No. _____

In The

Supreme Court of the United States

ANTOIN DENIL MARSHAL,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of capital murder and sentenced to life without parole. The State obtained a conviction based on the testimony of: (1) an eyewitness who claimed that, while he was on his apartment balcony at 2:30 a.m., he heard a gunshot and saw petitioner and another man exit the building across the parking lot in which the shooting occurred; and (2) a career criminal with a pending habitual offender charge who claimed that petitioner had confessed to him in the jail. Eleven years after petitioner's conviction became final, he filed a habeas corpus application alleging that his trial counsel was ineffective and that the State both failed to disclose impeachment evidence and presented and failed to correct false testimony. After a ten-day evidentiary hearing, the trial court—without addressing the merits—recommended that the application be dismissed based on the doctrine of laches because petitioner unreasonably delayed filing it, and the State would be unduly prejudiced at a retrial. The Texas Court of Criminal Appeals (TCCA) denied relief by adopting the trial court's findings and conclusions and also denied reconsideration. The questions presented are:

I. Whether the TCCA's application of the equitable doctrine of laches constitutes an independent and adequate state law ground that bars review of petitioner's substantial constitutional claims.

QUESTIONS PRESENTED—Continued

II. Whether the TCCA's application of the equitable doctrine of laches to bar review of the merits of petitioner's substantial constitutional claims violated his right to due process of law. Alternatively, whether the prosecution is estopped from relying on the doctrine of laches when its misconduct caused the delay in filing the habeas corpus application.

RELATED CASES

- *State v. Marshal*, No. 1087328, 337th District Court of Harris County, Texas. Judgment entered December 14, 2006.
- *Marshal v. State*, No. 14-06-01133-CR, