circuit acknowledged that the trial court did not instruct the jury on proximate cause "even though Georgia's felony murder statute and homicide by vehicle statute each requires proof of it [proximate cause] to impose criminal liability." 11th Cir. Op. at 1344. Still, the Eleventh Circuit interpreted the Georgia Supreme Court's decision as deciding those issues, and then concluded that decision is unassailable. *See id.* at 1349 (explaining that the panel is bound by the Georgia Supreme Court's determinations of proximate and intervening cause because these determinations "are not federal issues but pure issues of Georgia law."); *id.* at 1351 ("We have no authority to question the Supreme Court of Georgia's determination about what constitutes proximate cause and what constitutes intervening cause."). Such an outcome violates Calhoun's due process rights and contradicts clearly established federal law. By reading into the Georgia Supreme Court's opinion that Calhoun was the proximate cause of Shore's death (and that the PIT maneuver was not an intervening cause of her death), the Eleventh Circuit denied Calhoun's due process right

to have a jury determine his guilt or innocence on that essential element of felony murder.

To be sure, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). That said, a defendant has the due process right to insist that the state prove beyond a reasonable doubt every element of the offense charged. *Gaudin*, 515 U.S. at 510; *In re Winship,* 397 U.S. 358, 364 (1970). Yet the jury in Calhoun's case was not instructed on proximate cause, and thus under the Eleventh Circuit's reading of the Georgia Supreme Court's decision, the prosecution was not required to prove beyond a reasonable doubt that Calhoun proximately caused Shore's death. 11th Cir. Op. at 1344. (recognizing the trial court did not "instruct[] the jury on proximate cause specifically" and trial counsel failed to request an instruction on proximate or intervening cause); *Calhoun*, 308 Ga. at 151, n.3. Instead, according to the Eleventh Circuit, the Georgia Supreme Court decided that Calhoun proximately caused Shore's death. *Id.* at 150–51. By making this legal determination, the *Calhoun* court violated Calhoun's due process rights, defying U.S. Supreme Court precedent. *See Gaudin*, 515 U.S. at 510. The Eleventh Circuit should have followed its sister circuits and not deferred to the Georgia Supreme Court's determinations of proximate cause and intervening cause.

III. The question presented is important and warrants review.

This case presents an ideal vehicle to resolve the conflict between the law created by the Eleventh Circuit's

opinion, which lessens the prosecution's burden to prove each element of a criminal offense beyond a reasonable doubt, and the constitutional rights afforded criminal defendants. This Court has addressed this issue in the post-conviction sentencing context, expressly holding that a criminal defendant's sentence may not be increased beyond sentencing guidelines based on aggravating factors without the prosecution proving—and a jury finding—each aggravating factor beyond a reasonable doubt. *Gaudin*, 515 U.S. at 510; *Erlinger*, 144 S. Ct. at 1851–52.

The Court has not yet resolved the circuit split created by the Eleventh Circuit's opinion. Without clarity on this question, the Eleventh Circuit may unconditionally defer to state supreme courts on issues of proximate and intervening cause—or any other element of a crime—even when those issues were not decided by a jury. The law created by the Eleventh Circuit has far-reaching implications, such as stripping the Fifth and Sixth Amendment rights of criminal defendants throughout its jurisdiction. Under this precedent, federal courts in the Eleventh Circuit must give absolute deference to state courts on decisions about essential elements of crime, even if doing so deprives a criminal defendant of the right to have a jury decide those issues. The case offers an opportunity to answer this important question, resolve the circuit split, and bring clarity and uniformity to the rights afforded by the Fifth and Sixth Amendments to the U.S. Constitution.

CONCLUSION

For these reasons, Calhoun requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 15, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10313

THANQUARIUS R. CALHOUN,

Petitioner-Appellant,

v.

WARDEN, BALDWIN STATE PRISON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

Filed February 15, 2024

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 3:21-cv-00019-CDL-CHW

Before WILLIAM PRYOR, *Chief Judge*, ABUDU, and ED CARNES, *Circuit Judges*.

ED CARNES, *Circuit Judge*:

Thanquarius Calhoun led police officers on a reckless, high-speed chase that resulted in a crash and the death

of a passenger in his car. Calhoun was charged with and convicted by a jury of eight crimes arising from his flight and the crash, including felony murder. After his convictions and sentence of life imprisonment were affirmed by the Supreme Court of Georgia, Calhoun filed a federal habeas petition. This is his appeal from the district court's denial of his petition. The primary issues he has raised in this appeal depend on Georgia law questions that were decided against him by the state's highest court on direct appeal. That lets you know how this appeal is going to come out.

I.

It all began when Calhoun, driving over 95 miles per hour in a 70 mile-per-hour zone on an interstate highway, sped past an officer in an unmarked car. The officer activated his car's blue lights and siren and gave chase. Instead of pulling over, Calhoun accelerated. He had two other people with him in his car. One in the front passenger seat and another in the back seat.

A number of other officers joined the chase, but Calhoun thwarted their initial attempts to stop him. The officers tried to box in his car by surrounding it with theirs—a tactic known as a "moving roadblock"—but that didn't work. They also tried to stop his car with stop sticks (a tire deflation device), but that didn't work either.

Calhoun raced on at speeds of more than 115 miles per hour, weaving through traffic, turning in front of other vehicles, and using the emergency lane to pass other cars. At one point, he drove through a Department

of Transportation construction site, slowing down only "a minimal amount" before resuming his breakneck speed. At another point, he swerved out of the way of an officer who was stopping traffic in one of the lanes. Calhoun's last-minute swerving forced another officer who was in the chase to plow his car through the median to avoid running over the officer who was stopping traffic.

The chase lasted for 21 miles, and during it Calhoun averaged a speed of 90 miles per hour, which was more than 20 miles an hour above the speed limit. His top speed of 118 miles an hour was almost 50 miles an hour above the speed limit. Throughout the chase Calhoun drove erratically, recklessly, and dangerously in his efforts to escape the pursuing officers.

Having learned of the chase, Georgia State Patrol Post Commander Al Whitworth and Trooper Donnie Saddler waited in their respective patrol cars for Calhoun to get where they were located further down the highway. Because Calhoun had thwarted every technique used thus far in the effort to stop him, and he was speeding toward a particularly busy exit, Whitworth radioed Saddler that "if [they] ha[d] the opportunity and there [was] a safe way, [they would] use the PIT maneuver" to bring Calhoun's car to a halt.

The PIT ("Precision Immobilization Technique")[1] maneuver is a technique used by law enforcement officers

1. In the record, this is sometimes referred to as the "Precision Intervention Technique" or the "Pursuit Intervention Technique."

to stop fleeing vehicles. To execute the PIT maneuver, an officer matches the speed of the fleeing vehicle with his patrol car and "tap[s]" its left or right rear bumper, causing the vehicle to spin out.

After Post Commander Whitworth and Trooper Saddler both joined the pursuit, Saddler got his patrol car close enough to use the PIT maneuver on Calhoun's vehicle, which was then driving at 111 miles per hour. The PIT maneuver caused Calhoun's vehicle to travel off the right side of the roadway, strike a ditch, and flip over. Calhoun and the backseat passenger survived the crash, but front seat passenger Marion Shore was killed.

As for Calhoun's motive in fleeing so desperately, during the chase, counterfeit $100 bills were flying from his car and littering parts of the roadside. *See Calhoun v. State,* 308 Ga. 146, 839 S.E.2d 612, 619 (2020) ("[T]he counterfeit bills were relevant to explain why Calhoun engaged in such dangerous behavior leading up to the fatal crash."). Still more counterfeit bills were found "within the debris of the wreck scene." Not only that, but "just two weeks before this incident, Calhoun had been involved in a different high-speed chase," and by the time of this trial he had been charged with fleeing or attempting to elude a police officer, reckless driving, and speeding stemming from his earlier flight from officers. *Id.* at 618. And his driver's license had also been suspended. *Id.* at 615.

II.

For his criminal behavior during this latest flight from officers, Calhoun was charged with felony murder, homicide by vehicle in the first degree, fleeing or attempting to elude a police officer, reckless driving, speeding, failure to maintain his lane, driving with a suspended license, and failure to wear a seatbelt. The felony murder and the homicide by vehicle charges grew out of the death of his passenger, Marion Shore. The felony that provided the basis for Calhoun's felony murder charge was the fleeing or attempting to elude a police officer charge.

At trial both Post Commander Whitworth and Trooper Saddler testified during direct examination by the prosecution about the use of the PIT maneuver. Whitworth testified that before deciding to use it, officers should consider how much traffic is on the roadway, any pedestrian traffic on either side of the roadway, and any obstacles on the side of the roadway such as trees or businesses.

Saddler testified that when he was trained on using the PIT maneuver the vehicles were traveling at thirty-five miles per hour, but there was no Georgia State Patrol guideline on the maximum speed at which the maneuver could be performed. He also explained that when deciding to perform the PIT maneuver, officers should consider the danger of the situation, the reason the vehicle was fleeing, and any potential danger to the public that the maneuver would cause. During cross-examination, Saddler was not questioned further about whether it is safe to perform

the PIT maneuver at high speeds or the factors an officer should consider when deciding whether to use the maneuver in a given circumstance.

During his closing argument, defense counsel argued that before Calhoun could be convicted of felony murder, "[t]he State has to prove that whatever Mr. Calhoun did[,] it caused Marion Shore to die." He also argued that Trooper Saddler was the "sole cause of Marion Shore's death." In its closing argument the State argued that "[t]he ultimate issue for [the jury] to decide in this case is did the defendant's actions by fleeing or attempting to elude a police officer cause the death of Marion Shore." The State told the jurors that they could watch the video of the chase and see that it was foreseeable that someone could die as a result of Calhoun's reckless driving.

Defense counsel did not request a jury charge on proximate cause even though Georgia's felony murder statute and homicide by vehicle statute each requires proof of it to impose criminal liability. *See Wilson v. State,* 315 Ga. 728, 883 S.E.2d 802, 809 (2023); *Hartzler v. State,* 332 Ga.App. 674, 774 S.E.2d 738, 742 (2015). Instead of instructing the jury on proximate cause specifically, the court instructed the jury that "a person commits the crime of felony murder when, in the commission of a felony, that person causes the death of another human being." Defense counsel did not object to that instruction. The judge also charged the jury that "fleeing and attempting to elude a police officer constitutes a felony" when the fleeing person "operates his vehicle in excess of 20 miles an hour above the posted speed limit or flees in traffic conditions which place the general public at risk of receiving serious injury."

The jury found Calhoun guilty on all counts and the court sentenced him to life in prison without the possibility of parole.

III.

Calhoun eventually filed a motion for a new trial contending that he did not receive effective assistance of counsel. *See Calhoun,* 839 S.E.2d at 614 n.1 (recounting the appellate history and the remand necessary for consideration of that motion). In his motion, Calhoun complained that his defense counsel, Joe Louis Brown, Jr., failed to present a proximate/intervening cause defense to the felony murder charge and did not request a jury instruction on it. He argued that if Brown had presented the defense that the PIT maneuver was an intervening cause in Shore's death, he would not have been convicted of felony murder.

