

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DARRELL ALLEN HESS,

APR - 8 2025

Petitioner,

JOHN D. HADDEN
CLERK

v.

No. PC-2025-58

THE STATE OF OKLAHOMA

Respondent.

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

The Petitioner has appealed to this Court from an order of the District Court of Tulsa County denying his fourth application for post-conviction relief in Case No. CF-2007-2646. In that case, Petitioner was convicted by a jury of Robbery with a Dangerous Weapon and sentenced to thirty-three years imprisonment. This Court affirmed his judgment and sentence on direct appeal. *Hess v. State*, No. F-2008-1022 (Okl. Cr. March 29, 2010)(not for publication). We affirmed the district court's denials of Petitioner's first and third post-conviction applications and he did not appeal the district court's June 13, 2013 order denying his second post-conviction application. *Hess v. State*, No. PC-2010-518 (Okl. Cr. June 10, 2010)(not for publication); *Hess v. State*, No. PC-2022-1068 (Okl. Cr. April 7, 2023)(not for publication).

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Petitioner was fully afforded the opportunity for post-conviction relief in his previous applications. Petitioner has failed to establish entitlement to any relief in this subsequent post-conviction proceeding. "In the interests of efficiency and finality, our judicial system employs various doctrines to ensure that issues are not endlessly re-litigated." *Smith v. State*, 2013 OK CR 14, ¶ 14, 306 P.3d 557, 564. All issues that were previously raised and ruled upon in direct appeal proceedings or previous post-conviction proceedings are barred as res judicata, and all issues that could have been raised in those previous proceedings but were not, are waived, and may not be the basis of a subsequent post-conviction application. 22 O.S.2011, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569. Post-conviction review is not an opportunity for a second chance to argue claims of error in hopes that doing so in a different proceeding may change the outcome. *Turrentine v. State*, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989. "Simply envisioning a new method of presenting an argument previously raised does not avoid the procedural bar." *McCarty v. State*, 1999 OK CR 24, ¶ 9, 989 P.2d 990, 995. "Appellate jurisprudence was not created or designed to allow a person convicted of a crime to continually challenge a conviction with

new assertions of error.” *Mayes v. State*, 1996 OK CR 28, ¶ 14, n.3, 921 P.2d 367, 372, n.3.

Petitioner’s propositions of error either were or could have been raised in his previous applications for post-conviction relief and are thus barred by res judicata or waived. 22 O.S.2011, § 1086; *Fowler*, 1995 OK CR 29, ¶ 2, 896 P.2d at 569. He has not established any sufficient reason for not asserting or inadequately raising his current grounds for relief in his previous applications for post-conviction relief. *Id.* Therefore, the order of the District Court of Tulsa County denying Petitioner’s subsequent application for post-conviction relief in Case No. CF-2007-2646 should be, and is hereby, **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2025), 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

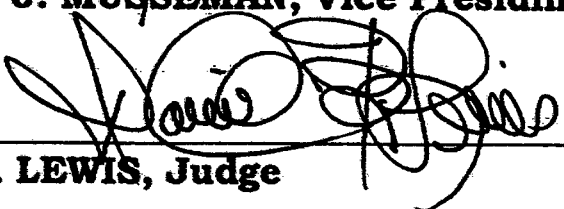
8th day of April, 2025.



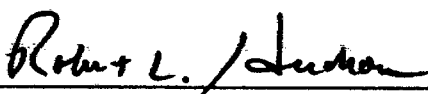
GARY L. LUMPKIN, Presiding Judge



WILLIAM J. MUSSEMAN, Vice Presiding Judge



DAVID B. LEWIS, Judge

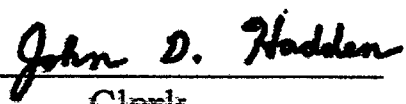


ROBERT L. HUDSON, Judge



SCOTT ROWLAND, Judge

ATTEST:



Clerk
PA



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

DARRELL HESS,

Petitioner,

VS.

STATE OF OKLAHOMA,

Respondent.

DISTRICT COURT
FILED

CF-2007-2646

DEC 23 2024

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

ORDER DISMISSING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

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

In 2007, Petitioner picked up three different robbery cases in Tulsa County: CF-2007-2334, CF-2007-2643, and CF-2007-2646. In CF-2007-2646, a jury found Petitioner guilty on October 9, 2008 of Robbery with a Dangerous Weapon and recommended punishment at 33 years. The Honorable District Judge Dana Kuehn sentenced him in accordance and elected to run his sentence consecutive to CF-2007-2643. Petitioner appealed to the Oklahoma Court of Criminal Appeals, and his judgment and sentence was affirmed in 2010. Petitioner requested post-conviction relief

Appendix - B

multiple times, which were denied on May 24, 2010, June 26, 2013, and as recent as October 7, 2022 by the Honorable Cliff Smith. The most recent denial was affirmed by the OCCA. *See Hess v. State*, PC-2022-1068 (April 7, 2023) (not for publication).

Petitioner now presents his Fourth Application for Post-Conviction Relief filed on August 27, 2024. In it, he raises identical claims as his previous applications. This Court need not tackle the merits of Petitioner's claims, however, because they are clearly procedurally barred.

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 in 2009 when he failed to withdraw his guilty plea. 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 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 20 day of Dec, 2024.


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:

Darrell Hess
Oklahoma State Penitentiary
P.O. Box 97
McAlester, OK 74502-0097

-&-

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

DON NEWBERRY, COURT CLERK

BY: _____

Deputy Court Clerk



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC - 6 2022

DARRELL ALLEN HESS,

Petitioner,

VS-

THE STATE OF OKLAHOMA,

Respondent.

JOHN D. HADDEN
CLERK

Appellate Case No.

PC 2022 1068

District Court of Tulsa County
Case No.: CF-2007-2646

PETITION IN ERROR
(Post-Conviction Appeal)

The Petitioner, Darrell Allen Hess, appears by his counsel and shows this Court the following:

I.

THAT in Case No. CF-2007-2646, filed in the District Court of Tulsa County, State of Oklahoma, Petitioner was found guilty by a jury and convicted of the crime of Robbery with a Dangerous Weapon (with two or more priors).

The jury recommended a sentence of 33 years. On October 20, 2008, Petitioner was sentenced formally in accordance with the recommendation of the jury.

Petitioner perfected an appeal to this Court, which denied relief in a written, but unpublished Summary Opinion in *Darrell Allen Hess v. State*, No. F-2008-1022 (Okl.Cr., March 29, 2010).

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Petitioner also sought post-conviction relief in Tulsa County which was denied by the Hon. Clancy Smith on May 20, 2010. Petitioner appealed that denial to this Court, which again denied relief in an unpublished order in case *Darrell Allen Hess v. State*, No. PC-2010-518 (June 10, 2010).

Petitioner sought post-conviction relief for a second time in the district court of Tulsa County on April 24, 2013, which was denied by the district court on June 26, 2013.

Petitioner filed his third application for post-conviction relief (the subject of this appeal) on July 14, 2021.

II.

THAT the district court issued an Order Denying Petitioner's Application for Post-Conviction Relief on October 7, 2022. A *certified* copy of the Order is attached to this Petition.

III.

THAT on October 19, 2022, Petitioner filed Notice of Post-Conviction Appeal in the district court of Tulsa County.

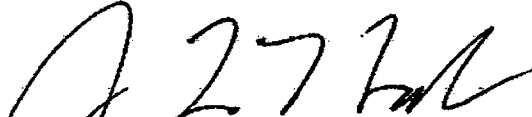
IV.

THAT this is a post-conviction appeal of the Order of the district court of Tulsa County taken pursuant to Okla. Stat. tit. 22, § 1051 (2021), and Section V, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

V.

THE Petitioner respectfully requests that this Court reverse the district court of Tulsa County, and remand to the district court with directions to grant post-conviction relief and an evidentiary hearing as requested by Petitioner.

Respectfully Submitted,

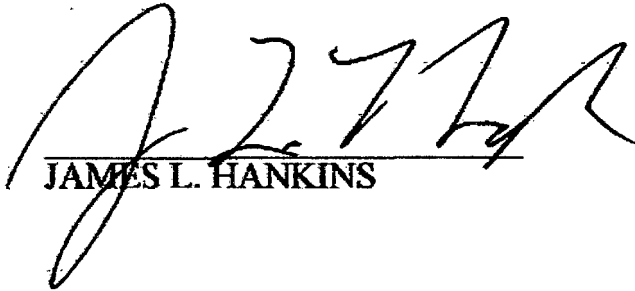


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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that on the date of filing the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court for service on the Attorney General.



JAMES L. HANKINS

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

**DARRELL ALLEN HESS,
A/K/A/ DARYL A. HESS,**

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. CF-2007-2646
Judge Smith

**DISTRICT COURT
FILED**

OCT 07 2022

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

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

This matter came on for consideration on Oct. 7, 2022 pursuant to the "Application for Post-Conviction Relief" ("Application") filed by Petitioner Darrell Allen Hess ("Petitioner") on July 14, 2021. The State filed a Response objecting to Petitioner's Application on November 24, 2021. ("State's Response").

HISTORY OF PETITIONER'S CASE

Petitioner Darrell Allen Hess was tried by jury and convicted in the District Court of Tulsa County, Case No. CF-2007-2646, of Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies, in violation of 21 O.S. 801 (2001). The jury set punishment at thirty-three years imprisonment. On October 20, 2008, the District Court sentenced Petitioner accordingly. From this Judgment and Sentence Petitioner appealed, raising the single issue that the trial court precluded him from presenting his defense of misidentification by ruling that he could not present his physical being for the sole purpose of entering into evidence his height and weight without waiving his privilege against self-incrimination and being subject to full cross-examination.

The Oklahoma Court of Criminal Appeals (hereinafter "OCCA") found that reversal was not required and affirmed the Judgment and Sentence of the District Court. The OCCA found that the

cases cited by Petitioner - to support his position that the trial court erred in holding that he would waive his privilege against self-incrimination by standing in front of the jury to present his height and weight - are persuasive. The OCCA found however that under the circumstances of this case, the Court need not decide the issue because error, if any, was harmless beyond a reasonable doubt and did not affect the verdict.

In addition, the Court stated that what makes Petitioner's case different from those he cites is the State's case against him did not rest solely on the victim's identification. Petitioner's co-defendants testified against him and corroborated the testimony of the victim. Nor did the victim rely solely on height and weight to identify Petitioner. The victim testified that the robber he later identified as Petitioner had marks near his eye and on his neck; these marks correspond with tattoos on Petitioner. Moreover, Petitioner's height and weight were discussed during closing argument, without objection, and defense counsel emphasized to the jury that Petitioner's actual height and weight differed from the victim's description. The OCCA therefore determined that error, if any, from precluding Petitioner's presentation of his measurements under these circumstances was harmless beyond a reasonable doubt. Therefore, the OCCA affirmed the Judgment and Sentence of the District Court. *See Hess v. State*, F-2008-1022, slip op. (Okla. Crim. App. March 29, 2010) (Not Published).

On April 19, 2010, the Petitioner filed his first "Application for Post-Conviction Relief" wherein he raised some three propositions of error. The propositions are as follows:

1. The Petitioner asserted, among other matters, in proposition one (1) that trial counsel was ineffective for failing to investigate, obtain and utilize available evidence that was available prior to trial. The Petitioner then goes on in support of proposition one (1) to state a litany of alleged errors by his trial counsel in both the preparation and the conduct of the Petitioner's case. The Petitioner then alleged that both trial counsel and appellate counsel were ineffective in raising this proposition as "all

effect.”

On June 26, 2013, the District Court issued an Order denying Petitioner’s second application.

In Petitioner’s third and current Application, he asserts in his first proposition that the same trial counsel who represented Petitioner prior to and at his preliminary hearing “later represented the State’s star witness against Petitioner resulting in ineffective assistance of counsel due to a conflict of interest.” Application at pp. 15-18. In his second proposition, Petitioner claims the State “offered its star witness a legal benefit in exchange for her testimony and asserted otherwise at trial.” Application at pp. 19-22. In his third proposition, Petitioner alleges that “the cumulative effect of the errors below deprived Petitioner of his right to due process.” Application at pp. 23-24.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner’s propositions of error are not proper for post-conviction review, because they could have been or were raised within his direct appeal or his two (2) prior applications for post-conviction relief. In so far as Petitioner’s propositions were raised on direct appeal, they are barred by the doctrine of *res judicata*. *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973. In so far as these propositions were not raised, but could have been, they are waived. *Id.* Petitioner has not established that these claims were inadequately raised in a prior proceeding. 22 O.S.2011, § 1086. Post-conviction review is not an opportunity for a second chance to argue claims of error in hopes that doing so in a different proceeding may change the outcome. *Turrentine v. State*, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989. “Simply envisioning a new method of presenting an argument previously raised does not avoid the procedural bar.” *McCarty v. State*, 1999 OK CR 24, ¶ 9, 989 P.2d 990, 995. The Court of Criminal Appeals has held that when a claim is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924.

The text of § 1086 is even more direct in its prohibition against subsequent post-conviction

applications. Section 1086 states that “[a]ll 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 section establishes procedural bars for matters subject to *res judicata* and waiver. *Id.* Such grounds are expressly prohibited from forming the basis of a subsequent application. *Id.* 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. *Id.* Accordingly, this Court denies relief. *See Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973.

I. IN HIS FIRST PROPOSITION OF ERROR, PETITIONER FAILED TO PROPERLY SUSTAIN HIS ALLEGATION OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO A CONFLICT OF INTEREST OR IN THE ALTERNATE, THIS PROPOSITION IS BARRED BY *RES JUDICATA* AND/OR WAIVER.

First, Petitioner failed to properly sustain his allegation that he received ineffective assistance of trial counsel due to a conflict of interest. In *Russell v. Cherokee Cty. Dist. Court*, 1968 OK CR 45, 438 P.2d 293, 294, the Court stated:

It is fundamental that where a petition for writ of habeas corpus, or for post-conviction appeal is filed, the burden is upon the Petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court. Error must affirmatively appear, and is never presumed.

