No. 24-

IN THE

Supreme Court of the United States

ROBIN ROOT,

Petitioner,

v.

JEREMY HOWARD, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *Missouri v. Seibert*, 542 US 600 (2004), a mid-stream *Miranda* warning may not be effective. This was a plurality opinion and the Circuits are split 9 to 2 about whether *Marks v. United States*, 430 US 188 (1977) means that Justice Kennedy's concurrence should control the analysis or whether the four-Justice plurality should control.

The first question presented is:

Whether the Michigan Court of Appeals misapplied Federal precedent when it relied on *Oregon v. Elstad*, 470 US 298 (1985) to admit post-Miranda admissions as opposed to excluding those admissions based on *Seibert* and whether the Circuit split should be resolved in favor of *Marks?*

The second question presented is:

In *Cardwell v. Taylor*, 461 US 571 (1983), this Court held that custodial statements that were obtained in violation of the Fourth Amendment could not be grounds for habeas relief, but relief would be available if the statements were involuntary and were thus obtained in violation of the Fifth Amendment. This Court remanded so that a determination about voluntariness could be made. In the instant case, the Sixth Circuit neither remanded nor addressed the Petitioner's Fifth Amendment claim independently. Rather the Sixth Circuit opined that the Fourth and Fifth Amendment claims were "inextricably intertwined" and therefore, under *Cardwell*, habeas relief was not available.

Whether the Petitioner's Fifth Amendment claims should have been independently reviewed by the Sixth Circuit Court of Appeals and whether relief (either granting certiorari or in granting the Petition, vacating the Sixth Circuit decision, and remand) should be granted so that the independent review can take place?

The third question presented is:

Since *Stone v. Powell*, 428 US 465 (1976) was decided, there have been numerous technological developments which have led this Court to interpret and tailor Fourth Amendment jurisprudence to respond to those technological developments. *E.g.*, *Riley v. California*, 573 US 373 (2014) (cell phone technology); *Carpenter v. United States*, 585 US 297 (2018) (use of cell towers to track movements). This Court has also recognized exceptions to *Stone*, *e.g.*, *Withrow v. Williams*, 507 US 680 (1993) (Fifth Amendment habeas claims are not barred by *Stone).* Because of the uncertainty of how Fourth Amendment principles should be applied to specific new technologies, a state criminal defendant may have an opportunity to make an argument but may not get a full and fair hearing because of those uncertainties. If habeas review is barred, the state criminal defendant may never get a meaningful review of a legitimate Constitutional question.

Whether this Court should recognize an exception to *Stone v. Powell* which allows a Federal habeas petitioner to raise a claim that a technological development not yet addressed by this Court was a search that invaded the Petitioner's reasonable expectation of privacy?

RELATED PROCEEDINGS

The following proceedings are related under this Court's Rule 14.1(b)(iii).

Root v. Howard, No. 24-1607 (6th Cir. February 10, 2025) (order denying a Certificate of Appealability).

Root v. Howard, No. 2:21-CV-11113 (U.S. District Court, Eastern District of Michigan July 9, 2024) (order denying habeas petition and denying a Certificate of Appealability).

People v. Root No. 161304 (Michigan Supreme Court, September 8, 2020) (denying Application for Leave to Appeal using routine language).

People v. Root, No. 346164 (Michigan Court of Appeals, April 9, 2020) (affirming jury conviction in second trial).

People v. Root, No. 15-004835-FC,) Michigan Kent County Circuit Court October 17, 2018) (convicted by jury of second-degree murder and sentenced to 25-50 years in prison).

People v. Root, No. 156658 (Michigan Supreme Court, May 11, 2018) (denying Application for Leave to Appeal using routine language, 1 Justice dissenting about whether review should have been granted of Court of Appeals decision allowing inculpatory statements after mid-stream *Miranda* warnings were given).

People v. Root, No. 331123 (Michigan Court of Appeals, August 31, 2017) (reversing and granting a new trial for violation of *Miranda* but ruling that inculpatory

statements made after mid-stream *Miranda* warnings were given would be admissible at re-trial).

People v. Root, No. 15-004835-FC (Michigan Kent County Circuit Court December 9, 2015) (convicted by jury of first-degree murder and sentenced to life in prison).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robin Root respectfully seeks a Writ of Certiorari to review an order issued by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's order below is unreported but is reproduced as Appendix ("App.") A 1a-4a. The opinion of the United States District Court for the Eastern District of Michigan is unreported and reproduced as App A, 5a-28a.

JURISDICTION

The Sixth Circuit issued its decision of February 10, 2025. This Court has certiorari jurisdiction under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or an indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put into jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

This case presents important and recurring questions concerning confessions made by a criminal suspect.

In *Oregon v. Elstad*, 470 US 298 (1985), this Court held that admissions made after *Miranda* warnings were given were admissible even though the suspect had been interrogated before warnings were given. In *Missouri v. Seibert*, 542 US 600 (2004), this Court established an exception to *Elstad* for a situation where the mid-stream *Miranda* warnings were ineffective to actually warn the suspect, with the result that the post-*Miranda* and pre-*Miranda* statements were both suppressed.

Seibert was a plurality decision. In an opinion joined by four Justices, the plurality suggested a four-pronged

list of factors for Courts to use when determining whether a mid-stream *Miranda* warning was or was not effective. If not effective, the statements made after the warnings were inadmissible. The fifth vote by Justice Kennedy was narrower. Justice Kennedy would have required evidence of a planned effort to undermine *Miranda* warnings. In *Marks v. United States*, 430 US 188 (1977), this Court held that when there is a plurality decision, the most narrow holding should be considered the opinion of this Court. The Circuits are split 9-2 about whether Justice Kennedy's concurrence or the four-Justice plurality opinion is the holding of *Seibert.* This case would give this Court the opportunity to resolve that Circuit split about an issue of great importance.

As to the merits, the Petitioner was questioned on a number of occasions. The last interrogation lasted over six hours. In a planned interrogation technique, one of the interrogators was replaced with the original investigator of the murder case. The tone of the interrogation immediately changed. Hours later, *Miranda* warnings were given and the interrogation continued. Inculpatory admissions, including a confession, were made both before and after the *Miranda* warnings. The Michigan Court of Appeals relied on *Elstad* and 1) granted a new trial; 2) excluded the statements made before the *Miranda* warnings were given; and 3) ruled that the statements made after the *Miranda* warnings were admissible at the new trial.

The Michigan Supreme Court declined review using routine language, but one Justice dissented and opined that further consideration should be given to the Court of Appeals decision on post-warning admissions. The

Petitioner's position is that given the particular facts of her case, *Seibert* should have been the controlling case and that her post-warning admissions should also have been excluded. This case gives this Court an opportunity to address *Elstad* and *Siebert* and to not only redress the wrong done in the Petitioner's case but to provide guidance to the lower courts as to how these two cases should be interpreted in the future.

As to the technology issue, the police obtained critical evidence against the Petitioner by using two cell-tower dumps. Unlike this Court's decision in *Carpenter v. United States*, 585 US 296 (2018), the dumps were not focused exclusively on the suspect. Rather, all of the data related to a specific time period was obtained and then the information was analyzed to obtain incriminating information against the Petitioner.

The Petitioner's case presented both a Fourth Amendment and a Fifth Amendment issue. The Fourth Amendment issue was whether *Carpenter* should be extended to the type of cell phone dump used to gather information against the Petitioner. The information gathered was the fact that the Petitioner's cell phone and the Decedent's cell phone traveled together and that both phones ended up in the area where the Decedent's body was found.

While cases like *Riley v. California*, 573 US 373 (2014) and *Carpenter v. United States* were not habeas petitions, the changing circumstances caused by the evolution of technology illustrated by those cases should be considered an exception to *Stone v. Powell*, 428 US 465 (1976) for an inability to get a full and fair hearing

in state courts because the law has not caught up to the technology at issue.

The Fifth Amendment issue was both *Miranda* and whether, regardless of how the Fourth Amendment issue was resolved, the Petitioner's admissions were involuntary given the intense nature of the lengthy final interrogation.

