

MICHAEL S. RICHIE
CLERK

**OPINION DENYING SUCCESSIVE APPLICATION
FOR POST-CONVICTION RELIEF, MOTION FOR
EVIDENTIARY HEARING, AND MOTION TO SEAL**

such person was killed while in performance of official duty.” 21 O.S.2001, § 701.12. The trial court further found that the aggravating circumstances outweighed the mitigating circumstances presented and sentenced Petitioner to death. This Court affirmed Petitioner’s sentence of death in *Malone v. State*, 2013 OK CR 1, 293 P.3d 198.

On September 14, 2012, Petitioner filed his Original Application for Post-Conviction Relief in Death Penalty case along with a Motion for Evidentiary Hearing and Discovery.¹ This Court denied Petitioner’s application. *Malone v. State*, unpub. dispo., PCD-2011-248 (Okla. Cr. April 23, 2013).

Petitioner raises three grounds for relief in his successive application. There is no constitutional right to post-conviction review. *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 402-03, 121 S.Ct. 1567, 1573, 149 L.Ed.2d 608 (2001). Instead, the State Legislature has created the mechanism for post-conviction relief within 22 O.S.2011, §§ 1080–1089.7. Section 1089 governs post-conviction proceedings where the defendant is under a sentence of death. The narrow scope of review available under the amended Post-Conviction Procedure Act is well established. See *Harris v. State*, 2007 OK CR 32, ¶ 2, 167 P.3d 438, 441; *Browning v. State*, 2006 OK CR 37, ¶ 2, 144 P.3d 155, 156; *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. The Post-Conviction Procedure Act was neither designed nor intended to provide

¹ After granting sentencing relief in Petitioner’s original appeal, this Court dismissed Petitioner’s initial post-conviction filing. *Malone v. State*, unpub. dispo., PCD-2005-662 (Okla. Cr. Oct. 2, 2007). We treated the application filed on September 14, 2012, as his original post-conviction application for both the guilt stage of his jury trial as well as the resentencing trial. *Hanson v. State*, 2009 OK CR 13, ¶¶ 16-17, 206 P.3d 1020, 1028.

applicants another direct appeal. *Murphy*, 2005 OK CR 25, 3, 124 P.3d at 1199. The Act has always provided petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Id.* The only issues authorized by the post-conviction statute are those that “[w]ere not and could not have been raised in a direct appeal,” and which “support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” 22 O.S.2011, § 1089(C). Claims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata*. *Smith v. State*, 2010 OK CR 24, ¶ 7, 245 P.3d 1233, 1236; *Murphy*, 2005 OK CR 25, 3, 124 P.3d at 1199.

The scope of review afforded subsequent applications for post-conviction relief is even narrower. See 22 O.S.2011, § 1089(D)(8). “A subsequent application for post-conviction relief shall not be considered, unless it contains claims which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable.” Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Unless the claim could not have been presented previously in a timely application for post-conviction relief because the factual basis for the claim was not available or ascertainable through the exercise of reasonable diligence on or before that date, the claim is waived and we do not grant relief. *Smith*, 2010 OK CR 24, ¶ 5, 245 P.3d at 1236.

In Proposition One, Petitioner contends that trial counsel rendered ineffective assistance. He asserts that trial counsel failed to investigate and present evidence at the sentencing trial concerning the sexual abuse he suffered as a child and the resulting trauma. He further asserts that appellate counsel rendered ineffective assistance in failing to challenge trial counsel's omission. Petitioner provides this Court with affidavits and evidentiary materials to support his claim. We note that Petitioner has not shown that these claims were not available or ascertainable through the exercise of reasonable diligence on or before the filing of his original application for post-conviction relief. Recognizing that he has waived these claims, Petitioner seeks to excuse his failure to timely raise the issue by asserting that the failure was the result of post-conviction counsel's ineffective assistance. 22 O.S.2011, § 1089(C)(1), (D)(8).

