Decision of 10th Circuit APPeals Court

APPENDIX (A)

FILED
United States Court of Appeals
Tenth Circuit

January 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MAJOR HUDSON, III,

Petitioner - Appellant,

v.

RICK WHITTEN,

Respondent - Appellee.

No. 20-6140
(D.C. No. 5:01-CV-00258-G)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **KELLY**, and **EID**, Circuit Judges.

Major Hudson, III, an Oklahoma prisoner proceeding pro se,[1] seeks to appeal the district court's dismissal of his Fed. R. Civ. P. 60(b) motion as an unauthorized second or successive 28 U.S.C. § 2254 petition. We deny Hudson's request for a certificate of appealability (COA) and dismiss this matter.

In 1998, an Oklahoma state court jury convicted Hudson on charges of first-degree burglary, first-degree rape, child abuse, and threatening a witness. The Oklahoma Court

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Hudson appears pro se, we construe his filings liberally but do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

of Criminal Appeals affirmed on direct appeal. Hudson filed his first § 2254 petition challenging his conviction in 2001. He claimed: "(1) admission of evidence of other crimes denied him a fair trial; (2) the evidence was insufficient to support the convictions; (3) defense counsel provided ineffective assistance of counsel at trial; (4) the sentences were excessive; and (5) his appellate counsel provided ineffective assistance on his direct appeal." *Hudson v. Saffle*, 30 F. App'x 823, 824 (10th Cir. 2002). The district court denied relief on the merits, and this court denied his request for a COA. In 2016, Hudson sought authorization to file a second or successive § 2254 petition, but we denied authorization.

In 2019, Hudson again sought authorization to file a second or successive § 2254 petition. He hoped to bring two new claims for ineffective assistance of appellate counsel. We again denied authorization. Undeterred, Hudson then filed a motion under Fed. R. Civ. P. 60(b)(6) in the district court seeking to amend his 2001 § 2254 petition to include the two claims for ineffective assistance of appellate counsel that we denied him authorization to file.[2] The district court concluded that because the motion sought "to

[2] Hudson entitled his pro se filing a "Motion to Recall Mandate." R. at 29 (capitalization omitted). The motion invoked, as "rel[e]vant authorities," both Fed. R. Civ. P. 15(c)(1)(B) and Fed. R. Civ. P. 60(b)(6). *Id.* at 32. "But the motion was filed after judgment, and we have held that once judgment is entered, the filing of an amended complaint [under Fed. R. Civ. P. 15] is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006) (internal quotation marks omitted). Hudson contends on appeal that he brought his motion "under Rule 60(b)(6)'s catch[-]all provision." Aplt. Combined Opening Br. at 2. We construe it accordingly. *See Nelson*, 465 F.3d at 1148 ("Because [the defendant] was proceeding pro se, we will construe his motion liberally, and treat it as a combination of a motion to set aside judgment under Rule 60(b) . . . and a motion to then amend under Rule 15." (citation omitted)).

present claims based upon a denial of [Hudson's] constitutional right to effective assistance of appellate counsel," it "must be treated as a second or successive habeas petition." R. at 75–76 (citing *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006)). The district court dismissed Hudson's motion for lack of jurisdiction as an unauthorized second or successive § 2254 petition and in the process expressly declined to transfer the motion to this court for possible authorization. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam) ("When a second or successive § 2254 or § 2255 claim is filed in the district court without the required authorization from this court, the district court may transfer the matter to this court if it determines it is in the interest of justice to do so under [28 U.S.C.] § 1631, or it may dismiss the motion or petition for lack of jurisdiction.").

The district court correctly construed Hudson's motion as a second or successive habeas petition. *See Spitznas*, 464 F.3d at 1215 ("[A] 60(b) motion is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction."). Hudson therefore must obtain a COA before he can appeal the district court's dismissal of the motion. *See* 28 U.S.C. § 2253(c)(1)(A); *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) (construing 28 U.S.C. § 2255 and holding "that § 2253 requires [a] petitioner to obtain a COA before he or she may appeal" from "the district court's dismissal of an unauthorized . . . motion").

To obtain a COA, Hudson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court's ruling rested

on procedural grounds, Hudson must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). Hudson has not met this burden.

