

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

S.C. SUPREME COURT

Honorable Alex Kinlaw, Jr, Circuit Judge

Case No.: 2019-CP-23-1138

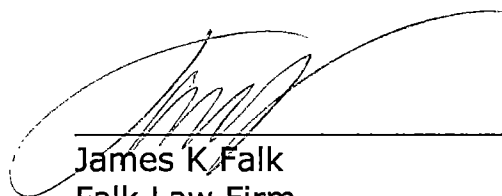
Joseph Dominick Urato #349299.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Joseph Dominick Urato appeals the Honorable Alex Kinlaw Jr's September 2, 2020 Final Order of Dismissal. Undersigned counsel received notice of entry of the order on September 22, 2020. A copy of the order on appeal is attached hereto.


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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Joseph Dominick Urato, #349299,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

) Case No.: 2019-CP-23-1138
)

) **FINAL ORDER OF DISMISSAL**
)

) ENTERED COMPUTER
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This matter comes before this Court by way of an application for post-conviction relief filed by Joseph Dominick Urato (“Applicant”) on March 4, 2019, and by a motion to dismiss filed by the State (“Respondent”) on June 23, 2020.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections pursuant to an order of commitment of the Greenville County Clerk of Court. During its July of 2011 term, the Greenville County Grand Jury indicted Applicant for entering “the Arthur State Bank, located at 1410 N. Pleasantburg Drive, Greenville, South Carolina, with intent to steal money, securities for money, or property, either by force, intimidation or threats” in violation of S.C. Code Ann. § 16-11-0380 (2010-GS-23-007945) and for conspiring with Deborah Basler (“codefendant”) for the purpose of accomplishing bank robbery on or about July 27, 2010, through July 30, 2010 (2010-GS-23-007909). During its December of 2011 term, the Grand Jury indicted Applicant for, “on or about the 30th day of July, 2010, enter[ing] the First Savers Bank, located at 1818 Augusta Street, Greenville, South Carolina, with intent to steal money, securities for money, or property, either by force, intimidation, or threats” in violation of S.C. Code Ann. § 16-11-0380

(2010-GS-23-007946).¹ Applicant was represented initially by Nihar Manhar Patel, Esquire, and ultimately by Randall Lee Chambers, Esquire (plea counsel), and Assistant Solicitor Jonathan Martin Gregory of the Thirteenth Circuit Solicitor's Office prosecuted the case. On January 17, 2012, Applicant appeared before the Honorable Edward W. Miller and pleaded guilty as indicted. At Applicant's plea hearing, the assistant solicitor provided a recitation of the facts the State would attempt to prove should Applicant proceed to trial, which were as follows:

On July 27, 2010, [codefendant] walked into the Arthur Bank on Pleasantburg Drive in Greenville County.

She pretended to use the bathroom to make sure the bank was clear. After she left, [Applicant] entered the bank wearing a mask and a blue bandanna around his mouth. He jumped over the counter, was screaming the whole time and said that no one would get hurt and demanded money.

[Applicant] got approximately \$3,400 in cash from the teller and left the bank.

Both [codefendant] and [Applicant] were arrested on July 30, 2010 after [codefendant] entered the First Saver's Bank on Augusta Road. The teller there recognized her as the co-defendant in the Arthur State Bank and she tripped a silent alarm.

According to [codefendant's] testimony, she says that after she went in the First Savers she went in the scope it out just like the Arthur State Bank. She went back to the truck with [Applicant], they started gearing up to rob the bank and that's when the police showed up and actually apprehended both suspects.

[Codefendant] gave a complete statement implicating herself and [Applicant] and she was deferred sentencing back in November. She was going to testify today.

Plea Transcript 7-8. Applicant affirmed to Judge Miller that "everything" the assistant solicitor

¹ The transcript from Applicant's plea hearing shows that this indictment initially read that the bank entered with an intent to steal was a "Wachovia Bank," but that the indictment was amended before the plea hearing to read that the bank entered was First Savers. The record shows that the indictment was amended with Applicant's knowledge and that the un-amended indictment was presented to Judge Miller at the plea hearing by mistake; the mistake was corrected during the hearing and Judge Miller marked a copy of the amended indictment as an original with Applicant's explicit consent. Plea Transcript 4, 7-11. For the sake of clarity, this Court will refer to the amended indictment only in this order because the amendment of the indictment does not appear to be an issue in this matter.

provided in his factual recitations was correct. Plea Transcript 11.

