

No. \_\_\_\_\_

**19-7310**

IN THE

SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

MICHAEL C. SMITH  
(Your Name)

— PETITIONER

**FILED**

NOV 19 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

vs.

MARK S. INCH

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

DISTRICT COURT OF APPEAL 2nd DISTRICT STATE OF FLORIDA

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL C. SMITH # C12416  
(Your Name)

Walton Correctional Institution  
(Address)

Defuniak Springs, FL 32433  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

QUESTION(S) PRESENTED

At the time the critical statements were made the mind of the accused was [insufficiently] clear and [hampered by the combination of his physical condition and the impact of the narcotic medication that can be said that Petitioner freely and voluntarily related his connection with the crime. A conviction which results from either physical or psychological coercion be permitted to stand?

## LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CITATIONS

### CASES

|  |   |
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| <u>Alston v. State</u> , 723 So. 2d 148 (Fla. 1998) . . . . .  | □ |
| <u>Blanco v. State</u> , 452 So. 2d 520 (Fla. 1994) . . . . .  | □ |
| <u>Brown v. State</u> , 719 So. 2d 882 (Fla. 1998) . . . . .   | □ |
| <u>Dessaure v. State</u> , 891 So. 2d 455 (Fla. 2004) . . . . .  | □ |
| <u>Henyard v. State</u> , 689 So. 2d 239 (Fla. 1996) . . . . .   | □ |
| <u>Hudson v. State</u> , 992 So. 2d 96 (Fla. 2008) . . . . .   | □ |
| <u>J.A.S. v. State</u> , 920 So. 2d 759 (Fla. 2d DCA 2006) . . . . .                                   | □ |
| <u>Moran v. Burbine</u> , 472 U.S. 412, 106 S. Ct. 1135,<br>89 L.Ed. 2d 410 (1986) . . . . .           | □ |
| <u>Old Chief v. United States</u> , 519 U.S. 172, 117 S. Ct. 644,<br>136 L.Ed. 2d 574 (1997) . . . . . | □ |
| <u>Reddish v. State</u> , 167 So. 2d 858 (Fla. 1964) . . . . .   | □ |
| <u>Rivera v. State</u> , 718 So. 2d 856 (Fla. 4th DCA 1998) . . . . .                                  | □ |
| <u>Rogers v. Richmond</u> , 365 U.S. 534, 81 S. Ct. 735,<br>5 L.Ed. 2d 760 (1961) . . . . .            | □ |
| <u>Rogers v. State</u> , 660 So. 2d 237 (Fla. 1995) . . . . .  | □ |
| <u>Sliney v. State</u> , 944 So. 2d 270 (Fla. 2006) . . . . .  | □ |
| <u>State v. DiGuilio</u> , 491 So. 2d 1129 (Fla. 1986) . . . . .                                       | □ |
| <u>State v. Parker</u> , 144 So. 3d 700 (Fla. 1st DCA 2014) . . . . .                                  | □ |
| <u>State v. Pitts</u> , 936 So. 2d 1111 (Fla. 2d DCA 2006) . . . . .                                   | □ |
| <u>Steverson v. State</u> , 695 So. 2d 687 (Fla. 1997) . . . . .                                       | □ |
| <u>Taylor v. State</u> , 146 So. 3d 113 (Fla. 5th DCA 2014) . . . . .                                  | □ |

Thomas v. State, 125 So. 3d 928 (Fla. 4th DCA 2013) . . . . . [ ]

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745

9 L.Ed. 2d 770 (1963) . . . . . [ ]

Tucker v. State, 884 So. 2d 168 (Fla. 2d DCA 2004) [ ]

Williams v. State, 156 Fla. 300 (1945) . . . . . [ ]

Williams v. State, 967 So. 2d 735 (Fla. 2007) . . . . . [ ]

**OTHER AUTHORITIES**

§90.401, Fla. Stat.. [ ]

§90.403, Fla. Stat.. [ ]

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[✓] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[✓] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/a.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/a, and a copy of the order denying rehearing appears at Appendix       .

An extension of time to file the petition for a writ of certiorari was granted to and including N/a (date) on N/a (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 9-04-2019. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: N/a, and a copy of the order denying rehearing appears at Appendix       .

An extension of time to file the petition for a writ of certiorari was granted to and including N/a (date) on N/a (date) in Application No. A.

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

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The 5<sup>th</sup> Amendment of U.S. Constitution.

Section 12, Declaration of Rights, Florida Constitution F.S.A.

STATEMENT OF THE CASE

On December 7, 2015, an information was filed, charging Michael Charles Smith with one count of sexual battery, the defendant older than 18 and the victim under 12, a capital felony. The State alleged that on November 21, 2015, Mr. Smith placed his mouth on L.C.'s organ (R.17-18).

An amended information was filed on February 10, 2017, alleging that Mr. Smith committed sexual battery, that he was older than 18 and victim, L.C. was under 12, a capital felony. The State alleged that Mr. Smith's mouth penetrated or had union with the sex organ of L.C. and it was done in a lewd or lascivious manner (R.29-30).