"Before a petitioner may file a second or successive 28 U.S.C. § 2254 petition in the district court, he must successfully apply to this court for an order authorizing the district court to consider the petition." *Spitznas*, 464 F.3d at 1215 (citing 28 U.S.C. § 2244(b)(3)). We rejected Hudson's application for authorization to file his motion. The district court therefore correctly concluded that it lacked jurisdiction to consider Hudson's motion. *See Cline*, 531 F.3d at 1251 ("A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until this court has granted the required authorization.").

Because reasonable jurists could not debate the correctness of the district court's procedural ruling, we deny Hudson's application for a COA and dismiss this matter. We deny Hudson's motion to proceed on appeal without prepayment of costs or fees because he failed to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court
Per Curiam

Decision OF U.S. District Ct. West. Dist. OKla

APPENDIX (B)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MAJOR HUDSON III,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-01-258-G**
	)	
RICK WHITTEN, Warden,	)	
	)	
Respondent.[1]	)	

ORDER

Now before the Court is a Motion to Recall Mandate (Doc. No. 37), filed by Petitioner Major Hudson III, a state prisoner appearing pro se. Respondent, Warden Rick Whitten, has submitted a Response (Doc. No. 38), Petitioner has replied (Doc. No. 42), and the matter is now at issue.

I. Relevant Background

In 1998, Petitioner was convicted in Oklahoma County District Court on charges of first-degree rape, first-degree burglary, child abuse, and threatening a witness, and was sentenced to four consecutive prison terms. *See State v. Hudson*, No. CF-1996-6675 (Okla. Cty. Dist. Ct.). His conviction and sentence were affirmed by the Oklahoma Court of Criminal Appeals ("OCCA") on August 23, 1999. *See Hudson v. State*, No. F-1998-695 (Okla. Crim. App.).

Petitioner then filed a Petition (Doc. No. 2) in this Court, seeking federal habeas

[1] The Warden of Petitioner's current facility is hereby substituted as Respondent. *See* R. 1(a)(1), 2(a), R. Governing § 2254 Cases in U.S. Dist. Cts.

corpus relief on several grounds pursuant to 28 U.S.C. § 2254. One of these grounds was ineffective assistance of appellate counsel ("IAAC") on his state-court direct appeal, *see* R. & R. (Doc. No. 17) at 14-20. On July 20, 2001, the Court denied the Petition on the merits. *See* Order of July 20, 2001 (Doc. No. 20). Petitioner appealed, and the Tenth Circuit Court of Appeals denied a certificate of appealability and dismissed the matter. *See Hudson v. Saffle*, 30 F. App'x 823, 824 (10th Cir. 2002).

In 2016, Petitioner filed a motion with the Tenth Circuit seeking authorization to file a second or successive § 2254 habeas petition challenging his 1998 state-court conviction. *See* 28 U.S.C. § 2244(b)(3)(A). The Tenth Circuit denied Petitioner's motion on October 20, 2016. *See In re Hudson*, No. 16-6270 (10th Cir. Oct. 20, 2016) (order) (Doc. No. 38-1).

In 2018, Petitioner filed an application for postconviction relief in the trial court. In this application, Petitioner argued two IAAC claims related to his first-degree burglary conviction that were not raised in his § 2254 Petition:

> I. Appellate counsel was ineffective for not showing that trial counsel was ineffective by not requesting a lesser-included offense instruction and for not showing the court's abuse of discretion resulting in structural error;
>
> II. Appellate counsel was ineffective for not showing court's abuse of discretion by not instructing on a lesser-included offense and allowing a misinstruc[tion] on the range of penalties, resulting in structural error.

State v. Hudson, No. CF-1996-6675 (Okla. Cty. Dist. Ct. July 3, 2018) (Order Denying Fifth Application for Post-Conviction Relief); *see also* Pet'r's Mot. at 3. The trial court denied relief. *See State v. Hudson*, No. CF-1996-6675, Order Denying Fifth Application

for Post-Conviction Relief. The OCCA affirmed the denial on February 19, 2019. *See Hudson v. State*, No. PC-2018-745 (Okla. Crim. App. Feb. 19, 2019) (Order Affirming Denial of Post-Conviction Relief) (Doc. No. 37-2).

