

APPENDIX

APPENDIX

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App. 1

APPENDIX A

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

**WR-54,880-02
Tr. Ct. No. 1052781-A**

[Filed September 7, 2022]

EX PARTE RODRIGUEZ, GILBERT IV,)
)
Applicant)
)

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

APPENDIX B

**IN THE 183RD DISTRICT COURT OF
HARRIS COUNTY, TEXAS**

NO. 1052781-A

[Filed July 22, 2022]

EX PARTE)
)
GILBERT RODRIGUEZ, IV,)
Applicant)

**STATE’S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER AFTER
REMAND**

Having reviewed the original application for writ of habeas corpus, the CCA’s remand order in WR-54,880-02, the documents filed in cause number 1052781-A, the credible affidavits of Windi Akins Pastorini and Charles Brown, and the official court records of the challenged conviction in the instant habeas proceeding, the trial court finds that there are no controverted, previously unresolved facts material to the legality of the applicant’s confinement which require an evidentiary hearing. The trial court recommends that relief be **DENIED** on all grounds, and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

Jurisdiction

1. The applicant, Gilbert Rodriguez, IV, is confined pursuant to the judgment and sentence of the 183rd District Court of Harris County, Texas, in cause number 1052781, where the applicant was convicted by a jury of the felony offense of capital murder on April 5, 2007.
2. The trial court sentenced the applicant to confinement for life without the possibility of parole in the Texas Department of Criminal Justice - Institutional Division on April 5, 2007.
3. The applicant was represented at trial by Charles Brown and Michelle Beck.
4. Brown was lead counsel and Beck was second-chair.

Direct Appeal

5. The applicant was represented by Windi Akins Pastorini on direct appeal.
6. The Fourteenth Court of Appeals affirmed the applicant's conviction in an opinion delivered on February 19, 2008. *Rodriguez v. State*, 14-07-00307-CR, 2008 WL 442577 (Tex. App.—Houston [14th Dist.] Feb. 19, 2008, no pet.).
7. The Fourteenth Court of Appeals issued mandate on April 18, 2008.

Writ Proceedings

8. The applicant, through retained habeas counsel, filed the instant application on June 3, 2021.
9. The applicant is represented by R. Christopher Goldsmith on the writ proceedings.
10. The trial court did not designate issues.
11. On September 29, 2021, the District Clerk properly forwarded the writ application to the Court of Criminal Appeals as required by Texas Rule of Appellate Procedure 73.4(b)(5).
12. On November 3, 2021, the Court of Criminal Appeals remanded the case to the trial court to resolve the specified issues. *Ex parte Rodriguez*, No. WR-54,880-02, 2021 WL 5099987, at *1 (Tex. Crim. App. Nov. 3, 2021).
13. The trial court ordered affidavits from Charles Brown and Windi Akins Pastorini.
14. The trial court finds that the affidavit of Windi Akins Pastorini, filed in the instant habeas proceeding on June 27, 2022, is credible and the facts asserted therein are true. *Affidavit of Windi Akins Pastorini*.
15. The trial court finds that the affidavit of Charles Brown, filed in the instant habeas proceeding on July 15, 2022, is credible and the facts asserted therein are true. *Affidavit of Charles Brown*.

The Trial Court

16. Judge Vanessa Velasquez is the former judge of the 183rd District Court and she presided over the applicant's trial.
17. Judge Chuck Silverman is the current judge of the 183rd District Court and he presided over the applicant's writ proceedings.

Ineffective Assistance of Trial Counsel

18. In his first ground for relief, the applicant alleges that he received the ineffective assistance of trial counsel. *Applicant's Writ* at 6-7.

Alleged failure to communicate

19. The applicant claims trial counsel failed to keep the applicant informed at all stages of trial due to lack of investigatory preparation. *Id.* at 6.
20. Brown kept his client informed at all stages of trial and went to the jail many times to speak with him. Brown discussed the circumstances of his case, how they would proceed, whether they would file any motions, including a motion to suppress, and whether or not his co-defendant, Julio Falcon, would testify on his behalf. Brown's recollection is that the applicant always wanted to proceed to a trial. *Affidavit of Charles Brown*.
21. The trial court finds that the applicant fails to show trial counsel was deficient.

