

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
DeAndrea G. Benjamin, Circuit Court Judge

Volume II of II

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JUN - 7 2013

S.C. Supreme Court

LEVON MINTZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212935

APPENDIX

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1 A I have no idea. We average about 200 cases a year at
2 Appellate Defense.

3 Q So it's --

4 A You're better at math than I am, Mr. Spencer.

5 Q -- probably over 1,000?

6 A Probably.

7 Q And is it fair to say you have a fairly routine
8 practice as to how you review a case and determine what to
9 brief?

10 A With the number of cases that we have that come into
11 Appellate Defense we have to have some sort of a system.
12 I'm not saying it's the best system, but we do have a
13 system.

14 Q Okay. If you could tell us what your system of doing a
15 brief entails?

16 A My system of doing a brief would be to initially read
17 the transcripts, taking notes, which I brought with me
18 today. Jotting down issues, jotting down objections as
19 they're made to determine whether there are preservation
20 issues. I will then go back and hopefully read the
21 transcript at least two to three other times. Do the legal
22 research and then figure out what my issues are. Hopefully
23 draft a statement of fact that would support those issues
24 and issues that were raised on appeal. Does that sort of
25 answer it?

1 Q That does. That does. And what -- and how do you
2 determine what you decide to raise or not raise as an issue
3 in your brief?

4 A Hopefully, you raise the strongest issues that are
5 there.

6 Q All right.

7 A Obviously, if I think I've got a stronger issue, while
8 it would be nice to brief every single issue, just due to
9 the case loads we have at Appellate Defense unfortunately we
10 don't brief every issue. Hopefully, we pick the strongest
11 and the right ones.

12 Q And in this particular case you were actually
13 representing Mr. Mintz on appeal from the denial of a PCR
14 application; is that correct?

15 A That is correct.

16 Q And do you recall how many issues you raised in the
17 petition for the Writ of Certiorari?

18 A I raised two issues. One was the fact that he should
19 have been entitled to a direct appeal, a belated direct
20 appeal, and the second one was -- do you want me to just
21 read the issue --

22 Q Sure.

23 A Did the PCR judge err in refusing to find counsel was
24 ineffective in stipulating to portions of the pathologist
25 report as it related to cause of death, but failing to

1 include in that stipulation that the decedent was under the
2 influence of cocaine and alcohol.

3 Q And, of course, this case entails the White procedure.
4 So at the same time that you submitted a Writ of Certiorari
5 would you have also submitted a brief pursuant to White v.
6 State?

7 A That's correct. They're submitted simultaneously.

8 Q Okay. And in this case would you have gone through the
9 same procedure that we discussed where you would have
10 reviewed the taking notes, reading the transcript, and
11 probably have reviewed it some more after the fact?

12 A Yes.

13 Q All right. Concerning the issue of right to remain
14 silent did you have some notes on that objection?

15 A I had it that there was an objection with reference to
16 a tape during closing arguments and that's the extent of my
17 notation.

18 Q Okay. And why would you -- to the best of your
19 recollection why would you have not raised that issue?

20 A Apparently, when I went back and looked at it, I didn't
21 think it was as strong as the other issue.

22 Q All right. Now, concerning the issue of whether or not
23 voluntary manslaughter should have been charged what would
24 support -- let me rephrase. Voluntary manslaughter, I know
25 you're aware of, requires both legal provocation and heat of

1 passion. In this case, what evidence of legal provocation
2 did you find?

3 A I am not that familiar with the facts and it doesn't
4 appear I've reviewed that brief. I've reviewed the brief I
5 submitted, and -- forgive me, I just don't specifically
6 don't remember all of the facts. I have to rely on the
7 brief I submitted, but it says that there was apparently an
8 altercation earlier in the evening inside the club. One of
9 those individuals got out of the car and approached just
10 prior to the shooting and then I've argued that his act, the
11 decedent's act of getting out of his vehicle and approaching
12 constitutes of evidence of the overt act sufficient for
13 legal provocation. So I don't know --

14 Q You don't have a clear recollection of what that prior
15 altercation was?

16 A I don't.

17 Q If I was to tell you that it was merely an exchange of
18 words, would you agree or disagree with that?

19 A I -- I simply don't remember.

20 Q And I know in your brief it doesn't mention anything.
21 Was there any indication that the person approaching Mr.
22 Mintz was armed or anything of that nature?

23 A If there was I didn't include it in my brief and
24 probably should have. I just simply don't remember.

25 Q Is the exchange of words ever, under our law,

1 sufficient to support legal provocation?

2 A Simply an exchange of words, but it looks like he got
3 out of his car and approached.

4 Q Is approaching, merely walking up to a person enough to
5 support legal provocation?

6 A Well, in this case we had a prior altercation, so --

7 Q What about prior altercation and exchange of words?

8 A I just don't remember what the extent of the prior
9 altercation was.

10 Q Would it be relevant that Mr. Mintz approached the car
11 first before the individual got out of the car?

12 A Perhaps, depending on the sequence of events.

13 Q And let me back up. Just because an issue might be
14 raised as a merits issue doesn't mean it's going to be
15 successful; is that a fair statement?