Counsel for Mr. Smith filed a Motion to Suppress Evidence and Admissions, arguing that Mr. Smith was under the influence of his medications when he made statements to the police and his statements were not freely and voluntarily given (R.33-37).

The motion hearing was held on December 18, 2017 (R.40-165). The judge took the matter under advisement (R.38-39), and entered a written order on January 10, 2018 denying the motion. The judge found that Mr. Smith did not appear intoxicated or confused when he was interviewed by police (R.337).

A second Motion to Suppress was filed, arguing that Mr. Smith was given incomplete Miranda warnings before his interview with police, as he wasn't told that he had a right to an attorney

before questioning and one would be appointed for him (R.334-336).

The State conceded error, noting that the detective failed to tell Mr. Smith at the time of his Miranda rights that if he could not afford an attorney, one would be appointed for him and that he had a right to an attorney before questioning (R.415-418).

The judge granted the defense motion. But, the judge ruled that Mr. Smith's statement was voluntary and could be used for purposes of impeachment if he testified (R.338-339; 417-418).

Mr. Smith proceeded to trial on May 7, 2018. A jury of six persons and one alternate was selected (T.1-149).

Before testimony began the next day, the judge heard argument on the defense motion in limine (R.343-345), which sought to preclude the 911 tape, which was denied. The defense also sought to preclude any mention of sperm cells found by analysts when, in fact, it was skin cells. The motion was granted. The defense also sought to preclude any mention of Mr. Smith's statement to police about being impotent, and having viewed pornography. This was granted. Finally, the defense sought to preclude any mention of a one-sided phone call that was overheard by a police officer on the scene. The judge took this matter under advisement (T.182-208).

Before trial, the judge also heard the State's motion in

limine, and he allowed a child's crying in the background of the 911 tape to remain on the tape recording finding that there was no prejudice to Mr. Smith (R.341-342; T.208-213).

Testimony began on May 8, 2018. Mr. Smith did not testify in his own defense. Defense counsel said that the judge's ruling on whether Mr. Smith's interrogation was voluntary impacted his client's decision on whether to testify in his own defense, noting that the court found the statement could be used for impeachment if he testified (T. 386).

The jury returned a verdict of guilty of sexual battery as charged on May 9, 2018 (R.355; 380; T.455-456).

At sentencing on May 11, 2018, Michelle Smith, the daughter of Mr. Smith, testified that her father is a good man who was not dangerous. She said he has lived his whole life raising his children to be good people (R.392-393). Mr. Smith had no prior record (T.458).

The judge adjudicated Mr. Smith guilty and sentenced him to mandatory life in prison, with 902 days of credit. The judge imposed court costs and fees (R.398-407; T.393-408).

The judge entered a written order finding Mr. Smith a sexual predator (R.354; 393-394). The judge ordered that Mr. Smith undergo testing for HIV and sexually transmitted diseases (R.352; 405).

A timely notice of appeal was filed on May 17, 2018 (R.381).

This appeal follows.

**STATEMENT OF THE FACTS**

In November, 2015, Lorna Smith and two of her four children, daughter, L.C., 5, and son, C.C., 3, moved into her father's home in Winter Haven. Also living in the home was Mr. Smith's wife, Catherine, their daughter, Michelle, and son Henry. Lorna Smith had lost her home and her job, and she needed help with her kids. She wasn't getting child support for these two children, and she needed financial help (T 264). By November, 2015, she had been living in her father's house for about a month (T.240-245).

The house was crowded and she and her two kids moved into one room in the house (T.265).

Her daughter, L.C. was in kindergarten, and C.C. was not yet in school (T.246).

Ms. Smith said he got along well with her father, and maintained a relationship with him after her parents divorced (T.241). Mr. Smith was close to her two children, and watched over them when she was at work. Her father was a retired fire fighter, and there had been no issues with her father and her kids (T.268).

On November 21, 2015, after dinner with the family, Lorna Smith put her son, C.C. to bed. She stayed with him until he fell asleep. L.C. was with her father playing on the computer. After her son fell asleep, Lorna went to get L.C. to put her to bed.

Lorna didn't hear any noise, commotion or screaming from her father's bedroom (T.272). She opened the door to her father's bedroom and she saw L.C. lying on the bed with her legs in the air, and her underwear near her ankles. Her father's face was between her daughter's legs in her vagina (T.247-249). Her father was clothed (T.272).

Lorna asked what he was doing. She said L.C. looked confused. Lorna pulled up her daughter's underwear and then called 911. Mr. Smith left the house and the police arrived (T. 250-251).

The 911 phone call was played for the jury over defense counsel objection (T.253-259).

Lorna said when the police arrived, her father had left the house, but he returned home (T.259). She gave police a sworn statement and then took her daughter to Lakeland Regional Health Center for a sexual assault examination (T.259). Lorna said she then moved out of her father's house (T.261).

