

Docket Number **18-9058**

Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

Circuit Court Number 15-51196

Juan Garcia,
Petitioner,

vs.

United States of America,
Respondent,

On writ of Certiorari to the
United States Court of Appeals for
the Fifth Circuit

ORIGINAL

original

Petition for Certiorari

Questions Presented for Review

1. Does the Supreme Court's decision in *Riley v. California*, 134 S.Ct. 2473 (2014) apply retroactively to cases on collateral review?

2. Does the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976) bar a Fourth Amendment challenge when Fifth Circuit precedent was directly contrary to this Court's holding in a subsequent decision?

List of Interested Parties

Petitioner hereby certifies to this Honorable Court, in accordance with Rule 14(1)(b), Supreme Court Rules, that the following parties have an interest in the outcome of this Court's decision rendered in the instant case, which parties are:

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Citations of Opinions in Case

Order of the District Court, December 16, 2015,
Granting Motion to file a Certificate of Appealability.
(Attached hereto in Appendix B);

Judgment of United States Court of Appeals, Fifth
Circuit, Denying Certificate of Appealability May 18,
2018. (Attached hereto in Appendix B);

Judgment of United States Court of Appeals, Fifth
Circuit, Denying Petition for Rehearing En Banc for
Certificate of Appealability July 10, 2018. (Attached
hereto in Appendix D);

Jurisdiction

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on May 18, 2018. Petition for Rehearing En Banc was sought and denied on July 10, 2018. This timely Writ for Certiorari follows, in accordance with Rule 12(2), and Rule 39(1), of the Rules for the Supreme Court.

Jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

In compliance with Rule 29(3), Supreme Court Rules, the opposing counsel has been duly served with copies.

Statement of the Case

On September 22, 2014 Garcia filed a pro se "Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" pursuant to 28 U.S.C. § 2255. (Doc. #159). Garcia argued that he was entitled to a new trial because the San Antonio Police officers who stopped his vehicle seized his cellular telephone, and proceeded to conduct a digital search without obtaining a warrant. On November 30, 2015 the Court entered a judgment denying the motion to vacate sentence. On December 10, 2015, Garcia filed a motion for a Certificate of Appealability arguing that the decision in *Riley v. California*, 134 S.Ct. 2473 (2014) should be applied retroactively. On December 16, 2015 the District Court granted the motion and set aside the judgment.

Certificate of Appealability as to whether Riley should be applied retroactively to cases that were not on direct appeal so that Garcia could

~~He~~ succeed in making a substantial showing that he ~~was~~
denied his Constitutional right to be free from unreasonable
searches pursuant to the Fourth Amendment.

Statement of the Facts

The facts that transpired on the 12th of August, 2010
are as follows; this investigation led to the stop, detainment, arrest
of Garcia without probable cause and ultimately the digital search
of Garcia's cell phone. Early on in the day, San Antonio Police officers
Flores, Garza, Adam and Val Garcia, were conducting surveillance
of possible drug-trafficking at the In-Town Suites in San Antonio,
Texas. Officers, based on the information they had, observed Mario
Ramirez, coming and going from the hotel room. Garcia arrived at
the hotel at about 4:25 pm met co-defendant Ramirez by his truck
and handed him a black bag containing Ramirez's personal clothing and shoes,
then left after a few minutes. Ramirez exited the hotel and drove

his truck to the San Antonio Mens Club where he was followed, then officers Schiller and detective Garza established surveillance of him there. At some point ~~Garza~~ Garcia was observed arriving at the mens club while Garza and Schiller are conducting surveillance of Ramirez. The officers originally claimed that Garcia walked into the club carrying a "black satchel", however, video surveillance of the club shows differently. Shortly thereafter, Garza and Schiller requested that a uniformed officer conduct a stop and seize Garcia because of suspected trafficking of drugs. After the stop and search of the vehicle, no drugs or paraphernalia were found but Garcia was arrested for conspiracy and his ~~password~~ password protected phone was hacked and searched. At trial hundreds of pages including text's, calls, pictures and emails were ultimately admitted into evidence over defense counsels numerous objections, after Garcia was repeatedly questioned about text pictures, ~~and~~ ^{and} marital problems, all irrelevant.