16 A That's a very fair statement.

17 Q And the standard for determining whether or not a
18 lessor included charge should have been charged, the
19 standard on review -- a review in court would be an abuse of
20 discretion would it not?

21 A That would be correct.

22 MR. SPENCER: Beg the Court's indulgence.

23 Your Honor, I don't think I have any further questions.

24

25 THE COURT: All right. Anything else?

1 MR. THOMPSON: Just briefly, Your Honor.

2 KATHERINE HUDGINS - REDIRECT EXAMINATION

3 BY MR. THOMPSON:

4 Q He, Mr. Spencer was asking you about your, you know,
5 your procedure about going through and reviewing the
6 transcript and things of that nature. When you file -- when
7 you file a merits brief verses an Anders brief, is a merits
8 brief more substantial than an Anders brief?

9 A Yes.

10 Q So would you -- you wouldn't have had one paragraph of
11 argument, essentially, in a merits brief?

12 A That's correct.

13 Q You would have filed something far more substantial on
14 behalf of Mr. Mintz in a merits issue?

15 A That's correct.

16 MR. THOMPSON: No further questions of this witness,
17 Your Honor.

18 MR. SPENCER: Briefly. Thank you.

19 KATHERINE HUDGINS - RECROSS EXAMINATION

20 BY MR. SPENCER:

21 Q Concerning how an Anders brief is done, does the Court
22 review the whole record for an Anders brief?

23 A They're supposed to.

24 Q And so they would review for the issue that you raised
25 in the Anders brief, would they not?

1 A I think they rely on us a good bit.

2 Q Is it fair to say that they would be looking at the
3 record themselves, though?

4 A I hope so.

5 Q And in your experience has the Supreme Court come back
6 when an Anders brief has been submitted, come back and
7 request that an issue be raised as a merits issue?

8 A Yes.

9 Q And has that sometimes been the very issue that's been
10 raised by appellate counsel?

11 A More often than not.

12 Q And to also, however, possible that they can go and
13 raise another issue that's been raised; is that true?

14 A That is true.

15 Q And it could even be the issue that could be raised in
16 a pro se brief?

17 A That is true.

18 Q And no matter what the case may be, the Supreme Court
19 is going to review the entire record available on appeal,
20 would they not?

21 A That's what the Anders brief procedure calls for.

22 Q Thank you.

23 MR. SPENCER: I have no further questions.

24 THE COURT: All right. You may step down.

25

1 MR. THOMPSON: I believe she's actually here pursuant to
2 their subpoena, but may she be excused?

3 MR. SPENCER: I certainly have no objections.

4 THE COURT: All right. Thank you.

5 MR. THOMPSON: Your Honor, the applicant would call Mr.
6 Levon Mintz.

7 THE COURT: All right.

8 THE CLERK: Would you state your name for the record,
9 please.

10 MR. MINTZ: Levon Mintz.

11 (WHEREUPON, Levon Mintz was sworn to tell the
12 truth.)

13 THE CLERK: Thank you. You may be seated.

14 LEVON MINTZ - DIRECT EXAMINATION

15 BY MR. THOMPSON:

16 Q Mr. Mintz, how are you doing this morning?

17 A All right.

18 Q I'm going to try and keep this relatively short for
19 you. You are the applicant in this case, correct?

20 A Yes, sir.

21 Q And you are -- you were represented by Ms. Hudgins on
22 your PCR appeal?

23 A Yes, sir.

24 Q And belated direct appeal?

25 A Yes, sir.

1 Q And obviously you heard her testify she filed an Anders
2 brief on your behalf on the appeal?

3 A Yes, sir.

4 Q Did you file your own pro se brief?

5 A Yes, sir.

6 Q What did you argue in your pro se brief?

7 A That counsel -- not counsel, the solicitor covered my
8 right to remain silent.

9 Q When did the solicitor do that?

10 A During closing arguments.

11 Q And what did the solicitor say, to the best of your
12 recollections?

13 A It was concerning the statement that was given by
14 Katina Brooks (sp). She gave a -- it wasn't concerning the
15 tapes. It was concerning a statement that she claimed by her
16 own admission that she wrote. He said that we had the tape
17 the whole time and we didn't want him to know that. It was
18 on tape.

19 Q And did your attorney object to that?

20 A Yes, he did.

21 Q And was that objection overruled or was it sustained?

22 A Overruled.

23 Q And so, I want to make sure we get this straight.

24 Katina Brooks testified at trial that she gave a handwritten
25 statement to the police?

1 A Yes.

2 Q And did the police have any recollection of any such
3 statement being given, written?

4 A No, he said it wasn't there.

5 Q And was that the issue that your attorney was trying to
6 bring up --

7 A Yes.

8 Q -- during the trial?

9 A Yes.

10 Q Was he trying to hide the fact that there was a tape
11 statement?

12 A No. We never knew about the handwritten statement.
13 When she got on the stand and testified, she said then that
14 she got a statement that she wrote other than the tape
15 statement.

16 Q So you believe that issue should have been argued by --
17 you believe that Ms. Hudgins should have argued that issue
18 on your belated direct appeal?

19 A Yes.

20 Q With regard to the voluntary manslaughter issue, what
21 was the testimony at trial about regarding the prior
22 confrontation?

