

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

**20-6621**

IN THE

SUPREME COURT OF THE UNITED STATES

Shauna Smith, Pro Se  
(Your Name)

— PETITIONER

vs.

Brooks L. Burton, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED

SEP 25 2020

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

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

PETITION FOR WRIT OF CERTIORARI

Shauna Smith GDC # 1000446646

(Your Name)

Lee Arrendale State Prison Dorm C2-85T

P.O. Box 839

(Address)

Alto, Ga 30510

(City, State, Zip Code)

(706) 776-4700

(Phone Number)

QUESTION(S) PRESENTED

1.) Ms. Smith alleged that her appellate counsel was ineffective for failing to raise on appeal that her trial counsel was deficient for not moving to suppress the phone records presented as evidence against her. Ms. Smith was convicted, in large part, upon CSLI (cellular site location information), as the Supreme Court of Georgia placed a great deal of emphasis on the importance of these cell phone records. In finding no prejudice, the ~~Superior~~ Court of Habersham County and the Eleventh Circuit relied on appellate counsel Jonathan Majeske's sworn testimony of his harmful opinion "that there was no viable basis to challenge trial counsel's effectiveness. (H.T. 44-45)

H.T. - citations to the September 19, 2018, evidentiary hearing transcripts.

Did the Eleventh Circuit err in deferring to the Superior Court Finding that Ms. Smith was not prejudiced by her appellate counsel Failure to raise on appeal that her trial counsel was deficient For not moving to suppress the phone records presented as evidence against her ?

2.) Ms. Smith prepared and submitted a brief by the required deadline to substantiate the grounds that she raised at her evidentiary hearing, conducted on September 18, 2019.

The petitioner's Former counsel Rodney Zell submitted a proposed order arguing only one of the twelve grounds that the petitioner raised. The proposed order was submitted over seven months after the pro se

brief was submitted, Ms. Smith received her docket history verifying that the brief was received in a timely manner. However, the courts never ruled on the brief that was originally sent.

Did the Superior Court of Habersham County err in failing to rule on all the grounds that the petitioner raised on her Writ of Habeas petition?

## 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:

Matthew M. Youn Assistant Attorney General  
Georgia Department of Law  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300

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### OTHER

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 A 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 Habersham Superior court appears at Appendix B 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 \_\_\_\_\_.

☐ 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: \_\_\_\_\_, 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 \_\_\_\_\_ (date) on \_\_\_\_\_ (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 June 29, 2020.  
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, 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 \_\_\_\_\_ (date) on \_\_\_\_\_ (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 following statutory and constitutional provisions are involved in this case.

### U.S. Const., Amend. IV

In all states the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### U.S. Const., Amend VI

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. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. § 2254

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

(b)(1) An application for a Writ of Habeas Corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available

in the courts of the State; or

(B)(i) there is an absence of available State corrective process

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application For a Writ of Habeas Corpus may be

denied on the merits, notwithstanding the Failure of the applicant

to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaust-

ion requirement or be estopped From reliance upon the

requirement unless the State, through counsel, expressly waives

the requirement.

(c) An applicant For a Writ of Habeas Corpus on

shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An applicant 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 invo-

lved 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.

(E)(1) In a proceeding instituted by an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual

basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would



have found the applicant guilty of the underlying offense

(F) IF the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. IF the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official.

IF the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's Factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may

appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority.

Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

UNITED STATES CODE  
SERVICE  
(USCS § 2703)  
The Stored Communication Act

(d.) Requirement For court order

- A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such only when the governmental entity:

(A) Obtain a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or in the case of a State court, issued using a State warrant procedure) by a court of competent jurisdiction or

(B) Obtain a court order for such disclosure under subsection (D) of this section may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offer specifics and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

### STATEMENT OF THE CASE

The petitioner, Shauna Smith, and codefendant Gregory Williams, was convicted of the murder of Brian Mosley by jury trial on December 20, 2010. The petitioner and codefendant was sentenced to life in prison plus twenty five years with the possibility of parole. The evidence that was relied upon to obtain the conviction was circumstantial and the testimony of an unreliable informant, Latonya Cujoe, and Detective Buchanan testimony of an unrecorded statement of involvement allegedly given by the petitioner.

