No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STANLEY JAMES OLIVER,
Petitioner,

vs.

GLENN JOHNSON, Warden &
COMMISSIONER, Georgia Department of Corrections,
Respondents.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Eleventh Circuit*

(CA11 No. 17-14288-GG)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

A federal habeas petitioner challenging a state conviction cannot obtain appellate review unless and until a certificate of appealability ("COA") issues. 28 U.S.C. § 2253(c). A COA must issue whenever "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDanie*l, 529 U.S. 473, 484 (2000).

Below, both the district court and the Eleventh Circuit refused to issue a COA on Issue 1 raised in Mr. Oliver's habeas petition challenging his two life sentences plus twenty years—that is, that he received ineffective assistance of counsel where trial counsel failed to subpoena Mr. Oliver's telephone records for potential use at trial. Those records, trial counsel admitted during the evidentiary hearings on his ineffectiveness, would have been "particularly valuable" to the defense. Further, trial counsel testified that he would have used them if he had had them because they were inconsistent with the complaining witness' testimony—and, as the Eleventh Circuit held below, "the case against Oliver hinged largely on [the victim's] credibility." [App. at 11].

The question presented in this Petition is whether the Court of Appeals erred below in denying Mr. Oliver a COA on whether trial counsel was ineffective in not subpoenaing Mr. Oliver's telephone records for potential use at trial. The Court should summarily reverse the denial of the COA and remand for the Court of Appeals to consider the merits of that claim.

LIST OF PARTIES

In addition to the parties listed on the cover page, the following additional parties are relevant to this Petition. The current commissioner of the Georgia Department of Corrections is Timothy C. Ward.[1]

LIST OF RELATED PROCEEDINGS

State Judgments

Habersham County (Georgia) Superior Court:

State v. Oliver, No. 08-SU-CR-315-W. Judgment entered September 24, 2008. (Motion for new trial granted May 17, 2013, and denied July 2, 2015)

Georgia Court of Appeals:

State v. Oliver, No. A13A2394. Judgment entered March 13, 2014. (Reconsideration granted April 2, 2014).

Oliver v. State, No. A16A0096. Judgment entered May 2, 2016. (Reconsideration denied May 13, 2016).

Georgia Supreme Court:

Oliver v. State, No. S16C1596. Judgment entered December 8, 2016.

Federal Judgments

U.S. District Court for the Northern District of Georgia

Oliver v. Johnson, No. 2:17-cv-000070-RWS. Judgment entered September 15, 2017.

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[1] During the proceedings below, the commissioner was Gregory C. Dozier.

U.S. Court of Appeals for the Eleventh Circuit

Oliver v. Johnson, No. 17-14288-GG. Judgment entered March 13, 2019. Rehearing denied April 24, 2019.

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TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Stanley James Oliver respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals issued an unpublished order granting Mr. Oliver a partial certificate of appealability and a merits opinion. Neither was published. Both are reprinted in the Appendix. On April 24, 2019, the Court of Appeals issued an order denying a timely motion for rehearing, which is unpublished but is reprinted in the Appendix.

The district court did not prepare a reported opinion. Its rulings are reprinted in the appendix.

JURISDICTION

The district court had jurisdiction over the petition for habeas corpus. 28 U.S.C. § 1331; 28 U.S.C. § 2254.

This Court has jurisdiction to review the judgment of the Eleventh Circuit. 28 U.S.C. § 1254(1). Judgment was entered on March 13, 2019, and rehearing was denied on April 24, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Provisions

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

U.S. Const. Amend. VI

* * * * *

Federal Statutes

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253

STATEMENT OF THE CASE

I. THE STATE PROCEEDINGS

A. The Trial

Mr. Oliver was indicted and tried before a Georgia jury on charges of kidnapping with bodily injury, rape, and aggravated assault of F.W., a woman, arising out the events of March 8-12, 2008. [R. 4].

1. F.W.'s Testimony

F.W. testified that she had known Mr. Oliver since 2005 and had been romantically involved with him. She said that she had ended her relationship with Mr. Oliver around Valentine's Day 2008, when he supposedly had hit her hard enough to cause bruises, but she did not report the incident to the police.

