

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

OCT 15 2014

**S.C. Supreme Court**

STEVEN BURTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000283  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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## **ISSUE PRESENTED**

Whether the PCR court erred in holding Petitioner did not establish ineffective assistance of trial counsel where Petitioner was found with incriminating evidence in a shed in his back yard; where a police investigator discovered the evidence after going to Petitioner's home without a warrant and proceeding directly into the backyard rather than knocking at the front door; and where trial counsel did not successfully argue a pretrial motion to suppress the evidence based on an unconstitutional search and did not renew the objection during trial.

## STATEMENT

On March 4, 2010, the Aiken County Grand Jury indicted Petitioner Steven Maurice Burton on two counts of receiving stolen goods and eight counts of violations of the Motor Vehicle Chop Shop Act. App. 222, line 8—App. 224, line 23; App. 314-331. On March 17, Petitioner appeared at trial before a jury and The Honorable Jack Early. Michael Routzong represented Petitioner and Sam Grimes and Steve Kodman represented the State. App. 1.

During a pretrial hearing, testimony was proffered that on June 8, 2009, the North Augusta Public Safety Department received a report of a stolen covered-trailer containing construction tools. Sometime thereafter, officers discovered the empty trailer in the possession of a third party, who claimed he purchased the trailer from Petitioner at his home in Aiken County. App. 8, line 4—App. 9, line 23; App. 15, line 17—App. 16, line 3.

Not having jurisdiction, the North Augusta officer informed Investigator Prince of the Aiken County Sheriff's Office about the matter. App. 7, line 24—App. 8, line 3. On September 4, 2009, Investigator Prince drove to Petitioner's residence. App. 14, lines 7-11; App. 16, lines 6-10. Although the mobile home had a front door, Investigator Prince did not knock on it. App. 16, lines 11-14. "I went to the door that seems to be the most used which would be the back door. I knocked on the back door, could not get no answer there." App. 10, lines 5-20. He then walked to a fifth-wheel camper sitting nearby in the yard and connected to water and electricity. Knocking on the door, he again received no answer. He claimed that beside the back door was a motorcycle "being stripped" and a small outbuilding with an open door. Inside were an air compressor, table saw, and miter saw consistent with those described as being in the stolen covered-trailer. App. 10, line 25—App. 11, line 19. Officer Prince left and obtained a search warrant for the residence to return and seize the items for use as evidence at trial. App. 12, lines 3-6.

Prior to trial, counsel moved to suppress the evidence on grounds that Investigator Prince's failure to knock on the front door and his entry into the curtilage of Petitioner's home were unjustified and resulted in an unconstitutional search. When prompted, trial counsel had no case law to support the motion. The trial judge denied the motion. App. 19, line 21—App. 21, line 16. During trial the State called Investigator Prince, who testified to his investigation, search and seizures at Petitioner's residence without objection from trial counsel. App. 87, line 13—App. 111, line 6. At the conclusion of trial, the jury found Petitioner guilty on one count of receiving stolen goods and all eight counts of Chop Shop Act violations. App. 222, line 8—App. 224, line 23; App. 314-331. The trial court sentenced Petitioner to ten years' incarceration for the receiving stolen goods charge, five years consecutive on one Chop Shop Act violation, and five years concurrent for the remaining Chop Shop Act violations. App. 238, line 12—App. 239, line 1.

On June 11, 2012, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. Specifically, Petitioner claimed trial counsel was ineffective in arguing the illegality of law enforcement's search under the Fourth Amendment and in failing to contemporaneously object to the tainted evidence at trial. App. 241-248. The State filed a return on October 8, 2012. App. 249-252. On July 10, 2013, Petitioner appeared at an evidentiary hearing before The Honorable R. Ferrell Cothran. Charles T. Brooks represented Petitioner and Daniel Gourley represented the State. App. 253. On cross-examination, trial counsel admitted that he did not adequately prepare himself for the Fourth Amendment issue: "I think that's just obvious," he stated. App. 278, lines 16-21. He was thereafter walked through his Fourth Amendment argument in the trial transcript and asked whether he still believed he was not adequately prepared. App. 13—286, line 2. "I disagree probably now . . . . I think there's other things I probably could have

argued. For one thing, I could have had case law. I think I recall that Mr. Burton had [‘no trespassing[’] signs on his property. I’m not sure I raised that to the Court.” App. 286, lines 3-8.

On August 19, 2013, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance. App. 304-313. Specifically, the order concluded that Investigator Prince was lawfully on Petitioner’s property at the time he saw the tools in the shed:

He approached the door of the mobile home which appeared to be the most frequently used door. He knocked and did not receive an answer. He subsequently went to the door of the trailer and did not receive an answer. It was in this process of investigation that he saw the stolen goods later recovered under the search warrant.

Investigator Prince had every right to investigate the crime by going up to the doors of the mobile home and trailer. He was permitted to be on the property to investigate and he could proceed to what appeared to be the most used door in order to attempt to make contact with [Petitioner]. In doing so, any evidence in plain view, such as the motorcycle and the tools in the open shed, was subject to seizure and certainly usable by Investigator Prince in preparing a search warrant for the property.

App. 311. Thus, trial counsel sufficiently argued the motion, the trial court properly admitted the evidence, and no prejudice resulted from trial counsel’s failure to contemporaneously object. App. 312.