At Ms. Smith trial, her state appointed trial counsel, Dawn Belisle Filed a single motion, which was a motion to suppress the alleged statement.

Ms. Smith testified to her account of the events that occurred during the time of her arrest. During her sworn testimony, she testified to the fact that she never implied that she had knowledge or involvement of the crime that she was charged of. Trial counsel failed to argue the fact that Detective Buchanan made several inconsistent statements, nor did he produce any written statements, affidavit or any other evidence to support his testimony of the petitioner's alleged statement. Every other suspect that was detained and interviewed was recorded and transcribed. Trial counsel failed to address the inconsistencies to properly impeach Detective Buchanan.

Therefore, his sworn testimony was heard during the petitioner's trial.

Trial counsel had less than Five objections throughout the entire trial, and testimonies of the leading witnesses went unchallenged. Trial counsel also Failed to challenge the hearsay testimony of the State's Key witness; Latonya Cojoe.

Illegally obtained cell phone records was the only circumstantial evidence that was presented, which was the triangulation of the area where the petitioner's and codefendant cell phones were in use the day of the crime. GPS evidence was never produced to pinpoint

the exact location of the petitioner and codefendant.

An eyewitness testified that neither the petitioner or the codefendant was seen at the scene of the crime.

The State appointed trial counsel Failed to File a motion to suppress the illegally obtained phone records. The court order which was included in discovery, clearly indicated conflicting dates and reasons For the request of the records .

Trial counsel Failed to prepare or present a defense before or during trial. The petitioner assured trial counsel, in addition to every other state appointed counsel, of her innocence. Ms.

Smith gave her alibi to trial counsel. She told trial counsel that to her knowledge her codefendant Mr. Williams



did not know Mr. Mosley. The conversation she had with Mr. Williams was regarding a vehicle that she was trying to purchase. The frequency of calls between the two was due to the fact that the calls kept dropping and the petitioner was trying to receive directions to the location to view the vehicle. The petitioner and codefendant chose not to testify at trial, therefore their alibi was never presented. Nor did either one of their counsels make reference to their alibi during trial.

The petitioner retained Joshi Law Firm to represent her on appeal. A timely motion for new trial was filed on December 30, 2010. The petitioner received one

visit from counsel Jonathan Majeske from Joshi Law Firm

in 2014. Due to monetary issues, the motion was amended

on March 25, 2015. The motion for new trial was denied

on April 8, 2015. Counsel Majeske filed a timely motion/notice

of appeal on May 7, 2015. Mr. Majeske made an executive

decision and failed to communicate his decision to argue

only one ground on direct appeal, which was argued orally

on May 19, 2016. The direct appeal was denied on November

21, 2016.

The petitioner filed a timely application for writ of

Habeas Corpus, pro se on November 14, 2017. An evidentiary

hearing was held on September 19, 2018. Counsel Rodney


Zell was retained after the hearing. He Filed an entry of appearance on January 16, 2019. Mr. Zell was retained to solely assist the petitioner with the preparation of her brief. The brief had a deadline of January 18, 2019. Counsel Zell Failed to communicate with the petitioner regarding a possible extension and/or if he would meet the deadline. The petitioner prepared and submitted a brief pro se to ensure that her grounds would be preserved. Mr. Zell contacted the petitioner via mail over seven months after the petitioner had submitted the brief. He advised her that he Filed a proposed order arguing only one of the twelve grounds that she raised on her

Writ of Habeas Corpus. The proposed order was Filed on August 27, 2020 and denied on September 27, 2019. The petitioner Filed pro se, a notice of appeal and certificate of Probable Cause. The certificate of Probable Cause was denied on June 29, 2020\*.