In any event, on the first day in question, Mr. Oliver supposedly showed up unannounced at her door—which she opened without calling 911—allegedly causing her to feel scared enough to go back to his house. She said that from Saturday, March 8th, to Wednesday, March 12th, she was kept in Mr. Oliver's house. When she first arrived, the two did drugs together. Later that day, the two received visitors at the home: Tonya Pritchett and Dale Hightower. The next day, Sunday, she said that Mr. Oliver began hitting her with his fists, a

strap, and a fire poker, threatening to kill her. When she had attempted to leave, she said that Mr. Oliver had stabbed her in the leg.

On the night of the 11th, she said that he "had finally calmed down" and apologized to her. He then began kissing her, and the two had sex. She did not physically resist but had sex with him because she thought that she would not be able to leave otherwise.

She left on the 12th, when her mother unexpectedly came by Mr. Oliver's home. Although she initially testified that she went directly to the hospital, the nurse who saw her at the hospital testified that F.W. reported going home to shower and change clothes before coming there for treatment.

During her alleged captivity, F.W. said that she had been denied food and drink. She also said that she had not called for help on her cell phone because Mr. Oliver had taken away its battery, though she did not explain why she had not called for help using the home phone.

Trial counsel's cross examination of F.W. focused on three points: 1) impeaching her with her history of drug use and lying; 2) impeaching her with her prior criminal conduct; 3) impeaching her with her continued romantic behavior with Mr. Oliver before the charged instances, including taking trips with him and writing him love letters; and 4) impeaching her with the lack of documented proof of the alleged prior incident when Mr. Oliver beat her. Counsel questioned F.W. about the inconsistencies between her trial testimony and what she had told deputies occurred during her time at Mr. Oliver's home in

March. F.W. denied remembering that she told the deputy that she saw no one during her stay at Mr. Oliver's home except for a vehicle that came into the driveway and left before she could get to it.

F.W. acknowledged that she had been a methamphetamine addict and lied as a consequence. She was then impeached with her prior felony convictions. F.W. admitted falsely denying that she had not had sex with Mr. Oliver from between September 2007 and February 2008, although she had done so. She confirmed that while she had previously denied seeing or visiting him several weeks prior to the incident around Valentine's Day, she had actually gone with him.

Counsel had F.W. confirm her statement to deputies that she did not call law enforcement after the Valentine's incident because she was scared and that she stopped her mother from reporting it as well. Counsel elicited from F.W. testimony that, despite her earlier unsolicited remark that her mother did not like Mr. Oliver because of the mother's belief he had a history of being "bad to women," the mother did not report the Valentine's incident. F.W. conceded that she had no proof that she was beaten and explained that she had hid her injuries from her children and others. The "others" included people with whom she worked scrubbing, pulling bags of trash and cleaning facilities, none of whom noticed her experiencing any significant pain.

With great specificity, counsel had F.W. deny that she had had any voluntary contact whatsoever with Mr. Oliver between Valentine's Day and March 8, 2008, when he supposedly showed up at her door unannounced:

> Q So, did you have any consensual contact with Mr. Oliver between February '08 and March of '08?
>
> A Not till the 8th.
>
> Q Well, I guess what I'm asking, [F.W.], can you tell us whether you picked up the cell phone and called up Mr. Oliver and said: You dirty SOB, don't you ever come around me again or next time I'm gonna go to the law?
>
> A No.
>
> Q You didn't do that, did you?
>
> A No, I didn't.
>
> Q You didn't even warn him?
>
> A No.
>
> Q Did he call you?
>
> A Yes.
>
> Q During the time period?
>
> A Yes.
>
> Q You called him?
>
> A No.
>
> Q You did not call him?
>
> A No.
>
> Q All right, when he called you, what would you talk about this time?

A I didn't answer the phone.

Q You just let it ring and ring?

A Yes, sir.

Regarding the charged events, counsel questioned F.W. about her statements to deputies that, when Mr. Oliver knocked on her door, she was "surprised" but did not call 911 or alert anyone else in the house. In her statements, she at first told deputies that Mr. Oliver said he had only wanted to talk to her, but she later told deputies that he had threatened to hurt everyone in the house if she did not go with him. Counsel questioned F.W. about her claim that she went directly from Mr. Oliver's house to the hospital after being tortured and then counsel introduced photographs taken at the hospital with a suggestion that F.W. was showered and groomed before she arrived. F.W. was then questioned about the extent of her bruises in light of the extreme beating she reported to police. Counsel elicited that F.W. had purchased pink handcuffs from a sexual toy store, but then she later denied making the purchase. F.W. admitted that the handcuffs were purchased at the start of a multi-day visit with Mr. Oliver in January of 2008 during which methamphetamine was used. She denied that the statements in her letter to him that they needed leather in their wedding was a reference to rough sex. With that, cross-examination concluded.

