IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

GEORGE A. CHRISTIAN, JR.,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2021-75

ORDER AFFIRMING DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

Petitioner, pro se, appeals from an order of the District Court of Oklahoma County denying him post-conviction relief in Case No. CF-1998-3134. On May 3, 1999, Petitioner pled guilty to kidnapping and, pursuant to a plea agreement, was sentenced to imprisonment for five years, all suspended. In a letter dated May 7, 1999, Petitioner indicated a desire to withdraw the plea. A hearing was scheduled for May 24, 1999, and then continued to June 2, 1999. At the June 2 hearing, the motion to withdraw the plea was stricken when, apparently, Petitioner failed to appear.

In the ensuing seventeen years, Petitioner made no attempt to withdraw the plea until he filed his initial post-conviction application in the District Court on November 1, 2016. He filed an amendment to

the application on May 8, 2020. The District Court denied the application in an order filed on January 7, 2021. We review the District Court's decision for an abuse of discretion. *Stevens v. State*, 2018 OK CR 11, ¶ 12, 422 P.3d 741, 745. 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 actions are not a substitute for a direct appeal. *Johnson v. State*, 1991 OK CR 124, ¶ 4, 823 P.2d 370, 372. Where, as here, a defendant does not seek to withdraw his plea using procedures set out in Rule 4.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), he is presumed to have waived the right to litigate that issue. In this regard, the District Court found that "the record indicates that Petitioner sought to invoke his right to appeal by requesting to withdraw his plea of guilty. For reasons that are unclear from the record, however, Petitioner abandoned his request. In so doing, he affirmatively waived his right to appeal." This conclusion does not involve an abuse of discretion. *See Maines v. State*, 1979 OK

CR 71, 597 P.2d 774, 775 (failure to perfect appeal creates the "appearance of one who has waived or deliberately bypassed his statutory direct appeal"). Petitioner has not established that he is entitled to an appeal out of time because he has failed to demonstrate that he was denied an appeal through no fault of his own. *See* Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021).

Petitioner's remaining claims are not properly before the Court because they could have been presented in a direct (certiorari) appeal and have been waived. *See Stevens v. State*, 2018 OK CR 11, ¶ 14, 422 P.2d 741, 746 (issues which could have been raised previously but were not are waived).

Petitioner has failed to demonstrate an abuse of discretion by the District Court. Therefore, the order of the District Court of Oklahoma County denying Petitioner's application for post-conviction relief in Case No. CF-1998-3134 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision. Petitioner's state remedies are deemed

exhausted on all issues raised in his petition in error, brief and any prior appeals. Rule 5.5, *Rules*, *supra*.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 23rd day of March, 2021.

DANA KUEHN, Presiding Judge

SCOTT ROWLAND, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden
Clerk

PA

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

GEORGE ALLEN CHRISTIAN, JR., Petitioner,	)	
v.	)	Case No. CF-1998-3134
THE STATE OF OKLAHOMA, Respondent.	)	

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

MATERIALS REVIEWED FOR DECISION

The Court has reviewed the following materials before making its decision:

1. Petitioner's pleadings for Post-Conviction Relief.
2. State's Response to Petitioner's pleadings and attachments thereto.

FINDINGS OF FACT

Petitioner was charged by Information with the following crimes in Oklahoma County Case No. CF-1998-3134: Count 1, Kidnapping, AFCF (2 or More); Count 2, Robbery in the First Degree, AFCF (2 or More); Count 3, Assault and Battery with a Dangerous Weapon, AFCF (2 or More); and Count 4, Forcible Oral Sodomy, AFCF (2 or More). On May 3, 1999, Petitioner, represented by counsel, entered a plea of guilty before the Honorable Susan Bragg. Pursuant to plea negotiations, the State agreed to dismiss the second page of the Information as well as the charges in Counts 2 through 4. The State further recommended that Petitioner be sentenced to five years imprisonment, to be suspended in full, on the remaining charge of Kidnapping in Count 1. The court accepted the plea and sentenced petitioner accordingly. Petitioner was advised of and acknowledged his right to appeal and the manner in which to invoke that right.