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Alleged failure to object to jail call

22. The applicant claims trial counsel failed to object to a jail call between Julio Falcon and his aunt. *Applicant's Writ* at 6.
23. The trial record reflects that trial counsel did object to the jail call based on improper impeachment, but his objection was overruled (5 R.R. at 66-68, 84-91, 112).
24. The trial court finds that the applicant fails to show trial counsel was deficient.

Alleged failure to object to the applicant's statement and search

25. The applicant claims trial counsel failed to object to the admissibility of the applicant's statement to police based on the fact that he was not read his Miranda rights and also failed to object to a search of his home on Fourth Amendment grounds. *Applicant's Writ* at 6.
26. The trial record reflects that the applicant's statement was not admitted during his trial (4 R.R. at 253-55).
27. The trial record also reflects that the applicant consented to a search of his home (4 R.R. at 253-54).
28. The trial court finds that the applicant fails to show trial counsel was deficient.

Alleged failure to call “key witnesses”

29. The applicant claims trial counsel failed to call several “key witnesses” to testify on his behalf even though they were available at trial. *Applicant’s Writ* at 6.
30. The applicant’s writ does not identify by name any of these alleged “key witnesses.” *Id.*
31. The trial record reflects that trial counsel called one witness, Julio Falcon, on the applicant’s behalf during his case-in-chief (5 R.R. at 22-84).
32. Brown had John Castillo appointed as an investigator to assist on the applicant’s case. Brown reviewed all of the discovery provided by the State and also conducted an independent investigation using Castillo’s services. Based on Brown’s file notes, Castillo talked to several witnesses about the case, including X-tret (the applicant’s friend), Edward (the applicant’s cousin), and Brandon Ray. Brown did not recall that any of these witnesses were material to the applicant’s case. *Affidavit of Charles Brown.*
33. Due to the passage of time, Brown cannot now recall whether they had other potential witnesses ready to testify, but he would have discussed all of this with the applicant prior to trial. Brown recalls that the applicant gave him the names of some of his friends, but none of these friends had any direct knowledge about the incident. *Id.*

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- 34. The trial court finds that the applicant fails to demonstrate what further investigation by trial counsel would have revealed.
- 35. The trial court finds that the applicant fails to show trial counsel was deficient or that he was harmed by trial counsel's alleged actions.

Alleged failure to allow the applicant to take the stand

- 36. The applicant claims trial counsel advised the applicant not to take the stand even though the applicant requested to take the stand. *Applicant's Writ* at 6.
- 37. The trial record reflects that trial counsel admonished the applicant about the pros and cons of testifying and about whether or not they would call Falcon in their case-in-chief, and the applicant stated he wanted to testify and that he wanted trial counsel to call Falcon as a witness (5 R.R. at 18-21).
- 38. The trial record reflects that the applicant did not end up taking the stand (5 R.R. at 91-92, 117).
- 39. Due to the passage of time, Brown has no recollection about why the applicant did not end up testifying, but can say that he would never stop a client from testifying if they wanted to because it is their choice whether or not they testify. Brown informed the applicant of his right to testify, and he must have ultimately decided not to take the stand. *Affidavit of Charles Brown*.

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40. The trial court finds that the applicant fails to show trial counsel was deficient or that he was harmed by trial counsel's alleged actions.

Alleged failure to introduce letter

41. The applicant claims trial counsel failed to overcome the State's challenge to his introduction of an exculpatory letter from Julio Falcon to the applicant's father. *Applicant's Writ* at 6-7.
42. Brown attempted to offer letters written by Falcon, but the Judge sustained the State's hearsay objections (5 R.R. at 46-49). *Affidavit of Charles Brown*.
43. The trial court finds that the applicant fails to show trial counsel was deficient or that he was harmed by trial counsel's alleged actions because regardless of whether Falcon's letters were admitted, Falcon nonetheless testified that the applicant had no part in the kidnapping and murder of the complainant.