\*See Appendix A

## REASONS FOR GRANTING THE PETITION

### I. THE ELEVENTH CIRCUIT'S MISAPPLICATION OF THE PREJUDICE STANDARD OF STRICKLAND WARRANTS THIS COURT'S ATTENTION

The Eleventh Circuit's opinion misapplied the Strickland v. Washington, 466 U.S. 668, 687-88 (1984)  disregarding the fact that the motion to suppress admissible evidence was within merit.

Deprivation of effective assistance of counsel during a criminal prosecution is a violation of a defendant's rights under the U.S. Constitution Amendment six. Strickland v. Washington, 466 U.S. 668, 104 S. Ct 2052 (1984) and is a viable constitutional claim for Habeas Corpus relief. Graddy v. Hopper, 233 Ga. 65, 66 (2) (209 S.E. 2d 636) (1974). The standard for determining whether appellate counsel was

ineffective was determined by the Georgia Supreme Court in Nelson v. Hall, 275 Ga. 792, 573 S.E. 2d 42 (2002), which held "to obtain Habeas Corpus relief on a claim of ineffective assistance of appellate counsel, the Appellant must satisfy the two prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) - that "appellate counsel was deficient in failing to raise an issue on appeal and that the deficiency in failing to raise the issue resulted in a prejudiced defense." To satisfy the second prong of Strickland the Applicant must show a "reasonable probability

that the outcome of the appeal would have been different."

When considering the prejudice prong, "the inquiry does not focus on the projected result on remand or retrial, but whether there is a reasonable probability that the result of the appeal would have been different. A reasonable probability sufficient to undermine confidence in the outcome. Crawford v. Thomas, 278 Ga. 517, 520 (2004).

In the proposed final order submitted by the Appellant's former Habeas-Corpus relief counsel, Rodney Zell, the finding of facts and conclusion of law demonstrates that the Appellant's former appellate counsel Jonathan Majeske decision not to raise an ineffective assistance

of counsel claim on motion for new trial and or appeal  
for trial counsel failure to suppress phone records, particularly  
CSLI, was unreasonable.

#### Fourth Amendment - Freedom from illegally search and seizure, and Fourteenth Amendment - Due Process of Law Violations

1) Several subpoenas and court orders were obtained to produce the Appellant cell phone records and CSLI. Under the S.C.A. (Stored Communication Act) the subpoenas and court orders were sufficient to obtain the Appellants phone records, such as, call log information. Due to the fact that the Appellant does not have a reasonable expectation of privacy in records belonging to someone else. However, the cell site location information that was illegally obtained tracked the Appellants movements and personal ~~affiliations~~ affiliations. Therefore, the Appellant does have a privacy interest in the CSLI. This information was ~~used~~ used against her during trial. The trial counsel should have investigated the evidence to determine if it was legally obtained. Being that the Appellant had a privacy interest in the CSLI, trial counsel should have motioned the courts to suppress the evidence.



"Where a defendant has a privacy interest in the cell phone, whose calls and text messages were the subject of the subpoenas, she can move to suppress the information. (Hampton v. State, 295 Ga. 665, 669, 763 S.E. 2d 467 (2014))

2) Detective Buchanan did not produce any search warrants to obtain the CSLI that was used in Appellant's Case. The court orders that were produced included statements that was intentionally fabricated, such as "the records were needed "to locate Gregory Williams, and Shauna Smith wanted for murder, in violation of D.C.G.A. 16-5-1," (H.T. Vol 2 110-170) The intentional fabrication raises two issues. 1.) The Appellant was not charged at this time, due to the fact that the State lacked evidence. (Review H.T. Vol 2 page 291 and page 170 - Appellant was not charged until February 19<sup>th</sup> 2009, the court order was dated July 25<sup>th</sup> 2008) 2.) The illegally obtained CSLI was not used to locate the Appellant. This entire case rest upon the State using the illegally obtained CSLI to determine who the Appellant was communicating with around the time of the crime and to identify her whereabouts. This misuse of the information, even though it was illegally obtained "exceeded the scope of searching for fugitives wanted for murder." (Grant v. State, 220 Ga. App. 604, 469 S.E. 2d 826 (1996)) "A lawful search is limited to that which is described in the warrant." Grant citing Lockhart v. State, 166 Ga. App. 555, 557 (2) 305 S.E. 2d 22 (1983)

