

ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

**RECEIVED**

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December 3, 2013

**S.C. Supreme Court**

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

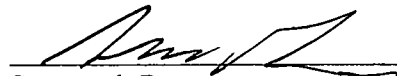
Re: Joseph Dominick Urato v. State

Dear Mr. Shearouse:

After receiving an envelope of which I enclose a copy, I am sending my copy of the package I mailed November 1, 2013. While it does not contain the original Notice of Appeal and Proof of Service upon the Respondent as they were lost in the mail, I hope it suffices to preserve Mr. Urato's appeal. Clearly, I did not mail an empty envelope as the contents weighed by US Post Office shows \$.86 postage.

Let me know if there are any problems or concerns.

Sincerely,



Susannah Ross  
Attorney at Law

enclosure

330 E. COFFEE ST. • GREENVILLE/SC • 29601  
PHONE: (864) 242-0029  
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

Ms. Susannah Ross  
Ross and Enderlin, PA  
330 E. Coffee St.  
Greenville SC 29601

*Return NO  
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Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
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Columbia, South Carolina 29211

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ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

November 1, 2013

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

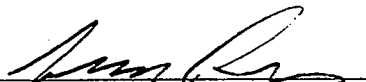
Re: Joseph Dominick Urato v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. The Notice has also been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel.

Sincerely,

  
Susannah Ross  
Attorney at Law

enclosure

cc: Paul Wickensimer, Clerk  
Office of the Attorney General  
Office of Appellate Defense

330 E. COFFEE ST. • GREENVILLE/SC • 29601  
PHONE: (864) 242-0029  
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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2012-CP-23-3617

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Joseph Dominick Urato, ..... Appellant,

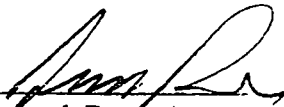
v.

The State, ..... Respondent.

NOTICE OF APPEAL

Joseph Dominick Urato appeals the Honorable Robin B. Stilwell's Order of Dismissal filed on October 10, 2013.

This 1 day of Nov, 2013.

  
Susannah Ross, Attorney at Law  
330 East Coffee St.  
Greenville, South Carolina 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
Karen Ratigan, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

**PROOF OF SERVICE OF NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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2012-CP-23-3617

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Joseph Dominick Urato, ..... Appellant,

v.

The State, ..... Respondent.

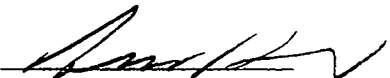
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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 1, 2013, addressed to Attorney General of South Carolina, Attn: Karen Ratigan, P.O. Box 11549 Columbia, SC 29211.

This 1 day of November, 2013.

  
Susannah Ross, Attorney at Law  
330 East Coffee St.  
Greenville, South Carolina 29601  
(864) 242-0029  
Attorney for Appellant

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Joseph Dominick Urato, )  
 S.C.D.C. No. 349299, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-3617

**ORDER OF DISMISSAL**

FILED - CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL R. WINTERKROW  
 2013 OCT 10 AM 10:10

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 31, 2012. The Respondent made its return on August 31, 2012. An evidentiary hearing into the matter was convened on August 28, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Randall L. Chambers, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the Applicant's Exhibit 1.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the July 2011 term of the Greenville County Grand Jury for two counts of bank robbery (2010-

GS-23-7945, -7946) and conspiracy (2010-GS-23-7909). He was represented by Randall L. Chambers, Esquire.

On January 17, 2012, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of thirty years suspended on service of eighteen years and three years probation for one count of bank robbery,<sup>1</sup> thirty years suspended during probation for the second count of bank robbery, and five years for conspiracy. The Applicant did not appeal.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. "Lawyer advised me that if I plead I would get a 10 yrs nonviolent sentence."
2. "Probation officer said it would be a 51% but SCDC has it as a nonviolent 85%."
3. "Never entered bank that I'm charged with. Never saw or shown indictment. I've been charged with wrong bank!!!"

At the PCR hearing, the Applicant proceeded upon the ground of ineffective assistance of plea counsel.

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by

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<sup>1</sup> 2010-GS-23-7946.

S.C. Code Ann. § 17-27-80 (2003).

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he planned on going to trial the day he went to court. The Applicant stated plea counsel told him he would receive a ten-year non-violent sentence if he pled guilty. The Applicant stated he signed the plea paperwork without reading it. The Applicant stated he told the plea judge he was guilty, agreed with the State’s recitation of the facts, and was “absolutely satisfied” with plea counsel because he believed he was going to receive a ten-year sentence. The Applicant stated he only pled guilty because he thought he would receive a ten-year sentence. The Applicant stated he did not understand what was happening at the plea hearing when there was discussion about amending the indictment. The Applicant stated the Court of Appeals subsequently told him there was no appeal in his case.

Plea counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Plea counsel testified they also discussed the impact of the co-defendant's statement and the Applicant's version of events. Plea counsel testified the majority of the discussions with the Applicant concerned the Applicant's desire for these charges to be handled in federal court. Plea counsel testified the case was on the trial docket the day the Applicant pled guilty. Plea counsel testified he told the Applicant there was overwhelming evidence against him and that he would likely be convicted. Plea counsel testified he told the Applicant that he would be pleading guilty without a sentence recommendation but that he probably said he would try and get a ten-year sentence. Plea counsel testified he thought the indictment had already been amended prior to the plea hearing. Plea counsel testified there was nothing wrong with the decision to amend the indictment. Plea counsel testified he probably discussed the amendment with the Applicant during the plea hearing and did not recall the Applicant had any problem with it.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, pp.6-7; p.11). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.5-7).

This Court finds the Applicant failed to meet his burden of proving plea counsel said he

would receive a ten year sentence if he pled guilty. Initially, this Court notes the Applicant has not presented any credible evidence in the form of documentation or testimony that a plea offer for a ten-year sentence ever existed. The sentence sheets signed by Applicant indicate the plea was entered without a recommendation. Plea counsel testified he never told the Applicant there was a ten-year recommendation or that he would receive such a sentence. This Court finds plea counsel's testimony is credible. While plea counsel did ask the plea judge for a seven or eight year sentence, this Court notes there is no mention in the plea transcript of a ten-year sentence. (Plea transcript, p.14). While the Applicant may have hoped for a ten-year sentence, he was not advised that he would receive such. See Holden v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citing Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made."). The Applicant never mentioned he was pleading guilty in exchange for a ten-year sentence and, in fact, told the plea judge he had not been made any promises in exchange for his guilty pleas. (Plea transcript, p.6). This Court finds the Applicant's allegation that plea counsel advised him that he would receive a ten-year sentence is refuted by the plea transcript. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly advise him about amending the indictment. At the guilty plea hearing, the assistant

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solicitor noted indictment 2010-GS-23-7946 should have been amended to read First Savers Bank as the location, not Wachovia. Plea counsel testified he was aware this amendment would take place. (Plea transcript, pp.7-9). The Applicant did not tell the plea judge he had any problems with the amendment of the indictment. (Plea transcript, p.11). This Court finds plea counsel properly explained the amendment issue to the Applicant. Plea counsel told the plea judge they had previously discussed the issue and the Applicant indicated he did not have a problem with the indictment. (Plea transcript, p.11). The plea transcript, therefore, refutes the Applicant's claim. See Stalk v. State, 375 S.C. at 300, 652 S.E.2d at 407. Further, this Court notes indictments are merely notice documents and it is clear from plea counsel's testimony that he was on notice that this amendment would take place. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005).

This Court finds the Applicant failed to meet his burden of proving he is entitled to a review of his direct appeal issues. The Applicant has failed to present any evidence that he asked plea counsel to file an appeal. Without such evidence, this Court cannot speculate about whether appellate review of the Applicant's guilty plea hearing is warranted.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to

meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 8 day of OCT, 2013.



Robin B. Stilwell  
Presiding Judge  
Thirteenth Judicial Circuit

Gillett, South Carolina.

Derek J. Enderlin, Esquire  
Ross & Enderlin, PA  
330 East Coffee Street  
Greenville, SC 29601

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