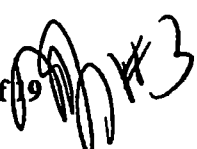
Judge Miller accepted Applicant's guilty pleas as given freely, voluntarily, and intelligently, with the advice of competent counsel with whom Applicant affirmed he was satisfied, and as based upon "a substantial factual basis." Plea Transcript 11-12. For each indictment of entering a bank with the intent to steal, Judge Miller sentenced Applicant to imprisonment for a concurrent term of thirty years, with the balance suspended upon the service of eighteen years, with probation for three years, and ordered Applicant to pay restitution; for the indictment for conspiracy, Judge Miller sentenced Applicant to imprisonment for five years, to be served concurrently with the other two sentences, suspended to probation concurrent with the probationary terms of the other two sentences. Judge Miller imposed conditions on the probation, which were that Applicant must undergo substance abuse counselling, submit to random drug and alcohol testing, and pay \$500 to the Public Offender Fund for his appointed attorney.

Applicant did not appeal his convictions or sentences.

2012-CP-23-3617

Applicant filed his first application for post-conviction relief on May 31, 2012, claiming therein that he was entitled to post-conviction relief because (1) plea counsel was constitutionally ineffective for advising Applicant that he would be sentenced to imprisonment for ten years as a nonviolent offender if he pleaded guilty, (2) a probation officer told Applicant that he would be eligible for parole after serving 51% of his sentence, and (3) Applicant did not enter the bank he was charged with robbing and was never shown the indictment. Respondent made its return on August 31, 2012, requesting that the court convene a PCR hearing.

A hearing was held at the Greenville County Courthouse on August 28, 2013, with the Honorable Robin B. Stilwell presiding. Applicant was present and was represented by Susannah

A handwritten signature in black ink, followed by the number '3' written in a large, stylized font.

C. Ross, Esquire, and Respondent was represented by Karen C. Ratigan of the South Carolina Attorney General's Office. At the hearing, clarified that he would be proceeding only upon claims that he received the constitutionally ineffective assistance of plea counsel. October 8, 2013, Judge Stilwell issued an order of dismissal, denying the application and dismissing it with prejudice. Specifically, Judge Stilwell found, among other things, that plea counsel properly advised Applicant regarding the amendment of indictment 2010-GS-23-007946 and that Applicant was on notice that indictment 2010-GS-23-007946 would be amended. App. 66.²

Ross filed a timely notice of appeal. Appellate Defender LaNelle Cantey Durant of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Durant filed a motion to be relieved as counsel and a petition for a writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), arguing Judge Stilwell erred in finding Applicant failed to show that plea counsel was constitutionally ineffective for failing to ensure that Applicant's guilty pleas were given freely, voluntarily, and knowingly. Applicant filed a response to Durant's Johnson petition, and styled it a "Pro Se Johnson Petition for Writ of Certiorari," and argued therein that Judge Stilwell erred in finding plea counsel was not constitutionally ineffective because (1) plea counsel failed to secure the enforcement of a ten-year plea agreement, (2) plea counsel failed to challenge the "elements of the Indictment as to whether the offense was committed," and (3) plea counsel failed to inform Applicant of his right to appeal his convictions and sentences. Applicant also filed a pro se motion to supplement the record with an affidavit, allegedly of his father, which he argued would rebut the testimony given by plea counsel at the PCR hearing before Judge Stilwell. The Supreme Court of South Carolina denied Applicant's pro se motion to supplement the record. Urato v. State, S.C. Sup. Ct. Order filed August 7, 2014. The Supreme Court granted

² Citation is to the appendix filed in Applicant's first PCR appeal.

Durant's motion to be relieved and denied Applicant's petition for a writ of certiorari. Urato v. State, S.C. Sup. Ct. Order filed October 8, 2014. The remittitur was issued on October 24, 2014.