The Sixth Circuit ruled that the Fourth and Fifth Amendment issues were inextricably intertwined and cited *Cardwell v. Taylor*, 461 US 571 (1983) in support of a holding that the Fifth Amendment issue did not save the habeas petition from *Stone*. The Petitioner's position is that the Sixth Circuit misapplied *Cardwell* which ruled that the Fifth Amendment issue should be further considered to determine whether the admissions were indeed voluntary. The Sixth Circuit decision gives this Court an opportunity to revisit *Cardwell* and clarify what the lower Federal courts should do when confronted in a habeas petition with both Fourth Amendment issues and Fifth Amendment issues.

As an alternative, the Petitioner is asking this Court to consider the GVR procedure as an appropriate way to grant relief and to give the Petitioner the opportunity to have the *Miranda* and the other Fifth Amendment issues reviewed by the Sixth Circuit on their merits.

STATEMENT

1. On December 4, 2007, Janna Kelly disappeared. The Petitioner Robin Root was interviewed two days later and denied knowing anything about what might have happened to Ms. Kelly. The Petitioner voluntarily gave a

DNA sample, but that sample was not sent to the lab for testing at that time. Ms. Kelly's body was found in March of 2008, and the medical examiner declared her death a homicide. The subsequent investigation went nowhere, and the case went unsolved.

2. In 2014, two detectives were assigned to re-open the investigation into Ms. Kelly's death. The investigators realized that Petitioner's DNA sample had never been tested and, as a result, the DNA was sent to the lab for testing. The testing showed that the Petitioner's DNA matched blood found in the Decedent's car and on her jacket. The investigators also analyzed a cell phone tower dump obtained years earlier. The dump had not focused on anyone in particular but had just dumped information about every cell phone that had had contact with two towers. The analysis showed that both the Petitioner's cell phone and Ms. Kelly's cell phone had traveled along the same path. The Petitioner's cell phone had stopped for a time in the area where the Decedent's body was found.

3. The Petitioner was contacted and agreed to come to the Sheriff's office on April 22, 2015 for an interview. The interview was cut short because the Petitioner had to pick up one of her grandchildren. Nothing of substance came out during this interview.

On April 27, 2015, the Petitioner returned to the Sheriff's office. This interview began at 11:44 AM and lasted for about six hours. The interview was held in a windowless room with the door closed. She was flanked by two armed detectives asking her questions. At approximately 2:25 PM, the interrogators made a deliberate change in the interview technique. At this point,

one of the interrogators was replaced by the detective who had first interviewed the Petitioner in 2007. A gun was visible on the new interrogator's belt. The tone turned intense as the new interrogator claimed that the Petitioner had been lying and showed the Petitioner evidence of those alleged lies. The interrogators repeatedly threatened that prosecutors were standing by who were ready to bring criminal charges against the Petitioner. The investigators continually ramped up the pressure with threats and statements implying inevitability. At 2:56 PM, the Petitioner confessed. *Miranda* warnings had not been given to the Petitioner. The interrogation continued. At around 4:35 PM, *Miranda* warnings were finally given. The interrogation continued, and the Petitioner again confessed.

4. The Petitioner tried to suppress her confessions, but that motion was denied. She was thereafter tried based in large part upon admissions that she had made during April 27th interviews. The Petitioner was convicted and sentenced to life in prison.

5. The Petitioner appealed. The Michigan Court of Appeals reversed and concluded that a new trial was required. *People v. Root*, Case No. 331123, August 31, 2017. In doing so, the appellate court recognized both *Elstad* and *Seibert*, but applied *Elstad.* The result was that the statements made before *Miranda* warnings were deemed inadmissible at the new trial, but the statements made after *Miranda* warnings were given were deemed admissible. The appellate court also concluded that the statements were voluntary. This determination was made by the appellate court without the benefit of an evidentiary hearing.

6. The Petitioner was again tried. The Petitioner moved to suppress the statements she had made to the police after detectives had confronted her with the cell phone data obtained from the tower dump. Relying on *Carpenter v. United States*, 585 US 296 (2018), the Petitioner argued that the failure to obtain a search warrant for the cell phone data required suppression. The trial court disagreed and denied the motion. Among other things, the trial court relied on the fact that *Carpenter* involved a focus on a specific phone number whereas in the instant case, the police had done a cell tower dump which did not focus on any specific phone number. The trial court declined to rule on whether a tower dump would produce the same result as a focus on a specific phone number associated with the suspect. The Petitioner was convicted at the second trial and was sentenced to 25-50 years in prison. She appealed and the appellate court affirmed the denial of the suppression motion. Among other things, the appellate court relied on the good faith exception and the fact that this Court had declined to extend *Carpenter* to information obtained through a tower dump.

7. In 2021, the Petitioner filed a habeas petition arguing both Fourth and Fifth Amendment violations based on the admission of the Petitioner's statements after she was informed about her cell phone's location-information and the tower dump which produced that information. The district court concluded that any Fourth Amendment claim was barred by *Stone v. Powell.* The district court acknowledged that a Fifth Amendment claim based on involuntariness or *Miranda* was not barred. However, the district court reasoned that any Fifth Amendment claim was tied to the Fourth Amendment claim and was thus barred by *Stone v. Powell.* The habeas petition was denied on July 9, 2024 as was a Certificate of Appealability.

8. The Petitioner filed a Motion for Certificate of Appealability in the Sixth Circuit, again asserting both Fourth and Fifth Amendment claims and focusing on the Petitioner's statements which were admitted as a result of the first Michigan Court of Appeals decision. The Sixth Circuit, citing *Cardwell*, held that a Certificate of Appealability would not issue because the Fourth and Fifth Amendment claims were intertwined and thus barred by *Stone v. Powell.*

REASONS FOR GRANTING THE PETITION OR GRANTING GVR RELIEF

1. The *Miranda* question warrants review.

Applying the *Miranda* holding to specific facts has often created difficulties for Courts. *Elstad* and *Seibert* are prime examples of these difficulties as Circuits have split over the remedy when mid-stream *Miranda* warnings are given.

A. The Circuit Split.

Seibert was a plurality decision. Four Justices opined that the post-warning statements should be suppressed and suggested a four-pronged test that courts could use when determining whether suppression should be granted. Justice Kennedy provided the deciding vote although his opinion suggested a narrower approach, *i.e.*, that there must be some evidence of a deliberate effort to take advantage of when the *Miranda* warnings were given to the suspect.

In *Marks v. United States*, 430 US 188 (1977), this Court instructed that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." 430 US at 193.

Given that Justice Kennedy's opinion was the narrowest, *Marks* would seem to dictate that his opinion would be considered the opinion of the Court. *Marks* did not consider whether its holding would apply when the narrowest ground was the opinion of only one Justice.

However, despite *Marks*, the Circuits are divided 9-2 on the question of which opinion is the opinion of the Court in *Seibert.* The majority of the Circuits have adopted Justice Kennedy's opinion as the opinion of this Court. *United States v. Capers*, 627 F.3d 470 (2d Cir. 2010); *United States v. Naranjo*, 426 F.3d 221 (3d Cir. 2005); *United States v. Khweis*, 971 F.3d 453 (4th Cir. 2020); *United States v. Fernandez*, 48 F.4th 405 (5th Cir. 2022); *United States v. Magallon*, 984 F.3d 1263 (8th Cir. 2021); *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006);*United States v. Guillen*, 995 F.3d 1095 (10th Cir. 2021); *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006); *United States v. Neely*, 123 F4th 937 (D.C. Cir. 2024).

The minority circuits are the 6th and 7th Circuits. *United States v. Ray*, 803 F3d 244 (6th Cir. 2015); *United States v. Heron*, 564 F.3d 879 (7th Cir. 2009).

Granting certiorari would give this Court an opportunity to resolve this Circuit split and to confirm the

reasoning of *Marks*. *Miranda* warnings are the subject of continuing litigation in both state and Federal courts. Addressing the conflict would give guidance to the state and Federal courts, law enforcement, and the bar. Given the frequency with which *Miranda* issues arise, such guidance would help assure uniform application of the important rights which *Miranda* protects.