23 A Testimony was -- well, it was a couple of people that
24 testified to that. One was Terrell Parker (sp), he
25 testified that me and the victim and one of my friends, all

1 of us had an altercation inside the club and it spilled over
2 and said the bouncers had to get into it and he left. And
3 they left and when he seen us approach he said he had to get
4 in the car because the victim was -- he had to drive because
5 the victim was drunk, at the time. So he said he didn't say
6 we approached the car, he said that after the altercation in
7 the club, he said that he seen us outside. He looked out
8 and both of them seen us and the victim jumped out and said,
9 F-that and approached us.

10 Q And that's when --

11 A He got shot.

12 Q And that was the testimony at the trial?

13 A That was one of them. Levon Jones testified that it was
14 a prior altercation. He was a bouncer. He testified about
15 the prior altercation, about -- it was -- said it appeared
16 to be a fight in the bathroom, as well. And but he didn't
17 testify about what was going on, because Katina Brooks
18 testified about the altercation dn about the approach and al
19 that there.

20 Q So -- and I don't mean to cut you off, but there was
21 plenty of testimony about you had gotten into a prior
22 altercation with the victim?

23 A Yes, there was.

24 Q In the bathroom?

25 A Yes, sir.

1 Q And that y'all had to be, basically, shown out the
2 door?

3 A Yes, sir.

4 Q And then the victim --

5 A No, I didn't have to be shown out the door.

6 Q The bouncers had to get in between you?

7 A Yeah. The bouncers came and they dismissed everything.

8 Q And the club -- did the club close?

9 A Yes.

10 Q Okay. And so y'all go outside and the victim comes back
11 around and says F-that.

12 A Terrell probably testified that while they was in the
13 car the victim seen us and said F-that and jumped out the
14 car.

15 Q And that's when he got shot?

16 A That's when he got shot.

17 Q Now, if voluntary manslaughter, and I know, you know,
18 it's hard, you're not an attorney, so it's hard to ask this
19 question, but if voluntary manslaughter had been warranted
20 would you have wanted Ms. Hudgins to raise that issue on
21 your behalf in a merits brief?

22 A Yes, I feel it was because of the prior altercation and
23 the reason that he was on alcohol at the time was it was
24 evidence that he was on alcohol because one of his friends
25 testified that he was drunk, that's why he had to drive the

1 car. The words that he used, F-that, show that he's acting
2 aggressive at the time and he jumped out the car at us. So
3 being the prior altercation and you got people testifying
4 about the prior altercation and the reason he was on alcohol
5 and the approach, the words that he used and the aggressive.
6 All that combined is enough evidence to warrant a
7 manslaughter charge, and she should -- and has she raised it
8 in that way my appeal would have been different.

9 Q And as well you believe she should have raised the
10 issue pertaining to your -- the comment on your right to
11 remain silent, not to present a defense during closing
12 arguments?

13 A Yes, because the whole case was an eye-witness case and
14 you got a witness coming and testify that she wrote the
15 handwritten statement and you got the solicitor turned
16 around and he's saying that we had a statement, we knew
17 about it. It's inferring that all we had to do was put up a
18 defense and we would have -- he's commenting on our right to
19 remain silent. And had she raised that issue -- and has she
20 raised that issue and perfected that issue, I really -- I
21 tried to do it, but me not being an attorney I didn't know
22 what I was doing. But had she raised that issue and
23 perfected it, the outcome of my appeal would have been
24 different.

25 Q Now, you heard me talk about earlier you had filed this

1 PCR originally against your PCR counsel as well, Robert
2 Hood?

3 A Yes.

4 Q Do you agree with me -- are you in agreement with me, I
5 told the Judge that you are not going forward with any
6 allegations in that regard?

7 A Not right now.

8 Q Not right now you don't want to go forward with any
9 allegations against Mr. Hood?

10 A No, sir.

11 MR. SPENCER: Your Honor, I just want to be clear on the
12 record right now, I mean, of course, at this point I would
13 consider it waived because we could have had Mr. Hood here
14 if we needed him, but, you know, not raising it now means
15 for sure it won't be available in the future.

16 A From what my attorney told me what the case law says we
17 couldn't raise it now. Just going by what he told me, you
18 know what I'm saying, that we couldn't raise it now.

19 MR. SPENCER: I certainly don't want to talk directly to
20 the applicant. I just want to be clear that -- and actually
21 my position would be consistent with that that it couldn't
22 even be raised now, but it certainly cannot be raised in the
23 future. The earlier the better, you know, we would have
24 argued against it being something that could be raised and I
25 think successful on that issue. I just didn't -- I just

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33

1 wanted to clarify that Mr. Mintz wasn't expecting, you know,
2 to see how this one goes and then raise that issue later.
3 That absolutely wouldn't be possible.

4 BY MR. THOMPSON:

5 Q Let me rephrase the question. We've talked about
6 whether or not you can allege ineffective assistance of
7 counsel against your PCR attorney, right?

8 A Yes.

9 Q And you understand that under South Carolina law you
10 can't. Our Supreme Court has held that you cannot raise
11 ineffective assistance of PCR counsel.

12 A Yes, sir.

13 Q That's your understanding?

14 A Yes, sir.

15 Q And you understand that the United States Supreme Court
16 just had an opportunity to say that you could and then
17 refused to do that?