The United States Supreme Court has refused to find that a criminal defendant has a Constitutional right to counsel and hence, the effective assistance of counsel, in any proceeding beyond direct appeal. *Martinez v. Ryan*, -- U.S. --, 132 S.Ct. 1309, 1319-20, 182 L.Ed.2d 272 (2012); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012). Instead, the right to counsel in a capital post-conviction proceeding in Oklahoma comes from the Amended Capital Post-Conviction Act, itself. See 22 O.S.2011, § 1089(B) ("The Oklahoma Indigent Defense System shall represent all indigent defendants in capital cases seeking post-conviction relief upon appointment by the appropriate district court after a hearing determining the indigency of any such

defendant.”). This Court has determined that complaints concerning the performance of counsel during capital post-conviction proceedings, raised at the first available opportunity, are reviewed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Hale v. State*, 1997 OK CR 16, ¶¶ 9-10, 934 P.2d 1100, 1102-03.

The *Strickland* test requires a petitioner to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Smith*, 2010 OK CR 24, ¶ 19, 245 P.3d at 1239, citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Petitioner must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms. *Id.*

However, the Court need not determine whether counsel's performance was deficient before examining the alleged prejudice suffered by the petitioner as a result of the alleged deficiencies. *Id.*, 466 U.S. at 697, 104 S.Ct. at 2069. To demonstrate prejudice a petitioner must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's unprofessional errors. *Id.*, 466 U.S. at 698, 104 S.Ct. at 2070. “The likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, that course should be followed.” *Strickland*, 466 U.S. at 697, 104 S.Ct. at 270.

Reviewing Petitioner’s claim under the *Strickland* analysis, we find that Petitioner has not shown that he was denied the effective assistance of post-conviction counsel. At the center of Petitioner’s challenge is his assertion that “the entire truth” was unveiled after his resentencing trial. (Pet. 18, 23). He, now, claims that his mother, her boyfriends, and his stepfather sexually abused him. Petitioner asserts that trial counsel should have investigated and presented evidence concerning his sexual abuse trauma at trial in an effort to mitigate his punishment. He argues that post-conviction counsel rendered ineffective assistance when counsel failed to challenge appellate counsels’ omission to challenge trial counsels’ failure.

The record on appeal reveals that trial counsel retained mental health professionals qualified to identify sexual abuse trauma. Counsel had forensic psychologist, Antoinette McGarrahan, Ph.D., and psychiatrist, Jonathan Lipman, M.D., assess Petitioner. *Malone*, 2013 OK CR 1, ¶¶ 69-70, 293 P.3d at 217. Counsel had McGarrahan and Lipman testify at the sentencing trial concerning Petitioner’s substance abuse, mental health and family history. *Malone*, 2013 OK CR 1, ¶¶ 69-70, 293 P.3d at 217. McGarrahan testified that during her interview with Petitioner she had asked him about sexual abuse but that Petitioner denied being the victim of sexual abuse.

Trial counsel also had sociologist David Musick, Ph.D., investigate Petitioner’s family history. Musick interviewed numerous members of

Petitioner's extended family. Musick reported that Petitioner and his sisters informed him that their Mother engaged in sexual activities with numerous men in their presence when they were growing up. Counsel introduced Musick's report and had Musick testify at the sentencing trial concerning the effects of childhood trauma.

Trial Counsel further presented the testimony of Petitioner's closest relatives and friends, who related that Petitioner's stepfather mentally and, on occasion, physically abused Petitioner and his sisters. In addition, Petitioner's twin sisters explained that once they had reached adulthood, their stepfather had inappropriately touched them. Petitioner's older sister testified that on one occasion their stepfather had tried to touch her when she was seventeen years old. In contrast, Petitioner's relatives and friends universally agreed that Petitioner had a loving and supportive relationship with his mother, had never said a negative word about her, and had been greatly affected by her death.

Trial counsel also presented evidence concerning Petitioner's treatment at the Oklahoma Forensic Center. *Id.*, 2013 OK CR 1, ¶¶ 69-70, 293 P.3d at 217. Dr. Satwant Tandon, M.D., testified concerning Petitioner's diagnosis and treatment. He related that Petitioner and his aunt both reported that Petitioner had not been sexually abused. Counsel similarly presented evidence concerning Petitioner's mental health during his period of incarceration. Psychiatric nurse, Cindy Baugh, explained that she had treated Petitioner for two to three years. Baugh testified that Petitioner denied being the victim of sexual abuse.

We refuse to find that trial and appellate counsel rendered ineffective assistance under the circumstances of this case. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. If Petitioner was sexually abused as a child, those facts were known to him at the time of trial. His decision to not disclose that information to the defense experts, mental health professionals or either of his two defense teams effectively foreclosed trial counsel from discovering and presenting such evidence at the resentencing trial. However, Petitioner's claims of childhood sexual abuse are suspect as he actively denied such fact to numerous individuals during the course of his case. Therefore, we find that post-conviction counsel's omission to challenge trial and appellate counsels' effectiveness in this regard constituted reasonably effective assistance under prevailing professional norms. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065.

We further find that Petitioner has not demonstrated that post-conviction counsel's omission of the issue prejudiced him. In light of the aggravating and mitigating circumstances presented at trial, there is not a reasonable probability that the outcome of the proceeding would have been different absent counsels' omission. *Id.*, 466 U.S. at 698, 104 S.Ct. at 2070; *See Malone*, 2013 OK CR 1, ¶¶ 68-72, 88-95, 293 P.3d at 216-18, 222-24 (discussing aggravating circumstances and evidence presented in mitigation). Proposition One is denied.

In Proposition Two, Petitioner contends that defense counsels' advice to waive his right to have a jury determine his punishment at the resentencing trial was constitutionally unreasonable and constituted ineffective assistance.

Petitioner admits that he raised this issue on direct appeal but requests that this Court reconsider his claim and further asserts that counsels' advice was unreasonable in light of the issues surrounding his competency.² We find that Petitioner's claim is not properly before the Court.

Post-conviction review is neither a second appeal nor an opportunity for a petitioner to re-raise or amend propositions of error already raised on direct appeal. *Hooper v. State*, 1998 OK CR 22, ¶ 4, 957 P.2d 120, 123. "The doctrine of *res judicata* does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process." *Davis v. State*, 2005 OK CR 21, ¶ 17, 123 P.3d 243, 248.

Just because post-conviction counsel has the benefit of reviewing appellate counsel's brief on direct appeal, and with the benefit of hindsight, envisions a new method of presenting the arguments is not a legal basis for disregard of the procedural bar. In other words, "post-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings."

Turrentine v. State, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989, *quoting Trice v. State*, 1996 OK CR 10, ¶ 11, 912 P.2d 349, 353. Because Petitioner's claim was raised and decided on direct appeal, it is barred by *res judicata*. As Petitioner has not shown why the argument was not previously raised, we find that the

² In concluding that Petitioner had not overcome the presumption that trial counsel's performance fell within the wide range of reasonable professional assistance we determined that "the defense team did not try to influence [Petitioner] one way or the other" but that "the decision to waive jury trial was solely [Petitioner's] decision." *Malone*, 2013 OK CR 1, ¶¶ 20, 26, 293 P.3d at 207, 209. Petitioner benefitted from the therapeutic environment at the Forensic Center and was returned to competency. *Id.*, 2013 OK CR 1, ¶ 70, 293 P.3d at 217. At the hearing held on Petitioner's waiver of his right to have a jury determine his punishment, the trial court thoroughly determined that Petitioner's waiver was knowing and voluntary. *Id.*, 2013 OK CR 1, ¶ 20 n. 5, 293 P.3d at 207 n.5.

portion of his argument which he had not heretofore presented is waived. *Id.*; *Patton v. State*, 1999 OK CR 25, ¶ 18, 989 P.2d 983, 989.

In Proposition Three, Petitioner contends he should be afforded post-conviction relief due to the cumulative impact of errors identified in his direct appeal, in his original application for post-conviction relief, and in this application. Petitioner raised claims of cumulative error on direct appeal and in his original application for post-conviction relief. Those claims were denied. *Malone*, 2013 OK CR 1, ¶ 74, 293 P.3d at 218; *Malone v. State*, unpub. dispo., PCD-2011-248 (Okla. Cr. April 23, 2013). Therefore *res judicata* bars further consideration of those claims. *Patton*, 1999 OK CR 25, ¶ 18, 989 P.2d at 989. Having found no merit to any of the claims raised herein, there is no basis for granting post-conviction relief and therefore the instant claim is denied.

Filed simultaneously with the Application for Post-Conviction Relief is a Motion for Evidentiary Hearing. For purposes of the motion, Petitioner incorporates the exhibits included in his Appendix of Attachments to the Successive Application for Post-Conviction Relief and seeks permission to bring forth other evidence as needed to further support the issues raised in the application.

A post-conviction applicant is not entitled to an evidentiary hearing unless the application for hearing and supporting affidavits "contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief."

Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). If this Court determines that the requirements of section 1089(D) of Title 22 have been met and issues of fact must be resolved, it shall issue an order remanding to the district court for an evidentiary hearing. Rule 9.7(D)(6). Upon review of Petitioner's application and supporting materials, we conclude he has not made this clear and convincing showing. His request for an evidentiary hearing is therefore denied.

Petitioner also filed his Motion to Seal Portion of Application for Post-Conviction Relief and Related Attachment simultaneously with his Application for Post-Conviction Relief. Petitioner requests this Court withdraw from the public record and maintain under seal those portions of his application and appendix which reference childhood sexual abuse and incest.

The Oklahoma Public Records Act requires that all court records shall be considered public records and be subject to the provisions of the Oklahoma Public Records Act unless the records fall within a statutorily prescribed exception in the Act or are otherwise identified by statute as confidential. *Nichols v. Jackson*, 2001 OK CR 35, ¶ 10, 38 P.3d 228, 231; 51 O.S.Supp.2014, § 24A.30. This Court interprets the provisions of the Oklahoma Public Records Act to ensure compliance with constitutionally guaranteed rights. *Id.*, 2001 OK CR 35, ¶ 11, 38 P.3d at 231-32.

Initially, we note that Petitioner has failed to comply with the provisions of the Oklahoma Open Records Act. Title 51 O.S.Supp.2012, § 24A.29 requires that any party seeking to file protected materials place such materials in a

sealed manila envelope clearly marked with the caption and case number as well as the word "CONFIDENTIAL." As a result of Petitioner's failure to comply with the provisions of § 24A.29, the materials which are the subject of his motion were filed and made available for public inspection and copying.

Petitioner asserts that this Court should withdraw the documents because they are akin to the juvenile records which 10A O.S.2011, § 1-6-107 makes confidential. Section 1-6-107 provides that the reports required by 10A O.S.2011, § 1-2-101 as well as all other information acquired pursuant to the Oklahoma Children's Code shall be confidential and may only be disclosed as provided by the Code, applicable state or federal law, regulation, or court order. Section 1-2-101 sets forth both the general and specific duties for individuals to report child abuse or neglect for any child under the age of eighteen (18) years old to the Department of Human Services.

Reviewing the documents which Petitioner requests sealed, we find that the documents are neither reports of child abuse or neglect to the Department of Human Services nor other information acquired pursuant to the Oklahoma Children's Code. As such, we find that § 1-6-107 does not require their confidentiality.

Petitioner further asserts that this Court should withdraw the documents because the sensitive and private nature of the information disclosed in the documents outweighs the public's interest in access to the documents. Since this Court's opinion in *Nichols*, the Oklahoma Legislature has made provision for the sealing of a court record based upon a compelling privacy interest.

Section 24A.30 of the Open Records Act provides that “[i]f confidentiality is not required by statute, the court may seal a record or portion of a record only if a compelling privacy interest exists which outweighs the public's interest in the record.”

In the present case, we find that Petitioner has not established that § 24A.30 requires sealing of any portion of the record. Petitioner has not forwarded any argument other than to assert that the circumstances set forth in the subject documents are “sensitive and private.” As Petitioner challenges his sentence of death, we find that the public’s interest in the subject documents is great. Petitioner attempted to mitigate his punishment and introduced as evidence a considerable amount of sensitive and private information concerning his childhood and his familial relationships at his sentencing trial. He, now, requests that this Court grant him a new sentencing trial claiming that trial counsel should have introduced into evidence the very circumstances he seeks to withdraw from the record. Under these circumstances, we find that he has not established a compelling privacy interest which outweighs the public’s interest in the documents which he has requested sealed. His request to withdraw and seal a portion of his application and appendix is therefore denied.

DECISION

After carefully reviewing Petitioner's Application for Post-Conviction Relief, Motion for Evidentiary Hearing, and Motion to Seal, we conclude: (1) there exists no controverted, previously unresolved factual issues material to

the legality of Petitioner's confinement; (2) grounds for review which are properly presented have no merit; and (3) the current post-conviction statutes warrant no relief. 22 O.S. 1089 (D)(4)(a) / 22 O.S. 1089 (D)(2) / 22 O.S. 1089(D)(3). Accordingly, Petitioner's Application for Post-Conviction Relief and Motion for Evidentiary Hearing and Motion to Seal are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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NO RESPONSE NECESSARY FROM THE STATE

OPINION BY LUMPKIN, V.P.J.

SMITH, P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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