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.

BRIEF OF RESPONDENT

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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* 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 refiled on November 4, 2019. Respondent’s Return to the Petition for Writ of Certiorari was filed on March 2, 2020. Cert was granted on June 16, 2020. Petitioner filed his brief on July 16, 2020. This Brief of Respondent 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 on top. (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 the call 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). One 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 PCR 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 PCR 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 PCR 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. Thus, this Court should affirm the PCR court's denial of relief.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id*. 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 a preponderance of the

evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is 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). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

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 695. 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).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland,* 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before

examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

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. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *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*[1] 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. To act reasonably, Counsel was not required to be clairvoyant enough to predict how *Riley* would be decided and act upon this

[1] 573 U.S. 373 (2014).

prediction at trial by objecting to evidence not yet deemed suppressible. *See e.g. Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765-66 ("[t]his court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial.").

Additionally, Petitioner cites *United States v. Wurie*[2] as persuasive authority indicating that a cell phone search incident to arrest required a warrant existent before the trial. Petitioner readily concedes this First Circuit case is not binding precedent. 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.

Further, Counsel moved to exclude the photographs, because they were overly prejudicial to Applicant, the charge, and of questionable authenticity, which she thought was stronger argument strategically because *Riley* was not yet settled law. (App. 34, 270-72). This decision was strategic in nature and, because *Riley* was not decided yet, reasonable. Thus, Counsel was not deficient because she provided the best defense argument available, given the state of the law at the time and, consequently, was not expected to anticipate changes in the law, nor expect the judge to decide in her favor by citing persuasive authority from outside jurisdictions.

Regarding prejudice, there is no indication that the Court would have sustained the objection to the evidence because of an argument from Counsel founded in undecided and otherwise non-binding law from the Supreme Court and outside circuits, respectively. Additionally, the photographs in issue were only tangentially related to the crime because they

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

served as the impetus to Petitioner's decision to physically harm his wife, but did not directly show the harm committed against the victim. (App. 34-35). The harm against Petitioner was otherwise substantiated at trial by testimony from the victim and three responding officers. (App. 2-3). Further, other photographs taken by officers while on scene of injuries sustained by the victim were introduced in to evidence and these photographs are not the photographs found on the cell phone in question. (App. 103-05). Collectively, this created a very strong case in favor of the State, regardless of what the cell phone photographs showed. Thus, because the evidence against Petitioner was strong and the photographs in issue were only tangentially related to the crime, Petitioner presumably would have been found guilty at trial even if the objection was sustained. Accordingly, there is no indication that the result of the proceedings would have been different if Counsel objected to the admittance of the photographs.

Counsel was not ineffective for failing to object to evidence obtained from a warrantless search of a cell phone when no binding precedent existed indicating that that a warrantless search of a cell phone was unconstitutional and, even if Counsel was successful in objecting to the photographs, Petitioner still likely would have been found guilty and, thus, was not prejudiced by any alleged inaction. Consequently, this Court should deny certiorari.

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.

Respectfully submitted,

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BY: /s Chelsey F. Marto
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August 7, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO HORRY COUNTY

RECEIVED
Aug 07 2020
SC Court of Appeals

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.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Kathrine H. Hudgins, Esquire
khudgins@sccid.gov

This 7th Day of August, 2020.

s/ Chelsey F. Marto
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From: Chelsey Marto
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Cc: Fifteenthcircuitpcr
Subject: Frady, Timothy -PCR Appeals BOR (2018-000466)
Date: Friday, August 7, 2020 3:14:00 PM
Attachments: FRADY Timothy - BOR, CL, COS (02346466xD2C78).PDF

Hello,

Attached please find the Brief of Respondent in Timothy Frady's PCR appeals case (2018-000466), to be filed with the court of appeals momentarily.

Please let me know if you have any questions or concerns regarding this matter.

Best,
Chelsey Marto

ALAN WILSON
ATTORNEY GENERAL

August 7, 2020

The Honorable Jenny A. Kitchings
Clerk of Court — SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: **Timothy L. Frady v. State of South Carolina**
Appellate Case No. 2018-000466
Lower Court Case No. 2015-CP-26-08676

Dear Ms. Kitchings:

Attached is a copy of the original **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
SC Bar #104191

CFM/ec

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division (without enclosure)