

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Anderson County

RECEIVED

Honorable Letitia H. Verdin, Circuit Court Judge

SEP 28 2017

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KEVIN JEROME GILLIARD,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000071

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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John H. Strom  
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South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel's professed trial strategy for not suppressing evidence of Petitioner's uncharged possession of marijuana was not objectively reasonable.

## STATEMENT

On April 19, 2009, Anderson County Sherriff's Deputy Surratt watched a silver Pontiac Grand Am run a stop a sign. App. 33, ll. 20-25. Surratt pulled the car over. The driver was Demtrius Robertson. Petitioner was the only passenger. *Id.* Surratt would claim that Petitioner was holding a partially smoke marijuana cigarette. Petitioner also had a small bag of marijuana in his pocket. App. 36, ll. 1-7.

Petitioner and Robertson were both arrested. A search of the vehicle found 2.9 grams of crack cocaine, a half-pound of marijuana, and forty-five caliber pistol. App. 35, l. 8 – 40, l. 21. Surratt's incident report and Petitioner's arrest warrant also stated that Surratt found a clear plastic bag containing a substance that field tested positive for crack cocaine. App. 54, l. 13 – 55, l. 19. Surratt's incident report and arrest warrant unambiguously stated that Surratt found this crack cocaine prior to taking Petitioner to the detention center. *Id.*

At trial, Surratt would be forced to admit that he inexplicably lied in his incident report and when drafting Petitioner's arrest warrant. App. 72, l. 1 – 78, l. 20. Contrary to his claims pre-trial, Surratt testified at trial that the crack cocaine was not found until Petitioner was being searched at the detention center. *Id.* Video footage from the detention center was destroyed prior to trial despite Surratt requesting a copy of the video. App. 105, l. 2 – 106, l. 24. Surratt dismissed his mendacity as simply a mistake.

Before Petitioner's trial, Robertson claimed responsibility for the 2.9 grams of crack cocaine, the half-pound of marijuana, the scales, and the forty-five caliber pistol. App. 35, l. 8 – 40, l. 21. Robertson was allowed to plead guilty to possession with intent to distribute crack cocaine. *Id.* Petitioner was not charged for the marijuana found on his person and proceeded solely to trial on the charge of trafficking in crack cocaine.

Despite not being charged with the marijuana, the State elicited testimony that Petitioner was initially arrested for having the marijuana cigarette and the small amount of marijuana on him. App. 66, l. 4 – 68, l. 24. Defense counsel did not object to the jury learning about Petitioner’s prior bad act of possessing marijuana.

Petitioner was found guilty of trafficking in crack cocaine and Judge Maddox sentenced Petitioner to a term of twenty-five years imprisonment. App. 173, l. 4 – 175, l. 25. On appeal Petitioner was represented by Deputy Chief Appellate Defender Wanda Carter. The South Carolina Court of Appeals affirmed his conviction and sentence. *State v. Gilliard*, No. 2012-UP-351 (filed June 13, 2012). This Court granted certiorari. However, on July 15, 2015, this Court dismissed certiorari as improvidently granted. *State v. Gilliard*, No. 2015-MO-041.

#### **Post-Conviction Relief Application**

On September 1, 2015, Petitioner filed an application for post-conviction relief. App. 177 - 183. The State filed a Return on May 23, 2016. App. 184 - 188. An evidentiary hearing was held before the Honorable Letitia H. Verdin. R. Mills Ariail, Jr. represented Petitioner. App. 189 – 250. Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

#### **Post-Conviction Relief Evidentiary Hearing**

Petitioner and trial counsel both testified at the evidentiary hearing. Petitioner testified that he was innocent of the trafficking charge and that he did not have the crack cocaine attributed to him in his possession. App. 200, l. 2 – 202, l. 21. Petitioner maintained that the crack cocaine purportedly found on him did not belong to him and was likely planted or already on the detention center floor. App. 203, l. 3 – 206, l. 15.

Petitioner recalled that the trial was essentially a credibility battle where the police had already been caught lying twice. *Id.* Moreover, Robertson had already accepted responsibility

for the drugs in the car. *Id.* Petitioner expressed confusion about how the State was able to introduce evidence of the marijuana found at the traffic stop during Petitioner's trial for the crack cocaine reportedly found at the detention center:

I'm saying it's 13 months later, 9 months later, I haven't been charged with this. I hadn't been tried, convicted or nothing for this marijuana. How could you use this against me the day of my trial? I didn't even have time to prepare a defense for it or nothing. Me and Mr. Potter, we never discussed it because I wasn't never charged with this. So we never discussed this. He never even told me told me. He said, 'well – yet, still, after the fact, he talked about, oh, you talking about the joint and the bag of marijuana.' Well, if you knowed about this why didn't you tell me prior to trial?

App. 210, ll. 9-20.

Defense counsel testified that he tried to use the marijuana found on Petitioner while he was in the car, along with the failure to find the crack cocaine prior to the detention center, to suggest that law enforcement was incompetent and may have been mistaken about Petitioner being the source of the crack cocaine. App. 234, l. 3 – 236, l. 24. Defense counsel believed that the events surrounding the traffic stop were largely immaterial to the case. *Id.*

Counsel explained that he did not think to challenge or seek to have found inadmissible the marijuana from the traffic stop:

The only thing I could think of, at that point in time, was probably wanting to focus the jury more in regards to the allegations of the police officers that may try to trap and try to challenge the veracity of Officer Surratt, specifically, and the officers involved in the case. So at that point in time, it was probably a game plan decision. What specific thinking I was making at that point in time, I can't tell you.

App. 238, ll. 12-20.

## **Order of Dismissal**

Judge Verdin denied Petitioner's application for post-conviction relief in a written order of dismissal issued on December 28, 2016. App. 251- 261. In denying Petitioner's application, Judge Verdin concluded that Petitioner had failed to prove that defense counsel was ineffective for failing to exclude evidence about the marijuana found in Petitioner's pocket during the traffic stop. App. 258 – 259.

Specifically, the PCR Court found that "counsel testified to a valid trial strategy in addressing and using this testimony to benefit his client." App. 258. Despite finding counsel was not ineffective, the PCR court noted that the State had dismissed all of the charges related to the traffic stop prior to trial. App. 259. The PCR court accepted the summary explanation that defense counsel intended to contrast the police finding the marijuana at the traffic stop with their inability to find the crack cocaine. *Id.*

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel's professed trial strategy for not suppressing evidence of Petitioner's uncharged possession of marijuana was not objectively reasonable.**

Generally, evidence of prior crimes or bad acts is not admissible to prove the crime for which the defendant is charged. *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). However, a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination. *See State v. Young*, 364 S.C. 476, 485-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005) (discussing South Carolina jurisprudence regarding opening the door to otherwise inadmissible evidence). However, a party cannot complain of prejudice from evidence to which he opened the door. *Id.* at 485-88, 613 S.E.2d at 391-93; *See State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991).

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted).

Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

### **Deficient Performance**

In this case, trial counsel’s performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Specifically, trial counsel failed to move to have excluded from trial testimony that Petitioner had marijuana in his possession at the time he was arrested. App. 36, ll. 1-7. Petitioner was standing trial for trafficking in crack cocaine, his possession of marijuana was not part of any criminal charges and therefore should have been excluded from evidence.

Trial counsel’s claim that his decision to reference the marijuana was a strategic trial decision is inapposite. In the mind of jurors, Petitioner was more likely to have possessed the crack cocaine by virtue of having earlier possessed the marijuana. Accordingly, the PCR court erred in finding that trial counsel made a valid strategic trial decision because trial counsel’s performance was not reasonable “under prevailing professional norms.” App. 258-259; *see Strickland*, 466 U.S.

### **Prejudice**

Petitioner was prejudiced because the inadmissible testimony would have resulted in a mistrial if it was elicited by the State and would have not otherwise been admissible absent trial counsel opening the door. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (finding trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result”) (quoting *Strickland*, 466 U.S. at 692).

By eliciting evidence that Petitioner possessed marijuana when arrested, trial counsel was providing jurors with a connection between Petitioner and drug dealing. The prior bad act of

possessing marijuana made it all the more likely to jurors that Petitioner also possessed the disputed crack cocaine. App. 258 – 259; *see State v. Dawkins*, 346 S.C. 151, 551 S.E.2d 260 (2001); *see also State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (noting when the prior bad acts are “strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced”); *see* Rule 403, SCRE.

However, the PCR court erroneously found that “trial counsel testified to a valid trial strategy in addressing and using this testimony to benefit his client.” App. 258. This cursory excuse is insufficient to validate trial counsel’s tactics, in light of the circumstantial nature of the State’s case and law enforcement’s investigative problems. Therefore, “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” App. 255 - 261; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

**CONCLUSION**

Based on the foregoing reasons, Petitioner Kevin Gilliard's petition for writ of certiorari should be granted to allow full briefing on the issue.

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of September, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable Letitia H. Verdin, Circuit Court Judge

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KEVIN JEROME GILLIARD,

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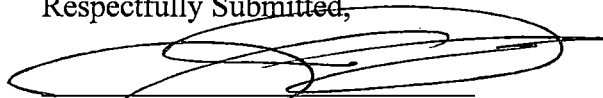
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Kevin Jerome Gilliard states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Letitia H. Verdin, which was held on October 24, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.  
Therefore, counsel requests that the Court relieve him as counsel for Kevin Jerome Gilliard.

Respectfully Submitted,



John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of September, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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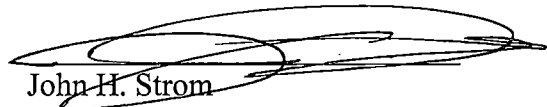
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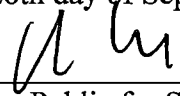
RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Kevin Jerome Gilliard, #275357, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of September, 2017.

  
John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 28th day of September, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025