At the hearing on the motion for new trial, Calhoun offered testimony from Stephen S. Rushton, a troop commander for the Georgia State Patrol who trained Trooper Saddler on how to conduct the PIT maneuver in 2012. He testified that the Georgia Public Safety Training Center conducts PIT maneuver training at 35-45 miles per hour because it would be dangerous and ineffective to train at higher speeds. Rushton also testified that in some circumstances, where the driver's identity is known and he does not pose a threat to public safety, the prudent course is to discontinue the pursuit and attempt to arrest the suspect with a warrant later. He explained that when deciding whether to execute the PIT maneuver, officers

should weigh the danger of letting the fleeing vehicle escape against the danger of executing the maneuver, and that the risk to passengers in the fleeing vehicle should be considered in this calculus. Trooper Saddler testified that although the maximum speed at which he had trained to perform the PIT maneuver was 35 miles per hour, he had executed the maneuver at over 100 miles per hour in the field prior to conducting the maneuver here.

Calhoun also presented at the hearing the testimony of Dr. Geoffrey Alpert, a sociologist and criminology professor whom he had retained to testify about police procedure related to the PIT maneuver. Dr. Alpert testified that it is unsafe to perform the PIT maneuver when a fleeing vehicle is driving over 40 miles per hour and that most police departments limit its use to 35 miles per hour.

After considering all of the evidence, the trial court denied Calhoun's motion for a new trial, determining that he had failed to establish either the deficient performance or prejudice prong of an ineffective assistance of counsel claim.

Calhoun appealed his conviction and the denial of his motion for a new trial to the Supreme Court of Georgia. *Calhoun,* 839 S.E.2d at 615. The Court stated that to succeed on his ineffective assistance of counsel claim, Calhoun had to "show that his lawyer performed at trial in an objectively unreasonable way" and also that the lawyer's "deficient performance prejudiced the defense, which requires showing that counsel's errors were so

serious that they likely affected the outcome of the trial." *Id.* (quotation marks omitted). The Court concluded that Calhoun had not met that dual burden. *Id.* at 616-19.

Calhoun argued that on the felony murder charge "trial counsel should have focused on developing a defense establishing that the PIT maneuver was an intervening cause of Marion Shore's death," which would have ruled out the proximate cause element of that crime. *Id.* at 616 (quotation marks omitted). The Supreme Court of Georgia assumed without deciding that counsel's performance was deficient in that regard, but it held that the claim still failed because Calhoun had not established he had suffered prejudice as a result. *Id.* at 616-17.

The Court explained that: "Proximate cause exists when the accused's act or omission played a substantial part in bringing about or actually causing the victim's injury or damage and the injury or damage was either a direct result *or a reasonably probable consequence of the act or omission*." *Id.* at 616 (alteration omitted) (quotation marks omitted). A defendant's action sometimes is not the "legal cause" of the injury or damage if some other act "intervenes." *Id.* (quotation marks omitted). But if the intervening act "could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act." *Id.* (quotation marks omitted). In other words, proximate cause is not affected by a reasonably foreseeable intervening cause.

The Supreme Court of Georgia determined that Calhoun did not present enough evidence—at trial and in the hearing on the motion for a new trial combined—to establish that Trooper Saddler's use of the PIT maneuver was an intervening cause that severed the causal chain linking Calhoun's actions with Shore's death. *See id.* at 616-17. At most, the Court held, the evidence showed that he may have been negligent in performing the PIT maneuver, and the negligence of a third party is "generally insufficient to constitute [an] intervening cause." *Id.* at 617 (citing *Neal v. State,* 290 Ga. 563, 722 S.E.2d 765, 767-68 (2012)).

The Court did consider Dr. Alpert's testimony, including his opinion that a PIT maneuver shouldn't be used on a fleeing vehicle going faster than 40 miles per hour. But it concluded that Calhoun's evidence merely "challenged Trooper Saddler's judgment in deciding to perform the PIT maneuver," which was insufficient to show that Saddler had broken the causal chain. *Id.* The Court also pointed out that Dr. Alpert was a sociologist "qualified as an expert on *police procedures*," not an expert on "actually performing the maneuver." *Id.* at 616-17 (quotation marks omitted).

The Supreme Court of Georgia determined that it was: "reasonably foreseeable—and not abnormal—that Calhoun's high-speed antics might cause another car—whether law enforcement or not—to strike Calhoun's vehicle or otherwise cause Calhoun to lose control of his vehicle, resulting in a catastrophic incident for Calhoun, his passengers, or occupants of other vehicles." *Id.* at

617. On the core state law issue that the ineffective assistance of counsel claim depended on, the Supreme Court of Georgia's decision establishes that use of the PIT maneuver in this case was not an unforeseen intervening cause, meaning that Calhoun proximately caused Shore's death. *Id.* Any deficient performance on behalf of his counsel relating to proximate cause did not prejudice Calhoun. *Id.*

The Court also rejected Calhoun's argument that Brown was ineffective for failing to request a jury instruction on proximate or intervening cause. It held, as a matter of Georgia law, that "the jury was adequately instructed on causation with respect to felony murder," and "even if the jury had been presented with Calhoun's additional evidence and these [proposed] jury instructions, [the Court could not] say that a reasonable jury would have reached a different verdict." *Id.* at 617 n.3.

After losing in state court, Calhoun filed an application for a writ of habeas corpus in federal district court under 28 U.S.C. § 2254, contending he received ineffective assistance of counsel at trial. The district court denied his application and denied him a certificate of appealability. We granted him one to determine:

> Whether the Georgia Supreme Court's rejection of Mr. Calhoun's ineffective assistance of counsel claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, or resulted in a decision that was based on an unreasonable

determination of the facts in light of the state court record, *see* 28 U.S.C. § 2254(d).

IV.

"We review de novo a district court's denial of habeas relief on an ineffective-assistance-of-counsel claim, which presents a mixed question of law and fact." *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (en banc). For each claim for relief, we review "the last state-court adjudication on the merits." *Sears v. Warden GDCP*, 73 F.4th 1269, 1280 (11th Cir. 2023) (quotation marks omitted). We presume the state court's findings of fact are correct, and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

When reviewing § 2254 habeas applications from state prisoners based on claims previously decided by a state court on the merits, federal courts generally apply the "highly deferential standard[ ]" established under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Pye*, 50 F.4th at 1034 (quotation marks omitted). That standard "demands that state-court decisions be given the benefit of the doubt." *Sears*, 73 F.4th at 1279 (quotation marks omitted).

The exception to the rule of deference is that federal courts decide federal issues in habeas cases without deference to the state courts' decisions of those issues if the state court proceedings (1) "resulted in a decision that was contrary to, or involved an unreasonable application

of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). If either of those exceptions is met, we are to decide for ourselves if Calhoun's ineffective assistance of counsel claims have merit. *Adkins v. Warden, Holman CF,* 710 F.3d 1241, 1249-50, 1255 (11th Cir. 2013).

Calhoun contends that the Supreme Court of Georgia's decision was contrary to or involved an unreasonable application of the federal ineffective assistance of counsel standard because that court misstated the standard in its analysis. He is right about that, although it doesn't entitle him to federal habeas relief.

V.

For reasons we will explain, we agree with Calhoun that the Supreme Court of Georgia appears to have applied a stricter prejudice standard than the one mandated by the United States Supreme Court for claims of ineffective assistance of counsel. Accordingly, instead of applying AEDPA deference to its prejudice holding, we must decide that issue *de novo. See Adkins,* 710 F.3d at 1255. But, also for reasons we will explain, even a *de novo* review results in the self-evident conclusion that the Supreme Court of Georgia's statement and application of Georgia law on intervening cause was necessarily (one might say automatically) correct. Because of that state law applicable to this case, Calhoun has not carried his

burden of persuading us there is a reasonable probability of a different result if counsel had done as Calhoun says he should have regarding an intervening cause defense; our confidence in the outcome of the trial has not been undermined.

A.

A state court determination is contrary to clearly established law if "the court arrived at a conclusion opposite to the one reached by the Supreme Court on a question of [federal] law." *Sears,* 73 F.4th at 1279. That happened here. The correct standard for ineffective assistance of counsel is set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That progenitor decision (cited in more than 219,000 decisions so far) holds that to establish ineffective assistance a petitioner must show that his counsel's performance was outside the wide range of reasonable professional assistance and that deficient performance prejudiced his defense. *Id.* at 687, 104 S.Ct. 2052.

Strickland also held that proving prejudice requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. The Court cautioned that the reasonable probability standard was not a preponderance or likelihood standard and, as a result, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the

case." *Id.* at 693, 104 S.Ct. 2052. Ineffective assistance prejudice can exist "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694, 104 S.Ct. 2052.

That is the problem with the Supreme Court of Georgia's statements about the prejudice issue involving the intervening cause question in this case. Its opinion states that: "nothing presented at [Calhoun's] hearing on the motion for new trial *would have established* that the use of the PIT maneuver was an intervening cause," *Calhoun,* 839 S.E.2d at 616 (emphasis added), or that "a reasonable jury *would have reached* a different verdict," *id.* at 617 n.3 (emphasis added), or that counsel's errors "*likely affected the outcome* of the trial," *id.* at 615 (emphasis added) (quoting *Jones v. State,* 305 Ga. 750, 827 S.E.2d 879, 885 (2019)), or "*affect[ed] the outcome* of Calhoun's trial," *id.* at 617 (emphasis added). All of those formulations are versions of the preponderance standard.

The proper prejudice standard is not preponderance. It's not what "would have" been established but for the error or deficiency of counsel, or what verdict the jury "would have reached" but for it, or whether it actually did "affect the outcome." Instead of a probability of a different result, there need be only a "reasonable probability" of a different result. The difference is whether it is more likely than not the result would have been different under the preponderance standard compared to whether there is enough possibility that there would have been a different result that the reviewing court's confidence in the outcome is undermined. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

The correct prejudice standard puts a lesser burden on the petitioner than the one the Supreme Court of Georgia stated. *See generally United States v. Watkins,* 10 F.4th 1179, 1183-84 (11th Cir. 2021) (en banc) (explaining that the reasonable probability standard is "a lesser showing" than a preponderance standard).