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On March 6, 2015, Applicant filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina, claiming he was entitled to relief because (1) plea counsel was constitutionally ineffective, (2) Applicant did not enter the bank of which he was charged of robbing, (3) Applicant was never shown the indictment, (4) the "lower courts" decision was based on an unreasonable determination of facts, and (5) the indictment contained false and misleading statements. On June 1, 2015, Respondent filed a return and moved for summary judgment. On January 25, 2016, United States Magistrate Judge Kevin F. McDonald issued a report and recommendation, recommending that Respondent's motion for summary judgment be granted as to the claims addressed by Judge Stilwell during Applicant's first PCR action in state court and denied as to Applicant's claim that plea counsel was constitutionally ineffective for advising Applicant to plead guilty for robbing a bank that Applicant allegedly never entered. On March 15, 2016, United States District Judge Timothy M. Cain adopted the report and recommendation and ordered additional briefing as to whether the failure of Applicant's counsel in his first PCR action provided cause for the court to excuse Applicant's procedural default of the claim under Martinez v. Ryan, 566 U.S. 1 (2012).

On March 30, 2016, Respondent filed a second motion for summary judgment, addressing the sole remaining claim in Applicant's petition. Applicant filed a return to Respondent's motion for summary judgment on May 4, 2016, and Respondent filed a reply thereto on May 13, 2016. Judge McDonald issued a report and recommendation on September 13, 2016, recommending that

Respondent's second motion for summary judgment be granted. On December 22, 2016, United States District Judge Timothy M. Cain issued an order adopting the report and recommendation and granting Respondent's motion for summary judgment.

2018-000124

On January 23, 2018, Applicant, through counsel, filed a petition for declaratory relief in the original jurisdiction of the South Carolina Supreme Court, arguing Applicant had evidence that one of the banks at issue in one of Applicant's guilty pleas had never been robbed and that the Supreme Court should entertain the matter as any additional applications for post-conviction relief filed by Applicant would be successive and untimely. On February 24, 2018, Respondent made its return to the petition, arguing the Supreme Court should not entertain the matter in its original jurisdiction because Applicant failed to show that the issues involved were extraordinary and could not be entertained properly in the lower courts, and because substantive South Carolina law supported the conclusion that a crime existed as charged despite the fact that Applicant did not personally enter the relevant bank because the conviction was supported by the theory of accomplice liability. Applicant was represented by Tommy A. Thomas, Esquire, and Respondent was represented by Deputy Attorney General Donald J. Zelenka of the South Carolina Attorney General's Office. On March 7, 2018, Applicant made his reply, putting forth further arguments in support of his position that the Supreme Court should entertain the matter in its original jurisdiction. The Supreme Court denied Applicant's petition. Urato v. State, S.C. Sup. Ct. Order filed May 29, 2018.

CURRENT APPLICATION

In his second and current application for post-conviction relief, filed on March 4, 2019, Applicant alleges he is being held in custody unlawfully and that he is entitled to post-conviction

relief based upon the claim that Judge Stilwell erred in denying Applicant's first application for post-conviction relief because Judge Stilwell failed to make specific findings of fact and conclusions of law. Applicant prays therein that the Court would grant post-conviction relief and resentence Applicant to imprisonment for ten years as a nonviolent offender, vacate Applicant's present sentences, try Applicant for the "right" offense, sentence Applicant to imprisonment similarly to codefendant, and/or allow Applicant to preserve issues for appellate review.

On June 23, 2020, Respondent filed its return, and moved therein for the summary dismissal of the application on the grounds that the application was not filed within the time required by the Uniform Post-Conviction Procedure Act, is prohibited as a successive application, and is barred by the doctrine of res judicata. On June 30, 2020, this Court issued a conditional order of dismissal, conditionally granting Respondent's motion to dismiss and giving Applicant twenty days after the service of the order upon him in which to file a response thereto. Applicant was served with the conditional order of dismissal on June 30, 2020.

On July 27, 2020, Applicant served Respondent with a response to the conditional order of dismissal, and filed the response on August 7, 2020.³ Applicant argues therein that he is entitled to post-conviction relief based upon the following claims: (1) plea counsel was constitutionally ineffective for failing to conduct an adequate investigation into the factual basis for "the alleged crime," (2) plea counsel was constitutionally ineffective for advising Applicant to plead guilty to a crime that did not occur, (3) Judge Miller lacked the authority to accept Applicant's guilty plea because there was an insufficient factual basis to show "that the crime occurred," and (4) the Greenville County Court of General Sessions lacked the subject matter jurisdiction to impose a

³ Though not filed within the twenty-day window afforded to Applicant in this Court's conditional order of dismissal, this Court accepts the response as timely filed because Applicant, through counsel, requested an extension, which was granted by this Court without objection.