Reasons for Granting Writ Argument Number One

The first issue is whether Riley v. California, 134 S.Ct.

2473 (2014) (decrying the warrantless search of the contents of a cell phone incident to arrest as constitutionally unreasonable) should be made retroactive to cases such as Garcia's on collateral review.

When the Supreme Court announces a ~~new~~ rule, that rule's effect on a defendant's conviction will differ based on whether the rule is "new" or "old" and whether his/her case is pending on direct or collateral review. A new rule will generally apply only to criminal cases pending on direct review, while an old rule will apply to cases on both direct and collateral review. Whorton v. Bockting, 549 U.S. 406, 416 (2007) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1997)). Even though some just would argue that any decision from the Supreme Court would qualify as a new rule, that simply blinks reality, since there are occasions where the court announces an old rule based on the factual context of the rule.

Notwithstanding, the rubric set out by Teague v. Lane, 489 U.S. 288 (1989) concerning retroactivity of a recent Supreme Court opinion and its applicability as a threshold question, would first require the answer to a key question, did Riley state an old or new rule.

Garcia does not contest (nor does the government) that his conviction became final on January 13, 2014 for purposes of the Teague analysis (Garcia v. United States, 134 S.Ct. 989 (2014)) after the Supreme Court denied his petition for rehearing from a denial of a petition for certiorari.

Second, the Court must "survey the legal landscape" as it then existed," Graham v. Collins, 506 U.S. 461, 468 (1993) at the time the conviction became final and determine whether a court considering such a claim would have felt compelled by existing precedent to conclude that the rule ~~was~~ was required by the constitution. Saffle v. Parks, 494 U.S. 484, 488 (1990) (emphasis added).

Prior to the Supreme Court's decision in Riley, several circuits relied on United States v. Robinson, 414 U.S. 218 (1973), and concluded that a cellular phone found on the person of an arrestee could be searched incident to arrest. See e.g., United States v. Finley, 497 F.3d 250 (5th Cir. 2007); United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009); Silvan W. v. Briggs, 309 F. Appx. 216, 225 (10th Cir. 2009) (unpublished); United States v. Rodriguez, 2011 U.S. Dist. LEXIS 100433, WL 3924958 at *5 (S.D. Tex. 2011) aff'd 702 F.3d 206 (5th Cir. 2012).

During the same time period other courts came to the opposite conclusion, for example, by finding that a search of a cellular phone did not advance either rationale in Robinson for the search-incident-to-arrest. See e.g., United States v. Wurie, 728 F.3d 1 (1st Cir. 2013) companion case to Riley, United States v. McGhee, 2009 U.S. Dist. LEXIS 62427, WL 2424104 at *3 (D. Neb. 2009).

These cases demonstrate the judicial schism that persisted

before Riley regarding whether officers could search an arrestee's cellular phone incident to their arrest. What is certain is that all these courts' used their interpretation of existing Supreme Court precedent in Robinson when handing down the decisions of cell phone searches incident to arrest. So prior to Riley district and circuit courts had taken opposing positions on the justification of a search of a cell phone incident to arrest.

Surveying the legal landscape as it then existed, this Court must conclude that it would have been anything but clear to reasonable jurist that prior to Riley, Garcia's Fourth Amendment rights to be free from unreasonable searches and seizures would have comported with the Constitution as described in Saffle. "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable ~~good~~ minds', or put differently, if 'reasonable jurist may disagree'" (citations omitted)

Stringer v. Black, 503 U.S. 222, 238 (1992). Even though there was a

split legally throughout the country, the Fifth Circuit had taken its position against Garcia in Riley and affirmed that decision in Rodriguez, thus leaving Garcia without the protections offered by the Fourth Amendment and the Constitution of the United States. As we must remember law is not a lottery that randomly chooses the lucky or blessed based on where they live, sleep or travel, law should apply evenly based on what the Constitution requires yesterday, today and tomorrow.