On redirect, the prosecution sought a bench conference to obtain clarification that, the *ruling in limine* to the contrary notwithstanding, the State was

now able to question F.W. about Mr. Oliver's prior acquittal for assault and multiple other charges involving P.M. The trial court permitted the testimony. Accordingly, the prosecution asked F.W. about Mr. Oliver's prior acquittal:

> Q. Mr. Carter asked you some questions, and as I recall the question, he said that either you and your mother, or maybe your mother, knew about Mr. Oliver's history with women. You remember that question?
>
> A. (Nods head affirmative)
>
> Q. Is that a yes?
>
> A. Yes, sir.
>
> Q. And something to the effect he had a history of doing this to women. Do you remember that question?
>
> A. (Nods head affirmative)
>
> Q. And Mr. Carter also asked you about why you didn't report that first, those first bruises, you didn't report that to law enforcement. You remember that?
>
> A. (Nods head affirmative)
>
> Q. Did Mr. Oliver tell you anything about [P.M.]?
>
> A. (Nods head affirmative)
>
> Q. Is that a yes?
>
> A. Yes, sir.
>
> Q. I have to ask -- I don't mean to be -- you have to answer for the microphone. What did he tell you about [P.M.]?
>
> A. He just -- He didn't tell me nothing straight out about [P.M.]. But, but I heard 'em talking about getting by with what he did to her. They were all sitting around laughing about beating the system.
>
> Q. Okay.

A. And... And so I knew he'd done got by with it. And that it was just gonna be trouble.

Q. Did that have an effect on you and cause you – Did that influence your decision not to call law enforcement the first time?

A. Yes, sir.

The prosecutor then began questioning F.W. specifically about the case involving P.M. and her knowledge of the outcome.

Q. Okay. And, in fact, he faced charges for doing similar things to [P.M.], is that right?

A. Yes, sir.

Q. But a jury found him not guilty?

A. Yes, sir.

Q. Jury said he didn't do that.

A. (Nods head affirmative)

Q. But you knew that he had been found not guilty of same things and you were taking all that into consideration didn't you?

A. (Nods head affirmative)

The prosecutor asked F.W. whether Mr. Oliver told her anything during the dates of the charged offenses about the [P.M.] trial. The only portion of F.W.'s response that could be heard was, "[J]ust that they were like no --." Both trial counsel and the trial court interposed that they could not hear F.W. The prosecutor moved to the next line of questions without having F.W. repeat herself and inquired whether Mr. Oliver "ever" told her "of plans he had of things to

do to P.M. the woman who had testified against him." When F.W. responded affirmatively, the following colloquy occurred:

> A. Yes, sir.
>
> Q. What were those plans and what did he tell you?
>
> A. He was gonna nail the door shut and burn them out.
>
> Q. Can you repeat that?
>
> A. He was gonna nail their door shut and burn them out.
>
> Q. What about did he tell you anything about what he would do if he were convicted of those offenses?
>
> A. He said that he would get the-- the jailer's gun and shoot her.
>
> Q. Okay. Did that influence you in deciding not to report that first incident?
>
> A. Yes, sir.
>
> Q. All those things.
>
> A. (Nods head affirmative)

2. The State's Other Witnesses

Following F.W.'s testimony, the prosecution called her mother and other witnesses including the investigating officers. None had any direct knowledge of the events that took place while Mr. Oliver and F.W. were together during the period in question. F.W.'s mother did say, however, that when she picked up F.W., F.W. claimed to have been held against her will and had been beaten (though apparently said nothing about having been raped).

3. Mr. Oliver's Testimony

Mr. Oliver took the stand in his own defense. He testified that he and F.W. had known each other for approximately three years and had begun a romantic relationship before F.W. had gone to prison. Their relationship continued even after she left prison, and their interactions were frequent enough for F.W. to leave personal items over at Mr. Oliver's house.