We know that this type of error ordinarily strips a state court decision of AEDPA deference because the Supreme Court told us that it would in *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). There the Court gave an example of where a state court's decision would be contrary to clearly established federal law, disqualifying it from AEDPA deference. The Court's example was: "[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different." *Id.* That, the Court said, would make the resulting decision "contrary to, or involve[ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254(d)(1). *See id.*

A word of caution, or actually a full paragraph of it, is appropriate here: The Supreme Court's decision in *Williams* and our decision today should not be misread to mean that a state court decision isn't entitled to AEDPA deference unless the opinion quotes with precision, without shorthand references, and with flawless consistency the proper federal standard of reasonable probability of a

different result. The Supreme Court has made it clear that a perfectly articulated, non-flub, ambiguity-free discussion of the prejudice component is not required in a state court opinion for AEDPA deference to be due. *See Holland v. Jackson,* 542 U.S. 649, 654-55, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004) ("[T]he statement [in the state court opinion] that respondent had 'failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors' . . . is permissible shorthand *when the complete* Strickland *standard is elsewhere recited.*") (emphasis added); *Woodford v. Visciotti,* 537 U.S. 19, 23-24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) ("The California Supreme Court's opinion *painstakingly describes the* Strickland *standard.* Its *occasional shorthand reference* to [the reasonable probability] standard by use of the term 'probable' without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision.") (emphasis added); *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (For a state court decision to be entitled to deference in a federal habeas proceeding, it "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."); *see also Hall v. Head,* 310 F.3d 683, 700 (11th Cir. 2002) ("While [some of the state court's opinion] may be read to suggest that the state court required more certainty of a different outcome than *Strickland* requires, it nevertheless appears to us that the state court was *simply using abbreviated language* in making its findings, especially since *the state*

court opinion made abundantly clear that it applied exactly the right federal law.") (emphasis added).

But that "close-enough" wrinkle in, or exception to, the *Williams v. Taylor* rule does not apply to the Supreme Court of Georgia decision in this case. It doesn't because the opinion that accompanied the *Calhoun* decision repeatedly stated and used the preponderance of the evidence/"would have" standard instead of the reasonable probability/confidence-in-the-outcome standard that *Strickland* mandates. This isn't a case where there was only the occasional use of shorthand references or abbreviated language for the correct law and where the state court opinion elsewhere made "clear that it applied exactly the right federal law." *Hall,* 310 F.3d at 700. Nor is it a case where the state court did not expressly state the prejudice standard it was applying. Instead, the *Calhoun* opinion stated, several times, a prejudice standard that *Strickland* itself rejected and that *Williams v. Taylor* gave as an example of what would be clearly contrary to federal law.

For those reasons, we must treat the Supreme Court of Georgia's decision of the ineffective assistance of counsel claim as contrary to clearly established federal law, and we must decide the issue *de novo. See Lafler v. Cooper,* 566 U.S. 156, 173, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) (when a state court applies the wrong standard in deciding an ineffective assistance of counsel claim, a federal habeas court is to decide the claim applying the correct standard); *Daniel v. Comm'r, Ala. Dep't of Corr.,* 822 F.3d 1248, 1260 (11th Cir. 2016). Deciding the federal issue *de novo* does

not mean that we decide *de novo* the state law issues that are bound up in the federal ones. Far from it. Instead, we still must honor any state supreme court's holdings on state law issues, even if they are decisive in a federal habeas or other proceeding.

B.

In conducting our *de novo* analysis of the federal ineffective assistance of counsel claims, we will begin and end with the prejudice requirement.

It is undisputed that Calhoun led law enforcement on a long, extremely reckless, high-speed chase that endangered the lives of a number of people and culminated in a crash in which one person lost her life. *See* Part I, *supra*; *see also Calhoun,* 839 S.E.2d at 615. Calhoun does not dispute those material, historical facts. What he does dispute is whether his wrongful and felonious conduct was the proximate cause of the death, instead of the PIT maneuver that officers used to end the chase being an intervening cause that broke the causal chain between his wrongful conduct and the death. While ineffective assistance of counsel is a federal constitutional claim, the proximate cause and intervening cause issues that are at the heart of the prejudice component of the federal constitutional claim are not federal issues but pure issues of Georgia law. The State of Georgia can define proximate and intervening cause any way it wishes. And when it comes to deciding how Georgia law defines those terms, there is one and only one court that's supreme. It's not this Court. It's not even the United States Supreme Court.

Appendix A

1.

In fact, the Supreme Court itself has long and consistently held that a state supreme court is the "ultimate exposito[r] of state law," meaning that what it says about its own state law is without question that state's law. *See Riley v. Kennedy,* 553 U.S. 406, 425, 128 S.Ct. 1970, 170 L.Ed.2d 837 (2008) (alteration in original) (quoting *Mullaney v. Wilbur,* 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)); *Johnson v. United States,* 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) ("We are . . . bound by the [state] Supreme Court's interpretation of state law, including its determination of the elements of [the statute of conviction]."); *Kennedy v. Louisiana,* 554 U.S. 407, 425, 128 S.Ct. 2641, 171 L.Ed.2d 525 ("Definitive resolution of state-law issues is for the States' own courts. . . ."), *modified on denial of reh'g,* 554 U.S. 945, 129 S.Ct. 1, 171 L.Ed.2d 932 (2008); *Wisconsin v. Mitchell,* 508 U.S. 476, 483, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute."); *see also In re Cassell,* 688 F.3d 1291, 1292 (11th Cir. 2012) ("[T]he United States Supreme Court 'repeatedly has held that state courts are the ultimate expositors of state law.'") (quoting *Mullaney,* 421 U.S. at 691, 95 S.Ct. 1881).

The Supreme Court has applied the principle of state high court supremacy over state law issues specifically to federal habeas review of state court convictions. *Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on

direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Wainwright v. Goode,* 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) ("[V]iews of the state's highest court with respect to state law are binding on the federal courts."); *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Mullaney,* 421 U.S. at 690-91, 95 S.Ct. 1881 (rejecting an argument "that the Maine Supreme Judicial Court's construction of state law should not be deemed binding on [the Supreme] Court since it marks a radical departure from prior law, leads to internally inconsistent results, and is a transparent effort to circumvent [a Supreme Court precedent]") (footnote omitted).

We have, of course, applied that same principle in many habeas decisions ourselves. *Jones v. GDCP Warden,* 753 F.3d 1171, 1191 (11th Cir. 2014) ("[A] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief. . . .") (quotation marks omitted); *Pinkney v. Sec'y, DOC,* 876 F.3d 1290, 1299 (11th Cir. 2017) ("[S]tate law is what the state courts say it is. As the Supreme Court and this Court have repeatedly acknowledged, it is not a federal court's role to examine the propriety of a state court's determination of state law.") (internal citations omitted); *Green v. Georgia,* 882 F.3d 978, 988 (11th Cir. 2018) ("On habeas review, federal courts may not second guess state courts on questions of state law. . . . Accepting the [state court's] interpretation of Georgia law, it was thus correct in holding that [the petitioner] did not suffer *Strickland* prejudice."); *In*

re Dailey, 949 F.3d 553, 558 n.4 (11th Cir. 2020) ("The district court concluded that [the petitioner's] claim could also be read to assert that the state court committed an error of state law when it denied the claim during state post-conviction proceedings. It correctly held that such an argument was not cognizable in federal habeas proceedings.") (internal citations omitted); *cf. Blue Cross & Blue Shield of Ala., Inc. v. Nielsen,* 116 F.3d 1406, 1413 (11th Cir. 1997) ("The final arbiter of state law is the state supreme court, which is another way of saying that [a state's] law is what the [state] Supreme Court says it is.").

Because the Supreme Court of Georgia, after reviewing all of the evidence in Calhoun's case, held that under Georgia law Calhoun proximately caused Shore's death, *see Calhoun,* 839 S.E.2d at 616-17, that is the final answer to that state law question. Because it held that the PIT maneuver and the manner in which it was performed in this case was not an intervening cause, that is the final answer to that state law question. We have no authority to question the Supreme Court of Georgia's determination about what constitutes proximate cause and what constitutes intervening cause and how the two fit together in Georgia law. *See Estelle,* 502 U.S. at 72, 112 S.Ct. 475 ("[O]ur habeas powers [do not] allow us to reverse [Calhoun's] conviction based on a belief that the [Supreme Court of Georgia] incorrectly interpreted" Georgia law). What the Supreme Court of Georgia says is Georgia law is Georgia law.

Police chases are dangerous; they often involve the fleeing vehicle and the officers in pursuit driving

at dangerous speeds and breaking traffic laws. It is foreseeable that driving a fleeing vehicle in the perilously reckless way that Calhoun did would result in someone's death. It does not matter if performing the PIT maneuver was the best choice the officers had for ending the dangerous chase, or whether most officers would have performed the PIT maneuver at those high speeds.

What matters is that the Supreme Court of Georgia authoritatively decided as a matter of Georgia law that: "it was reasonably foreseeable—and not abnormal—that Calhoun's high-speed antics might cause another car—whether law enforcement or not—to strike Calhoun's vehicle or otherwise cause Calhoun to lose control of his vehicle, resulting in a catastrophic incident for Calhoun, his passengers, or occupants of other vehicles." *Calhoun,* 839 S.E. 2d at 617. The Supreme Court of Georgia also decided that any questions about the propriety or wisdom of using the PIT maneuver in the circumstances were insufficient for that maneuver to have been an intervening cause under Georgia law. *Id.* at 616-17.

Because it has been authoritatively and finally decided by the Supreme Court of Georgia that Calhoun proximately caused Shore's death under Georgia law, and that the use of the PIT maneuver was not an intervening cause of her death under Georgia law, any asserted errors or failures of trial counsel regarding those issues are not prejudicial: they do not undermine our confidence in Calhoun's conviction for felony murder. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052 (holding that to establish ineffective assistance prejudice a petitioner "must show

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome").

2.

In an attempt to undermine the Supreme Court of Georgia's decision of the Georgia law issues of proximate cause and intervening cause, Calhoun contends that in reaching its decision that court made multiple determinations of the facts about the PIT maneuver that were unreasonable within the meaning of 28 U.S.C. § 2254(d)(2). The Supreme Court of Georgia considered all of the evidence presented both at trial and in the motion for new trial. *See Calhoun,* 839 S.E.2d at 616-17. Not just the facts concerning the PIT maneuver, but also the undisputed facts about the 21-mile chase that Calhoun led the officers on, averaging speeds of 90 miles per hour and reaching 118 miles per hour at one point, weaving, swerving, using the emergency lane to pass cars, and causing a patrol car to plow through the median to avoid running over someone.

Calhoun cites 28 U.S.C. § 2254(d)(2) as authority for his argument about the facts, but neither that nor any other provision in AEDPA supports the position that habeas relief is due. The only purpose and effect of § 2254(d)(2) is to strip a state court's decision on a federal constitutional claim of the deference that it would otherwise be due under the opening part of § 2254(d)

and to thereby require *de novo* review. *See Sears,* 73 F.4th at 1295 ("[B]ecause we've already determined that [the state court decision] was based on an unreasonable determination of the facts. . . . we are unconstrained by § 2254's deference and must undertake a de novo review of the record.") (quotation marks omitted); *Cooper v. Sec'y Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) ("Thus, the state court's decision on prejudice was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' and we will review [the petitioner's] claim *de novo.*") (citation omitted). We are already giving Calhoun's ineffective assistance claim *de novo* review because of § 2254(d)(1), *see* Part V.A., *supra*; § 2254(d)(2) does not affect that.

