CAUSE NO. 1087328-A

EX PARTE	**§ IN THE**
	§ DISTRICT COURT
	§
	§ OF HARRIS
	§ COUNTY, TEXAS
	§
	§ 337th JUDICIAL
ANTOIN DENEIL MARSHALL	**§ DISTRICT**

TRIAL COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW EXHIBIT A – EXCERPT FROM STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ADOPTED BY TRIAL COURT AS EDITED BELOW

II. LACHES

3. The Court finds that an assessment of whether the equitable doctrine of laches should apply is appropriate given: (i) the eleven-year delay between the appellate mandate and the writ application; and (ii) habeas counsel's case evaluation that concluded, "the courts could refuse to consider the merits of your case under the Doctrine of Laches because of the delay in filing your application" (~~IV~~ V W.R. at 129).[1]

PERTINENT LAW

4. In order for laches to apply, the State does not need to demonstrate particularized prejudice resulting

[1] "W.R." denotes the writ evidentiary hearing record, "R.R." the trial record, and "C.R." the clerk's record.

from the applicant's significant delay in filing his writ. *Ex parte Perez*, 398 S.W.3d 206, 215 (Tex. Crim. App. 2013). Instead, Texas jurisprudence requires this Court to employ a "flexible" approach that allows for the consideration of "anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant, so that a court may consider the totality of the circumstances in whether to grant equitable relief." *Id.* The Court of Criminal Appeals has explained:

> [N]o single factor is necessary or sufficient. Instead, courts must engage in a difficult and sensitive balancing process that takes into account the parties' overall conduct. In considering whether prejudice has been shown, a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial. . . . If prejudice to the State is shown, a court must then weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief.

Id. at 217 (citations and quotation marks omitted). The broad scope of the prejudice inquiry helps to "ensure that courts are permitted to consider the State's and society's interest in the finality of a conviction in determining whether laches should apply." *Id.* at 218.

5. In *Perez*, the Court of Criminal Appeals further held that, "With regard to the degree of proof required, the extent of the prejudice the State must

show bears an inverse relationship to the length of the applicant's delay." *Id.* at 217. If an applicant delays filing for "much more than five years" after conclusion of his direct appeal the less evidence the State must present to demonstrate prejudice. *Id.* at 218. A court should reject the application of laches when the record shows that: (1) the applicant's delay was "not unreasonable because it was due to a justifiable excuse or excusable neglect", (2) "the State would not be materially prejudiced as a result of the delay", or (3) "the applicant is entitled to equitable relief for other compelling reasons, such as . . . that he is reasonably likely to prevail on the merits." *Id.*

PERTINENT FACTS

6. The Court finds that the applicant declares (*Applicant's Writ Exhibit No. 2* at 2) in support his writ application: "I have diligently pursued habeas relief through counsel since my conviction was affirmed on appeal in 2009"; that at the writ evidentiary hearing the applicant testified that his eleven-year delay in filing his writ application was due to "the trials and the tribulations we went through dealing with the *lawyers* before" retaining current habeas counsel (XI W.R. at 82) (emphasis added);

7. The Court finds that the applicant's writ hearing testimony is not credible (XI W.R. 57-94; XII W.R. 7-51); that his explanations for the eleven-year delay are not supported by the record; that the applicant is generally not credible in light of the fact that he acknowledged he lied under oath at his

trial so many times that he could not be certain of the exact amount (XII W.R. 44-45).

8. The Court finds that a review of the record reveals the applicant engaged and chose to be represented by non-attorneys for the majority of the eleven-years in question.

9. The Court finds that the applicant presented the testimony of his sister, Eumiko Egins, during the writ hearing (V W.R. at 99-137); that, according to habeas counsel, Egins was presented as a "procedural" witness to explain the timetable of events and introduce documents (V W.R. at 123); that Egins acknowledged on cross-examination that the applicant was the "client," i.e., the ultimate decision-maker (V W.R. at 130).

