

No. _____

In the Supreme Court of the United States

KEITH C. KISACK
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for a Writ of Certiorari to
The Supreme Court Louisiana

PETITION FOR WRIT OF CERTIORARI

Christopher A. Aberle
Louisiana Appellate Project
P.O. Box 8583
Mandeville, LA 70470-8583
caaberle@gmail.com
(985) 871-4084

Counsel of Record for Petitioner

Questions Presented

A warrant is needed to search data stored in a cell phone, even though the phone itself may be lawfully seized without a warrant. Prison authorities found and seized Mr. Kisack's hidden contraband cell phone, as was their right, and then hacked into it to examine its digital contents. Because the State's interests in security, order, and discipline ceased when the phone was seized, did the State need a warrant before searching the cell phone's data?

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Petition for Certiorari

Keith C. Kisack respectfully petitions for a writ of certiorari to review the judgment entered below by the Supreme Court of Louisiana.

Opinions Below

The judgment of the Supreme Court of Louisiana is reported at 2016-0797 (La. 10/18/17), ___ So. 3d ___, and is reprinted herein at A1-A8. The judgment of the Louisiana Fourth Circuit Court of Appeal, which was affirmed in part and reversed in part by the Louisiana Supreme Court, is reported at 2015-0083 (La. App. 4 Cir. 3/30/16), 190 So. 3d 806, and is reprinted at herein at A9-A22.

Jurisdiction

The Louisiana Supreme Court rendered judgment on October 18, 2017. This petition is filed within 90 days of that date. Accordingly, this Court has jurisdiction to review the judgment below. Sup. Ct. R. 13(1); 28 U.S.C. § 1257.

Authority Involved

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Statement of the Case

During a shakedown on a tier at the Orleans Parish Prison in 2011, prison personnel discovered and seized a cell phone and a charger hidden inside of sock inside of a crevice of a wall in the day room, a common area of the tier where inmates eat, watch, TV, and socialize. Because the phone was “locked,” requiring a pass code to access its data content, an officer trained in such matters obtained the pass code with the use of a specialized computer system and downloaded the phone’s content, which included photographs, incoming and outgoing text messages, phone numbers, social contacts, and other usage data. Among the many photos of various inmates, were numerous photos of Mr. Kisack, including some that appeared to be “selfies,” thereby suggesting that Mr. Kisack actually, though presumably jointly, possessed the phone.

Additionally, the particular prison location for the setting of at least some of the photos was identifiable, and the time stamps of the photos coincided with the Mr. Kisack’s housing unit assignments, thus suggesting that the phone moved with him from one unit to another. Furthermore, among the many texts found on the phone included those between Mr. Kisack and his defense attorney, who had been representing him in a pending criminal matter, for which Mr. Kisack was being detained.

Having determined from the phone’s digital content that it belonged to Mr. Kisack, the State charged Mr. Kisack with possession of a cellular telephone in a parish prison, a violation punishable with up to five years in prison.¹ Following a two-day trial, a jury found Mr. Kisack guilty as charged. The State thereafter filed a multiple-offender bill alleging that Mr. Kisack had

¹ LA. REV. STAT. ANN. § 14:402(E)(7) & (G).

three prior felony convictions: illegal discharge of a firearm; aggravated battery, and possession of a firearm by a felon (federal), convictions each obtained by guilty plea in 1993, 1995, and 2001, respectively. Following a hearing, the court found Mr. Kisack to be a fourth-felony offender, thus subjecting him to a statutory sentencing range of 20 years to life.² At the urging of the State, the district court imposed the maximum sentence of life in prison without the possibility of parole.

The Louisiana Fourth Circuit Court of Appeal affirmed Mr. Kisack's conviction and sentence. Mr. Kisack then challenged that ruling in the Supreme Court of Louisiana, which affirmed the conviction but vacated the sentence on the ground that it was imposed prematurely. Mr. Kisack now challenges the Louisiana Supreme Court's ruling insofar as it affirmed the denial of his motion to suppress the evidence obtained from his seized cell phone.

Reason for Granting the Petition

The Louisiana Supreme Court errs in holding that the Fourth Amendment protections identified by this Court in *Riley v. California* can never apply to an incarcerated person.

Background

Prior to trial, Mr. Kisack moved to suppress the evidence of the data seized from the cell phone on the ground that it was obtained without a warrant in violation of his Fourth Amendment rights. In his motion, Mr. Kisack cited *Riley v. California*, in which this Court held that, absent a showing of exigent circumstances, a search warrant is a prerequisite to a valid search of the data stored in a cell phone, even though the cell phone itself may have been lawfully seized pursuant

² LA. REV. STAT. ANN. § 15:529.1(A)(4)(a).

to a search incident to an arrest.³ The district court denied the motion on the ground that unlike the defendant in *Riley*, Mr. Kisack was in the state’s penal custody at the time of the search.

On appeal, the Fourth Circuit rejected Mr. Kisack’s argument. That court held: “As explained in *Hudson* [*v. Palmer*, 468 U.S. 517 (1984)], if the cell phone had been found on Kisack’s person or in his cell, he would not have had any reasonable expectation of privacy as to the contents of the cell phone; therefore, there is a lower expectation of privacy considering that the phone was abandoned outside of Kisack’s prison cell.”⁴ Mr. Kisack challenged that holding in the Louisiana Supreme Court, arguing that the Fourth Circuit’s analysis failed to distinguish the phone from its digital contents. He also challenged the appellate court’s suggestion that the phone was abandoned, given that it was very obviously hidden, not discarded.

