STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Edward B. Cottingham, Trial Judge
The Honorable William H. Seals, Jr., PCR Judge

Appellate Case No. 2018-000466

TIMOTHY L. FRADY...Petitioner,

v.

STATE OF SOUTH CAROLINA,..Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Did the PCR judge err in refusing to find counsel ineffective of failing to object to the admission of photos found on Petitioner's cell phone on the ground that the photos were obtained by an illegal warrantless search of Petitioner's phone in violation of the Fourth Amendment?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly determine Petitioner failed to establish that counsel was ineffective for failing to object to the admission of photos found on Petitioner's cellphone on the ground that the photos were obtained through a warrantless search of Petitioner's phone in violation of the Fourth Amendment because no binding case law existed at the time of Petitioner's trial, requiring such an objection from Counsel?

STATEMENT OF THE CASE

Timothy L. Frady (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its December 2012 term, the Horry County Grand Jury indicted Petitioner for criminal domestic violence, third offense (2012-GS-26-4266). Petitioner was represented by Melinda A. Knowles, Esquire. Assistant Solicitor Jennings Scott Hucks, Esquire of the Fifteenth Circuit Solicitor's Office represented the State. On May 12, 2014, the case proceeded to trial before Honorable Edward B. Cottingham, circuit court judge. The jury found Petitioner guilty and Judge Cottingham sentenced him to five years suspended upon the service of four years followed by three years of probation.

Petitioner timely filed a notice of appeal that was perfected by Petitioner's Counsel Tiffany L. Butler, Esquire. The South Carolina Court of Appeals affirmed the conviction, the opinion filed on November 4, 2015. *State v. Frady*, Op. No. 2015-UP-508 (S.C. Ct.App. filed Nov. 4, 2015).

Petitioner filed a PCR application on December 10, 2015. Respondent made its return on December 15, 2016. The evidentiary hearing occurred on October 3, 2013 before the Honorable William H. Seals, Jr. At the hearing, Petitioner alleged ineffective assistance of counsel, claiming that counsel was ineffective for failing to object to the introduction of Petitioner's cell phone records based on prejudicial effect and failing to object on the basis of *Riley v. California*, 573 U.S. 373 (2014).

In an Order filed February 28, 2018, the court concluded that Counsel was not ineffective because Counsel objected to the introduction of cell phone records and the Court overruled the objection, finding the photographs were both relevant and not overly prejudicial. Further, the

Court found Counsel was not ineffective for failing to object to the admission of evidence pursuant to *Riley v. California* because *Riley* was not decided at the time of the trial and Counsel was not expected to anticipate the outcome of the Supreme Court case. Thus, the request for relief was denied. A timely notice of intent to appeal was served on March 12, 2018. On November 15, 2018, Counsel filed a petition for writ of certiorari pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 210 (1988), and a motion to be relieved as counsel. In the *Johnson* petition, Petitioner alleged that the PCR judge erred in refusing to find counsel ineffective for failing to object to the admission of photos found on Petitioner's cell phone on the ground that the photos were obtained by an illegal warrantless search of Petitioner's phone in violation of the Fourth Amendment.

On January 8, 2019, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(1) of the South Carolina Appellate Court Rules. On October 3, 2019, the South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to address the question of whether trial counsel was ineffective for not moving to suppress pictures found on Petitioner's cell phone based on a warrantless search that violated the Fourth Amendment. The petition for writ of certiorari was submitted on November 4, 2019. This return to petition for writ of certiorari thus follows.

STATEMENT OF THE FACTS

The victim and Petitioner were married and living together, though in separate bedrooms, at the time of the incident. (App. 54-55). While looking for missing documents and belongings scattered throughout the mobile home, victim found an unfamiliar cell phone that she picked up and began scrolling through. (App. 55-56). Contained therein were photographs of her daughter (Petitioner's stepdaughter) with explicit language written overtop. (App. 56-57). The victim also found similar photos of other women that were graphic and of a sexual nature. (App. 57-59). Petitioner emerged while victim was still looking at the phone. (App. 59). Petitioner walked away after noticing the victim with the phone and the victim hid the phone in a crib set up for the victim's expected grandchild. (App. 59-60). She also found the title to the mobile home, which contained her name alone thereon, and hid this in the crib as well. (App. 59-60).

The victim and Petitioner began fighting over the phone shortly thereafter. (App. 60). The fight continued escalating until the victim noticed Petitioner was enraged and, after trying to get away, Petitioner began choking the victim, saying no one would find her body. (App. 61). The victim broke free. (App. 61). Petitioner went into another room while the victim grabbed the title and phone. (App. 61-62). Petitioner struck the victim in the face and the victim thereafter ran out of the home and attempted to call 911, but was disconnected. (App. 62). She called again and was found hiding in the backyard when the officers arrived, refusing to come out until Petitioner was in a patrol car. (App. 62-64). The responding officer found her crying and distraught in the back of the home. (App. 99). Based upon his observations and information provided to him, the responding officer determined Petitioner was the primary aggressor. (App. 104).