B. The Merits.

In the Petitioner's case, the Michigan Court of Appeals acknowledged both *Elstad* and *Seibert*. The Michigan Court of Appeals also acknowledged that there was a deliberate interrogation technique employed when a different interrogator joined the interrogation midstream with the express purpose of being aggressive and of confronting the Petitioner with the evidence the interrogators had collected, including the DNA evidence and the cell tower evidence. *Miranda* warnings were not given either at the outset of the interrogation or when the tone of the investigation changed. The Petitioner was aggressively questioned from about 2:20 PM to about 4:35 PM when *Miranda* warnings were finally read. At around 2:56 PM, the Petitioner gave in to the interrogators and confessed. The interrogators then continued to question the Petitioner for more than 90 minutes before warnings were given. The questioning continued after the warnings were given and the Petitioner was formally arrested. The post-warning interrogation was akin to a standard police interview, and the Petitioner confirmed her confession. The specific issue was whether admissions the Petitioner made after the warnings were given were admissible at the new trial which the Court of Appeals had ordered.

In *Elstad*, the defendant was a suspect in a burglary. He was picked up at his home and he immediately made inculpatory statements. *Miranda* warnings were not given. The defendant was then transported to the station house where he was given *Miranda* warnings and where he thereafter made a full confession. This Court held that "absent coercion or improper tactics in obtaining" the unwarned admissions, a subsequent *Miranda* warning can cure any prior defects. In *Elstad*, this Court opined that the failure to give *Miranda* when the defendant was first confronted was inadvertent. There was no attempt at a detailed interrogation, and *Miranda* warnings were promptly given when the defendant reached the station house. Thus, both the admissions made at the home and the admissions made at the station house were deemed admissible.

In *Seibert*, the defendant was suspected in a possible arson fire that had resulted in a person's death. The police used a deliberate interrogation technique which involved unwarned interrogation and questions designed to obtain a confession. After the confession was obtained, *Miranda* warnings were then given and the interrogator asked questions designed to repeat the confession previously given. This Court held that the *Miranda* warnings were insufficient and ineffective under these circumstances. As a result, the entire interrogation was suppressed.

The Michigan Court of Appeals suppressed the statements made before the *Miranda* warnings were given. The challenged appellate analysis thus focused on the statements made after the *Miranda* warnings. The Michigan Court of Appeals cited both *Elstad* and *Seibert.* The appellate court concluded that *Elstad* applied, opining

that even though the Petitioner had confessed, she was free to end the interview and leave until around 5 PM when she was formally arrested. The appellate court also characterized the failure to give *Miranda* warnings as an inadvertent mistake as opposed to an attempt to avoid giving the warnings until the object of the interrogation had been achieved. The state appellate court also opined that the post-warning questions were not identical to the pre-warning statements.

An analysis based on *Seibert* would yield a different result. Specifically: 1) there was a deliberate interrogation technique, *i.e.*, bringing in a different interrogator with an agenda of being aggressive; 2) the interrogation technique included not giving *Miranda* warnings. In fact, the interrogation had been going for over five hours before *Miranda* warnings were given and over two hours after the new interrogator took over; 3) there were constant accusations that the Petitioner was not telling the truth; 4) there were constant allegations that prosecutors were listening to the interrogation and that the prosecutors were ready to charge the Petitioner; 5) the Petitioner was told that her only chance for lesser charges was to tell the truth; 6) the Petitioner confessed, but the interrogators kept going without giving *Miranda* warnings; 7) there was no break in the interrogation, *i.e.*, the interrogation did not stop nor did the location of the interrogation change; and 8) the interrogators again got the confession during the post-*Miranda* interrogation. Contrary to the Court of Appeals assertion, it is contended that there was no inadvertent mistake. The facts of the Petitioner's case are far different than *Elstad*'s facts.

If *Seibert* and not *Elstad* applied, there was likely a habeas violation that would have required relief. It is the Petitioner's opinion that the Michigan Court of Appeals (the last court to decide the merits) misapplied established Federal precedent, requiring habeas relief on Fifth Amendment grounds. In this regard, one Justice of the Michigan Supreme Court dissented from a decision to deny the Application and opined that more analysis was required regarding the post-warning statements.

Given the difficulty of applying this Court's two cases and of deciding when one or the other should be applied, granting certiorari would give this Court an opportunity to further clarify the limits on interrogation techniques. This case squarely presents the issue and gives this Court an opportunity to provide needed guidance on a subject that repeats itself with great frequency. This Court could also resolve the Circuit split.

2. The Fifth Amendment Voluntariness Question Warrants Review.

A. *Cardwell v. Taylor*, 461 US 571 (1983). In *Cardwell*, this Court reaffirmed that *Stone v. Powell*, 428 US 465 (1976) precludes habeas review of Fourth Amendment questions as long as the criminal defendant had a full and fair opportunity to litigate the Fourth Amendment claims in state court.

This Court also held that relief could be granted if statements were involuntary and therefore obtained in violation of the Fifth Amendment. This Court used the "grant, vacate, and remand" procedure, thus sending the

case back to the Court of Appeals to review the District Court's decision on voluntariness.

In the instant case, the voluntariness issue was not considered by the Federal habeas courts. As an alternative remedy, the Petitioner is respectfully asking this Court to consider the GVR remedy and to grant the Petition, vacate the decision of the Court of Appeals and remand for consideration of the Fifth Amendment claim on the merits.

B. The Michigan Court of Appeals. During the first appeal, the Michigan Court of Appeals addressed the voluntariness issue. There was no hearing that specifically addressed voluntariness or that gave the Petitioner an opportunity to make her position on voluntariness part of the decision-making process. Rather, the Michigan Court of Appeals relied on a decision of the Michigan Supreme Court which had set forth a number of factors that can be considered when determining whether a statement was voluntarily made. *People v. Cipriano*, 431 Mich 315, 429 NW2d 781 (1988). *Cipriano* cited and relied upon two cases from this Court in making its analysis. *Columbe v. Connecticut*, 367 US 568 (1961) and *Schneckloth v. Bustamonte*, 412 US 218 (1988).

The Michigan Court of Appeals reasoned that : 1) there was no physical abuse or threats of physical abuse; 2) no evidence of injury, ill health, or that she was under the influence of a controlled substance; 3) the Petitioner had set the date and time for the interview and had driven herself to the Sheriff's office; 4) The Petitioner had ended a previous interrogation because she had to pick up a grandchild; 5) the Petitioner was intelligent and did give some exculpatory explanations; 6) the Petitioner was asked

whether she needed anything or wanted to take a break; 7) the detectives did not threaten to arrest the Petitioner's daughters; and 8) although the Petitioner confessed, she tried to minimize what happened.

It is the Petitioner's position that this reasoning about voluntariness was a misapplication of this Court's precedents. At the threshold, the Court of Appeals' own recitation of the interview makes it clear that there was an extreme level of psychological pressure applied to the Petitioner. She was threatened and badgered. She was told that she had to confess because prosecutors were standing by and that she was going to be charged. The pressure went on continuously for hours. Even after *Miranda* warnings were given, there was additional unrelenting pressure in an effort to re-obtain the confession that had previously been given. The Court of Appeals analysis ignores the level of psychological pressure. The facts that the Petitioner voluntarily went to the interview, had terminated a previous interview, and that she was intelligent are factors to consider, but they should not have been considered without balancing those factors against the overall psychological pressure that went on for hours. Finally, the fact that the Petitioner tried to minimize her responsibility is a jury question and not a voluntariness question. The confession was forced out of her, and it is only human reaction to minimize one's culpability.

In sum, voluntariness is an important issue in confession jurisprudence. This case presents this Court with an opportunity to revisit established precedents and to again give guidance to the bench, the bar, and law enforcement about how this important issue should be handled. Alternatively, this Court could grant the Petition,

vacate the Sixth Circuit decision, and remand so that the voluntariness issue can be considered.

3. The technology issue warrants consideration and review in the context of whether a person in the Petitioner's position can actually receive an opportunity for full and fair litigation of a claim in state courts based on advanced technology which has not yet been addressed by this Court.