In April 2019, Petitioner again sought authorization from the Tenth Circuit to file a second or successive § 2254 petition in this Court. In the new petition, Petitioner sought to raise the two IAAC claims cited above. *See In re Hudson*, No. 19-6054 (10th Cir. May 1, 2019) (Order) (Doc. No. 35). The Tenth Circuit denied this request on May 1, 2019, stating that these claims were not based on newly discovered evidence, as required for authorization to be granted under 28 U.S.C. § 2244(b)(2)(B). *See id.* Rather, the appellate court found that "these claims are based on testimony from a witness at Hudson's trial in 1998 and that testimony was available to him before he filed his first habeas application in 2001. The discovery of a new legal theory is not new evidence." *Id.* at 2.

II. Petitioner's Current Motion

In the instant Motion, filed February 7, 2020, Petitioner again seeks to challenge his 1998 state-court conviction—specifically, his conviction for first-degree burglary. Liberally construed, Petitioner asks to reopen this federal habeas case so that he may file an amended § 2254 petition. In such an amended petition, Petitioner would present the two IAAC claims cited above as a demonstration that his appellate counsel failed to present examples of reversible error on direct appeal and therefore denied him effective assistance. *See* Pet'r's Mot. (Doc. No. 37) at 3, 5; *see also id.* at 7-9 (citing testimony from his criminal trial and asserting that an instruction on the crime of illegal entry should have been provided to the jury as a lesser-included offense to the burglary charge). Although

Petitioner cites various authorities in support, none of them provides a basis to grant Petitioner's request.

As a threshold matter, Petitioner's citations to Federal Rule of Civil Procedure 15(c)(1)(B) are inapposite, as there is no currently pending pleading for which amendment or relation back can be contemplated. *See id.* at 3, 4-6; Fed. R. Civ. P. 15(c)(1)(B).

Petitioner also devotes much of his argument to explaining how the ineffectiveness of his appellate attorney should provide "cause" for his "failure to comply with Oklahoma's procedural rules" and allow his claims to be considered by a federal court. Pet'r's Mot. at 9-12 (stating that "[b]ecause of the OCCA's ruling" Petitioner's "federal claim was 'precluded'"); *see* Pet'r's Reply at 1. *See generally Dretke v. Haley*, 541 U.S. 386, 388 (2004) ("[A] federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default."). No such "cause" analysis applies here, however. This Court did note that Petitioner's initial IAAC claims were procedurally defaulted, *see* R. & R. at 16.[2] But the relevant federal habeas claims were nonetheless addressed and denied on the merits, *see id.* at 16-20; Order of July 20, 2001, at 1-2; *see also Cannon v. Mullin*, 383 F.3d 1152, 1159 (10th Cir. 2004) ("When questions of procedural bar are problematic . . . and the substantive claim can be disposed of readily, a federal court may exercise its discretion to bypass the procedural issues and reject a habeas claim on the merits."), *abrogated on other*

[2] "On appeal from the trial court's decision, the OCCA declined jurisdiction and dismissed the post-conviction appeal because the appeal was not timely filed . . . . Petitioner has therefore procedurally defaulted his claim of ineffective assistance of appellate counsel." R. & R. at 16.

grounds as recognized in Simpson v. Carpenter, 912 F.3d 542 (10th Cir. 2018).[3] The Tenth Circuit's decision likewise did not rest upon a finding of procedural bar at the state appellate level or elsewhere. *See Hudson*, 20 F. App'x at 824.

Similarly, Petitioner argues that he is entitled to raise the two new IAAC claims before this Court pursuant to Federal Rule of Civil Procedure 60(b) because

> a [R]ule 60(b) motion challenging the denial of section 2554 habeas corpus relief based on a procedural bar is not a successive habeas petition because it does not contest the merits of a conviction. *See Gonzales v. Crosby*, 545 U.S. 524 (2005). A petition[er] does not make a habeas claim when "he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4, 533, 538; *See Spitznas v Boone*, 464 F.3d 1213, 1224-25 (10th Cir. 2006).

Pet'r's Mot. at 5 (citations and quotation corrected); *see* Pet'r's Reply at 1.

This argument is unavailing, however, because the denial of relief on the § 2254 Petition was a "merits determination," not a disposition "based on a procedural bar." *Gonzalez*, 545 U.S. at 532 n.4; Pet'r's Mot. at 5. Indeed, the Tenth Circuit has explained that, pursuant to *Gonzalez*, "a pleading denominated a Rule 60(b) motion that arises within a habeas context should be treated as a second or successive habeas petition" if the pleading "in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Spitznas*, 464 F.3d at 1215. Petitioner's Motion, seeking to present claims based upon a denial of his constitutional right to effective assistance of appellate counsel, fits squarely within this category of pleadings. *See id.* at 1216 (noting

[3] "However, the complex issue of procedural default need not be addressed because Petitioner's ineffective assistance of appellate counsel claim has no merit." R. & R. at 16.

that Rule 60(b) motions that "seek[] to present a claim for constitutional error omitted from the movant's initial habeas petition" or "seek[] leave to present 'newly discovered evidence' in order to advance the merits of a claim previously denied" "should be treated as second or successive habeas petitions").

Accordingly, the Court finds that Petitioner's Motion must be treated as a second or successive habeas petition. Pursuant to 28 U.S.C. § 2244(b)(2), "[t]he filing of a second or successive § 2254 application is tightly constrained." *Case v. Hatch*, 731 F.3d 1015, 1026 (10th Cir. 2013). "Before a court can consider a second claim, an applicant must first 'move in the appropriate court of appeals for an order authorizing the district court to consider the application.'" *Id.* (quoting 28 U.S.C. § 2244(b)(3)(A)). "Section 2244's gate-keeping requirements are jurisdictional in nature, and must be considered prior to the merits of a § 2254 petition." *Id.* at 1027 (citing *Panetti v. Quarterman*, 551 U.S. 930, 942-47 (2007)).

Because the claims now raised by Petitioner "challeng[e] the same conviction" as did Petitioner's prior habeas petition, this Court lacks jurisdiction to consider the claims. *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011); *see also In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) ("A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until this court has granted the required authorization.").

> When a second or successive § 2254 . . . claim is filed in the district court without the required authorization from [the appellate] court, the district court may transfer the matter to [the appellate] court if it determines it is in the interest of justice to do so under [28 U.S.C.] § 1631, or it may dismiss the . . . petition for lack of jurisdiction.

In re Cline, 531 F.3d at 1252. "Where there is no risk that a meritorious successive claim will be lost absent a § 1631 transfer, a district court does not abuse its discretion if it concludes it is not in the interest of justice to transfer the matter to [the appellate] court for authorization." *Id.*

As outlined above, Petitioner already sought and was denied authorization from the Tenth Circuit to present the claims he attempts to raise here. *See In re Hudson*, No. 19-6054 (10th Cir. May 1, 2019) (Order). There is nothing in his Motion to disrupt the appellate court's conclusion that Petitioner "has failed to meet the requirement for authorization in § 2244(b)(2)(B)." *Id.* at 2. Therefore, it would not further the interest of justice to transfer the matter to the Tenth Circuit Court of Appeals because Petitioner cannot satisfy the statutory requirements to obtain authorization to proceed with a second or successive habeas petition. *Cf.* 28 U.S.C. § 2244(b)(3)(E) ("The . . . denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition of rehearing or for a writ of certiorari.").

CONCLUSION

For the foregoing reasons, Petitioner's Motion to Recall Mandate (Doc. No. 37), construed as a second or successive § 2254 habeas corpus petition, is DISMISSED.

IT IS SO ORDERED this 3rd day of September, 2020.

Charles B. Goodwin

CHARLES B. GOODWIN
United States District Judge

Decision of U.S. District Ct. West. Dist. Okla.

APPENDIX (C)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MAJOR HUDSON III,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-01-258-G**
	)	
ROBERT DENTON, Acting Warden,	)	
	)	
Respondent.[1]	)	

ORDER

In February 2020, Petitioner Major Hudson III filed a Motion to Recall Mandate. After consideration of the Motion, the State's Response, and the relevant record, the Court found that the Motion must be construed as a second or successive habeas corpus petition challenging Petitioner's 1998 state-court conviction. *See* Order of Sept. 3, 2020 (Doc. No. 43) at 3-7 (citing *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006)). Because Petitioner had not received authorization from the Tenth Circuit Court of Appeals to file a second or successive petition, the Court found that it lacked jurisdiction to consider Petitioner's claims. The Court further found that it was not in the interest of justice to transfer the matter to the appellate court and dismissed the Motion. *See id.* at 6-7; *see also* 28 U.S.C. § 2244(b).

Petitioner has now filed a notice of appeal of the Court's Order of dismissal. On September 15, 2020, the Tenth Circuit directed a limited remand of this matter for the Court

[1] The current Acting Warden of Petitioner's facility is hereby substituted as Respondent. *See* R. 1(a)(1), 2(a), R. Governing § 2254 Cases in U.S. Dist. Cts.

to consider whether a certificate of appealability ("COA") should issue. *See* Order, No. 20-6140 (10th Cir. Sept. 15, 2020).

A COA may issue only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts requires the Court to issue or deny a certificate of appealability when it enters a final order adverse to a petitioner. Here, the Court's Order being appealed from is a dismissal of an unauthorized petition for lack of jurisdiction, which is considered a procedural ruling. *See McKnight v. Dinwiddie*, 362 F. App'x 900, 902 (10th Cir. 2010). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Upon review, the Court concludes that a reasonable juror would not find debatable the Court's decision to construe the Motion as a second or successive § 2254 petition and to dismiss it on that basis. As explained in the previous Order, prior to filing the Motion Petitioner previously had sought and been denied federal habeas relief on the relevant conviction under § 28 U.S.C. § 2254. The Motion presented claims based upon a denial of Petitioner's constitutional right to effective assistance of appellate counsel in connection with that conviction and was therefore required to be "treated as a second or successive habeas petition," despite being "denominated a Rule 60(b) motion." *Spitznas*, 464 F.3d at

Order of State Trial Court in an earlier Petition stating that defense counsel was outside the wide range of competense expected of counsel in a criminal case. "Page 4"

APPENDIX (D)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MAJOR HUDSON III,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Case No. CF-96-6675

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUL 0 6 2000

PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

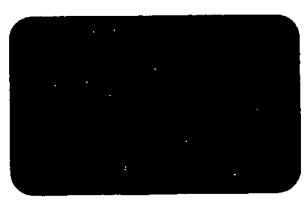
The above named Petitioner has filed an Application for Post-Conviction Relief and the Respondent, through the District Attorney of Oklahoma County, has filed a timely response thereto.

MATERIALS REVIEWED FOR DECISION

This Court has reviewed the following materials in making this decision: (1) Petitioner's Application for Post-Conviction Relief; (2) Petitioner's Motion to Supplement Application for Post-Conviction Relief; (3) State's Response to Application for Post-Conviction Relief; and (4) district court file.

FINDINGS OF FACT

Petitioner, represented by counsel, was tried by a jury for commission of the following crimes in Case No. CF-96-6675: Count 1 – Rape in the First Degree; Count 2 – Burglary in the First Degree; Count 3 – Child Abuse; and Count 4 – Threatening a Witness. The jury returned a verdict of guilty on all charges and recommended punishment as follows: Count 1 – 53 years imprisonment; Count 2 – 20 years imprisonment; Count 3 – 10 years imprisonment; and Count 4 – 7 years. On May 13, 1998, the Honorable Richard Freeman sentenced Petitioner in accordance



with the jury's recommendations. In addition, Judge Freeman ordered the sentences to be served consecutively.

Petitioner, by and through counsel, perfected a direct appeal to the Court of Criminal Appeals.[1] The Court affirmed the conviction and sentence on August 23, 1999 in Case No. F-98-695. On September 15, 1999, Petitioner filed a pleading styled as Pro Se Motion for Suspended Sentence. In the motion, Petitioner argued that the district court retained authority to order his sentences suspended under 22 O.S. § 994. On October 21, 1999, the Honorable Jerry D. Bass denied the motion.

On January 20, 2000, Petitioner, pro se, filed the instant Application for Post-Conviction Relief. On February 17, 2000, Petitioner filed a motion to supplement the Application for Post-Conviction Relief. In support of the application, Petitioner asserts the following propositions of error:

1. Petitioner received ineffective assistance of appellate counsel; and

2. Evidence of other crimes should not have been admitted at trial.

CONCLUSIONS OF LAW

The Post-Conviction Procedure Act, Title 22 O.S. §1080, *et seq.*, is not a substitute for a direct appeal. *Maines v. State*, 597 P.2d 774, 775-76 (Okl.Cr. 1979); *Fowler v. State*, 896 P.2d 566, 568-69 (Okl.Cr. 1995). The scope of this remedial measure is strictly limited and does not allow for litigation of issues available for review at the time of direct appeal. *Castro v. State*, 880 P.2d 387, 388 (Okl.Cr. 1994).

[1] On direct appeal, the following propositions of error were raised: 1) evidence of other crimes denied Appellant a fair trial; 2) the evidence was insufficient to support the charges; 3) defense counsel was ineffective for eliciting an improper reference to Appellant's rights to remain silent and to an attorney and for failing to ensure a complete record for appeal; and 4) the sentences were excessive.

The application of Oklahoma's Post-Conviction Procedure Act is limited to only those claims which, for whatever reason, could not have been raised on direct appeal. *Paxton v. State*, 910 P.2d 1059, 1061 (Okl.Cr. 1996). Issues that were not raised on direct appeal, but could have been raised are waived. *Rojem v. State*, 829 P.2d 683, 684 (Okl.Cr. 1992). All issues that have been previously raised and ruled upon are barred from consideration by the doctrine of res judicata. *Webb v. State*, 835 P.2d 115, 116 (Okl.Cr. 1992). These procedural bars still apply under the amended Act. *Welch v. State*, 972 P.2d 26, 28 (Okl.Cr. 1998).

I. Ineffective Assistance of Appellate Counsel

In his first proposition of error, Petitioner alleges appellate counsel was constitutionally ineffective. Petitioner faults appellate counsel for failing to specifically raise the following challenges on direct appeal: (1) ineffective assistance of trial counsel; (2) improper comment by the prosecutor at trail; and (3) illegality of Petitioner's arrest. Petitioner also faults appellate counsel for failing to adequately reply to the brief of the Attorney General's office.

In the context of ineffective assistance of appellate counsel, the court must make the threshold inquiry of whether or not counsel actually committed the act that is the basis for the allegation. *Welch v.* State, 972 P.2d 26, 29-30 (Okl.Cr. 1998). If, in fact, the act was committed the court must determine if (1) counsel's performance was so seriously deficient that representation fell below an objective standard of reasonableness and was not within the range of competence demanded of attorneys in criminal cases; and (2) if but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would be different. *Strickland v. Washington*, 466 U.S. 668, 677-78 (1984).

A. Ineffective Assistance of Trial Counsel

Petitioner initially asserts that appellate counsel was ineffective for failing to raise seven alleged errors committed by trial counsel's which he claims resulted in ineffective assistance of trial counsel. This claim was not presented on appeal; however, counsel's failure to raise this issue was not constitutionally deficient.

The analysis of a claim of ineffective assistance of counsel "begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both deficient performance and resulting prejudice." *Turrentine v. State*, 965 P.2d 955, 970 (Okl.Cr. 1998); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "When a claim of ineffective assistance of counsel can be disposed of on the ground of lack of prejudice, that course should be followed." *Turrentine*, 965 P.2d at 970.

In order to satisfy the prejudice prong of the *Strickland* analysis, a Petitioner must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 971 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). An "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.*

Petitioner has wholly failed to demonstrate the result of the trial proceedings was fundamentally unreliable based upon his allegations of ineffective assistance of trial counsel. Because he has failed to establish resulting prejudice, this Court need not determine if counsel's performance was deficient. Nevertheless, Petitioner's allegations do meet his burden of demonstrating counsel's performance was outside the wide range of competence expected of counsel in criminal cases.

Petitioner's allegations that trial counsel made prejudicial statements and allowed the State to mislead the jury with his prior rape charge are directly contradicted by the record. As such, these claims do not establish deficient performance by trial counsel. Petitioner also claims trial counsel was ineffective for failing to object to the admission of his prior rape charge. On appeal, the admissibility of Petitioner's prior rape charge was raised and the Court of Criminal Appeal found such evidence was properly presented; as such, trial counsel's failure to object to its admission cannot be constitutionally deficient.

Petitioner claims trial counsel failed to investigate or prepare for trial. The record does not support Petitioner's claim that counsel failed to take advantage of discovery and examine the clothing and bed sheets of the victim. Nor was counsel's performance ineffective for requesting expert analysis of these items and testimony regarding the same. Such a decision could be reasonable strategy; had testing revealed results consistent with Petitioner's guilt, the State would have been allowed to present such evidence at trial. Thus, this allegation is insufficient to support a claim of ineffective assistance of trial counsel.

Petitioner's allegations that counsel's performance fell below an objective standard of reasonableness for failing to individually voir dire prospective jurors on racial bias is untenable. Nor has Petitioner demonstrated that he was denied the constitutional right to a jury pool represented a cross section of the community; thus, trial counsel's performance cannot be deficient for not raising this objection at trial.

Detective Campbell was properly allowed to remain in the courtroom; thus, the position that trial counsel was ineffective for failing to object to his presence is without merit. Finally, Petitioner faults counsel for failing to present testimony from Officers Filey and Crowcroft. However, the testimony Petitioner asserts they would give as favorable to his defense was

presented through other witnesses at trial. Thus, counsel's representation did not fall below an objective standard of reasonableness for failing to call additional witnesses to the same.

Each of Petitioner's allegations of ineffective assistance of trial counsel are wholly without merit under the analysis set forth in *Strickland*. Therefore, while these claims were not raised on appeal, appellate counsel's performance cannot be considered constitutionally deficient for not asserting these frivolous claims of error. It also follows that the result on appeal would not have been more favorable had the arguments been presented for review by the Court. As such, Petitioner's claim of ineffective assistance of appellate counsel is without merit and is denied.

B. Improper Comments by the Prosecutor

Petitioner asserts that appellate counsel was ineffective for failing to argue that the prosecutor improperly vouched for the credibility of the witnesses at trial. "Argument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony." *Cargle v. State*, 909 P.2d 806, 823 (Okl.Cr. 1995).

Each of the statements complained of by Petitioner cannot be considered impermissible vouching under *Cargle*. Because the statements complained of were not improper, Petitioner has failed to demonstrate that appellate counsel's performance was deficient for failing to raise this frivolous issue. Nor would the result on appeal have been different has this issued been presented on direct appeal The instant argument of error is without merit and is denied.

C. Legality of Arrest

Finally, Petitioner argues that appellate counsel was ineffective for failing to raise the issue of the legality of Petitioner's arrest on direct appeal. "One who makes a citizen's arrest must, before making the arrest, inform the person to be arrested of the cause thereof and require him to submit, except when he is in actual commission of the offense or when he is arrested on pursuit immediately after its commission." *Tomlin v. State*, 869 P.2d 334, 338 (Okl.Cr. 1994). In the present case, Petitioner was apprehended on pursuit immediately following the commission of the crimes; thus, the guard was not required to inform Petitioner of the cause of his detainment.

Appellate counsel's performance did not fall below an objective standard of reasonableness for failing to raise this claim. Nor can Petitioner demonstrate that the results on appeal would have been different had the claim been presented for consideration on direct appeal. Thus, this allegation of ineffective assistance fails scrutiny under the analysis set forth in *Strickland* and is hereby denied.

D. Appellate Counsel's Reply

Petitioner claims that he received ineffective assistance of appellate counsel where counsel failed to adequately reply to the assertion that the prior charges where not used at trail. On appeal, it was argued that the evidence of Petitioner's prior charges was improperly admitted. The Court of Criminal Appeal reviewed the claim for plain error and found the evidence was properly admitted and the jury properly instructed regarding its use; thus, the Court gave full consideration to this issue. Petitioner cannot demonstrate that counsel's performance was deficient for not presenting a more vigorous reply. Moreover, Petitioner fails to show that the Court would have rendered a more favorable decision had such a reply been presented. Petitioner's instant claim is, thus, without merit.

II. Evidence of Other Crimes Was Properly Admitted

In his amended application, Petitioner argues that the evidence of his prior criminal charges should not have been admitted under the doctrine of collateral estopple. The issue of the admissibility of the prior criminal charges was raised on direct appeal. The Court reviewed the claim for plain error and found the evidence to be properly admitted. "Simply envisioning a new method of presenting an argument previously raised does not avoid the procedural bar." *McCarty v. State*, 989 P.2d 990, 995 (Okl.Cr. 1999). Thus, consideration of this proposition of error is barred by the doctrine of res judicata.

IT IS THEREFORE ORDERED BY THIS COURT, for the reasons set out above, Petitioner is not entitled to post-conviction relief and his application is hereby DENIED.

Dated this 6 July March, 2000

DISTRICT JUDGE

I, PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 6 day of July, 2000.

PATRICIA PRESLEY, Court Clerk

By Jamea Ring Deputy