It is important to distinguish between § 2254(d) conditional deference to a state court's decision of a federal claim, such as ineffective assistance of counsel, and what might be called "unconditional deference" to a state high court's decision of a state law issue in a federal habeas case. We *are not* applying the former; we *are* applying the latter. To be sure, absolute deference to holdings on state law issues that are intertwined in a federal claim can determine the outcome of a federal habeas case. But the source of absolute deference to state supreme courts on state law issues does not come from § 2254(d) or any other AEDPA provision. It is grounded instead in fundamental tenets of federalism and the dichotomy of state and federal law that shapes our federal-state system. And it is compelled by the dozen or so decisions of the Supreme Court and this Court that are cited in Part V.B.1., *supra.*

3.

There is another problem with Calhoun's challenge to the Supreme Court of Georgia's proximate cause and intervening cause rulings. His strong focus on the wisdom, or lack of it, in the officers' use of the PIT maneuver in this case betrays a lack of understanding of proximate cause/intervening cause law in Georgia. That law does not depend on whether the most immediate or specific instrumentality of death was foreseeable, but on whether it was reasonably foreseeable that the result of the defendant's conduct might be catastrophic for someone through whatever immediate instrumentality produced it—"*whether law enforcement or not.*" *Calhoun,* 839 S.E.2d at 617 (emphasis added). The focus of foreseeability in Georgia law is macro, not micro. The *Ponder* and *Smith* decisions show that, thereby refuting Calhoun's position. *See Ponder v. State,* 274 Ga.App. 93, 616 S.E.2d 857 (2005); *Smith v. State,* 285 Ga. 725, 681 S.E.2d 161 (2009). (And, of course, so does the decision of the Supreme Court of Georgia in Calhoun's own case.)

Ponder was an appeal involving a conviction for first degree homicide by vehicle. 616 S.E.2d at 858. Late one night while being chased by two police vehicles with their sirens and blue lights on, the defendant drove at speeds of 80 to 90 miles per hour with his headlights off, running several stop signs and side-swiping two vehicles along the way. *Id.* at 858-60. While chasing Ponder, Sergeant Scott drove his patrol car "into an uphill grade passing lane of the highway as if he intended to pass Ponder," and then made "a sudden evasive maneuver[ ] to avoid a collision

between his and Ponder's vehicle and while doing so, lost control of his vehicle and collided with [an] oncoming" car driven by an innocent third party. *Id.* at 859. Sergeant Scott was killed in the collision. *See id.*

As a result of Scott's death, Ponder was charged with first degree homicide by vehicle, *see id.* at 858 & n.1, which is defined to include "caus[ing] the death of another person through" fleeing or attempting to elude a police officer. *See* Ga. Code §§ 40-6-393(a), 40-6-395(a). To sustain a conviction under that statute, the State had to prove "that the defendant's conduct was the proximate cause as well as the cause in fact, of the death." *Ponder,* 616 S.E.2d at 859 (quotation marks omitted). The Court of Appeals of Georgia explained what proximate cause means:

> An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

Id. Applying that standard, the Court upheld the conviction because "Ponder's actions of eluding an officer at high speed in a reckless manner played a substantial part in bringing about Sgt. Scott's death and . . . the death was a reasonably probable consequence of Ponder's actions." *Id.* at 860 (cleaned up). It reached that decision even though Sergeant Scott had pulled into an uphill passing lane at

a high rate of speed and lost control of his car. *See id.* at 859. But for that the head-on collision with an oncoming car and Scott's death would not have happened. Still, the Court of Appeals held that Ponder's high-speed flight and recklessness was the proximate cause of Scott's death. *Id.* at 860. It did not hold that Scott's actions were an intervening cause.

Four years after the Court of Appeals of Georgia's *Ponder* decision, the Supreme Court of Georgia issued its *Smith* decision affirming a conviction for first degree homicide by vehicle, specifically for causing the death of another person while fleeing or attempting to elude an officer. *See Smith,* 681 S.E.2d at 162-63. An escaped prisoner driving a truck was being chased by a deputy sheriff in a patrol car with its blue lights flashing and siren going. *Id.* at 162; *see id.* at 163 (Hunstein, C.J., dissenting). The pursuit continued for three or four miles at 75 miles per hour, which was 20 miles an hour over the posted speed limit. *See id.* at 163 (Hunstein, C.J., dissenting). Both the fleeing prisoner and the pursuing deputy were running a red light while speeding through an intersection. *Id.* at 162.

The prisoner managed to prevent his truck from colliding with any of the other vehicles that were at the intersection. *See id.* But the deputy was driving so close behind the fleeing truck that he couldn't see in time whether there were any other vehicles at the intersection, causing his vehicle to crash into a car stopped at the red light. *Id.* The woman who was waiting for the light to change was killed. *See id.*

In his appeal, Smith contended that the facts did not establish the necessary proximate cause element of first degree homicide by vehicle. *Id.* at 162; *see also id.* at 163 (Hunstein, C.J., dissenting). Citing favorably the Court of Appeals' *Ponder* decision, the Supreme Court of Georgia rejected that argument and held that Smith's reckless flight was the proximate cause of the innocent motorist's death. *Id.* at 162. That holding in *Smith* necessarily establishes as a matter of Georgia law that the actions of the pursuing deputy in speeding toward the intersection when he couldn't see if there were any vehicles there, which resulted in a collision with a car stopped at the redlight, was not an intervening cause as that term is defined in Georgia case law. *See id.*

In *Smith* the Vehicle Pursuit Policy applicable to the deputy provided that he could exceed the speed limit during a chase only if he "exercises due regard for the safety of all persons," and he must terminate the pursuit if "the risk of continuing outweighs the danger of permitting the suspect to escape." *Id.* at 164 n.2 (Hunstein, C.J., dissenting). Yet, violations of those policies did not transform the pursuing deputy's driving into an intervening cause that prevented defendant Smith's driving from being a proximate cause of the death. *See id.* at 162.

At oral argument, Calhoun's counsel attempted to distinguish *Smith* from this case by contending that the crash in *Smith* was an unavoidable accident while the crash caused in this case was not an accident because the officers intentionally used the PIT maneuver. But the deputy in the *Smith* case intentionally chose to follow closely behind

the fleeing truck, and because of that deliberate choice he couldn't see the innocent motorist's vehicle stopped at the redlight until it was too late. *See id.* Both *Smith* and the present case involved actions that an officer intentionally took during a high-speed chase that endangered lives. In both cases the officers' actions contributed to a crash and a death. But in each case the Supreme Court of Georgia held as a matter of state law that the criminal recklessness of the fleeing driver, not the officer's actions, was the proximate cause of the death.

The Supreme Court of Georgia in this case held that "it was reasonably foreseeable—and not abnormal—that Calhoun's high-speed antics might cause another car—*whether law enforcement or not*—to strike Calhoun's vehicle or otherwise cause Calhoun to lose control of his vehicle, resulting in a catastrophic incident for Calhoun, his passengers, or occupants of other vehicles." *Calhoun,* 839 S.E.2d at 617 (emphasis added). Just as in *Smith,* proximate cause was established by dangerous and reckless driving in an effort to elude law enforcement. *See id.*; *see also Smith,* 681 S.E.2d at 162. And just as in *Smith,* the actions of the pursuing officer in this case were not an intervening cause of the death, as "intervening cause" is defined in Georgia law.

Because Calhoun proximately caused his passenger Shore's death under Georgia law, he did not suffer prejudice due to any alleged deficiencies or errors of his trial counsel. He has not carried his burden of establishing a reasonable probability of a different result if his trial counsel had taken different actions regarding the

proximate cause/intervening cause issue. Our confidence in the outcome of the trial is not undermined.

VI.

For similar reasons we reject Calhoun's claim that his attorney rendered ineffective assistance of counsel by not requesting specific jury instructions on proximate and intervening cause. In rejecting this claim the Supreme Court of Georgia expressly held that the jury was adequately instructed on the applicable state law. *Calhoun,* 839 S.E.2d at 617 n.3. The words of the United States Supreme Court in another case fit well here: "The [state] Supreme Court expressly held that the jury instruction correctly set forth state law, and we have repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'" *Waddington v. Sarausad,* 555 U.S. 179, 192 n.5, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009) (citation omitted) (quoting *Estelle,* 502 U.S. at 67-68, 112 S.Ct. 475).

Alternatively, look at it this way. The most Calhoun could have been entitled to is instructions on what the Georgia courts have decided is the relevant state law on a subject. The law regarding proximate and intervening cause was determined in and stated by the Georgia Court of Appeals in *Ponder* and by the Supreme Court of Georgia both in *Smith* and in Calhoun's own appeal. Given that law, and the undisputed facts of Calhoun's highly reckless behavior, which endangered the lives of many people, there is no reasonable probability of a different result had the jury been instructed precisely in accord with the decisions

in *Ponder, Smith,* and *Calhoun.* Our confidence in the outcome of the trial is not undermined by any shortcoming in the instructions.

That conclusion necessarily follows from the Supreme Court's instructions in *Strickland* that when deciding whether a petitioner was prejudiced by an error of counsel: "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 466 U.S. at 695, 104 S.Ct. 2052. That's because "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.* That means "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker [would] reasonably, conscientiously, and impartially apply[ ] the standards that govern the decision." *Id.* We have no doubt about what any properly instructed jury reasonably, conscientiously, and impartially applying the legal standards governing proximate and intervening cause that were set out in *Ponder, Smith,* and *Calhoun,* would have found. It would have found that Calhoun proximately caused the death of Marion Shore, a passenger who had the misfortune to be riding in his car when he drove it with great recklessness and total disregard for human life, and it would have found that no tactic of law enforcement, including the PIT maneuver, was an intervening cause under Georgia law.

VII.

In essence, Calhoun asks us to decide that the Supreme Court of Georgia misunderstood and misapplied Georgia law. By definition, it did not do that. Calhoun's claims fail and he is not entitled to habeas relief.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 19, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10313-E

THANQUARIUS R. CALHOUN,

Petitioner-Appellant,

versus

RONALD BRAWNER, TIMOTHY C. WARD,

Respondents-Appellees.

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

ORDER:

Thanquarius Calhoun, a Georgia prisoner serving a sentence of life without parole, moves for a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. A COA is GRANTED on the following issue:

> Whether the Georgia Supreme Court's rejection of Mr. Calhoun's ineffective assistance of counsel claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, or resulted in a decision that was based on an unreasonable

> determination of the facts in light of the state court record, *see* 28 U.S.C. § 2254(d).

The right to appeal from the denial of a habeas corpus petition is governed by the requirements of 28 U.S.C. § 2253, which provides that an appeal from a final order in a federal habeas corpus proceeding may not be taken without a COA. *See* 28 U.S.C. § 2253(c)(1)(B). The COA must certify that "the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and must "indicate which specific issue or issues satisfy the showing required." *Id.* § 2253(c)(3). The Supreme Court has clarified that a petitioner satisfies § 2253(c)(2)'s standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (emphasis added); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As the Supreme Court has explained, these "threshold inquir[ies] do[ ] not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336.