Lorna said she was sexually abused by her brother when she was 5. That abuse still affects her. She has epilepsy and takes medication for it (T.274).

Jibi Abraham, a registered pediatric emergency room nurse at Lakeland Regional Health Center, assisted Dr. Rhodes in conducting a sexual assault kit on L.C. on November 22, 2015. She collected L.C.'s shirt, pants, underwear, and socks and gave

the clothes to the police (T.276-281).

Melissa Turnage with the Polk County Sheriff's Office was the lead detective on the case. She went to the Smith house and obtained a sworn statement from Lorna Smith. She went to the hospital and collected the sexual assault kit. She also met Mr. Smith and obtained buccal swabs from him (T.287-292).

Ashley Tilka, a crime lab analyst in the biology section of the Florida Department of Law Enforcement, received the sexual assault kit from L.C. that included her underwear and vaginal and buccal swabs. She also received buccal swabs from Mr. Smith (T.293-299). Ms. Tilka said there was not enough male DNA in the vaginal swabs to develop a profile. She swabbed the inside and outside of L.C.'s underwear and found a mixture of two people - L.C. and a partial profile of Mr. Smith. She said Mr. Smith's DNA matched a profile found on L.C.'s underwear (T.300-302).

Ms. Tilka didn't do a presumptive test for amylase or saliva on the girl's underwear. She explained that the vaginal swabs didn't meet the threshold for a DNA profile (T.304-315).

Hugh Jones is a Polk County Sheriff's deputy who was called to the Smith house in Winter Haven on November 21, 2015. He arrived at 9 p.m. and was called to assist. The girl's mother and grandmother were there, but Mr. Smith wasn't. The deputy didn't interact with L.C. or her mother (T.340-341).

Deputy Jones's involvement was with Mr. Smith. While the

deputy was at the house. Mr. Smith drove up and pulled into the driveway. Mr. Smith was alone and not under arrest. At first, the deputy wasn't sure who was in the car, but then realized that L.C.'s mother was on the porch and he knew that Mr. Smith was a suspect. The deputy took the car keys from Mr. Smith. Mr. Smith asked to stay in the car and the deputy stood near him (T.341).

As the deputy stood there, Mr. Smith started talking to him. Over defense counsel objection to hearsay and the motion in limine that was overruled, Mr. Smith said that L.C. had been telling him what her father had been doing to her, and she asked Mr. Smith to do the same. He repeatedly said no, but then fell into it. That was when L.C.'s mother caught him. Mr. Smith said he tried to square it with his daughter and wife, but he didn't and he was sorry (T.346).

The deputy didn't interrupt Mr. Smith nor did he question him. The deputy didn't speak to him at all (T.346).

The deputy didn't ask Mr. Smith why he returned to the house. The deputy stood in the rain as Mr. Smith sat in the car. He was there as security (T.356). Mr. Smith asked if he wanted to sit in the car, but the deputy remained outside in the rain with the car door open. The car was turned off. He said the two men had no conversation, as it was Mr. Smith talking. The deputy didn't take any notes, and wrote his report three hours later (T.348-352). The deputy said his patrol car had audio equipment

but he said he wasn't going to stop Mr. Smith from talking to get his tape recorder (T.353-354). The deputy said the Polk County Sheriff's Office does not use body cameras (T.353).

★THE END.★

The trial court erred in failing to grant the motion to suppress when the evidence showed that Mr. Smith's interview with police was involuntary and not freely given. Mr. Smith was under the influence of numerous medications and alcohol. According to the expert whose testimony was unrebutted, Mr. Smith had taken nearly double the doses of medication that caused him confusion and disorientation. His speech was compromised. He was disoriented and his head was down and drooping. Despite these signs, the police proceeded to question Mr. Smith, even after he told them at the start of the interrogation that he felt awful. The trial court ruled that this interrogation was voluntary and could be used as impeachment, thereby precluding Mr. Smith from testifying at trial.

The trial court abused its discretion in allowing into evidence the 911 call and other statements made by Mr. Smith. The 911 call was made after Lorna Smith had time to contrive or misrepresent what had happened. The statements made by Mr. Smith to Deputy Jones were hearsay, prejudicial and were not necessary for the State to prove its case. The admission of this evidence was not harmless error.

#### REASONS FOR GRANTING THE PETITION

1. The Petitioner's confession was taken from him in violation of the 5<sup>th</sup> Amendment to the United States Constitution.
2. Not a single Person thought to ask Petitioner about his physical or mental condition prior to interviewing him regarding this alleged crime. Therefore, the Respondent cannot argue that Petitioner was mentally capable of waiving his right to remain silent. The fact that Petitioner was immediately Baker Acted and sent to Peace River for observation only further muddies the water.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark R. Johnson". The signature is written in a cursive style with a horizontal line underneath it.

Date: 11/19/19