Mr. Oliver vigorously denied that he had ever raped F.W. They frequently had sex, with the help of sex toys and other items, and F.W. appeared to always enjoy their encounters. Likewise, he denied that he had beaten her over Valentine's Day or in the period in question.

With respect to the events at issue, Mr. Oliver testified that he and F.W. spoke by phone on March 8, before he picked her up. She told him that she needed to be picked up before her mother came home, as her mother did not like Mr. Oliver. F.W. said that she would meet Mr. Oliver up the road a little from her house. They met in a school parking lot, and she got into his truck.

After stopping by McDonald's, the two returned to his house. Over the course of several days, the two had sex multiple times, in between visits from several individuals. On Sunday night, the two left the house together to go visit a woman named Val but wound up going to the store instead because Val was not home.

During the period that F.W. was at his house, F.W. cut off her phone because her mother kept trying to call.

Mr. Oliver indicated that the two did meth together that weekend, for its sex-enhancing purposes.

He also testified that he left the house on Tuesday at 5, and F.W. indicated that she had called her niece to come pick her up to take her to visit her grandmother. When Mr. Oliver returned around midnight, he said that he found her sitting on his couch. She looked like she had been in a fight. When he inquired as to what had happened, she indicated that Lowell, the father of her child, was responsible.

He said that on Wednesday morning, F.W. woke him up to say that her mother was outside. F.W.'s mother then appeared at the door and began yelling angrily. F.W. left with her shortly thereafter.

Mr. Oliver admitted that he had previously been convicted of two counts of theft by receiving.

4. The Defense's Other Witnesses

The defense put up multiple witnesses who testified that—contrary to F.W.'s claims of forced abduction—F.W. seemed to be in Mr. Oliver's home voluntarily.

Carla Wilburn met with F.W. and Mr. Oliver at Mr. Oliver's home during the period in question and testified that F.W. did not appear to have been in any distress. Indeed, at one point, F.W. was "laughing and giggling." Likewise,

Mr. Oliver was not visibly agitated. Ms. Wilburn testified to several personal items that F.W. kept in Mr. Oliver's home.

Tammy Bryson, a longstanding friend of F.W. and Mr. Oliver, testified that F.W. had called her a few days before the supposed kidnapping to say that F.W. had wanted Mr. Oliver again. When Ms. Bryson saw Mr. Oliver and F.W. at Mr. Oliver's home on the 8th, F.W. acted completely normally; she did not appear to have been held against her will. Ms. Bryson and Ms. Bryson's husband saw her again on the 9th, while Mr. Oliver was sleeping. And F.W. did not indicate that anything was wrong. Nor did F.W. do so when Ms. Bryson saw her again on the 11th. Ms. Bryson also identified several sex toys that F.W. kept on F.W.'s side of the bed at Mr. Oliver's home, as well as other property that she kept there so that F.W. "could live there" when she wanted to do so.

L.S., a minor neighbor, testified that he, too, saw Mr. Oliver and F.W. at Mr. Oliver's house during the period in which she was supposedly being held against her will but did not see any evidence that F.W. was not present there voluntarily. At one point that weekend, he recalled F.W. talking with him about her plans to marry Mr. Oliver.

Bradly Sane testified that he visited Mr. Oliver and F.W. and saw them eating McDonald's hamburgers together on the 8th and talked with them. F.W. did not appear to have been in any distress. He saw them again on the 9th, without any apparent distress on F.W.'s part. On May 10th, Mr. Oliver came to Mr. Sane's shop to visit him, without F.W.

According to Dewey Franklin, when he saw F.W. with Mr. Oliver, she did not appear to be in any distress.

Tonya Howard testified that she had stopped by Mr. Oliver's house on her way to Walmart and saw Mr. Oliver and F.W. When F.W. mentioned that she could not find her mascara, Ms. Howard offered to pick up some from Walmart and bring it back. When Ms. Howard returned, she found F.W. alone, because Mr. Oliver had left with Ms. Howard's husband to go to his shop. She visited with F.W. for about 45 minutes alone in the house, during which time F.W. seemed happy. F.W. asked her not to tell her mother that she was staying with Mr. Oliver because F.W. was worried that her mother would be upset.