A. The Technology Problem. It is undisputed that technology is developing at a rapid pace. It is also undisputed that these technological advances expose the personal lives of people to law enforcement in ways that did not exist and were likely not anticipated in 1976 when *Stone v. Powell* was decided.

When technology enhances law enforcement's law enforcement's surveillance abilities, this Court has typically recognized a Fourth Amendment search only when the technology is particularly invasive. *E.g.*, *Kyllo v. United States*, 533 US 27 (2001) (thermal imaging camera); *United States v. Jones*, 565 US 400 (2012) (attaching a GPS tracking device without first obtaining a warrant).

In the Petitioner's case, the specific technology involved was a tower dump. When the police originally collected the data, they apparently did not have the knowledge or the equipment to decipher the data. As a result, the police were not able to determine anything useful. When the case was re-opened, technology had advanced to the point where the police were able to decipher the data and to determine the cell phone movements of both the Petitioner and Ms. Kelly. Since those movements matched and since

they ended in the area where Ms. Kelly's body was found, the data was powerful evidence for the prosecution.

The Petitioner did have an opportunity to attack the evidence and did so both in the trial court and on appeal.

The problem is that the law often develops slower than the technology. As a result, someone like the Petitioner is often presenting questions of first impression. If this Court has not yet addressed a specific technology, there is no legal guidance from this Court about how the state court should resolve a suppression motion based on new technology. In the Petitioner's case, the state court declined to address whether a cell tower dump fell within *Carpenter.* As a result, while the Petitioner had a theoretical opportunity to address the issue, the state court denied relief because *Carpenter* did not provide an answer. This Court has recognized exceptions to *Stone*. For example, in *Withrow v. Williams*, 507 US 680 (1993), this Court held that a suppression motion based on a Fifth Amendment claim is not barred by *Stone*. Granting certiorari would give this Court an opportunity to consider whether developments in technology which had outpaced authoritative legal decisions can be litigated in a habeas proceeding. This is particularly true in situations where the law is not clear in the pre-habeas stages of a criminal case but becomes clear at a later date.

B. Technology and this Court. For years, this Court has taken the position that individuals do not have a reasonable expectation of privacy in activity that occurs in the public view. *E.g.*, *California v. Ciraolo*, 476 US 207 (1986) (warrant not required to view property from the air); *Dow Chemical v. United States*, 487 US 227 (1986)

(aerial view of an industrial plant did not violate the Fourth Amendment).

An exception was announced when surveillance was conducted of activities beyond the public view using equipment not generally available to the public. *E.g.*, *Kyllo v. United States*, 533 US 27 (2001) (use of a thermal imaging camera for surveillance of a suspect's home).

In *United States v. Knotts*, 460 US 276 (1983), this Court held that using a beeper attached to a container of chemicals to aid in tracking the vehicle was not a search. In *Carpenter v. United States*, 585 US 296 (2018), this Court distinguished *Knotts* and opined that "different constitutional principles may be applicable if twenty-four hour surveillance of any citizen of this country was possible." 585 US at 306-307, citing concurring opinions in *United States v. Jones*, 565 US 400, 430 (Justice Alito concurring); 565 US 400, 415 (Justice Sotomayor, concurring). *(Jones* itself held that attaching a GPS device to a vehicle in order to track its movements was a search). 565 US 400 (2012).

In *Carpenter v. United States*, 585 US 296 (2018), this Court distinguished between "pursuing a subject for a brief stretch," from secretly monitoring and cataloguing every single movement of an individual's car for a very long period. 565 US at 429-430. Using a cell tower to track a person's movements for a lengthy period of time "provides an all-encompassing record of the holder's whereabouts." 565 US at 311. This Court opined that tracking cell site location data allows the Government to "travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers." 565 US

at 312. As a result, accessing the cell-site location data "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements," thereby constituting a search. 565 US at 313.

A related issue is the so-called third-party doctrine. Usually, a person lacks a reasonable expectation of privacy in information that person has voluntarily disclosed to a third-party, *i.e.*, Fourth Amendment protections do not apply. *E.g.*, *Smith v. Maryland*, 442 US 735 (1979) (installation of a pen register by a telephone company is not a search); *United States v. Miller*, 425 US 435 (1976) (bank depositor has no privacy interest in records maintained by the bank).

Technology became an issue and in *Carpenter*, this Court essentially held that the third-party doctrine does not apply to the retrospective collection of cell-site location information for periods of at least seven days. This Court recognized that carrying a cell phone is "indispensable to participation in modern society" and that cell phones generate cell-site location information "without any affirmative act on the part of the user." In concluding that a search had occurred, this Court left open a number of possibilities including: a) obtaining less than seven day's work of cell-site location information; b) collection of cell-site location information in real time; c) tower dumps which did not focus on a single suspect; or d) business records that might reveal location information.

C. The Suggested Exception. The problem with law enforcement using enhanced surveillance technology is that it is often uncertain whether a search has occurred. In general, a Fourth Amendment search occurs only if

the target had "a reasonable expectation of privacy in the area searched." *E.g.*, *Katz v. United States*, 389 US 347 (1967). A two-part, conjunctive test is used: a) does the individual have a subjective expectation of privacy in the object of the challenged search and b) is society willing to recognize that expectation as reasonable? *E.g.*, *California v. Ciraolo*, 476 US 207 (1986). Many of the decisions of this Court wrestled with the question of whether there was a reasonable expectation of privacy (*e.g.*, *Katz* deciding that the use of a public phone booth created an expectation of privacy). Prior to this Court deciding the issue, reasonable jurists could disagree about whether a particular use of technology was or was not a search.

For example, this Court has not addressed such technological advances such as: a) cutting edge drone technology; b) artificial intelligence software; c) developments in what video cameras can do; and d) pole cameras.

In the Petitioner's case, this Court has not addressed cell tower dumps. Thus, while the State of Michigan gave the Petitioner an opportunity to challenge the cell tower dump, the uncertainty of what legal principles applied meant that she really did not get a meaningful opportunity. Indeed, her case presented a variation. Specifically, when the police did the original cell tower dump, they had not focused upon the Petitioner. The tower dump went unanalyzed for years because the investigation had gone cold. When the tower dump was finally analyzed, the investigation had focused on the Petitioner and the police were looking for data related to her cell phone. This fact brought her facts closer to *Carpenter*, but because this Court had declined to rule on tower dumps, the

state courts refused to give substance to her arguments. Even if the law subsequently crystalizes, someone in the Petitioner's situation would be denied any meaningful relief because of *Stone v. Powell.* The Petitioner is asking this Court to conclude that this type of situation should be considered an exception to *Stone v. Powell*, allowing for habeas review.

The Petitioner's case squarely gives this Court the opportunity to address the problems raised by advances in technology and the use of those advances by law enforcement to intrude on legitimate privacy interests.

CONCLUSION

The Petition for a Writ of Certiorari should be granted or, alternatively, the Petition should be granted and the judgment of the Sixth Circuit Court of Appeals should be vacated and the cause remanded.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 10, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1607

ROBIN ROOT,

Petitioner-Appellant,

v.

JEREMY HOWARD, WARDEN,

Respondent-Appellee.

Filed February 10, 2025

ORDER

Robin Root, a Michigan prisoner, appeals the district court's denial of her petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. She applies for a certificate of appealability (COA). For the following reasons, her application is denied.

