IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 27301

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

KENNETH DALE THOMASON,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE RANDALL L. MACY

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PRELIMINARY STATEMENT

Throughout this Brief, Defendant/Appellant, Kennneth Dale Thomason, will be referred to as "Defendant" or by name. Plaintiff/Appellee, State of South Dakota, will be referred to as "State." References to the transcripts of the jury trial shall be referred to as "JT" followed by the specific page(s). All other transcripts will be referred to by name and date followed by the specific page number(s). All other documents within the settled record as outlined in the Clerk's Amended Alphabetical Index shall be referred to as "SR" followed by the page number.

JURISDICTIONAL STATEMENT

On May 8, 2014, Mr. Thomason was indicted by a Lawrence County Grand Jury on two counts of Forgery and two counts of Offering False or Forged Instrument for Filing, Registering or Recording. *See* Indictment at Appendix A1-A2, SR 15. Additionally, the State also filed a Part II Information alleging that Mr. Thomason had previously been convicted of a felony. SR 17. On October 29, 2014, after a two-day trial, the jury returned a verdict of guilty on each count. *See* Judgment at B1-B6, SR 523.

Subsequently, on October 30, 2014, Mr. Thomason entered an admission to the Part II Information, which alleged that he was a habitual offender. Thereafter, on December 11, 2014, Mr. Thomason was sentenced by the Honorable Randall L. Macy to serve three years in the South Dakota State Penitentiary. *See* Judgment at Appendix B2 and SR 523. Notice of Appeal was timely filed December 24, 2014. SR 536. Appeal from the final judgment is brought as a matter of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. Did the trial court err by refusing to grant Mr. Thomason's motion to dismiss based upon double jeopardy and res judicata?

   The trial court denied Mr. Thomason's motion to dismiss. SR 76, JT 471.

   Bank of Hoven v. Rausch, 449 N.W.2d 263 (S.D. 1989).
   State v. Thomason, 2014 S.D. 18, 845 N.W.2d 640.
   Dakota Plains AG Center, LLC v. Smithey, 2009 S.D. 78, 772 N.W.2d 170.

2. Did the trial court err by failing to grant Mr. Thomason's motion to dismiss for lack of venue?

   The trial court denied Mr. Thomason's motion to dismiss for lack of venue. SR 76, JT 471.

   State v. Greene, 86 S.D. 177, 192 N.W.2d 712 (S.D. 1971).
   State v. Iwan, 2010 S.D. 92, 791 N.W.2d 788.

STATEMENT OF THE CASE AND FACTS

Summary: After this Court reversed and vacated Mr. Thomason's conviction for Aggravated Grand Theft By Deception Over $100,000, (*State v. Thomason*, 2014 S.D. 18, 845 N.W.2d 640) (*Thomason I*)) the State immediately charged Mr. Thomason with two counts of Forgery and two counts of Offering False or Forged Instrument for Filing, Registering, or Recording. The new charges were based upon an alleged forged power

of attorney, which was used as evidence to prove the Aggravated Grand Theft during the first trial. At the second trial, the crux of the State's case was that Mr. Thomason had either drafted or knowingly used the forged power of attorney to facilitate the transaction that was described by this Court in *Thomason I*. Before trial, and after the State's case-in-chief, Mr. Thomason moved to dismiss the indictment on the grounds of double jeopardy, res judicata, and collateral estoppel, given that the State's case was essentially a re-litigation of the same facts and issues that were litigated in *Thomason I*. The trial court denied the motion to dismiss on each occasion.

Mr. Thomason also moved to dismiss the new charges on the grounds that Lawrence County was not the proper venue for the action. Under the State's new theory of guilt, Mr. Thomason had possessed and/or passed the forged documents while in Lincoln County to complete the lease-to-buy-back loan related to the Gold Town Hotel this Court described in *Thomason I*. Although those documents were eventually filed with the Lawrence County Clerk of Courts, the State's evidence conclusively established that Getty Abstract Company, which is located in Sioux Falls, and not Mr. Thomason, caused the forged documents to be filed in Lawrence County.

The trial also court denied Mr. Thomason's pretrial motion to dismiss and subsequent motion to dismiss at the close of the State's case-in-chief.

Background facts of case: The background facts of this case, in large part, were set forth by this Court in *Thomason I*. Generally, this case centers on a financial agreement that was reached to resolve an ongoing dispute between family members. Unfortunately, the financial agreement did not work out as planned. This Court set forth the facts in *Thomason I* as follows:

In 2004, Thomason and his wife, Kim Thomason, purchased the Gold Town Hotel (Hotel) in Lead, South Dakota. Thomasons purchased the Hotel from Tamra Bennett (Bennett) by a contract for deed. In March 2005, Kim Thomason's mother Barbara Langlois (Langlois) began sending money to Thomasons. The transfers were understood to be loans.

In December 2005, Bennett, who still held legal title to the property and business, threatened to reclaim the property if Thomasons did not pay a deficient amount by the end of December. Short on cash, Thomasons requested $50,000 from Langlois. Langlois agreed to a $50,000 loan. She drafted, without professional assistance, a quitclaim deed that she described as for security. No other document assigns or further defines a security interest. On December 8, 2005, Thomasons gave the signed quitclaim deed for the hotel (2005 quitclaim deed) to Langlois. Subsequently, on December 12, 2005, Langlois transferred $50,000 to Thomasons. Langlois testified that the quitclaim deed was to be used as a security interest alone, and that she never intended to file the deed. Langlois did not, at that time, file the deed. Thomasons continued to request loans from Langlois. With the loaned money, Thomasons made repairs and improvements to the Hotel.

In 2006, Bennett stated that due to missed payments, the Hotel property was again subject to foreclosure. Langlois agreed to assist Thomasons by loaning them additional money. Langlois retained attorney Brad Schreiber (Schreiber) and an agreement was negotiated between Thomasons and Bennett. Ultimately, Langlois loaned Thomasons $328,133.01 to pay Bennett the remaining money due on the contract. Bennett delivered a warranty deed, dated September 27, 2006, naming Thomasons as grantees. Langlois was present during the negotiations and personally delivered the warranty deed to the Lawrence County Register of Deeds on December 11, 2006, even paying the filing fee.

Eventually, the parties' relationship deteriorated. Langlois was frustrated that she was not receiving repayment for her loans. Poor record keeping contributed to the frustration as the amount of money owed and interest rate was not precisely recorded, though Langlois told Schreiber that Thomasons owed her approximately $521,000. In November 2007, Langlois sought assistance from Schreiber in recovering her loans from Thomasons.

Schreiber, upon learning of Langlois' unrecorded 2005 quitclaim deed, advised Langlois to record it. Langlois recorded the 2005 quitclaim deed on November 16, 2007. Langlois then instructed Schreiber to serve an eviction notice on Thomasons. Spurred by the eviction threat, Thomasons negotiated with Schreiber to settle the outstanding debt and eviction issues. Eventually the parties negotiated an agreement, memorialized in a “Letter of Intent/Agreement” (Letter) signed by Langlois and Thomasons on January 7, 2008.

According to the Letter, it was understood that Thomason made an application for a loan in the amount of $350,000 that was set for closing on January 9, 2008. The

> letter recites Thomason's concern that since Langlois filed the 2005 quitclaim deed, the loan closing may be impacted. The Letter also states that Thomason would pay Langlois $200,000 as partial payment for the debt due and owing to her. Additionally, Langlois was later to obtain a mortgage against the property from Thomasons for an amount that was to be determined. Shortly after the Letter's execution, Schreiber provided Thomasons with a quitclaim deed (2008 quitclaim deed). The 2008 quitclaim deed, acknowledged on December 28, 2007 and recorded on January 29, 2008, at 2:59 p.m., conveyed any interest Langlois had in the Hotel to Thomasons and their son Dale.
>
> Thomasons were unable to obtain a traditional loan secured by a mortgage. Instead, on approximately January 10, 2008, Thomasons entered into a "lease-to-buy-back" agreement with Christopher and Shalece Vinson from Sioux Falls. As required by the agreement, Thomasons transferred title to the Hotel to Vinsons as security for a payment they made to Thomasons. The lease-to-buy-back contract was to be paid over the next several years while Thomasons continued to occupy and manage the Hotel. As structured, Thomasons would recover title to the property at the end of the payment period. By the time various other liens and amounts were paid off, from the $350,000 transaction, Thomasons collected $206,687.12.
>
> When Langlois did not receive her money by January 14, 2008, she contacted Schreiber. Langlois also attempted to contact Thomasons. Thomasons, however, were gone. Before the end of January 2008, Thomasons left for the Dominican Republic. Thomasons claim the trip was a pre-planned vacation, yet they stayed for approximately four years. Before they left, they retained the services of attorney Scott Armstrong (Armstrong).
>
> After he reviewed the file, Armstrong was concerned that the 2005 quitclaim deed did not convey any interest in the Hotel and that Langlois was unable to arrive at a total amount owed. Based on those concerns and until they were addressed, Armstrong advised Thomasons not to pay Langlois the $200,000. Armstrong and Schreiber corresponded over their clients' concerns.
>
> Unable to contact Thomasons, Langlois contacted the Lead Police Department and filed a complaint. On May 1, 2008, a Lawrence County Grand Jury indicted Thomason on charges of Aggravated Grand Theft by Deception Over $100,000. On August 31, 2012, the Lawrence County Grand Jury entered a Superseding Indictment which added an aiding and abetting theory plus a second count of Aggravated Grand Theft by Obtaining Property Without Paying.