Dale Hightower, Ms. Howard's husband, confirmed that he and Mr. Oliver were out of the house together for about 45 minutes, while his wife was inside with F.W. Like his wife, he testified that F.W. appeared happy at Mr. Oliver's house when he saw her.

Finally, Randy Bryson testified that F.W. did not appear to be in any distress on March 8th and 9th, when he had visited with Mr. Oliver and F.W.

5. No Rebuttal

The State did not put on any rebuttal evidence, including from F.W. Thus Mr. Oliver's statements were un-contradicted that the two had sex multiple times that weekend, besides on the date alleged in the rape count and that Mr. Oliver was away from the house during part of the period in which F.W. was supposedly being held against her will. Nor did F.W. (or anyone else) rebut the

many defense witnesses who saw F.W. happy to be in Mr. Oliver's home that weekend.

6. The Jury Struggles with the Guilty Verdicts

The jury obviously struggled in its deliberations. It sent out two notes, one requesting information about the date of the injury to F.W.'s leg, and another asking to be recharged on the law.

Ultimately, however, the jury returned guilty verdicts on all counts, and the trial court sentenced Mr. Oliver to two concurrent life sentences for kidnapping and rape, plus twenty years for the aggravated assault.

B. The First Motion for New Trial Hearing

The judge who presided over the motion for new trial was not the same as the trial judge.[2] At the motion hearing, the parties agreed to bifurcate purely legal issues from factual ones. The motion court held that a legal ground existed for a new trial that did not necessitate the receipt of evidence: the questioning of F.W. about Mr. Oliver's charges involving P.M. It held that the evidence was inadmissible and prejudicial. It thus rejected the State's claim that the evidence was overwhelming such that any error would have been harmless.

C. The First Appeal to the Georgia Court of Appeals

[2] To avoid confusion, this Petition will refer to the "motion court" instead of the "trial court" when the reference is to actions taken by the successor judge in state court.

The State appealed the motion court's grant of a new trial, and the Georgia Court of Appeals reversed. *State v. Oliver*, 755 S.E.2d 293, 326 Ga. App. 759 (2014). [App. 45]. It held that the State was not collaterally estopped from mentioning the acquitted charges involving P.M. [App. 54-55]. And it held that the trial court was within its discretion to lift the *motion-in-limine* prohibiting questioning about the prior charges. While those charges were bad-character evidence, it held that Mr. Oliver's trial counsel had opened the door to the evidence when counsel cross-examined F.W. about her failure to immediately notify law enforcement about the rape. [App. 55-57].

The Court of Appeals remanded the case back to the motion court for consideration of the other grounds raised in the motion for new trial that the motion court had not ruled upon. [App. 58].

D. The Motion for New Trial Hearing on Remand

On remand, the motion court held an evidentiary hearing on Mr. Oliver's motion for new trial addressed to trial counsel's ineffective assistance under U.S. Const. Amend. VI. Two witnesses testified: trial counsel and Mr. Oliver.

1. Trial Counsel's Testimony

Trial counsel testified that the evidence in this case was essentially he said, she said. Consequently, he deemed it of "[p]aramount importance" to establish the lack of credibility on the part of F.W. As part of that strategy, he sought to present "numerous witnesses that basically saw Mr. Oliver and the victim living as man and wife in his residence during the requisite period of time that

this occurred," to help show that her presence there was voluntary and that all sex was consensual.

Because F.W. claimed that Mr. Oliver had "swooped on her out of the blue" and carried her away, trial counsel agreed that it would have been helpful at trial if trial counsel could have shown that F.W. and Mr. Oliver had had telephone contacts in the days and weeks leading up to the incident in question.

At the new trial hearing, the motion court received Mr. Oliver's cell phone records into evidence, which showed lengthy phone calls from F.W.'s phone to Mr. Oliver's phone, including calls from her to him on the day she says that she was supposedly surprised when he showed up at her doorstep. Trial counsel agreed that those records would have been "particularly valuable" as trial evidence "because they did not depend on Mr. Oliver's credibility, but instead came from a third-party source[.]"