The government argues that "Riley is a new rule of criminal procedure because, by requiring police to obtain a warrant before searching a cell phone seized incident to arrest, it regulates ~~the~~ only the manner of determining the defendant's culpability."

First, to qualify as a new rule within the meaning of Teague a holding must break new ground, impose a new obligation on the states or the federal government, or was not dictated by precedent at the time the

defendant's conviction became final. Graham, *supra*.

Riley's requirement to officers before searching a cell phone incident to arrest is "accordingly simple - get a warrant." This requirement does not break new ground nor does it impose new obligations on states or officers. In fact, the Supreme Court has historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." Polidge v. New Hampshire, 403 U.S. 443, 481 (1971). Furthermore, recent technological advances i.e. cell phones have made the process of obtaining a warrant itself easier and quicker thus more efficient. See Missouri v. McNeely, 569 U.S., 185 L.Ed. 2d 696 (2013). Moreover, the Riley Court left open avenues to officers that would not require a warrant, "If the police are truly confronted with a 'now or never' situation, . . . they may be able to rely on exigent circumstances." Riley at 445; quoting McNeely, *Id.* The critical point is that, unlike

the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case. Riley at 452, quoting McNeely Id.

In Riley, the Supreme Court didn't break with any of its existing precedent in regards to incident to arrest doctrine it simply and only distinguished "modern day cell phones" from any privacy concerns "implicated by the search of a cigarette pack [Robinson], a wallet, or a purse." Riley at 446. But, left open the possibility that "a mechanical application of Robinson [may]... support the warrantless searches at issue here." Id at 441.

Garcia's claim simply states that the Riley Court extended a fundamental Fourth Amendment protection to the specific factual context of the warrantless search of the contents of a cell phone incident to arrest. Because, "[w]here the beginning point is a rule... designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent

Case that yields a result so novel that it forges a new rule, one not dictated by precedent." Wright v. West, 505 U.S. 277 (1992) (concurring opinion of Kennedy, J., at 309).

A case does not announce a new rule when it is merely an application of the principle that governed a prior decision to a different set of facts. Case-in-point, where the beginning point of the Supreme Court analysis in Riley is a rule of general application Robinson, supra; Chimel v. California, 395 U.S. 752 (1969); Arizona v. Gant, 556 U.S. 332 (2009) rules designed for the specific purpose of evaluating a myriad of factual contexts (search of a cellular phone) the Court only applies a general standard to the kind of factual circumstances it was meant to address, the Court will rarely state a new rule for Tague.

What Riley did was state with certainty that because of a cell phones quantitative and qualitative difference, factually, from other objects that might be kept on an arrestee's person the search-incident-to-arrest exception

does not apply to the contents of a cell phone. However, the Fifth Circuit had been ingrained in its belief that their decision in Riley and Rodriguez, *Supra*, comported with the Constitution. But Garcia never had an opportunity to contest and exercise his right against a unreasonable search and seizure pursuant to the Fourth Amendment of the United States Constitution, due to Fifth Circuit precedent. This would lead to the conclusion that if Riley is a rule of criminal procedure it would more likely than not be an old rule. The rule should apply retroactively to cases on collateral review.

Alternatively, under Teague's second exception a rule may be applied on collateral review, "if it requires the observance of 'those procedures that are... implicit in the concept of ordered liberty.'" Teague (quoting Mackey v. United States, 401 U.S. 667, 693 (1971)). Thus, the decision in Riley defines the principle to protect the right valued in our system and society, under the Fourth Amendment, which is "implicit in the concept

of ordered liberty enforceable... through the Due Process Clause." Wolf v. Colorado, 338 U.S. 25 (1949).

Argument Number Two

In determining Garcia's certificate of appealability argument as to whether or not Riley applied retroactively to cases on collateral review the Fifth Circuit determined that Garcia was ~~not~~ banned by Stone v. Powell 428 U.S. 465 (1976) in raising a Fourth Amendment claim on collateral review. Primarily by stating "Because Garcia had a full and fair opportunity to litigate his Fourth Amendment claim in pre-trial proceedings and on direct appeal," this is simply inaccurate.

