

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

FILED  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

VITALY BURLEOVITSCH )  
KOLOSHA, )  
Petitioner, )  
v. )  
THE STATE OF OKLAHOMA, )  
Respondent. )  
No. PC-2023-233

APR - 4 2023

JOHN D. HADDEN  
CLERK

**ORDER AFFIRMING DENIAL OF SUBSEQUENT APPLICATION  
FOR POST-CONVICTION RELIEF**

Petitioner, pro se, appeals to this Court from an order of the District Court of Tulsa County denying post-conviction relief in Case No. CF-2007-3180.

Petitioner was convicted by jury of four counts of Lewd Molestation (Counts 1-4) and sentenced to concurrent terms of twenty years imprisonment for each Counts 1, 2, and 4, and a consecutive term of seven years imprisonment for Count 3. This Court affirmed Petitioner's judgment and sentence on direct appeal. *Kolosha v. State*, No. F-2009-915 (Okl. Cr. October 28, 2010) (not for publication). Petitioner has since filed myriad pleadings in the district court challenging his convictions or sentence, including at least six

applications for post-conviction relief. This Court affirmed the denial of Petitioner's first, second, fourth, and fifth post-conviction applications, and dismissed an attempted appeal from the denial of his third post-conviction application. *Kolasha v. State*, No. PC-2012-69 (Okl. Cr. April 20, 2019); *Kolasha v. State*, No. PC-2015-926 (Okl. Cr. January 13, 2016) (not for publication); *Kolasha v. State*, No. PC-2017-644 (Okl. Cr. September 18, 2017); *Kolasha v. State*, No. PC-2018-809 (Okl. Cr. February 19, 2019); *Kolasha v. State*, No. PC-2021-1408 (Okl. Cr. January 20, 2022).

On January 9, 2023, Petitioner filed his most recent application for post-conviction relief in the district court alleging various trial errors. The Honorable David Guten, District Judge, denied the application in an order filed on February 28, 2023. It is from this order that Petitioner appeals.

We review the district court's determination for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and

judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Judge Gluten found that Petitioner had not shown sufficient reason for the claims presented to be considered in a subsequent post-conviction application. We agree. *See* 22 O.S.2011, § 1086; *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 (“Issues that were previously raised and ruled upon by this Court are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.”).

Reviewable issues in a subsequent post-conviction application are strictly conscribed. 22 O.S.2011, § 1086; *Stevens v. State*, 2018 OK CR 11, ¶ 15, 422 P.3d 741, 746 (“There are even fewer grounds available to a petitioner to assert in a subsequent application for post-conviction relief.”). The claims presented in the instant application either were, or could have been, presented on direct appeal or in Petitioner’s previous post-conviction applications. As the district court found, Petitioner has not demonstrated a sufficient reason for failing to adequately raise these claims in prior proceedings. *See* 22 O.S.2011,

§ 1086. Accordingly, the claims have been waived or are barred by res judicata.

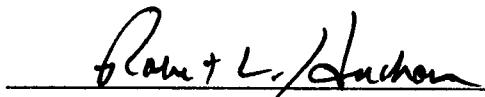
Because Petitioner has failed to establish he is entitled to post-conviction relief, the order of the District Court of Tulsa County in Case No. CF-2007-3180 denying his sixth application for post-conviction relief is **AFFIRMED**. Petitioner has **EXHAUSTED** his State remedies regarding all issues raised in his petition in error, brief, and any prior appeals. Subsequent application on these issues is **BARRED**. See Rule 5.5 *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2023). Pursuant to Rule 3.15, *supra*, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**IT IS SO ORDERED.**

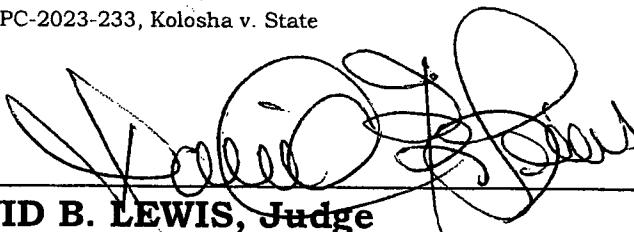
**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this

4<sup>th</sup> day of April, 2023.