10. The Court finds that the applicant's efforts to secure counsel for a habeas petition between 2009-2012 were passive:

    i. The applicant testified at the writ evidentiary hearing that he sought legal assistance from the Innocence Project at the University of Texas Law School; that he applied in 2009 and was denied by the organization in 2011; ~~that the applicant provides no files, questionnaires, applications, or correspondence to support his testimony~~ (XI W.R. at 79-80).

    ii. The applicant sought assistance from the University of Houston Law Center Texas Innocence Center Non-Capital Division; that in 2007 he applied for assistance asserting a claim of actual innocence; that

the organization could not find sufficient exonerating information and concluded its investigation; that the organization notified the applicant in January 2013 that its investigation was terminated. *Applicant's Laches Exhibit 23.*

11. The Court finds that during 2012, the applicant started to communicate with Houston-based attorney R. Christopher Goldsmith (XI W.R. at 82); that Goldsmith was referred to the applicant by the National Professional Legal Associates (NLPA).

12. The Court finds that the applicant did not call Goldsmith to testify at the writ evidentiary hearing, or provide an affidavit, to explain his work on behalf of the applicant, if any; that the applicant provides no written documentation (i.e., invoices, receipts, a contract) to demonstrate Goldsmith was ever retained; that the absence of written documentation of a formal agreement for services stands in sharp contrast to the extensive documentation between the applicant and the NLPA. *Applicant's Laches Exhibit No. 2-10.*

13. The Court finds that from 2011-2018 the applicant's post-conviction energies were centered on his communications and interactions with the NLPA; that the applicant read "all" communications from the NLPA (XII W.R. at 12); that the applicant was aware the NLPA did not and could not provide legal representation to file a post-conviction writ of habeas corpus (XII W.R. at 31); that the NLPA would only provide research to the applicant and his counsel (XII W.R. at 32); that the NLPA advised the applicant deadlines needed to

be taken into account (XII W.R. at 15-16); to wit, the NLPA told the applicant:

i. "It is important for you to understand that . . . NLPA is not a law firm and cannot represent you in court. NLPA cannot directly provide legal advice to you, nor can NLPA offer its research services directly to you. Therefore, you must be represented by counsel licensed to practice in the appropriate court and your counsel must be willing to work with NLPA in order for us to be of assistance." (XII W.R. at 12-14). *Applicant's Laches Exhibit No. 2.*

ii. "Once completed, our research will be forwarded to you, your family, and the attorney who has agreed to receive the research. You then will be able to review this research with that lawyer to come up with your game plan on how you wish to proceed, based upon our lawyer's recommendations. . . . Please keep in mind that the post-conviction motion for your area, however, may require that certain criteria be met, including deadlines" (XII W.R. at 15-16). *Applicant's Laches Exhibit No. 3.*

iii. "NLPA is not a law firm, professional services are only provided to licensed counsel in all areas that involve the practice of law." (XII W.R. at 19-20). *Applicant's Laches Exhibit No. 4.*

iv. "Regarding your attorney, please remember that you have engaged NLPA to work

> with and assist your attorney in your case. However, if you do not presently have an attorney, we are happy to refer you to several attorneys licensed in your jurisdiction who NLPA has worked with extensively in the past. Should you elect to have one of these attorneys authorize this evaluation and review it with you upon completion, they will be doing so at no additional charge to you. Should you choose to retain that attorney for any additional legal services beyond a review of the evaluation, you will have to agree on a fee for that assistance with that attorney. The evaluation fee does not cover any attorney's legal representation fees for performing any service beyond a review of the evaluation prepared by NLPA." (XII W.R. 20-21). *Applicant's Laches Exhibit No. 5*.

14. The Court finds that the NLPA prepared two draft writs of habeas corpus for attorney Goldsmith's signature; that these writ applications are dated 2014 and 2018; that neither of these applications were ever filed (XII W.R. at 30-32). *Applicant's Laches Exhibits No. 11-13.*

15. The Court finds that the applicant provides no explanation for the lack of activity and diligence between 2014 and 2018; that habeas counsel acknowledged to the Court that the absence of documentation during this period "speaks for itself" (XII W.R. at 36).

