

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Colleton County  
Honorable Roger L., Couch, Circuit Court Judge

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Joshua Graham,

Petitioner,

V.

State of South Carolina,

Respondent,

APPELLATE CASE NO. 2016-000756

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Pro-Se Petition Pursuant to Johnson

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By: Joshua Graham, #314554  
BRCI-Wateree Unit  
4460 Broad River Road  
Columbia, S.C. 29210

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S.C. SUPREME COURT

ISSUES PRESENTED

1. Whether counsel on appeal was ineffective by filing a Johnson Petition as opposed to a merits brief regarding Applicant's Pittman claim(s).
2. Whether Applicant's plea of guilty was voluntarily and intelligently rendered?

STATEMENT OF THE CASE

On August 12, 2012, Petitioner appeared before the Honorable Brooks P. Goldsmith, in Collenton County and plead guilty to armed robbery and possession of a weapon. He was sentenced to respective terms of seventeen (17) years and five (5) years. Petitioner was represented at the plea hearing by John Byron, and the State was represented by Tameake Legette. (App. p. 1-p. 20).

There is no record any appeal from the conviction and sentence was ever filed in this case.

Petitioner then mounted a timely application for Post-Conviction relief on December 17, 2013. Respondent filed a return dated May 21, 2105. An evidentiary hearing was held on October 21, 2015, before the Honorable Roger L. Couch. Petitioner was present and represented by James K. Falk, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both the Petitioner and plea counsel testified during the hearing.

On April 5, 2016, Judge Couch issued an order denying and dismissing Petitioner's application for post-conviction relief. In which brings about the instant application seeking a writ of certiorari.

SUMMARY OF THE ISSUES PRESENTED

Petitioner begins by noting the Johnson petition is very similar in character with the Anders brief from a direct appeal. As such, the appellate attorney is cloaked with the duty to outline "any arguable" issue which may contain merit for review by this Honorable Court. On that basis and for the following reasons, Petitioner request that this Court reject the Johnson petition

filed on his behalf, and order re-briefing consistent with the issues forwarded within Petitioner's pro-se brief.

ARGUMENT SUPPORTING FIRST ISSUE

This pro-se brief is being respectfully brought before this Honorable Supreme Court of South Carolina. As a result of Appellate Defender Robert M. Pachak's conclusion, that the appeal from the post-conviction proceeding has no merit. As previously expounded upon, the Petitioner firmly objects Mr. Pachak's conclusion.

As the Anders Court noted beginning with Griffin v. Illinois, 351 U.S. 12 (1956), it held "that equal justice was not afforded an indigent appellant where the nature of the review depends on the amount of money he has", at 19 and continuing through Douglas v. California, 373 U.S. 353 (1963), this Court has consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself".

Petitioner's understanding of the law, which may be limited, connotes the issue stemming from the PCR Court's ruling focused on "whether the defendant was indeed informed not only about 'the nature of the offense'". But rather, "whether or not the Petitioner was also admonished about 'the consequences of that offense ', in conjunction with the court's duty along with counsel's obligation to provide effective assistance of counsel.

ARGUMENT SUPPORTING THE SECOND ISSUE

Petitioner begins by positing verbatim, the very starting colloquy between his PCR attorney and the court which records the following: (R. p 39, lines 18-22)

Mr. Falk: Thank you, Your Honor. We are really going forward on a straight **Pittman type issue** on the issue of whether or not my client was adequately appraised of the rights that he was waiving when he entered his guilty plea.

The Court: I see. You may proceed.

After the above colloquy between the court and counsel, Petitioner was called to the witness stand. (R. p. 40). From pages (R. p. 40-41) here outlined, Petitioner on the record stated; (1) he was prepared for trial had counsel been ready, and (2) prior to being coerced into a guilty plea, counsel nor the court informed him of the maximum penalties (which is irrefutable according to the record before this Court), for the crimes in which he plead guilty to.

Beginning at page (R. 9, p. 9-13, lines 1-8), is where the court in this case qualified Petitioner's guilty plea. Moreover, on page (9) lines 1-14, the Petitioner refuted part of the evidence or facts as conveyed by the State, of what actually occurred during the robbery incident.