### ARGUMENT

**The PCR judge’s holding that Investigator Prince lawfully entered Petitioner’s backyard and that Petitioner would not have succeeded in arguing the issue on appeal was erroneous.**

The PCR judge’s holding that Investigator Prince lawfully entered Petitioner’s backyard and that Petitioner would not have succeeded in arguing the issue on appeal was erroneous. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective

assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

“An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge.” *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002). “[A] contemporaneous objection is required to properly preserve an error for appellate review.” *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (citing *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)). Thus, trial counsel renders ineffective assistance when his failure to preserve an issue for appellate review prejudices defendant’s case. *See, e.g., Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: “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. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967). “The burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures is upon the prosecution.” *State v. Bultron*, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

For example, the South Carolina Supreme Court has held that under the “plain view” exception, evidence is subject to a warrantless *seizure* if “the initial intrusion which afforded the

authorities the plain view was lawful and . . . the incriminating nature of the evidence was immediately apparent to the seizing authorities.” *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). Importantly, the intrusion by the government into a private residence and its curtilage is of the gravest ilk. *Camara v. San Francisco*, 387 U.S. 523, 529-30 (1967); *Florida v. Jardines*, 133 S. Ct. 1409 (2013). Thus, law enforcement may not enter a residence or its curtilage absent probable cause and a warrant or warrant exception or consent. “[T]he knocker on the front door is treated as an invitation or license to attempt an entry . . .’ [which] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.” *Jardines* at 1415. This type of visitor includes investigating police officers. *Id.* at 1415-16.

The Third Circuit Court of Appeals recently examined the scope of this license under facts similar to those in this case. In *Carmen v. Carrol*, 749 F3d 192 (3rd Cir. 2014), the court held that an officer’s bypassing the front door of a home and proceeding directly to the back door exceeded the implied invitation supporting a “knock and talk” investigation. The officer, searching for a suspect reportedly hiding at the residence, parked his car and went straight to the backyard “because he saw a light on in the garage and thought someone might be there.” *Id.* at 195. Seeing no one there, walked onto the back deck because the sliding door there “looked like a customary entryway.” *Id.* Relying on *Jardines*, inter alia, the court reasoned that the officer’s contention that the back door was “the most expedient and direct access to the house from where [he] had to park” did not affect the scope of the implied license because the Fourth Amendment “is not grounded in expediency.” *Id.* at 198-99. “The ‘knock and talk’ exception requires that police officer begin their encounter at the front door, where they have an implied invitation to go.” *Id.* at 199. *See also State v. Socci*, No. 2013-182, 2014 WL 3056503 (S. Ct. N.H. July 8,

2014) (holding officer's search unconstitutional when he walked perimeter of garage after exiting vehicle and localizing strong smell of marijuana).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule provides that evidence seized in violation of the Fourth Amendment must be excluded from trial. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule also prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Id.*; *see also State v. Sachs*, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975); *State v. Brown*, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010).

In this case, Investigator Prince's entry into Petitioner's backyard constituted an unconstitutional search, and the evidence he seized as a result should have been suppressed. Investigator Prince saw the evidence from a position in which he was unlawfully intruding into Petitioner's back yard. He arrived at Petitioner's home warrantless and for purposes of investigation. He admitted that he saw the mobile home's front door but did not approach it. Instead, he went to the backdoor, claiming it seemed to be "the most used." As explained in *Carmen v. Carrol*, the mere fact that the back door appeared to be the most used door did not expand the scope of the implied license to enter the curtilage because the Fourth Amendment does not subvert the grave privacy interest in one's home to the convenience of police officers for purposes of a routine criminal investigation. Moreover, the mere fact that a back door is more commonly used cannot support a determination that a visitor has a license to approach it.

Frequent use of such a door by residents and invited guests as a connection between the home and the curtilage, blocked from view from approaching thoroughfares, brings the area inherently within the privacy protections of the Fourth Amendment.

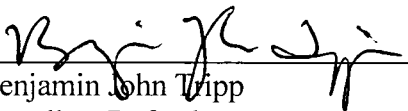
In Petitioner's case, visitors not invited into his curtilage elsewhere were signaled to attempt entry at the front door affronting the street. Investigator Prince was permitted to take the front path, knock promptly, wait briefly to be received, and then leave. Only while in the back yard did Investigator Prince see the motorcycle "being stripped" and the opening to the small outbuilding containing the purportedly stolen tools. He was in a position of unlawful intrusion, and his discovery of evidence was therefore a direct result of an unconstitutional search of the curtilage of Petitioner's home.

Trial counsel did not succeed on his suppression motion because he was unprepared to argue it. When prompted, trial counsel had no case law to support the motion. At the PCR hearing, he stated it was obvious that he did not adequately prepare. Worse still, trial counsel failed to contemporaneously object to the admission of the evidence of the incriminating evidence through Investigator Prince's testimony during trial. Accordingly, the PCR court's determinations that trial counsel sufficiently argued the motion to suppress, that the trial court properly admitted the evidence, and that no prejudice resulted from trial counsel's failure to contemporaneously object were in error, and Petitioner established ineffective assistance of counsel in violation of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Steven Maurice Burton's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

  
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Benjamin John Tipp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County  
R. Ferrell Cothran, Jr., Circuit Court Judge

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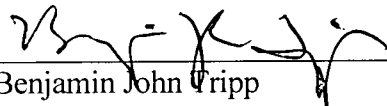
RESPONDENT

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CERTIFICATE OF SERVICE

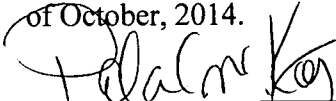
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of October, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day  
of October, 2014.

  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.