STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Clifton B. Newman, Circuit Court Judge

DARRYL FRIERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001940

BRIEF OF PETITIONER

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 4

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) 14

Frierson v. State, 417 S.C. 287, 297 S.E.2d 762, 767 (Ct. App. 2016) .... passim

Gilmore v. State, 314 S.C. 453, 457 S.E.2d 454 (1994) 14

Robinson v. State, 308 S.C. 74, 77 S.E.2d 88 (1992) 14

State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014) .... passim

State v. Mitchell, 234 Ariz. 410, 419 P.3d 69 (Ct. App. 2014) 9

United States v. Knotts, 460 U.S. 276, 281 S.Ct. 1081, 75 L.Ed.2d 55 (1983) .... passim

United States v. Jones, 565 U.S. 400, 404 S.Ct. 945 L.Ed.2d 911 (2012) .... passim

United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) 6, 9, 10

United States v. Narrl, 789 F.Supp.2d 645, 652 (D.S.C. 2011) 9, 10, 11

Richard v. United States, No. 2:09-CR-992-PMD, 2016 WL 6775699, at *2 (D.S.C. Jan. 27, 2016), appeal dismissed, 656 F. App'x 26 (4th Cir. 2016), cert. denied, 137 S. Ct. 1107, 197 L. Ed. 2d 211 (2017) 11

Statutes

28 U.S.C § 2255 10

S.C. Const. Art. I, §10 4

U. S. Const. Amend. IV 4, 13

S.C. Code §17-30-140 .... passim

ISSUE PRESENTED

Did the Court of Appeals err in refusing to find that the guilty plea was rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search?

STATEMENT

In September of 2007, the Richland County Grand Jury indicted Petitioner Frierson for assault and battery of a high and aggravated nature [ABHAN], armed robbery, kidnapping and criminal conspiracy, indictments #2007-GS-40-4362, 4363, 4364, 4429. On December 3, 2008, petitioner appeared before the Honorable J. Michelle Childs and pled guilty as charged. Sentencing was deferred to allow petitioner to testify as a State's witness in the trial of a co-defendant. On August 24, 2009, petitioner appeared before Judge Childs for sentencing. Deon O'Neil represented petitioner at both the guilty plea and the sentencing. Daniel L. Goldberg prosecuted the case on behalf of the State. Judge Childs sentenced petitioner to five (5) years for criminal conspiracy, ten (10) years for ABHAN, and thirty (30) years for both kidnapping and armed robbery. Judge Childs ordered the sentences for ABHAN, kidnapping and armed robbery to be served concurrently but consecutive to the sentence for criminal conspiracy. (App. p. 21, lines 13-21) A petition for reconsideration was filed and denied without a hearing. A timely notice of intent to appeal was filed but later dismissed by the Court of Appeals on January 8, 2010.

On June 28, 2010, petitioner filed an application for post- conviction relief [PCR]. The State filed a return on July 20, 2010. An evidentiary hearing was held on February 14, 2010, before the Honorable Clifton B. Newman. Nicole Singletary represented petitioner at the PCR hearing. Rob Corney was present on behalf of the State. In a written order filed March 27, 2012, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 4, 2012. On January 10, 2013, the petition for writ of certiorari was filed. The State filed a return on May 24, 2013. On February 22, 2014, the South Carolina Court of Appeals granted the petition for writ of certiorari and subsequent briefs were filed. On September 8, 2015, the Court of Appeals heard arguments in the case. On June 29, 2016, the Court of Appeals affirmed the denial

of post- conviction relief. A timely petition for rehearing was filed and denied on August 18, 2016. On September 19, 2016, a petition for writ of certiorari was filed with this Court. On August 22, 2017, this Court granted the petition for writ of certiorari and ordered further briefing. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in refusing to find that the guilty plea was rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search.