Ineffective Assistance of Appellate Counsel

44. In his first ground for relief, the applicant alleges that he received the ineffective assistance of appellate counsel. *Applicant's Writ* at 7.
45. The applicant claims that his appellate attorney, Windi Akins Pastorini, rendered ineffective assistance by failing to file a petition for discretionary review (PDR) upon his request. *Id.*

46. The trial court finds, based on the credible affidavit of Pastorini, that Pastorini has no independent recollection of the facts and circumstances surrounding the applicant's direct appeal. *Affidavit of Windi Akins Pastorini*.
47. The trial court finds, based on the credible affidavit of Pastorini, that Pastorini has no recollection about whether the applicant requested that she file a PDR on his behalf, but that it was her standard practice to try to find an issue to appeal on PDR if so requested by her client. *Id.*
48. The trial court finds, based on the credible affidavit of Pastorini, that Pastorini's standard practice at the time was to timely inform her appellate clients about whether their convictions had been affirmed on appeal and to provide copies of the appellate opinions to her clients. *Id.*
49. The trial court finds, based on the credible affidavit of Pastorini, that Pastorini's standard practice at the time was to inform her appellate clients of their right to file a *pro se* PDR and the time limits for doing so if she had decided not to file a PDR on their behalf. Pastorini has no reason to believe that she did not follow her standard practices at the time she represented the applicant. *Id.*
50. The trial court finds that the applicant fails to show that Pastorini failed to timely notify the

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applicant that his conviction had been affirmed on appeal.

51. The trial court finds that the applicant fails to show that Pastorini deprived the applicant of his opportunity to file a *pro se* PDR.
52. The trial court finds that the applicant fails to show appellate counsel was deficient or that he was harmed by appellate counsel's actions.

Laches

53. The instant habeas application was filed on June 3, 2021, thirteen (13) years after the mandate issued in the applicant's case.
54. The trial court finds that the applicant has failed to offer a legitimate reason for the delay in filing the instant application and the applicant's delay has affected the credibility of his claims.
55. The trial court finds that due to the passage of time, the State has been prejudiced as a result of the applicant's unreasonable delay in the filing of the instant application because Brown and Pastorini cannot recall all of the specific details of their representation of the applicant.

CONCLUSIONS OF LAW

Ineffective Assistance of Trial Counsel

1. The trial court concludes that the applicant fails to show that trial counsel's conduct fell below an objective standard of reasonableness; that but for the alleged deficient conduct of trial counsel,

there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas); *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (defining the two-part *Strickland* standard).

Ineffective Assistance of Appellate Counsel

2. The trial court concludes that the applicant fails to show that appellate counsel's performance was deficient and that the applicant would have timely filed a PDR but for counsel's deficient performance. *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); *Ex parte Crow*, 180 S.W.3d 135 (Tex. Crim. App. 2005).
3. The trial court concludes that the applicant fails to show that he was denied the effective assistance of counsel because he fails to show that appellate counsel failed to timely notify the applicant of his right to file a PDR. *Ex parte Florentino*, 206 S.W.3d 124, 125 (Tex. Crim. App. 2006) (finding counsel ineffective for failing to notify defendant of the time to file petition for discretionary review).

Laches

4. The trial court concludes that the delay by the applicant in filing the instant application for writ of habeas corpus has affected his credibility. *Ex parte Young*, 479 S.W.2d 45, 46 (Tex. Crim. App. 1972).

5. In the alternative, the trial court concludes that the doctrine of laches is applicable to the instant application and the applicant's claims should be denied. *See ex parte Perez*, 398 S.W.3d 206, 216-18 (Tex. Crim. App. 2013) (recognizing that delays of more than five years may generally be considered unreasonable in the absence of any justification for the delay).

Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be **DENIED** on all grounds.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers filed in cause no. 1052781-A, and transmit them to the Court of Criminal Appeals as provided by TEX. CRIM. PROC. CODE ANN. art 11.07. The transcript shall include certified copies of the following documents:

1. the application for writ of habeas corpus and all attachments in cause number 1052781-A;
2. the trial court's order(s) in cause number 1052781-A;
3. the indictment, judgment and sentence, and docket sheets in cause number 1052781;
4. the docket sheets in cause number 1052781;
5. the appellate record (including the clerk's record and the reporter's record) in cause number 1052781;
6. the appellate opinion in cause number 1052781;
7. the affidavits of Windi Akins Pastorini and Charles Brown;

8. the trial court's Findings of Fact and Conclusions of Law in cause number 1052781-A;
9. the *State's Proposed Findings of Fact and Conclusions of Law after Remand* and the Applicant's Proposed Findings of Fact and Conclusions of Law in cause number 1052781-A.

THE CLERK is further ORDERED to send a copy of this order to the applicant's attorney, R. Christopher Goldsmith, at rchristophergoldsmith@gmail.com, and to counsel for the State, Rehana Vohra, Harris County District Attorney's Office, vohra_rehana@dao.hctx.net.

By the following signature, the trial court adopts the *State's Proposed Findings of Fact, Conclusions of Law, and Order after Remand* in Cause No.1052781-A.

SIGNED this ____ day of _____, 2022.

Signed: s/

8/1/2022

JUDGE PRESIDING

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APPENDIX C

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-54,880-02

[Filed November 3, 2021]

EX PARTE GILBERT RODRIGUEZ IV,)
)
Applicant)
)

**ON APPLICATION FOR A WRIT OF HABEAS
CORPUS CAUSE NO. 1052781-A IN THE 183RD
DISTRICT COURT FROM HARRIS COUNTY**

Per curiam.

ORDER

Applicant was convicted of capital murder and sentenced to life imprisonment. The Fourteenth Court of Appeals affirmed his conviction. *Rodriguez v. State*, No. 14–07–00307–CR (Tex. App.—Houston [14th Dist.], Feb. 19, 2008). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends, among other things, that trial counsel was ineffective because he failed to adequately investigate the case and keep Applicant informed;

failed to properly object to Julio Falcon's recorded jailhouse phone conversation with his aunt; failed to object on Fourth Amendment grounds to Applicant's statement made to homicide detectives and the physical evidence gathered from his home; failed to call several key, available witnesses to testify at trial on his behalf; did not allow Applicant to testify during trial despite Applicant's repeatedly requests; and failed to challenge the State's argument against the admissibility of the letter from Julio Falcon to Applicant's father. Applicant also contends that appellate counsel was ineffective because he failed to file a petition for discretionary review despite Applicant asking him to do so. Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997); *Ex parte Crow*, 180 S.W.3d 135 (Tex. Crim. App. 2005). Accordingly, the record should be developed. The trial court is the appropriate forum for findings of fact. TEX. CODE CRIM. PROC. art. 11.07, § 3(d). The trial court shall order both trial and appellate counsel to respond to Applicant's claims. In developing the record, the trial court may use any means set out in Article 11.07, § 3(d). It appears that Applicant is represented by counsel. If the trial court elects to hold a hearing, it shall determine if Applicant is represented by counsel, and if not, whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. *See* TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact and conclusions of law as to whether, considering the totality of the circumstances, the common-law doctrine of laches bars equitable relief in this case. *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013). The trial court shall also make findings of fact and conclusions of law as to whether trial counsel's performance was deficient and Applicant was prejudiced. The trial court shall also make findings of fact and conclusions of law as to whether appellate counsel timely informed Applicant that his conviction had been affirmed and whether Applicant would have timely filed a petition for discretionary review but for appellate counsel's alleged deficient performance. The trial court may make any other findings and conclusions that it deems appropriate in response to Applicant's claims.

The trial court shall make findings of fact and conclusions of law within ninety days from the date of this order. The district clerk shall then immediately forward to this Court the trial court's findings and conclusions and the record developed on remand, including, among other things, affidavits, motions, objections, proposed findings and conclusions, orders, and transcripts from hearings and depositions. *See* TEX. R. APP. P. 73.4(b)(4). Any extensions of time must be requested by the trial court and obtained from this Court.

Filed: November 3, 2021

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