In 2007, Janna Kelly went missing. *People v. Root*, No. 346164, 2020 Mich. App. LEXIS 2712, 2020 WL 1816009, at *1 (Mich. Ct. App. Apr. 9, 2020) (per curiam). The day after her disappearance, police recovered her

purse, wallet, and jacket from a car wash near her house. *Id.* And they found her car parked a few blocks from her home. Both the jacket and the car had blood on them that did not belong to Kelly. In an effort to locate Kelly, police obtained cell-site location information (CSLI) for her cellphone. 2020 Mich. App. LEXIS 2712, [WL] at *3. The CSLI showed that on the morning after Kelly's disappearance, her phone connected to a tower by her house. *Id.* Later that day, Kelly's phone connected to towers in two different nearby cities. *Id.* Several months after her disappearance, a surveyor found her body near the last cell site that connected to her phone. *Id.*

In 2009, police obtained a court order to collect information as a part of a tower dump. Unlike CSLI related to a specific cell phone, a tower dump downloads the information of all devices connected to a particular cell site during the specified period. *Id.* The police thus received a list of every phone that connected to the cell towers near Kelly's home and where her body was discovered. *Id.* But at the time, the police department was unable to decipher the information. *Id.*

Six years later, when reviewing the case, detectives discovered that Root's DNA—which the police had collected in 2007—matched DNA from the blood on Kelly's car and jacket. *Id.* And they learned that Root's phone number appeared in the tower dump. Root's cell phone was around Kelly's phone at the time Kelly disappeared. *Id.* The day after Kelly disappeared, Root's phone traveled at the same time as Kelly's phone to the area where Kelly's body was later found. *Id.*

Appendix A

In 2015, the police obtained a court order, but not a warrant, for Root's cell phone billing records for dates relevant to the murder. *Id.* The billing records showed that two days after Kelly went missing, Root called Christian evangelist Billy Graham's hotline. 2020 Mich. App. LEXIS 2712, [WL] at *4. The police believed Root "made this call because she felt guilty for killing Kelly." *Id.* Based on this evidence, police conducted a series of interviews with Root. During the last of these interviews, Root confessed to killing Kelly. The police used evidence from the tower dump and her billing records in eliciting the confession. 2020 Mich. App. LEXIS 2712, [WL] at *2, *4.

After the Michigan Court of Appeals ordered a new trial, a jury convicted Root of second-degree murder and sentenced her to 20 to 50 years in prison. The Michigan Court of Appeals affirmed. 2020 Mich. App. LEXIS 2712, [WL] at *1. Relevant here, the court concluded that the trial court did not err in refusing to suppress Root's inculpatory statements. 2020 Mich. App. LEXIS 2712, [WL] at *6. Citing the recently decided *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), Root had argued that the exclusionary rule required suppression of her statements because the police used information from the warrantless tower dump in interrogating her, but the court rejected that argument. Root also challenged the use of the billing records in interrogating her. The court reviewed for plain error because Root failed to preserve the issue in the trial court and rejected it because using the billing

records did not violate her Fourth Amendment rights. *Id.* The Michigan Supreme Court declined to review the Court of Appeals' judgment. *People v. Root*, 947 N.W.3d 818 (Mich. 2020) (mem.). Root then timely filed this § 2254 petition, raising a single claim: that using the tower dump and billing records to extract her confession violated her Fourth and Fifth Amendment rights. The district court denied the petition and declined to issue a COA. Root now seeks a COA from this court.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of h[er] 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, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Reasonable jurists would not debate the district court's resolution of Root's claim. The district court reasoned that Root's claim implicated only the Fourth Amendment and determined that *Stone v. Powell*, 428 U.S. 465, 482, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), barred it. *Stone* bars a Fourth Amendment habeas claim unless "the state provided no procedure by which the prisoner could raise h[er] Fourth Amendment claim, or the prisoner was foreclosed from using that procedure." *Good v. Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013) (quoting *Willett v. Lockhart*, 37 F.3d 1265, 1273 (8th Cir. 1994) (en banc)). The State provided Root a procedure. She took

advantage of that procedure when she raised her Fourth Amendment claim in the Michigan Court of Appeals on direct appeal. *See Root*, 2020 Mich. App. LEXIS 2712, 2020 WL 1816009, at *336. "That suffices to preclude review of the claim through a habeas corpus petition under *Stone*." *Good*, 729 F.3d at 640. Therefore, reasonable jurists could not debate the district court's resolution of Root's Fourth Amendment claim.

Seeking to avoid *Stone*, Root attempts to assert her claim under the Fifth Amendment as well. She claims that her confession arose from the allegedly unconstitutional tower dump search and billing records inquiry and that its use at trial therefore violates her Fifth Amendment rights. But whether the tower dump was an unconstitutional search under *Carpenter* is a Fourth Amendment issue. And obtaining the billing records without a warrant also implicates the Fourth Amendment. So, Root's Fourth and Fifth Amendment claims are inextricably interwoven. Without an independent Fifth Amendment claim, both claims are barred by *Stone*. *Cardwell v. Taylor*, 461 U.S. 571, 572-73, 103 S. Ct. 2015, 76 L. Ed. 2d 333 (1983) (per curiam).

Therefore, this court **DENIES** the application for a COA.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX B — JUDGMENT, OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JULY 9, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 2:21-CV-11113
HON. DENISE PAGE HOOD

ROBIN L. ROOT,

Petitioner,

v.

JEREMY HOWARD,

Respondent.

Filed July 9, 2024

JUDGMENT

The above-entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, the Honorable Denise Page Hood, United States District Judge, presiding, and in accordance with the Opinion and Order entered on this date;

Appendix B

IT IS ORDERED AND ADJUDGED that the Petition for a Writ of Habeas Corpus is **DENIED** and **DISMISSED WITH PREJUDICE**.

KINIKIA ESSIX
CLERK OF THE COURT

APPROVED:

BY: s/LaShawn Saulsberry
DEPUTY CLERK

s/Denise Page Hood
Denise Page Hood
United States District Court
Dated: July 9, 2024

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 2:21-CV-11113
HON. DENISE PAGE HOOD

ROBIN L. ROOT,

Petitioner,

v.

JEREMY HOWARD,

Respondent.

Filed July 9, 2024

OPINION & ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS, DENYING A CERTIFICATE OF APPEALABILITY, & DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

I. Introduction

Michigan prisoner Robin L. Root ("Petitioner"), through counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that she is being held in custody in violation of her constitutional rights. ECF No. 1. Petitioner was convicted of second-degree

murder, Mich. Comp. Laws § 750.317, following a jury trial in the Kent County Circuit Court. She was sentenced to 25 to 50 years in prison in 2018. In her pleadings, she challenges the admission of her inculpatory statements to police. For the reasons stated herein, the Court denies the habeas petition. The Court also denies a certificate of appealability and denies leave to proceed in forma pauperis on appeal.

II. Facts and Procedural History

Petitioner's conviction arises from the death of Janna Kelly in Grand Rapids, Michigan in 2007. The Michigan Court of Appeals described the underlying facts, which are presumed correct on habeas review, *see* 28 U.S.C. § 2254(e)(1); *Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009), as follows:

> On the evening of December 4, 2007, Janna Kelly went missing from her Grand Rapids, Michigan, home. Her daughter and boss became concerned, and a police investigation ensued after Kelly's purse, wallet, and a fleece jacket were discovered abandoned at a local car wash the next day. Police also discovered Kelly's car parked in a neighborhood within walking distance of Kelly's home. Officers found blood on the car and on the jacket; test results showed that it belonged to an unidentified female donor. Officers also obtained Kelly's phone records and found that her phone had traveled from Grand Rapids to a location in Ottawa County on December 5, 2007.

Appendix B

In the course of looking for her mother, Kelly's daughter searched her mother's house and discovered that Root had called Kelly's home phone on the night of her disappearance. The daughter also discovered a note Kelly had written indicating that she was arranging to have Root pay a judgment that Kelly obtained against Root after she evicted Root from the duplex that she owned. The duplex was located behind Kelly's home.

