Docket No. ______________

In the Supreme Court of the United States

STEVEN BURTON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE AIKEN COUNTY COURT OF COMMON PLEAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner was denied effective assistance of counsel as guaranteed by the Sixth Amendment based on his trial attorney's failure to preserve for appellate review the issue of whether under the Fourth Amendment, a police officer attempting to contact Petitioner at his home without a warrant could disregard his front door, enter his backyard, and use his back door just because that was how Petitioner generally entered his home.

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The first report of the denial of Petitioner's Fourth Amendment claim was South Carolina Court of Appeals Unpublished Opinion Number 2012-UP-138 (Feb. 29, 2012). In an unpublished circuit court order in South Carolina Case No. 2012-CP-02-01421 (Aiken County Ct. Common Pleas Aug. 19, 2013), Petitioner's Sixth Amendment claim, which was for ineffective assistance of counsel based on the denial of his Fourth Amendment claim, was denied for the first time. On April 8, 2015, the Supreme Court of South Carolina denied discretionary review of the latter order in an unpublished order in South Carolina Appellate Case No. 2014-000283.

BASIS OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C §1257(a) because Petitioner is asserting the deprivation of a right – the effective assistance of trial counsel – secured by the United States Constitution. The Aiken County Court of Common Pleas issued an order dismissing Petitioner's Sixth Amendment claim on August 19, 2013. The Supreme Court of South Carolina issued an order denying discretionary review on April 8, 2015.

CONSTITUTIONAL PROVISIONS

"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.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

STATEMENT OF THE CASE

At Petitioner's criminal trial, Stacy Prince from the Aiken County Sheriff's Office described his standard method for attempting uninvited contact with a home resident during an investigation:

> When we arrived at [Petitioner's home]—**normally when I arrived at a residence I attempt to make contact with what appears to be the most used door.** In this case I went to the back door, knocked on the back door and received no response from there. I then took **the path of least resistance** from the back door to a camper door which was located in the yard parked next to the trailer.

Trial Tr. 88, lines 12-18 (emphasis added).

* * *

The Aiken County Grand Jury indicted Petitioner Steven Maurice Burton on March 4, 2010 on one count of receiving stolen goods[1] and eight counts of violations of South Carolina's Motor Vehicle Chop Shop Act.[2] On March 17, 2010, Petitioner appeared for trial in the Aiken County Court of General Sessions. Trial Tr. 1. In a pretrial hearing, The State of South Carolina proffered testimony that on June 8, 2009, police received a report of a stolen 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. On September 4, 2009, Investigator Prince drove to Petitioner's mobile home. Although the residence had a front door, Prince "didn't even try" to approach there. Trial Tr. 16, lines 11-19. Instead, he "went to the door that

[1] S.C. Code Ann. § 16-13-180 (1976).
[2] S.C. Code Ann. § 56-29-30(C)(1) (1976).

seem[ed] to be the most used which would be the back door. [He] knocked on the back door, could not get no answer there." Trial Tr. 10, lines 5-20. From the back door, Prince "took the path of least resistance around to the side of [a separate fifth-wheel] camper where [he] knocked on the door of the camper and received no response from there." Trial Tr. 10, line 25—Trial Tr. 11, line 5. He testified that beside the back door of the mobile home was a stripped motorcycle 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. Trial Tr. 10, line 25—Trial Tr. 11, line 19. Investigator Prince obtained a search warrant and returned to seize the items. Trial Tr. 12, lines 3-6.

After Prince's testimony, Petitioner's trial counsel moved to suppress the seized evidence on grounds that his failure to knock on the front door and his entry into the curtilage of Petitioner's home were unconstitutional:

> Your Honor, this evidence should be suppressed because it was a product of an unlawful or unconstitutional intrusion into Mr. Burton's privacy. All of these items were well within the curtilage of the house. They had a front door. They could have chosen to knock on the front door. He testified that he didn't.
>
> . . .
>
> . . . But for that intrusion, Your Honor, [the investigator] would not have had probable cause to seek a search warrant—

Trial Tr. 19, line 21—Trial Tr. 20, line 2. The trial judge asked counsel whether any case law specifically held "that if they failed to knock on the front door and simply walk to the backyard that that is an invasion of the defendant's rights."

Trial Tr. 20, line 24—Trial Tr. 21, line 3. Counsel could not name a specific case, so the trial judge denied the motion. Trial Tr. 21, lines 4-16.

Trial counsel did not object when Prince testified during trial. Trial Tr. 87, line 13—Trial Tr. 105, line 25. The jury found Petitioner guilty as charged, and the trial judge sentenced him to ten years' incarceration for the receiving stolen goods charge, five years consecutive for one of the Chop Shop Act violations, and five years concurrent for the remaining Chop Shop Act violations. Trial Tr. 222, line 8—Trial Tr. 224, line 23; Trial Tr. 238, line 14—Trial Tr. 239, line 6.

Petitioner timely filed an with the South Carolina Court of Appeals an appeal "arguing investigators used evidence obtained during an illegal search as the basis for probable cause in support of a search warrant." On February 29, 2012, the court affirmed the conviction on grounds of error-preservation.[3] Opinion aff'g conviction.

On June 11, 2012, Petitioner filed in the Aiken County Court of Common Pleas an application for post-conviction relief (PCR)[4] claiming that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment. Specifically, Petitioner argued trial counsel's "failure to make contemporaneous objections to the introduction of the evidence resulted in the applicant being denied the right to raise

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[3] The opinion cited *South Carolina v. Forrester*, 541 S.E.2d 837, 840 (2001):

> "In most cases, making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a factual determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."

[4] *See generally* S.C. Code Ann. Title 17, Ch. 27 ("Uniform Post-Conviction Relief Act").

a valid Fourth Amendment violation issue on direct appeal." App. for PCR 3A-3B.

On July 10, 2013, Petitioner appeared at an evidentiary hearing for his Sixth Amendment claim. PCR Tr. 1. On August 19, 2013, after reviewing the testimony, the trial transcript, appellate records, and records of the Aiken County Clerk of Court, the PCR judge issued an order of dismissal concluding Petitioner failed to establish ineffective assistance of trial counsel.[5] PCR Order of Dismissal. Specifically, the judge concluded that the investigator was lawfully on Petitioner's property at the time he saw the seized evidence:

> . . . [The investigator] was lawfully on [the] property at the time the items were seen. [He] was investigating the possession of stolen goods. 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.
>
> [The investigator] 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 . . . in preparing a search warrant for the property.

PCR Order of Dismissal 8 (emphasis added). The judge concluded that because no prejudice resulted from trial counsel's failure to preserve the issue for appellate

[5] At the hearing, trial counsel testified, "I disagree that I adequately prepared on the Fourth Amendment issue. I think that's just obvious." PCR Tr. 26, lines 16-21. "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

prejudice resulted from trial counsel's failure to preserve the issue for appellate review, Petitioner could not establish a claim for ineffective assistance under *Strickland v. Washington,* 466 U.S. 668 (1984). PCR Order of Dismissal 9.

On October 15, 2014, Petitioner filed with The Supreme Court of South Carolina a petition for writ of certiorari seeking discretionary review based on the following issue:

> 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.

Petition for Writ of Cert. On April 8, 2015, The Supreme Court of South Carolina denied the petition. Order Denying Certiorari.

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his property. I'm not sure I raised that to the Court." PCR Tr. 34, lines 3-8.

ARGUMENT FOR ALLOWANCE OF THE WRIT UNDER RULE 10, SUBSECTION (C)

In the recent case of *Carroll v. Carman*, 135 S. Ct. 348, 352 (2014), this Court left undecided the question of "whether a police officer may conduct a 'knock and talk' at any entrance [in the curtilage] that is open to visitors rather than only the front door." The answer flows logically from this Court's opinion in *Florida v. Jardines*, 113 S. Ct. 1409 (2013): an officer has license to approach an entrance in the curtilage based on an objectively reasonable indication that the residents permit an attempt at uninvited contact there. Nevertheless, a number of federal courts of appeals and state courts have failed to look at *Jardines* in answering this question. Instead, they have applied the outdated analysis that *Jardines* intended to obviate: whether an officer's actions within the curtilage were reasonably related to locating the resident. Without this Court's clarification of the proper analysis under *Jardines*, lower courts will continue to approve—and police officers will continue to execute—unconstitutional searches of curtilages incidental to locating residents.