Garcia points this Court directly to the government's stance on brief stating; "At the time of the seizure and search of Appellant's cell phone, and while on direct appeal, Fifth Circuit precedent authorized a warrantless search of the contents of a cell

Phone pursuant to a valid custodial arrest. United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007)." Brief for the United States of America, Doc. 00513944184 Pg 20, Pg 24-25.

What Garcia did argue was that he was deprived of an opportunity for a full and fair hearing of a Fourth Amendment challenge to the cell phone evidence because such a claim was foreclosed under then existing Fifth Circuit precedent. The government simply states "Contrary to this argument, Fifth Circuit precedent prior to Riley did not preclude Appellant from asserting his Fourth Amendment claim in a motion to suppress and challenging the Fifth Circuit law on direct appeal." ~~to the~~ ~~the~~ ~~the~~ ~~the~~ ~~the~~ Brief for the United States of America Doc. 00513944184 Pg. 39.

Such a circumbutory stance is incongruous, the government doesn't explain how Garcia would bring a motion to suppress that is squarely foreclosed by Fifth Circuit precedent, or how an attorney would be willing to

Submit such a motion.

See: Turner v. Quarterman, 481 F.3d 292, 300 (5th Cir. 2007)

(recognizing Fifth Circuit precedent foreclosed arguments that Eighth Amendment and Due Process Clause of the Fourteenth Amendment mandated jury instructions regarding the effect of a capital sentencing jury's failure to reach a unanimous verdict); Johnson v. Cockrell, 305 F.3d 249, 255 (5th Cir. 2002) (holding there was nothing deficient in counsel's failure to object to the admission of psychiatric testimony that was admissible under then-existing precedent). cert. denied.

Since the district court would be required to follow the law of the circuit until it was overruled, it was not completely unreasonable for counsel to forego a claim that was a loser under the then-current state of law, ~~and~~ furthermore any panel of judges would have to give deference to previous decisions reached by the Fifth Circuit, i.e. Finley.

In Williams v. Warden, Federal Bureau of Prisons, 713 F.3d

1332, 1343-44 (11th Cir. 2013) the court explained that a challenge is

squarely foreclosed when a . . . petitioner had no "genuine opportunity"

to raise it ~~and~~ due to the effect of binding circuit precedent, and

that a challenge is squarely foreclosed if our Court would have been

"unwilling to listen to [it]." Cert. denied sub. nom. Williams v. Hastings,

— U.S. —, 135 S.Ct. 52 (2014).

In Stone a bar applies to habeas review of a Fourth

Amendment claim unless the petitioner was unable to receive a

full and fair opportunity to litigate such claim. "A full and fair

hearing means that where there are facts in dispute, full and fair

consideration requires the fact-finding court and at least the availability of

meaningful appellate review by a higher . . . Court." Davis v. Blackburn, 803

F.2d 807-08 (5th Cir. 1986) (citing O'Berry v. Wainwright, 546 F.2d 1204, 1213

(5th Cir. 1977)). Garcia asserts that he never received or could have

received a full and fair opportunity before a fact-finding court to contest the warrantless search of his cell phone incident to arrest because of Circuit precedent in Finley and Rodriguez. The opportunity to present the claim is sufficient, unless the state "routinely or systematically" . . . prevent[s] the actual litigation of Fourth Amendment claims on their merits." Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980). ~~See~~

Accordingly, in the Fifth Circuit's determination of Finley and ultimately Rodriguez they determined that the arrestee's Fourth Amendment rights were not violated by searching a cell phone incident to arrest, this decision invariably created a systematic fault in an arrestee's ability to contest searches of a cell phone incident to arrest. Garcia, had no opportunity to a full and fair hearing on the facts of the search of his cell phone via "celebrite" hacking software since Fifth Circuit precedent authorized such a search.