3) The State's theory of the crime that the Appellant was convicted of, relied solely on the Appellant's CSLI. The conviction was unconstitutional due to the fact the "government did not obtain a warrant supported by probable cause before acquiring Appellant's CSLI. The lead Detective acquired those records pursuant to a court order (that contained falsified information stating that Appellant was a fugitive) under the S.C.A. which required the government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation," 18 U.S.C. § 2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under § 2703(d), is not a permissible mechanism for accessing historical cell site location information. Carpenter v. United States, 138 S. Ct. 2206

In addition, the CSLI information that was illegally obtained, is a "comprehensive record of the Appellant's public movements that reflected a wealth of detail about her familial, political, professional, religious, and sexual associations." Riley v. California, 573 U.S.

573 U.S. 373 citing United States v. Jones, 565 U.S. 400, 415, 132 S.Ct. 945, 955, 181 L.Ed. 2d 911, 925 (2012) (Sotomayor, J., concurring)

4) Reviewing Chatom v. White, 858 F.2d 1479 (11th Cir. 1988)  
Reversed and Remanded - "His counsel failed to object to the introduction of certain scientific evidence at trial fell below standards of reasonable performance. The state's case against petitioner consisted entirely circumstantial evidence. Thus, the introduction of the scientific evidence constituted a pivotal point in the trial. Further, due to general verdicts rendered by the jury, it could not have been said that the scientific evidence did not have a prejudicial effect upon the jury's verdict. Thus, the lack of any objection clearly prejudiced the petitioner." - In comparison with the Appellant's case 1.) the case was based on solely circumstantial evidence 2.) the circumstantial scientific evidence was unchallenged by the trial counsel. 3.) trial counsel failed to object to the admissibility of the evidence. There is a reasonable probability that if trial counsel would have challenged the admissibility of the evidence

the outcome of the trial would have been different. In addition, if appellate counsel would have litigated the ground of ineffective assistance of trial counsel for failing to challenge the admissibility of the evidence, there is a reasonable probability that the outcome of the motion for new trial would have been different.

5) Compounding the issues already mentioned, Detective Buchanan testified to his falsities, stating on record that he embellished information to get the phone records Foster and that the Appellant was never a Flight risk (H.T. Vol 9 2537-2541). The Eleventh Circuit holds that "a police officer who applies for an arrest warrant can be liable for malicious prosecution if he should have known that his application failed to establish probable cause or if he made statements or omissions in his application that were perjurious or recklessly false. (Black v. Wigginton, 811 F.3d 1259, 1267 (11th Cir.)

In compliance with Strickland v. Washington, the Appellant has demonstrated through various interpretations of the law, that she has suffered violations of the Fourth, Sixth and Fourteenth Amendments to the U.S. Constitution, proving the two prong test requirement that appellate counsel Majeske was deficient for failing to raise an issue on appeal and that if he would have raised the issue there is a reasonable probability that the outcome of the motion for new trial/appeal would have been different

II. THE ELEVENTH CIRCUIT FAILED  
TO RULE ON THE BRIEF SUBMITTED BY  
THE PETITIONER.

The petitioner raised twelve grounds on her amended Writ of Habeas Corpus. A timely brief was submitted to substantiate the grounds that were argued at the evidentiary hearing. Habersham Superior Court received the brief on January 22, 2014. The petitioner's former counsel submitted a proposed order arguing only one of the grounds the petitioner raised, seven months after the submission of the pro se brief. The proposed order was ruled upon, but the brief that was submitted never received a ruling.

The petitioner request that this case is reversed back to Habersham Superior Court For a disposition on all the grounds that has been litigated.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shauna Smith

Date: September 23, 2020