Petitioner bases his allegation that he received ineffective assistance of trial counsel due to a conflict of interest on his theory that Ms. Ball, an attorney with the Public Defender’s Office, represented Ms. Solomon, who testified against him in his trial, after she represented him. He explains “Ball was able to prepare Solomon to testify against Hess in an unconstitutional manner because she was privy to information about Hess himself.” Application at pp. 14, 18. Petitioner claims he was “never informed about the subsequent representation of Solomon by Ball, and had he known about it, he would have objected.” Application at p. 16. Petitioner explains he is unable to confirm his theory that Ms.

Ball represented Ms. Solomon after she terminated her representation of Petitioner because "reference to Jessica Solomon has been expunged from the court record in this case and neither Hess nor counsel are able to access those documents at this time." Application at p. 14.

However, Petitioner now claims he recently became "aware" that Ms. Ball also represented Ms. Solomon. See Affidavit of Darrell A. Hess ("Affidavit") at p. 6 of 9. Petitioner explained that "[a] review of social media has indicated that Jessica Solomon has changed her life around for the better, and she thanked one person in particular for making her life better: Julie Ball. See attached Exhibit '5' (letter with attachments)." Application at p. 14. The exhibit Petitioner references consists of a screen shot of a Facebook post from a Jessica Solomon, dated only October 28 with no year provided. This Facebook post discusses a change in Ms. Solomon's life nine years earlier and recognizes some people that played a role in Ms. Solomon's "recovery." Next, it states "I am forever grateful for Julie Ball as well, Live 4 Life & Oxford and of course all members of AA and NA around the world!" This statement does not indicate that Ms. Ball provided Ms. Solomon with legal representation. In fact, this expression of gratitude is only made in the context of Ms. Solomon's discussion of her "recovery." Therefore, this statement provides absolutely no support for Petitioner's speculation that Ms. Ball provided Ms. Solomon with legal representation subsequent to her representation of Petitioner or at any other time. Therefore, since this vague Facebook post is the only support Petitioner provides for his theory that Ms. Ball ever provided Ms. Solomon with legal representation connected to his case, Petitioner has completely failed to sustain the allegations in his first proposition of error that he received ineffective assistance of counsel due to a conflict of interest. See *Russell*, 438 P.2d at 294. Accordingly, the Court denies Petitioner's Application on this basis.

In the alternative, Petitioner's proposition of error that his trial level counsel provided

ineffective assistance due to a conflict of interest is barred by the doctrine of *res judicata* because Petitioner previously raised ineffective assistance of trial counsel in his first application for post-conviction relief, where he asserted his trial counsel had committed a litany of alleged errors. Petitioner's presentation of a different direction for his ineffective assistance of trial counsel argument here by speculating that Ms. Ball provided him ineffective assistance of counsel due to a conflict of interest, as discussed above, does not avoid the procedural bar of *res judicata* attached to this previously raised argument. *See McCarty*, 939 P.2d at 995; 22 O.S. § 1089. Therefore, the Court also denies this proposition of error on the basis of *res judicata*.

Finally, to the extent the ineffective assistance of counsel arguments Petitioner raised in his first application for post-conviction relief differ from his current arguments these arguments are also barred by waiver because he could have raised these specific arguments on direct appeal and in his first application for post-conviction relief but he failed to do so. Specifically, general information, regarding the Office of the Public Defender having a conflict of interest in representing Petitioner, was available to Petitioner and his subsequent counsel long prior to his trial, direct appeal, and subsequent applications for post-conviction relief. For example, on July 10, 2007, Assistant Public Defender, Richard Couch, filed an Application to Withdraw as Attorney of Record ("Application to Withdraw") in Petitioner's case. He requested that he and the entire Public Defender's Office be allowed to withdraw because "there exists an irreconcilable conflict of interest which prevents the further representation of said Defendant." Application to Withdraw. *Exhibit 1* to the State's Response. The District Court issued an Order granting the Application to Withdraw on July 12, 2007. *Exhibit 2* to the State's Response. Therefore, since this information regarding a conflict of interest with attorneys from the Public Defender's Office was known or readily available to

Petitioner and his subsequent counsel long prior to the time of his trial, direct appeal and subsequent applications for post-conviction relief, Petitioner's assertion of this error in his third and current application is barred by the doctrine of waiver. *See* 22 O.S. § 1086; *Logan*, 293 P.3d at 973. Petitioner provides no "sufficient reason" why he failed to assert this ground for relief or why this ground was inadequately asserted in his prior applications. *See* 22 O.S. § 1086. Accordingly, the Court also denies Petitioner's Application on this basis.

II. PETITIONER'S SECOND AND THIRD PROPOSITIONS OF ERROR ARE PROCEDURALLY BARRED.

In his second proposition of error, Petitioner claims that the State "offered its star witness a legal benefit in exchange for her testimony and asserted otherwise at trial." Application at p. 19-22. Petitioner's claims, once again, are based completely on his own speculation and self-serving statements. Since Petitioner fails to provide any support for his self-serving claims, he is again failing to properly sustain his allegations. *See Russell*, 438 P.2d at 294. Therefore, the Court rejects this argument on this basis.

Further, Petitioner could have raised this issue on direct appeal and in his previous applications for post-conviction relief but failed to do so. He provides no "sufficient reason" why he failed to previously assert this ground for relief or why this ground was inadequately asserted in his prior applications. Therefore, this allegation is now barred under the doctrine of waiver. *See Logan*, 293 P.3d at 973; 20 O.S. § 1089C.1; 22 O.S. § 1086. Accordingly, the Court also denies Petitioner's Application on this basis.

In his third proposition of error, Petitioner asserted that the "cumulative effect of the errors below deprived Petitioner of his right to due process." Application at p. 23. However, he bases this assertion of cumulative error on propositions of error that were based only on speculation and self-

serving statements that did not serve to properly sustain these allegations, as discussed above. *See Russell*, 438 P.2d at 294. Therefore, the Court should reject this argument for this reason. Further, since Petitioner previously raised the “cumulative effect” of errors on his right to a fair trial as a proposition of error in his second application for post-conviction relief, Petitioner’s reassertion of this issue, even if raised in a slightly different way, is barred by *res judicata*. *See McCarty*, 989 P.2d at 995. Therefore, the Court also denies Petitioner’s Application on this basis.

III. AN EVIDENTIARY HEARING IS NOT NECESSARY

Section 1084 of the Post-Conviction Procedure Act provides that an evidentiary hearing may be had where the application cannot be disposed of on the pleadings or where there is a material issue of disputed fact. 22 O.S.2011, § 1084. “[A petitioner] has no constitutional or statutory right to an evidentiary hearing on post-conviction review unless his application cannot be disposed of on the pleadings and the record or a material issue of fact exists.” *Fowler v. State*, 1995 OK CR 29, ¶ 8, 896 P.2d 566, 566; *see also Logan*, 2013 OK CR 2, ¶¶ 20–22, 293 P.3d at 978. Here, a request for a hearing contains no material dispute for which an evidentiary hearing is necessary to resolve because, as discussed above, consideration of Petitioner’s claims may be disposed on the record and as a matter of law. *See* 22 O.S.2011, § 1083(C). Therefore, this Court declines to conduct an evidentiary hearing.

