 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County
G. Edward Welmaker, Circuit Court Judge

RECEIVED

AUG - 1 2014

S.C. Supreme Court

ERIC LEE GRAHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000284

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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

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 January 28, 2013, petitioner appeared before the Honorable Edward W. Miller in Pickens County and pled guilty to second degree burglary, failure to stop for a blue light, and third degree assault and battery by a mob. Respective sentences of twelve (12) years, three (3) years consecutive, and time served were imposed. Perry D. DeLoach, Jr., Esquire, was plea counsel. (App. 1. – p. 17).

Petitioner filed an application for post-conviction relief on June 13, 2013. (App. p. 18 – p. 25). Respondent filed a return dated October 14, 2013. (App. p. 26 – p. 30). An evidentiary hearing was held on December 18, 2013, before the Honorable G. Edward Welmaker. Petitioner was present and was represented by Mills Ariail, Esquire. Respondent was represented by Karen Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 31 – p. 55). On January 21, 2014, Judge Welmaker issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 56 – p. 63).

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,

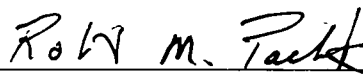
89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court 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 plea counsel spoke with him four or five times while he was at the Greenville Detention Center. He said he and his brother were accused of burglary. His brother would testify that petitioner was not at the scene of the burglary and was not a part of it. (App. p. 39, lines 7 – 18). There was a lack of evidence and fingerprints to show that petitioner was involved. He asked plea counsel to check into his alibi which put him with his grandmother on the day in question and to look at the surveillance footage that showed him at Ingles where he picked up his brother. (App. p. 40, lines 2 – 22). There was just a lack of investigation. (App. p. 42, lines 3 – 4). An alibi defense places no burden on a criminal defendant, but emphasizes that it is the State’s burden to prove the defendant was present and participated in the crime. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). Plea counsel was ineffective in failing to pursue an alibi defense.

CONCLUSION

Petitioner's writ should be granted and his guilty plea to second degree burglary should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO PICKENS COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

ERIC LEE GRAHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000284

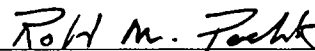
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Lee Graham 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 . 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 Eric Lee Graham.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of August, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County
G. Edward Welmaker, Circuit Court Judge

ERIC LEE GRAHAM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Eric Lee Graham, #305817, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 1st day of August, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of August, 2014.

 (L.S.)

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