  
**SCOTT ROWLAND, Presiding Judge**

  
**ROBERT L. HUDSON, Vice Presiding Judge**

  
**GARY L. LUMPKIN, Judge**



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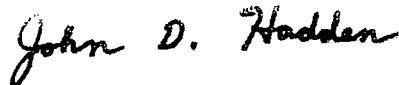
**DAVID B. LEWIS, Judge**



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**WILLIAM J. MUSSEMAN, Judge**

ATTEST:



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Clerk

PA

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

VITALY BURLEOVITSH KOLOSHA,

)

Petitioner,

)

vs.

)

STATE OF OKLAHOMA,

)

Respondent.

)

CF-2007-3180

Judge Guten

DISTRICT COURT  
FILED  
FEB 28 2023  
DON NEWBERRY, Court Clerk  
STATE OF OKLA. TULSA COUNTY

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**ORDER DISMISSING PETITIONER'S APPLICATION FOR POST-CONVICTION  
RELIEF**

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Petitioner's Application for Post-Conviction Relief comes before this Court for consideration under the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. This Court has reviewed the Application, the State's Response, and the records in rendering its decision. This Court finds that the Application fails to present any issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony; this matter can be decided on the pleadings and records reviewed. *Johnson v. State*, 1991 OK CR 124, ¶ 10, 823 P.2d 370, 373-74.

Also, this Court finds it unnecessary to appoint counsel for Petitioner. See 22 O.S. § 1082.

**STATEMENT OF RELEVANT FACTS**

On August 27, 2009, a jury convicted Petitioner of four counts of Lewd Molestation. The jury sentenced Petitioner to 20 years imprisonment on three counts and 7 years imprisonment on once count. The District Court sentenced Petitioner accordingly, electing to run the sentences concurrently with the exception of the 7-year sentence, which he ran consecutively. The Oklahoma Court of Criminal Appeals affirmed Petitioner's judgment and sentence in 2010. Petitioner has requested post-conviction relief in 2011, 2015,

2016, 2017, and 2021, all of which were denied and affirmed by the OCCA. Petitioner now presents his Sixth Application for Post-Conviction Relief filed January 9, 2023.

### **ARGUMENT AND AUTHORITY**

Oklahoma's Post-Conviction Procedure Act, 22 O.S. § 1080-1089, provides that the District Court may dismiss an application when it is satisfied "on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings." 22 O.S. § 1083(B). Accordingly, dismissal on the pleadings is improper where there exists a material issue of fact. *Id.* So, as in the case at bar, where a Petitioner fails to state a meritorious claim for relief and fails to present any material fact for this Court to consider, it should dismiss the application. Petitioner's Application is fit for dismissal.

#### **I. PETITIONER'S CLAIMS ARE PROHIBITED BY 22 O.S. § 1080.1.**

The Oklahoma Legislature has limited post-conviction relief under the Post-Conviction Procedure Act available to petitioners. Under 22 O.S. § 1080.1, petitioners have *one year* to initiate claims for post-conviction relief, and that timeline is calculated based upon the following:

A. A one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application. The limitation period shall run from the latest of:

1. The date on which the judgment of conviction or revocation of suspended sentence became final by the conclusion of direct review by the Oklahoma Court of Criminal Appeals or the expiration of the time for seeking such review by the Oklahoma Court of Criminal Appeals;
2. The date on which the Governor revoked parole or conditional release, if the petitioner is challenging the lawfulness of said revocation;
3. The date on which any impediment to filing an application created by a state actor in violation of the Constitution of the United States or the Constitution of the State of Oklahoma, or laws of the

State of Oklahoma, is removed, if the petitioner was prevented from filing by such action;

4. The date on which the constitutional right asserted was initially recognized by the United States Supreme Court, if the right has been newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review; or
5. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

B. Subject to the exceptions provided for in this section, this limitation period shall apply irrespective of the nature of the claims raised in the application and shall include jurisdictional claims that the trial court lacked subject-matter jurisdiction.