Thomason I ¶ 2-11, 641-43.

In addition to the facts set forth by this Court in *Thomason I*, during the first trial the State also presented facts related to an alleged forged power of attorney purportedly

signed by Mr. Thomason's son, Kenneth Dale Thomason III (Dale). The power of attorney permitted Mr. Thomason to sign his son's name to complete the "lease-to-buy-back" agreement related to the Gold Town Hotel. During the first trial, Dale testified that the signature on the power of attorney was not his. *See* transcript of jury trial from Crim. 08-412 (*Thomason I*) at 395- 396, 445-446. Appendix C20-C23 and SR 22. During the first trial, the State argued extensively that the forged power of attorney was strong evidence to help establish that Mr. Thomason was guilty of the Aggravated Grand Theft Charge. For example, in summation during the first trial the State argued:

> But then ask yourselves: Who – who utilized this power for their benefit? And there's only two people, and that would be Kenneth Dale Thomason, Jr. [the defendant], and Kimberly M. Thomason, because they are the ones that are appointed attorney in fact for Kenneth Dale Thomason, III [Dale]. They're the only ones that benefit from the power of attorney. So they're the only ones that have any motivation whatsoever to see that the power of attorney is put together.

See transcript of jury trial from Crim. 08-412 (*Thomason I*) at 718-743, located at Appendix C10-C18 and SR 22.

Although the State was aware of the circumstances surrounding the power of attorney at the time of the original grand jury proceedings, for reasons not in the record, the State did not seek an indictment on any charges related to the power of attorney.

The facts of the second trial very closely mirrored the facts of the first trial. Just as in the first trial, during the second trial the State called Barbara Langlois, Gerard Langlois, Attorney Brad Schreiber, Kimberly Thomason, Adrian Polk, and Sheree Green, the Register of Deeds for Lawrence County. These witnesses all testified to virtually the same facts during the second trial as they did during the first trial and re-established the facts this Court set forth in *Thomason I*. Dale also again testified regarding the alleged forged power of attorney, again claiming that he had never signed the document. JT 280-

81. During the second trial, instead of calling Sioux Falls businessman Christopher Vinson the State called Attorney John Billion who works for Getty Abstract, which is located in Lincoln County, South Dakota. Attorney Billion testified to the "lease-to-buy-back" agreement involving the Gold Town Hotel and testified that the transaction took place in Sioux Falls in January of 2008, and that based upon the records in closing company's file, Thomason, along with his wife and son, Dale, entered into the agreement with Mr. Vinson and his wife. JT 422-25. Attorney Billion further testified that the alleged forged documents came to his office during the closing and that the documents were subsequently "overnighted" from Lincoln County to Lawrence County for filing. JT 429-432.

The State's theory of guilt at the second trial was that while at the closing at Getty Abstract, Mr. Thomason utilized the forged power of attorney to unlawfully sign Dale's name to complete a warranty deed for the Gold Town Hotel (count 1 and 2 of the indictment respectively). After the transaction was completed, both documents were then filed with the Lawrence County Register of Deeds (hence count 3 and 4 of the indictment). Similar to summations from the first trial, during the second trial the State argued the following regarding the power of attorney:

> But if you go ahead and you examine the evidence in this case with an eye on who benefited, who profited, the evidence leads, beyond a reasonable doubt, and points only to one person in this courtroom, and that's the Defendant, Kenneth Dale Thomason, Jr.
> …
> And the Defendant's intent to defraud has been manifesting itself in a special power of attorney and in warranty deed that was signed by virtue of a false or the fake power of attorney.

JT 497.

Procedurally, during the second litigation, Thomason moved pretrial to dismiss the charges against him on the grounds of double jeopardy, collateral estoppel,[1] res judicata and venue. A written brief in support of the motion to dismiss was filed. SR 22, App. C1-C33. The Court denied the motion to dismiss and entered written findings. SR 76, App. D1-D4. At the conclusion of the State's case-in-chief, Mr. Thomason again moved to dismiss the charges against him on same grounds as previously stated. JT 463-469. The trial court again denied the defense motions to dismiss. JT 471.

ARGUMENTS

1. The Trial Court erred by refusing to grant Mr. Thomason's motion to dismiss the criminal action based upon double jeopardy and res judicata.

Summary: The State had a full and fair opportunity to litigate the forgery and offering false or forged instrument for filing, registering or recording charges in *Thomason I*. It was only after this Court remanded and vacated Mr. Thomason's conviction for Aggravated Grand Theft Grand Theft by Deception Over $100,000, (and thus precluding the State from retrying Mr. Thomason on that same charge) that the State brought the charges now before this Court. The State should not be permitted to retry the same facts under as many new theories as the State can envision. Such a practice clearly runs afoul of the heart of the doctrines of double jeopardy and res judicata.

Standard of review: This Court reviews de novo a circuit court's denial to dismiss an indictment on double jeopardy grounds. *State v. Danielson*, 2010 S.D. 58, ¶ 9, 786 N.W.2d 354, 357. *See United States v. Petty*, 62 F.3d 265, 267 (8th Cir.1995). The

[1] Mr. Thomason does not urge collateral estoppel as grounds for reversal on appeal. *See Black Hills Jewelry Mfg. v. Felco Jewel Ind.*, 336 N.W.2d 153, 157 (S.D. 1983) (res judicata which embodies the concepts of merger and bar is broader than the issue preclusion function of collateral estoppel).

burden is "on defendant to demonstrate that the issue whose relitigation [defendant] seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350, 110 S.Ct. 668, 673, 107 L.Ed.2d 708 (1990).

Legal Authority and Analysis: Res judicata (former jeopardy) and collateral estoppel "are two of the individual members of a larger doctrinal family, known collectively as the law of double jeopardy." *Burkett v. State*, 98 Md.App. 459, 633 A.2d 902, 905 (1993). "It is beyond question that the closely related doctrines of res judicata and collateral estoppel apply to criminal as well as civil causes." *Cook v. State*, 281 Md. 665, 668, 381 A.2d 671, 673 (1978). *See also*, *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916) (Supreme Court rejecting government's argument that res judicata did not apply in criminal cases); *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) (Supreme Court applying collateral estoppel in a criminal case); *Legrand v. Weber*, 2014 S.D. 71, 855 N.W.2d 121 (this Court applying res judicata in a habeas proceeding where prisoner was challenging underlying criminal conviction), *St. Cloud v. Leapley*, 521 N.W.2d 118 (S.D. 1994) (this Court baring as res judicata prisoner's habeas arguments which where re-arguments from direct appeal); *see also Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978) and *United States v. Kummer*, 15 F.3d 1455 (8th Cir. 1994).

The Supreme Court of the United States has described the doctrine of res judicata as follows:

> *Res judicata* ensures the finality of decisions. Under *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). *Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or

> determined in the prior proceeding. *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940); 1B J. Moore, Federal Practice ¶ 0.405[1] (2d ed. 1974). *Res judicata* thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed. 2d 767 (U.S. 1979).[2]

The Fifth Amendment protection against double jeopardy appears to be coextensive with the double jeopardy protections provided for under Art. VI § 9, of the South Dakota Constitution. This Court has also extensively written on the doctrine of res judicata:

> …res judicata bars any "attempt to relitigate a cause of action by the parties or one of the parties in privity to a party to an earlier suit." *Speck v. Federal Land Bank of Omaha,* 494 N.W.2d 628, 633 (S.D.1993) (citing *Merchants State Bank v. Light,* 458 N.W.2d 792 (S.D.1990); *Bank of Hoven v. Rausch,* 449 N.W.2d 263 (S.D.1989)). The doctrine "embodies both *merger* and *bar* [.]" *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc.,* 336 N.W.2d 153, 157 (S.D.1983) (citing *Palma v. Powers,* 295 F.Supp. 924 (N.D.Ill.1969)). "Res judicata serves as *claim* preclusion to prevent relitigation of an *issue actually litigated or which could have been properly raised and determined* in a prior action." *Id.* (citing *Matter of Estate of Nelson,* 330 N.W.2d 151 (S.D.1983); *Schmidt v. Zellmer,* 298 N.W.2d 178 (S.D.1980); *Gottschalk v. South Dakota State Real Estate Comm'n,* 264 N.W.2d 905 (S.D.1978)). Res judicata also requires that the court in which the matter was litigated have had jurisdiction and have issued a final and unreversed decision. *Id.* (citing *Keith v. Willers Truck Serv.,* 64 S.D. 274, 266 N.W. 256 (1936)).