18 A Yes, sir.

19 Q And you understand that?

20 A Yes, sir.

21 Q And so you understand that if you don't go forward
22 today and raise -- and quite frankly I don't know, from our
23 discussions, I don't know what we would have gone forward in
24 that regard, but if -- you understand that if you don't
25 raise anything against Mr. Hood here today that you can't do

1 it in the future?

2 A I understand I can't do it in state court, but what you
3 told me was I can bring it in --

4 Q Okay.

5 A -- federal.

6 Q Under Martinez you can allege he was ineffective in
7 federal court?

8 A Yes.

9 Q But you can't do it here; you understand that?

10 A I understand it.

11 Q And so you don't want to go forward with any
12 allegations against Mr. Hood here today?

13 A No, sir.

14 Q Or in the future in state court?

15 A Not state court.

16 Q Okay. And just for posterity sake, you understand you
17 were charged with murder, got convicted of murder?

18 A Yes, sir.

19 Q And that you got a 50 year sentence for murder?

20 A Yes, sir.

21 Q And that if you won this PCR hearing you could
22 potentially go back and face a life sentence for murder?

23 A Yes, sir.

24 Q Understanding that do you still want to go forward with
25 that here today?

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35

1 A Yes, sir.

2 Q All right. I think I've covered everything about your
3 case that we've talked about before, but this actually your
4 second shot at PCR. You're probably not going to get
5 another one after this. Is there anything you want to tell
6 the Judge today about your case that you think I may have
7 left out?

8 A No, that's it.

9 MR.. THOMPSON: No further questions.

10 MR. SPENCER: Thank you, Your Honor.

11 LEVON MINTZ - CROSS EXAMINATION

12 BY MR. SPENCER:

13 Q Mr. Mintz, as I'm sure you're aware of there's a
14 transcript of the entire trial that's in the record today?

15 A Yes.

16 Q I did want to go through, you had provided some
17 testimony about the facts of the case. You mentioned that
18 prior altercation outside the bathroom at the bar, that was
19 with you, a friend of yours named Andre and the victim; is
20 that correct?

21 A That was what the evidence was. Yes, sir.

22 Q Okay, and in fact that was just an exchange of words;
23 isn't that correct?

24 A The evidence that was presented at trial was there was
25 an exchange of words and the bouncer -- evidence, a

1 statement admitted to the jury that the bouncer said it
2 appeared to be a fight inside the bathroom, as well.

3 Q But he did not say a physical fight, did he?

4 A He said -- the dispensers and stuff was broken off the
5 wall.

6 Q Was there any evidence of anything more -- well, let me
7 back up. The victim's friend, his name escapes me at the
8 moment -- Mr. Parker. Mr. Parker testified that there was
9 an exchange of words between Andre and you and the victim;
10 is that right?

11 A That's what he testified.

12 Q And then he testified that the victim later got out of
13 the car and was cursing and having an exchange back and
14 forth with Andre and that was when he was shot; right?

15 A He testified that the victim said he seen us and said
16 F-that and jumped out the car.

17 Q Right. So he got out and cursed and then he was shot;
18 is that correct?

19 A Yes.

20 Q And that's the evidence that would support voluntary
21 manslaughter?

22 A The part that he -- he was drunk, the testimony the way
23 he jumped out the car, the prior altercation, all that got
24 to be used -- all the evidence combined together. It's not
25 he approached. It's all the evidence combined together.

1 Q And, in fact, Ms. Hudgins did raise that in a brief, it
2 was just an Anders instead of a merits; right?

3 A She raised what?

4 Q The issue as to whether or not voluntary manslaughter
5 should have been charged?

6 A She raised it as a -- she didn't perfect the brief,
7 though. She raised it as a non-merits brief and left all
8 the other elements out. All the other elements of
9 manslaughter she just left out. She just basically said the
10 man approached. That's not manslaughter. It had to be all
11 the evidence that was presented at trial.

12 MR. SPENCER: Your Honor, I have no further questions.

13 MR. THOMPSON: Nothing further of this witness, Your
14 Honor.

15 THE COURT: All right. You may step down.

16 All right. You next witness.

17 MR. THOMPSON: No further witnesses, Your Honor.

18 THE COURT: Yes, sir?

19 MR. SPENCER: State wouldn't call any witnesses, but I
20 would like a brief opportunity to close.

21 THE COURT: Yes, sir.

22 MR. SPENCER: Your Honor, I would renew just for the
23 sake of making sure I'm good on the record, my motion in
24 terms of dismissing this under successive and pursuant to
25 Ace verses South Carolina. Just would add that, in fact,

1 this was a PCR appeal. How these issues were determined,
2 matter of fact, the White brief is -- under these
3 circumstances the White brief is submitted concurrently with
4 the petition for Writ of Certiorari, which lends further
5 support to that that this is just a collateral proceeding,
6 that there's no right to effective assistance.

7 Moving on from that issue, there's two issues that Mr.
8 Mintz is alleging should have been raised. One is voluntary
9 manslaughter, which was raised and further -- and actually I
10 believe it's one thing where there's a charging conference
11 and then there's a charge and that's it. In this case
12 there's a charging conference, there's a charge, and then
13 the Judge asks, are there any exceptions. You know, the
14 attorney agrees there is none. You know, trial strategy, he
15 may have been convinced from the argument that charge was
16 not warranted. Questionable whether it was warranted at
17 all. So I think whether, you know, asking whether there are
18 any exceptions makes clear that any prior objections is not
19 a final ruling and that's what we're looking for in terms of
20 error preservation.

21 But moving beyond that there's just simply no evidence
22 to support a voluntary manslaughter charge. Word, no matter
23 how bad words are, no matter what they say about you or the
24 mother or whatever and whatever manner you can come up with
25 never justifies, never creates legal provocation sufficient

1 to support voluntary manslaughter and merely getting out of
2 your car and approaching another person, my gosh, I sure
3 hope would never amount to legal provocation. The fact that
4 he may be intoxicated and I don't think there's any evidence
5 that he was grossly intoxicated or anything like that.
6 Everyone was at a bar, everyone was drinking. Nothing
7 beyond that.

8 The prior altercation testimony, the evidence in the
9 record is that there was an exchange of words and nothing
10 more. Concerning the bouncer's testimony, my recollection
11 the bouncer's testimony is they looked at a video and that
12 they had somehow determined there was some sort of
13 altercation. Looked at a video. They don't say what
14 happened during that. There is nothing in there in the
15 record from the bouncer, is my recollection that supports
16 any physical altercation, even so the actors were not
17 discussed in that. Basically, there was an altercation and
18 they decided to close the bar at 2:00 instead of 3:00 in the
19 morning. So there's no evidence to support voluntary
20 manslaughter charge.

21 I would note at trial what the attorney requested, the
22 attorney's basis of the charge was there was a prior
23 altercation, but he couldn't point to any physical
24 confrontation or anything like that that would have even
25 risen to the level of legal provocation. You also have to

1 have heat of passion and the fact that he had an altercation
2 some period ago and then everybody's leaving and there's a
3 second altercation. You can't take that second altercation
4 and call that heat of passion. So there's no evidence to
5 support that.

6 The second issue, quite frankly, that was raised at
7 trial somehow being a Doyle violation, a comment on the
8 right to remain silent. However, it was really just
9 responsive to the evidence. If you look at the solicitor's
10 comments it was not objectionable and certainly Ms. Hudgins
11 testified she would look to raise the strongest issue and
12 her determination at the time wasn't the strongest issue and
13 you're looking at an abuse of discretion standard on that,
14 if you're looking -- if you're think about it in direct
15 appeal terms, and certainly the trial court certainly did
16 not abuse its discretion in overruling the objection
17 particularly where, quite frankly, how you get there, how
18 you find a problem with the solicitor's argument of -- the
19 right to comment on the right to remain silent.

20 And just -- Your Honor, the actual objection is on Page
21 289. I don't know if anyone's given you that cite yet.
22 Your Honor, and the standard for determining ineffective
23 assistance of appellate counsel, if we're going to look at
24 it under rule is you have to look at both prejudice --
25 excuse me -- whether counsel's performance was deficient and

1 whether the applicant was prejudiced by that. So if you
2 look at the first prong, which is Strickland. You look at
3 deficient performance for claim of appellate counsel the
4 issue is whether counsel if not under a duty to raise every
5 non-frivolous issue. Counsel can choose the strongest
6 issue. She chose the strongest issue. Of course, we're
7 looking at an Anders proceeding and I don't know what better
8 confirmation of counsel's professional judgment exist than
9 having the Supreme Court, the entire Supreme Court reviewing
10 the record to decide whether an issue is even meritorious
11 and whether or not to grant Ms. Hudgins motion to be
12 relieved from counsel. Her performance in that regard did
13 not fall under professional norms choosing to do an Anders
14 brief on the voluntary manslaughter issue. Even if you find
15 it's preserved it's extremely weak and not really would
16 merit -- further -- you have to look at prejudice and
17 whether it would effect the outcome of the proceeding and in
18 this case the issue clearly would not have been something
19 that would have been successful on appeal. There's just no
20 evidence to support voluntary manslaughter and certainly
21 none that would warrant a finding of abuse of discretion
22 from the trial judge.

23 At the same time on the second issue, the Doyle issue,
24 I guess, for lack of a better term. Again, counsel made a
25 judgment call that this was not a very strong issue. I have

1 to agree with that. Again the Supreme Court has reviewed
2 the entire record and they found preserved error that would
3 merit they would have denied the motion to dismiss and made
4 both Ms. Hudgins and made the state raise that issue, and if
5 there was any other issues in the record that were
6 meritorious they would have come back and done that.

7 So I would ask that this application be denied. Of
8 course, I'm still sticking with my motion to dismiss on the
9 grounds that this is a collateral proceeding.