Appendix-B

By letter to the Court dated May 2, 1999, and filed on May 13, 1999, Petitioner, pro se, filed a timely application to withdraw his plea of guilty. Therein, Petitioner stated he entered his plea of guilty as a result being under a lot of pressure at the time and due to "unusual circumstances" occurring while being incarcerated while awaiting trial. The matter was originally set for hearing before the Honorable Susan Bragg on May 24, 1999. However, at that time the application was stricken by the court for failure to present.

On November 1, 2016, Petitioner, pro se, filed an Application for Post-Conviction Relief requesting an appeal out of time or other unspecified collateral relief. On the same date, Petitioner also filed an "Application for Appeal Out of Time," and a "Motion to Withdraw Plea of Guilty. Within his combined pleadings, Petitioner raises the following arguments:

1. Petitioner received ineffective assistant of counsel where counsel failed to conduct a reasonable pre-trial investigation and otherwise had a conflict of interest;

2. Petitioner's plea of guilty was entered without deliberation and through ignorance;

3. The prosecutor improperly withheld exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), improperly coerced the victim to testify at preliminary hearing, made improper statements during preliminary hearing, and failed to correct false testimony at preliminary hearing.

4. The trial Court made an unspecified decision that was based upon an unreasonable determination of the facts and contrary to clearly established federal law; and

5. Petitioner is entitled to an appeal out of time where he was not advised of his right to appeal and where counsel failed to automatically initiate an appeal following his plea of guilty.

CONCLUSIONS OF LAW

Petitioner asks this Court to consider the allegations of error presented and recommend that he granted an appeal out of time or grant him other unspecified relief. However, as discussed herein, Petitioner is not entitled to an appeal out of time or any other collateral relief.

I. Petitioner is Not Entitled to a Post-Conviction Relief Out of Time

Petitioner has filed pleadings entitled "Application for Appeal Out of Time" and "Motion to Withdraw Plea of Guilty." Additionally, within his Application for Post-Conviction Relief, Petitioner asserts that he was denied his right to appeal through no fault of his own where neither the Court nor defense counsel advised him of his right to appeal and where counsel failed to automatically initiate an appeal following the plea. However, Petitioner's request for an appeal out of time is denied as unseasonable and otherwise without merit.

A. Laches

Initially, any request for appeal out of time is barred by laches. It has long been held that "[a] defendant in a criminal case may waive any right not inalienable, given him by the Constitution or by the statute, either by express agreement or conduct, or by such failure to insist upon it in seasonable time...." *Sarsycki v. State,* 540 P.2d 588, 590 (Okl.Cr. 1975) (quoting Syllabus of *Rapp v. State,* 413 P.2d 915 (Okl.Cr. 1966)). Consistent with this principle, the Court of Criminal Appeals has held that the doctrine of laches can be invoked where the circumstances of a case indicate that the petitioner has forfeited the right to an appeal out of time by his own inaction in requesting such relief. *Thomas v. State,* 903 P.2d 328, 330-32 (Okl.Cr. 1995).

In *Thomas v. State*, 903 P.2d 328 (Okl.Cr. 1995), the Petitioner's counsel on direct appeal failed to file a brief on his behalf. *Id.* at 329. The Court of Criminal Appeals reviewed the record for fundamental error and, finding none to exist, affirmed the Petitioner's conviction and sentence. *Id.* Eighteen years later, the Petitioner filed an Application for Post-Conviction Relief claiming,

inter alia, to have been denied a direct appeal through no fault of his own where his attorney failed to file an appellate brief on his behalf. *Id.* At 328-29. The Court noted that the Petitioner appeared to have been denied an appeal through no fault of his own, but concluded that he was not entitled to an appeal out of time. *Id.* at 330-31. In recounting its long history of invoking the doctrine of laches in the context of collateral relief, the Court noted that of concern is the State's ability to locate evidence and witnesses after passage of long periods of time should a new trial be granted. *Id.* at 331. As the Petitioner failed to make a seasonable request for an appeal out of time, the Court found that the doctrine of laches was properly invoked to deny his clam. *Id.* at 332.