Here, under the statutory standard set forth in § 2253(c)(2), Mr. Calhoun's motion for a COA has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 327. Mr. Calhoun's motion therefore is GRANTED as to the issue referenced above. The balance of his request for a COA is denied.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

APPENDIX C — OPINION OF THE SUPREME COURT OF GEORGIA, DATED FEBRUARY 28, 2020

SUPREME COURT OF GEORGIA

S19A1411.

CALHOUN,

v.

THE STATE.

February 28, 2020, Decided

BENHAM, Justice.

Appellant Thanquarius Calhoun was convicted of felony murder and various misdemeanors in connection with the death of Marion Shore.[1] On appeal, Calhoun

1. The crimes occurred on May 14, 2013. On March 19, 2014, a Franklin County grand jury indicted Calhoun for felony murder predicated on fleeing or attempting to elude a police officer, homicide by vehicle in the first degree, felony fleeing or attempting to elude a police officer, reckless driving, speeding, failure to maintain lane, driving while license suspended or revoked, and failure to wear a safety belt. At Calhoun's March 2015 trial, a jury found him guilty on all counts. The trial court sentenced Calhoun to serve life in prison for felony murder and twelve months each for speeding, failure to maintain lane, and driving while license suspended or revoked, all to run concurrent to his murder sentence. Finally, Calhoun was fined $25 for failure to wear a safety belt. All other counts merged for sentencing.

argues that his trial counsel rendered constitutionally ineffective assistance. We disagree and affirm.

Reviewing the record in a light most favorable to the verdicts, the evidence presented at trial established as follows. On May 14, 2013, a Banks County Sheriff's deputy was traveling northbound on I-85 in his patrol car when a gray Toyota Corolla passed him traveling approximately 95 miles per hour. Calhoun, whose license was suspended, was driving, and Shore was in the passenger seat. The deputy attempted to initiate a traffic stop, but Calhoun did not comply, and a high-speed pursuit ensued. Deputies attempted to stop Calhoun by boxing him in and by deploying spike strips, but neither countermeasure was effective; the chase continued for approximately twenty miles and, at times, exceeded 110 miles per hour. At some point, Georgia State Patrol Trooper Donnie Saddler joined

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Calhoun filed a motion for new trial on April 1, 2015, which he amended on December 15, 2015. The trial court denied the motion as amended on February 19, 2016. Calhoun filed a timely notice of appeal to this Court on March 21, 2016, and the case was docketed to this Court on August 1, 2016, as Case No. S17A0005. However, on August 2, 2016, before any briefs were filed, counsel for Calhoun filed a notice of substitution of counsel, and, on August 10, 2016, Calhoun moved for a remand so that he could raise claims of ineffective assistance of trial counsel for the first time. On September 12, 2016, this Court granted the motion for remand.

On March 2, 2017, Calhoun filed a motion for new trial. After a hearing held December 8, 2017, and April 2, 2018, the trial court denied Calhoun's motion on April 1, 2019. Calhoun filed a timely notice of appeal to this Court on April 26, 2019, and this case was docketed in this Court to the August 2019 term and was orally argued on October 22, 2019.

the pursuit and, following discussions with fellow law enforcement, performed a "PIT" maneuver[2] — a tactical intervention in which a law enforcement officer matches the speed of a fleeing vehicle, uses his or her vehicle to "tap" the bumper of a fleeing vehicle, and causes the fleeing vehicle to "spin out," thereby ending the pursuit. Following the maneuver, Calhoun's vehicle left the road, flipped several times, and crashed into trees. Though he was not wearing his seatbelt, Calhoun survived the incident; Shore, however, was partially ejected and died as a result of her injuries.

Multiple law enforcement officers identified Calhoun as the driver of the vehicle and testified that he was seen weaving in and out of traffic, passing cars in the emergency lane, and driving in a generally erratic manner. Multiple witnesses also testified to seeing what appeared to be United States currency being thrown from the vehicle during the pursuit; law enforcement were later dispatched to recover the currency, and the recovered bills — which were suspected to be counterfeit — were admitted into evidence at trial.

1. Though not raised by Calhoun as error, in accordance with this Court's standard practice in appeals of murder cases, we have reviewed the record and find that the evidence, as stated above, was sufficient to enable a rational trier of fact to find him guilty beyond a reasonable

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2. The transcript is replete with inconsistent expansions of the PIT acronym (though there is no corresponding inconsistency as to the nature of the technique or how it is performed); as such, we refer to the technique using the acronym.

doubt of the crimes of which he was convicted. *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979).

2. Calhoun argues that trial counsel was ineffective in trial preparation and defense presentation, in failing to object during the State's opening statement and closing argument, in failing to object to various evidence and testimony, and, finally, in counseling Calhoun regarding the State's pre-trial plea offer.

Calhoun's claims can succeed only if he demonstrates both that his trial counsel's performance was deficient and that he suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U. S. 668, 687 (III) (104 SCt 2052, 80 LE2d 674) (1984). "To prove deficient performance, [Calhoun] must show that his lawyer performed at trial in an objectively unreasonable way considering all the circumstances and in the light of prevailing professional norms." *Romer v. State*, 293 Ga. 339, 344 (3) (745 SE2d 637) (2013). As to prejudice, Calhoun must establish that "the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious that they likely affected the outcome of the trial." *Jones v. State*, 305 Ga. 750, 755 (4) (827 SE2d 879) (2019).

"[S]atisfaction of this test is a difficult endeavor. Simply because a defendant has shown that his trial counsel performed deficiently does not lead to an automatic conclusion that he was prejudiced by counsel's deficient performance." *Davis v. State*, 306 Ga. 140, 144 (3) (829 SE2d 321) (2019). And "[i]f an appellant is unable to

satisfy one prong of the *Strickland* test, it is not incumbent upon this Court to examine the other prong." (Citation and punctuation omitted.) Id. at 143. With these principles in mind, we address Calhoun's arguments in turn.

(a) Calhoun first complains that trial counsel did not adequately prepare for trial and put forth no defense. As Calhoun reads the record, trial counsel spent very little time preparing for trial, conducted an anemic cross-examination of a few of the State's witnesses, and failed to articulate a cohesive and focused defense. According to Calhoun, trial counsel should have focused on developing a defense establishing that "the PIT maneuver was an intervening cause of Marion Shore's death." To this end, Calhoun asserts that trial counsel should have: conducted additional research into the PIT maneuver; secured training and policy materials regarding the maneuver from the Georgia State Patrol; conducted a more thorough cross-examination of the troopers regarding their training, the use of the PIT maneuver, and the various Georgia State Patrol policies concerning the tactic; and retained an expert witness on the PIT maneuver. However, assuming without deciding that counsel's trial preparation and defense presentation fell below an objective standard of reasonableness and, thus, constituted deficient performance, Calhoun has failed to demonstrate prejudice.

"[T]he felony murder statute requires only that the defendant's felonious conduct proximately cause the death of another person." *State v. Jackson*, 287 Ga. 646, 660 (697 SE2d 757) (2010). "[P]roximate cause exists when

the accused's act or omission played a substantial part in bringing about or actually causing the victim's injury or damage and the injury or damage was either a direct result *or a reasonably probable consequence of the act or omission*." (Citation and punctuation omitted; emphasis supplied.) *Chaney v. State*, 281 Ga. 481, 482 (640 SE2d 37) (2007). "In cases of felony murder … legal cause will not be present where there intervenes (1) a coincidence that is not reasonably foreseeable … or (2) an abnormal response." (Citation and punctuation omitted.) *Skaggs v. State*, 278 Ga. 19, 20 (596 SE2d 159) (2004). However,

> [i]f the character of [an] intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act.

Guzman v. State, 262 Ga. App. 564, 568 (586 SE2d 59) (2003).

As an initial matter, the Georgia State Patrol policies and procedures concerning the PIT maneuver — which Calhoun vehemently contends should have been the focus of counsel's preparation and defense — were actually brought out at trial *by the State*. Both Trooper Al Whitworth and Trooper Saddler testified on direct examination about

factors that should be considered before the PIT maneuver is to be utilized. Indeed, Trooper Saddler testified that the use of the maneuver was a carefully defined policy and required law enforcement to consider, among other things, the reason a vehicle is fleeing, the general safety of the public, and the dangers associated with the continued pursuit. Further, though Calhoun makes much of the fact that Trooper Saddler had not apparently been trained on the PIT maneuver at speeds exceeding 100 miles per hour, this fact, too, was brought out at trial. Trooper Saddler explained during direct examination that his training on the PIT maneuver occurred at 35 miles per hour.

These evidentiary considerations aside, nothing presented at the hearing on the motion for new trial would have established that the use of the PIT maneuver was an intervening cause. Notably, the expert tendered by Calhoun at the hearing on his motion for new trial was expressly *not* tendered as an expert "in actually performing the maneuver." Instead, the witness — a sociologist — was qualified as an expert on *police procedures*, and his testimony explored the "factual circumstances that an officer is supposed to consider when determining whether the use of [the] PIT [maneuver] is appropriate." At best, Calhoun's presentation merely called into question the propriety of the Georgia State Patrol policies on the PIT maneuver — namely that the policies do not limit the speed at which the maneuver may be performed — and suggested that Trooper Saddler may not have fully complied with these policies when considering and utilizing the PIT maneuver in this instance (though his trial testimony indicates that he did);

simply put, Calhoun has challenged Trooper Saddler's judgment in deciding to perform the PIT maneuver. This is insufficient to establish an intervening cause. See *Neal v. State*, 290 Ga. 563 (1) (722 SE2d 765) (2012) (ordinary negligence of third party generally insufficient to constitute intervening cause); *Hendrick v. State*, 257 Ga. 17 (5) (354 SE2d 433) (1987) (same).

Even taking into account Calhoun's presentation at the hearing on his motion for new trial, it was reasonably foreseeable — and not abnormal — that Calhoun's high-speed antics might cause another car — whether law enforcement or not — to strike Calhoun's vehicle or otherwise cause Calhoun to lose control of his vehicle, resulting in a catastrophic incident for Calhoun, his passengers, or occupants of other vehicles. See *Skaggs*, 278 Ga. at 20 (victim's injuries and death from fall after being struck in face by defendant reasonably foreseeable); *Kirk v. State*, 289 Ga. App. 125, 127 (656 SE2d 251) (2008) (reasonably foreseeable that improper lane change by tractor-trailer could cause victim's vehicle to be struck, careen out of control into median, and then be struck by second truck). Thus, Trooper Saddler's actions did not amount to an intervening cause. As such, even if trial counsel's trial preparation and defense presentation were constitutionally deficient, trial counsel's failure in this regard did not affect the outcome of Calhoun's trial.[3]

3. Calhoun also contends that trial counsel was ineffective for failing to have the jury specifically instructed on proximate and intervening cause. However, the jury was adequately instructed on causation with respect to felony murder. As such, Calhoun has failed to demonstrate prejudice. See *Taylor v. State*, 290 Ga. 245

(b) Calhoun next claims that the State's opening statement and closing argument were filled with "baseless" comments and "imaginary" evidence and, consequently, that trial counsel should have objected. Specifically, he contends that trial counsel should have objected during opening statement when the prosecutor asserted that Calhoun was "solely to blame for the situation that led to the death of Marion Shore" and, also, when the prosecutor described Shore as "an innocent, unwilling passenger who was trapped in [Calhoun's] vehicle." Likewise, Calhoun asserts that trial counsel should have objected during closing argument when the prosecutor posited that drivers on I-85 were "scared because they thought [Calhoun] would cause them to wreck … [and] los[e] their lives" and that the trooper performed the PIT maneuver because he knew "Calhoun was not going to stop" and would "continue to put lives at risk."

