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JUN 13 2013

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Beaufort County

Perry M. Buckner, Circuit Court Judge,

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JUN 13 2013

S.C. SUPREME COURT

JOHN DYKEMAN,

Petitioner

V.

STATE OF SOUTH CAROLINA,

Respondent,

APPELLATE CASE NO. 2012-213569

PETITION FOR WRIT OF CERTIORARI

JOHN DYKEMAN

Pro Se PETITIONER

P.O. Box 205 LCI EA-41

Ridgeville, SC 29472

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ISSUE I

Whether appellate counsel was ineffective in failing to brief on appeal the issue of defense counsel's motion for directed verdict?

ISSUE II

Whether appellate counsel was ineffective in failing to brief on appeal the issue of defense counsel's motion to strike specific portions of State's witness Brandy Ross and/or denying defense motion for a mistrial pertaining to this witness testimony?

ISSUE III

Whether appellate counsel was ineffective for failing to raise any preserved issues for appellate review?

STATEMENT

Petitioner was convicted of murder, armed robbery, and kidnapping after a jury trial held on April 16-18, 2007, before the Honorable John M. Milling. Petitioner was sentenced to life imprisonment for murder and to thirty (30) years for armed robbery and kidnapping. Gene Hood, Esquire, was trial counsel and McDuffie Stone, Esquire, Sean Thorton, Esquire and Angela Tanner, Esquire, represented the State. (APP. P. 1-581).

Petitioner appealed his convictions and the appeal was affirmed by the Court of Appeals on October 12, 2010. State v. Dykeman, Op. NO. 2010-4P-436. (APP. P. 583-P. 598).

Petitioner filed an application for post-conviction relief on November 18, 2010, (APP. P. 591-P. 609). Respondent filed a return dated March 17, 2011, (APP. P. 610-P. 614). An evidentiary hearing was held on September 4, 2012, before the Honorable Perry M. Buckner, III. Petitioner was present and was represented by Samuel Kirkland, Esquire. Respondent was represented by Ashleigh Wilson, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (APP. P. 615-P. 660).

On October 1, 2012, Judge Buckner issued an order denying and dismissing petitioner's application for post-conviction relief, (APP. P. 664-P. 670). A motion to alter or amend was denied on November 9, 2012. (APP. P. 671-P. 677).

This petition follows.

ARGUMENT

Appellant counsel was ineffective in failing to brief on direct appeal the issue of defense counsel's motion for directed verdict.

During petitioner's trial defense counsel made a motion for directed verdict. (App. p. 481 lines 18, 19). By counsel's motion, this preserved the issue so that it could be briefed on direct appeal. Due to appellate counsel's failure to brief this issue petitioner was denied due process of law and deprived of his 6th Amendment right. From the language used in Delgado v. Lewis, 168 F.3d 1148 (9th Cir 1999), which states that appellate counsel's failure to raise any arguable issues in brief on appeal created presumption of prejudice satisfying prejudice prong of defendant's claim of ineffective assistance of appellate counsel, in that defendant was essentially left without representation on appeal. USCRA, Amend. 6.

Appellant counsel was ineffective in failing to brief on appeal the issue of defense counsel's motion to strike specific portions of State's witness Brandy Ross and/or denying defense motion for a mistrial pertaining to this witness testimony.

Also during petitioners trial defense counsel made a motion for a mistrial (APP.P 487 Lines 16-25) and to have all previous motions renewed and were denied. The record clearly shows that petitioner advised and made appellate Counsel aware of the issues that were preserved for appellate review and carried the most likely hood of success, and were non-frivolous. Petitioners testimony clearly shows that, were it not for appellate counsels incompetence he would not have knowingly raised an unpreserved issue for appellate review, clearly depriving petitioner of his right to due process and denying petitioner a fair bite at the apple. Petitioners testimony shows that appellate Counsel was made aware of the issues that were preserved for appellate review. (APP.P. 647 lines 4-25 p. 648 Lines 1-7 p. 649 Lines 21-25 p. 660 Lines 1-12). Delgado v. Lewis 168 F3d 1148 (9th Cir. 1999). Appellant counsel rendered constitutionally deficient representation under 6th Amend. when he failed to raise any arguable issues in appellate brief on direct appeal, which constructively left defendant without counsel on appeal, and did not file requisite motion to withdraw from the case. USCA Const. Amend. 6.

ISSUE III

Appellate counsel was ineffective for failing to brief any issues that were preserved for appellate review on direct appeal.

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. A defendant is entitled to effective assistance of appellate counsel, Southerland v. State 337, S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

Appellant counsel's failure to raise any arguable issues in brief on direct appeal created presumption of prejudice satisfying prejudice prong of defendant's claim of ineffective assistance of appellate counsel, in that

defendant was essentially left without representation on appeal. 10 Criminal Law Key 641.13 (7) Delgado v. Lewis 168 F.3d 1148 (9th Cir 1999). Appellate Counsel rendered constitutionally deficient representation under 6th Amend. when he failed to raise any arguable issues in appellate brief on direct appeal, and did not file requisite motion to withdraw Id. According to Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999) appellate counsel has a mandatory obligation to file a meritorious brief or an Anders brief and a motion to be relieved as counsel to afford applicant an opportunity to brief any meritorious issues. Record clearly shows that appellate counsel failed on every level there by denying Petitioner effective assistance of counsel and due process of law. According to Martinez v. Ryan 2012 WL 912950 (U.S.) An attorney's errors during an appeal on direct review may provide cause to excuse a procedural default if

the attorney appointed by the state to pursue the direct appeal is ineffective, the state prisoner has been denied fair process and the opportunity to comply with the states procedures and obtain an adjudication on the merits of his claims. USCA Const. Amend. 6.

CONCLUSION

Because appellate counsel failed to raise on direct appeal any issues that were preserved for review by appellate court and by failing to file requisite motion to be relieved as counsel there by denying petitioner his right to due process of law, petitioner's writ should be granted and he should be given a new trial.

This 13th DAY OF
MAY 2013

Respectfully Submitted,

John Dykeman 245443

John Dykeman 245443
Pro se



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Acting Chief Appellate Defender
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November 23, 2010

Tiffany N. Richardson
Staff Attorney
Office of Disciplinary Counsel
Post Office Box 12159
Columbia, SC 29211

Re: NOTICE OF INVESTIGATION
Complainant: John Dykeman
Matter Number: 10-DE-L-1228

Dear Ms. Richardson:

I am writing in response to your letter of November 9, 2010, concerning Mr. Dykeman's undated complaint apparently received by your office October 2, 2010. I represented Mr. Dykeman in the direct appeal of his convictions for murder, kidnapping and armed robbery. Although I was unable to help him in that proceeding, I nevertheless identified an unpreserved issue for post-conviction relief that, in my professional opinion, will result in a new trial. (A copy of my brief, the Court of Appeals opinion affirming Mr. Dykeman's convictions and relevant correspondence with Mr. Dykeman are attached.)

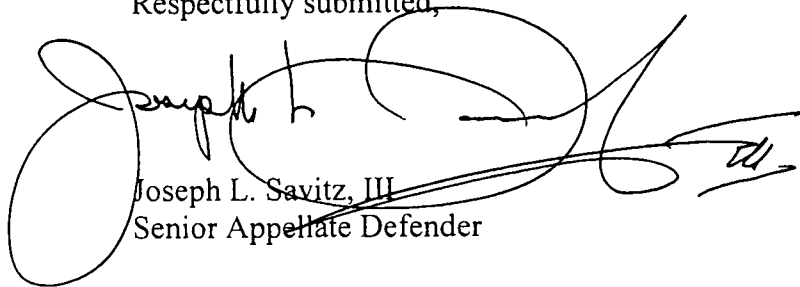
I categorically deny Mr. Dykeman's accusation of professional misconduct. I obtained a copy of the *Jackson v. Denno* hearing of which he speaks and, as reflected in my correspondence, sent him a copy. (The nondisclosure of Brady material was neither an issue at trial nor on appeal.) Moreover, I spoke with Mr. Dykeman a number of times about his case, and I cannot remember ever refusing to talk with him when he called.

If anything, I believe that I provided Mr. Dykeman with better representation than required by the Rules of Professional Conduct. While I have not provided you with a copy of my entire file on Mr. Dykeman, I certainly have no objection if you wish to review it.

In my opinion, Mr. Dykeman will obtain relief in his case (if at all) by raising the issue I have identified on post-conviction relief. In any case, Mr. Dykeman's allegations against me are groundless and his complaint should be summarily dismissed.

Thank you for your courtesy and cooperation. Please do not hesitate to contact me if you need additional information or I may be of further assistance.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III'. The signature is written over the typed name and title.

Joseph L. Savitz, III
Senior Appellate Defender

JLS/pds

Enclosures

cc: Mr. John Dykeman #245443