Riley and Retroactivity

Author : Jessica Smith

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Last month the U.S. Supreme Court held that under the Fourth Amendment to the U.S. Constitution, officers can't search a cell phone as a search incident to arrest. *Riley v. California*, __ U.S. __, 134 S.Ct. 2473 (2014). For background on those cases, see the blog post here. Since then I've had a bunch of calls asking: Does *Riley* apply retroactively to my trial if the search was done pre-*Riley*? My answer: *Riley* applies but it's not a retroactivity issue.

Under *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987), new rules apply to all cases that are pending on direct review or yet not final. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (citing *Griffith*, 479 U.S. at 328). As a general rule, a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari to the U.S. Supreme Court has elapsed or a timely petition for certiorari has been finally denied. *See Griffith,* 479 U.S. at 321 n.6. For our purposes, that means if the trial hasn't occurred yet, the case isn't final and *Riley* applies. But defense lawyers don't get too excited! The State will likely argue for application of the good faith exception to the exclusionary rule, an issue Jeff will address in a follow up post.

But back to retroactivity. Retroactivity comes into play when the question is whether the new rule applies to cases that became final before the rule was issued. Thus, retroactivity doesn't become an issue until the post-conviction stage—in N.C., typically a motion for appropriate relief (MAR). While all of the questions I've gotten so far have dealt with pending cases, it's only a matter of time until the first *Riley* MAR gets filed. And when that happens, retroactivity will be front and center. Here's your cheat sheet.

In NC, there are two rules for retroactivity: One for new rules based on federal law (as *Riley* is) and one for new rules based on state law. For new federal rules, the *Teague* anti-retroactivity test applies. Teague v. Lane, 489 U.S. 288, 311 (1989) (*Teague* was a plurality decision that later became a holding of the Court. *See* Gray v. Netherland, 518 U.S. 152 (1996); Caspari v. Bohlen, 510 U.S. 383 (1994)). Under *Teague,* a new rule isn't retroactive unless it's substantive or it's a watershed rule of criminal procedure. A substantive rule is one that "narrow[s] the scope of a criminal statute by interpreting its terms" and "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro*, 542 U.S. at 352. This exception should cover decisions like *Lawrence v. Texa*s, 539 U.S. 558, 578 (2003), which held that criminalizing consensual adult sodomy was unconstitutional. It's pretty clear that *Riley* isn't a substantive rule.

Nor is *Riley* likely to fall within the second *Teague* exception for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." O'Dell v. Netherland, 521 U.S. 151, 157 (1997) (quotation omitted). The Court has said that it's "unlikely" that such rules have yet to emerge. *Teague*, 489 U.S. at 313; Tyler v. Cain, 533 U.S. 656, 666 n.7 (2001); Beard v. Banks, 542 U.S. 406, 417 (2004) (quotation omitted). And although the Court repeatedly has referred to *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing an affirmative right to counsel in all criminal trials for serious offenses), as the type of rule that would fall within this exception, *see, e.g.*, *Gray*, 518 U.S. at 170, the Court has never once held a rule to fall within this *Teague* exception. *See Beard*, 542 U.S. at 417. Meanwhile it has repeatedly rejected arguments that particular rules constitute watershed rules. *See, e.g.,* Whorton v. Bockting, 549 U.S. 406, 416-21 (2007) (*Crawford* is not a watershed rule of criminal procedure); *Schriro*, 542 U.S. at 356-58 (same as to *Ring* rule); *Beard*, 542 U.S. at 418-20 (same as to *Mills* rule); *O'Dell*, 521 U.S. at 167 (same as to *Simmons* rule); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997) (no retroactivity for rule of

Espinosa v. Florida, 505 U.S. 1079 (1992)); Goeke v. Branch, 514 U.S. 115, 120 (1995) (same as to rule relating to fugitive dismissal); Sawyer v. Smith, 497 U.S. 227, 241-45 (1990) (same as to Caldwell v. Mississippi, 472 U.S. 320 (1985)); *Gray*, 518 U.S. at 170 (same as to rule concerning notice of evidence to be used against defendant); *Caspari*, 510 U.S. at 396 (same as to new rule that Double Jeopardy Clause prohibits successive non-capital sentence proceedings); Graham v. Collins, 506 U.S. 461, 477-78 (1993) (same as to rule regarding mitigating evidence in capital sentencing); Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (same as to new rule regarding jury instructions); Butler v. McKellar, 494 U.S. 407, 416 (1990) (same as to Arizona v. Roberson, 486 U.S. 675 (1988)); Saffle v. Parks, 494 U.S. 484, 495 (1990) (same as to rule that a judge in a capital case was barred from telling the jury to avoid any influence of sympathy). Thus, while there is a *chance* that *Riley* will be held to be a watershed rule of criminal procedure, most wouldn't be willing to put a lot of money on that bet.

As noted, *Riley* was decided under the Fourth Amendment to the U.S. Constitution. The N.C. Supreme Court has expressly adopted the *Teague* test for determining whether new federal rules apply retroactively in state court MAR proceedings. State v. Zuniga, 336 N.C. 508, 513 (1994). However, should a defendant assert a "*Riley* claim" under the N.C. Constitution, the retroactivity issue might come out differently. That's because State v. Rivens, 299 N.C. 385 (1980), sets out the relevant retroactivity test for rules grounded in North Carolina law. *See Zuniga*, 336 N.C. at 513. Under *Rivens*, overruling decisions are presumed to operate retroactively unless there is a compelling reason to make them prospective only. *See Rivens*, 299 N.C. at 390. And that's clearly a more permissive test than the *Teague* rule. For more on *Rivens* retroactivity, see my blog post here.