Based on the foregoing, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner’s application for post-conviction relief and request for an evidentiary hearing are hereby **DENIED**.

SO ORDERED this 7 day of July, 2021.

**CLIFFORD SMITH
JUDGE OF THE DISTRICT COURT**

CERTIFICATE OF MAILING/DELIVERY

I certify that on the date of filing, a file stamped certified copy of the above and foregoing

Order was mailed to:

James L. Hankins
Mon Abri Business Center
2524 North Broadway
Edmond, OK 73034
Attorney for Petitioner

And I further certify that on the date of filing, a file stamped certified copy of the above and

foregoing Order was hand delivered to:

Marianna E. McKnight, Esq.
Assistant District Attorney
Tulsa County District Attorney's Office
800 County Courthouse
500 S. Denver Ave.
Tulsa, OK 74103

DON NEWBERRY
TULSA COUNTY COURT CLERK

BY: Alana Higgin
DEPUTY COURT CLERK



**IN THE COURT
OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

DARRELL ALLEN HESS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

PC 2022 1068

Case No.: _____

District Court of Tulsa County
Case No. CF-2007-2646

**ORIGINAL BRIEF FOR AND ON BEHALF
OF PETITIONER DARRELL ALLEN HESS**
In Support of Post-Conviction (Non-Capital) Petition in Error

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**IN THE COURT
OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

DARRELL ALLEN HESS,)	
)	
<i>Petitioner,</i>)	
)	
v.)	Case No.: _____
)	
)	District Court of Tulsa County
THE STATE OF OKLAHOMA,)	Case No. CF-2007-2646
)	
<i>Respondent.</i>)	

BRIEF OF PETITIONER
in Support of Post-Conviction (Non-Capital) Petition in Error

Petitioner, Darrell Allen Hess, by and through the undersigned counsel, presents the following argument and authorities in support of his Application for Post-Conviction Relief filed in the District Court of Tulsa County. Petitioner will be referred to by name. The Respondent, State of Oklahoma, will be referred to as the State.

STATEMENT OF THE CASE

The State accused three persons in this case of Robbery with a Dangerous Weapon: Darrell Hess, Joshua Dale Hamilton, and Jessica Renee Solomon. Tr. II 210.¹ Jury trial was held from October 7-9, 2008, and Hess was found guilty of committing that crime after having been convicted of two or more prior felonies.

The jury recommended sentence of 33 years imprisonment. O.R. 169. On October 20, 2008, the Hon. Dana Kuehn sentenced Hess in accordance with the recommendation of the jury, and also ordered the 33-year sentence to run consecutively to Tulsa County case number CF-2007-2643. Sent. Tr. 4-5; *see also* Post-Conviction Application, attached Exhibit "1" (Judgment and Sentence).

Petitioner perfected an appeal to this Court, which denied relief in a written, but unpublished Summary Opinion in *Darrell Allen Hess v. State*, No. F-2008-1022 (Okl.Cr., March 29, 2010).

Petitioner also sought post-conviction relief in Tulsa County which was denied by the Hon. Clancy Smith on May 20, 2010. Petitioner appealed that denial to this

¹ As he did in the district court below, Petitioner references and incorporates the trial court record in this case, including the Original Record [hereinafter "O.R."] and the transcripts of the jury trial and other proceedings. These documents are part of the case file in the district court and are proper for the district court to judicially notice as factual support for Petitioner's claims. *See* 12 O.S. § 2202 (judicial notice of adjudicative facts). The State did not object to this below.

Court, which again denied relief in an unpublished order in case *Darrell Allen Hess v. State*, No. PC-2010-518 (June 10, 2010).

Petitioner sought post-conviction relief for a second time in the district court of Tulsa County on April 24, 2013, which was denied by the district court on June 26, 2013.

Petitioner filed his third application for post-conviction relief (the subject of this appeal) on July 14, 2021. The district court denied relief on October 7, 2022. Hess filed notice of appeal on October 19, 2022.

STATEMENT OF THE FACTS

Although the State charged all three defendants with this crime, Hess was the only one who went to trial. This is because co-defendant Jessica Solomon, who had not yet entered a plea in the case, was scheduled to testify against Hess as a State witness; and co-defendant Joshua Hamilton, who *had* pled guilty in the case, was also scheduled to testify against Hess. Tr. II 213, 235 (Solomon testified that she had not yet entered a plea in the case).

According to the State, as the prosecutor laid out in opening statements, Jessica Solomon was just there to tell the truth to the jury as she understood it:

Now, as we have talked about in voir dir, Jessica [Solomon] is charged in this case with robbery and she is going to come in here and she is going to tell you as of today, she has no deals for her. There have been no deals offered to Jessica Solomon for her to come in here and testify truthfully. She is also going to tell you that she understands everything that she says in this courtroom, everything that she says on that stand can be used against her in her own trial. She is going to com in and she is going to tell you that she understands that.

Tr. II 213 (opening statement by the State). The prosecutor was less sure about the testimony of Hamilton, telling the jury that Hamilton was going to shuffle into court to testify against Hess in prison orange, and that the State did not know what he was going to say. Tr. II 213 ("He is going to come in here and he is going to be in orange. He is in custody."); Tr. II 214 ("I don't know what he is going to say.")

As to Solomon, she was the State's second witness. On direct examination, the first order of business by the prosecutor was to establish that she had not yet entered a plea in the case, and had not yet worked out any deals with the State:

Q. Ms. Solomon, now, you're aware that you have been charged with robbery with a dangerous weapon; correct?

A. Yes.

Q. And you understand that in that case you are charged with Darrell Hess and Josh Hamilton?

A. Yes.

Q. And you understand that whatever you say today—have you pled or anything on your case?

A. No.

Q. So you understand that today, whatever you testify to today, could be used against you in your very own trial?

A. Yes.

Q. And that as of today, has the State of Oklahoma given you any deals on your testimony for today?

A. No.

Q. And that you're here today to testify truthfully; correct?

A. Yes.

Tr. II 235-36.

From that point, Solomon testified that she knew Hess because she was a very close friend of his sister. Tr. II 236. She also was acquainted with Josh Hamilton because she had worked with his brother at a Sonic in Tulsa. Tr. II 237.

Back in March, 2007, Solomon was no longer working at Sonic, but she had been working there within the prior six months. Tr. II 238. She testified that on March 8, 2007, she, Hamilton and Hess were at the apartment of Hess's sister, that the three of them were getting high on meth, and that she heard Hamilton and Hess discussing how to come up with some money by committing a robbery. Tr. II 238-39.

According to Solomon, it was decided that they would rob the Sonic. Tr. II 240. Sonic was chosen because Hamilton's brother worked there. Tr. II 251. The trio used Solomon's car because Hamilton's car would be recognized by employee's at the Sonic (he used it to pick up his brother from work). Tr. II 240. Solomon went along with them because she needed money for her daughter's birthday present. Tr. II 251.