10 I appreciate Your Honor's time.

11 THE COURT: Thank you.

12 MR. THOMPSON: Just very briefly, Your Honor.

13 Starting with the voluntary manslaughter issue. In
14 terms of deficient conduct, Ms. Hudgins clearly testified
15 that she thought the issue was not preserved for review and
16 that's why she filed an Anders brief and that she had
17 realized that it was preserved for review she would have
18 filed a merits brief on the issue and -- Your Honor, I think
19 this kind of gets into a distinction between what an Anders
20 brief legally means and what it -- and what the appearance
21 of an Anders brief means to the Court. Yes, the Court, the
22 Supreme Court does have a duty under the Anders Procedure to
23 review the entire record, to review the case, but as Ms.
24 Hudgins testified she believes that the Supreme Court relies
25 on their judgment. You have a case here where the

1 applicant's attorney came to the Supreme Court and said,
2 this case has no merit. This case has no merit. There's
3 nothing in here that's any good. This issue's okay, but
4 this isn't any good. None of this is any good. And I don't
5 know that you can underestimate the impact that has on a
6 reviewing court when you've got an attorney who is
7 constitutionally required to advocate for the client going
8 up to the Court saying, no, nothing here.

9 And on top of that, Your Honor, we would argue that
10 voluntary manslaughter was warranted on the facts of this
11 case. I would -- just the next to the last page of State
12 verses Johnson that I handed up earlier and the next to the
13 last paragraph. And while we held the victim, the defendant
14 was entitled to a charge on voluntary manslaughter where the
15 defendant and victim were in a heated argument and quote the
16 decedent was about to initiate a physical encounter when the
17 shooting occurred, close quote. That's what happened in
18 this case. We've got Mr. Mintz getting into multiple
19 arguments with the victim. At the club, they had to close
20 the club because of the argument, because it was getting so
21 heated they had to close the club. They go outside and the
22 victim comes up to Mr. Mintz again. This is, you know, this
23 is not just some, you know, pulls out a gun and shoots him.
24 Following an argument Mr. Mintz being approached again by
25 the victim after they had this big argument inside the club

1 that required the club to be closed. Under those
2 circumstances and under the decision they were citing in
3 Johnson, Your Honor, in State verses Lowery, 315 SC 396 434
4 SE2d 272, and that was actually -- and that was actually
5 cited in the Anders brief, but still these are the facts of
6 the case. That decision -- voluntary manslaughter was
7 warranted based on that decision, based on Johnson, and we
8 would submit that not only was appellate counsel deficient
9 for failing to make the argument as a merits argument, but
10 also that it was warranted.

11 Again, Your Honor, I don't believe there is any
12 confusion in this area. I would just hand up a copy of
13 Bennett verses State 33 SC 303 680 SE2d 273. I believe it's
14 footnote 6. Yes. Describes basically the standard of
15 review in ineffective assistance -- is the same as it would
16 be in any other case. Which goes to show that the Supreme
17 Court recognizes that they may have missed a case, where
18 they may have missed a decision, otherwise they would just
19 hold the court can't have gotten anything wrong. So you
20 can't have ineffective assistance of counsel for failing to
21 file a merits brief. They recognize that relieve can be
22 granted in this situation, in this type of situation and we
23 submit it should be granted, because voluntary manslaughter
24 was warranted and because by her own admission Ms. Hudgins
25 should have filed a merits brief on the issue.

1 With regard, just briefly, Your Honor, to the -- on a
2 second argument, the comment on the right to remain silent.
3 The -- what happened was Katina Brooks testified she gave a
4 handwritten statement in addition to a typed up statement to
5 the police. The police officer testified I don't have a
6 handwritten statement from her. That was what defense
7 counsel was trying to show. During closing argument the
8 solicitor gets up and says -- I want to get the quote right
9 here -- the solicitor gets up and says, then you find out on
10 redirect her statement is on tape and guess who had that
11 tape all along, the defense had it. They didn't want you to
12 know that it was on tape.

13 Getting up and arguing that the defense, who has no
14 obligation to present any evidence whatsoever has the tape
15 and was trying to hide it from the jury. You can't get any
16 more clear-cut error in commenting on the defendant's right
17 to remain silent. A defendant's right to present a defense
18 or not to present a defense. And we submit that that
19 comment was prejudicial and warranted both a new trial and
20 briefing on the merits by appellate counsel.

21 And, again, Your Honor, I meant to address this first
22 with the voluntary manslaughter. Mr. Spencer argued that
23 because there was an opportunity to object at the charge
24 conference that meant that the issue was not preserved for
25 review. That's not what Johnson holds. Johnson says, you

1 know, we clarify that our opinions in Rule 20 alters a long
2 standing rule that where a party requests a jury charge and
3 after opportunity for discussion the trial judge declines
4 the charge it is unnecessary to preserve the point on appeal
5 to renew the request at the conclusion of the court's
6 instructions. That's what happened. It's preserved for
7 review. Johnson says it's preserved for review. It should
8 have been reviewed.

9 And so we would submit, Your Honor, that Mr. Mintz
10 received ineffective assistance of belated appeal counsel.
11 That that is a constitutional right and that he should
12 receive a new trial.

13 THE COURT: Thank you. Briefly.

14 MR. SPENCER: Just briefly, just concerning the right to
15 remain silent. What he's talking about is a comment on
16 evidence presented. It's not a well, where's this or why
17 didn't defense do this. It's just that comment on evidence
18 that was presented at trial. That's not any kind of comment
19 on the right to remain silent. That's -- if anything --
20 where they're raising an argument and the solicitor is
21 meritoriously and appropriately replying to the argument and
22 the testimony presented. So there's no right to remain
23 silent issue in this case despite counsel's objections.