Prior to *Jardines*, many lower courts held that an officer without a warrant could enter the curtilage of a home in a manner reasonably related to locating a resident. For example, in *United States. v. Daoust*, the First Circuit Court of Appeals wrote, "[T]here is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person." 916 F.2d 757, 758 (1st Cir. 1990). Similarly, in *Alvarez v. Montgomery County*, the Fourth Circuit wrote, "It was not unreasonable . . . for officers responding to a 911 call to enter the backyard when circumstances indicated they might find the

homeowner there." 147 F.3d 354, 359 (4th Cir. 1998). *See also U.S. v. Raines*, 243 F.3d 419, 421 (8th Cir. 2001) (holding "because it was a pleasant summer evening and several cars were parked in the driveway," officer "did not interfere with [homeowner's] privacy interest when he, in good faith, went unimpeded to the back of [the] home to contact the occupants of the residence"); *U.S. v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977) ("We cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded as the fruit of an illegal search."); *U.S. v. Wells*, 648 F.3d 671, 679-80 (8th Cir. 2011) (holding no license to approach backdoor when officer failed initially to attempt contact at front door); *U.S. v. Thomas*, 430 F.3d 274, 280 (6th Cir. 2005) (Holding no reasonable expectation of privacy in the back of house if back door "was customarily used as the entrance to the house"); *U.S. v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir. 1974) ("[W]e cannot say that Agent Williams exceeded the scope of his legitimate purpose for being there by walking around to the back door when he was unable to get an answer at the front door.").

Jardines edified that an officer's license to enter the curtilage without a warrant is not based on the purpose of locating a resident. Instead, it exists because the resident has impliedly allowed the officer to approach and make an offer for uninvited contact. *Jardines*, 133 S.Ct. 1415-16. The *Jardines* opinion also stated that this principle represents an easy application of "the traditional property-based understanding of the Fourth Amendment." *Id.* at 1417.

The Court elaborated that due to the Fourth Amendment's utmost protection of privacy in the home and curtilage, the license must be considered narrow in scope in time, space, and means. *Id.* ("[A]n officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. . . . [The] license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . . But introducing a trained police dog to explore . . . is something else. There is no customary invitation to do *that.*"); *id.* at 1420-22 (Alito, J. dissenting) ("The law of trespass generally gives members of the public a license to use a walkway to approach a front door of a house and to remain there for a brief time. . . . Of course, this license has certain spatial and temporal limits."). The Court also explained that a resident may communicate circumscription or even abrogation of the license, for example through a door fronting to a public thoroughfare; a door with a knocker, bell, or letterbox; or a "no trespassing" sign or closed gate blocking ingress to the curtilage. *See id.* at 1415 ("'[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave.' . . . [T]he only question is whether he ha[s] given his leave (even implicitly) for them to do so," and "the knocker on the front door is treated as an invitation or license to attempt an entry . . . ." (citations omitted)). *See also U.S. v. Titemore*, 437 F.3d 251, 259 (2nd Cir. 2006) (holding no Fourth Amendment violation based on approaching sliding glass door that faced a public road); *U.S. v. James*, 40 F.3d 850, 862 (7th Cir. 1994) (holding no Fourth Amendment violation based on use

of paved walkway and rear side door of duplex that were accessible to general public and commonly used for entrance from nearby alley), *vacated on other grounds,* 516 U.S. 1022 (1995); *U.S. v. Garcia,* 997 F.2d 1273, 1279-80 (4th Cir. 1993) ("If the front and back door of a residence are readily accessible from a public place, . . . the Fourth Amendment is not implicated . . . ."); *Robinson v. Commonwealth of Va.*, 612 S.E.2d 751, 761 (Ct. App. Va. 2005) (stating factors relevant to propriety of entrance into curtilage include "whether homeowner has erected any physical barriers" and "whether homeowner has posted signs, such as 'no trespassing' or 'private property' signs, indicating a desire to exclude the public from the premises").