Solomon acted as a sort of getaway driver, choosing to stay in the car while Hamilton and Hess got out and went towards the Sonic. Tr. 240-41. According to Solomon, Hess had a tire tool and was dressed in black, as was Hamilton who also wore a ski mask. Tr. II 246-47.

After what seemed like an hour to Solomon, the Hamilton and Hess came

running back to the car, jumped inside, and told her to drive. She noticed that Hess had some money. Tr. 245-47. She drove back to the apartment of Hess's sister where they divided the money, and she received about \$120.00. Tr. II 248. Solomon knew the robbery victim, Michael King, because she had worked with him since 2003. Tr. II 251.

After Solomon testified, the jury heard from Hamilton, who took the stand and told the jury that he knew Hess through Solomon because they were seeing each other. Tr. II 276. He also recalled hanging out at the apartment of Hess's sister, along with Hess and Solomon. Tr. II 277.

He testified that he remembered participating in the robbery of the Sonic with two other people, but that he could provide no other useful information about it because he was too intoxicated to recall details of the event. Tr. II 278. When Hamilton was asked directly if Hess had participated in the robbery, he was unable to confirm this. He did not confirm in any way that Hess participated in the robbery.

However, he admitted to signing his plea paperwork in which he admitted assisting Hess in the robbery of Michael King at the Sonic; although he admitted also that he had not read his plea paperwork when he signed it and was unaware that he had involved Hess. Tr. II 291.

The victim in this case, Michael King, was blind in one eye at the time of the

robbery due to a previous, unrelated, assault that he had suffered in 1986. Tr. III 327-28 (he had been hit on the head with a nightstick in Arizona while auditing a restaurant there).

King testified that on March 8, 2007, he had been working at Sonic, and he was in fact one of the partners in the business. Tr. III 328-29. On this night, King was closing up, which usually involved three employees being present, but there were computer problems that day so he decided to send the cook and the carhop home for the day while he closed. Tr. III 329.

As King left the Sonic alone, he turned around to put his key in the lock to finish closing the store when a hand caught the door before it could close. King turned around and a man was there. Tr. III 329. The man asked King for his deposits, which he had on his person and amounted to between \$2,300.00-\$2,400.00. Tr. III 331.

The robbers took King around to the back of the store, made him lie down and take off his glasses, and tied him up and took the keys. Tr. III 337-38. The robbers then left King subdued, but unharmed. He eventually loosed himself, used his spare key to enter the store, and called the police. Tr. III 341.

Later, King met with Det. Bob Little and was shown a couple of different photo line-ups. Tr. III 348. King claimed to have identified Hess as person number 5 in

photo line-up “C.” Tr. III 349-50. In another line-up, King identified the accomplice. Tr. III 351-52. He knew that this person had a brother named Shawn who worked at Sonic. Tr. III 354. King also knew Solomon because she had worked for him in the past, but she never stayed very long because she had problems with drugs and alcohol. Tr. III 355.

Finally, during closing arguments, the State again reminded the jury that Jessica Solomon had no deal with the State in exchange for her testimony: “But she came in here and she told you, she even admitted on the stand there is no deal, we have no deal.” Tr. III 450.

SUBSEQUENT FACTUAL DEVELOPMENTS

As Hess argued below, in order to provide context to the importance of the role of Jessica Solomon to the State in prosecuting Hess, it is important for the Court to realize that this case was only one of *four* cases where the State had charged Hess with crimes—and Jessica Solomon was the State’s star witness in all four.

In addition to this case, the State had prosecuted Hess in *State v. Hess*, No. CF-2007-2643, *State v. Hess*, No. CF-2007-2334, and *State v. Hess*, No. CF-2007-2903 (this was a stolen vehicle charge that was dismissed as part of a plea bargain in case number CF-2007-2334), all out of Tulsa County.

In fact, prior to the jury trial in the current case in October, 2008, Hess had a

jury trial in CF-2007-2643, only a month before in September, 2008, in which Solomon had testified against Hess as the State's star witness; and she was prepared to testify against him in yet a third trial in No. CF-2007-2334, but Hess ended up pleading guilty in that case.

Thus, during the time frame that the current case was being prosecuted, there was actually a cluster of four cases against Hess, all four of which involved Jessica Solomon as the star witness for the State.

Hess recalls that, although Solomon was a charged co-defendant in his case as her trial testimony and the trial record reflect, Solomon was given an O.R. bond pending trial, on which she remained free for almost *two years* waiting to testify against Hess. *See* Post-Conviction Application, attached Exhibit "2" at ¶ 12 (affidavit of Darrell Hess).

The record also shows that the testimony of Mr. King in this case was along the lines that Solomon had worked for him in the past, but she was not a good employee because she had problems with drugs and alcohol; and the testimony of Solomon herself that she used meth with Hess and Hamilton at the apartment. *See* Tr. II 238-39; Tr. III 355.

In addition, in CF-2007-2643 (another robbery case), when police raided Solomon's apartment, they found her pre-school aged daughter, along with stolen

items in the apartment, drug paraphernalia, a stolen car, as well as firearms in her car. See Trial Transcript in that case at Tr. 286-88, 289, 293-99, 315-17, 340-43, 387-93, 469-70.²

Thus, it is obvious that there were many more criminal charges that Solomon could have faced had the State been intent on prosecuting her to the fullest, not to mention the issue of custody of her pre-school aged child amid ongoing and serious criminality, in addition to her own admitted drug use.

Although Solomon and the prosecutor were careful to tell the jury that she had no formal deal, it is clear that the State had provided legal benefits to her in exchange for her testimony against Hess in the form of non-prosecution for obvious criminal conduct (her admitted drug use, keeping her child in a drug/contraband filled apartment) as well as an O.R. bond on a serious crime such as conjoint robbery for which she was an actual charged defendant in this case. See Tr. III 447 (State closing argument: "The defendant on March 8, 2007, along with Josh Hamilton and Jessica Solomon, decided to rob Michael King.") This never occurs without the consent of the State in such a case.

² Petitioner refers to, and incorporates, the entire trial record in *State v. Hess*, No. CF-2007-2643 (Tulsa Co.), *State v. Hess*, No. CF-2007-2334 (Tulsa Co.), and *State v. Hess*, No. CF-2007-2903 (Tulsa Co.), to include the Original Record and the trial transcripts. These documentary items are part of the court file and in possession of the Clerk of this Court.

Finally, there is the disposition of her own criminal charge in this case, which was a very short deferred sentence. Although Solomon was a charged co-defendant in this case, all traces of her involvement as a defendant have been wiped from the official records and court docket. *See* Post-Conviction Application, attached Exhibit “3” (docket in CF-2007-2646).

JULIE BALL

Julie Ball was an assistant Public Defender in Tulsa County who was an attorney assigned to represent Hess early on in this case, prior to and at the preliminary hearing. *See* Post-Conviction Application, attached Exhibit “3” at page 4 (docket entry showing her appearance on June 13, 2007); Exhibit “4” (transcript cover for preliminary hearing).

Hess recalled that he met with Ball, as his counsel in this case, prior to the preliminary hearing on more than one occasion and had discussions with Ball about the discovery material (police reports and witness statements) provided by the State, defense strategy and the facts of the case, and specifically witness statements by Jessica Solomon, who as outlined above, was the State’s star witness in this case and the other three cases as well. *Id.* attached Exhibit “2” (affidavit of Darrell Hess).

A review of social media has indicated that Jessica Solomon has changed her life around for the better, and she thanked one person in particular for making her life

better: Julie Ball. *Id.* attached Exhibit “5” (letter with attachments).

Hess asserts that Julie Ball, after representing *him*, represented Jessica Solomon and worked out a plea deal for her in this case that resulted in a sentence for which she was eligible for expungement.

Counsel for Hess wrote a letter to the District Attorney and the Public Defender for Tulsa County requesting any legal documents in their respective files indicating the identity of the lawyer who represented Jessica Solomon in this case. *Id.* attached Exhibit “5.”

The Public Defender responded that they have not retained files from this case. The District Attorney did not respond in any way.

SUPPLEMENTAL RECORD

Petitioner sought an order from the district Court unsealing that portion of this case that dealt with co-defendant Jessica Renee Solomon. That motion was granted and counsel for Petitioner acquired those records from the Court Clerk and moved to supplement the post-conviction record with those sealed records, which was granted. *See* Reply to Supplemental Response and Order Sealing exhibit, filed in the district court on September 6, 2022.

These sealed records, acquired by counsel during these post-conviction proceedings by order of the district court, show that Public Defender Julie Ball, who

had represented Petitioner initially, ended up as counsel of record for Jessica Solomon, Petitioner's co-defendant and the State's star witness against him in this case at trial. *See* Reply to Supplemental Response, attached Exhibit #1 (sealed pleadings regarding Jessica Solomon, including the docket sheet entry May 27, 2009; Order of Deferred Sentence filed May 29, 2009; Plea of Guilty Summary of Facts Form filed May 29, 2009; Acknowledgment of Receipt of Discovery; Waiver of Jury trial filed August 7, 2007; and Waiver of Preliminary hearing filed August 2, 2007).

These newly discovered records corroborate the basic claim of the Petitioner: after Ms. Ball had represented him in this case and acquired confidential information from him, she then switched horses, in the same case, and ended up representing the State's star witness, Jessica Solomon, against Petitioner—in the trial of the same case where they were both charged as co-defendants (and in subsequent cases).

In addition, these records show that Jessica Solomon was given a benefit by the State in exchange for her cooperation and testimony in the form of an O.R. bond in this serious felony case where she was a charged co-defendant, and ultimately a short deferred sentence with unsupervised probation on a reduced/amended charge of Accessory after the fact.

No defendant would get that deal in a case like this where she was actively involved in the robbery based upon her own testimony; and the prosecutors who

worked these cases, all four of them, would have known about the deal that she had received in exchange for her testimony against Petitioner; and they all would have known that Julie Ball had represented Hess and then switched to represent the State's star witness against him--and none of them informed the trial court about it.

The records also show that Solomon did not receive this deal until after all of Petitioner's case were over, which indicates intent by the State to use her against Petitioner in all of his cases. She also failed to appear two times and suffered no consequences for it, which is another favor/benefit she received by the State; and she also got a free public defender lawyer when she should not have been entitled to one.

Finally, it should be recognized that although she pled to the lesser crime of Accessory after the fact, this is *inconsistent* with her trial testimony which shows that the robbery was formulated *with her prior to the fact*, that she discussed it while they smoked meth, and that she actively drove them to the scene.

Thus, even though this is Hess's third application for post-conviction relief, it is based upon newly discovered evidence (the trial court record in this case relating to Jessica Solomon) undiscoverable to him since it was under seal.³

³ The State made the claim below that Petitioner had raised this claim in prior post-conviction proceedings, but he had not; and the State has not provided any pleading where such a claim was raised, and although Petitioner had filed previously *pro se* post-conviction applications, he had not in fact raised the claims he now raises in this post-conviction application, nor could he because the records concerning

PROPOSITION I

TRIAL LEVEL COUNSEL FOR PETITIONER LATER REPRESENTED THE STATE'S STAR WITNESS AGAINST PETITIONER RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO A CONFLICT OF INTEREST.

A. Standard of Review.

Where the trial court has issued findings of fact and conclusions of law this Court reviews the factual findings under an abuse of discretion standard, and the conclusions of law *de novo*. See *King v. State*, 2008 OK CR 13, ¶ 4, 182 P.3d 842 (“While we review findings of fact under an abuse of discretion standard, we review questions of law *de novo*.”)

B. Merits.

The newly discovered evidence in this case evidences a clear attorney conflict and a constitutional violation which constitutes a breakdown in the adversarial system.

An attorney in the Public Defender's Office, Julie Ball represented Hess early on in this case, prior to and at the preliminary hearing (where Jessica Solomon was actually endorsed as a State witness), discussed discovery material with him, including statements by Jessica Solomon (in all four cases pending against him at that

Jessica Solomon had been sealed and expunged when she completed her deferred sentence.

time), the facts of the case, defense strategy, and gave advice to Hess on how to proceed.

After this interaction with Hess, she then ceased being his counsel and represented Jessica Solomon in the same case. This constitutes an intolerable conflict of interest in violation of the Sixth and Fourteenth Amendments. *See Wood v. Georgia*, 450 U.S. 261, 268-72, 101 S.Ct. 1097, 1101-03, 67 L.Ed.2d 220 (1981) (the guarantee of conflict-free counsel extends to any situation in which counsel for the accused owes conflicting duties to the accused and to another person).

In *Holloway v. Arkansas*, 435 U.S. 475, 488, 98 S.Ct. 1173, 1180, 55 L.Ed.2d 426 (1978), the Supreme Court held that improper joint representation in a criminal case requires automatic reversal if a timely objection is made.

Here, Hess had no opportunity to object because he was never informed about the subsequent representation of Solomon by Ball, and had he known about it, he would have objected. *See Post-Conviction Application*, attached Exhibit "2" at ¶ 6. Thus, he should be entitled to the automatic reversal rule of *Holloway*.

In *Allen v. State*, 1994 OK CR 30, 874 P.2d 60, the Court confronted a situation similar to what happened to Hess, where there was successive representation that generated a conflict. The Court recognized that this situation implicates the ongoing duty of loyalty to the client, even after the representation has concluded. *Id.* ¶ 11.

The Court also held that since there was no indication in the record that the conflict was disclosed to the accused, and he was thereby given the opportunity to object, he was “effectively precluded from lodging a timely objection.” *Id.* ¶ 14. Thus, the accused was not required to show an adverse effect from the actual conflict of interest, and thus prejudiced is presumed and reversal is mandated.⁴ *Id.*

Thus, application of the rules of *Holloway* and *Allen* compel the conclusion that the conflict in Hess’s case warrants automatic reversal without a showing of prejudice. Ball had an actual conflict representing first Hess, and then Solomon—two charged co-defendants in the same case; and Hess was not made aware of the conflict, had no opportunity to object to it, and would have had he been made aware of it.