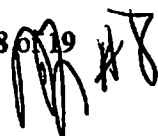
sentence for a crime that did not occur. Applicant alleges that he has evidence that Applicant did not rob the First Savers Bank ("First Savers") and that First Savers was not robbed on July 30, 2010, in the form of a lack of any incident report in possession of the Greenville County Sheriff's Department and the Greenville Department of Public Safety indicating a robbery occurred at First Savers on July 30, 2010, and anticipated testimony of two former employees of First Savers that they were working on July 20, 2010, and that no robbery occurred on that date. Applicant argues that the entry of his guilty plea was invalid because there was no factual basis to support the crime and that his claim that Judge Miller did not have the subject matter jurisdiction to sentence Applicant can be raised at any time.

Before this Court are the records of the Greenville County Clerk of Court regarding Applicant's convictions; the transcript from Applicant's plea hearing; the records from Applicant's first application for post-conviction relief and its appeal, including the appendix; the records from Applicant's petition for a writ of habeas corpus in federal court; the records from Applicant's petition for the South Carolina Supreme Court to entertain the matter in its original jurisdiction; Applicant's records from the South Carolina Department of Corrections; and the filings in this second PCR action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), this Court makes the following findings of fact and conclusions of law.

Judge Gravely conditionally dismissed the application because it was not filed within the time required by the Uniform Post-Conviction Procedure Act, it is prohibited as a successive application, and it is barred by the doctrine of res judicata. In his filed response, Applicant has failed



to provide this Court with a sufficient reason that Respondent's motion to dismiss should not be granted and that the summary dismissal of the application should not become final.

Pursuant to S.C. Code Ann. § 17-27-70(c), this Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact" and the movant is entitled to judgment as a matter of law. The summary dismissal of an application for post-conviction relief without a hearing is appropriate only when it is apparent on the fact of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. Mose v. State, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)). The Court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by Applicant as true and view them in the light most favorable to Applicant. Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)).

Statute of Limitations

This Court finds Applicant has failed to present a sufficient reason that the application should not be dismissed summarily due to its being filed after the required statutory period. A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). The Uniform Post-Conviction Procedure Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468,

469 S.E.2d 606 (1996). One who was convicted and sentenced prior to the effective date of the statute of limitations must file the application within one year of the effective date of the statute, which was July 1, 1995. Id. at 470, 469 S.E.2d at 607. Applicant was convicted and sentenced on January 17, 2012. Applicant did not appeal his convictions or sentences. The application was, therefore, due on or before January 18, 2013. This application was not filed until March 4, 2019, more than six years after the statutory filing period expired.

Applicant argues that his second application, filed more than six years after the statutory filing period expired, should not be subject to dismissal on the ground that it was filed after the expiration of the statutory period because his claim that Judge Miller lacked the subject matter jurisdiction to accept the entry of Applicant's guilty plea and issue a sentence may be raised at any time, in reliance upon State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).⁴ In Gentry, Gentry was indicted for, among other things, accessory before the fact to armed robbery and accessory before the fact to assault and battery with intent to kill. Gentry, at 96-97, 610 S.E.2d at 496. Gentry argued on appeal that the relevant indictments did not allege that Gentry was absent from the scene of the crimes and that, because such absence was a necessary element for accessory before the fact, the trial court lacked the subject matter jurisdiction to hear those charges. Id. at 98-99, 610 S.E.2d at 497-98. The South Carolina Supreme Court reiterated that "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong; and that issues related to subject matter jurisdiction may be raised at any time." Id. at 100, 610 S.E.2d at 498 (citations omitted). The Supreme Court clarified that subject matter jurisdiction

⁴ Although it is discussed later in this order, this Court notes here that Applicant testified at his PCR hearing before Judge Stilwell that Judge Miller did not have the subject matter jurisdiction to accept his guilty pleas and sentence him because First Savers was never robbed and due to an alleged defect in indictment 2010-GS-23-007946. App. 41-42.