Trial counsel freely admitted that if he "had had those [telephone] records at the time of trial," he "[w]ould … have used them" at trial. [*Id.*]. But prior to the trial, trial counsel had never subpoenaed the records and thus had never seen them. When asked why he did not try to subpoena the records in advance of trial, trial counsel could not recall a specific reason for his failure:

> Q … [W]hy didn't you subpoena the phone records?
>
> A I don't recall. I recall some vague conversation about it with Stanley. I can't recall what they were. Again, I mean, we had over 50 pictures of them living together. We had at least five or six witnesses that they were living together. I

> don't know. It just seemed, I don't recall specific instructions about telephone records. We just had, we thought, overwhelming evidence that they were living as man and wife and that they were just, this was a party weekend that went bad and she was guilty to her mother, her mother took her to the hospital and she cried rape.
>
> Q But, again, having now seen the phone records, if you had had them at the time of trial would you have admitted them, or tried to admit them?
>
> A I would have tried to use them if I had them at trial, but, you know.

2. Mr. Oliver's Testimony

Mr. Oliver testified that, prior to trial, his trial counsel promised that he would obtain F.W.'s telephone records for use at trial.

Mr. Oliver explained the numbers shown on his phone records, identifying his number and her phone number and confirming the length of the conversations that he and F.W. had during the period that she had sworn under oath at trial that the two had not been talking at all. For example, on February 27, 2008, the records show that F. W.'s phone made four calls to Mr. Oliver's cell phone, one lasting one minute, the second lasting thirteen minutes, the third lasting nineteen minutes, and the fourth lasting twenty minutes. Additionally, Mr. Oliver confirmed that the records showed, as he testified at trial, that he made several phone calls away from his home during the weekend that F.W. was claiming she was being involuntarily held at Mr. Oliver's home.

3. The Motion Court's Ruling

The motion court denied Mr. Oliver's motion for new trial. [App. 87]. It held that trial counsel acted reasonably when he opened the door to the questioning about Mr. Oliver's acquittal regarding P.M.; acted unreasonably when he failed to ask for a limiting instruction, but that error was not prejudicial to the outcome of the trial; and made a strategically reasonable choice to never look at the phone records before trial that, in the alternative, would not have altered the trial's outcome. [App. 91-96]. Accordingly, the motion court found that trial counsel was not ineffective under federal constitutional law.

E. The Georgia Court of Appeals' Ruling in the Second Appeal

The Georgia Court of Appeals affirmed the denial of the motion for new trial. *Oliver v. State*, 786 S.E.2d 701, 337 Ga. App. 90 (2016). [App. 59]. It held that regardless as to whether trial counsel had been deficient for having failed to subpoena the exculpatory phone records any error was not prejudicial. [App. 63-65]. The Georgia Court of Appeals did, however, concede that the phone records would have shown at trial "that events did not transpire exactly as F.W. had claimed" and indeed that "Oliver left the home at some point during the time she was staying at his house." [App. 65]. As for counsel's unintentional opening of the door to the character evidence, the Georgia Court of Appeals held that it was a reasonable strategy and, in any event, non-prejudicial in light of the other evidence. [App. 66-70]. As to the failure to have requested a limiting instruction, the court agreed that counsel had been ineffective, but

found the evidence sufficiently strong that no prejudice had occurred. [App. 70-72].

F. The Georgia Supreme Court's Ruling.

Mr. Oliver filed a petition for certiorari to the Georgia Supreme Court, which was denied on December 8, 2016. *Oliver v. State*, No. S16C1596, 2016 Ga. LEXIS 814 (Dec. 8, 2016). [App. 45].

II. THE FEDERAL PROCEEDINGS

A. The District Court

Mr. Oliver timely filed a § 2254 petition, seeking habeas review of three federal ineffective assistance of counsel issues that he raised in the state courts, including in his petition for *certiorari* to the Georgia Supreme Court. His petition sought habeas relief because trial counsel had been ineffective: (1) for failing to subpoena Mr. Oliver's cell-phone records for potential use at his trial, (2) for opening the door to Mr. Oliver's prior acquittal on the charges involving P.M., and (3) for failing to request a limiting instruction on the prior-bad acts evidence involving P.M.

The magistrate judge recommended that the district judge deny the petition. [App. 19]. The magistrate judge did so because he agreed with the Georgia Court of Appeals that the evidence of guilt was sufficient such that any ineffective assistance was harmless error. The magistrate judge recommended granting a certificate of appealability ("COA") only on the second issue, about

whether trial counsel had blundered by opening the door to the prior-acts evidence involving P.M. [App. 43-44].