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(2) (719 SE2d 417) (2011) (trial counsel not ineffective for failing to request a jury instruction specific to circumstantial evidence where, considering the instructions as a whole, the jury was properly instructed on that point of law); *Butts v. State*, 273 Ga. 760, 768 (546 SE2d 472) (2001) (where trial court's instructions were adequate as given, appellant could not show prejudice in trial counsel's failure to request charge). See also *Whiting v. State*, 296 Ga. 429 (768 SE2d 448) (2015) (no plain error resulted from trial court's failure to charge jury on proximate cause where jury instructions, read as whole, properly instructed the jury on the issue of felony murder causation). Further, for the reasons discussed above, even if the jury had been presented with Calhoun's additional evidence and these jury instructions, we cannot say that a reasonable jury would have reached a different verdict.

As an initial matter, there is no indication that counsel was asked about these remarks during his testimony at the hearing on Calhoun's motion for new trial. A decision by trial counsel to refrain from objecting to remarks by the State during opening statement or closing argument "may indeed fall within the ambit of trial strategy," *Holmes v. State*, 273 Ga. 644, 647 (543 SE2d 688) (2001), and, "[i]n the absence of testimony to the contrary, counsel's actions are presumed strategic." Id. In any event, nothing suggests that the prosecutor's remarks were, in fact, improper. While Calhoun may disagree with the prosecutor's characterization of the evidence, the prosecutor was within bounds during opening statement to elaborate on what he expected the evidence to show, see *Menefee v. State*, 301 Ga. 505 (4) (a) (801 SE2d 782) (2017), and then, in closing argument, to draw reasonable inferences from the evidence actually presented at trial, see *Martinez v. State*, 302 Ga. 86 (3) (805 SE2d 44) (2017). Given the nature of the prosecutor's comments, an objection was unnecessary, and counsel is not ineffective for failing to lodge a baseless objection. See *Wesley v. State*, 286 Ga. 355 (3) (c) (689 SE2d 280) (2010). Accordingly, Calhoun has failed to demonstrate that trial counsel's performance was deficient in this regard and, as such, the claim fails.

(c) Calhoun also argues that trial counsel should have objected when the State introduced the following evidence: crash-scene photographs; evidence showing that, at the time of the incident, Calhoun was already under indictment for, inter alia, fleeing or attempting to elude a police officer, speeding, and reckless driving; and the alleged counterfeit money. We address each in turn.

(i) The State introduced eight crash-scene photographs depicting Shore's body in the vehicle wreckage. Calhoun contends that the photographs were irrelevant and unduly prejudicial and, as such, that trial counsel was ineffective for failing to object. At the hearing on Calhoun's motion for new trial, counsel testified that he did not object to the photographs because he believed that they were admissible and that any objection would have been unsuccessful. Counsel also testified that he had concerns about autopsy photographs — which depicted Shore naked — and that he was successful in excluding those exhibits.

A review of the crash-scene photographs reflects that they simply depict Shore's body as it came to rest after Calhoun's car flipped. These photographs, "as crime-scene photos in murder cases go, … [are] not especially gory or gruesome." (Citations and punctuation omitted.) *Davis*, 306 Ga. at 145. Further, these photographs tend to establish the cause and nature of Shore's death, as well as her identity. Id. As we have held before, "photographic evidence that fairly and accurately depicts a body or crime scene and is offered for a relevant purpose is not generally inadmissible under [OCGA § 24-4-403] merely because it is gruesome." *Plez v. State*, 300 Ga. 505, 508 (3) (796 SE2d 704) (2017). As such, it was reasonable for trial counsel to conclude that these exhibits were admissible — and that any objection would thus be fruitless — and to focus his efforts on exhibits he found more troubling. See *Davis*, 306 Ga. at 145-146 (3) (c).

(ii) Prior to trial, the State provided notice of its intent to present evidence of other acts pursuant to OCGA § 24-4-404 (b) ("Rule 404 (b)"). Specifically, the State sought to present evidence that, just two weeks before this incident, Calhoun had been involved in a different high-speed chase and, consequently, had been charged with, inter alia, fleeing or attempting to elude a police officer, reckless driving, and speeding; the State sought to use the evidence to prove intent, knowledge, and identity. Following a hearing, the trial court granted the State's motion. Now, Calhoun argues both that trial counsel failed to object and, also, that the State "offered no argument as to the connection or similarity between Calhoun's [earlier] arrest … and the current case."

However, the record is clear that trial counsel did, in fact, object. During a pretrial hearing, trial counsel objected to the State's motion and argued that the evidence of the earlier offenses was absolutely irrelevant to the State's prosecution of the current offenses. As to Calhoun's claim concerning the State's failure to prove "similarity," his argument — and the cases cited in support of it — is grounded exclusively in Georgia's *former* Evidence Code, namely, the admissibility of "similar transaction evidence." See *Hanes v. State*, 294 Ga. 521, 522 (755 SE2d 151) (2014). Because Calhoun does not articulate what argument, if any, trial counsel should have made with respect to Rule 404 (b) — which was the basis of the trial court's ruling — he has not demonstrated that trial counsel performed deficiently in this regard. Moreover, even if trial counsel did perform deficiently in failing to object, the evidence against Calhoun was strong, and, thus, he has not shown

that the other acts evidence prejudiced him such that the outcome of his trial would have been different if trial counsel had made a successful objection. See *Davis v. State*, 302 Ga. 576 (6) (a) (805 SE2d 859) (2017).

(iii) Next, Calhoun complains that trial counsel failed to object when the State introduced the alleged counterfeit bills that were released from Calhoun's vehicle as he drove down I-85. According to Calhoun, the State used the counterfeit bills to suggest wrongdoing and explain why he fled from law enforcement, but, he says, "[e]vidence … as to why [he] led police officers on a high-speed chase was irrelevant and immaterial to the finding of guilt on any charge at issue in this case." Calhoun continues, arguing that, had an objection been made, the trial court "may have found the evidence inadmissible because [Calhoun's] motivation for speeding is not part of the [charged] crime[s]." This claim lacks any merit.

"'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OCGA § 24-4-401. Here, the counterfeit bills were relevant to explain why Calhoun engaged in such dangerous behavior leading up to the fatal crash. Though motive is not an essential element of any offense, evidence of motive is generally relevant in murder prosecutions, see, e.g., *Romer*, 293 Ga. at 341 (1) (b), and trial counsel did not perform deficiently in failing to object.

(d) Calhoun asserts that counsel "did not fully discuss" with him a pre-trial plea offer extended by the State; Calhoun also asserts that he "did not reject the State's [plea offer] outright, but instead proposed … an alternative plea" that was never communicated to the State by counsel. This claim, like the others, fails.

As a factual matter, it is clear from the transcribed pre-trial proceedings and the hearing on Calhoun's motion for new trial that counsel presented the State's plea offer to Calhoun, that counsel discussed the plea offer with Calhoun and recommended that he accept it, and that Calhoun rejected the plea offer. In fact, the record establishes that Calhoun personally rejected the plea offer in writing. As such, the trial court was authorized to conclude that trial counsel did not perform deficiently in this regard. Nevertheless, even if we were concerned that trial counsel had failed to properly advise Calhoun of the plea offer, Calhoun has made no showing that, but for trial counsel's alleged failures in this regard, he would have accepted the State's plea offer (and that the trial court would have accepted its terms) or, alternatively, that the State (and trial court) would have accepted the terms of his "counteroffer."[4] See *Lafler v. Cooper*, 566 U. S. 156,

4. Calhoun points to a passing statement made by the State before trial to support his claim that he would have pleaded guilty. Specifically, immediately prior to trial, the trial court inquired as to whether the State had made a plea offer to Calhoun. The State advised the trial court that it had extended a plea offer; that, at some point, Calhoun had expressed an interest in pleading guilty but had rejected the offer; and that the offer was no longer available.

The record does not reflect — and Calhoun has never clarified — when, exactly, he expressed interest in pleading guilty and whether

164 (132 SCt 1376, 182 LE2d 398) (2012). Accordingly, Calhoun has also failed to demonstrate prejudice, and his argument fails.

(e) Finally, the cumulative prejudice from any assumed deficiencies discussed in Division 2 is insufficient to show a reasonable probability that the results of the proceedings would have been different in the absence of the alleged deficiencies. See *Jones v. State*, 305 Ga. 750, 757 (4) (e) (827 SE2d 879) (2019). Accordingly, Calhoun is not entitled to relief under this theory.

Judgment affirmed. All the Justices concur.

Calhoun was interested in accepting the State's plea offer or his own "counteroffer." Further, trial counsel's testimony from the hearing on the motion for new trial suggests that Calhoun had originally considered pleading guilty but ultimately changed his mind and rejected the offer, resulting in the State's withdrawing its offer.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION, FILED AUGUST 4, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CASE NO. 3:21-cv-19-CDL-CHW

THANQUARIUS R. CALHOUN,

Petitioner,

vs.

RONALD BRAWNER *et al.*,

Respondents.

O R D E R

After a de novo review of the record in this case, the Report and Recommendation filed by the United States Magistrate Judge on September 8, 2021 is hereby approved, adopted, and made the Order of the Court, including the denial of a certificate of appealability.

The Court considered Petitioner's objections to the Report and Recommendation and finds that they lack merit. As a matter of clarification, the Court finds that the Magistrate properly applied the standard under 28 U.S.C. § 2254(d)(2) for the review of state court decisions and the undersigned has done so de novo in concluding that

Petitioner is not entitled to the relief he seeks. The Court acknowledges the Magistrate made a clerical error by citing the wrong officer's testimony—attributing a quote by Officer Rushton to Trooper Saddler—but concludes the error does not change the Magistrate's analysis. Nor does it support Petitioner's request for relief in this case.

IT IS SO ORDERED, this 29th day of November, 2021.

S/ Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION, SEPTEMBER 8, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Case No. 3:21-cv-00019-CDL-CHW

THANQUARIUS R. CALHOUN,

Petitioner,

v.