Photographs taken of the victim revealed marks under her eye and red marks and fingerprints on her neck. (App. 103). The victim ultimately returned Petitioner's phone to the

police station, stating that she did not turn it in the day of the assault because she did not know if anything could be done about the situation and confirmed that the phone was Petitioner's but did not know when the photos were taken or if her daughter was underage when taken. (App. 89-90). The phone's photographs could not be downloaded, but the photographs were reproduced by taking pictures of the images. (App. 132).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State,* 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State,* 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish that counsel was ineffective for failing to object to the admission of photos found on Petitioner's cellphone on the ground that the photos were obtained through a warrantless search of Petitioner's phone in violation of the Fourth Amendment because no binding case law existed at the time of Petitioner's trial, requiring such an objection from Counsel.

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief because counsel was ineffective for failing to object to the admission of photos found on Petitioner's cellphone. Specifically, Petitioner argues that the photos were obtained through a warrantless search of Petitioner's phone in violation of the Fourth Amendment. However, the post-conviction relief court properly rejected this argument, finding that no binding case law existed at the time of Petitioner's trial, requiring such an argument from Counsel. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

To prove ineffective assistance of counsel, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686 (1984). The *Strickland* analysis is a two-pronged test, of which the applicant shoulders the burden of proof in meeting both prongs. *Id.* at 682, 694.

First, the applicant must prove defense counsel's performance was deficient. *Strickland,* 466 U.S. at 686; *Cherry v. State,* 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by the preponderance of the evidence[1] that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Reasonableness is determined by the "variety of circumstances faced by defense counsel or the

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[1] As per Rule 71.1(e) SCRCP

range of legitimate decisions regarding how to best represent a criminal defendant" and the scope limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690).

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 295. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

When presenting a defense, counsel is not expected in the regular course of competence to anticipate future changes in the law that have not come to pass at the time of trial. *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted). Further, Counsel has never been required "to be clairvoyant or anticipate changes in the law which were not existent at the time of trial." *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). *See generally e.g. Robinson v. State,* 308 S.C. 74, 417 S.E.2d 88 (1992); *Arnette v. State,* 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v. State,* 306 S.C. 359, 412 S.E.2d 389 (1991).

Here, Petitioner relies heavily upon *Riley v. California*[2] when alleging Counsel was ineffective for failing to object to the admission of photos found on Petitioner's cellphone. The Court in *Riley* found that, law enforcement are generally required to obtain a warrant before conducting a cell phone search incident to arrest. This was decided on June 25, 2014; a little over a month after Petitioner's trial. *Riley*, 573 U.S. at 403. Counsel was not expected to act upon non-existent law at the trial through objecting to evidence that was not previously deemed unlawfully obtained. *See e.g. Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765-66.

Additionally, Petitioner cites *United States v. Wurie*[3] as persuasive precedent indicating that a cell phone search incident to arrest required a warrant existent before the trial. Petitioner readily concedes this First Circuit case did not serve as binding precedent in Petitioner's case. There was no reason why Counsel should have considered the holding in *Wurie* persuasive enough to utilize it when developing a trial strategy, especially because there is no indication other circuit courts, along with the First Circuit, had considered this issue before the Petitioner's trial. It is not within the realm of competence to require Counsel to develop a trial strategy based upon one circuit court case falling outside the jurisdiction of the case in issue.

Thus, Counsel was not ineffective for failing to develop a defense strategy involving an objection regarding evidence obtained from a warrantless search of a cell phone when binding precedent did not exist at the time of trial concerning this issue. Consequently, this Court should deny certiorari.

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[2] 573 U.S. 373 (2014).

[3] 728 F.2d 1 (1st Cir. 2013).

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: [signature]
Chelsey F. Marto

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~~February 28~~, 2020
March 2, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
The Honorable William H. Seals, Jr., Circuit Court Judge

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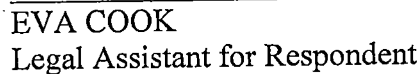
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 2nd day of March, 2020.



EVA COOK
Legal Assistant for Respondent

ALAN WILSON
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March 2, 2020

The Honorable Jenny A. Kitchings
Clerk of Court, Court of Appeals
Post Office Box 11629
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SC Court of Appeals

RE: **Timothy Frady v. State of South Carolina**
Appellate Case No. 2018-000466
Lower Court Case No. 2015-CP-26-8676

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Chelsey F. Marto
Assistant Attorney General
S.C. Bar No. 104191

CFM/ec
Enclosures

cc: Kathrine H. Hudgins, Esquire