24 Further I think counsel -- I think the solicitor,
25 during the closing argument had actually said, and I meant

1 to look at the instructions from the court, but Solicitor
2 Pasco even said that what he says and what Mr. Walters said
3 are argument and there for the jury to figure out what the
4 evidence was.

5 And just turning and just in reply to the Bennett case
6 that was provided, I certainly did not argue and was aware
7 of the proposition generally -- the fact that something is
8 submitted for Anders brief is not dispositive of whether or
9 not counsel was providing effective assistance during
10 appeal, however, I think it still remains highly relevant
11 and Bennett, if I recall, finding effective -- still remains
12 highly relevant that in an Anders process you have the whole
13 court looking at it, the whole court looking at it came to
14 the same conclusion Ms. Hudgins came to which is appropriate
15 enough -- simply not enough evidence to support a -- no
16 evidence to support a voluntary manslaughter charge.

17 That would be it. I'd request this Court to deny this
18 application.

19 THE COURT: All right. I will take a look at the
20 transcript and I'll let you all know something shortly.

21 MR. SPENCER: Thank you, Your Honor.

22 MR. THOMPSON: Thank Your Honor.


23 (This proceeding was concluded.)
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C-E-R-T-I-F-I-C-A-T-E

I, THE UNDERSIGNED HILDA M. JORDAN, CVR-M, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDING IN THE CAPTIONED CAUSE, IN THE COURT OF COMMON PLEAS SESSIONS FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE 21 DAY OF MAY, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


Hilda M. Jordan, CVR-M

December 15, 2012

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF ORANGEBURG)

C.A. NO. 2010-CP-38-1698)

Lavon Mintz,
S.C.D.C. No. 303362,)

Applicant,)

ORDER OF DISMISSAL.)

VS.)

State of South Carolina,)

Respondent.)

2012 MAY -3 AM 11:30

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 24, 2010. The State made its return and motion to dismiss on May 17, 2011. A hearing was convened at the Orangeburg County Courthouse on May 21, 2012, at which time Applicant was present in court and represented by Jeremy Thompson, Esquire. Respondent was represented by David Spencer of the South Carolina Office of the Attorney General.

At the hearing, the State moved to dismiss the entire application on the grounds that it was successive and beyond the statute of limitations. This Court denied the motion and heard testimony from Applicant's PCR appellate counsel. This Court also had before it the pleadings from both parties, the briefs and the appendix from the appeal of Applicant's prior PCR application, the Applicant's records from the South Carolina Department of Corrections, and the Clerk of Court's records regarding the subject convictions.

PROCEDURAL HISTORY

Applicant is currently confined in the Department of Corrections pursuant to the orders of commitment by the Clerk of Court for Orangeburg County. Applicant was indicted at the May 2003.

term of the Orangeburg County Grand Jury for murder. Applicant was tried before a jury on April 19, 2005 and found guilty as charged on April 20, 2005. The Honorable James C. Williams, Jr., sentenced Applicant to fifty years imprisonment. Applicant did not appeal his conviction or sentence.

Applicant filed his first PCR application on September 30, 2005. The State filed its return on May 17, 2006. An evidentiary hearing was held before the Honorable Perry M. Buckner, III, on August 6, 2008. Judge Buckner denied relief except that he found that Applicant did not freely and voluntarily waive his right to directly appeal the conviction and sentence, by order dated September 3, 2008. Applicant filed a motion to alter or amend the ruling on September 24, 2008. This was denied by Judge Buckner by written order dated October 6, 2008.

Applicant appealed Judge Buckner's rulings and was represented by Katherine H. Hudgins, Esquire. Ms. Hudgins submitted a petition for writ of certiorari and a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Supreme Court granted the petition for writ of certiorari in part and reviewed the Anders brief, granting counsel's motion to dismiss and dismissing the appeal. Mem. Op. No. 2010-MO-026 (S.C. Sup. Ct., filed October 25, 2010).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003):

The State moved to dismiss this application as successive and beyond the statute of limitations. Applicant opposed the motion on the basis that this application was his first opportunity to allege that his PCR appellate counsel was ineffective during the belated review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). This Court denies the State's motion on the basis that this is Applicant's first opportunity to challenge PCR appellate counsel's effectiveness.

Applicant alleges that he received ineffective assistance of counsel in the belated direct review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Appellate counsel filed an Anders brief and raised the issue that the trial court should have instructed the jury on the lesser included offense of voluntary manslaughter.

Applicant alleges that the brief should have been submitted as a merits brief instead of an Anders brief. Appellate counsel testified that upon review of the record, she believes that the issue was preserved for review, and had she realized this, she would have addressed the issue as a merits brief. The State argued that the issue was not preserved for review.

Regardless of whether the issue was preserved for review, this Court finds that no evidence supports the voluntary manslaughter charge. The law to be charged must necessarily be determined from the evidence presented at trial. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). A request to charge the lesser included offense only if the evidence supports a reasonable inference that the accused committed the lesser rather than the greater offense. State v. Fuchess, 267 S.C. 427, 229 S.E.2d 331 (1976); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Morris, 307 S.C. 480, 415 S.E.2d 819, 821 (Ct. App. 1992) (emphasis added).

