

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2012-212935
Circuit Court Case No. 2010-CP-38-1698

LEVON MINTZ, #303362,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**SECOND SUPPLEMENTAL APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JEREMY A. THOMPSON
Attorney and Counselor at Law

JOHN W. MCINTOSH
Chief Deputy Attorney General

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 Fax
jeremyvatlaw@yahoo.com

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEY FOR PETITIONER.

ATTORNEYS FOR RESPONDENT.

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JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 Fax
jeremyatlaw@yahoo.com

ATTORNEY FOR PETITIONER.

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James C. Williams, Jr., Circuit Court Judge

Lewon Mintz

Petitioner,

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Prose Brief of Petitioner Pursuant to
White v. State

Lewon Mintz[#] 303362
Prose Petitioner

Lieber Com. Inst.
P.O. Box 205
Ridgeway S.C. 29472

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TABLE OF AUTHORITIES

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ISSUE PRESENTED

Did the trial judge err in allowing the prosecutor to make an indirect comment on defendant's right to remain silent and put the state to its burden of proof?

STATEMENT

In May of 2003, the Orangeburg County Grand Jury indicted Leon Mintz, Appellant, for murder, indictment # 2003-GS-38-0887. On April 19, 2006, Mintz proceeded to jury trial before the Honorable James C. Williams, Jr. The jury returned a verdict of guilty and Judge Williams sentenced Mintz to fifty (50) years. Trial counsel failed to properly file the direct appeal.

On September 30, 2005, Mintz filed an application for post conviction relief. The application was amended on July 7, 2006. The state filed a return on May 17, 2006. On August 6, 2008, an evidentiary hearing was convened before the Honorable Perry M. Buchner. In a written order signed September 3, 2008, Judge Buchner found that Mintz was entitled to seek a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Judge Buchner denied all other relief and dismissed the application. A timely notice of intent to appeal was filed on November 5, 2008. Appellate counsel filed an Anders brief on July 1, 2009. This Rose brief of petitioner pursuant to Anders v. California 87 S.Ct 1396, and a separately filed Petition for writ of certiorari follows

ARGUMENT

The judge erred in allowing the prosecutor to make an indirect comment on defendant's right to remain silent and put the state to its burden of proof.

During the course of the state's closing argument he made he made the following comments in reference to Cotina Brooks testimony: Remember on cross-examination Mr. Walters hammered her about discovers, and not getting this and not getting a statement. Then you find out on redirect, her statement is on tape. Then guess who had that old alone? The defense has it. they did not want you to know that. It's on tape. (APP.P. 289 1n 6-12).

A timely objection was made (APP.P.289 1n 12-B). The objection was made on the ground that it was a violation of defendant's sixth amendment right and fifth amendment right to remain silent (APP.P. 311 1n 22-25 P. 320 1n 8). Defense counsel stated that, any inference, any fact that put before the court is in dispute and we do not have to come forward and refute anything (APP.P. 320 1n 6-8). The trial judge overruled the objection. The judge erred.

In State v. Johnson 293 S.C., 360 S.E.2d 317 (1987) the Courts concluded that it is improper for the state to refer to a defendant's exercise of a constitutional right: "Right to Plead not

guilty and put the state to its burden of proof." (right to remain silent). Although indirect, the comment is constitutionally impermissible. State v. Hawkins 359 S.E.2d 10. For example when a defendant invokes the Fifth Amendment, the prosecutor cannot proffer the accused silence as evidence of guilt Griffin v. California 380 U.S. 609, 85 Sct 1229, 14 L.Ed.2d 106 (1965). Likewise, this court has held that comments upon an accused decision not to testify and plead not guilty are egregious error State v. Lockham, 365 S.E.2d 23.

In this case the witness Cotina Brooks by her own admission on re-cross-examination testified that she "wrote" a statement and gave it to Det. Bobby Rivers, a statement other than the one on tape (App. P. 185 In 1-25 P. 186 In 1-25, P. 187 In 1-25 P. 188 In 1-25). Det. Bobby Rivers testified that he did not receive a written statement (App. P. 226 In 21-P. 227 In 1-2). The tape statement was never the statement in dispute. This is clearly a credibility issue for the jury to decide.

Appellant contends that the solicitor's closing argument was an indirect reference to appellant's silence at trial and right to put the state to its burden of proof. Any inference, or fact that's put before the court is in dispute and the defense does not have to come forward to rebut or refute anything. The words the defense used, they did not want you to know that, shifts the

burden of proof from the state to the defense and it infers that by the defense remaining silent he was intentionally misleading the jury and he had something to hide. By the judge not sustaining the objection with instructions not to consider those comments during their deliberation, the jury was allowed to deliberate on an issue in dispute and weigh the fact that the defense did not refute it and was misleading the jury in its cross-examination. And given the fact that this was a eye-witness and credibility case these comments were prejudicial because it refers to the credibility of Cotina Brooks, who testified that she saw the defendant pull a gun and Det. Rivers who testified that he took her statement.

Conclusion

Based on the above argument, the Appellates sentence and conviction should be reversed and the case remanded for a new trial.

Respectfully Submitted,

Levon S. Mintz

Levon Mintz # 303362

Prose Appellant

This 28 day of July 2009.

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IN THE SUPREME COURT

Certiorari to Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Levon Mintz,

Petitioner,

v.

State of South Carolina

Respondent

Certificate of Service

I certify that a true copy of the prose brief of Appellant pursuant to White v. State, in this case has been served on the Honorable Daniel E. Shearouse, Clerk of the Supreme Court of South Carolina, for filing via postal mail, this 28 day of July, 2009.

Sworn to and Subscribed before me

this 28 day of July, 2009

[Signature]

Notary Public
State of South Carolina

My Commission Expires: 4/4/2011

[Signature]

Levon Mintz #302362
Prose Petitioner

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I certify that a true copy of the prose brief of appellant pursuant to White v. State, in this case has been served on Mans S. Williams, Esquire, via postal mail, this 29 day of July, 2009.

sworn to and subscribed before me

this 29 day of July, 2009

Cheryl J. Wall
Notary Public

State of South Carolina

My Commission expires: 4/4/2012

Levon Mintz

Levon Mintz # 303362

Prose Petitioner