The State's placement and use of a mobile tracking device or GPS device to monitor petitioner's movements without a court order or search warrant violated the U.S. Const. Amend IV, S.C. Const. Art. I, §10 and South Carolina Code §17-30-140. In United States v. Jones, 565 U.S. 400, 404, 132 S.Ct. 945, 949, 181 L.Ed.2d 911 (2012)(n. 2 omitted), the Supreme Court wrote, "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'."

This Court first addressed the warrantless installation of a GPS device, post Jones, in State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014). Adams was pending direct appeal at the time Jones was decided. In Adams, this Court, quoting Jones, wrote:

> In United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), the Supreme Court held that "the Government's [warrantless] installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " 132 S.Ct. at 949. While the Supreme Court's holding of a Fourth Amendment violation was unanimous, the majority's rationale was based on a theory of trespass, characterizing the government's conduct as the physical occupation of private property for the purpose of obtaining incriminating evidence. Id.

409 S.C. at 646, 763 S.E.2d at 344. In Adams this Court found that the warrantless installation of a GPS device violated the Fourth Amendment as an illegal search requiring suppression of evidence pursuant to the exclusionary rule. This Court found that neither the attenuation/intervening act doctrine nor the good-faith reliance exception allowed admission of the evidence obtained as a result of the illegal search.

Both Adams and Jones were decided after petitioner entered his guilty plea. Neither case, however, changed Fourth Amendment principles. Instead, the cases applied established Fourth Amendment principles to the Government's use of GPS devices. The installation of the GPS device on petitioner's car, even prior to the Court's decision in Jones and prior to this Court's decision in Adams, constituted a search requiring a warrant. This conclusion is further supported by the fact that South Carolina Code §17-30-140 requires officers to obtain a court order prior to installing a mobile tracking device. The warrantless placement of the GPS device on petitioner's car was an illegal search. Plea counsel was ineffective in failing to advise petitioner that he could challenge the illegal search and move to suppress any evidence gained as a result of the illegal search. There is a reasonable probability that if plea counsel had properly advised petitioner about his ability to challenge the illegal search and move to suppress evidence, petitioner would not have pled guilty.

During the course of an investigation into the robbery of an armored truck, officers with the Richland County Sheriff's Department, without an order or search warrant, placed a mobile tracking device [GPS] on Petitioner's car. (App. p. 100, lines 12-16; Supp. App. p. 18, lines 19-20). Monitoring the GPS on Petitioner's car, officers located Petitioner and a co-defendant, Domonique Blakney, and arrested both men. Both Petitioner and Domonique Blakney gave incriminating statements. (App. p. 105, lines 11-24). On December 3, 2008, Petitioner pled guilty to assault and battery of a high and aggravated nature [ABHAN], armed robbery, kidnapping and criminal conspiracy.

In the application for post-conviction relief Petitioner alleged that plea counsel was ineffective in failing to advise Petitioner that he could challenge the placement of the GPS without an order, as required by S.C. Code §17-30-140, and move to suppress any evidence

gained as a result of the violation of the statute as well as the Fourth Amendment violation. (App. pp. 43-45).

During the PCR hearing Petitioner testified that counsel told him the GPS device was legal because it was placed on the outside of the car. (App. p. 76, lines 20 – p. 77, lines 1-8). Plea counsel admitted advising Petitioner, based on United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), that the placement of the tracking device was legal. (App. p. 101, lines 4-20). Counsel's advice was erroneous. The Knotts case did not authorize the placement of a GPS tracking device on the outside of a vehicle without an order or warrant. In Adams, this Court, discussing the inapplicability of the good faith exception to the exclusionary rule wrote, "The State contends that two United States Supreme Court cases—United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) and United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)—constitute binding precedent that specifically authorized officers to install a tracking device on Adams' car without a warrant. We disagree." 409 S.C. at 651, 763 S.E.2d at 347. This Court in Adams went on to write:

> Neither Knotts nor Karo involved, much less expressly or impliedly authorized, a physical trespass as occurred in this case. As the Supreme Court observed in Jones, "Knotts noted the limited use which the government made of the signals from [the] particular beeper, and reserved the question whether different constitutional principles may be applicable to dragnet-type law enforcement practices of the type that GPS tracking [makes] possible...." Jones, 132 S.Ct. at 952 n. 6 (internal citations and quotations omitted). Moreover, no pre-Jones precedent in this federal circuit extended Knotts or Karo to the installation and monitoring of a GPS device. We conclude Knotts and Karo did not constitute binding precedent that authorized law enforcement's warrantless actions in this case.

409 S.C. at 652, 763 S.E.2d at 347. Plea counsel was ineffective in failing to distinguish the physical trespass that occurred with the warrantless installation of the GPS device in the present case as well as in Jones and Adams, from the placement of beepers, in containers with the

consent of the owners of the containers, in Knotts and Karo. Petitioner testified that if he had been advised that he could challenge the installation of the GPS device as a Fourth Amendment violation, he would have gone to trial. (App. p. 78, lines 1-4).

In regard to the statutory violation, plea counsel admitted that he was unaware of S.C. Code §17-30-140. (App. p. 101, lines 21 – p. 102, lines 1-3). S.C. Code §17-30-140 was in effect at the time of petitioner's guilty pleas and provides:

> (A) The Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State.
>
> (B) An application under subsection (A) of this section must include:
>
> (1) a statement of the identity of the applicant;
> (2) a certification by the applicant that probable cause exists to believe that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State which may provide evidence relating to any offense or any evidence of any conspiracy or solicitation to commit any violation of the laws of this State;
> (3) a statement of the offense to which the information likely to be obtained relates; and
> (4) a statement whether it may be necessary to use and monitor the mobile tracking device outside the jurisdiction of the court from which the authorization is being sought.
>
> (C) Upon application made as provided under subsection (B), the court, upon a finding that the certification and statements required by subsection (B) have been made in the application and probable cause exists, must enter an ex parte order authorizing the installation and use of a mobile tracking device. The order may authorize the use of the device within the jurisdiction of the court and outside that jurisdiction but within the State of South Carolina if the device is installed within the jurisdiction of the court.
>
> (D) A court may require greater specificity or additional information beyond that which is required by this section as a requisite for issuing an order.
> (E) The standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices apply to the installation and use of any device as authorized by this section.

> (F) As used in this section, a "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

Petitioner testified that, at the time of the plea, he was unaware of the existence of any South Carolina statute regarding tracking devices. (App. p. 78, lines 5-8). Counsel testified that S.C. Code §17-30-140 could have been used to support a motion to suppress based on the State's failure to comply with the statute. (App. p. 104, lines 13-24). Petitioner testified that if he had known about the statute, he would not have pled guilty and instead would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). Plea counsel was ineffective in failing to distinguish Knotts and failing to challenge the GPS on constitutional grounds as well as failing to advise Petitioner in regard to the statutory violation of S.C. Code §17-30-140.

Without specifically finding deficient performance, the Court of Appeals found that Petitioner failed to show prejudice writing:

> However, even if plea counsel was deficient in failing to advise Petitioner of section 17–30–140 in conjunction with their discussions of moving to suppress and attempting to challenge the legality of the GPS monitoring at trial, we find probative evidence supports the PCR court's finding that Petitioner failed to prove the prejudice necessary to support the granting of post-conviction relief. See Strickland, 466 U.S. at 700, 104 S.Ct. 2052 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Frierson v. State, 417 S.C. 287, 297, 789 S.E.2d 762, 767 (Ct. App. 2016). In support of the finding of no prejudice the Court of Appeals wrote:

> At the time of Petitioner's guilty plea in 2008, the constitutionality of the placement of a GPS tracking device on a vehicle was an unsettled question of law; the United States Supreme Court had not decided Jones, and our supreme court had not decided Adams. Instead, Knotts provided authority suggesting the placement of a GPS tracking device on the outside of a vehicle might not have been a constitutional violation, and other South Carolina courts considering the question before Jones found no constitutional violation under such circumstances. See United States v. Narrl, 789 F.Supp.2d 645, 652 (D.S.C. 2011) ("Knotts is clear that the use of a tracking device to track a person's movements

on public roads is not a violation of that person's Fourth Amendment rights."). As no clear authority concluded that the placement of a tracking device on a vehicle without a court order was a Fourth Amendment violation at the time of Petitioner's plea, we find Petitioner failed to establish a reasonable probability that he would have prevailed at a suppression hearing despite the violation of the statute.

Frierson v. State, 417 S.C. 287, 298, 789 S.E.2d 762, 767–68 (Ct. App. 2016). The Court of Appeals erred. Petitioner would have prevailed at a suppression hearing based on both the statutory and Fourth Amendment violations. Jones and Adams did not change Fourth Amendment principles. "Finally, as Justice Scalia made clear in Jones, Katz supplemented rather than replaced the Fourth Amendment trespass test. 132 S.Ct. at 951. Jones did not overrule prior Supreme Court precedent or announce a new legal standard, but instead simply applied existing –albeit dormant-Fourth Amendment principles." State v. Mitchell, 234 Ariz. 410, 419, 323 P.3d 69, 78 (Ct. App. 2014). In South Carolina, at the time of petitioner's guilty plea in 2008, the constitutionality of the placement of a GPS tracking device on a vehicle was **not** an unsettled question of law. As this Court noted in Adams:

> Moreover, no pre-Jones precedent in this federal circuit extended Knotts or Karo to the installation and monitoring of a GPS device. We conclude Knotts and Karo did not constitute binding precedent that authorized law enforcement's warrantless actions in this case. Having found no support in federal jurisprudence for the State's use of the GPS in this case, we turn now to South Carolina law. Prior to Jones, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device. There is, however, a state statute that squarely addresses law enforcement's use of electronic tracking devices

409 S.C. at 652, 763 S.E.2d at 347 (2014).

The Court of Appeals' finding that Knotts provided authority suggesting the placement of a GPS tracking device might not have been a constitutional violation is contrary to this Court's finding in Adams and the Supreme Court's finding in Jones. Knotts did not authorize the

placement of a GPS tracking device on the outside of a vehicle without an order or warrant. Neither Knotts nor Karo, constituted binding precedent at the time of the 2008, guilty plea authorizing officers to install a GPS tracking device without a warrant. See Adams. Importantly, Knotts and Karo were not overturned by Jones. While there was no clear authority that concluded that the placement of a GPS on a vehicle without a court order constituted a Fourth Amendment violation, there was also no clear authority authorizing the placement of a GPS without an order or warrant. The installation of the GPS device on petitioner's car, even prior to the Court's decision in Jones and prior to this Court's decision in Adams, constituted a search requiring a warrant. This conclusion is further supported by the fact that South Carolina Code §17-30-140, a statute in effect at the time the GPS device was installed on petitioner's car, requires officers to obtain a court order prior to installing a mobile tracking device.

The reliance by the Court of Appeals on Narrl is misplaced. As noted in n. 1 in Narrl, "Defendant's name is Narrl Richard. Mr. Richard is referred to in the indictment as Richard Narrl a/k/a Noel H. Richard a/k/a Richard Earl, but his correct name is Narrl Richard." 789 F. Supp. 2d at 646. Narrl Richard was granted a new trial in 2012 based on the Supreme Court's decision in Jones. In a subsequent action pursuant to 28 U.S.C § 2255 the South Carolina District Court wrote:

> The case proceeded to trial in October 2011, where a jury found Petitioner guilty. Before sentencing, however, the Supreme Court held that using a GPS tracking device to monitor a car's movements constitutes a "search" under the Fourth Amendment. United States v. Jones, 132 S. Ct. 945, 949 (2012). Relying on Jones, Dickson filed a motion for a new trial that would exclude all evidence police obtained by electronically tracking Petitioner's car. This Court granted Petitioner a new trial and ruled that "[a]ll of the evidence relating to [Petitioner's] travelling to New Jersey and other evidence gathered using the GPS tracking device" would be excluded from the new trial. (Order dated Apr. 12, 2012, ECF No. 163, at 11–12.) However, the Court also held that Coney's failure to signal purged the taint of the illegal GPS tracking, and therefore evidence discovered after the legal traffic stop would not be suppressed.

Richard v. United States, No. 2:09-CR-992-PMD, 2016 WL 6775699, at *2 (D.S.C. Jan. 27, 2016), appeal dismissed, 656 F. App'x 26 (4th Cir. 2016), cert. denied, 137 S. Ct. 1107, 197 L. Ed. 2d 211 (2017). Additionally, Narrl was decided **after** the 2008, plea and plea counsel could not have relied on the case in support of his erroneous advice.

The Court of Appeals erroneously found that probative evidence supported the PCR court's finding that petitioner failed to prove prejudice because he did not establish a reasonable probability that, but for counsel's erroneous advice about the constitutionality of the search, petitioner would not have pled guilty but instead would have proceeded to trial. The Court of Appeals wrote:

> Although Petitioner asserted he would have proceeded to trial had plea counsel advised him of the statute, the PCR court found Petitioner's testimony "wholly incredible." See Simuel, 390 S.C. at 270, 701 S.E.2d at 739 ("[An appellate court] gives great deference to a PCR [court's] findings where matters of credibility are involved."); Stalk, 383 S.C. at 563, 681 S.E.2d at 595 ("[The] prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial."); Hill, 474 U.S. at 59, 106 S.Ct. 366 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). At the time of Petitioner's guilty plea in 2008, the constitutionality of the placement of a GPS tracking device on a vehicle was an unsettled question of law; the United States Supreme Court had not decided Jones, and our supreme court had not decided Adams.

Frierson v. State, 417 S.C. 287, 297–98, 789 S.E.2d 762, 767 (Ct. App. 2016). This finding by the Court of Appeals, however, is premised on the erroneous assertion that Knotts provided authority suggesting the placement of a GPS tracking device might not have been a constitutional violation, as discussed above.

The PCR judge's adverse credibility finding, noted by the Court of Appeals, ("Although Petitioner asserted he would have proceeded to trial had plea counsel advised him of the statute,

the PCR court found Petitioner's testimony 'wholly incredible.'" Frierson v. State, 417 S.C. 287, 297, 789 S.E.2d 762, 767 (Ct. App. 2016)) is not supported by the record. The PCR judge wrote in the order of dismissal, "Based on the testimony presented at the [sic] and a thorough review of the plea transcript, this Court finds Applicant failed to carry his burden in proving counsel was ineffective in this regard [Failure to challenge the GPS]. Further, this Court finds counsel's testimony to be credible while finding Applicant's testimony to be wholly incredible." (App. p. 146). It is unclear what was "wholly incredible" about petitioner's testimony. Plea counsel's testimony at the PCR hearing did not contradict petitioner's testimony. Counsel testified:

> It – I was not aware of that statute [§17-30-140] at the time we had this discussion. Upon me being aware of the statute – I guess mainly because Mr. Frierson's PCR application –I've since looked at the statute. It, it appears on its face to be applicable to his situation, and it would have availed to him a opportunity to have a pretrial hearing to determine whether or not the state had followed the prescriptions of that statute and if not – my understanding of, my reading of the statute is that he would have had an opportunity to try to get all evidence derived from the illegal tracking device suppressed at trial.