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of the circuit and the sufficiency of an indictment are distinct concepts that should not be blended because “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Id. at 101, 610 S.E.2d at 499.

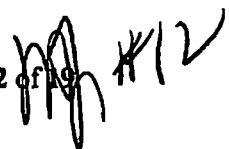
This Court finds that there is no genuine issue of material fact and that, even if local law enforcement agencies lack records of a robbery of First Savers on July 30, 2010, and two former employees would testify under oath that no bank robbery occurred at First Savers on July 20, 2010, Respondent is entitled to summary dismissal as a matter of law. Applicant’s argument that Judge Miller did not have subject matter jurisdiction to accept the entry of Applicant’s guilty plea under indictment 2010-GS-23-007946 is without merit. Applicant’s argument is based upon his assertion that evidence available to him, and allegedly to plea counsel, shows that First Savers was not robbed on July 20, 2010, or on July 30, 2010; however, whether a robbery occurred at First Savers on those two dates is irrelevant to whether Applicant is guilty of violating § 16-11-380. Section 16-11-380(A) provides that:

It is unlawful for a person to enter a building or part of a building occupied as a bank, depository, or building and loan association with intent to steal money, securities for money, or property, either by force, intimidation, or threats.

Id. The statute does not require that a person actually rob a bank in order for him to have violated its terms; rather, one who merely enters a bank with the intent to steal money, securities for money, or property by force, intimidation, or threats has committed a criminal offense. As previously noted in this order, indictment 2010-GS-23-007946 contained the allegation that Applicant entered First Savers with the intent to steal, not that he actually committed robbery therein. The assistant solicitor’s factual recitation, all aspects of which Applicant affirmed as factually true at his plea hearing, made it clear that the State was prosecuting Applicant for violating the statute with respect to First Savers under the theory of accomplice liability as codefendant entered the building as part of her and Applicant’s preparation for their imminent robbery of the bank. When accomplice

liability applies, “one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citations omitted). The lack of a reference to accomplice liability in the indictment itself is of no consequence here because “[i]t is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.” Id. (quoting State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000)).

Not only does Applicant’s argument ignore the fact that, under a theory of accomplice liability, Applicant could be found guilty of entering First Savers with the intent to steal without having gone in himself, it also ignores the fact that the crime did not necessarily have to be committed on July 20, 2010, or on July 30, 2010. Applicant alleges that two local law enforcement agencies were unable to produce incident reports showing that First Savers was robbed on July 30, 2010, and that two former employees of First Savers would testify at a PCR hearing that they were working on July 20, 2010, and that no robbery of the bank occurred on that date. This Court finds that those allegations, even if true, fail to show that there was not a factual basis for the entry of Applicant’s guilty pleas and that Judge Miller lacked the subject matter jurisdiction to accept Applicant’s pleas and sentence him. Indictment 2010-GS-23-007946 alleges that Applicant entered First Savers with the intent to steal “on or about the 30th day of July, 2010.” The indictment for conspiracy alleges that Applicant conspired with codefendant to commit bank robbery “on or about the 27th of July through the 30th day of July, 2010.” Applicant did not include in his response whether the local law enforcement agencies had incident reports showing that codefendant entered First Savers with the intent to steal on the days “about the 30th” and “on or about the 27th of July through the 30th day of July, 2010.” Furthermore, Applicant has not given this Court any reason to



find that the anticipated testimony of anyone who was working at First Savers on July 20, 2010, would be probative as to whether codefendant entered the bank with the intent to steal around seven to ten days later.

Presumably, Applicant's claim that Judge Miller lacked the authority to accept the entry of Applicant's guilty plea because there was an insufficient factual basis to show "that the crime occurred" is also meant to provide this Court with a reason that the statute of limitations should not procedurally bar this application and to open the door for Applicant's claim that plea counsel was constitutionally ineffective for advising Applicant to plead guilty when there was not a sufficient factual basis for the entry of the guilty plea. Before a court accepts a defendant's guilty plea, it must be certain that the defendant understands the charge and the consequences of the entry of the plea. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975). Additionally, the record must indicate a factual basis for the plea. Id. An adequate factual basis for the conviction under indictment 2010-GS-23-007946 was established before Judge Miller because, as Applicant agreed at his plea hearing, Applicant's accomplice entered First Savers with the intent to steal while he waited outside for her return so that they could then rob the bank, as they had done not long before at another bank.⁵ Applicant's allegations in his response to Judge Gravely's conditional order of dismissal, even if they are true, would not have deprived Judge Miller of the subject matter jurisdiction to accept Applicant's guilty pleas to entering a bank with the intent to steal and conspiring with codefendant to commit bank robbery. Applicant's arguments that the statute of limitations should not act as a procedural bar to his application fail. Therefore, the application is dismissed summarily