From this point outlined above (p. 9 lines 1-25), onto page 13, where the court qualified Petitioner's guilty plea. The court went with (1) admonishing the defendant concerning his right to have a trial by jury; (2) that by pleading guilty he gives up certain rights and defenses (R. p. 11, lines 3-6); (4) have the defendant had sufficient time with the attorney (R. p. 11, lines 10-

22); to which the Petitioner answered "Somewhat". (R. p. 11, line 22). Where also the Petitioner mentioned his dissatisfaction, and counsel's unpreparedness that he had experienced with counsel's performance as reason for "not wanting to go forth with trial". (R. p. 12, lines 9-11); (5) the court also questioned Petitioner as to whether anybody had threatened or promised any thing or held out any hope or reward as an inducement to get Petitioner to plead guilty (R. p. 12 lines 18-21); (6) and on page 13, lines 3-9, right there in stark contrast, is "where the court concluded that there was the necessary factual basis for the plea, made freely and voluntarily". Yet, no where on the record does the court admonish the accused "about the results of sentencing", should he accept the guilty plea.

As a matter of fact, the only time during this entire plea transcript, does any sentencing exposure appears on the record is page 19, lines 15-20, where the defendant is actually sentenced.

The only record we have that any consequences have been explained to Petitioner relating to the sentence, "is counsel's self-serving answer" when the plea hearing had initiated, on page 3, lines 14-17. In which the Petitioner denied during the PCR hearing.

LEGAL ANALYSIS OF PITTMAN v. STATE.

Pittman v. State, 524 S.E.2d 623 (S.C. 1999) retains its vitality from the historical cases such as Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). As such, "when entering a guilty plea which results in a waiver of several constitutional rights, the Due Process Clause requires that guilty

pleas are entered into voluntarily, knowingly, and intelligently by defendants.  
395 U.S. 238

The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. *Id.* Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. The Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980); and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991).

In addition, to the requirements in *Boykin*, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.*

A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea "may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both". See State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171 (1993).

Although the trial court is not required to direct defendants attention to each right and obtain a separate waiver, the 'record' should indicate the defendant was **fully aware of the consequences of his guilty plea.** State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976).

Like the instant case at bar. In Pittman's case, "it was the Court that failed" (not counsel), to affirmatively ask him for an admission of guilt; that did not advise Pittman of the crucial elements of the offense charged. And 'mainly', as in the instant case at bar; "the Court failed to inform Pittman that the armed robbery carried a mandatory minimum sentence of ten

years, seven without the possibility of parole. See 22 C.J.S. Criminal Law §404 (1989)("Prior to accepting a plea of guilty the court is required to advise accused of the range of punishment attached to the offense charged such as the minimum sentence".) This case is similar to Hazel, supra, where we found a defendant's plea involuntary since she was never informed of the mandatory minimum sentence required by her guilty plea. See also Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)

In addition, Petitioner like Pittman, testimony concerning counsel's poor performance went uncontradicted as far as him preparing Petitioner's case for trial and questioning witnesses, during the PCR hearing.

IN CONCLUSION

Finally, "the record" itself is totally void concerning whether "the court" admonished the defendant or his attorney concerning the Due Process protections stemming from the guilty plea. That for one, expounds essentially on the "consequences" (including and minimum mandatory, or maximum penalties) of the plea. As such is void on "the record", Appellate Counsel was ineffective by failing to forward this main concern within a merits as opposed to a Johnson petition.

For these reasons, Petitioner respectfully request that Certiorari is granted, and any further relief deemed just and proper by this Honorable Court.

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Respectfully Submitted,

/s/ Joshua Graham

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cc: filed  
10/3/2016

VERIFICATION OF LEGAL CORRESPONDENCE

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This is to verify that Joshua Graham (314554) sent legal correspondence to The Supreme Court of South Carolina (Attn: Daniel Shearhouse) PO Box 11330, Columbia SC 29211 on 11 October 2016. This mail was return to the BRCI institution on October 17<sup>th</sup> and October 28<sup>th</sup>.



BRCI Postal Director

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