(App. p. 104, lines 13-24). Counsel then testified to a summary of the evidence that he would have moved to suppress had he been aware of the statute. (App. p. 105, line 1 – p. 106, lines 1-8).

The PCR judge wrote, "Applicant has failed to convince this Court that, had counsel taken some further action regarding this GPS device or done some further investigation into S.C. Code §17-30-140, Applicant would have proceeded to trial to face such serious charges rather than enter a plea." (App. pp. 146-147). Petitioner, however, did not receive a great benefit by entering guilty pleas. Petitioner had little to lose by challenging the placement of the GPS as both a violation of the statute and a Fourth Amendment. As discussed above, petitioner would have prevailed on a motion to suppress based on the illegal search. Petitioner established that

there was a reasonable probability that, but for counsel's errors, petitioner would have proceeded to trial.

Plea counsel testified at the PCR hearing, "And my discussion with him was the he gave a statement indicating that he was part of this plan, and that his co-defendants gave statements indicating he was part of the plan. And that our chances of winning at trial were slim, based on the fact that they had gave those – given those statements." (App. p. 111, lines 12-17). Plea counsel later testified, "I think the most damning thing for Mr. Frierson was his own statement. And I think the mobile tracking device, if we won that argument at a hearing, then we could have got his own, Mr. Frierson's, statement suppressed, and then at least we'd have a fighting chance at trial. We could just say that the other co-defendants are just blaming him because he's the obvious fall guy. That would have been my advice to him. You know, of course it would have been Mr. Frierson's decision whether he wanted to take it." (App. p. 123, lines 12-20). Counsel, however, never advised Petitioner Frierson about challenging the mobile tracking device based on S.C. Code §17-30-140. Counsel provided erroneous advice about the constitutionality of the placement of the GPS. Petitioner testified that if he had known about the statute, he would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). The PCR judge erred in refusing to find counsel ineffective for not advising Petitioner about the ability to move to suppress critical evidence because it was obtained in violation of S.C. Code §17-30-140 and the Fourth Amendment.

The Court of Appeals acknowledged plea counsel's testimony writing:

> Plea counsel testified he advised Petitioner to plead guilty because he believed Petitioner's chances of succeeding at trial were "very slim" based on his statement confessing to his involvement in the plan and the likelihood his co-conspirators would have testified against him. Plea counsel explained he researched the constitutionality of the tracking device after learning it was installed without a warrant or court order, however, he was unable to find any South Carolina case

> law addressing the issue. Plea counsel explained that in light of United States v. Knotts and the placement of the tracking device on the outside of Petitioner's vehicle, he believed Petitioner's Fourth Amendment rights were not implicated.
>
> Plea counsel admitted he was unaware of section 17–30–140 at the time of Petitioner's plea, did not find it in his research, and did not discuss it with Petitioner. He further testified, however, that he believed the statute was applicable to Petitioner's case and could have been used in an attempt to suppress some of the incriminating evidence. Plea counsel asserted that if he had been aware of section 17–30–140, he *293 would have filed a motion to suppress Petitioner's confession and his co-defendants' confessions, arguing they were the fruit of the poisonous tree stemming from the warrantless use of the tracking device. Plea counsel contended Petitioner's confession was the most damaging evidence against him, and he believed Petitioner would have had a "fighting chance" at trial if a motion to suppress the confession had succeeded.

Frierson v. State, 417 S.C. 287, 292–93, 789 S.E.2d 762, 765 (Ct. App. 2016)(n. 2 omitted). There is no evidence of probative value to support the PCR judge's finding that Petitioner failed to establish that if he had been properly advised, he would have challenged the placement of the GPS and moved to suppress critical State's evidence.

In a footnote in Frierson the Court of Appeals wrote:

> We resolve this matter in reliance upon the "prejudice" prong of the Strickland analysis. However, like the PCR court, we recognize the clarification of our Fourth Amendment jurisprudence with respect to the warrantless placement of tracking devices in United States v. Jones and State v. Adams occurred some years after Petitioner's guilty plea. Our courts have "never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); see also Robinson v. State, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense).