The government and the Fifth Circuit cite the decision in United States v. Ishmael, 343 F.3d 741 (5th Cir. 2003) to foreclose Garcia's argument under Stone stating this "[c]ourt declined to reach the merits of that petition [since] Ishmael had a full and fair opportunity to litigate his Fourth Amendment claim in pre-trial proceedings and on direct appeal." However, Ishmael is factually and legally inopposite to Garcia's case, this can be determined by the history.

In December, 1993 Ishmael filed a motion to suppress the government's use of a thermal imaging device to detect excessive heat emitting from concealed underground illegal activity. Since a warrant had not been procured until after the use of the device the district court's analysis began with the two-prong test enunciated in Katz v. United States, 389 U.S. 347 (1967). The court granted the

motion to suppress holding that the Ishmael's had a reasonable expectation of privacy in the building and surrounding property, and would not sanction thermal imaging without a warrant. Ishmael, 843 F. Supp. 205, 212 (E.D. Tx 1994)

On interlocutory appeal, the Fifth circuit reversed the district court's order and remanded for further proceedings holding that a thermal scan of a structure on the Ishmael's property was not unreasonable despite legitimate privacy expectations because it was passive and did not reveal intimate details. United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995). In determining the merits of the government's appeal the Fifth circuit noted that the warrantless use of thermal imagers by police has spawned a fair amount of search and seizure jurisprudence "the Fifth Circuit has yet to squarely address this issue." *Id.* at

853. (emphasis added).

This explicitly lends itself to the theory that when Ishmael filed a motion to suppress and while the Fifth Circuit ruled on the government's ~~appeal~~ appeal the issue of thermal imagers had not been "squarely" addressed by the Fifth Circuit, as clearly stated in Ishmael, Id.

Subsequently, the Supreme Court ruled that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search' and is presumptively unreasonable without a warrant." Kyllo v. United States, 533 U.S. 27 (2001).

Ishmael filed a 32255 petition based on the decision in Kyllo, the district court granted a certificate of appealability as to a Fourth

Amendment violations by employing, without a warrant, thermal imaging devices to detect heat emanating from a hydroponic laboratory located on Ishmael's property. United States v. Ishmael, 343 F.3d 741, 742 (5th Cir. 2003). Ishmael had originally raised his Fourth Amendment challenge in a successful pre-trial motion to suppress but his claim was later rejected by the Fifth Circuit on interlocutory appeal. *Id.*

On Ishmael's certificate of appeal the Fifth Circuit declined to reach the merits of that petition because Ishmael "had a full and fair opportunity to litigate his Fourth Amendment claim in pre-trial proceedings and on direct appeal." *Id.*; United States v. Cook, 997 F.2d 1312, 1317 (10th Cir. 1993).

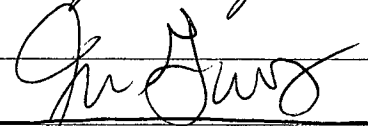
Garcia had no such luxury as he was foreclosed by Fifth Circuit precedent, and until the circuit was overruled by the Supreme Court in Riley Garcia never had a full and fair opportunity to challenge.

Conclusion

As technology raced ahead of the law, the Fifth Circuit was ingrained in the belief that incident to arrest a search of a cell phone was reasonable under the Fourth Amendment, however the court did not take into account what or how much information a modern day cell phone would contain. Afterwards, they made no attempt to address how to protect the intimate data i.e., travels, chats, pictures, videos. The government's warrantless search (via Cellebrite hacking technology) of Garcia's password-protected cell phone violated the expectation of privacy upon which Garcia reasonably relied. By using newly developed technology only recently available at time of arrest to hack Garcia's cell phone, officers extended the search in Finley and Rodriguez, past the objective boundaries of reasonableness. This overreaching search that officers subjectively relied on allowed them to peep Garcia's entire life as could only be seen through his eyes. Garcia was thus subjected to

an unreasonable search and seizure, albeit then authorized by Fifth Circuit precedent foreclosing any possibility of a full and fair opportunity for a Fourth Amendment challenge, denying him fundamental fairness in the ensuing proceedings, implicit in the concept of ordered liberty and due process.

Respectfully Submitted



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