The Louisiana Supreme Court did not rely on the appellate court’s abandonment holding. Rather, the court agreed that *Riley* does not apply in light of a prisoner’s “reduced expectation of privacy.”⁵ In support of that conclusion, the court relied on *United States v. Boyce*,⁶ a recent unreported decision from the federal district court in the U.S. Virgin Islands, which reached a similar conclusion.

Analysis

Mr. Kisack understands that an inmate has no reasonable expectation of privacy within a prison with respect to the search and seizure of his personal effects, and he has never suggested

³ 134 S. Ct. 2473 (2014).

⁴ Appendix at A-14.

⁵ Appendix at A-4.

⁶ No. 2014-00029, 2015 WL 856943 (D.V.I. Feb. 26, 2015).

that the prison authorities in this case did not have an unfettered right to search for and seize the cell phone in this case. In this regard, both the Louisiana Supreme Court and the Fourth Circuit Court of Appeal place too much reliance on *Hudson v. Palmer* to reject Mr. Kisack’s claim. *Hudson* made clear that a prisoner does not have a privacy interest in preventing prison officials from conducting a “shakedown” search of that prisoner’s cell.⁷ Mr. Kisack does not quibble with that holding.

But *Hudson v. Palmer*, which predates the existence of cell phones, does not speak to the question raised in this proceedings, which is whether the prison authorities who discover a contraband cell phone pursuant to a valid shakedown may thereafter rummage through the digital information contained on, and otherwise made available through, that cell phone. In *Riley*, this Court recognized that, for Fourth Amendment purposes, there is an enormous difference between a cell phone as an object and the data it contains and otherwise makes available. To make this point, this Court quotes Learned Hand, who said 90 years ago that it is “a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.”⁸ In applying that idea to the case before it, the *Riley* Court noted:

“If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house. A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”⁹

⁷ 468 U.S. at 525-26.

⁸ *Riley v. California*, 134 S. Ct. 2473, 2490-91 (2014) (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926)).

⁹ *Id.* at 2491.

In other words, searching the cell phone in this case went beyond searching Mr. Kisack's personal effects within the prison; instead, the sheriff deputies searched a significant part of Mr. Kisack's life, and the lives of others, that extends well beyond the prison walls. Unquestionably, the State's compelling penological interests in security, order, and discipline unquestionably limit an inmate's constitutional rights, and thus it cannot be doubted that "an inmate's expectations of privacy are considerably less than those of the free members of our society in general."¹⁰ But it is equally clear that "[p]risoners do not lose all constitutional rights once they pass beyond prison walls."¹¹ "While inmates have a diminished expectation of privacy, they retain their Fourth Amendment right to be free from searches and seizures that are objectively unreasonable in light of those diminished expectations."¹²

If, as the jurisprudence makes clear, some remnants of constitutional rights do survive incarceration, then a Fourth Amendment right must exist in this case, as no reasonably conceivable penological interest is served by allowing the state to forgo the warrant requirement. Like the defendants in *Riley*, Mr. Kisack had no right to prevent the authorities from searching for and seizing the cell phone, but once that phone was securely in the state's possession, all of the State's particular interests that ordinarily override an inmate's constitutional rights suddenly ceased to

¹⁰ See *Bell v. Wolfish*, 441 U.S. 520 (1979).

¹¹ *Stauffer v. Gearhart*, 741 F.3d 574, 584 (5th Cir. 2014) (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987) and *Hudson v. Palmer*, 468 U.S. 517, 523 (1984)). See *Louisiana v. Draughter*, 13-0914, p. 15 (La. 12/10/13), 130 So. 3d 855, 866 ("subject to the legitimate requirements of prison discipline and security, even a person convicted of a crime and incarcerated retains fundamental constitutional rights and protections"); *Louisiana v. Dauzat*, 364 So. 2d 1000, 1003 (La. 1978) ("Prisoners are not totally deprived of Fourth Amendment rights by virtue of their incarceration.").

¹² *Webb v. United States*, 789 F.3d 647, 658 (6th Cir. 2015) (citation omitted) (citing *Bell v. Wolfish*, 441 U.S. at 557).

exist. The phone was not going anywhere. It could no longer be used or misused. The State had full control over its physicality.

As this Court has explained:

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life.” The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. 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.¹³

Indeed, the contents of the phone seized in this case contained very private information, including, among other things, records of personal conversations, some involving attorney/client communications. Thus, while the phone itself may have been contraband, its electronic content, at least some of it, was personal, private, and potentially none of the State’s business. As a matter of analytical consistency, Mr. Kisack, no less than the defendants in *Riley*, was entitled to be secure from government intrusion into that content absent a search warrant. In any case, the importance of this issue merits a more responsive, detailed, and guiding judicial treatment than was provided by the courts below, or, for that matter, by the ruling of the Virgin Islands District Court in *Boyce*, which refused, without analysis, to extend *Riley*’s holding beyond a search incident to arrest.¹⁴

¹³ *Riley*, 134 S. Ct. at 2494-95 (citation omitted).

¹⁴ 2015 WL 856943 at *6 n.16.

Conclusion

This Court should grant certiorari to review the Louisiana Supreme Court's holding that *Riley* has no application in the prison context. That important holding arguably conflicts with the analysis in *Riley* and, in any case, the holding raises an important question of federal law that has not been but should be settled by this Court. *See* Sup. Ct. R. 10(c).

Respectfully submitted,

/s/ Christopher Albert Aberle
Christopher Albert Aberle
Louisiana Appellate Project
P.O. Box 8583
Mandeville, LA 70470-8583
caaberle@gmail.com
(985) 871-4084

Attorney of Record for Petitioner
Keith C. Kisack