

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

BILLY LEE OATNEY, JR.,
Petitioner-Appellant,

v.

Brandon KELLY,
Superintendent,
Oregon State Penitentiary,
Defendant-Respondent.

Marion County Circuit Court
04C12723; A163685

Dale Penn, Judge.

Argued and submitted June 16, 2017.

Daniel J. Casey argued the cause and filed the briefs for appellant.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Affirmed.

ARMSTRONG, P. J.

Petitioner was convicted of aggravated murder and sentenced to death. After his conviction and sentence were affirmed on appeal in *State v. Oatney*, 335 Or 276, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004), petitioner sought post-conviction relief on a number of grounds. Those grounds included that his trial counsel had provided him with constitutionally deficient legal representation by failing to seek to exclude at petitioner's criminal trial statements and testimony by petitioner's co-conspirator in the murder, Johnston, that the state allegedly had obtained in violation of an immunity agreement with petitioner. The post-conviction court denied relief, but we reversed its decision on appeal because we concluded that petitioner was entitled to post-conviction relief on his first claim for trial counsels' failure to seek to exclude Johnston's statements and testimony. *Oatney v. Premo*, 275 Or App 185, 223, 369 P3d 387 (2015), *rev den*, 359 Or 847 (2016).

On remand from our decision, petitioner sought to have the post-conviction court include in its judgment granting post-conviction relief a provision prohibiting Johnston from testifying for the state on retrial of the charges against petitioner and excluding as evidence on retrial (1) Johnston's testimony at the first trial, (2) all out-of-court statements made by Johnston on or after the date of the state's immunity agreement with petitioner, and (3) any evidence obtained or derived from the statement that petitioner had given the state under the immunity agreement. The post-conviction court entered a judgment on remand that set aside petitioner's aggravated murder conviction and death sentence but that did not include the provision that petitioner sought restricting the evidence that could be admitted on retrial of the charges against petitioner. Petitioner appeals the post-conviction judgment, contending that the post-conviction court erred in failing to include in the judgment the provision sought by petitioner, because the doctrines of issue preclusion, claim preclusion, and law of the case operate to prevent the state from relitigating the admissibility of the evidence that petitioner sought to exclude. We conclude that

the post-conviction court did not err in entering the judgment that it did on remand and affirm.

We conclude as we do because, had the post-conviction court correctly reached in the first instance the conclusion that we reached on appeal—*viz.*, that petitioner’s trial counsel had provided petitioner with constitutionally deficient legal representation by failing to seek to exclude from petitioner’s criminal trial the statements and testimony by Johnston—the judgment that the post-conviction court would have entered granting relief on that basis would have set aside petitioner’s conviction and sentence (as the judgment does here), but it would not, and could not, have included a provision on the admissibility of evidence on retrial. Simply put, the admissibility of evidence on retrial of the charges against petitioner was not, and could not have been, a subject of post-conviction relief. To the extent that the grant of post-conviction relief could affect the admissibility of evidence on retrial under the doctrines of issue and claim preclusion, as petitioner contends, that is an issue that petitioner will have to raise with the trial court that presides over the retrial.

That it took an appeal to us to establish petitioner’s entitlement to post-conviction relief for trial counsels’ failure to seek to exclude Johnston’s statements and testimony does not alter the post-conviction relief to which petitioner is entitled. In other words, the relief to which petitioner is legally entitled is the same whether it was determined by the post-conviction court in the original proceeding or by that court on remand under our direction to grant petitioner post-conviction relief. To the extent that the doctrines of issue preclusion, claim preclusion, and law of the case are applicable as a result of our decision on appeal, they are applicable *upon* the entry of the judgment granting post-conviction relief, not *in* the judgment granting that relief.¹ Hence, the post-conviction court did not err in rejecting petitioner’s contention that he was entitled to have included in

¹ To forestall misunderstanding, we acknowledge that the doctrine of law of the case applied to the post-conviction court on remand and, for example, would have prevented the state from opposing post-conviction relief on remand on grounds that it had failed to raise on appeal. *See, e.g., State v. Pratt*, 316 Or 561, 569, 853 P2d 827, *cert den*, 510 US 969 (1993).

the post-conviction judgment the provision that he sought on the admissibility of evidence on retrial of the charges against him.

Affirmed.