From these two principles, a third logically follows that the mere fact that an entrance is regularly or most frequently used by the residents, used by guests with standing invitations, where contact would most easily or likely be made, or in contemporaneous use by residents or guests does not constitute an objectively reasonable indication that the residents permit an attempt at uninvited contact there. In itself, the regular use and enjoyment of these areas in the home and curtilage by residents and their invited guests creates the heightened privacy interests that the Fourth Amendment was intended to strictly protect. Concordantly, while many a citizen frequently occupies his or her living room or bedroom, sometimes with regularly visiting personal companions, the Fourth Amendment does not provide reduced protection in these places.

A fourth principle also follows that the mere fact that a resident is home but does not respond to an offer for uninvited contact at a designated door does not

constitute an objectively reasonable indication that the residents permit additional attempts through other undesignated entrances into the curtilage. *Jardines* at 1415 ("[The] license typically permits the visitor to . . . wait briefly to be received, and then (absent invitation to linger longer) leave.") *See also U.S. v. Perea-Rey*, 680 F.3d 1179, 1188 (9th Cir. 2012) ("[O]nce an attempt to initiate a consensual encounter with the occupants of a home fails, 'the officers should end the knock and talk and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.'" (citation omitted)).

Despite this Court's opinion in *Jardines*, lower courts have mistakenly rehashed the pre-*Jardines* analysis by formulating that residents give an implied license to approach any entrance in the curtilage if doing so is reasonably related to locating the resident. For example, the Fourth Circuit Court of Appeals ruled in *Covey v. Assessor of Ohio County* that an officer searching for a homeowner was entitled to "bypass the front door (or other entry point usually used by visitors)" because he had a reasonable belief that the homeowner was elsewhere on the property. 777 F.3d 186, 192-93 (4th Cir. 2015) (citing *Alvarez*, 147 F.3d 354)). Similarly, the Tenth Circuit Court of Appeals held in *United States. v. Shuck* that officers did not search the curtilage of a trailer home in violation of the Fourth Amendment because "the evidence showed that by approaching the back door as they did, the officers used the normal route of access, which would be used by anyone visiting this trailer." 713 F.3d 563, 568 (10th Cir. 2013). However, no evidence reasonably indicated that the back door was open to contact from uninvited guests

beyond the mere regular use by residents and guests with standing invitations:

> The officers went around the chainlink fence to the west side of the trailer house where the back door was located. Detective Ruhman testified that it appeared persons entering the trailer entered through the back door.

Id. at 565. The court stated that its conclusion that no violation occurred was consistent with pre-*Jardines* cases from other circuits, citing *Thomas*, 430 F.3d at 280, *Raines*, 243 F.3d at 421, *Garcia*, 997 F.2d at 1279-80, and *Daoust*, 916 F.2d at 758. *Shuck* at 568 n.2. *But see Carman v. Carroll*, 749 F.3d 192 (3rd Cir. 2014) (holding officer's bypassing front door for back door because he saw light on and then walking to sliding door on back deck because it looked like a customary entryway exceeded license because Fourth Amendment "is not grounded in expediency"), *reversed on other grounds per curiam*, 135 S. Ct. 348 (2014).

In the very recent state court opinion in *South Carolina v. Bash*, ___ S.E.2d ___, Op. No. 5314 (S.C. Ct. App. April 22, 2015), the South Carolina Court of Appeals, without citing this Court's opinion in *Jardines*, relied on *Alvarez*, 147 F.3d 354, and *Covey*, 777 F.3d 186, to hold that police officers do not conduct an impermissible search by walking to the back door if they are unable to make contact at the front door as long as "they have a legitimate law enforcement purpose for doing so" and "have reason to believe the person they are attempting to contact will be found there." Also failing to apply the proper *Jardines* analysis, the Supreme Court of New Hampshire recently held that an officer's search around a garage was only unconstitutional because his purpose was "to gather evidence" rather than to locate the resident. *N.H. v. Socci*, No. 2013-182, 2014 WL 3056503 (S. Ct. July 8, 2014).