⁵ As will be discussed later in this order, this Court's conclusion that there was a sufficient factual basis for the entry of Applicant's guilty pleas was reached, too, by the federal district court that denied Applicant's petition for a writ of habeas corpus in federal court; that court's finding remains undisturbed.

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for Applicant's failure to file within the time mandated by Act and by Peloquin.

Successiveness

This Court finds Applicant has failed to present a sufficient reason that the application should not be dismissed summarily due to its being barred by the prohibition to successive applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised in a previous application. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" that new grounds were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450. If the applicant could have raised the allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

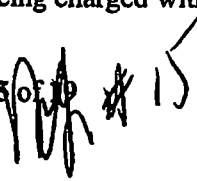
The only thing this Court finds in Applicant's response to Judge Gravely's conditional order of dismissal that could be considered an argument that the application should not be dismissed due to the prohibition to successive applications is Applicant's allegation that, had plea counsel

conducted "even a modest factual investigation regarding the alleged July 30, 2010 robbery" at First Savers, he would have discovered that no such robbery occurred. This falls far short of an adequate reason that Applicant's claims could not have been presented in Applicant's first PCR action. This is particularly true in this matter because Applicant presented a claim during his first PCR hearing that, if not identical, was substantially similar to Applicant's present claims about plea counsel's alleged inadequate investigation, the claim that Judge Miller did not have the authority to accept Applicant's guilty pleas because an adequate factual basis for the offenses was not established, and the claim that Judge Miller lacked the subject matter jurisdiction to accept the pleas and issue sentences because First Savers was not robbed on July 20, 2010, or on July 30, 2010. In his first application, application claimed that he was entitled to post-conviction relief because he did not enter the bank he was charged with robbing and was never shown the indictment. At his PCR hearing before Judge Stilwell, the following exchange occurred between Applicant and his attorney:

Q: Briefly explain what was the problem with the Indictment?

A: From what I understand, the problem with the Indictment originally was they were saying it was a Wachovia Bank. And that's what I thought they were fixing. Because I kept saying, I have nothing to do with a Wachovia Bank. Then they switched it to -- it was attempted robbery, originally. It was never bank robbery, I never entered a bank. So, I was saying I didn't rob that bank or even enter that bank. And they said, Well, they switched it to [First Savers]. Because apparently while me and [codefendant] were separated, she had went into [First Savers]. Which I wasn't aware of at the time. And that would have came out if we went to trial. Because I would have testified to that. But what happened was they changed it from attempted robbery to bank robbery. I never entered that bank, I never robbed that bank.

So, my whole grief with this whole thing is how am I in SCDC for robbing a bank that was never robbed? If we took the bank tellers or the bank president and they got on the stand right now and asked them if their bank was ever robbed, they would say no. And that would be the truth because it was never robbed. So how am I being charged with a bank that was never



charged?

Q: So, you're saying that amended Indictment doesn't give subject matter jurisdiction of that charge?

A: No, ma'am. No, ma'am.

App. 41-42. In his order denying Applicant's first application and dismissing it with prejudice, which was issued on October 8, 2013, Judge Stilwell found, among other things, that plea counsel properly advised Applicant regarding the amendment of indictment 2010-GS-23-007946 and that Applicant was on notice that indictment 2010-GS-23-007946 would be amended. App. 66. Judge Stilwell also found that Applicant abandoned "any and all allegations that were raised in the application or at the [PCR hearing] and not specifically addressed" in the Order of Dismissal because Applicant failed to present any testimony, argument, or evidence in support of them at the hearing. App. 67. Although Durant filed a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), while representing Applicant on appeal in his first PCR action, Applicant (unsuccessfully) advanced his own argument to the South Carolina Supreme Court in response that Judge Stilwell erred in finding plea counsel was not constitutionally ineffective because, among other things, plea counsel failed to challenge the "elements of the Indictment as to whether the offense was committed." Not only has Applicant failed to provide this Court with a sufficient reason that he could not have advanced the claims presented in this second PCR action during his first, he has failed to present arguments that are not identical or substantially similar to those he did present during his first PCR action, whether before or during his PCR hearing before Judge Stilwell or on appeal to the Supreme Court, which further demonstrates that Applicant could have advanced these claims in that action. Therefore, the application is dismissed summarily because it is a successive application.