In the present case, Petitioner entered his plea of guilty over seventeen years ago before requesting to withdraw his plea and now brings the instant request for relief for the first time. Certainly if Petitioner, was serious about pressing claim for an appeal out of time, he could have done so long before now; his failure to do so in a timely manner now warrants invocation of the doctrine of laches. The circumstances of this case, therefore, indicate a waiver by Petitioner of an entitlement to an appeal out of time. For this reason alone, petitioner's request for an appeal out of time is denied.

B. Appeal Out of Time

Even if this Court were not to apply the doctrine of laches, Petitioner's claim is insufficient to demonstrate entitlement to an appeal out of time. "[A] defendant waives his right to appeal when he is aware of that right, but does not bring an appeal within the statutory time period." *Bickerstaff v. State*, 669 P.2d 778, 779 (Okl.Cr. 1983). "The mere absence of an appeal of a conviction does not warrant a granting of an appeal out of time ... where the convict knew of said right but failed to perfect an appeal as required by law." *Whitforth v. State*, 450 P.2d 851, 852 (Okl.Cr. 1969). A petitioner seeking an appeal out of time must show that he was denied an appeal

through no fault of his own. *Smith v. State,* 611 P.2d 276, 277 (Okl.Cr. 1980), *modified in part on other grounds, Blades v. State,* 107 P.3d 607 (Okl.Cr. 2005).

It is well settled that the decision of whether or not to take an appeal is the defendant's alone to make. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983); *Buchanan v. Page,* 451 P.2d 17, 18 (Okl.Cr. 1969). As the decision to appeal belongs to the defendant, it is incumbent upon him to advise the Court or counsel of his desire to appeal within the time provided therefor. As aptly stated by the Court of Criminal Appeals:

> Where a defendant knowingly fails to indicate to the Court or to his attorney that he desires to appeal his conviction, he cannot be heard to complain that he has been denied any right. Accordingly, such a defendant forfeits the right to appeal his conviction.

Martin v. Page, 457 P.2d 829, 831 (Okl.Cr. 1969); *see also Roe v. Flores-Ortega,* 528 U.S. 470, 478, 120 S. Ct. 1029, 1035, 145 L. Ed. 2d 985 (2000) (holding that that absent an express request or some other manifestation of the client's wish to invoke his or her right to appeal, counsel is not required to take steps to bring an appeal).

Contrary to his assertions, Petitioner was expressly advised that to invoke his right to appeal, he was required to file an application to withdraw his plea within ten days. Petitioner was further advised that, if his application was denied after a hearing on the matter, he could perfect a certiorari appeal to the Court of Criminal Appeals. In addition, counsel, by his signature thereto, further affirmed that he had discussed these rights with Petitioner. In fact, the record indicates that Petitioner sought to invoke his right to appeal by requesting to withdraw his plea of guilty. For reasons that are unclear from the record, however, Petitioner abandoned his request. In so doing, he affirmatively waived his right to appeal. Having waived his right to appeal, Petitioner is not entitled to an appeal out of time and his request for such relief must be denied.

II. Petitioner is Not Entitled to Post-Conviction Relief

In the alternative, Petitioner asks this Court to consider his remaining allegations of error and grant him unspecified relief. However, Petitioner is not entitled to post-conviction relief. The Post-Conviction Procedure Act, Title 22 O.S. § 1080, *et seq.,* Is the proper vehicle by which a petitioner can challenge the legality of the conviction or sentence imposed. 22 O.S. 2011, § 1080; *et seq.*, *Mahler v. State,* 783 P.2d 973, 973 (Okl.Cr. 1989). However, the Act is neither a substitute for a direct appeal nor a means for a second appeal. *Maines v. State,* 597 P.2d 774, 775-76 (Okl.Cr. 1979); *Fox v. State*, 880 P.2d 383, 384 (Okl.Cr. 1994). The scope of this remedial measure is strictly limited and does not allow for litigation of issues available for review at the time of direct appeal. *Castro v. State,* 880 P.2d 387, 388 (Okl.Cr. 1994). Issues that were not raised on direct appeal, but could have been raised are waived. *Fields v. State*, 946 P.2d 266-69 (Okl.Cr. 1997). All issues that have been previously raised and ruled upon are barred from consideration by the doctrine of res judicata, *Id.*

An exception to these rules exists where a court finds sufficient reason for not asserting or inadequately presenting an issue in prior proceedings or "when an intervening change in constitutional law impacts the judgment and sentence." *Bryson v. State,* 903 P.2d 333, 334 (Okl.Cr. 1995); 22 O.S. 2011 § 1086. Sufficient reason for failing to previously raise or adequately assert an issue requires a showing that some impediment external to the defense prevented the petitioner and counsel from properly raising the claim. *Johnson v. State,* 823 P.2d 370, 373 (Okl.Cr. 1991).

In the present case, each of Petitioner's arguments could have been raised in an application to withdraw his plea and thereafter, on certiorari appeal. Petitioner does not offer this Court any reason, external to the defense, for failing to previously assert these issues. Thus, consideration of

these propositions of error is barred by the doctrine of waiver. The Court of Criminal Appeals has stated that where a claim is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 915 P.2d 922, 924 (Okl.Cr. 1996). As aptly stated by the Court:

> In the case sub judice, Petitioner was afforded an opportunity to pursue a direct appeal; he specifically decline to do so. As a result, he is bound by that earlier decision; as a consequence of that decision, he has forfeited his right to have this Court consider [issues], which would have been readily available for that direct appeal.

Wallace v. State, 935 P.2d 366, 370 (Okl.Cr. 1997) (citation omitted). Accordingly, the allegations of error raised by Petitioner need not be addressed and the Application for Post-Conviction Relief is denied as a matter of law.

A. Laches

In addition to the procedural bar of waiver, Petitioner's allegations of error should be barred by laches. It has long been held that "[a] defendant in a criminal case may waive any right not inalienable, given him by the Constitution o rby the statute, either by express agreement or conduct, or by such failure to insist upon it in seasonable time ...." *Sarsycki v. State,* 540 P.2d 588, 590 (Okl.Cr. 1975) (quoting Syllabus of *Rapp v. State,* 413 P.2d 915 (Okl.Cr. 1966)). Consistent with this principle, the Court of Criminal Appeals has held that the doctrine of laches can be invoked where the circumstances of a case indicate that the petitioner has forfeited the right to collateral relief by his or her own inaction in seeking the same. *Paxton v. State*, 903 P.2d 325, 327 (Okl.Cr. 1995); *Thomas v. State,* 903 P.2d 328, 332 (Okl.Cr. 1995). While federal courts require the state to demonstrate actual prejudice before laches is triggered, there is no such requirement under Oklahoma law. *Id.* Rather, "[t]he applicability of the doctrine of laches necessarily turns on the facts of each particular case." *Id.*

The Court of Criminal Appeals has set forth an even more stringent standard where a petitioner seeks to collaterally challenge a sentence after it has been discharged; "a trial court is without jurisdiction to modify, suspend, or otherwise alter a judgment which has been satisfied except to set aside a judgment void on its face as shown by the record." *Fitchen v. State,* 826 P.2d 1000, 1001 (Okl.Cr. 1992). A judgment is not void on its face where the trial court had jurisdiction of the person, jurisdiction of the subject matter, and authority under the law to pronounce judgment and sentence as rendered. *See Bumpus v. State,* 925 P.2d 1208, 1210 (Okl.Cr. 1996) (citing *In re Brewster,* 284 P.2d 755, 757 (Okl.Cr. 1955)).

Petitioner entered his plea of guilty over twenty years ago. Petitioner does not contest and the record reflects that the trial court in the present case had jurisdiction over Petitioner, as well as the subject matter, and had authority to imposed judgment and sentence. By its very terms, Petitioner's sentence has expired. As such, this Court has no authority to vacate or otherwise modify the Judgment and Sentence. Petitioner's claims are wholly without merit.

B. Voluntary Nature of the Plea

In his motions and Application for Post-Conviction Relief, Petitioner challenges the voluntariness of his plea of guilty claiming it was entered through ignorance and without deliberation. It is axiomatic that a plea of guilty must be entered into in a knowing and voluntary manner. A plea of guilty is valid where the record reflects it to be a product of the voluntary and intelligent choice between alternative courses of action available to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970). In *King v. State,* 553 P.2d 529 (Okl.Cr. 1976), the Court of Criminal Appeals announced the procedures a trial court should follow in accepting guilty pleas. "The plea acceptance guidelins are thought to assemble numerous

facts which bear materially on the voluntary, knowing, understanding and intelligent quality of tendered guilty pleas ...." *State v. Durant*, 609 P.2d 792, 794 (Okl.Cr. 1980).

Under *King*, the court must first determine if the defendant is competent. *King v. State*, 553 P.2d 529, 534 (Okl.Cr. 1976). This should be accomplished through interrogation of the defendant and counsel regarding past and present mental state, as observation of the defendant's demeanor before the court. *Id.* A court must also advise the defendant of the nature and consequences of the guilty plea. *Id.* This should include advising the defendant of the right to trial counsel, the right to a jury trial, the right to confront witnesses, the privilege against self-incrimination, and the range of punishment for the crime charged. *Id.* at 534-335.

In addition, the court msut advise the defendant that by exercising the right to a jury, the State will be required to prove the allegations contained in the information beyond a reasonable doubt, and that by entering the plea of guilty he waives these rights. *Id.* at 535. The mandates of *King* also require the trial court to determine the voluntariness of the plea, including whether or not plea is the result of force, threats, or coercion. *Id.* Where the court determines the plea is the result of a plea agreement, the court shall inquire as to the factual basis of the plea and require full disclosure of the terms of the plea agreement, *Id.*

As reflected by the record, the trial court followed the guidelines of *King* in accepting Petitioner's plea of guilty, The Court began by inquiring of Petitioner's competence to understand the proceedings. Petitioner stated he had a high school education and was able to read and understand the questions on the Plea of Guilty Summary of Facts form. Petitioner advised that he had not taken any medications or other substances nor had he failed to take necessary medication such that would his ability to understand the proceedings would be affected. Petitioner further

advised that he had no history of mental illness. Petitioner was asked "Do you understand the nature and consequences of this proceeding?" to which Petitioner responded "yes." In addition to the inquiry of Petitioner, defense counsel advised the court that Petitioner was able to assist in his defense and was able to understand the nature and consequences of the proceedings such that his plea was knowingly and voluntarily entered.

At the time of the plea, Petitioner acknowledged that he received a copy of the Information and understood the crimes with which he was charged. Petitioner was advised of the range of punishment for Kidnapping. In accepting the plea of guilty, the court advised petitioner of his right to jury trial and associated rights. Petitioner acknowledged that he understood that he would waive these rights upon his plea of guilty.

Petitioner advised the court that he had fully discussed the charges against him with counsel and wished to enter his plea of guilty because he committed the acts as alleged by the State. He further provided a written statement in support of the factual basis for the plea. In accordance with *King*, the trial court inquired of the voluntariness of the plea to which Petitioner advised that he entered the plea of his own free will without coercion from any source. Finally, Petitioner stated, under oath, that the answers contained in the Summary of Facts form were true and correct and that he may be prosecuted for perjury for any false statements made therein.

The record before this Court is unequivocally clear and Petitioner's plea of guilty was an intelligent choice among alternative courses of action and, thus, was knowingly and voluntarily entered. Petitioner's claim to the contrary is without merit and is rejected.

C. Effective Assistance of Counsel

In what he labels as his first, third, fourth, sixth, and eighth propositions of error, Petitioner contends he received ineffective assistance of counsel. Although raised in five separate claims, Petitioner fails to clearly articulate the separate errors he believes to have been committed by counsel. He does, however, state that counsel was ineffective in failing to conduct adequate investigation and formulate a theory of defense. He further claims counsel had a conflict of interest. These allegations will be addressed in turn.

1. Conflict of Interest

In his sixth proposition of error, Petitioner makes passing reference to counsel having a conflict of interest. A conflict of interest arises where counsel "owes conflicting duties to the defendant and some other person." *Allen v. State*, 874 P.2d 60, 63 (Okl.Cr. 1994). Where no objection on the basis of a conflict of interest is made during the court proceedings, a petitioner seeking to establish a claim of ineffective assistance of counsel thereon must establish the existence of an actual conflict of interest that adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-49, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333 (1980); *Carey v. State*, 902 P.2d 1116, 1118 (Okl.Cr. 1995). The mere "possibility of a conflict is insufficient to impugn a criminal conviction." *Id.*, 446 U.S. at 350, 100 S. Ct. at 1719; *Banks v. State*, 810 P.2d 1286, 1296 (Okl.Cr. 1991). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.*, 446 U.S. at 350, 100 S. Ct. at 1719.

In the present case, Petitioner claims counsel was under a conflict of interest, but does not specify on what basis he believes counsel was representing competing interests. Petitioner's vague allegation does nothing to demonstrate the existence of an actual conflict of interest. In the absence of an actual conflict of interest, Petitioner must demonstrate actual harm. This he cannot do.

Petitioner offers this Court nothing to demonstrate that he would not have otherwise entered his plea of guilty. Petitioner has failed to establish either the existence of an actual conflict of interest or actual harm from a potential conflict and, thus, his challenge to the efficacy of counsel must fail.

2. Generalized Claims of Ineffectiveness

Like his claim of a conflict of interest, Petitioner's remaining challenges to counsel's performance are vague and conclusory. These, however, do not entitle him to relief.

The analysis of a claim of ineffective assistance of counsel "begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both deficient performance and resulting prejudice." *Turrentine v. State*, 965 P.2d 955, 970 (Okl.Cr. 1998). In order to demonstrate ineffective assistance of counsel, a petitioner must make two showings: (1) counsel's performance was so seriously deficient that representation fell below an objective standard of reasonableness and was not within the range of competence demanded of attorneys in criminal cases; and (2) but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would be different. *Strickland v. Washington*, 466 U.S. 688, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674 (1984).

In order to satisfy the prejudice requirement of *Strickland* in the context of a guilty plea, a petitioner must show that, but for the error of counsel, he would not have pled guilty and would have instead insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Lozoya v. State*, 932 P.2d at 31 (Okl.Cr. 1996). A petitioner must do more than simply state that, but for counsel's error, he would not have pled guilty, for any court would find such a statement suspect. *Lozoya,* 932 P.2d at 31. If a petitioner cannot demonstrate he was

prejudiced, a court need not determine if counsel's performance was deficient. *Howell v. State*, 967 P.2d 1221, 1226 (Okl.Cr. 1998), *overruled in part on other grounds, Fitzgerald v. State*, 61 P.3d 901, 905 (Okl.Cr 2002).

Applying these principles to the case at bar, Petitioner's challenge to the efficacy of counsel must fail. As presented, Petitioner's challenges to the effectiveness of counsel are nothing more than conclusory allegations of deficient performance. Yet, "[c]onclusory alegations, standing alone, will never support a finding that an attorney's performance was deficient." *Smith v. State*, 955 P.2d 734, 738 (Okl.Cr. 1998); *see also, Perry v. State*, 853 P.2d 198, 203 (Okl.Cr. 1993) (generalized claim of ineffectiveness for failing to file motions insufficient to meet burden under *Strickland*); *Trice v. State*, 912 P.2d 349, 355 n.24 (Okl.Cr. 1996) ("bare allegations of defense counsel's unpreparedness do not support a claim of ineffective assistance of counsel"); *Boyd v. State*, 839 P.2d 1363, 1373 (Okl.Cr. 1992) (generalized claim of inadequate investigation and preparation and failure to file unspecified motions insufficient to establish claim of ineffective assistance).

In rejecting Petitioner's claim, it need only be noted:

> The principle value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution ..., by contesting all guilty .... A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea ....

Braun v. State, 909 P.2d 783, 796 (Okl.Cr. 1995) (quoting *Brady v. United States*, 397 U.S. 742, 756-57, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)). This principle applies with equal force to the case at bar.

There is nothing to suggest that counsel's advice that Petitioner enter a plea of guilty was made with anything but primary concern for his interests after professional evaluation of the evidence against him. The record reflects that Petitioner fully discussed the charges against him and any possible defenses with counsel and was satisfied with counsel's advice in the matter. Having failed to satisfy either inquiry of the *Strickland* standard, petitioner's claim is denied.

D. Prosecutorial Misconduct

In what he labels as his seventh proposition of error, Petitioner appears to assert multiple claims of prosecutorial misconduct. Although it is far from clear, Petitioner appears to urge that the State failed to disclose exculpatory evidence, improperly coerced the victim to testify at preliminary hearing, made improper statements at preliminary hearing, and failed to correct false testimony at preliminary hearing.

1. Failure to Disclose Evidence

Initially, Petitioner avers the prosecutor failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "There is a presumption of regularity in the trial court proceedings. As a consequence, it becomes the burden of the convicted defendant on appeal – whether on direct appeal or post-conviction – to present to this Court sufficient evidence to rebut this presumption." *Brown v. State*, 933 P.2d 316, 324-25 (Okl. Cr. 1997) (citations omitted). Included in this principle, is the presumption that prosecutors, as officers of the court, adhere to their duty to disclose evidence. *Id.; McCarty v. State*, 989 P.2d 990, 997 (Okl.Cr. 1999). "It is the burden of the party claiming that the evidence has been withheld

to show that the evidence was, in fact, withheld." *Van Woudenberg v. State*, 942 P.2d 224, 227 (Okl.Cr. 1997).

Petitioner's claim of prosecutorial misconduct is entirely insufficient to overcome the presumption of regularity. Petitioner has failed to demonstrate that exculpatory evidence within the meaning of *Brady* actually exists. In fact, while he claims evidence was withheld, he doesn't specify what that evidence was. Even if it presumed that such evidence exists, Petitioner has wholly failed to demonstrate that on March 8, 1999, the State filed a Notice of Open file Discovery. Having failed to make any showing that exculpatory evidence within the meaning of *Brady* existed and was improperly withheld by the prosecutor, Petitioner's claim does not overcome the presumption of regularity in court proceedings. Accordingly, Petitioner's claim to the contrary is denied.

2. Failure to Correct False Testimony

In his seventh proposition of error, Petitioner states that the prosecutor concealed a crime, but does not specify what that crime was or who committed it or how it was concealed by the State; his reference to *Napue v. Illinois*, may suggest that his intended claim is one of prosecutorial misconduct in failing to correct false or misleading testimony.

As noted in the preceding section, "There is a presumption of regularity in the trial court proceedings." *Brown v. State*, 933 P2d 316, 324-25 (Okl.Cr. 1997) (citation omitted). Included in this principle, is the presumption that prosecutors, as officers of the court, do not suborn perjury or otherwise allw false testimony to go uncorrected. *Cargle v. State,* 947 P.2d 584, 589 (Okl.Cr. 1997); *Hatch v. State,* 924 P.3d 284, 295-96 (Okl.Cr. 1996). In order to obtain relief upon such an allegation, Petitioner bears the burden of establishing that (1) false or misleading testimony was

presented, (2) that the prosecutor knowingly used such testimony and (3) that the testimony was material to guilt or innocence. *Omalza v. State*, 991 P.3d 286, 307 (Okl.Cr. 1995).

As with the other allegations of error presented by this Application for Post-Conviction Relief, Petitioner's claim of prosecutorial misconduct on this basis is vague conclusory. In fact, Petitioner fails to identify what portion of the victim's testimony at preliminary hearing was false or misleading. Nor does Petitioner explain how the prosecutor knew such testimony was false. An unsupported, self-serving claim such as this is entirely insufficient to overcome the presumption of regularity in trial proceedings. Certainly, such a vague allegation falls drastically short of demonstrating that the prosecutor knowingly presented false testimony and that the same was material to Petitioner's guilt or innocence. Accordingly Petitioner's claim of prosecutorial misconduct on this allegation is denied.

3. Improper Conduct at Preliminary Hearing

In his final claim of prosecutorial misconduct, Petitioner appears to urge that the prosecutor improperly coerced the victim to testify at preliminary hearing and made improper statements during the hearing. Apart from procedural bar of waiver, any claims in this respect have been waived by Petitioner's plead. *Berget v. State,* 824 P.2d 364, 372 (Okl.Cr. 1991); *Rodgers v. State,* 483 P.2d 1375, 1376 (Okl.Cr. 1971); *Ledgerwood v. State,* 455 P.2d 745, 746-47 (Okl.Cr. 1969). So too has the United States Supreme Court. "[A] When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L.Ed. 2d 235 (1973).

Petitioner's conviction is the result of his own voluntary admission of guilt. Accordingly, he is now estopped from urging entitlement to relief on the grounds that defects, constitutional or otherwise, occurred in the preliminary hearing prior to the entry of his plea.

E. Trial Court Error

Throughout his application, Petitioner states that the trial court made one or more decisions which were based on an unreasonable determination of the facts and/or an unreasonable application of clearly established law. Beyond mere assertions that error occurred, Petitioner makes no attempt to develop his claims. The Court of Criminal Appeals has long held: "a party complaining of error must show not only that some error occurred, but also that some injury resulted from the error." *Carpenter v. State,* 929 P.2d 988, 994 (Okl.Cr. 1996). At best, Petitioner's allegation establishes nothing more than error in the abstract for which he has neither articulated nor proven prejudice. As such, Petitioner is not entitled to collateral relief on these grounds and his claims to the contrary are denied.

III. Request for Discovery and Evidentiary Hearing

Finally, within his application and by separate motion, Petitioner requests this Court to allow him to conduct discovery. The Court of Criminal Appeals has recognized that neither the Oklahoma Discovery Code nor the Oklahoma Criminal Discovery code apply to post-conviction proceedings. *Bland v. State,* 991 P.2d 1039, 1041 (Okl.Cr. 1999). In fact, a court is not authorized to order discovery on issues it is precluded form considering. *Cargle v. State*, 947 P.2d 584, 590 (Okl.Cr. 1997). As Petitioner's claims are procedurally barred by the doctrine of waiver, this Court has not authority to grant Petitioner's request.

CONCLUSION

Petitioner was fully advised of his right to appeal and the manner in which to invoke that right. By abandoning his application to withdraw plea of guilty, Petitioner affirmatively waived his right to appeal. Accordingly, Petitioner's is not entitled to an appeal out of time. Nor is Petitioner entitled to collateral relief. Petitioner's Propositions of error are not proper for post-conviction review as they could have been raised in a timely appeal. Petitioner does not offer this Court sufficient reason to avoid application of the doctrine waiver. Thus consideration of those arguments is procedurally barred. In addition, the doctrine of laches is applied to preclude collateral challenge to Petitioner's convictions. Apart from the procedural bars of post-conviction review and the doctrine of laches, Petitioner's claims are without merit.

It is therefore ORDERED by the Court, for the reasons set out above, Petitioner's Application for Post-Conviction Relief is denied.

Dated this 5th day of January. 2021.

TIMOTHY R. HENDERSON
DISTRICT JUDGE

NOTICE OF RIGHT TO APPEAL

A final judgment under this act [Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*] may be appealed to the Court of Criminal Appeals on petition in error filed either by the applicant or the State within thirty (30) days from entry of the judgment. Upon motion of either party on filing of notice of intent to appeal, within ten (10) days of entering the judgment, the district court may stay the execution of the judgment pending disposition on appeal; provided the Court of Criminal Appeals may direct the vacation of the order staying the execution prior to final disposition of the appeal. 22 O.S. § 1087. The party desiring to appeal from the final order must file a Notice of Post-Conviction Appeal with the Clerk of the District Court within twenty (20) days from the date the order is filed in the District Court. Rules 2.1(E)(1) & 5.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2018).

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2021, I mailed a certified copy of the above and foregoing order, with postage thereon fully prepaid, to:

George Christian, Jr.,
Lexington Correctional Center
Post Office Box 260
Lexington, OK 73051

Oklahoma Court of Criminal Appeals
2100 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105

and that a true and correct copy of the above and foregoing order was hand-delivered to:

Jennifer Hinsperger, Assistant District Attorney
Oklahoma County District Attorney's Office

Deputy Court Clerk