

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge  
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**RECEIVED**

APR 28 2014

**S.C. Supreme Court**

JOSHUA MONROE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000342  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 4

CONCLUSION ..... 6

PETITION TO BE RELIEVED AS COUNSEL ..... 7

ISSUE PRESENTED

Whether plea counsel was ineffective in failing to pursue an alibi defense?

## STATEMENT

On November 14, 2011, petitioner appeared before the Honorable R. Ferrell Cothran, Jr., in Dorchester County and pled guilty to two (2) counts of armed robbery, three (3) counts of kidnapping, and one (1) count of assault and battery of a high and aggravated nature. An aggregate twenty (20) year sentence was ordered to be served. Michell Suggs, Esquire, was plea counsel. Russell Hilton, Esquire, was the assistant solicitor. (App. p. 1 – p. 16).

Petitioner filed an application for post-conviction relief on October 10, 2012. (App. p. 17 – p. 35). Respondent filed a return dated March 13, 2013. (App. p. 36 – p. 40). An evidentiary hearing was held on November 1, 2013, before the Honorable Diane S. Goodstein. Petitioner was present and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Megan E. Harrigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing along with Michael Dupree, Esquire. (App. p. 41 – p. 82). On February 2, 2014, Judge Goodstein issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 83 – p. 88)

This petition follows.

## ARGUMENT

Plea counsel was ineffective in failing to pursue an alibi defense.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243,

89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case, petitioner testified at the evidentiary hearing that an incriminating statement he made only linked him to one of the crimes he was charged with. (App. p. 49, lines 1 – 11; app. p. 50, lines 15 – 18). He said he told plea counsel about his mother and that she could be an alibi witness. She had video footage of petitioner during the time of the alleged robberies. (App. p. 60, line 3 – 10). In Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), the Court wrote as follows:

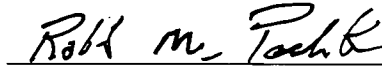
In Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), this Court recently held trial counsel’s failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed. Moreover, counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). We find counsel’s professed strategy in this case invalid under an objective standard of reasonableness. An alibi charge places no burden on criminal defendant but emphasizes that it is the State’s burden to prove the defendant was present and participated in the crime. See State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943). An alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case. *Id.*

Plea counsel in this case was ineffective in failing to pursue an alibi defense. If she had pursued it, she would then have been entitled to an alibi charge that would have helped petitioner.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,



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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO DORCHESTER COUNTY  
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

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JOSHUA MONROE,

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APPELLATE CASE NO. 2014-000342

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PETITION TO BE RELIEVED AS COUNSEL

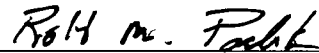
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Counsel for Joshua Monroe states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on November 1, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Joshua Monroe.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of April, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Dorchester County  
Diane Schafer Goodstein, Circuit Court Judge

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JOSHUA MONROE,

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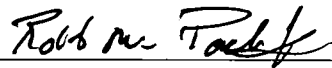
APPELLATE CASE NO. 2014-000342

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CERTIFICATE OF SERVICE

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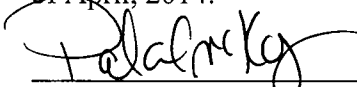
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joshua Monroe, #344735, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of April, 2014.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of April, 2014.



(L.S.)

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