Mr. Oliver filed objections to the magistrate judge's report and recommendation, including to the denial of a COA on all three issues presented. The district judge overruled the objections and limited the COA to the single issue that the magistrate judge had recommended. [App. 18].

B. The Court of Appeals

Mr. Oliver asked the U.S. Court of Appeals for the Eleventh Circuit to expand the COA to encompass the two additional issues that the district court had not granted a COA: the failure to have subpoenaed the telephone records and the failure to have requested a limiting instruction. But, in a brief order, the COA only expanded the COA to include the issue concerning the limiting instruction. [App. 13].

As to the merits of the two issues encompassed by the expanded COA, the COA found that neither merited relief. As to the opening the door to the prior bad-acts evidence, the Court of Appeals held that "[b]ecause the case against Oliver hinged largely on F.W.'s credibility, it was reasonable for counsel to question F.W. about her prior failure to report Oliver's previous uncharged offenses against her." [App. 10]. As to the failure to have requested a limiting instruction, it held that the error was not prejudicial. [App. at 11-12].

REASONS FOR GRANTING THE PETITION

Although the federal question involved in this Petition normally might not merit *certiorari*, this Court will nonetheless intervene when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup. Ct. R. 10(a). This case presents such a need for this Court's supervisory power. A summary disposition is appropriate. *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) ("[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.").

Ineffective assistance requires a two-part showing: (1) "a reasonable probability that, but for counsel's unprofessional errors, [(2)] the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Where, as here, the question of ineffective assistance of trial counsel arises under a petition for habeas corpus, a court of appeals may not consider that question (or any other) unless and until either the district court or the court of appeals issues a COA. *See* 28 U.S.C. § 2253(c).

The standard for the issuance of a COA is very low. A showing is substantial enough to merit a COA when "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues

presented were adequate to deserve encouragement to proceed further." *Slack v. McDanie*l, 529 U.S. 473, 484 (2000). Mr. Oliver can be entitled to a COA even if the Court does not ultimately believe that he will ever prevail on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("[A] COA does not require a showing that the appeal will succeed…. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail.").

In the Eleventh Circuit, a single judge can consider a request for COA. 11th Cir. L.R. 22-1(c). "The denial of a certificate of appealability…may not be the subject of a petition for panel rehearing or a petition for rehearing en banc." *Id.*

Here, neither the Georgia Court of Appeals nor the district court below ever held that trial counsel's failure to subpoena Mr. Oliver's telephone records comported with the Sixth Amendment's performance standards. [App. 30-32, 64-65]. Rather, those courts thought that even if it were error to not have obtained the records, the error was not of constitutional magnitude given the other evidence in the case. [*Id.*].

As the Panel Opinion ultimately determined, "the case against Oliver hinged largely on [the victim's] credibility." [App. at 11]. Given that the jury sent out two notes during their deliberations, it is obvious that it struggled with how to resolve that credibility determination. Indeed, even the judge who granted the motion for new trial following counsel's opening the door to bad-

acts evidence rejected the State's claim that the evidence in the case was overwhelming. *See* [App. 83 (granting a new trial because the bad-acts testimony had a "prejudicial effect" on the verdict)].

As even the Georgia Court of Appeals determined, "the phone records might have tended to show that events did not transpire exactly as F. W. had claimed." [App. 66]. Indeed, far from having been forced to come to his home and to remain there for the weekend, those records would have shown to the jury that "she may have been in contact with him more than she admitted, [and] that Oliver left the home at some point during the time she was staying at his house." [*Id.*]. That latter point is an especially important one given that Mr. Oliver was charged with kidnapping.

Given the very low threshold for the issuance of a COA, Mr. Oliver should have received a COA on the issue of trial counsel's failure to have subpoenaed the telephone records. This Court should not accept the deprivation of an appeal on the merits of that issue—particularly when Mr. Oliver has received two life sentences plus twenty years. Liberty is simply too important to tolerate potential constitutional errors in failing to obtain exculpatory evidence.

CONCLUSION

For the forgoing reasons, this Court should grant the petition, summarily reverse the denial of the COA on the issue of trial counsel's failure to have subpoenaed Mr. Oliver's telephone records, and remand for an appeal on the merits of that issue to proceed.

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Respectfully submitted,

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