16. The Court finds that State's trial witness Calvin L. Finnels died on June 20, 2014 (*Applicant's Laches Exhibit No. 21*); that Finnels was a necessary and critical witness for the State who testified that he saw the applicant in the apartment complex moments before and after the capital murder (Findings of Fact No. 49-52, *infra*.); that the critical nature of Finnels' testimony is underscored by the extensive briefing, testimony, and exhibits presented by the applicant in his writ application that questions Finnels' ability to make a positive identification of the applicant at the crime scene (V W.R. at 23-77), *Applicant's Writ Exhibits No. 23-25*; that were a retrial to be required, the State would be at a disadvantage because the jury would be unable to assess Finnels' credibility and, as in the instant writ, the applicant would almost certainly present evidence to raise doubt about Finnels' identification. See *Perez*, 398 S.W.3d at 210 citing *Ex parte Carrio*, 992 S.W.2d 486, 487-88 (Tex. Crim. App. 1999) (inequitable to permit long delayed claims to proceed when trial participants are dead); *Ex parte Westerman*, 570 S.W.3d 731, 734 (Tex. Crim. App. 2019) (Yeary, Slaughter J.J., Keller P.J. dissenting) (same).

17. The Court finds that the applicant understood the need to file a writ of habeas corpus after the appellate mandate issued (XI W.R. at 79).

APPLICATION OF THE FACTS TO THE LAW

18. The Court finds that the equitable doctrine of laches applies and prevents consideration of the

applicant's claims for relief; that, applying *Perez* to the instant case, the following are pertinent:

i. The applicant's eleven-year delay was unreasonable. The applicant knew when the appellate mandate issued in 2009 that he would need to file a writ. During 2009-11, the applicant's efforts to pursue a writ were limited to correspondence with the Innocence Project. From 2012-18 he engaged the NLPA, rather than an attorney, for legal advice, i.e., his delays are not the result of the "trials and tribulations" with attorneys. He provides no documentation to support that he ever hired attorney-at-law Goldsmith. The applicant does not provide any explanation for the lack of diligence during 2014-18.

ii. The State has been materially prejudiced by the delay. Finnels died in 2014, the period during which the applicant provides no explanation for lack of post-conviction activity. In the event of a retrial, the State would be prejudiced by the State's inability to present Finnels' credibility. In addition, the jury witnessed an important in-court demonstration of the distance from which Finnels observed the applicant at the crime scene (IV R.R. at 109) (emphasis added); this strength of this demonstration is lost amidst a dry record:

> Q. What's the closest they get to you?
>
> A. The distance between the street and my balcony.

Q. *You see where I'm standing now*?

A. Uh-huh.

Q. The distance we are apart. When you're as close to those individuals as you get, *are you closer than this*?

A. *Give or take maybe a foot or two.*

Q. *More like that*?

A. But I'm elevated, looking down; so, it's kind of different, you know, as to the way I was seeing them.

iii. The applicant presents no other compelling reasons for equitable relief. He does not present a claim of actual innocence and he does not prevail on any claims for relief in the instant writ. *Infra.* In addition, albeit in an unpublished opinion, the Court of Criminal Appeals has held that "[l]ack of funds, pro se status, and/or the lack of sophistication of the law" would not, without more, excuse an extensive delay in seeking habeas relief. *Ex parte Caudill*, No. WR-86,762-02, 2019 WL 1461929, at *7 (Tex. Crim. App. Jan. 30, 2019) (not designated for publication).

iv. The memories of the prosecutors who tried the case, and the trial attorney who defended the applicant, are all diminished due to the passage of time.

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OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

5/2/2022
MARSHAL, ANTOIN DENEIL WR-92,202-01
Tr. Ct. No. 1087328-A

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

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* DELIVERED VIA E-MAIL *