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996).

The cases are clear that evidence of both heat of passion and sufficient legal provocation must exist to warrant a voluntary manslaughter charge. E.g. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

The evidence was that Applicant had a prior verbal altercation in a club with victim and his friend. As Applicant and his friend were leaving the parking lot, the victim exited his car and approached Applicant. Applicant then shot victim.

"When death is caused by the use of a deadly weapon, words alone, however opprobrious, cannot constitute sufficient legal provocation." State v. Johnson, 324 S.C. 38, 40, 476 S.E.2d 681, 682 (1996). "Rather, the offending words must be accompanied by some overt threatening act which could have produced the heat of passion." Id. Johnson found that merely "bad mouthing" and "trash talking" were insufficient to support a charge for voluntary manslaughter and the fact that one of the individuals showed a willingness to fight was insufficient to constitute an overt threatening act. In the instant case, like Johnson, evidence presented fails to show an overt threatening act that would give rise to heat of passion.

Applicant alleges that appellate counsel should have raised the issue that the prosecutor improperly commented on Applicant's right to remain silent during closing argument. Tr. p. 289. Appellate counsel testified that she did not think this was a strong issue. Counsel's strategy is reasonable, especially in light of the fact that the issue would not be preserved for review. Trial counsel made an objection, but did not state the nature of the objection, after a conference at the bar, the prosecutor continued closing argument without further objection or clarification from trial counsel or a ruling from the trial court. State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("the proper course to be pursued when counsel makes an improper argument is for

opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon").

"[A]ppellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aikeri, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, *Id.* at 537. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

To prove prejudice when an Applicant claims ineffective assistance of counsel, he must show that but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, *supra*; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, he must prove prejudice by showing he would have prevailed on appeal had counsel made the argument he claims he did not make. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

This Court finds that Applicant has failed to prove that appellate counsel was ineffective. The issue concerning the voluntary manslaughter issue was raised in the Anders brief. While not dispositive of this issue, this Court notes that the Supreme Court reviewed the entire record and determined that a meritorious issue did not exist. Regardless, this Court finds that Applicant was not prejudiced by the failure to not raise the issue as a merits issue, as no evidence supporting the lesser included offense was presented at trial. Accordingly, as a merits issue, the appeal would not have been successful. Further, appellate counsel made a reasonable strategic decision not to raise the issue concerning the closing argument, as it was not preserved for review and further, Applicant was not prejudiced by the failure of counsel to raise this issue. Accordingly, this Court finds that Applicant has not met his burden of proving counsel was ineffective. This Court denies the application with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.


This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. *State v. Bray*, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP.

provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied with prejudice;
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 24 day of July, 2012.

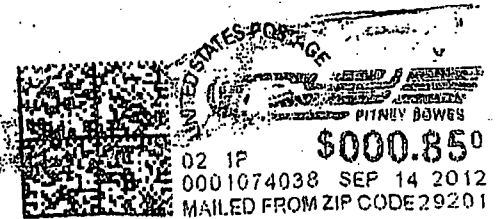


 DeAndrea G. Benjamin
 Presiding Judge
 1st Judicial Circuit

Columbia, South Carolina

LAW OFFICE OF
JEREMY A. THOMPSON
LLC

P.O. Box 12891, Columbia, SC 29211



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

WITNESSES

DOCKET NO. 2003GS38-0887

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

The State of South Carolina

Defendant

County of

ORANGEBURG

I hereby appear in my own proper person and plead guilty to the within indictment or to

DETECTIVE BOBBY RIVERS

COURT OF GENERAL SESSIONS

Arresting Agency:

May 12, 2003 TERM

Orangeburg Public Safety

Defendant

ARREST WARRANT NUMBER

Witness:

H325274

THE STATE

Arrested: Dec 12, 2002

vs.

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

Lavon Gilbert Mintz

Indictment for

MURDER

M. D. Myers
Foreperson of Grand Jury

TRUE BILL

Date: May 15, 2003

MAY 15 2003

VERDICT

Guilty

Carl Kinney
Foreperson of Petit Jury

Date: 4-20-05

SC Code: 16-03-10
CDR Code: 0116
Class: FEL-EXM

ATTEST: TRUE COPY
Lisa M. Mizell
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

FILED FOR RECORD
LISA M. MIZELL
CLERK OF COURT
ORANGEBURG, SC

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STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

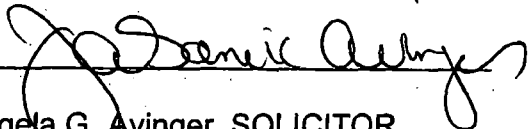
INDICTMENT
2003GS38-0887

At a Court of General Sessions, convened on May 12, 2003 the Grand Jurors of Orangeburg County present upon their oath:

MURDER

That Lavon Gilbert Mintz, did in Orangeburg County, on or about December 9, 2002, with malice aforethought, kill one Alfredo Lewis, by means of shooting the victim multiple times, and the said victim did die as a proximate result thereof. This offense being in violation of the Common Law of South Carolina, and Section 16-3-10 of the Code of Laws of South Carolina, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Angela G. Avinger SOLICITOR

RECEIVED
MAY 12 2003
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA