IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Petitioner,	)	
-vs.-	)	**No. PC-2015-6**
KENDALL WAYNE EDWARDS,	)	
Respondent.	)	

ORDER AFFIRMING DISTRICT COURT JUDGMENT GRANTING POST-CONVICTION RELIEF

On January 5, 2015, Petitioner, the State of Oklahoma, through counsel Jennifer M. Hinsperger, Assistant District Attorney, filed a Petition in Error and supporting brief with the Clerk of this Court in appeal of a final judgment entered on December 5, 2014, by the Honorable Kenneth C. Watson, District Judge, in Oklahoma County District Court, Case No. CF-2001-1642. The judgment followed an evidentiary hearing in adjudication of an Application for Post-Conviction Relief that Respondent, Kendall Wayne Edwards, had filed through post-conviction counsel, Paul S. Faulk, on July 13, 2012, and which application Respondent had supplemented on August 29, 2013. (O.R. 23 & 233). The judgment granted post-conviction relief by vacating Respondent's murder conviction and ordering a new trial for Respondent. Judge Watson granted this relief on Respondent's claim of ineffective assistance of counsel and on a claim of newly discovered evidence as shown presented at evidentiary hearings on this latter claim.

On January 27, 2015, the District Court Clerk filed a post-conviction appeal record with this Court's Clerk. On March 19, 2015, this Court issued an Order requiring the parties to file any objection they might have to the

completeness of that record, and it further directed Respondent to file a brief in answer to Petitioner's brief. No objection to the record was received, and on May 18, 2015, Respondent filed his answer brief and additionally filed "Respondent's Request for Oral Argument on the Claim of Actual Innocence."

I. Procedural Background and Respondent's Post-Conviction Claims

Respondent was charged by Information with Murder in the First Degree, with malice aforethought, in the March 9, 2001, shooting death of Gerald Lamont Ford. (O.R. 192; Tr. 158.) A jury trial was held before the Honorable Virgil C. Black, District Judge, where Respondent was represented by retained counsel. The jury found Respondent guilty as charged and fixed punishment at life imprisonment. (Tr. 737.) On November 20, 2002, Judge Black sentenced Respondent in accordance with that verdict. Respondent appealed, and the Judgment and Sentence was affirmed. *Edwards v. State*, No. F-2002-1474 (Okl.Cr. March 4, 2004) (Summ. Op.) (unpublished). On March 20, 2009, Respondent filed an Application for Post-Conviction Relief, but Judge Watson denied that Application on July 8, 2009.

In Respondent's latest post-conviction application that results in this appeal, Respondent raised eight grounds for post-conviction relief:

> 1. That admission of certain opinion testimony by a police detective was improper and deprived Respondent of due process and a fair trial (O.R. 30-40);
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> 2. That prosecutorial misconduct and comments by the trial court and the prosecutors occurring during voir dire, and the jurors additionally viewing Respondent in handcuffs at different times throughout the trial proceedings, diminished the presumption of innocence and the State's burden of proof and violated Respondent's right to due process (O.R. 41-51);
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> 3. That the State's cross-examination of Respondent improperly commented on Respondent's right to have counsel during his questioning by police (O.R. 51-54);

4. That Respondent's trial counsel provided ineffective assistance in not imposing proper objections to the errors identified in the three foregoing post-conviction claims and to hearsay evidence at trial, and that Respondent's appellate counsel provided ineffective assistance in not asserting on direct appeal an ineffective-assistance-of-trial-counsel claim based on those issues (O.R. 54-64);

5. That newly discovered evidence that Respondent "was not the triggerman" entitles him to post-conviction relief (O.R. 64-68);

6. That the jury instructions and the prosecution's statements concerning self-defense violated Respondent's federal due process rights to a fair trial (O.R. 68-69);

7. That the evidence was insufficient as a matter of federal law to support a conviction of First Degree Murder with malice aforethought (O.R. 69-71); and

8. That the admission of irrelevant character evidence violated Respondent's federal due process rights (O.R. 71-72).

With the exception of his fifth ground for relief wherein Respondent alleges newly discovered evidence, each of the foregoing claims presented issues that were raised or could have been raised in Respondent's direct appeal or in his prior post-conviction application. For that reason, those claims were each barred as being either waived or res judicata.[1]

[1] "It is not the office of the Post-Conviction Procedure Act, 22 O.S.1991, § 1080 *et seq.* to provide a second appeal under the mask of post-conviction application." *Thomas v. State*, 1994 OK CR 85, ¶ 3, 888 P.2d 522, 525; *see also Hooper v. State*, 1998 OK CR 22, ¶ 4, 957 P.2d 120, 123 ("Post-conviction is neither a second appeal nor an opportunity for [a defendant] to re-raise or amend propositions of error already raised in the direct appeal brief."). Post-conviction claims that were not raised on direct appeal, but that could have been raised, are waived. *Woodruff v. State*, 1996 OK CR 5, ¶ 2, 910 P.2d 348, 350. Claims that could have been raised in a prior post-conviction application are also waived. *Berget v. State*, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081-82. Claims that were raised and decided in a defendant's direct appeal or within a prior post-conviction proceeding are barred as res judicata. *Paxton v. State*, 1996 OK CR 4, ¶ 2, 910 P.2d 1059, 1061 (claims raised on direct appeal); *Jones v. State*, 1983 OK CR 127, ¶ 3, 668 P.2d 1170, 1171 (claims raised in prior application for post-conviction relief). This Court will not consider issues that have been waived or issues that are barred by res judicata. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924; *Stiles v. State*, 1995 OK CR 51, ¶ 2, 902 P.2d 1104, 1105.

In granting Respondent post-conviction relief, Judge Watson relied in part on Respondent's ineffective-assistance-of-trial-counsel claim.[2] In Proposition II on appeal, Petitioner contends that this was error, as Respondent's claim was procedurally barred because of his direct appeal and prior post-conviction application. We agree.

Respondent's Application more than once acknowledged that the acts cited as trial counsel ineffectiveness were each "apparent from the record." (O.R. 55 & 62.) Respondent stated, "Again, these instances of ineffective assistance of trial counsel were apparent from the record, no legitimate strategy excuses their exclusion from the direct appeal." (O.R. 62.) As Respondent's direct appeal and prior post-conviction proceedings caused Respondent's ineffective assistance of trial and appellate counsel claims to be procedurally barred, it was error for the District Court to grant him post-conviction relief based on these ineffective assistance allegations.

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[2] More specifically, Judge Watson held:

> Ground IV of [Defendant]'s Application alleged that his trial and appellate counsel were ineffective. . . . . This Court finds it unnecessary to reach a decision as to whether appellate counsel was ineffective and does find that trial counsel, based on the allegations set out in Mr. Edwards' Application, was ineffective due to the failure to object to improper cross-examination by the State, prejudicial testimony proffered by the State, and improper comments by the State in opening and closing statements. The most egregious being 1) Detective Sterling's improper testimony elicited by the State that [Defendant]'s intent was to commit murder, her generalized and highly prejudicial testimony regarding gang activity, her improper testimony explaining away the inconsistencies of the eyewitnesses, and 2) the State's cross-examination of the [Defendant] regarding his refusal to speak with the police without an attorney which violated [Defendant]'s right to counsel and right to remain silent . . . . [O.R. 306.]
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> . . . . Further, this Court finds that but for trial counsel's unreasonable omissions in failing to object there is a reasonable probability that result of this trial would have been different. [O.R. 307.]

(O.R. 306-07.) Judge Watson concluded by finding "trial counsel violated [Defendant's] rights under the Sixth and Fourteenth Amendment to the United States Constitution by providing ineffective assistance at his jury trial." (O.R. 309.)

II. Analysis of Newly Discovered Evidence Claim

Nothing in the District Court's order shows that its decision in favor of Respondent's newly discovered evidence claim turned on its decision to grant post-conviction relief for ineffective assistance of counsel. By every indication, these rulings were independent of one another. The District Court's finding that Respondent suffered prejudice because he received ineffective assistance appears distinct from its finding that the outcome of Respondent's trial is now in doubt because of the new evidence. Consequently, if we affirm the District Court's decision on Respondent's newly discovered evidence claim—a claim the District Court evaluated independently from that of Respondent's ineffective assistance claim—the error occurring in disposition of the ineffective assistance claim becomes moot and standing alone does not require reversal.

A. Test for Establishing a Post-Conviction Claim for Newly Discovered Evidence and Standards of Appellate Review

The District Court observed that for new evidence to meet the standard of "newly discovered evidence" sufficient for overturning a conviction, it must meet the following four-part test:

> (1) the evidence must be material; (2) the evidence could not have been discovered before trial with due diligence; (3) the evidence cannot be cumulative; and (4) the evidence must create a reasonable probability that, had the newly discovered evidence been introduced at the original trial, it would have changed the outcome.

Hunter v. State, 1992 OK CR 19, ¶ 15, 829 P.2d 64, 67.[3] The District Court recognized that the materiality component of this test required that it evaluate

[3] In *May v. State*, 1976 OK CR 328, ¶ 10, 75 P.3d 891, 892, the Court held that Section 1080(d) of the Post-Conviction Procedure Act, which permits relief when "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" (22 O.S.2011, § 1080(d)) employs the same test as that

the new evidence "in the context of the entire record." (O.R. 308.) Citing to the decision of *Untied States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976), and on which the Court in *Hunter* had also relied, Judge Watson explained:

> Meaning that upon consideration of the newly discovered evidence, if there is still no reasonable doubt about guilt then there is no justification for a new trial. Conversely, if the verdict's validity is questionable then newly discovered [sic] which is relatively minor in importance might be sufficient to create a reasonable doubt.

(O.R. 308.)[4]

In an appeal from a trial court's decision granting or denying a newly discovered evidence claim, we review for an abuse of discretion. "Whether a

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which is followed in passing on a motion for new trial for newly discovered evidence under Title 22, Section 952, of the Oklahoma Statutes.

[4] In *Agurs*, the Supreme Court was concerned with "whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." *Argus* 427 U.S. at 107, 96 S.Ct. at 2399. In elaborating on the concept of "materiality," the Supreme Court observed:

> It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs 427 U.S. at 112-13, 96 S.Ct. at 2402 (footnote omitted) *abrogated in part by United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (holding that the test for materiality formulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), for ineffective-assistance-of-counsel claims was "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused," the three situations that had been identified in *Agurs* as requiring three different standards of materiality; meaning that the new single and uniform standard would be: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). In *Patterson v. State*, 2002 OK CR 18, ¶ 20, 45 P.3d 925, 930, when addressing a motion for new trial for newly discovered evidence, this Court again cited with approval an excerpt from the above-quoted passage in *Agurs*.

[post-conviction] motion for new trial on the grounds of newly discovered evidence will be granted is within the discretion of the trial court and this Court will not reverse unless there is an abuse of that discretion." *Hale v. State*, 1991 OK CR 27, ¶ 11, 807 P.2d 264, 268.[5] "Although this Court must make the ultimate determination of whether newly-discovered evidence warrants a new trial, we afford great deference to the district court's findings on the issue, and review only for an abuse of discretion." *Patterson v. State*, 2002 OK CR 18, ¶ 19, 45 P.3d 925, 930. In making this determination, we have found that a trial court will have abused its discretion in not granting a motion for a new trial where "there is a reasonable probability that a different result would have been reached had the newly discovered evidence been introduced at trial." *Hunter*, ¶ 19, 829 P.2d at 67.

B. Evidence at Respondent's Jury Trial

Respondent admitted at trial that at a 7-11 convenience store at North Harvey and Northwest Wilshire in Oklahoma City, and while he carried a handgun in the waistband of his pants, he confronted a group of rival gang members on the sidewalk outside the store's entrance. Consequently, it is undisputed that Respondent was present and instigated the confrontation that ended in the shooting death of Gerald Lamont Ford. The key issue before the jury was whether Respondent was the one firing the shot that killed Ford.

The pathologist performing the post-mortem examination on Ford's body testified Ford was shot from the front and died from a single bullet wound in

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[5] *See also Spuehler v. State*, 1985 OK CR 132, ¶ 14, 709 P.2d 202, 204-05 (trial court's order denying a motion for new trial on grounds of newly discovered evidence was reviewed by Court on direct appeal of defendant's conviction under abuse-of-discretion standards); *Carson v. State*, 1974 OK CR 215, ¶ 41, 529 P.2d 499, 509 ("Whether or not a Motion for New Trial on the basis of newly discovered evidence shall be granted is clearly within the discretion of the trial judge and this Court will not overturn the trial judge's decision unless that discretion is abused.").

the left chest that struck Ford's heart and lung in a manner that would cause death in several minutes. (Tr. 595-97.) The gun used in the shooting was never found, despite a thorough sweep of the crime scene area and a search of the house where, immediately after the shooting, police located Respondent.[6] (Tr. 213-14, 235-36.) It is undisputed that only one shot was fired (Tr. 292, 381, 399, 421, 453, 467, 492, 512) and that it left a 9mm shell casing at the scene (Tr. 232).

At jury trial Respondent admitted that when the shooting occurred, he was active in a Bloods street gang, used the name "K Evil," and had several gang tattoos including one using the letters "CK" meaning "Crip Killer." (Tr. 627-30.) Respondent further acknowledged that on March 9, 2001, at about 5:30 P.M., he walked up to the entrance of the 7-11 with a handgun on his right hip under his shirt and confronted several Crips gang members with the use of gang-sign hand gestures and derogatory language. Respondent said as he confronted these gang members, a man in a green jersey came out from between parked cars and hit him. (Tr. 611-12, 614-15.) Respondent identified this individual as Wilbert Lee Brewer III. (Tr. 617.) Respondent testified that as he struggled with Brewer, six or seven males who were in the company of Brewer came to Brewer's aid. (Tr. 611-13.)

Respondent stated that during this fight:

> I felt somebody tug at the gun like they was trying to take it off of me so I reached for it. As I reached for it, the gun fell and hit the ground.
>
> . . . .

[6] Because the 7-11 store clerk called 911 as soon as the fight began, police were on their way to the scene when the shooting occurred. The clerk testified at trial that while on the phone to police, his vision of the actual shooting was blocked by his parked truck and an SUV. (Tr. 287-88; 293-94.)

> The gun fell, I bent over to try to pick the gun up. One of them kicked it. It slid out towards the middle of the parking lot and I heard somebody say, get the gun, cuz, get the gun. By then I knew that I wasn't going to get that gun before they was going to get that gun, so I took off running towards the east. They was on me the whole time, still hitting me.

(Tr. 613-14.) Respondent continued by explaining, that he was on his knees when the shot was fired, that he did not see the shooter, but only heard the shot. (Tr. 615.) When he got to his feet, Respondent saw Brewer holding the gun that Respondent had carried. (Tr. 616-17).

Respondent said that he ran to the car, got in, told the driver, Katherine Toahty,[7] to go, and Toahty then drove Respondent to a house several blocks away. (Tr. 617-18.) At the house, Respondent got out of the car just before it was concealed in the home's garage. (Tr. 617-18, 632.) According to Respondent, while still outside speaking to individuals in the front yard and asking them to look to see if he may have been shot by his own gun, police arrived at the house. (Tr. 618.) On their arrival, Respondent ran inside the house. (Tr. 618.) Officers entered the home to retrieve Respondent, and found him inside a small bathroom, and after which they eventually transported him to the police station for questioning. (Tr. 618-20.)

Respondent stated that it was not until detectives questioned him at the police station that he learned someone had been struck by the gunshot. (Tr. 620.) Respondent testified that during that questioning, Brewer walked by the door, and he immediately told the detectives, "that's the guy that I seen with the gun right there" (Tr. 623-24); but the detectives responded saying, "every-

[7] The trial and post-conviction transcript's vary in the spelling of this individual's name. In this Order, we have used the spelling contained in Ms. Toahty's notarized affidavit that Respondent filed with his post-conviction application. (O.R. 97-99.)

body said you had it" (Tr. 624), and they did not otherwise seem interested. (Tr. 624, 643-44.)

After Respondent's attorney, Guinise Marshall, arrived at the police station that evening and spoke with Respondent, he gave his videotaped statement to police about what had occurred, and that recording was played for the jury. (Tr. 625-38.) Respondent confessed that he had lied during that statement about not having a gun, about being driven to the store by Toahty, and about speaking to Katie Taylor, a witness and young woman inside the 7-11 to whom Respondent had given a note and had written down his cell phone number, his street-gang name, and utilized letters having gang symbols. (Tr. 622-23, 364.) During his cross-examination, Respondent continued to insist that he did not shoot or kill anyone and that the "two girls" (Katie Taylor and Julia Elder), who had testified Respondent was the shooter, were lying about that. (Tr. 648-49.)

The State's key eyewitnesses at the 7-11 that day were Katie Taylor and Julia Elder. These individuals testified that the two of them and Katie's sister, Stacy, were all at the 7-11 in a Suburban SUV in order to get some change to wash the SUV. (O.R. 246, 325-26.) Parking directly in front of the 7-11 next to the car Toahty was driving, Elder remained in the back seat and Stacy in the front passenger seat, while Taylor went inside the store for the change needed for the car wash. (Tr. 247-48, 326-28.)

While Taylor was inside the store, Respondent came up to her and asked her for her phone number. (Tr. 328-29.) She refused to give it to him, but Respondent wrote down his phone number and his K-Evil name and gave it to Taylor and left. (Tr. 329-30.) Taylor then stood at the register counter to pay for her purchases. (Tr. 332, 35-36.) While standing there, she could see out

the front doors of the store, she witnessed a confrontation between Respondent and a group of black males walking up from the gas pumps (Tr. 331-36.) As she paid the cashier and walked to the front doors to exit the store, she saw Respondent pull up his shirt showing a gun, make some gang signs, and swear at the other men. (Tr. 334-37.)

Standing at the doors, Taylor saw Ford sneak out from between the parked cars and hit Respondent. (Tr. 337-38.) Taylor watched the fight begin and move from the sidewalk into the parking lot. (Tr. 338-39.) Taylor said Respondent was bent over during most of the fighting and that "something was dropped because everybody right there bent down for a second. You could see them down towards the ground, fighting, and at that moment, you seen the defendant stand up with the gun in his hand, aiming, you heard a gunshot almost simultaneously . . . ." (Tr. 339-40.)

While Taylor remained inside the store, Elder, from the back seat of the Suburban, watched Respondent come out of the store and get in the red maroon car that Toahty was driving. (Tr. 247-52.) As that car began to drive away and pull out of the parking lot, it stopped and Respondent began "yelling out the window towards some people in the parking lot." (Tr. 253-54.) Respondent then got out of the car and approached four black males who had exited a black and white Caprice that "looked like an old police car." (Tr. 254-55.) Respondent lifted up his shirt several times to reveal a gun in his waist-band and cursed at them. (Tr. 254, 258-59.) According to Elder, the other men "didn't seem like they wanted a problem at first" (Tr. 259), but then Ford, who was crouched down between the parked cars, ran out and hit Respondent in the face (Tr. 260-61).

At that point, the others began hitting Respondent as he tried to escape into the parking lot in the direction of where Toahty had moved the maroon car. (Tr. 257, 261-62.) Elder explained, that as the fight continued in the parking lot, she "heard something fall," and "saw somebody reaching down and people kind of scattered." (Tr. 263.) At first, Elder was not sure whether the item that had fallen was the cell phone that she had seen clipped onto Respondent's pants (Tr. 259) or was instead the gun from Respondent's waistband. (Tr. 263-64.) Elder said that when Respondent raised back up "his hands were free," but then she "saw him reach into his waistband for his gun." (Tr. 264-65.) She then saw Respondent aiming the gun as he backed away from the crowd of people and fired. (Tr. 265-67, 276.) Elder then saw Ford "hit the concrete hard and [he] didn't get back up." (Tr. 267.) Ford's friends loaded Ford into the black and white Caprice and drove off while Respondent entered the maroon car and sped away. (Tr. 268-69.) Elder testified that she had no doubt that Respondent had fired the gun. (Tr. 270.)

When Taylor, while looking out the store window, heard the gunshot, it appeared to her that Ford was trying to standup, turn, and run, but instead fell on his face right behind the Suburban. (Tr. 340, 343.) Respondent then "backed up with the gun in his hand" and ran out of sight around the corner of the building, while Ford was taken away by his friends. (Tr. 343-45.)

When Taylor joined Elder in the Suburban immediately after the shooting, Elder was on the speakerphone to 911 describing what had happened. (Tr. 345.) Taylor joined that conversation, telling "the lady on 9-1-1 that the guy that had just—had shot the gun, committed the murder, had just gave me his phone number." (Tr. 345.) The recording of this 911 call was played for the jury. (Tr. 269.)

Taylor said that she saw no one else besides Respondent come up with a gun (Tr. 350, 354), and that when the shot was fired, Ford was at a distance of nine to ten feet (Tr. 355-56). Taylor acknowledged that she had testified at the preliminary hearing that she did not see the gun go off, but that she did see Respondent aim and shoot the gun using both hands. (Tr. 366.) Although it had appeared to her that Ford was shot in his back while getting up, she said the gunshot occurred as Ford "was getting up with a twist motion off the ground" and that he fell before he could take a step. (Tr. 355-56.)

Elder also testified that when Respondent pulled his gun, Ford "was turning to run." (Tr. 276.) But she too acknowledged that at preliminary hearing, she had testified the crowd, including Ford, was running away from Respondent as he pulled his gun and that she had therefore believed Ford's back was toward Respondent when he was shot. (Tr. 276-80.) She explained, however, that the sequence of events that involved something dropping to the ground, Respondent picking it up, his rising back up, his pulling out the gun, and his backing away and firing it, all happened "at the snap of [her] fingers"; thus, whether the crowd had scattered at the moment something hit the ground or at the moment Respondent pulled the gun was the cause for any confusion about her prior testimony and statements to police. (Tr. 276-77.)

In addition to presenting the testimony of Taylor and Elder, the State also provided the testimony of the seven surviving men who were involved, along with Ford, in the confrontation with Respondent. The testimony of these seven revealed that all but one or two of the eight men were members of Crip gangs and that they were all traveling together in two cars, with four men in each vehicle, when they pulled into the 7-11: one group of four in the black and white Caprice and the other group in a blue Buick Regal in which Ford

was riding. (Tr. 369-73, 392-96, 415-17, 422, 434-35, 463-64, 485-87, 503-06.) Of these seven witnesses, only two (one of whom was Brewer) testified that they actually saw Respondent shoot Ford. Between these two, the manner in which they described Respondent shooting Ford varied significantly. Brewer stated Respondent fired the gun using two hands while standing and facing Ford (Tr. 453-54), but the other man testified that Respondent, while he was being struck by several of them, bent over to pick up his dropped gun, and while still being hit, aimed behind and shot the gun (Tr. 398, 402).

C. Respondent's Newly Discovered Evidence Claims

The evidence alleged to be newly discovered, as presented by Respondent at the post-conviction evidentiary hearings, consisted of testimony from three individuals.[8] Larika A. Alexander was one of those three individuals, and it was her testimony that the trial court found met the test for newly discovered evidence warranting a new trial. (Tr. 308-09.) The trial court found Respondent's remaining two witnesses did not qualify as newly discovered evidence, because one witness's information could have been discovered with the use of due diligence (O.R. 307), and the other witness had no material evidence to offer, as he had recanted his unsworn statements that Respondent was not the shooter. (Tr. 308.)

According to Alexander, she was a passenger in a car driven by her cousin, when they approached the 7-11 on the afternoon of March 9, 2001. (6/14/13 Tr. 13-15.) Alexander admitted that when this occurred, she was

[8] A fourth individual, Katherine Toahty, was referenced in Respondent's post-conviction application as a source of newly discovered evidence and an affidavit from Toahty was attached to that application. Respondent however, did not produce Toahty at the evidentiary hearings and the District Court made no reference to her affidavit in its granting Respondent post-conviction relief. Moreover, neither party to this appeal has raised the affidavit in support of their arguments on appeal. We therefore do not address that affidavit further in deciding this appeal.

doing "[s]omehting [she] wasn't supposed to be doing": smoking marijuana. (*Id.* 13-14.) As the two neared the 7-11, they saw a group of at least seven black males beating up on another black male who had lighter colored skin. (*Id.* 14-18.) Seeing this, they slowed to a stop in the middle of the street and watched the fight at a distance of about 15 to 20 yards away. (*Id.* 15, 27-32) Alexander identified Respondent as an individual who looked like the man who was being beaten. (*Id.* 18.) She described what she saw by saying, "first he getting beat in the face real bad by these dudes but then he kind of roll over" and got on his stomach to protect himself, but "that wasn't really working cause they was pounding him out, they was pounding him out hard." (*Id.* 18.)

Alexander testified that this beating lasted "about a good five, six minutes," but ended "when the gunshot went off." (*Id.* 19.) Alexander stated that as they parked their car to the side of a business that was next door to the 7-11, she saw the "dark-skinned dudes riding off, they run to their car so they can get out of there, but it's a dark-sinned dude and a light-skinned dude still on the ground even after the gunshot went off." (*Id.* 19-20.) Getting out of the car and peering around the corner of the neighboring building, Alexander said she witnessed the light-skinned man hop up, get in the back seat of a car driven by a female, and then speed off. (*Id.* 20.)

Alexander claimed that when the gunshot went off she was looking at the brawl and the man on the ground had "his hands by his head trying to, like, protect his self or whatever." (*Id.* 21.) Asked if there was any way that this individual could have fired a shot at that point, Alexander replied, "Uhm, I don't think so. He had to be Superman. I don't know how he gone and do that." (*Id.*) During cross-examination, Alexander admitted that she could not see Respondent 100 per cent of the time with the number of people in the mob

around him. (*Id.* 33-34.) She also admitted that she never saw a gun at any time (*id.* 35-36), and that she left quickly as soon as Respondent got up because she "saw that guy laying on the ground [and] knew it was a murder at that point," and "didn't want to stick around and talk to nobody and be a snitch like I am now" (*id.* 40-41). Alexander confessed that because of the length of time that had passed, the "whole ordeal" was "pretty vague." (*Id.* 41.)

Alexander was asked why she was just now providing testimony about what she had witnessed years ago. She explained that her cousin had told her about recently being at the 7-11 where the shooting occurred, and while there, she saw Respondent's mother passing out flyers that asked for witness information. (*Id.* 15.) Alexander described her reaction to her cousin's information as follows: "I really don't want nothing to do with it, but after a while, kind of talking to my granny and stuff, talking about God, she was like you need to come forward, so that's why I'm here." (*Id.* 15-16.) Alexander explained she felt "guilty" for not doing "the right thing," because after the shooting, she had "been through hell" and "lost [her] kids" to a gang lifestyle. (*Id.* 22-23, 26.) She added, "I feel like if I would have came forward," then "maybe I wouldn't have [undergone those things]." (*Id.* 22-23.)

During her cross-examination, Alexander elaborated further on this. She stated that "gangbanging" was one of the regrets to which she was referring, but that she had since given up that lifestyle. (*Id.* 26-27.) She continued by advising, "I was only 20 years old at the time" of the shooting, was part of a gang at that time, and that she and her cousin had pulled over at the 7-11 in order to determine if the individuals fighting "may be from a gang that [she] was possibly affiliated." (*Id.* 26.)

D. District Court's Newly Discovered Evidence Ruling

In granting Respondent post-conviction relief, Judge Watson was critical of the testimony of the seven male witnesses. He observed that they were members from a rival gang of that to which Respondent belonged and that they "gave conflicting testimony about how the shooting occurred." (O.R. 309.) He further discounted the testimony of Taylor and Elder on perceiving it to be different from that which they had previously provided. Judge Watson found that they had "told police after the shooting their views were obscured and they never saw [Respondent] with a gun. They then testified at preliminary hearing that they saw [Respondent] shoot the victim in the back as he ran away." (O.R. 309.) Judge Watson believed that both women had changed their testimony at trial to "comport[ ] with the physical evidence that the victim had been shot in the chest." (O.R. 309.)

Judge Watson found Alexander's testimony to be particularly credible in that she did not know Respondent and "came forward of her own volition." (Tr. 309.) He further characterized Alexander's testimony as "compelling" as it "supports the [Respondent]'s lone testimony that he was not the shooter" and was "even more compelling when examined in the entire context of the record which reflects a questionable verdict based on the conflicting testimony of eyewitnesses as to material facts." (O.R. 309.)

In urging error in the District Court's having granted Respondent relief on this record, the State cites to the lack of citations to the record by Judge Watson, and contends "the conclusions the court reaches suggest that the court did not actually take the record of the original proceedings into consideration." (Br. of Pet'r 14.) Unless otherwise shown, we presume regularity in

trial court post-conviction proceedings.[9] Nevertheless, even setting aside this presumption, a review of the post-conviction appeal record reveals that those conflicts and irregularities in testimony on which Judge Watson has relied are in fact present in the trial record.

Additionally, in making its argument against the District Court's decision, the State neglects to acknowledge or specifically address the trial evidence that was consistent with Respondent's claim that another individual had picked up the fallen gun during the fight and shot Ford. Boiled down, the State's position is simply that it disagrees with Judge Watson's conclusion that the jury verdict rested on conflicting eyewitness testimony and that confidence in that verdict is undermined by Alexander's new testimony.

The test, however, is not whether the State, or even this Court, might have exercised its discretion differently than did the trial court in adjudicating Respondent's claim; rather, the test is instead whether the trial court's decision constitutes an abuse of discretion. In reviewing for an abuse of discretion, this Court does not substitute its judgment for that of the trial court, but instead determines if there is any evidentiary support in the record for the trial judge's decision, for if there is, no abuse of discretion occurs.[10] Because there exists portions of the record in Respondent's case that will provide some support for those findings of fact and conclusions of law reached by the trial court, and

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[9] *See Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25 (holding that "[t]here is a presumption of regularity in the trial court proceedings," and therefore it is the burden of the appealing party"—whether on direct appeal or post-conviction—to present to this Court sufficient evidence to rebut this presumption").

[10] *See W.D.C. v. State*, 1990 OK CR 71, ¶ 8, 799 P.2d 142, 145 ("Our duty on appellate review of the magistrate's decision, therefore, is not to conduct our own weighing de novo, but rather to determine whether the decision of the magistrate is supported by the law and facts of the case. A decision which is so supported is, by definition, not an abuse of discretion."); *Glover v. State*, 1974 OK CR 126, ¶ 14, 524 P.2d 51, 53 ("Although the evidence is conflicting, this Court will not attempt to substitute its judgment for that of the jury and the trial judge.").

because we must accord a high degree of deference to such findings and conclusions and to the weight and credibility choices made by the trier of fact concerning the testimony on which it bases its findings and conclusion;[11] we **FIND** that the District Court's judgment granting Respondent post-conviction relief must be affirmed.

IT IS THEREFORE THE ORDER OF THIS COURT that Respondent's May 18, 2015, Request for Oral Argument is **DENIED**, and the December 5, 2014, final judgment of the District Court of Oklahoma County, granting the application for post-conviction relief of Respondent, Kendall Wayne Edwards, by vacating his judgment and sentence and granting him a new trial in Case No. CF-2001-1642, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of December, 2015.

Clancy Smith
CLANCY SMITH, Presiding Judge

Gary L. Lumpkin DISSENTS
GARY L. LUMPKIN, Vice Presiding Judge

[11] *See Bland v. State*, 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714 ("The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary."); *Jennings v. State*, 92 Okl.Cr. 347, 360, 223 P.2d 562, 569 (1950) ("Where jury is waived, judgment of trial court upon a disputed question of fact will be sustained on appeal where there is competent evidence in the record to support his finding.").

Arlene Johnson (C.I.R.)
ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

Robert L. Hudson - DISSENT
ROBERT L. HUDSON, Judge

ATTEST:

Michael A. Richie
Clerk

PA

LUMPKIN, JUDGE: DISSENTING

As the District Court's order granting post-conviction relief goes far afield, I must respectfully dissent.

I agree that, with the exception of his claim of newly discovered evidence, all of Respondent's claims are either barred by waiver or *res judicata*. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 (Post-conviction review was neither designed nor intended to provide applicants another direct appeal); *Carter v. State*, 1997 OK CR 22, ¶ 2, 936 P.2d 342, 343 (Issues previously raised are procedurally barred under doctrine of *res judicata*; and issues which could have been raised on direct appeal are waived). However, the District Court's determination that Respondent had met the requisite standard of newly discovered evidence is a clearly erroneous conclusion and judgment as it is both clearly against the logic and effect of the facts presented and made without proper consideration of the law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (defining abuse of discretion standard); *Hale v. State*, 1991 OK CR 27, ¶ 11, 807 P.2d 264, 268 (applying abuse of discretion standard to review of denial of post-conviction relief).

The District Court improperly considered Respondent's barred ineffective assistance of counsel claim in determining that relief was required. The record reveals that the District Court announced: "[t]rial counsel's multiple failures to object . . . has undermined this Court's confidence in the outcome of the trial." (O.R. 307). Then the District Court evaluated Larika Alexander's testimony at the evidentiary hearing "in the context of the entire record." (O.R. 308-09).

While this is the correct standard for determining the materiality of alleged newly discovered evidence, the District Court wrongly considered Alexander's testimony in light of this "undermined [ ] confidence in the outcome of the trial."[1] This was Respondent's second application for post-conviction relief and his ineffective assistance claim was unquestionably barred. Therefore, the District Court clearly abused its discretion when it considered the claim in evaluating the materiality of Alexander's testimony.

The District Court's determination that Alexander's testimony was compelling is also clearly against the logic and effect of the facts presented. Although Alexander testified that Respondent was on the ground and would not have been able to have fired the shot, the record reveals that Alexander was a limited witness with a restricted opportunity to observe the incident and a faded recollection. Alexander was a passenger in a vehicle driving past the 7-11 convenience store. By her own admission she did not observe all of the altercation. Alexander's cousin stopped the car in the middle of the street 15 to 20 yards away from the altercation, but this occurred by the gas pumps. Alexander's vision was obstructed by the individuals involved. She lost sight of Respondent during the incident. (Evid. Hrg. Tr. 33-34). Alexander explained: "I couldn't see him every single second." (Evid. Hrg. Tr. 42-43). She further explained that she was not able to see Respondent's hands "100 percent of the

[1] *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 2401-01, 49 L.Ed.2d 342 (1976) (holding materiality of omitted evidence must be evaluated in the context of the entire trial); *Hale v. State*, 1991 OK CR 27, ¶ 11, 807 P.2d 264, 268 ("Petitioner bears the burden of proving the existence of a probability that the newly discovered evidence, if presented at trial, would have changed the jury's verdict.")

time." (Evid. Hrg. Tr. 51). She never saw a handgun. Instead, Alexander saw the bodies around Respondent and then heard a gunshot. (Evid. Hrg. Tr. 34).

Alexander also admitted that she was under the influence of marijuana at the time of the offense. She did not speak to the law enforcement officers that investigated the murder. Instead, Alexander waited over 12 years, as her memory of the event diminished, to speak to any of the parties. She continued to smoke marijuana for years after witnessing the incident. Alexander acknowledged that she had trouble remembering what happened because it had been a long time and the "whole ordeal" was "vague." (Evid. Hrg. Tr. 41).

In contrast, the ten eyewitnesses that testified on behalf of the State at trial, observed the entire incident. They were only feet away from the altercation and both saw and heard all of the events. The ten eyewitnesses spoke to law enforcement contemporaneous with the investigation of the offense. Their collective account was consistent. Respondent started the altercation. He was the only person observed with a gun. No one else had a weapon that day. No one else was observed in possession of Respondent's gun. Respondent shot Ford one time and then fled the scene.

Specifically, seven of the eyewitnesses saw Respondent with a gun. Three of the eyewitnesses observed Respondent fire the shot that killed Ford. One eyewitness saw Respondent with the gun immediately after he heard the gunshot. Thus, four individuals closer to the event than Alexander positively identified Respondent as the shooter.

Even if accepted as true, Alexander's testimony was cumulative to other evidence at trial. Testimony which is cumulative in nature does not meet the requirements to constitute newly discovered evidence because such testimony does not create a reasonable probability of changing the outcome of the trial. *Sheppard v. State*, 1987 OK CR 4, ¶¶ 4-5, 731 P.2d 989, 990. It was undisputed that several of the eyewitnesses fought with Respondent after he initiated the altercation. Three of the State's witnesses testified that they did not observe Respondent with a gun. Respondent introduced the testimony of a purported eyewitness who related that he saw the gun slide across the ground but did not see who picked it up. Respondent, himself, testified that he did not possess the gun during the precise moment in which Ford was shot. As Alexander's testimony was cumulative to the evidence at trial, it does not create a reasonable probability of changing the outcome of the trial. *Id.*, 1987 OK CR 4, ¶ 5, 731 P.2d at 990 (finding alleged newly discovered testimony lacked materiality where it simply restated defendant's own testimony).

In determining that Alexander's testimony was compelling, the District Court cited to the minor inconsistencies in the eyewitnesses' statements.[2] I note that the jury heard this evidence and in returning a verdict of guilty apparently determined that the eyewitnesses were credible and rejected the testimony that Respondent did not fire the handgun. Because Alexander's testimony was cumulative and of such limited value in light of the existing trial record, I find

[2] Unfortunately, the judge that conducted the evidentiary hearing was not the same judge that presided at Respondent's trial and, thus, was in no better position to assess how Anderson's evidence might have affected the outcome of the trial than this Court. *Cf. Patterson v. State*, 2002 OK CR 18, ¶ 20, 45 P.3d 925, 930.

that there is not a reasonable probability that the outcome of the trial would have been different had Respondent presented Alexander's testimony at trial. I would reverse the District Court's order granting post-conviction relief.

I am authorized to state that Judge Hudson joins in this writing.