Detective Tim DeVries with the Grand Rapids Police Department interviewed Root on Thursday, December 6, 2007. At the request of police, Root and her live-in male companion drove to the police station to be interviewed. Root's interview was recorded. At the time of the interview, Root was living in a different rental home located behind Kelly's house. Root acknowledged that when the police first approached her house that day, she told them they were probably there to talk with her about her ex-landlord. She explained that she saw the news story on television that evening and recognized Kelly immediately. Root stated that she had last seen Kelly the Saturday before and acknowledged that it was in regard to money she owed Kelly for unpaid rent, for which Kelly had obtained a judgment. Root described her personal encounters with Kelly on Wednesday, November 28 and Saturday, December 1, 2007, both occurring at Kelly's house. She was very

detailed in answering questions concerning her whereabouts in the days leading up to Kelly's disappearance, including where she was when making two telephone calls to Kelly—at 5:02 p.m. and at 6:15 p.m.—on Tuesday, December 4, 2007, the evening Kelly disappeared. However, when asked about her activities on Wednesday, December 5, 2007, which was the day after Kelly's disappearance and only one day prior to the police interview, she took a long time to answer and became extremely vague. She stated that she was home for the most part, but that she was also over at her daughter's house and ran some errands. When asked about what errands she ran, she stated that one of them included getting gas. When asked what gas station she went to, Root said she could not recall, but that it was probably one of two that she typically uses. She stated that the farthest she drove that day was to pick up her son at his school, Forest Hills Central, which is located in Cascade, Michigan. When asked if she ever gets up to Grand Haven, Hudsonville, Jenison, or Zeeland, she said no, "I don't try and go that far" and that there was no reason for either her or her male companion to be out that way. Root voluntarily provided a DNA sample; it was not immediately sent to the lab for testing.

In March 2008, a surveyor discovered Kelly's remains while surveying a property in Grand Haven Township. Testimony and evidence

established that someone had stripped Kelly of her clothing, dumped her in a secluded area, and set her on fire using gasoline, with charring most prominent around her face and upper body. There was also evidence that her mouth and limbs had been duct taped. Due to the partial burning, exposure to the environment, and animal activity, the medical examiner could not determine whether the perpetrator had asphyxiated Kelly. The medical examiner determined that Kelly died from homicide by unspecified means.

More than six years passed without discovering who killed Kelly. In 2014, cold case detectives Venus Repper and Kreg Brace with the Ottawa County Sheriff's Office reviewed Kelly's case. Repper noticed that some DNA profiles had not been sent to the laboratory that tested the blood from Kelly's car and the jacket found at the carwash. She contacted DeVries about her discovery and the additional samples were sent to the lab. The results of the testing showed that the blood matched Root's DNA profile. DeVries also analyzed cell phone data and learned that Root's cell phone had moved along the same path at the same time that Kelly's cell phone had traveled west from Grand Rapids to Grand Haven on Wednesday, December 5, 2007. Root's cell phone stopped for a period of time in the same area where Kelly's remains were later found.

Repper and Brace contacted Root and visited her home on April 21, 2015, conducting a short, audiotaped interview, and arranging for her to visit the Ottawa County Sheriff's Office in West Olive the next day for a formal interview. The detectives did not inform Root about the DNA and cell phone evidence they had obtained. The following day, Root drove herself to the Sheriff's Office, where, in another audiotaped interview, she answered casual questions for 90 minutes before cutting the interview short in order to pick up her granddaughters from school. The interview ended before any detailed discussion of Root's whereabouts and activities at the time of Kelly's disappearance. Root arranged with detectives to complete the interview on another day. On April 27, 2015, Root again drove herself to the Sheriff's Office, where her interview with detectives began at 11:44 a.m. and lasted for approximately six hours. The interview was videotaped. After several hours of questioning, the detectives extracted from Root a confession. Root unsuccessfully sought to suppress the confession from being admitted as evidence at trial.

At her trial, Root conceded that she killed Kelly and dumped her remains in Ottawa County, but she argued that Kelly's death was an accident and that she covered up the crime out of panic. As already noted, the jury rejected Root's defense and found her guilty. [*People v. Root*,

> unpublished per curiam opinion of the Court of Appeals, issued August 31, 2017 (Docket No. 331123), p. 1-2.]
>
> This Court vacated defendant's first-degree murder conviction finding that portions of her statement to police were inadmissible because they were obtained in violation of her *Miranda* rights. *Root*, unpub. op. at 3-15. On remand to the trial court, defendant was again tried before a jury, and the portions of her statement to police that this Court had determined were inadmissible were not submitted to the jury. She was convicted of second-degree murder and thereafter sentenced to 25 to 50 years in prison.

People v. Root, No. 346164, 2020 Mich. App. LEXIS 2712, 2020 WL 1816009, *1-2 (Mich. Ct. App. Apr. 9, 2020) (footnote citation omitted).

Following her conviction and sentencing (after her second trial), Petitioner filed an appeal of right with the Michigan Court of Appeals raising the same claim presented on habeas review, as well as two sentencing claims. The court denied relief on those claims and affirmed her conviction and sentence. *Id.* at *3-8. Petitioner then filed an application for leave to appeal with the Michigan Supreme Court, which was denied in a standard order. *People v. Root*, 506 Mich. 892, 947 N.W.2d 818 (2020).

Petitioner thereafter filed her federal habeas petition. She raises the following claim:

> The Michigan appellate courts erroneously affirmed the trial court's denial of [her] motion to suppress her April 27, 2015 inculpatory statements to police investigators, contrary to [her] Fourth and Fifth Amendment federal constitutional rights.

ECF No. 1, PageID.2; ECF No. 2, PageID.19. Respondent filed an answer to the petition contending that it should be denied. ECF No. 7. Petitioner filed a reply to that answer. ECF No. 9.

III. Standard of Review

Federal law imposes the following standard of review for habeas cases brought by state prisoners:

> 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 proceedings.

28 U.S.C. § 2254(d).

"A state court's decision is 'contrary to' ... clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)); *see also Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

"[T]he 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. However, "[i]n order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-521 (citations omitted); *see also Williams*, 529 U.S. at 409. "AEDPA thus imposes a 'highly deferential standard for

evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (quoting *Lindh*, 521 U.S. at 333, n. 7; *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam)).

A state court's determination that a claim lacks merit "precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)). Pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.* In order to obtain federal habeas relief, a state prisoner must show that the state court's rejection of a claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*; *see also White v. Woodall*, 572 U.S. 415, 419-420, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014). A habeas petitioner cannot prevail as long as it is within the "realm of possibility" that fairminded jurists could find

the state court decision reasonable. *Woods v. Etherton*, 576 U.S. 113, 118 (2016); *Woods v. Donald*, 575 U.S. 312, 316, 135 S. Ct. 1372, 191 L. Ed. 2d 464 (2015).

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *Williams*, 529 U.S. at 412; *see also Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (noting that the Supreme Court "has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court") (quoting *Wright v. Van Patten*, 552 U.S. 120, 125-126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (per curiam)); *Lockyer*, 538 U.S. at 71-72. Section 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington*, 562 U.S. at 100. Furthermore, it "does not require citation of [Supreme Court] cases-indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); *see also Mitchell*, 540 U.S. at 16.

The requirements of clearly established law are determined solely by Supreme Court precedent. "[C]ircuit precedent does not constitute 'clearly established Federal law as determined by the Supreme Court'" and it

cannot provide the basis for federal habeas relief. *Parker v. Matthews*, 567 U.S. 37, 48-49, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012) (per curiam); *see also Lopez v. Smith*, 574 U.S. 1, 2, 135 S. Ct. 1, 190 L. Ed. 2d 1 (2014) (per curiam). The decisions of lower federal courts, however, may be useful in assessing the reasonableness of the state court's resolution of an issue. *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007) (citing *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003)); *Dickens v. Jones*, 203 F. Supp. 354, 359 (E.D. Mich. 2002).

Lastly, a state court's factual determinations are presumed correct on federal habeas review. 28 U.S.C. § 2254(e)(1). A petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-361 (6th Cir. 1998). Habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

IV. Analysis

Petitioner asserts that she is entitled to habeas relief because the trial court erred in refusing to suppress her April 27, 2015 inculpatory statements to police investigators in violation of her Fourth and Fifth Amendment rights. Specifically, she argues that those statements should have been suppressed because they were the product of an illegal search and seizure of her cell phone records. Respondent contends that this claim is not cognizable on habeas review, that it is procedurally defaulted in part, and that it lacks merit.