C. The provisions of this section shall apply to any post-conviction application filed on or after the effective date of this act.

22 O.S. § 1080.1 (effective Nov. 1, 2022). Petitioner's judgment and sentence became final when the OCCA affirmed his judgment and sentences in 2010. Petitioner's current Application is prohibited under 22 O.S. § 1080.1, and the Court dismisses his Application on this basis.

## **II. PETITIONER'S CLAIM IS PROCEDURALLY BARRED.**

Oklahoma's Post-Conviction Procedure Act "provides petitioners with very limited grounds upon which to base a collateral attack on their judgments." *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. The Post-Conviction Procedure Act is not intended to provide a second appeal. *Richie v. State*, 1998 OK CR 26, 957 P.2d 1192. Accordingly, "[i]t 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, 888 P.2d 522, 525. Finality of judgments is of the utmost importance in the post-conviction posture and should be stressed accordingly:

We will narrowly construe these amendments in accordance with the legislature's intent to honor the principle of finality of judgment. The Post-Conviction Procedure Act is not intended to provide a second appeal. We will consider neither

issues raised on direct appeal and therefore barred by *res judicata*, nor issues waived because they could have been raised on direct appeal but were not.

*Cannon v. State*, 1997 OK CR 13, 933 P.2d 926, 928. This commandment is embodied in the Post-Conviction Procedure Act: “All grounds for relief available to the application under this act must be raised in the original, supplemental or amended application.” 22 O.S. § 1086. The doctrine of *res judicata* procedurally bars issues which were already raised and ruled upon; the doctrine of waiver bars issues which could have been raised on review, but were not. *Id. King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090 (noting that petitioner’s claims should have been raised prior to his guilty plea, but most certainly in a direct appeal, and, therefore, his claims were barred). *See also Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, overruled on other grounds (holding that petitioner’s third attorney was procedurally barred from raising an ineffective assistance claim in petitioner’s *second* application for post-conviction relief).

The Legislature has provided a narrow exception, allowing for subsequent applications when there exists a “sufficient reason” why the grounds for relief were not asserted or inadequately asserted in the prior application. 22 O.S. § 1086. Thus, analysis turns to whether there exists a sufficient reason for not raising them or inadequately raising them in his previous direct appeal and/or his previous six applications. Petitioner makes no showing whatsoever. The Application consequently fails to advance any reason indicating how his claims were inadequately raised in his prior direct appeal and/or in prior applications; Petitioner fails to overcome the procedural bar imposed by 22 O.S. § 1086. Therefore, the Court dismisses Petitioner’s Application on this basis as well.

### **CONCLUSION**

Petitioner’s claims are both fit for dismissal under 22 O.S. § 1080.1 and procedurally barred under 22 O.S. § 1086. The Court dismisses the Petitioner’s Application for Post-Conviction Relief.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner's Application for Post-Conviction Relief is hereby **DENIED**.

**SO ORDERED** this 24 day of February, 2023.

  
**DAVID GUTEN**  
**DISTRICT COURT JUDGE**

**CERTIFICATE OF MAILING**

This Court certifies that on the date of filing, a true and correct copy of the above and foregoing Order was delivered to:

Vitaly Kolosha  
Joseph Harp Correctional Center  
P.O. Box 548  
Lexington, OK 73051-0548

-&-

Meghan Hilborn, OBA #33908  
Assistant District Attorney  
500 South Denver, Suite 900  
Tulsa, Oklahoma 74103-3832

DON NEWBERRY, COURT CLERK

BY: Alana Hagan  
Deputy Court Clerk