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Jul 20 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Horry County
The Honorable Edward B. Cottingham, Trial Judge
The Honorable William H. Seals, Jr., PCR Judge
Appellate Case No. 2018-000466

Timothy Frady,

Petitioner.

v.

State of South Carolina,

Respondent.

PETITION FOR REHEARING

On July 7, 2021, this Court issued an opinion affirming the post-conviction relief court's denial of relief to Petitioner Timothy Frady. *Frady v. State*, 2021-UP-260 (S.C. Ct. App. filed July 7, 2021). In affirming the post-conviction relief court's denial of relief, this Court found that although trial counsel was deficient for failing to argue photographs recovered from Petitioner's phone should be suppressed because they were recovered without a warrant, Petitioner nevertheless could not establish prejudice based on overwhelming evidence of his guilt. While Respondent agrees with the ultimate conclusion of the Court, Respondent respectfully argues this Court misconstrued and misapplied the proper authority when determining trial counsel was deficient despite clear precedent indicating such an argument should be made and makes the following petition for rehearing to preserve the following argument for any future review in compliance with Rule 221(a), SCACR:

In *Frady*, this Court found Counsel was deficient for not arguing the photographs should have been suppressed because they were retrieved without a warrant. Specifically, even though the seminal case *Riley v. California*¹ was not decided until after trial, this Court found Counsel was nonetheless deficient because *Riley* did not establish a new legal principle or change existing law, relying on *Chappell v. State*, 429 S.C. 68, 79, 837 S.E.2d 496, 502 (Ct. App. 2019). Respondent contends this is a misinterpretation of the impact *Riley* had upon Fourth Amendment case law, both based upon the language in *Riley* itself, as well as the identified impact *Riley* had, as recognized among other states and circuits in their interpretation of the impacts of *Riley*.

“A holding constitutes a ‘new rule’ within the meaning of *Teague* if it ‘breaks new ground,’ ‘imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant’s conviction became final.’” *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). The bottom line rule set forth in *Riley* remains clear: “the search incident to arrest exception does not apply to cell phones.” *Riley*, 573 U.S. 373, 401 (2014). In reaching this conclusion, the Court made it abundantly clear both how unique and how groundbreaking the cell phone was, both in the realm of technology and upon the right to privacy. Specifically:

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of our human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. . . . Even less sophisticated phones like Wurie’s, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Id. at 385.

¹ 573 U.S. 373 (2014).

The court continues on, further separating *Riley* out from prior precedent:

[W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel* – harm to officers and destruction of evidence – are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

Id. at 386.

In differentiating *Riley* from all other search incident to arrest cases, the Court pointed out the unique characteristics associated with cell phones and the privacy concerns implicated thereby:

The United States asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of these sorts on physical items. . . . That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but an extension of that reasoning to digital data has to rest on its own bottom . . .

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.

Id. at 393.

The Court expands upon this last comment in great detail, stating that because of the types of information stored on cell phones in conjunction with the immense storage capabilities on phones renders cell phones uniquely different than every other item an individual could potentially carry on themselves in a typical search-incident to arrest case. *Id.* at 393-97.

Following *Riley*, other states and judicial circuits have acknowledged *Riley* as a new rule or change in existing law under similar circumstances. *See e.g. United States v. Gary*, 790 F.3d 704, 7908 (7th Cir. 2015) (quoting *Riley*, 573 U.S. at 403) (“The Court was unequivocal in announcing its new rule: ‘our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant.’”); *Coppedge v. United States*, 2018 WL 8368873, * 20 (E.D. N.C. filed July 6, 2018) (finding “it is likely a ‘new rule’ was announced in *Riley* because it created a new obligation on the government – obtaining a warrant before searching data of cell phones seized incident to arrest.”); *Cross v. Gilmore*, 164 F.Supp.3d 818, 824 (E.D. Va. Filed Jan. 29, 2016) (quoting *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995)) (finding counsel was not ineffective for failure to anticipate *Riley* because the “Fourth Circuit has made clear, ‘an attorney’s assistance is not rendered ineffective because he failed to anticipate a new rule of law.’”); *Hart v. Quintana*, 2015 WL 8770077, *4 (E.D. Ky. Filed Dec. 14, 2015) (finding that *Riley* was a new rule of law); *Stringer v. United States*, 215 WL 4664454, *3 (W.D. Mo. Filed Aug. 6, 2015) (quoting *Graham v. Collins*, 506 U.S. 461, 467 (1993)) (finding that *Riley* was a new rule because its holding “was not ‘dictated by existing precedent when [Movant’s] conviction became final.’”).

In addition to finding *Riley* constituted a new rule, Courts have found that it does not apply retroactively. *See e.g. Young v. Pfeiffer*, 933 F.3d 1123, 1125 (9th Cir. 2019); *Sayles v. State*, No. E201800141CCAR3PC, 2019 WL 1417873, at *7–8 (Tenn. Crim. App. Mar. 28, 2019), *appeal denied* (July 17, 2019); *Davis v. Mahally*, 307 F. Supp. 3d 373, 377 (E.D. Pa. 2018); *Mordi v. United States*, No. 14-CV-00759-SMY, 2017 WL 2633194, at *2 (S.D. Ill. June 19, 2017); *Denight v. United States*, No. 2:15-CV-02115-SLD, 2017 WL 2435279, at *3 (C.D. Ill. June 5, 2017); *Wagner v. United States*, Nos. 2:13-cr-120-RDP-HGD & 2:15-cv-8014-RDP, 2017 WL 1437508,

at *4 (N.D. Ala. Apr. 24, 2017); *Coppedge v. United States*, No. 4:09-CR-00064-F-1, 2016 WL 2901740, at *4 (E.D.N.C. May 18, 2016), *appeal dismissed*, No. 16-6768, 2017 WL 656751 (4th Cir. Feb. 17, 2017).

Respondent contends this Court incorrectly determined that the Supreme Court did not articulate a new rule in *Riley*. Instead, the Supreme Court in *Riley* declined to extend the search incident to arrest doctrine to the warrantless search of cell phones. This was done not out of a desire to abandon the doctrine itself, but because the Court for the first time found the doctrine did not transfer over to the search of cell phones; a device the Court itself recognized had not been addressed by the Court before, did not exist a decade before the decision came out, and could not be properly compared to any other item discoverable in other search-incident-to-arrest cases considered before *Riley*. *Riley*, 573 U.S. at 385. Recognition of the cell phone as a unique device unsuited for the treatment of every other perceivable belonging in a search-incident-to-arrest case for the first time is a change in existing law; specifically, search incident to arrest law. This Court's reliance on *Chappell* in establishing Counsel's deficiency for failing to anticipate the Court's ruling in *Riley* was misplaced, because *Riley* represented a new rule; a finding recognized in other States and Judicial Circuits. Further, to the extent it applies, *Riley* does not represent a new rule requiring its application retroactively. *See Teague v. Lane*, 489 U.S. 288, 311 (1989) (finding rules of criminal procedure do not apply retroactively unless they constitute new substantive rules finding certain conduct cannot be criminalized or procedural rules constituting 'watershed' rules of criminal procedure). Accordingly, Counsel cannot be found deficient for failing to anticipate this change in the law, nor should this new law apply retroactively. *See 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) (Counsel is not required "to be clairvoyant or anticipate changes in the law

which were not existent at the time of trial.”). Thus, because Counsel is not required to be clairvoyant, a finding of deficiency is inappropriate. Consequently, Respondent requests this Court grant the petition for rehearing, as it relates to the deficiency prong of the Court’s analysis.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing in this case, and find Counsel was not deficient for failing to anticipate a change in the law, as created by *Riley v. California*, 573 U.S. 373 (2014).

Respectfully submitted,

ALAN WILSON
Attorney General

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Assistant Attorney General

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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 Petition for Rehearing 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.sc.gov

This 20th Day of July, 2021.

s/ Chelsey F. Marto
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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

July 20, 2021

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

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 is the **Petition for Rehearing** in the above-referenced case.
By copy of this letter we are serving opposing counsel today.

Sincerely,

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

CFM/ec
Enclosures

cc: Kathrine H. Hudgins, Esquire