Appendix B

The Michigan Court of Appeals described the relevant facts for this claim, which, again, are presumed correct on habeas review, as follows:

> Shortly after Kelly disappeared in December 2007, the police, in an effort to locate Kelly, obtained the cell-site location information (CSLI) related to her cell phone. From this information, the police were able to determine that on the morning after her disappearance, Kelly's cell phone was located near her home because the phone connected with a tower near her home. However, at 11:22 a.m. that day, Kelly's cell phone connected with a cell site in Hudsonville, and at 12:03 p.m., her cell phone connected with a cell site in West Olive, near where her body was later discovered in March 2008.
>
> On September 23, 2009, the police obtained information from certain phone companies from what is known as a "tower dump." Although the officers obtained a court order to collect the information, they did not obtain a warrant. Unlike CSLI related to a specific cell phone, a tower dump is a download of information of all the devices that connected to a particular cell site during a particular time period. In this case, police obtained a tower dump for every phone number that connected to the cell phone tower near the victim's home and a tower dump for every phone number that connected to the

cell tower near the location where her body was discovered during the relevant times. However, at that time the police did not decipher the information from the tower dump; the lead detective investigating the murder testified that at that time the police department had neither the software nor the expertise to do so.

Six years later, after detectives reviewing the police investigation as a cold case discovered that defendant's DNA matched the DNA found on the victim's car and jacket, police deciphered the CSLI obtained from the 2009 tower dump and found that defendant's cell phone had been in the area of the victim's cell phone at the time of her murder and the next day traveled at the same time as the victim's phone to the area where the victim's body was later discovered. In January 2015, police obtained the billing records for defendant's cell phone for dates that included December 5, 2007, again with a court order but without obtaining a warrant.

In April 2015, the police again interviewed defendant; during the interview, the detectives confronted defendant with the information that they had gathered from the tower dump that her cell phone had been in the location of the victim's cell phone at the time she was murdered, and the next day defendant's cell phone moved at the same time as the victim's cell phone to the location where the victim's

body was later discovered. Police also told defendant that her cell phone billing records indicated that she had called Billy Graham's hotline on December 7, 2007, and that they believed she made this call because she felt guilty for killing Kelly. Defendant eventually confessed to killing the victim and moving her body to the West Olive location.

At trial, defendant moved to suppress the statements that she made to police after the detectives confronted her with information they had gleaned from the tower dump. Defendant argued that she made the statements after police confronted her with evidence police obtained without a search warrant, and therefore her statements were the product of a warrantless search and subject to suppression. Relying on a then newly-released Supreme Court decision in *Carpenter v. United States*, __ U.S. __; 585 U.S. 296, 138 S. Ct. 2206, 2221; 201 L. Ed. 2d 507 (2018), defendant argued that the officers were required to obtain a search warrant before obtaining her CSLI. Defendant did not contend, however, that the statements were subject to suppression because information was gathered from her billing records about the call to the Billy Graham hotline.

The trial court denied the motion to suppress. The trial court observed that *Carpenter* involved CSLI obtained regarding a particular

> phone number and did not involve locational information ascertained through a tower dump of all numbers connecting with a cell tower at a particular time. The trial court also noted that there was no indication that the newly-announced warrant requirement of *Carpenter* was to be applied retroactively to invalidate earlier searches. The trial court therefore permitted the introduction of defendant's statements to police made after she learned that they had obtained the locational information.

Root, 2020 Mich. App. LEXIS 2712, 2020 WL 1816009 at *3-4 (explanatory footnotes omitted).

The Michigan Court of Appeals then discussed the legal issues, found no constitutional violation, and denied relief on this claim. The court explained:

> On appeal, defendant contends that the police obtained the CSLI regarding her cell phone without a warrant in violation of the Fourth Amendment. She argues that the trial court therefore erred in denying her motion to suppress statements she made to police after she was confronted with the improperly seized CSLI. Defendant also suggests that the trial court should have suppressed her statements because police obtained her cell phone billing information without a warrant in January 2015 and used that information to learn that she called Billy Graham's hotline on December 7,

2007, then used the information, together with the CSLI information, during the April 2015 interview to obtain her confession.

This Court reviews de novo constitutional issues and the application of the exclusionary rule. *People v. Campbell*, __ Mich. App. __, __; __ N.W.2d __ (2019) (Docket No. 344078); slip op. at 2. When reviewing a trial court's ruling on a motion to suppress, we review the trial court's factual findings for clear error and review de novo the trial court's interpretation of the law or application of a constitutional standard. *People v. Tanner*, 496 Mich. 199, 206; 853 N.W.2d 653 (2014). With regard to the unpreserved challenge to the use of evidence obtained from defendant's cell phone billing records, defendant failed to properly preserve this issue by specifically raising this issue before the trial court, and we therefore review the issue for plain error affecting defendant's substantial rights. *See People v. Carines*, 460 Mich. 750, 763; 597 N.W.2d 130 (1999).

The United States and Michigan Constitutions both guarantee the right of citizens to be free from unreasonable searches and seizures. *See* U.S. Const., Am. IV; Const. 1963, art. 1, § 11; *People v. Slaughter*, 489 Mich. 302, 310; 803 N.W.2d 171 (2011). A search occurs when "the government intrudes on an individual's reasonable, or justifiable, expectation of

privacy," and property is seized when "there is some meaningful interference with an individual's possessory interest in that property." *People v. Woodard*, 321 Mich. App. 377, 383; 909 N.W.2d 299 (2017). The reasonableness of a search and seizure is fact specific and is determined by examining the totality of the circumstances. *People v. Williams*, 472 Mich. 308, 314; 696 N.W.2d 636 (2005). To comply with the prohibition against unreasonable searches and seizures, the police must establish probable cause and that they either obtained a warrant to search or that the search fell within an exception to the warrant requirement. *People v. Kazmierczak*, 461 Mich. 411, 418; 605 N.W.2d 667 (2000).

Generally, evidence seized in violation of the constitutional prohibition against unreasonable searches and seizures must be excluded from evidence at trial. *People v. Mahdi*, 317 Mich. App. 446, 458; 894 N.W.2d 732 (2016). The exclusionary rule was judicially created to protect the Fourth Amendment right to be free of unreasonable searches and seizures by barring admission into evidence of "materials seized and observations made during an unconstitutional search." *People Hawkins*, 468 Mich. 488, 498-499; 668 N.W.2d 602 (2003). However, in *People v. Goldston*, 470 Mich. 523, 526; 682 N.W.2d 479 (2004), our Supreme Court adopted the good-faith exception to

the exclusionary rule, stating that "[t]he purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant." Thus, the "application of the exclusionary rule is inappropriate in the absence of governmental misconduct." *People v. Frazier*, 478 Mich. 231, 250; 733 N.W.2d 713 (2007). Rather, "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right .... Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan v. Tucker*, 417 U.S. 433, 447; 94 S. Ct. 2357; 41 L. Ed. 2d 182 (1974).

In *Carpenter*, law enforcement officers obtained CSLI pursuant to court orders issued under the Stored Communications Act, which requires law enforcement only to show "reasonable grounds" for believing that the CSLI was "relevant and material to an ongoing investigation" to obtain a court order for the information. *Carpenter*, _ U.S. at _; 138 S. Ct. at 2212; 18 USC § 2703(d). In *Carpenter*, the police had obtained the CSLI related specifically to the defendant's cell phone (not from a "tower dump") by obtaining a court order, but did not obtain a warrant for the information. The Court in

Carpenter held that the locational information police obtained regarding the defendant's cell phone was obtained as the product of a search, observing that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at __; 138 S. Ct. at 2217. The Court therefore determined that a court order supported by "reasonable grounds" was not sufficient to acquire an individual's CSLI, and instead "the Government must generally obtain a warrant supported by probable cause before acquiring" CSLI specific to a defendant's cell phone. *Id.* at __; 138 S. Ct. at 2221. However, the Court also explicitly stated that it was not expressing a view on information gathered from cell phone "tower dumps," being "a download of information on all devices that connected to a particular cell site during a particular interval." *Id.* at __; 138 S. Ct. at 2220.