RONALD BRAWNER, *et al.*,

Respondent.

September 8, 2021, Decided
September 8, 2021, Filed

Proceedings Under 28 U.S.C. § 2254
Before the U.S. Magistrate Judge

REPORT AND RECOMMENDATION

Presently pending before the Court is Petitioner Thanquarius R. Calhoun's application for habeas relief under 28 U.S.C. § 2254. (Doc. 1). For the reasons stated below, it is **RECOMMENDED** that Petitioner's application be **DENIED**.

Appendix E

PROCEDURAL BACKGROUND

On March 9, 2015, in the Superior Court of Franklin County, a jury found Petitioner guilty of felony murder, homicide by vehicle in the first degree, fleeing or attempting to elude a police officer, reckless driving, speeding, failure to maintain lane, driving with a suspended license, and failure to wear a seat safety belt. (Doc. 1, p. 2). Petitioner received a sentence of life imprisonment without the possibility of parole for felony murder to run concurrently with sentences of "twelve months each for speeding, failure to maintain lane, and driving while license suspended or revoked." *Calhoun v. State*, 308 Ga. 146, n.1, 839 S.E.2d 612 (Ga. 2020). Petitioner's remaining counts were merged. *Id.*

Petitioner moved for a new trial on April 1, 2015, and then filed an amended motion on December 15, 2015. *Id.* The Superior Court of Franklin County denied Petitioner's motion as amended on February 19, 2016, and Petitioner timely appealed. *Id.* Upon the procurement of new counsel, however, Petitioner filed a motion to remand in order to assert ineffective assistance of trial counsel claims before the superior court. *Id.* The Georgia Supreme Court granted Petitioner's motion to remand, and Petitioner filed his second motion for new trial on March 2, 2017. (Doc. 1, p. 8). After holding two hearings, the superior court denied Petitioner's motion on April 1, 2019, following which Petitioner appealed. (*Id.* at 10).

Petitioner raised seven claims of ineffective assistance of counsel on appeal to the Georgia Supreme Court,

arguing that trial counsel: (1) did not sufficiently prepare for trial; (2) put forth no viable defense; (3) did not argue that a police officer's PIT maneuver was the intervening cause of the victim's death; (4) did not consult or seek to retain an expert in PIT maneuver procedures; (5) did not request an intervening and proximate-cause jury charge; (6) failed to object to inadmissible, prejudicial evidence; and (7) did not communicate a plea deal to Petitioner or relay Petitioner's counteroffer. (Doc. 19-1, p. 2). The Georgia Supreme Court denied Petitioner's appeal on February 28, 2020. (Doc. 1, p. 4).

With the aid of counsel, Petitioner filed his federal habeas petition with this Court on February 25, 2021, and he amended that petition on April 26, 2021. (Docs. 1, 12). Respondent filed an answer and response on May 17, 2021. (Doc. 17). Petitioner filed a reply brief on July 1, 2021. (Doc. 22).

FACTUAL BACKGROUND

On direct appeal, the Georgia Supreme Court summarized the facts and evidence in the case as follows:

> Reviewing the record in a light most favorable to the verdicts, the evidence presented at trial established as follows. On May 14, 2013, a Banks County Sheriff's deputy was traveling northbound on I-85 in his patrol car when a gray Toyota Corolla passed him traveling approximately ninety-five miles per hour. Calhoun, whose license was suspended, was

driving, and Shore was in the passenger seat. The deputy attempted to initiate a traffic stop, but Calhoun did not comply, and a high-speed pursuit ensued. Deputies attempted to stop Calhoun by boxing him in and by deploying spike strips, but neither countermeasure was effective; the chase continued for approximately twenty miles and, at times, exceeded 110 miles per hour. At some point, Georgia State Patrol Trooper Donnie Saddler joined the pursuit and, following discussions with fellow law enforcement, performed a "PIT" maneuver — a tactical intervention in which a law enforcement officer matches the speed of a fleeing vehicle, uses his or her vehicle to "tap" the bumper of a fleeing vehicle, and causes the fleeing vehicle to "spin out," thereby ending the pursuit. Following the maneuver, Calhoun's vehicle left the road, flipped several times, and crashed into trees. Though he was not wearing his seatbelt, Calhoun survived the incident; Shore, however, was partially ejected and died as a result of her injuries. Multiple law enforcement officers identified Calhoun as the driver of the vehicle and testified that he was seen weaving in and out of traffic, passing cars in the emergency lane, and driving in a generally erratic manner. Multiple witnesses also testified to seeing what appeared to be United States currency being thrown from the vehicle during the pursuit; law enforcement were later dispatched to recover the currency, and the recovered bills — which

were suspected to be counterfeit — were admitted into evidence at trial.

Calhoun, 308 Ga. at 147-48

DISCUSSION

Petitioner raises four grounds of ineffective assistance of trial counsel. (Doc. 12, pp. 10-35). For the reasons stated below, Petitioner's claims do not warrant relief.

I. Applicable Legal Standards

The Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), governs a district court's jurisdiction over federal habeas corpus petitions brought by state prisoners. In *Williams v. Taylor*, the United States Supreme Court held that federal habeas relief may only be granted where "the state-court decision was either (1) *contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States, or (2) *involved an unreasonable application of* . . . clearly established Federal law as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quotation marks omitted) (emphasis in original). Furthermore, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the

relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

With regard to findings of fact, 28 U.S.C. § 2254(e)(1) "commands that for a writ to issue because the state court made an 'unreasonable determination of the facts,' the petitioner must rebut 'the presumption of correctness [of a state court's factual findings] by clear and convincing evidence.'" *Ward v. Hall*, 592 F.3d 1144, 1155-56 (11th Cir. 2010). Before this Court, Petitioner challenges as patently unreasonable the state courts' findings of fact relating to use of the PIT maneuver upon his fleeing vehicle. Petitioner contends the PIT maneuver was unsafely performed at too great a speed, but Trooper Saddler—the officer who performed the maneuver—testified that the maneuver could be performed up to "about 210" miles per hour. (Doc. 12-1, p. 111). Petitioner also argues the PIT maneuver was abnormal given the circumstances, but testimony revealed that the circumstances warranted the maneuver because Petitioner was speeding at 94 miles per hour in a roadway construction zone, evading attempts by law enforcement to stop his flight, "driving reckless, weaving in and out of traffic, running vehicles off the roadway[,]" and nearing a large exit at "the Georgia state line." (Doc. 12-1, pp. 170-72). Petitioner's mere disagreement with the state courts' factual findings in this regard fails to meet the clear and convincing standard. *See Rutherford v. Crosby*, 385 F.3d 1300, 1311-12 (11th Cir. 2004) ("Although Rutherford now tries to characterize his childhood as cruel and terrible, the state court finding to the contrary is presumed to be correct, . . . and he has not carried his burden of rebutting

that presumption by clear and convincing evidence."). As such, the Court must apply the ordinary measure of deference due to the state courts' factual findings.

With regard to conclusions of law, the most relevant applicable standard was set by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 669 (1984). Pursuant to *Strickland*, to show ineffective assistance of counsel a petitioner must demonstrate that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To satisfy the first prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. This means that "the Court must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 2011 (quoting *Strickland*, 466 U.S. at 689). In order to show actual prejudice, Petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "When the claim at issue is one for ineffective assistance of counsel, . . . AEDPA review is doubly deferential," and "federal courts are to afford both the state court and the defense attorney the benefit of the doubt." *Woods v. Etherton*, 578 U.S. 113, 136 S.Ct. 1149, 1151, 194 L. Ed. 2d 333 (2016) (internal quotations omitted). Therefore, Petitioner "must also show that in rejecting his ineffective assistance of counsel claim the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v.*

Crosby, 385 F.3d 1300, 1309 (11th Cir. 2004) (internal citation omitted).

Petitioner attempts to overcome *Strickland* deference by arguing that the state courts applied a different standard—that is, that "[t]he Georgia Supreme Court erroneously placed a higher burden of proof on Petitioner's claims" than is required under *Strickland*'s prejudice prong. (Doc. 12, pp. 36-37). According to Petitioner, the Georgia Supreme Court's failure to use the phrase "reasonable probability" in its conclusions forced Petitioner to "definitively prove that a different outcome would have been reached[.]" (*Id.*). That Court's opinion, though, evidences that it both understood and applied the correct *Strickland* standard for ineffective assistance of counsel. *See Ventura v. Attorney General, Fla.*, 419 F.3d 1269, 1284 (11th Cir. 2005) ("[T]he fact that the state court failed to track precisely the language used by the Supreme Court does not mean that it applied the wrong standard here.").

Petitioner also argues that the Georgia Supreme Court unreasonably applied the *Strickland* standard because "[t]he overwhelming evidence presented in support of Petitioner's motion for new trial shows that at every turn his trial counsel rendered constitutionally deficient performance." (*Id.* at 36-37). As discussed in greater detail below, Petitioner has not shown that the Georgia Supreme Court's rulings were "so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 787. Rather, Petitioner attempts to overcome

Strickland deference by simply restating the arguments that he made before the Georgia Supreme Court, and disagreeing with its conclusions. This is insufficient. *See James v. Warden*, 957 F.3d 1184, 1190-91 (11th Cir. 2020) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). Accordingly, as to the state courts' *Strickland* legal conclusions, this Recommendation also employs the ordinary measure of due deference.

II. Analysis

A. Ground One

Petitioner's first ground for relief challenges his trial counsel's assistance as ineffective due to a lack of preparation and presentation of a viable defense. By Petitioner's account, in preparing for trial, his attorney failed to investigate police pursuit procedures and policies, specifically as they related to the PIT maneuver, to research intervening and proximate defenses, to interview troopers involved in the pursuit, or to retain an expert to testify about the use of a PIT maneuver under the circumstances. (Doc. 12, pp. 14-15). Petitioner argues that trial counsel's failures to pursue these matters prevented him from effectively cross-examining the prosecution's witnesses or presenting a viable defense at trial, such as an argument that the PIT maneuver was the intervening and proximate cause of the passenger's death. (*Id.* at 16).

Petitioner unsuccessfully raised this ground before the Georgia Supreme Court, which concluded that Petitioner had not demonstrated prejudice under the *Strickland* standard. *See Calhoun*, 308 Ga. at 150. The state court found that "nothing presented at the hearing on the motion for new trial would have established that the use of the PIT maneuver was an intervening cause." *Id.* In order to do so, Petitioner had to demonstrate that the trooper's intervening actions were either "(1) a coincidence that is not reasonably foreseeable . . . or (2) an abnormal response." *Id.* (citing *Skaggs v. State*, 278 Ga. 19, 20, 596 S.E.2d 159 (2004)). Based on the evidence presented, Petitioner had failed to show either. At the hearing on his motion for new trial, Petitioner called an expert who testified regarding the appropriateness of performing a PIT maneuver given the circumstances and whether the trooper in Petitioner's case complied with such procedures. According to the state court, this amounted to a challenge to the trooper's "judgment in deciding to perform the PIT maneuver" which "is insufficient to establish an intervening cause." *Id.* (citing *Neal v. State*, 290 Ga. 563, 722 S.E.2d 765 (2012)). Moreover, the fact remained that "it was reasonably foreseeable — and not abnormal — that [Petitioner's] high-speed antics might cause another car — whether law enforcement or not — to strike [Petitioner's] vehicle or otherwise cause [Petitioner] to lose control of his vehicle, resulting in a catastrophic incident for [Petitioner], his passengers, or occupants of other vehicles." *Id.* (citing *Skaggs*, 278 Ga. at 18-21). Given these findings, the Georgia Supreme Court concluded that Petitioner had not demonstrated that trial counsel's actions, even if deficient, affected the outcome of the trial.