Dakota Plains AG Center, LLC v. Smithey, 2009 S.D. 78, ¶19, 772 N.W.2d 170, 179 (emphasis in original).

On several occasions, this Court has applied the following four-part test when applying the doctrine of res judicata:

> (1) Whether the issue decided in the former adjudication is identical to the present issue; (2) whether there was a final judgment on the merits; (3) whether the

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[2] The Double Jeopardy protection of the Fifth Amendment is applicable to the State of South Dakota via the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 399 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

> parties in the two actions are the same or in privity; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

Springer v. Black, 520 N.W.2d 77, 79 (S.D. 1994), *Raschke v. DeGraff*, 81 S.D. 291, 295, 134 N.W.2d 294, 296 (1965), *Cf. Staab v. Cameron*, 351 N.W.2d 463, 465 (S.D.1984) (applying same factors to issue of collateral estoppel).

Turning to the case at bar, the legal causes of action in both *Thomason I* and *II* are identical for purposes of res judicata. This Court's res judicata analysis from *Bank of Hoven v. Rausch*, 382 N.W.2d 39 (S.D. 1986) (*Rausch I*) and *Bank of Hoven v. Rausch*, 449 N.W.2d 263 (S.D. 1989) (*Rausch II*) is on point. In *Rausch I*, the litigation focused on a promissory note that Rausch co-signed with his son in 1978 and subsequent promissory notes, including a note executed in 1982. When the 1982 note was not paid, Bank of Hoven (Bank) brought an action against Rausch demanding that he make payment on the loan. Rausch contended that his signature on the 1982 note was forged and that when the original promissory note from 1978 expired by its own terms the loan was also extinguished. The Bank contended that although Rausch's signature on the 1982 note was forged, Rausch effectively ratified the 1982 note (and thus the 1978 loan) by signing a security agreement in 1981 and a financial statement in 1981. The trial court agreed and entered judgment in favor of the Bank. On appeal this Court found that the 1982 note was not intended to be a renewal note of the original 1978 loan. The Court therefore reversed the circuit court's judgment holding Rausch liable for the loan. *See Rausch II* at 264.

Following this Court's reversal in *Rausch I*, the Bank then instituted another action against Rausch, this time claiming that he had ratified a 1981 promissory note by signing a 1980 security agreement and a 1980 financing statement in addition to other various documents. Rausch argued that res judicata prevented the bank from bringing

the new legal action related to the 1981 promissory note. The Bank argued that it was not prevented from bringing the lawsuit because that the 1981 promissory note was not litigated in the first lawsuit. The trial court agreed with the Bank and entered a judgment holding Rausch liable for the 1981 promissory note.

On appeal, this Court reversed and found that res judicata prevented the Bank from bringing the second lawsuit related to the 1981 note. This Court wrote:

> The facts involved in *Rausch I* and *II* are virtually the same. In both cases it was established that [Rausch's son] executed a number of notes to the Bank over a period of years, and forged his father's name on those notes. In both cases the Bank argues that [Rausch]'s alleged acts of ratification in 1980 and 1981 effectively rendered him liable for the debt incurred by his son. [Rausch]'s failure to pay this debt is the wrong sought to be redressed in both actions. We must conclude, therefore, the cause of action is the same in *Rausch I* and *II.* As the Bank's cause of action was determined by this Court in *Rausch I,* the Bank cannot now attempt to relitigate that same cause of action.
>
> Res judicata is premised upon two maxims: a person should not be twice vexed for the same cause and public policy is best served when litigation has a repose. These maxims are served when the parties have had a fair opportunity to place their claims in the prior litigation. Clearly the Bank had a fair opportunity to place its claims in *Rausch I.* Therefore, for the foregoing reasons, we conclude that the Bank's claim against William in *Rausch II* is barred by the doctrine of res judicata.

Rausch II at 266 (internal citations omitted).

This Court should reach the same result here. Ultimately, *Thomason I* and *Thomason II* are the same litigation for purposes of res judicata. Just as in the *Rausch* cases, in this matter both trials were virtually identical as they involved nearly all of the same witnesses and exhibits. The harm the State seeks to redress in the second litigation is essentially the same harm it tried to address in the first litigation: specifically, a conviction related to the failed Gold Town Hotel transaction. During the first trial the State in closing argued:

> But then ask yourselves: Who – who utilized this power for their benefit? And there's only two people, and that would be Kenneth Dale Thomason, Jr. [the defendant], and Kimberly M. Thomason, because they are the ones that are appointed attorney in fact for Kenneth Dale Thomason, III [Dale]. They're the only ones that benefit from the power of attorney. So they're the only ones that have any motivation whatsoever to see that the power of attorney is put together.

See transcript of jury trial from Crim. 08-412 (Thomason I) at 718-743, located at Appendix C10-C18 and SR 22.

During the second trial the State argued:

> But if you go ahead and you examine the evidence in this case with an eye on who benefited, who profited, the evidence leads, beyond a reasonable doubt, and points only to one person in this courtroom, and that's the Defendant, Kenneth Dale Thomason, Jr.
> …
> And the Defendant's intent to defraud has been manifesting itself in a special power of attorney and in warranty deed that was signed by virtue of a false or the fake power of attorney.

JT 497.

Just as the Bank in *Rausch II* shifted from one promissory note to another in order to secure payment, in this matter the State is shifting from one theory of guilt (aggravated grand theft) to another (forgery) in order to secure punishment for Mr. Thomason's actions related to the failed January 2008 Gold Town Hotel transaction.

Turning to the second element, a final judgment on the merits exists. After this Court reversed and vacated Mr. Thomason's conviction in *Thomason I*, the trial court entered an order granting a judgment of acquittal. This order serves as final judgment for purposes of res judicata analysis. *See Rausch II* at 266 (holding that decision in *Rausch I* was a final judgment for res judicata purposes.)

The third element is also met. The parties in both *Thomason I* and *Thomason II* are the same, specifically, the State of South Dakota through the Lawrence County States

Attorney's Office and the Defendant, Kenneth Dale Thomason are the same parties in both actions.

Finally, the Fourth element is also clearly met. Similar to the Bank in *Rausch II*, the State in this case had a full and fair opportunity to litigate the Forgery and Offering False or Forged Instrument for Filing, Registering, or Recording charges during the first trial. Between the time that this Court vacated the conviction from the original case until the second trial, no additional discovery was conducted and more importantly no substantively new evidence was presented during the second trial. For whatever reason, the State simply chose not to bring the Forgery and Offering False or Forged Instrument For Filling charges during the first litigation. As the State had a full and fair opportunity during the first trial, the State should not be permitted to relitigate the same cause of action a second time.

"Res judicata serves as *claim* preclusion to prevent relitigation of an *issue actually litigated or which could have been properly raised and determined* in a prior action." *Dakota Plains AG Center, LLC v. Smithey*, 2009 S.D. 78, ¶19, 772 N.W.2d 170, 179 (emphasis in original, citations omitted). If the State had wanted to pursue the charges of forgery and offering false or forged instrument for filing, registering, or recording, it should have done so during the first litigation in *Thomason I*. To allow the State a second chance at these charges would be to allow "a person…[to] be twice vexed for the same cause…" and to permit the State to engage in repeat litigation against the maximum of public police that places a repose on litigation. *Rausch II* at 266.

2. <u>The trial court erred by failing to grant Mr. Thomason's motion to dismiss for lack of venue.</u>

Summary: Alternatively, if the State were not barred by res judicata, the proper venue for these charges would have been Lincoln County as opposed to Lawrence County. The State failed to present any evidence that Mr. Thomason ever possessed, altered, forged or passed with intent to defraud the relevant documents in Lawrence County. To the contrary, the State's evidence establishes that the documents in question were delivered to Getty Abstract in Sioux Falls South Dakota, and that it was Getty Abstract that caused the documents in question to be mailed to Lawrence County for filing.

Standard of review: An appeal of a motion to dismiss presents a question of law and this Court employs de novo review without deference to a trial court's legal conclusions. *Osloond v. Farrier*, 2003 S.D. 28, ¶ 4, 659 N.W.2d 20, 22 (2003).

Factual background: The State did not call any witnesses who testified or presented any evidence that would have established that proper venue for this action was in Lawrence County. Although Sheree Green, who works with the Lawrence County Register of Deeds, testified that the alleged forged documents were filed in Lawrence County (JT 455-58), no witness testified that the defendant was in possession of the alleged forged documents in Lawrence County or that they observed the defendant submitting the documents for filing in Lawrence County. Based upon the testimony of State's witness, Mr. Vinson, from the previous trial in file CR 08-412, Mr. Thomason presented the alleged forged documents to Mr. Vinson while at Getty Abstract in Sioux Falls. Getty Abstract then caused the alleged forged documents to be filed with the Register of Deeds in Lawrence County. JT 429-432 (Attorney Billion's testimony related to "overnighting" documents for filing in Lawrence County.) *See also* Appendix

C28-C33 (excerpts from Mr. Vinson's trial testimony from file CR 08-412) (JT, Vol. III, pgs. 312, 483, 491-492, 494 and 506).

Legal analysis: The accused is entitled to be tried in the county where the crime was alleged to have been committed. South Dakota Constitution, Art. VI, § 7. *State v. Greene*, 86 S.D. 177, 192 N.W.2d 712, 181 (S.D. 1971). *See also*, SDCL 23A-16-3. The State has the burden of establishing venue by a preponderance of the evidence. *Greene* at 182-3. In the case of forgery, venue is created by establishing the county in which the instrument was either forged or where the defendant possessed the forged instrument with intent to defraud. *Id*. at 181-2.

After the State's case-in-chief, Mr. Thomason moved to dismiss the charges, in response the State argued:

> What we're relying upon is that [Mr. Thomason] is the one that passed, with intent to defraud, these false documents to cheat, to gain some advantage over somebody else by deceit. And he's the only one that benefited from it.
>
> So I believe when you read the venue statues, this crime is properly venued in Lawrence County. It's not venued somewhere else. This is where the documents ended up. We could make the argument that when [the alleged forged documents] were submitted in Sioux Falls there is additional jurisdiction in Lincoln County. But that one statute says if it's partially in one and partially in another county, it's in either place, or where the act or effects take place, that's where the venue is.

JT 470.

Despite the State's arguments, in this matter, the State did not produced any evidence that venue was proper in Lawrence County. The mere fact that the alleged forged power of attorney and forged warranty deed were filed with the Register of Deeds in Lawrence County is factually insufficient to establish venue. A similar case was presented to this Court in *State v. Iwan*, 2010 S.D. 92, 791 N.W.2d 788. In *Iwan*, the

defendant was charged with grand theft by passing an insufficient funds check in Jackson County, South Dakota. The State alleged that Mr. Iwan, who was located in Jackson County, telephoned Stern Oil Co., which is located in Hutchinson County, and that he requested a fuel delivery for his Jackson County convenience store. After Stern Oil Co. made the fuel delivery to Jackson County, Mr. Iwan gave the delivery driver a check made out to Stern Oil Co. The driver then returned to Rapid City and mailed the check to Stern Oil Co. in Hutchinson County. The check was later dishonored for insufficient funds. Prosecutors in Hutchinson County filed charges against Mr. Iwan alleging grand theft by passing an insufficient funds check. Mr. Iwan objected to venue and in response the State argued that "the effects of Iwan's criminal acts in Jackson County came home to roost in Hutchinson County, where he knew the check, as all the other checks he had sent to [Stern Oil] went." *Id*. at 790. The trial court denied Iwan's motion to dismiss and he was subsequently convicted at trial.

On Appeal, this Court reversed Iwan's conviction after finding that the acts constituting the charged offense were committed in Jackson County when Mr. Iwan passed the check to the delivery driver. This Court further rejected that SDCL 23A-16-8 (venue of offense committed partly in one county and partly in another) or SDCL 23A-16-14 (venue of offense by use of mails) permitted venue in Hutchinson County. *Id*. at 791. This Court wrote:

> First…the "passing" of the insufficient funds check occurred in Jackson County, at the time Iwan gave the check to Stern Oil's agent knowing there were insufficient funds in his account. Second, Iwan did not use "the mails" to pass the insufficient funds check. He handed the check to [the delivery driver] in a sealed envelope, which [the delivery driver] later placed in another envelope and mailed to Stern Oil. [The delivery driver] is Stern Oil's employee and there was no evidence that Iwan knew [the delivery driver] would mail the envelope to Stern Oil rather than deposit the check on behalf of Stern Oil. Neither SDCL 23A-16-8

> nor SDCL 23A-16-14 create venue in Hutchinson County. The acts constituting the charged offense were committed on April 12, 2008, in Jackson County, when Iwan passed to [the deliver driver] an envelope containing the insufficient funds check, given in exchange for the delivery of fuel…

Id. 790-1, ¶ 14.

The Court's analysis from *Iwan* applies to Mr. Thomason's case. At most, Mr. Thomason passed the alleged forged document to Mr. Vinson while the two of them met in Sioux Falls, Minnehaha County at Getty Abstract. It was Getty Abstract that then caused the documents to be mailed to the Lawrence County Register of deeds. JT 429-432. No evidence was produced to establish that Mr. Thomason either drafted or possessed with intent to deceive the alleged forged power of attorney within Lawrence County. Mr. Thomason's cases is therefore analogues to *Iwan*, in both cases the documents in question ended up in the county where the charges where filed because somebody else used the mails to send the document there.

In operative facts, *Iwan* is therefore controlling and the trial court therefore should have granted Mr. Thomason's motion to dismiss for lack of venue.

CONCLUSION

For the reasons stated above, Mr. Thomason respectfully requests that this Court enter an order reversing and remanding his conviction and further instruct the trial court that a judgment of acquittal be entered.

REQUEST FOR ORAL ARGUMENT

Mr. Thomason respectfully requests oral argument on all issues.

Dated this _____ day of April, 2015.

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APPENDIX

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27301

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KENNETH DALE THOMASON,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE RANDALL L. MACY
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed December 24, 2014

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27301

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KENNETH DALE THOMASON,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Kenneth Dale Thomason, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name.

The various transcripts and reports will be cited as follows:

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The settled record in the underlying criminal case, *State of South Dakota v. Kenneth Dale Thomason,* Lawrence County Criminal File No. 08-412, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." All references will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Randall L. Macy, Circuit Court Judge, on December 15, 2014. SR 523-25. Defendant filed a Notice of Appeal on December 24, 2014. SR 536. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY DETERMINED DEFENDANT'S PREVIOUS PROSECUTION FOR AGGRAVATED GRAND THEFT DID NOT BAR A SUBSEQUENT PROSECUTION FOR FORGERY AND OFFERING FALSE OR FORGED INSTRUMENT FOR FILING?

The trial court denied Defendant's motion to dismiss on the grounds of former jeopardy, collateral estoppel, and res judicata.

State v. Anderson, 2005 S.D. 22, 693 N.W.2d 675

State v. Weaver, 2002 S.D. 76, 648 N.W.2d 355

SDCL 22-11-28.1

SDCL 22-39-36

II

WHETHER THE TRIAL COURT CORRECTLY DETERMINED VENUE WAS PROPER IN LAWRENCE COUNTY?

The trial court denied Defendant's motion to dismiss for improper venue.

State v. Sullivan, 2002 S.D. 125, 652 N.W.2d 786

State v. Haase, 446 N.W.2d 62 (S.D. 1989)

SDCL 23A-16-8

STATEMENT OF THE CASE

On April 15, 2014, the Lawrence County State's Attorney filed a Complaint alleging that Defendant committed forgery by intending "to defraud, falsely make, complete, or alter or pass a written instrument, or did aid and abet in the commission of the crime" in violation of SDCL §§ 22-39-36 and 22-3-3. SR 7. Defendant was later indicted by grand jury on two counts of forgery, in violation of SDCL §§ 22-39-36 and 22-3-3, and two counts of offering false or forged instrument for filing, registering, or recording, in violation of SDCL §§ 22-11-28.1 and 22-3-3 on May 8, 2014. SR 15-16. On May 13, 2014, the State filed a Part II Information, alleging Defendant had been convicted of a prior felony, grand theft, in violation of SDCL §§ 22-30A-1 and 22-30A-17(1). SR 17.

Defendant filed motions to dismiss based on former jeopardy, collateral estoppel, res judicata, and improper venue.[*] SR 22-27. The trial court denied Defendant's motions. SR 76-78.

[*] Defendant was previously charged and convicted by jury for Aggravated Grand Theft by deception over $100,000. *State v. Thomason*, 2014 S.D. 18, 845 N.W.2d 640. This Court reversed Defendant's conviction holding Defendant's "ownership interest in a hotel and proceeds derived therefrom did not constitute the property of another as element of aggravated grand theft." *Id.*

Defendant was arraigned before the Honorable Randall L. Macy on June 12, 2014. SR 1135. Defendant pled not guilty to all four counts. SR 1139-40.

On October 29, 2014, Defendant was convicted by jury on all four counts. JT 522-23; SR 1119-20. On October 30, 2014, Defendant admitted to the Part II Information. PH 4, SR 1129.

On December 11, 2014, the trial court sentenced Defendant to three years imprisonment on Count 1, Forgery; two years imprisonment on Count 2, Offering a False or Forged Instrument for Filing; three years imprisonment on Count 3, Forgery, and two years imprisonment on Count 4, Offering a False or Forged Instrument for Filing. SH 16-17. All sentences were ordered to run concurrently. SH 16-17. Defendant filed a Notice of Appeal on December 24, 2014. SR 536.

STATEMENT OF FACTS

In 2005, Kenneth Dale Thomason (Defendant) and his wife, Kim Thomason (Mrs. Thomason), purchased the Gold Town Hotel (Hotel) in Lead, South Dakota from Mr. and Mrs. Bennett (the Bennetts). JT 180. Mrs. Thomason's mother, Barb Langlois (Ms. Langlois), loaned Defendant and Mrs. Thomason fifty thousand dollars for a deposit to buy the Hotel on a contract for deed. JT 181. In exchange for the loan, Ms. Langlois received a quitclaim deed to the property, which she did not file at the time. JT 181.

In 2006, the Bennetts commenced foreclosure proceedings against the Thomasons to get the Hotel back. JT 185. Ms. Langlois took out a loan against her Florida property in the amount of $328,000 to pay the Bennetts and end the foreclosure action. JT 183.

In 2007, Ms. Langlois hired attorney Brad Schreiber to collect the money she had loaned to Defendant and Mrs. Thomason. JT 188. The amount totaled over half a million dollars. JT 190. Mr. Schreiber discovered Ms. Langlois had not filed the quitclaim deed to the Hotel and advised her to do so. JT 188. Ms. Langlois filed the quitclaim deed on November 19, 2007. JT 189. Mr. Schreiber then continued to negotiate for Ms. Langlois to get her money back. JT 190. On January 7, 2008, Mr. Schreiber sent to Defendant and Mrs. Thomason a "letter of intent" stating that if Defendant and Mrs. Thomason paid Ms. Langlois two hundred thousand dollars by January 14, 2008, Ms. Langlois would quitclaim the hotel back to Defendant and Mrs. Thomason so that they could get a loan against the hotel. JT 140. The purpose of the loan would be to repay Ms. Langlois the remaining three hundred thousand dollars that she was owed. JT 141. Defendant and Mrs. Thomason signed the letter of intent agreeing to the provisions and received the quitclaim deed from Ms. Langlois. JT 142. The quitclaim deed named Defendant, Mrs. Thomason, and Dale Thomason (Dale), Defendant's son

(Mrs. Thomason's stepson), as owners of the deed in joint tenancy with the right of survivorship. JT 144.

Three days after Defendant and Mrs. Thomason signed the letter of intent, they traveled to Sioux Falls, where they sold the hotel for $350,000.00 to Chris Vinson (Mr. Vinson), who leased the business back to Defendant and Mrs. Thomason. JT 435. Defendant had created a forged Special Power of Attorney purportedly giving him the authority to sign Dale's name to sell the property to Mr. Vinson. JT 280, 410. Defendant had also fraudulently applied the notary seal of Adrian Polk (Mr. Polk) from Broward County, Florida, to the forged Special Power of Attorney. JT 410. Mr. Polk did not notarize the Power of Attorney and did not apply his seal. JT 410. In fact, Mr. Polk's seal had expired in 2001, and Defendant changed the expiration date on the seal from 2001 to 2008. JT 412. The documents, a warranty deed, and forged Special Power of Attorney, were executed in Sioux Falls and filed with the Lawrence County Register of Deeds. JT 424-27.

After Defendant and Mrs. Thomason presented the documents in Sioux Falls, they received three checks for $68,000 each, made out to the three title owners, Defendant, Mrs. Thomason, and Dale. JT 371. Defendant endorsed the check payable to Dale, and he and Mrs. Thomason kept Dale's money and went to the Dominican Republic for the next four to five years. JT 277, 371-72.

On January 14, 2008, the date Defendant and Mrs. Thomason had agreed to give Ms. Langlois $200,000, Ms. Langlois called Mr. Schreiber informing him that she had not received her money. JT 148. Mr. Schreiber contacted Defendant and Defendant claimed that he had deposited the check on January 14th, and it would take seven to ten days to clear. JT 147. When Ms. Langlois still had not received her money by the middle of February, Mr. Schreiber did a title search on the hotel and discovered that the hotel had been sold in violation of the terms of the agreement in the signed letter of intent. JT 151. Mr. Schreiber informed Ms. Langlois that Defendant and Mrs. Thomason left the country. JT 151. Ms. Langlois called the Lead Police and filed a complaint against Defendant and Mrs. Thomason. *State v. Thomason*, 2014 S.D. 18, ¶ 11, 845 N.W.2d 640, 642.

Defendant was indicted by Grand Jury for Aggravated Grand Theft by Deception over $100,000.00 on May 1, 2008, and a Superseding Indictment was entered on August 31, 2012, for aiding and abetting and a second count of Aggravated Grand Theft by Obtaining Property without Paying. *Id.* A Part II Information was also filed asserting Defendant had been previously convicted of a felony. *Id.* Defendant was subsequently convicted of Aggravated Grand Theft by Deception over $100,000.00, which was reversed by this Court. *Id.* at ¶¶ 12-13.

ARGUMENTS

I

DEFENDANT'S PREVIOUS PROSECUTION OF AGGRAVATED GRAND THEFT DOES NOT BAR A SUBSEQUENT PROSECUTION FOR FORGERY AND OFFERING FALSE OR FORGED INSTRUMENT FOR FILING

A. Standard of Review.

Reviewing double jeopardy claims on appeal are "question[s] of law which [are] reviewable de novo." *State v. Beck*, 1996 S.D. 30, ¶ 6, 545 N.W.2d 811, 812 (citing *Poppen v. Walker*, 520 N.W.2d 238, 241 (S.D. 1994)). "The burden 'is on the defendant to demonstrate that the issue whose relitigation [defendant] seeks to foreclose was actually decided in the first proceeding.'" *State v. Danielson*, 2010 S.D. 58, ¶ 9, 786 N.W.2d 354, 357 (quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

B. Legal Analysis.

The Double Jeopardy Clause of the Fifth Amendment declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The South Dakota Constitution provides that "no person shall . . . be twice put in jeopardy for the same offense." S.D. Const. Art. VI § 9. "These provisions shield criminal defendants from both multiple prosecutions and multiple punishments for the same criminal offense if the Legislature did not intend to authorize multiple punishments in the same prosecution."

State v. Wright, 2009 S.D. 51, ¶ 67, 768 N.W.2d 512, 533 (citing *State v. Dillon*, 2001 S.D. 97, ¶ 13, 632 N.W.2d 37, 43).

"The doctrine of res judicata prevents the relitigation of claims that were pursued and litigated in prior proceedings, as well as those 'issues which could have been properly raised and determined in a prior action.'" *State v. Anderson*, 2005 S.D. 22, ¶ 22, 693 N.W.2d 675, 682 (quoting *Merchants State Bank v. C.E. Light*, 458 N.W.2d 792, 794 (S.D. 1990)) (citations omitted).

Defendant argues that the State should be precluded from charging and convicting him of forgery and offering a false or forged instrument for filing, registering, or recording because it relied on the same facts to convict him of aggravated grand theft by deception conviction and that conviction was overturned by this Court on appeal. DB 8.

"Established double jeopardy jurisprudence confirms that the Legislature may impose multiple punishments for the same conduct without violating the Double Jeopardy Clause if it clearly expresses its intent to do so." *State v. Weaver*, 2002 S.D. 76, ¶ 8, 648 N.W.2d 355, 358 (quoting *Dillon*, 2001 S.D. 97, at ¶ 14, 632 N.W.2d at 43) (citations omitted). Aggravated Grand Theft by Deception of Over $100,000 is in violation of SDCL 22-30A-3 which provides:

> Any person who obtains property of another by deception is guilty of theft. A person deceives if, with intent to defraud, that person:

> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind. However, as to a person's intention to perform a promise, deception may not be inferred from the fact alone that that person did not subsequently perform the promise;
>
> . . .
>
> (3) Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom the deceiver stands in a fiduciary or confidential relationship.

Defendant was convicted in the present case for forgery in violation of SDCL 22-39-36, which states:

> Any person who, with intent to defraud, falsely makes, completes, or alters a written instrument of any kind, or passes any forged instrument of any kind is guilty of forgery.

Defendant was additionally convicted in the present case of two counts of offering false or forged instrument for filing, registering or recording, in violation of SDCL 22-11-28.1, which reads:

> Any person who offers any false or forged instrument, knowing that the instrument is false or forged, for filing, registering, or recording in a public office, which instrument, if genuine, could be filed, registered, or recorded under any law of this state or of the United States, is guilty of a Class 6 felony.

The Court must "shield criminal defendants from both multiple prosecutions and multiple punishments for the same criminal offense *if the Legislature did not intend to authorize multiple punishments in the same prosecution*." *Weaver*, 2002 S.D. 76, at ¶ 10, 648 N.W.2d at

359 (quoting *Dillon*, 2001 S.D. 97, at ¶13, 632 N.W.2d at 43) (citations omitted). To determine Legislative intent, this Court applies the *Blockburger* test. *Id.* (citing *Garret v. United States*, 471 U.S. 773, 778-79, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985)). The *Blockburger* test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* (quoting *Blockburger v United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)). This Court "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." *Id.* at ¶ 11, 359 (quoting *North Carolina v. Pearce*, 394 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)) (citations omitted).

The Eighth Circuit Court of Appeals explained the *Blockburger* analysis when reviewing successive prosecutions:

> Our "same offense" analysis, however is unaffected by whether this case involves multiple punishments or successive prosecution. It is well settled that "[i]f two offenses are th[e] same under the [*Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." Likewise, the opposite must also be true: if two offenses are not the same for purposes of barring multiple punishment, they

> necessarily will not be the same for purposes of barring successive prosecutions.

United States v. Bennett, 44 F.3d 1364, 1372, n. 7 (8th Cir. 1995) (quoting *Brown v. Ohio,* 432 U.S. 161, 165 (1977) (citing *U.S. v. Dixon*, 509 U.S. 688, 703 (1993)).

An application of the *Blockburger* test to the case at bar makes plain that aggravated grand theft by deception is not the same offense as forgery and offering false or forged instrument for filing, and, therefore, Defendant's prosecution for the latter offenses was legal and justified. The statutes at issue clearly require proof of additional facts that the other does not.

The Indictment in the present case charges Defendant with two counts of forgery in that Defendant "with intent to defraud, did falsely make, complete, or alter or pass a written instrument of any kind or did aid and abet in the commission of the crime." SR 15-16. The Indictment also charges Defendant with two counts of offering a false or forged instrument for filing, registering, or recording, stating: "the Defendant, did offer any false or forged instrument, knowing that the instrument is false or forged, for filing, registering, or recording in a public office, which instrument, if genuine, could be filed, registered, or recorded under any law of this state or of the United States . . ." SR 15-16. The Indictment does not charge Defendant with theft of any kind. The crimes of forgery and offering a forged instrument for recording also require the additional element of a written instrument

not found in the theft by deception statute. The two offenses in this case include additional elements, proven by the State, of falsely making, passing, and recording an instrument. These crimes are different offenses from aggravated grand theft by deception. Therefore, the subsequent prosecution does not violate res judicata and double jeopardy.

This Court has previously held in *Weaver* that the *Blockburger* test is the proper test to determine whether there has been a former jeopardy or double jeopardy violation in subsequent prosecutions. *Weaver*, 2002 S.D. 76, at ¶ 15, 648 N.W.2d at 361. In *Weaver*, the defendant was convicted of simple assault in Meade County, and convicted of violating a protection order in Pennington County. *Id.* at ¶¶ 4-5, 648 N.W.2d at 357. Both convictions stemmed from the same assault on the defendant's girlfriend. *Id.* The defendant claimed this was a violation of double jeopardy. *Id.* at ¶ 6, 648 N.W.2d at 358. This Court found that the Legislature intended the two violations to be separate offenses, and applied the *Blockburger* test to determine that the "two offenses are not the same and do not bar successive prosecution." *Id.* at ¶ 13, 648 N.W.2d at 361.

Defendant cites to *Bank of Hoven v. Rausch*, 449 N.W.2d 263 (S.D. 1989) in his argument that Defendant's case should be dismissed based on res judicata. DB 11. In *Rausch,* the defendant co-signed a promissory note in 1978 with his son, so his son could

receive a $75,000.00 loan. *Rausch*, 449 N.W.2d at 264. In 1979, the defendant's son cancelled the 1978 promissory note and executed a new note for the same amount, but at a higher interest rate. *Id.* The defendant's son did this without the defendant's knowledge, and forged the defendant's signature on the note. *Id.* The defendant's son reissued the promissory note in 1980, 1981, and 1982 for the same amount but each at a higher interest rate. *Id.* Each time the note was reissued, the defendant's son forged the defendant's signature. *Id.*

In 1983, the Bank of Hoven (the plaintiff) demanded payment from the defendant on the 1982 promissory note *(Rausch I*). *Id.* The defendant argued that his financial obligation on the promissory note was terminated upon cancellation of the 1979 promissory note. *Id.* The trial court held, however, that even though the defendant's son forged his name on the subsequent promissory notes, the notes were considered renewal notes and the defendant was liable on the 1982 note. *Id.* This Court reversed that judgment, holding that because each note had a higher interest rate, the notes were not classified as renewal notes. *Id.* Additionally, this Court held that the defendant did not ratify the 1982 note. *Id.*

The Bank of Hoven then brought an additional suit (*Rausch II*) against the defendant "claiming that [the defendant] had ratified the 1981 note by signing the 1981 security agreement and the 1980 financing statement in addition to other various documents." *Id.* at

265. The defendant moved to dismiss arguing res judicata. *Id.* The trial court "award[ed] the Bank the amount of the promissory note plus interest since 1981." *Id.* at 264. The defendant appealed asserting res judicata. *Id.* at 265. This Court reversed the trial court's judgment holding that the cause of action in *Rausch I* was the same as in *Rausch II*. *Id.*

Rausch does not apply to the case at hand. Defendant failed to apply the *Blockburger* test to determine whether successive prosecution should be barred. Because the convictions in *Thomason I* and *Thomason II* were different offenses each requiring different elements, Defendant's conviction of forgery and offering false or forged instrument for filing does not violate double jeopardy.

Because Defendant failed to establish that the same elements are necessary to prove both aggravated grand theft and forgery and offering false or forged instrument for filing, registering or recording charges, Defendant's subsequent prosecution did not violate double jeopardy.

II

THE TRIAL COURT CORRECTLY DETERMINED VENUE WAS PROPER IN LAWRENCE COUNTY.

A. Standard of Review.

The question of venue, this Court has held, is for a jury. *State v. Haase,* 446 N.W.2d 62, 65 (S.D. 1989). The *Haase* Court held:

> The state need only prove venue by a preponderance of the evidence. *State v. Graycek,* 335 N.W.2d 572 (S.D. 1983). On appeal, this [C]ourt accepts the evidence and the most favorable inferences that the jury might have fairly drawn therefrom to support the verdict. *State v. Boyles,* 260 N.W.2d 642 (S.D. 1977).

Haase, 446 N.W.2d at 65-66. This Court has further held that "[v]enue is not an integral part of a criminal offense[,]" and "does not affect the question of guilt or innocence of the accused." *State v. Greene,* 86 S.D. 177, ¶ 7, 192 N.W.2d 712, 716 (1971), *cert. denied,* 406 U.S. 929, 92 S.Ct. 1805, 32 L.Ed.2d 131 (1972). Venue may be proved by circumstantial evidence. *Id.* at 715.

B. Legal Analysis.

In this appeal, Defendant argues the proper venue for the charges of forgery and offering false or forged instrument for filing, registering, or recording is Lincoln County, because Defendant provided the forged Special Power of Attorney to Getty Abstract in Sioux Falls, South Dakota. DB 14.

After the trial court denied Defendant's motion to dismiss for lack of venue, Defendant raised a motion for judgment of acquittal based on lack of venue at trial. JT 463. Defendant cited *State v. Iwan,* arguing that Defendant "at best" possessed the forged documents in Lincoln County. JT 464; DB 14. The trial court determined that Defendant was improperly relying on whether there was sufficient evidence that Defendant "possessed" the forged

document in Lawrence County. JT 470-71. The trial court noted that possession is not an element of the crime of forgery, and because "venue is a question of fact to be determined by the jury," the "State has set forth sufficient evidence to put the matter to the jury with regard to issue of venue." JT 471.

Although Defendant did deliver the forged documents to Getty Abstract in Lincoln County, the forged land documents were required to be filed in Lawrence County. JT 469-70. The State provided evidence of that requirement by calling Getty Abstract and Title Company's general counsel, John Billion, to testify. JT 419. Mr. Billion testified that the forged documents were received in Sioux Falls for closing, but that he overnighted them to Lawrence Title Company for recording with the Lawrence County Register of Deeds. JT 427. Mr. Billion testified that the documents, the deed, and the original Special Power of Attorney had to be filed in Lawrence County. JT 430. Mr. Billion explained that the Power of Attorney had to be filed in Lawrence County, where the property was located. JT 431.

Lawrence County was the proper venue for this prosecution under SDCL 23A-16-8. That statute reads, in its entirety:

> When a public offense is committed partly in one county and partly in another county, or the acts or effects thereof constituting or requisite to the offense occur in two or more counties, the venue is in either county.

The State's evidence that the land documents and Special Power of Attorney were required to be filed and recorded in Lawrence County,

and that Defendant caused the forged documents to be filed in Lawrence County, justified the trial court's ruling that the proper venue had been proven by a preponderance of the evidence.

Similarly, in *State v. Sullivan*, 2002 S.D. 125, 652 N.W.2d 786, the defendant was indicted and convicted for four counts of forgery in Lake County. *Id.* at ¶ 4, 652 N.W.2d at 787. The defendant in *Sullivan* was a sales representative for a long distance telephone service company, Ionex, in Minnehaha County. *Id.* at ¶ 2, 652 N.W.2d at 787. The defendant contacted businessmen in Lake County inquiring whether they would be willing to switch their phone services to Lonex. *Id.* The defendant then filled out Ionex telephone service agreements, signed the businessmen's names to the contract without their knowledge or authorization, and submitted these contracts to his company in Minnehaha County. *Id.* at ¶ 3, 652 N.W.2d at 787. The defendant was then indicted and convicted in Lake County for four counts of forgery. *Id.* at ¶ 4, 652 N.W.2d at 787. The defendant appealed arguing there was insufficient evidence that the forgeries occurred in Lake County. *Id.* at ¶ 7, 652 N.W.2d at 788. This Court applied SDCL 23A-16-8 holding that because the charges could be brought in either Lake County or Minnehaha County, the defendant was properly tried and convicted in Lake County. *Id.* at ¶ 12, 652 N.W.2d at 790.

Defendant argues that *State v. Iwan*, 2010 S.D. 92, 791 N.W.2d 788 applies to the case at hand. DB 16. In *Iwan*, the defendant, who owned a gas station in Jackson County, called for a fuel delivery from Stern Oil, which was located in Hutchinson County. *Id.* at ¶ 3, 791 N.W.2d at 788. Stern Oil required Iwan to pay $26,000.00 upon delivery of the fuel. *Id.* at ¶ 4, 791 N.W.2d at 789. Iwan issued and delivered bad checks to the Stern Oil employee. *Id.* at ¶ 3, 791 N.W.2d at 789. The Stern Oil driver brought the bad checks back to Hutchinson County, where the checks were deposited and returned for insufficient funds. *Id.* at ¶ 4, 791 N.W.2d at 789. Iwan was charged and convicted of grand theft by insufficient funds checks in Hutchinson County. *Id.* This Court held that Hutchinson County was the incorrect venue to charge Iwan because Iwan gave the check to the Stern Oil employee in Jackson County, knowing there were insufficient funds to cover the amount. *Id.* at ¶ 14, 791 N.W.2d at 790. Additionally, Iwan did not mail the check, and there was no evidence that Iwan knew the check would be deposited in Hutchinson County. *Id.* Because there was no proof that Iwan knew the check would be deposited in Hutchinson County, Iwan's conviction was reversed and remanded. *Id.*

Iwan, however, does not apply to the case at hand. While Defendant handed the forged Special Power of Attorney to Getty's Abstract in Sioux Falls, the State provided a preponderance of

evidence that the land documents, deed, and Special Power of Attorney would be filed in Lawrence County, because that is where the hotel is located. JT 470. The State established that Lawrence County was the *only* place where these land documents could be properly filed. JT 470.

Accepting the evidence and the most favorable inferences therefrom in a manner supporting the verdict, this Court should affirm the trial court's ruling that venue in Lawrence County was shown by a preponderance of the evidence.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 4,275 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 26th day of May 2015.

/s/ *Caroline Srstka*
Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of May 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kenneth Dale Thomason* was served via electronic mail upon Ellery Grey, attorney for Defendant and Appellant, at ellery@ellerygreylaw.com.

/s/ *Caroline Srstka*
Caroline Srstka
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 27301

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

KENNETH DALE THOMASON,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE RANDALL L. MACY

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NOTICE OF APPEAL WAS FILED December 24, 2014

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PRELIMINARY STATEMENT

Throughout this Brief, Defendant/Appellant, Kennneth Dale Thomason, will be referred to as "Defendant" or by name. Plaintiff/Appellee, State of South Dakota, will be referred to as "State." References to the transcripts of the jury trial shall be referred to as "JT" followed by the specific page(s). All other transcripts will be referred to by name and date followed by the specific page number(s). All other documents within the settled record as outlined in the Clerk's Amended Alphabetical Index shall be referred to as "SR" followed by the page number. All references to the Appellee's Brief will be referenced by the initials SB followed by the corresponding page number.

STATEMENT OF THE LEGAL ISSUES

1. Did the trial court err by refusing to grant Mr. Thomason's motion to dismiss based upon double jeopardy and res judicata?

   The trial court denied Mr. Thomason's motion to dismiss. SR 76, JT 471.

   Bank of Hoven v. Rausch, 449 N.W.2d 263 (S.D. 1989).
   State v. Thomason, 2014 S.D. 18, 845 N.W.2d 640.
   Dakota Plains AG Center, LLC v. Smithey, 2009 S.D. 78, 772 N.W.2d 170.

2. Did the trial court err by failing to grant Mr. Thomason's motion to dismiss for lack of venue?

   The trial court denied Mr. Thomason's motion to dismiss for lack of venue. SR 76, JT 471.

   State v. Greene, 86 S.D. 177, 192 N.W.2d 712 (S.D. 1971).
   State v. Iwan, 2010 S.D. 92, 791 N.W.2d 788.

STATEMENT OF THE CASE AND FACTS

Mr. Thomason adopts the Statement of the Case and Facts presented in his Appellant's Brief. Additionally, Mr. Thomason notes that the State did not present any evidence that he himself personally forged the power of attorney, applied the notary seal of Adrian Polk to the document, or changed the expiration date on the notary seal from 2001 to 2008. Any such reference in the Appellee's Brief is mistaken. See SB 6. See JT 117 (trial prosecutor admitting that "There is no evidence of who the actual author of the counterfeit Special Power of Attorney is").

ARGUMENTS

1. The Trial Court erred by refusing to grant Mr. Thomason's motion to dismiss the criminal action based upon double jeopardy and res judicata.

Mr. Thomason challenges his two convictions for forgery and his two convictions for offering false or forged instrument for filing, registering, or recording on the grounds that the litigation should have been barred under the doctrines of double jeopardy and res judicata. The State has responded to this issue by arguing that the double jeopardy test announced by the Supreme Court of the United States in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) is controlling and applicable. "Defendant failed to apply the *Blockburger* test to determine whether successive prosecution should be barred...[therefore], Defendant's subsequent prosecution did not violate double jeopardy." SB 15.

In essence, the State's position appears to be that the doctrine of res judicata does not apply to criminal litigation, or alternatively, the State's position implies that the test

for double jeopardy and res judicata are one in the same, specifically, the *Blockburger* test. However, neither of these statements accurately reflects the law.

First, the doctrine of res judicata does apply in criminal litigation. "It is beyond question that the closely related doctrines of res judicata and collateral estoppel apply to criminal as well as civil causes." *Cook v. State*, 281 Md. 665, 668, 381 A.2d 671, 673 (1978). *See also*, *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916) (Supreme Court rejecting government's argument that res judicata did not apply in criminal cases); *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) (Supreme Court applying collateral estoppel in a criminal case). *State v. Anderson*, 2005 S.D. 22, 693 N.W.2d 675 (1990) (res judicata barring appeal issues previously raised by criminal litigant).

Second, no court has ever ruled that the doctrine of res judicata is utilized by applying the *Blockburger* test. While the doctrine of res judicata is a member of the larger doctrinal family of double jeopardy, res judicata is still a separate doctrine with its own distinct elements. *Burkett v. State*, 98 Md.App. 459, 633 A.2d 902, 905 (1993). More to the point, the argument that the doctrines of res judicata and double jeopardy are coextensive or that they are comprised of the same elements for purposes of criminal law has been expressly rejected by the Supreme Court of the United States.

> … the proposition of the government is that the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment… [however] It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt…
>
> …the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice… when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.

United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916) (emphasis added, internal citations omitted.)

In, *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.E.d2d 469 (1970), the Supreme Court again confirmed that the protections of double jeopardy extend beyond the mere text of the Fifth Amendment when it applied the doctrine of collateral estoppel in a criminal case and reversed a murder conviction. Citing *Oppenheimer,* the Supreme Court wrote: "Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*…" *Id*. 443. Importantly, even though *Ashe v. Swenson* was decided some thirty-eight years after *Blockburger*, when finding that double jeopardy also included the doctrine of collateral estoppel, the Supreme Court did not rule that the *Blockburger* decision outlined the applicable test. To the contrary, without citing *Blockburger*, the Supreme Court applied the doctrine of collateral estoppel consistent with civil case law.

Similarly, when this Court has applied res judicata in a criminal action it has utilized the same four-part test that it utilizes in civil cases. In *State v. Anderson*, 2005 S.D. 22, 693 N.W.2d 675 (1990) this Court applied res judicata and declined to reconsider criminal defendant's appellate issues where the defendant has previously raised those identical appellate issues. In *Anderson* this Court citied the civil case of *Moe v. Moe*, 496 N.W.2d 593, 595 (S.D.1993) to outline the four-part res judicata test this Court consistently employs. If the doctrine of res judicata applies in criminal actions, then the

four-part test set forth by this Court while applying res judicata must also apply.[1]

Ultimately, the Double Jeopardy Clause of the Fifth Amendment shields the citizens of this County from multiple prosecutions and multiple punishments for the same offense. *State v. Wright*, 2009 S.D. 51, ¶ 67, 768 N.W.2d 512, 533. This protection is provided for in at least three ways: first, under the traditional double jeopardy analysis of *Blockburger*; second, under the doctrine of collateral estoppel (*Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)); and third, under the doctrine of res judicata (*United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916)).

Mr. Thomason set forth his analysis regarding the application of this Court's four-part res judicata test in his original brief. See DB 11-14. Although the State took issue with the legal applicability of the doctrine of res judicata, the State did not contest Mr. Thomason's application of this Court's four-part test to the facts of his case. Given that the State declined to challenge the factual application, it should be estopped from doing so at this point. See *Zens v. Chicago, Milwaukee, St. Paul and Pacific R.Co*., 479 N.W.2d 155 (S.D. 1991) (holding that SDCL 15-26A-60(6) requires citation to authority and failure to cite authority supporting an issue on appeal waives that issue). When the State brought the second prosecution in this matter, it violated the principles of res judicata and hence the doctrine of double jeopardy. Therefore, given that the doctrine of res judicata applies in this action, and given that the state did not challenge Mr. Thomason's analysis of the four-part test, Mr. Thomason should prevail on this issue and

[1] Mr. Thomason argued extensively in his Appellant's Brief that *Bank of Hoven v. Rausch,* 449 N.W.2dM 263 (S.D. 1989) is analogous to his case. DB 11-13. The State argues that this case has no application. SB 15. However, in *Anderson* this Court also cites *Rausch* even though *Rausch* is a civil case.

the Court should vacate the conviction and remand this action with directions that a judgment of acquittal be entered.

2. <u>The trial court erred by failing to grant Mr. Thomason's motion to dismiss for lack of venue.</u>

Additionally, Mr. Thomason challenges his convictions on the grounds that Lawrence County was not the proper venue to bring this action given that the State failed to present any evidence that Mr. Thomason either possessed or drafted the allegedly forged instruments in Lawrence County. Generally, in the case of forgery, venue is created by establishing the county in which the instrument was either forged or where the defendant possessed the forged instrument with intent to defraud. *State v. Green*, 86 S.D. 177, 182, 192 N.W.2d 712 (S.D. 1971). The State has responded to this issue by arguing that SDCL 23A-16-8 is applicable and citing to this Court's decision in *State v. Sullivan*, 2002 S.D. 125, 652 N.W.2d 786.

SDCL 23A-16-8 allows for venue in more than one county if an offense is committed in more than one county or if the "acts or effects thereof constituting or requisite to the offense occurred in two or more counties…" In *State v. Sullivan*, this Court found that SDCL 23A-16-8 was applicable when a Sioux Falls (Minnehaha County) salesman contacted several potential clients in Madison (Lake County) in order to solicit their business for a long distance telephone company. Although the potential customers declined to signup for the long distance service contracts, the Sioux Falls salesmen forged the necessary documents to obtain his commission from the purported sales. The salesman was charged with burglary in Lake County. At trial, the salesman testified that he had forged and submitted the contracts while in Minnehaha County, on

that basis he then moved for a dismissal of the forgery charges on the grounds of lack of venue. This Court affirmed his forgery convictions finding:

> [The Salesman's] series of contacts with the three Madison businessmen in a narrow span of time and his use of those individuals' names and businesses on the four sets of contracts he forged and submitted to [the long distance company] in January 2001, justifies a reasonable inference that Sullivan first embarked upon his forgery scheme in Madison and formed at least part of his intent to commit his offenses in that community.

Id. ¶ 12.

Unlike in *Sullivan*, in this case no evidence has been presented that Mr. Thomason reached out to Dale, the alleged victim, in Lawrence County with the intent of embarking on a scheme to forge a power of attorney.[2] Moreover, no evidence was presented that Mr. Thomason personally forged the power of attorney; in fact, Dale testified that the forged power of attorney was not his father's (Mr. Thomason's) handwriting. See transcript of *Thomason I* at 445-46 located at appendix C9 of Appellants Brief and SR 22.

State v. Iwan is more factually analogous to Mr. Thomason's case. In *Iwan*, the defendant passed an insufficient check to a delivery driver; the delivery driver then mailed the check to a different county where it was dishonored. This Court found that SDCL 23A-16-8 was inapplicable to establish venue in the county where the check was dishonored and wrote:

> Iwan did not use "the mails" to pass the insufficient funds check. He handed the check to [the delivery driver] in a sealed envelope, which [the delivery driver] later placed in another envelope and mailed to Stern Oil. [The delivery driver] is

[2] See JT 254, specifically where Dale testified that while he was in the State of Illinois (as opposed to being in Lawrence County) Mr. Thomason contacted him about signing a Power of Attorney and further Dale testified that he had never observed the alleged forged Power of Attorney before the document was completed.

> Stern Oil's employee and there was no evidence that Iwan knew [the delivery driver] would mail the envelope to Stern Oil rather than deposit the check on behalf of Stern Oil. Neither SDCL 23A-16-8 nor SDCL 23A-16-14 create venue in Hutchinson County.

Id. 790-1, ¶ 14.

Similarly, in Mr. Thomason's case, he is accused of having passed the forged documents to Getty Abstract located in Minnehaha County. SB 6, JT 422-25. An employee of Getty Abstract then caused the allegedly forged documents to be mailed and filed in Lawrence County. JT 429-432. Although the State did establish "that Lawrence County was the only place where these land documents could be properly filed" (SB 20), the State has failed to establish that Mr. Thomason caused the documents to be filed in Lawrence County or that he was even aware of the law that requires "land documents" be filed in a particular county.

CONCLUSION

Based on the foregoing, Mr. Thomason's convictions should be vacated, the case should be remanded with instructions to grant the defense motion for judgment of acquittal and with further instruction that the defendant be discharged.

REQUEST FOR ORAL ARGUMENT

Defendant Thomason again requests that oral argument be granted on these issues.

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