

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CARLOS CUESTA-RODRIGUEZ,)

Petitioner,)

-vs-)

STATE OF OKLAHOMA,)

Respondent.)

NOT FOR PUBLICATION

No. PCD-2007-1191

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 31 2011

**OPINION DENYING APPLICATION FOR
POST-CONVICTION RELIEF**

MICHAEL S. RICHIE
CLERK

A. JOHNSON, PRESIDING JUDGE:

Before the Court is Petitioner Carlos Cuesta-Rodriguez's original application for post conviction relief. Cuesta-Rodriguez was tried in the District Court of Oklahoma County, Case No. CF-2003-3216, and found guilty of First Degree Murder in violation of 21 O.S.2001, § 701.7. The jury imposed the death penalty after finding that the murder was especially heinous, atrocious, or cruel and that Cuesta-Rodriguez presented a continuing threat to society. See 21 O.S.2001, §§ 701.12(4) and (7). Judgment and Sentence were imposed by the district court in accordance with the jury's verdict and Cuesta-Rodriguez appealed. We affirmed Cuesta-Rodriguez's conviction and sentence in *Cuesta-Rodriguez v. State*, 2010 OK CR 23, 241 P.3d 214, and denied his petition for rehearing in a published order at 2010 OK CR ___, ___ P.3d___.

Cuesta-Rodriguez raises four propositions of error in this application. None of these claims have merit. Under the Capital Post-Conviction Procedure

Act, the only claims that may be raised are those that “[w]ere not and could not have been raised in a direct appeal” and that also “[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” 22 O.S.Supp.2006, § 1089(C)(1) and (2). “This Court will not consider issues which were raised on direct appeal and are barred by *res judicata*, or issues which have been waived because they could have been, but were not, raised on direct appeal.” *Cummings v. State*, 1998 OK CR 60, ¶ 2, 970 P.2d 188, 190. The burden is on the applicant to show that his claim is not procedurally barred. See 22 O.S.Supp.2006, § 1089(C).

1.

Cuesta-Rodriguez claims in this application, as he did on direct appeal, that his Sixth Amendment right to confront witnesses against him was violated by the admission of certain testimonial hearsay evidence. Cuesta-Rodriguez specifically challenges the testimony of Dr. Jeffrey Gofton, the Chief Medical Examiner, who testified in place of Dr. Fred Jordan, the medical examiner who performed the autopsy on the victim, Olympia Fisher, but had retired by the time of trial. Dr. Gofton, who did not participate in the autopsy, testified about Dr. Jordan’s examination of Fisher’s body and gave his own opinions on Fisher’s injuries and cause of death based on his recitation and understanding of Dr. Jordan’s observations as recorded in Dr. Jordan’s autopsy report. Cuesta-Rodriguez contends that because the

autopsy report was prepared by Dr. Jordan, not Dr. Gofton, he was denied his constitutional right to confront Dr. Jordan and challenge the observations, findings, and conclusions contained in Dr. Jordan's report. On direct appeal, we found that certain portions of Dr. Gofton's testimony about Dr. Jordan's report were improperly admitted in violation of Cuesta-Rodriguez's Sixth Amendment rights under United States Supreme Court decisions in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S.____, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). See *Cuesta-Rodriguez*, 2010 OK CR 23, ¶¶ 28-47, 241 P.3d at 226-231. Nevertheless, despite finding constitutional error, we determined the error was harmless. This issue is *res judicata*. Post-conviction relief is not warranted.

2.

Cuesta-Rodriguez claims that trial counsel was constitutionally ineffective for failing to adequately investigate and present mitigating evidence during the sentencing phase of his trial. Specifically, Cuesta-Rodriguez contends that trial counsel was ineffective for failing to locate Cuesta-Rodriguez's cousin Enrique Valles, who lives in Florida, and then present him as a witness. According to Cuesta-Rodriguez, Mr. Valles would have provided powerful mitigating evidence by testifying about Cuesta-Rodriguez's childhood in Cuba.

In an affidavit proffered with Cuesta-Rodriguez's application for post-conviction relief Mr. Valles attests to growing up with Cuesta-Rodriguez in Santiago Cuba. Mr. Valles states that Cuesta-Rodriguez's family was very poor and his home life was violent. According to Mr. Valles, Cuesta-Rodriguez's stepfather consumed alcohol every day and regularly beat Cuesta-Rodriguez's mother. Mr. Valles describes one instance when Cuesta-Rodriguez's mother had to be hospitalized after his stepfather hit her in the head with a bottle. Mr. Valles also recounts a childhood incident when he and Cuesta-Rodriguez were in a bad bus crash and were thrown through the bus windshield. According to Mr. Valles, after Cuesta-Rodriguez received emergency surgery, he was in a coma for some time, and, according to Mr. Valles, Cuesta-Rodriguez's mother told him that she did not think Cuesta-Rodriguez acted the same after the incident. Mr. Valles also recounts that when Cuesta-Rodriguez was eleven or twelve years old, he was sexually abused on a daily basis by a man in the neighborhood. Additionally, Mr. Valles states that Cuesta-Rodriguez smoked marijuana and drank alcohol by the age of seven and that he became heavily involved in drugs when he came to the United States. Mr. Valles states further that while Cuesta-Rodriguez was married in Cuba he maintained a relationship with a wealthy gay man who provided him with drugs and alcohol. According to Mr. Valles, Cuesta-Rodriguez was out of control and drunk every day during this period.

Cuesta-Rodriguez also proffers an affidavit of attorney Catherine Hammarsten who represented Cuesta-Rodriguez at trial. According to Ms. Hammarsten, she and her investigator attempted to locate Cuesta-Rodriguez's cousins here in the United States. Ms. Hammarsten notes that she sent letters to multiple people with different names, hoping to find any of Cuesta-Rodriguez's cousins. Ms. Hammarsten states her belief that her attempts to locate Mr. Valles were unsuccessful because she did not have the correct spelling for his last name. Ms. Hammarsten declares that she believes that Mr. Valles' testimony would have been relevant and that she would have presented it as mitigating evidence during the sentencing phase had she been able to locate him.

Cuesta-Rodriguez acknowledges that despite not having located Mr. Valles, his defense team did present deposition testimony from a number of family members from Cuba during the sentencing phase.¹ Cuesta-Rodriguez also acknowledges that jurors were shown videotaped pleas for mercy from some of Cuesta-Rodriguez's relatives in Cuba, and that two of his aunts, a former employer, and a co-worker all testified in-person on his behalf during the sentencing phase. Mr. Valles' affidavit adds few new details about Cuesta-Rodriguez's life in Cuba beyond those already provided by this evidence.

Seeming to acknowledge this, Cuesta-Rodriguez argues that while the evidence presented by "written depositions was helpful, it wasn't as effective as

¹ The testimony was read to jurors by a translator.

it would have been had it been presented as live emotional testimony” (Application for Post Conviction Relief at 22). According to Cuesta-Rodriguez, “had the emotionally charged testimony of Mr. Valles, regarding the horrific violence and abuse suffered by Mr. Cuesta as a child, been presented to the jury in person, it could have made the difference between life and death” (Application for Post Conviction Relief at 23). This might be true, but to prevail on his claim that trial counsel was constitutionally ineffective for failing to adequately investigate and present mitigating evidence, Cuesta-Rodriguez must show that: (1) trial counsel’s performance was deficient, and (2) he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We are not persuaded that this claim meets either criterion.

First, with regard to trial counsel’s allegedly deficient performance, “[w]hen a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690, 2066. “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s performance.” *Id.* at 691, 2066.

In this instance, Cuesta-Rodriguez's proffered evidence, the affidavit of attorney Catherine Hammarsten, rebuts his assertion that she failed to properly investigate and present mitigating evidence (i.e., locate Mr. Valles and present his testimony about Cuesta-Rodriguez's life in Cuba). Ms. Hammarsten's affidavit shows that she understood the potential value of testimony by Cuesta-Rodriguez's cousins and that she undertook some reasonable, although ultimately unsuccessful efforts, to locate those cousins, including Mr. Valles. In addition to the evidence proffered with this application, the trial record shows that despite being unable to locate and obtain testimony from any family members in the United States, other than two aunts, Cuesta-Rodriguez's defense team expended considerable effort by traveling to Cuba to locate family members and obtain similar mitigating evidence to present by the only available means (e.g., written deposition, videotaped statements). Considering the circumstances existing at the time trial counsel investigated Cuesta-Rodriguez's mitigation case, and applying a heavy measure of deference to counsel's actions, as we must under *Strickland*, we find that trial counsel's actions were objectively reasonable. Trial counsel's performance was not constitutionally deficient.

Second, even if it is assumed that trial counsel's failure to locate Mr. Valles and present his testimony in mitigation was objectively unreasonable, and therefore constituted deficient performance, Cuesta-Rodriguez fails to show that he was prejudiced by that deficient performance. To show prejudice

sufficient to prevail on an ineffective assistance claim, “[i]t is not enough for the defendant to show that the errors had some **conceivable** effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067 (emphasis added). Rather, the defendant must affirmatively show prejudice. *Id.* That is, the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 2068. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Here, Cuesta-Rodriguez acknowledges that the deposition and video testimony of his Cuban relatives was “helpful” as part of his mitigation case, but contends only that “it wasn’t as effective as it would have been had it been presented as live emotional testimony” (Application for Post Conviction Relief at 22). Cuesta-Rodriguez asserts, therefore, that “had the emotionally charged testimony of Mr. Valles, regarding the horrific violence and abuse suffered by Mr. Cuesta as a child, been presented to the jury in person, it could have made the difference between life and death” (Application for Post Conviction Relief at 23).

While it is conceivable that Mr. Valles’ testimony could have made a difference in the jury’s sentencing decision based solely on the fact that it might have been presented in person, Cuesta-Rodriguez’s burden under *Strickland* is not to show that the alleged error by counsel might have had some “conceivable” effect on the outcome. Rather, his burden is to show to a

reasonable probability that but for the alleged error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-694, 104 S.Ct. at 2067-2068. Merely asserting that Mr. Valles live testimony “could” have resulted in a different sentence does not show to a reasonable probability that but for the fact that Cuesta-Rodriguez’s difficult childhood was portrayed by deposition rather than live testimony, his sentence would have been different. Consequently, Cuesta-Rodriguez fails to show prejudice. He has not shown, therefore, that trial counsel was constitutionally ineffective.

3.

Cuesta-Rodriguez claims his death sentence violates the Eighth Amendment’s ban on cruel and unusual punishment because, as a severely mentally ill person, his execution serves no retributive or deterrent function. Cuesta-Rodriguez argues that mentally ill persons such as himself should be exempted from the death penalty much as juveniles and the mentally retarded are. Cuesta-Rodriguez provides no explanation for why this claim was not raised on direct appeal. The claim is therefore waived. 22 O.S. 1089(C); *Cummings*, 1998 OK CR 60, ¶ 2, 970 P.2d at 190. Nevertheless, even if we were to consider the merits of the claim, it still fails.

It is the law that the execution of a convict “whose mental illness prevents him from comprehending the reasons for the penalty or its implications” constitutes cruel and unusual punishment under the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399, 417, 106 S.Ct. 2595, 2605, 91

L.Ed.2d 335 (1986). Cuesta-Rodriguez has not demonstrated, however, that any mental illness impaired him to this degree, although he did present evidence of mental illness through the testimony of Dr. James Choca, Ph.D., a psychologist who diagnosed him with borderline personality disorder and depression. Having been presented with this evidence, but still imposing the death penalty, the jury apparently found that Cuesta-Rodriguez's mental illness did not mitigate his moral culpability. See *Grant v. State*, 2009 OK CR 11, ¶ 61, 205 P.3d 1, 24 (explaining that after defendant presented some evidence of mental illness as mitigating circumstance, "[t]he jury apparently found that whatever mental illness [he] might have, it did not mitigate his moral culpability or blame"). We must accept this determination. *Id.* (citing *Lockett v. State*, 2002 OK CR 30, ¶ 42, 53 P.3d 418, 431). Thus, even when considered on the merits, this claim does not warrant relief.² *Id.*

² Cuesta-Rodriguez refers us to a proposal by the American Bar Association's Section of Individual Rights and Responsibilities made in 2003 that a defendant should not be sentenced to death if, at the time of the offense, he had a "severe mental disorder or disability that significantly impaired [his] capacity to (a) appreciate the nature, consequences or wrongfulness of [his] conduct, (b) exercise rational judgment in relation to conduct, or (c) to conform [his] conduct to the requirements of the law" (Application for Post Conviction Relief at 26 (citing Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 St.Louis U. Pub.L.Rev. 283, 283-84 (2006))). This proposal is similar to Oklahoma's statutory definition for the insanity defense set out at 21 O.S.2001, § 152(4). Section 152(4) exempts from criminal liability "[m]entally ill persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." Cuesta-Rodriguez did not raise an insanity defense, and we are not convinced that the evidence of mental illness that he did present meets either the statutory criteria for an insanity defense or the ABA's proposed mental illness defense criteria. See *Grant*, 2009 OK CR 11, ¶ 60, n.38, 205 P.3d 1, 24, n.38 (rejecting application of ABA mental illness proposal by explaining that ABA's proposal "requires not just 'mental illness' – which is still an elusive and

4.

Cuesta-Rodriguez also claims that an accumulation of errors identified in his direct appeal and in this post-conviction application requires relief. Having determined on direct appeal that there was no accumulation of error sufficient to warrant reversal of his conviction or modification of his sentence, and having found no merit to any of the claims raised here, there is no basis for granting post-conviction relief on this cumulative error claim.

5.

Also pending before the Court in connection with this application is Cuesta-Rodriguez's combined motion for an evidentiary hearing and request to conduct discovery. A post-conviction applicant is entitled to an evidentiary hearing and discovery to supplement the record in support of his application only if "the application for hearing and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009). Additionally, in a post-conviction proceeding, we will remand for an evidentiary hearing only if we find there are "unresolved factual issues

mutable diagnosis – but mental illness to a degree that affects perception, volition, or judgment").

material to the legality of the applicant's confinement." 22 O.S.Supp.2006, § 1089(D)(5).

Cuesta-Rodriguez's motion does not identify what types of evidence or evidentiary materials he needs to develop or discover in an evidentiary hearing to support the allegations raised in his application. Nor does his motion suggest how any of these unspecified materials might be relevant to any allegation he raises in his application for post conviction relief, and no such nexus is obvious to us. Furthermore, based on the existing record and the affidavits proffered with Cuesta-Rodriguez's application for post-conviction relief, we fail to discern any disputed questions of fact that are material to Cuesta-Rodriguez's confinement. Cuesta-Rodriguez's requests for an evidentiary hearing and discovery are denied.

DECISION

Having reviewed Cuesta-Rodriguez's application for post-conviction relief, we conclude: (1) there exist no controverted, previously unresolved factual issues material to the legality of his confinement; (2) Cuesta-Rodriguez's grounds for review have no merit or are barred from review; and (3) the Capital Post-Conviction Procedure Act warrants no relief in this case. Accordingly, Cuesta-Rodriguez's Application for Post-Conviction Relief is **DENIED**. Additionally, Cuesta-Rodriguez's, Motion for Evidentiary Hearing and Request to Conduct Discovery is **DENIED**. Pursuant to Rule 3.15, *Rules of the*

Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEY FOR PETITIONER:

WYNDI THOMAS HOBBS
OKLAHOMA INDIGENT
DEFENSE SYSTEM
CAPITAL POST CONVICTION DIVISION
P.O. BOX 926
NORMAN, OK 73070

ATTORNEYS FOR THE STATE:

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
ROBERT WHITTAKER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st STREET
OKLAHOMA CITY, OK 73105

OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Result
C. JOHNSON, J.: Concur
SMITH, J.: Concur

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