Frierson v. State, 417 S.C. 287, 299, 789 S.E.2d 762, 768 (Ct. App. 2016) (n. 7). Plea counsel in the present case did not need to be clairvoyant or anticipate changes in the law when there was no binding precedent authorizing the placement of a GPS without an order or warrant and there

was a statute that specifically **forbade** law enforcement officers from installing a GPS without court authorization. Plea counsel was deficient.

Finally, the Court of Appeals, in finding overwhelming evidence of guilt, misapprehended the State's remaining evidence after suppression of Petitioner's statement based on the unlawful search. The Court of Appeals wrote:

> Moreover, we find probative evidence supports the PCR court's finding that even if counsel had been successful in suppressing the evidence found as a result of the GPS tracking device, due to the overwhelming evidence of Petitioner's guilt, the outcome of Petitioner's case would have been no different had he chosen to proceed to trial. See Hutto, 387 S.C. at 249, 692 S.E.2d at 198 ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt."). Although police used the GPS tracking device to locate Petitioner to execute the arrest warrant, police obtained the arrest warrant through other aspects of the investigation independent of the tracking device. Police considered Petitioner a suspect because of his suspicious behavior and lack of injuries after the robbery, they located a glove outside Petitioner's house matching a glove from the armored truck, and Whitaker broke down and told police that Petitioner had been planning the heist for several months. Even if counsel had been successful in having Petitioner's own confession suppressed, Petitioner would likely have lacked standing to challenge the pictures of money from Domonique's phone, and the co-defendants' statements would have been admissible against him.

Frierson v. State, 417 S.C. 287, 298–99, 789 S.E.2d 762, 768 (Ct. App. 2016) (n.7 omitted).

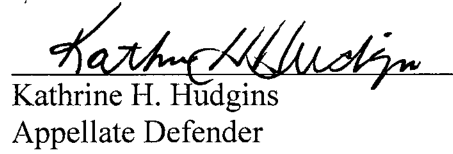
Plea counsel testified that Petitioner's statement was the most damaging piece of evidence and if the statement had been suppressed, Petitioner would have had a "fighting chance" at trial. (App. p. 123, lines 12-20). In regard to the statements by co-defendants, plea counsel testified, "We could just say that the other co-defendants are just blaming him because he's the obvious fall guy." (App. p. 123, lines 16-18). The remaining State's evidence was not overwhelming. Petitioner established prejudice from counsel's deficient performance.

Plea counsel was deficient in failing to challenge the placement of the GPS without a warrant or court order. The guilty plea was rendered involuntary by counsel's deficient performance. There is a reasonable probability that but for counsel's error, Petitioner would not

have pled guilty and instead would have gone to trial moving to suppress based on the statutory and constitutional violations.

CONCLUSION

Based on the above argument, petitioner's convictions and sentences should be reversed and the case remanded for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
SEP 25 2017
S.C. SUPREME COURT

Certiorari to Richland County

Honorable Clifton B. Newman, Circuit Court Judge

DARRYL FRIERSON,

PETITIONER,

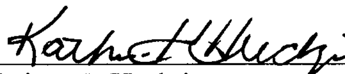
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

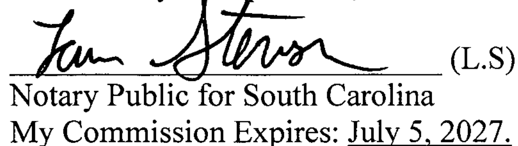
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon J. Clayton Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Darryl Frierson, #336466, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of September, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of September, 2017.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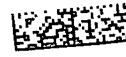

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South Carolina Commission on Indigent Defense
Division on Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

CONFIDENTIAL LEGAL MAIL

Honorable Daniel E. Shearouse
Clerk South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211