In *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980), the Supreme Court discussed potential, rather than actual, conflicts of interest of counsel in cases involving multiple representation where no objection is made at

⁴ The State tried to argue below that Hess was on notice because it was mentioned in two places in the trial transcript that Julie Ball was Solomon’s lawyer, but Julie Ball never was in court when Solomon testified, thus neither Hess nor his new counsel could have seen her; one of the times was a bench conference when Hess could not have heard it in any event, and as the proffered testimony of trial counsel, Brian Martin, shows, he was unaware that Julie Ball had previously represented Hess and it would not have alerted him to any problem. See Offer of Proof in Support of Post-Conviction filed October 19, 2022. In any event, the district court did not consider this argument, never made any findings about it in the written Order, and did not make a ruling related to the State’s assertion, thus it should not be considered by this Court here.

trial. In such cases, the accused must have the opportunity to show that potential conflicts affected adversely his right to a fair trial. *Id.* 348 (“In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.”)

The Court in *Cuyler* made clear that “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.” *Id.* 349-50. Since Ball in fact represented Hess first, then Solomon, an actual conflict has been shown.

The situation with Hess is that his counsel acquired confidential and privileged information from him about the facts and circumstances of the State’s accusations—then represented the star witness for the State, armed with the knowledge that she had acquired from Hess.

The conflict was not merely potential. Solomon actually testified against Hess in this case, and also in the case before, and was prepared to testify against him in a third and fourth case—and surely would have done so had Hess not pled guilty. Ball was able to prepare Solomon to testify against Hess in an unconstitutional manner because she was privy to information from Hess himself.

The remarkable aspect of Hess’s case is that the district court below, in its

written Order denying relief, did not mention any of the evidence pertaining to Julie Ball's representation of Jessica Solomon that it had ordered unsealed and which was subsequently presented under seal for the district court to consider as a sealed attachment to the Reply filed by Hess on September 6, 2022.

Rather, the district court simply echoed the initial objection of the State, prior to the new evidence being unsealed, that Hess's suspicion's about Ms. Ball representing Ms. Solomon after representing him were inadequate as a factual basis. The district court appears to completely ignore or be oblivious to the sealed record establishing as a fact that such representation by Ms. Ball, alternating between Hess and Ms. Solomon, did occur in this case.

In *United States v. Sheperd*, 44 F.4th 305 (5th Cir. 2022), the Fifth Circuit granted relief on similar facts. This was a Medicare fraud case where Sheperd's pretrial counsel was also representing one of the Government's star witnesses.

This was a conflict that the Government knew about, which affected adversely counsel's representation of Sheperd. The Fifth Circuit had little hesitation in reversing the conviction and remanding for a new trial, as this Court must do in Hess's case. Hess has presented evidenced of an actual conflict with demonstrable prejudice to Hess. Thus, under either standard as established by *Holloway* or *Cuyler*, Hess received ineffective assistance of counsel and his case must be reversed.

PROPOSITION II

THE RECORD INDICATES THAT THE STATE IN FACT OFFERED ITS STAR WITNESS A LEGAL BENEFIT IN EXCHANGE FOR HER TESTIMONY AND ASSERTED OTHERWISE AT TRIAL.

A. Standard of Review.

As with Proposition I, where the trial court has issued findings of fact and conclusions of law, this Court reviews the factual findings under an abuse of discretion standard, and the conclusions of law *de novo*. See *King v. State*, 2008 OK CR 13, ¶ 4, 182 P.3d 842 (“While we review findings of fact under an abuse of discretion standard, we review questions of law *de novo*.”)

B. Merits.

As the trial record indicates, the State made a big production out of the asserted fact that Jessica Solomon, who was a charged co-defendant along with Hess and Hamilton but who had not yet entered a plea at the time of her testimony against Hess at trial, was testifying against Hess without the benefit of any plea deal. The State told the jury this during opening statements (Tr. II 213), during closing arguments (Tr. III 450), and the State elicited testimony regarding the lack of any deals from Solomon herself when she was on the stand (Tr. II 235-36).

Had the State made any deals with Solomon in exchange for her testimony, it

would have to have disclosed this fact to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963) (requirement to disclose exculpatory information); *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985) (extending the *Brady* rule to impeachment evidence).

However, formal plea “deals” (which would be impeachment evidence under *Brady*) are not all that is covered by the *Brady* rule. Tacit understandings of favorable treatment, even if not written in formal deals, require disclosure to the defense. *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009) (“Like the majority of our sister circuits, we conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness). As the Tenth Circuit held in *Douglas*, “a deal is a deal—explicit or tacit.” 560 F.3d at 1186.

Hess finds it inconceivable that the State did not have at least a tacit understanding with Solomon that she would get a good deal if she cooperated and testified against Hess. Until now, Hess has not been able to support his assertion, but the newly unsealed record in this case pertaining to Jessica Solomon show that the State allowed her to secure an O.R. bond on a robbery charge, admitted to using meth on the stand for which she was not charged, had drug/alcohol problems, and as it came to light in a companion case in CF-2007-2643, she had a pre-school aged daughter at her apartment along with stolen goods, a stolen car, and drug

paraphernalia—for which she suffered no consequences as long as she testified against Hess.

Even in the absence of a formal, written plea deal, it is clear that the State gave Solomon overt benefits in exchange for her testimony that were not offered to Hess or Hamilton. To make matters worse, the State then made a big production at trial denying that it had given Solomon any special treatment. In Hess's view, the State's representation that there were no deals was not true, and the record shows this.

Again, even after the district court granted Hess's motion to unseal the trial records pertaining to Ms. Solomon, the court failed to consider any of them, choosing instead to deem this claim "procedurally barred" and claiming that Hess had not provided "sufficient reason" why he had failed to assert this ground in a prior application. *See Order at 8.*

The sufficient reason is because Ms. Solomon had completed her deferred and her trial records containing the beneficial treatment she had received from the State had been ordered sealed, and thus were inaccessible to Hess until he secured a court order in this post-conviction proceeding unsealing them; and then he presented them to the district court which apparently did not consider them. This is not a reasoned analysis by the district court. Constitutional error occurred here and Hess has shown the evidentiary support for it.

The conduct of eliciting testimony that there were no deals, when there in fact was some kind of special treatment, as prosecutors did in Hess's case, is a violation of clearly established federal law affording basic constitutional guarantees of fundamental fairness and Due Process of law under the Fourteenth Amendment. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

The Supreme Court has held that in evaluating *Napue* errors, courts apply a less demanding standard of review: whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); accord *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006). This materiality standard is, in effect, a form of harmless error review, but a far lesser showing of harm is required under *Napue*'s materiality standard than under ordinary harmless error review. *See Smith v. Phillips*, 455 U.S. 209, 220 n.10, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (describing the "materiality requirement" that applies to *Napue* and *Giglio* claims).

Napue is directly on point. The prosecutor sponsored a star witness and elicited from that witness that the witness had received no promise of consideration in return for his testimony. This turned out to be false, since the prosecutor had in fact promised him consideration, but did not correct the witness on the stand. The Supreme Court found this situation to be a violation of Due Process.