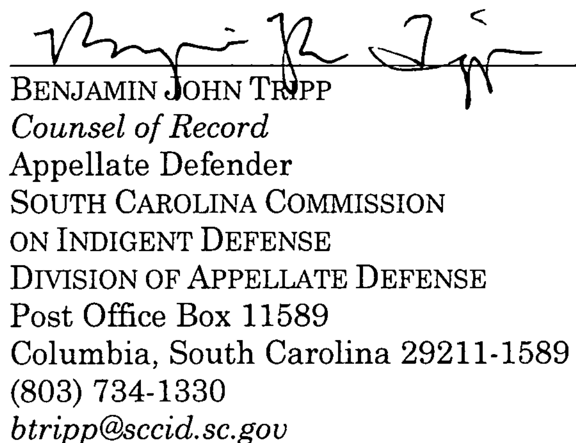
As for the case at hand, at Petitioner's criminal trial Investigator Prince explicitly stated his policy of attempting uninvited contact at residences through doors that appear to be the most used. He also described how, after receiving no answer at the back door, he took the path of least resistance to another door, an effort to locate Petitioner without what he believed to be unreasonable intrusion into Petitioner's privacy. The PCR judge later held that trial counsel's failure to preserve the question of the constitutionality of Prince's actions for appellate review did not render his assistance ineffective because Prince was permitted under the Fourth Amendmetn to approach the back "to investigate and he could proceed to what appeared to be the most used door in order to attempt to make contact with [Petitioner]."

As explained above, Prince's actions were not permissible under the Fourth Amendment. Thus, trial counsel's failure to preserve for appellate review the trial judge's plain legal error rendered his assistance ineffective under the Sixth Amendment. *See, e.g., United States v. DeWolf*, 696 F.2d 1, 4 (1st Cir. 1982) ("[W]hen the claim [of ineffective assistance] is premised on failure to object to evidentiary rulings . . . we are reluctant to find ineffective assistance when the rulings by the court do not rise to the level of plain error."), *abrogated on other grounds by Maine v. Moulton*, 474 U.S. 159, 159 (1985); *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1314 (11th Cir. 2003) ([T]here is no question that Davis's counsel performed deficiently in failing, as required by Florida's *Joiner* rule, to renew Davis's *Batson* challenge before accepting the jury."); *United States v. Green*,

429 F.2d 754, 760 (D.C. Cir. 1970) ("We have emphasized in the past the responsibility of trial counsel to make objection, out of the hearing of the jury, if it appears to him that the trial judge's participation may endanger his client's rights.").

By re-formulating the pre-*Jardines* analysis, the foregoing courts have effectively emasculated the time and space restrictions on the implied license that the Fourth Amendment imposes to protect residential privacy. Thus, this Court should allow the writ so that it can clarify that under *Jardines*, a police officer who traverses an entrance into the curtilage must show some objectively reasonable indication—beyond the mere regular use of the entrance by residents and invited guests, the residents' likely presence there, or the residents' failure to respond at another entrance—that the residents have permitted an attempt at uninvited contact there.

Respectfully submitted,



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July 7, 2015

The Honorable Scott S. Harris
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Steven Burton v. State of South Carolina

Dear Mr. Harris:

Enclosed are the originals and ten copies of a petition for writ of certiorari and a motion for leave to proceed *in forma pauperis*. The certificate of service is attached to the original petition.

Sincerely,

Benjamin John Tripp
Appellate Defender

BJT

Enclosures

cc: The Honorable Daniel E. Shearouse
Daniel Gourley, Esquire
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July 7, 2015

RECEIVED
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S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Steven Burton v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a copy of petition for writ of certiorari and a motion for leave to proceed *in forma pauperis*, which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

Benjamin John Tripp
Appellate Defender

BJT

Enclosures

cc: Daniel Gourley, Esquire