B. Ground Two

Second, Petitioner claims that trial counsel was ineffective in his failure to request an intervening or proximate cause jury instruction. (Doc. 12, p. 29). According to Petitioner, trial counsel's inaction was plainly deficient, as "Georgia law makes clear that Petitioner could not have been found guilty of felony murder without finding that his actions were the proximate cause of death[.]" (*Id.* at 30). The Georgia Supreme Court disagreed with Petitioner's argument, determining that "the jury was adequately instructed on causation with respect to felony murder." *Calhoun*, 308 Ga. at 151 n.3. As the Court explained, when instructing the jury on the felony murder charge, it is sufficient that the trial judge's instructions, considered as a whole, adequately explained the causation requirement. *Id.* The Georgia Supreme Court found this to be the case at Petitioner's trial. *Id.* The Court further noted that even if the jury had been instructed on proximate cause with respect to the PIT maneuver specifically, there is no basis to conclude that a reasonable jury could have reached a different verdict. *Id.* In light of the Georgia Supreme Court's finding that the trial court's jury instruction was consistent with Georgia law, Petitioner has not demonstrated ineffective assistance of counsel under either of *Strickland*'s prongs. Accordingly, and in summary, Petitioner is not entitled to relief based upon counsel's failure to raise a meritless objection to the trial court's jury instructions.

Appendix E

C. Ground Three

As his third ground for relief, Petitioner claims ineffective assistance of trial counsel for failing to object to certain irrelevant and prejudicial evidence. (Doc. 12, p. 31). Specifically, Petitioner argues that four pieces of evidence should have been excluded: (1) the state's characterization of the facts of the case during opening and closing; (2) the prior bad acts of similar charges presently pending against Petitioner; (3) the counterfeit money that was found at the crime scene; and (4) photographs of the crime scene and the victim's body. (*Id.* at 31-32). By failing to object to this evidence, or alternatively failing to request a limiting instruction on some of this evidence, Petitioner argues that trial counsel's performance fell below the *Strickland* standard of effective assistance. (*Id.*)

Petitioner unsuccessfully presented this argument to the Georgia Supreme Court. That court first found that Petitioner made no attempt at his new trial hearing to question trial counsel over the remarks made by the prosecution in opening and closing. *See Calhoun*, 308 Ga. At 151. Even apart from that finding, the Georgia Supreme Court separately concluded that while Petitioner "may disagree with the prosecutor's characterization of the evidence, the prosecutor was within bounds during opening statement to elaborate on what he expected the evidence to show." *Id.* Trial counsel thus had no reason to object because the prosecution's remarks were within the proper scope of opening statement. Accordingly, Petitioner cannot not overcome the strong presumption that trial counsel's decisions and actions were reasonable.

Next, the Georgia Supreme Court addressed Petitioner's claim that trial counsel should have objected to the introduction of crime scene photographs, and it found that claim unavailing. *Id.* at 152. Petitioner's trial counsel testified at the motion for new trial hearing "that he did not object to the photographs because he believed that they were admissible and that any objection would have been unsuccessful." *Id.* Additionally, trial counsel believed that these photos were less concerning than those of the victim from the autopsy. *Id.* Upon reviewing these latter photographs, the Georgia Supreme Court determined they were relevant and not prejudicial as they "simply depict" the victim's "body as it came to rest after" the crash, and "tend to establish the cause and nature of [the victim's] death, as well as her identity." *Id.* Trial counsel was therefore not deficient for failing to raise a meritless objection to these admissible photographs.

Turning to the prior bad acts evidence, the Georgia Supreme Court found that the record showed "that trial counsel did, in fact, object." *Calhoun*, 308 Ga. at 153. Trial counsel opposed the prosecution's motion to introduce such evidence at a pretrial hearing "and argued that the evidence of the earlier offenses was absolutely irrelevant to the State's prosecution of the current offenses." *Id.* The State argued in its pretrial motion that it "sought to use the evidence to prove intent, knowledge, and identity." *Id.* at 152-53. The Georgia Supreme Court observed that on a motion for new trial, Petitioner did not "articulate what argument, if any, trial counsel should have made with respect to Rule 404(b)" and therefore Petitioner failed to demonstrate "that counsel performed deficiently in this

regard." *Id.* at 153. Based on this record, the Georgia Supreme Court reasonably concluded that Petitioner had failed to demonstrate deficient performance by his trial counsel, and that even if he had, "the evidence against [Petitioner] was strong, and thus, he has not shown that the other-acts evidence prejudiced him." *Id.* at 153.

Finally, the Georgia Supreme Court assessed Petitioner's claim that trial counsel should have objected to the admission of the counterfeit money found at the crime scene, and it found this claim meritless. *Id.* According to the Court, "the counterfeit bills were relevant to explain why [Petitioner] engaged in such dangerous behaviors leading up to the fatal crash." *Id.* Under Georgia law, while "motive is not an essential element of any offense, evidence of motive is generally relevant in murder prosecutions." *Id.* (citing *Romer*, 293 Ga. at 341(1)(b)). Because the evidence was admissible under Georgia law, trial counsel was not ineffective in failing to raise a meritless objection to its admission.

D. Ground Four

As his fourth and final ground for relief before this Court, Petitioner argues that trial counsel was ineffective for failing to communicate with Petitioner regarding plea negotiations. (Doc. 12, p. 32). Prior to trial, the prosecution offered "a negotiated plea comprising a *nolle prosequi* for the felony murder charge and [a] sentence of fifteen years in prison for homicide by vehicle." *Id.* Petitioner contends that trial counsel failed to relay Petitioner's handwritten counteroffer that he "would accept 15 to do 5 or less, prefer

3 with credit for time already served in jail." (*Id.* at 33). Petitioner raised this ground before the Georgia Supreme Court, which found it without merit. *Calhoun*, 308 Ga. At 154. Specifically, the Georgia Supreme Court concluded that it was "clear from the transcribed pretrial hearing and the hearing on [Petitioner's] motion for new trial that counsel presented the State's plea offer to [Petitioner], that counsel discussed the plea offer with [Petitioner] and recommended that he accept it, and that [Petitioner] rejected the plea offer . . . in writing." *Id.* Accordingly, it was not apparent that trial counsel was deficient, and even if he were, Petitioner "made no showing that, but for trial counsel's alleged failures in this regard, he would have accepted the State's plea offer (and that the trial court would have accepted its terms) or, alternatively, that the State (and trial court) would have accepted the terms of his 'counteroffer.'" *Id.* (citing *Lafler v. Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)).

CONCLUSION

For the reasons stated herein, it is **RECOMMENDED** that Petitioner's Section 2254 petition be **DENIED**. Furthermore, pursuant to the requirements of Rule 11 of the Rules Governing Section 2254 Cases, it does not appear that Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Therefore, it is **RECOMMENDED** that the Court deny a certificate of appealability in its final order.

Appendix E

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge will make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 8th day of September, 2021.

/s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

APPENDIX F — ORDER OF THE SUPERIOR COURT OF FRANKLIN COUNTY, STATE OF GEORGIA, FILED FEBRUARY 25, 2021

IN THE SUPERIOR COURT
OF FRANKLIN COUNTY
STATE OF GEORGIA

CASE NO.: 14FR0134M

THE STATE OF GEORGIA,

vs.

THANQUARIUS RASHAWN CALHOUN,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

The Defendant filed a Motion for New Trial in the above-captioned proceeding.

The jury returned a guilty verdict on March 19, 2015, and the Defendant's Motion for New Trial was filed on April 1, 2015. After a hearing on Defendant's Motion for New Trial, the Motion was denied on February 19, 2016. A Notice of Appeal was filed on March 21, 2016, and the case was docked with the Supreme Court of Georgia on August 1, 2016. On September 12, 2016, the case was remanded for the filing of an additional ground for new trial, namely ineffective assistance of counsel and for an evidentiary hearing on that motion.

The hearing was initially set for December 2, 2016. On November 17, 2016, Mr. Stephen Brooks, Erika Birg, Lucas Westby, and Brandon Moulard filed a Notice of Appearance of Counsel on behalf of the Defendant and an Emergency Motion for Continuance. The Court scheduled the hearing for May 9 and 10, 2017. Defense Counsel requested a continuance on May 1, 2017. The Court reset the hearing for July 5 and 7, 2017. However, on May 31, 2017, Defense counsel again requested the matter be continued.

A hearing took place on December 8, 2017, which was suspended due to inclement weather, and the remainder of the hearing took place on April 3, 2018. A transcript of the Motion for New Trial hearing was filed on January 28, 2019. The Defendant filed a post-hearing brief in support of his Motion on February 18, 2019, and the State filed a brief in opposition to Defendant's Motion on March 8, 2019.

This Court having read and considered all relevant matters presented to or made known to this Court, the Court hereby issues the following ruling:

The Defendant's Motion raises the issue of whether Attorney Joe Brown provided ineffective assistance of counsel to the Defendant leading up to and during his two-day jury trial. Under *Strickland v. Washington,* 466 U.S. 68 (1984), "a criminal defendant must show that counsel's performance was deficient, and the deficient performance so prejudiced the client that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different. The

criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct." *Reid v. State,* 341 Ga. App. 604 (2017); *Davis v. State,* 301 Ga. 397 (2017); citing *Dunn v. State,* 291 Ga. 551,553 (2012). The Defendant has not overcome this presumption in this case nor has the Defendant shown a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different.

IT IS HEREBY ORDERED THAT for the above and foregoing reasons the Defendant's Motion for a New Trial is **DENIED.**

A copy of this order is being sent to counsel for the Defendant and State by regular U.S. Mail on the date shown below.

SO ORDERED this 1st day of April, 2019

/s/ Jeffery S. Malcom
Hon. Jeffery S. Malcom
Chief Judge, Superior Court
Northern Judicial Circuit

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 20, 2024

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 22-10313

THANQUARIUS R. CALHOUN,

Petitioner-Appellant,

versus

WARDEN, BALDWIN STATE PRISON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia
D.C. Docket No. 3:21-cv-00019-CDL-CHW

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILLIAM PRYOR, Chief Judge, and ABUDU and ED CARNES, Circuit Judges.

PER CURIAM:

Appendix G

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en bane. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.