Res Judicata

This Court dismisses the application summarily because the claims raised therein are barred by the doctrine of res judicata. Res judicata prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (S.C. Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (S.C. Ct. App. 1993). As previously noted in this order, Applicant's response to Judge Gravely's conditional order of dismissal repackages claims that were argued in the first PCR action or that could have been argued therein. That sort of revivification is barred by the doctrine of res judicata. Res judicata also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (approving of PCR court's finding that claims raised or that could have been raised in a prior federal habeas corpus proceeding were barred by res judicata). Applicant could have challenged and did challenge Judge Stilwell's findings of fact and conclusions of law during his first PCR action; in fact, because Applicant made his own pro se argument to the South Carolina Supreme Court in response to his appellate attorney's Johnson petition, he did present a challenge to some of Judge Stilwell's findings.

Furthermore, the United States District Court for the District of South Carolina found that Applicant's claim that his conviction under indictment 2010-GS-23-007946 was without merit under South Carolina law, despite Applicant's arguments (through counsel) that he did not enter the building of First Savers and that he lacked the requisite mental state because he did not know that his codefendant entered the building, because (1) the fact that Applicant did not enter First Savers was irrelevant because Applicant could be guilty of violating § 16-11-380 under the theory of accomplice liability and (2) the evidence supported the conclusion that Applicant was aware that

codefendant entered First Savers with the intent to steal. Urato v. Warden Stevenson, 6:15-cv-1062-TMC-KFM, Magistrate Report, September 13, 2016 (Cain). As the federal district court's findings were not disturbed by way of appeal, Applicant shall not now be allowed to litigate anew whether his conviction was due to his allegations that he did not enter First Savers or that it was not robbed on July 20, 2010, or on July 30, 2010. Therefore, the doctrine of res judicata precludes Applicant from raising the claims presented in his application.

Failure to Present Argument

This Court finds Applicant has not only failed to provide this Court with a sufficient reason that Judge Gravelly's conditional dismissal of the single claim presented in his application—that Judge Stilwell erred in not making findings of fact or conclusions of law as to all claims raised by Applicant during his first PCR action as required by the Uniform Post-Conviction Procedure Act—should not become final, but this Court finds also that Applicant has also failed to present in his response any argument in support of that claim. Because Applicant has failed to meet the burden imposed on him by the conditional order of dismissal, this Court finds that Respondent's motion to dismiss is granted as to that claim and that it is denied and dismissed with prejudice.

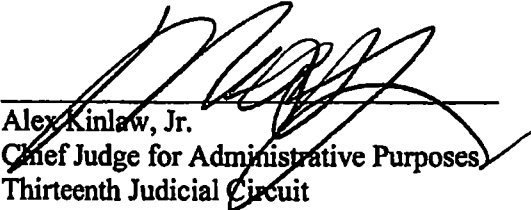
In summary, Applicant has failed to show that his application should not be dismissed summarily as being barred by the statute of limitations, by the prohibition on successive applications, and by the doctrine of res judicata. Therefore, Respondent's motion for summary dismissal is granted, this application is denied, and this PCR action is dismissed with prejudice.

IT IS THEREFORE ORDERED that the application for post-conviction relief is hereby denied and dismissed with prejudice due to its untimeliness, its successiveness, and its violation of the doctrine of res judicata. This Court advises Applicant that he must file and serve a notice of appeal within thirty days of the service of this order upon him to secure appellate review. Rule 203,

Handwritten signature and initials, possibly "A. #18", in black ink.

SCACR. Applicant's attention is directed to Rule 227, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 23rd day of September, 2020.



Alex Kinlaw, Jr.
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Cull, South Carolina.

Copy mailed to
Attorney General / JT AMY
on 9 / 9 / 2020