On remand from the Supreme Court in *United States v. Carpenter*, 926 F.3d 313, 318 (C.A. 6, 2019), vacated in part on other grounds, 788 Fed. Appx. 364 (C.A. 6, 2019), the Sixth Circuit determined that suppression of the CSLI gathered in that case was not required because the agents had in good faith relied on the Stored Communications Act when they obtained the data without a warrant. This holding is in accord with the principle that the purpose of the exclusionary rule, being the deterrence

of police misconduct, is not served when the police acted in good faith in accordance with constitutional standards that prevailed at that time. *Goldston*, 470 Mich. at 526; *see also Davis v. United States*, 564 U.S. 229, 231; 131 S. Ct. 2419; 180 L. Ed. 2d 285 (2011) (extending the good-faith exception to the exclusionary rule when police conduct in a search complied with binding precedent later overruled).

In this case, we likewise find that the police acted in good faith when obtaining information regarding defendant's cell phone as part of the "tower dump." Here, when police in 2009 obtained information from a "tower dump" of certain cell phone towers at the times relevant to Kelly's disappearance, they did so with a court order under the Stored Communications Act, which was not considered to be improper conduct under existing precedent. Indeed, even now this conduct has not been determined to be inappropriate, as the Supreme Court in *Carpenter* specifically declined to extend its holding to information obtained by police through a "tower dump." We also decline to do so here. We therefore conclude that the trial court did not err when it denied defendant's motion to suppress her inculpatory statements made after police revealed information to her they had gleaned from the tower dump.

To the extent that defendant contends on appeal that her cell phone billing records led

> to the police discovering the information that she called Billy Graham's hotline and using that information while interviewing her, we note that defendant failed to properly preserve this issue by specifically raising it before the trial court. We therefore review this issue for plain error affecting defendant's substantial rights, *Carines*, 460 Mich. at 763, and conclude that this issue is without merit. In *Carpenter*, the Supreme Court did not determine the constitutionality of obtaining a defendant's cell phone billing records without a warrant, *see Carpenter*, __ U.S. at __; 138 S. Ct. at 2234 (KENNEDY, J., dissenting), which differ from locational records. The holding in *Carpenter* was bound in an expectation of privacy in locational information. Because defendant points to no binding precedent to support her contention that her Fourth Amendment rights were violated with respect to the billing records, we find no error affecting defendant's substantial rights.

Id. at *4-6.

The state court's denial of relief is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. It is well-settled that federal courts will not address a Fourth Amendment claim on habeas review if the petitioner had a full and fair opportunity to litigate the claim in state court and the presentation of the claim was not thwarted by a failure

of the State's corrective process. *See Stone v. Powell*, 428 U.S. 465, 494-495, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). This rule extends to a claim that a statement taken from a petitioner violates the Fourth Amendment because it was the fruit of an illegal arrest or search. *See Cardwell v. Taylor*, 461 U.S. 571, 572-573, 103 S. Ct. 2015, 76 L. Ed. 2d 333 (1983) (per curiam). A court must perform two distinct inquiries when determining whether a petitioner may raise a Fourth Amendment claim in a habeas action. First, the court must determine "whether the state procedural mechanism, in the abstract, presents the opportunity" to raise a Fourth Amendment claim. Second, the court must determine "whether presentation of the claim was in fact frustrated because of a failure of that mechanism." *Machacek v. Hofbauer*, 213 F.3d 947, 952 (6th Cir. 2000) (quoting *Riley v. Gray*, 674 F.2d 522 (6th Cir. 1982)).

Michigan has a procedural mechanism which presents "an adequate opportunity for a criminal defendant to raise a Fourth Amendment claim." *Robinson v. Jackson*, 366 F. Supp. 2d 524, 527 (E.D. Mich. 2005). This procedural mechanism is a motion to suppress, ordinarily filed before trial. *See People v. Ferguson*, 376 Mich. 90, 93-94, 135 N.W.2d 357, 358-359 (1965) (describing the availability of a pre-trial motion to suppress); *see also People v. Harris*, 95 Mich. App. 507, 509, 291 N.W.2d 97, 99 (1980) (analyzing the legality of a warrantless search, seizure, and arrest even though raised for the first time on appeal).

Consequently, Petitioner is entitled to relief on this claim only if she shows that she was prevented from litigating the Fourth Amendment issue by a failure of

Michigan's procedural mechanism. Petitioner makes no such showing. Rather, the record indicates that she had the opportunity to raise, and did raise, an illegal search claim before the trial court via a motion to suppress and that she also raised the claim on direct appeal and was denied relief. Consequently, her Fourth Amendment claim is not cognizable on federal habeas review pursuant to *Stone v. Powell*.

Petitioner contends that her claim is not totally precluded by *Stone v. Powell* because she also asserts a violation of her Fifth Amendment rights. A claim that a confession was obtained in violation of a defendant's *Miranda* rights or was involuntary under the Fifth Amendment is not barred by *Stone v. Powell*. *See, e.g., Withrow v. Williams*, 507 U.S. 680, 683, 688-685, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). Petitioner, however, has not briefed her Fifth Amendment claim as a distinct issue from her Fourth Amendment claim in the proceedings before this Court. As such, she has waived her Fifth Amendment claim. *See McCray v. Metrish*, 232 F. App'x 469, 478 (6th Cir. 2007) (finding un-briefed Fifth Amendment claim to be waived and refusing to address it).

Nonetheless, to the extent that Petitioner asserts that the trial court failed to suppress the police statements admitted at her second trial in violation of her Fifth Amendment rights, her argument "is more accurately brought pursuant to the Fourth Amendment" because she sought exclusion of those statements based upon them being the fruit of the allegedly unlawful search and seizure of her cell phone records. *See United States v. Stepp*, 680

F.3d 651, 667 (6th Cir. 2012).[1] A claim that a confession was tainted by an illegal search and should have been excluded is a claim based on the Fourth Amendment, and such a claim fails under *Stone v. Powell. Cardwell*, 461 U.S. at 572-573 (discussing difference between Fourth and Fifth Amendment claims, holding that *Stone* barred claim that confession was inadmissible as fruit of illegal search, and explaining that "[o]nly if the statements were involuntary, and therefore in violation of the Fifth Amendment, could the federal court grant relief on collateral review"); *see also Machacek*, 213 F.3d at 952 (illegal arrest context). Petitioner does not allege any facts which show that the police statements admitted at her second trial were involuntary (other than the illegal search argument) so as to fall within the purview of the Fifth Amendment privilege against self-incrimination. Consequently, her claim is properly characterized as a Fourth Amendment claim – and is precluded by *Stone v. Powell*.

Lastly, even if *Stone v. Powell* does not preclude federal review of Petitioner's claim, she is still not entitled to habeas relief because her claim lacks merit. As fully explained by Respondent, *see* Resp. Ans., ECF No. 7, PageID.129-143, Petitioner fails to establish that the Michigan Court of Appeals' decision is contrary to

1. It is well-settled that confessions made after police confront a suspect with evidence obtained through an illegal search and seizure are the fruits of the poisonous tree and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). "The *Wong Sun* doctrine applies ... when the fruit of a Fourth Amendment violation is a confession." *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

Supreme Court precedent or an unreasonable application of federal law or the facts. Habeas relief is not warranted.

V. Conclusion

For the reasons stated, the Court concludes that Petitioner is not entitled to federal habeas relief. Accordingly, the Court **DENIES** and **DISMISSES WITH PREJUDICE** the petition for a writ of habeas corpus.

Before Petitioner may appeal this decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-485, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). "A petitioner satisfies this standard by demonstrating that ... jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When a court denies relief on procedural grounds, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the court

was correct in its procedural ruling. *Slack*, 529 U.S. at 484-485. Petitioner makes no such showing. Accordingly, the Court **DENIES** a certificate of appealability.

Lastly, the Court concludes that an appeal from this decision cannot be taken in good faith. *See* Fed. R. App. P. 24(a). The Court **DENIES** Petitioner leave to proceed in forma pauperis on appeal. This case is closed.

IT IS SO ORDERED.

s/Denise Page Hood
DENISE PAGE HOOD
United States District Judge

Dated: July 9, 2024