In essence, a conviction obtained through the use of false evidence, known to be false by the State, must fall under the Fourteenth Amendment. *Napue*, 360 U.S. at 269. In fact, even in the absence of an agreement, the Eighth Circuit has held that the fact that a sentence commutation hearing was to take place soon after the appearance of the witness a trial constituted exculpatory material under *Brady*. See *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989).

The error was that the State told the jury that the witness had nothing to gain from his testimony. *Id.* Similarly, Solomon clearly had *something* to gain by testifying against Hess and cooperating with the State. She had admitted to criminal activity, was granted an O.R. bond for a serious felony charge, was in serious jeopardy of losing custody of her child, and she was not sentenced until all of Hess's cases were concluded and she was no longer useful to the State. This is the essence of a plea deal.

Under *Napue*, *Brady*, and *Bagley*, it was error for the State to argue and state that Solomon had no deal when she clearly received a benefit from her testimony, ultimately concluding with a deferred sentence which has since been expunged and all traces of her involvement in this case erased from the public record. This violated the Fourteenth Amendment and Hess's conviction must be reversed.

PROPOSITION III

THE CUMULATIVE EFFECT OF THE ERRORS BELOW DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS.

A. Standard of Review.

This Court reviews claims of cumulative error as a question of law *de novo*.

See Simpson v. State, 2010 OK CR 6, ¶ 55, 230 P.3d 888.

In *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561, this Court stated:

“When a review of the entire record reveals numerous irregularities that tend to prejudice the rights of the defendant, and where a cumulation of said irregularities denies the defendant a fair trial, the case will be reversed, even though one of said errors standing alone would not be ample to justify reversal.”

B. Merits.

On direct appeal, this Court found legal error by making Hess stand in front of the jury to present his height and weight. *See* Summary Opinion on Direct Appeal at 1-2. This Court deemed this legal error harmless on the basis that the conviction of Hess “did not rest solely on the victim’s identification” and cited the fact that Hess’s co-defendants testified against him. *Id.*

However, as Hess presented below, his trial counsel was conflicted because she represented one of Hess’s co-defendants (the star witness Jessica Solomon), and in

fact Solomon had some sort of "deal" with the State either in the form of an express agreement or at least a tacit understanding that she would be rewarded for her testimony which was denied by Solomon and kept from the jury for consideration of her truthfulness.

Thus, under these circumstances Hess asserts that the height/weight error found by this Court on direct appeal can no longer be deemed harmless and, combined with the two errors outlined above, must result in reversible error because they implicate directly the testimony of co-defendant Solomon.

The district court did not address the substance of this claim at all, choosing instead to deem it procedurally barred and based on speculation and self-serving statements. *See Order at 8.*

This is not accurate. The claim is based upon the sealed records pertaining to Jessica Solomon that the district court ordered unsealed and accessible by counsel for Hess, which the district court failed to consider or mention in any way.

Under cumulative error analysis, the aggregate effect of legal errors are sufficient to warrant reversal and/or modification of sentence even if this Court is convinced that any one error does not warrant relief. *See Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561 ("When a review of the entire record reveals numerous irregularities that tend to prejudice the rights of the defendant, and where

a cumulation of said irregularities denies the defendant a fair trial, the case will be reversed, even though one of said errors standing alone would not be ample to justify reversal"); *see also Chandler v. State*, 1977 OK CR 324, ¶ 13, 572 P.2d 285; *Lovell v. State*, 1969 OK CR 177, ¶ 13, 455 P.2d 735; U.S. Const. amend. XIV; Okla. Const. art. II, § 7.

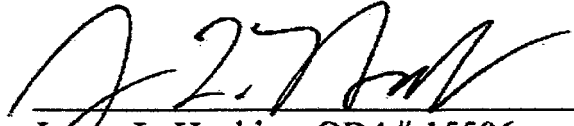
In Hess's case, the irregularities were not only numerous, but also extremely prejudicial warranting reversal and remand for a new trial. *See Mitchell v. State*, 2005 OK CR 15, ¶82, 120 P.3d 1196 (We remind the State and the trial courts that where numerous irregularities occur during the course of the trial that tend to prejudice the rights of the defendant, reversal will be required where the cumulative effect of all the errors denied the defendant of a fair trial. *Lockett v. State*, 2002 OK CR 30, ¶43, 53 P.3d 418, 431, *cert. denied*, 538 U.S. 982, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003)).

CONCLUSION

For the reasons stated above, Petitioner requests that this Court reverse the denial of post-conviction relief by the district court.

DATED this 6th day December, 2022.

Respectfully submitted,



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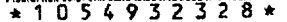
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on this 6th day of December, 2022, a true and correct copy of the foregoing was provided to the Clerk of this Court for service to the Attorney General.



James L. Hankins, OBA #15506



Ammonia NH_3

On July 14, 2021, Petitioner, through counsel, filed his third application for post-conviction relief, alleging (1) trial level counsel for Petitioner later represented the State's star witness against Petitioner resulting in ineffective assistance of counsel due to a conflict of interest (2) the record indicates that the state in fact offered its star witness a legal benefit in exchange for her testimony and asserted otherwise at trial, and (3) the cumulative effect of the errors below deprived Petitioner of his right to due process. The Honorable Clifford Smith, Associate District Judge, denied the application in an order filed on October 7, 2022. 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.

Post-conviction review is not a means for a second appeal. *Williamson v. State*, 1993 OK CR 24, ¶ 4, 852 P.2d 167, 169. Issues that were previously raised and ruled upon on direct appeal are

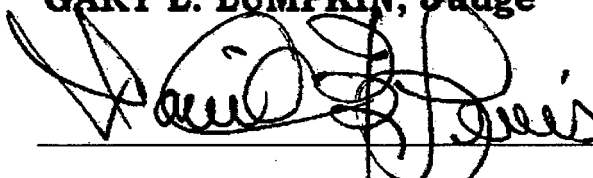
procedurally barred from further review under the doctrine of res judicata, and issues that were not raised previously on direct appeal, but which could have been, are waived. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973.

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.”). “This Court has consistently determined that failure to raise an alleged error, absent a showing of sufficient reason for failure to raise the issue, or a showing that the issue was inadequately raised in a prior direct appeal or application, waives the error, and bars it from future consideration.” *Berget v. State*, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081-82.

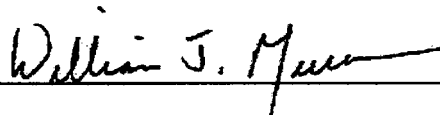
We do not reach the merits of Petitioner’s claims because the issues could have been raised in his direct appeal or previous post-conviction applications. As the district court found, Petitioner’s claims are waived. Although Petitioner claims the representation creating a conflict of interest was not known until the witnesses’ records were unsealed, they were readily available and public at the



GARY L. LUMPKIN, Judge

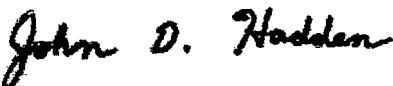


DAVID B. LEWIS, Judge



WILLIAM J. MUSSEMAN, Judge

ATTEST:



Clerk

PA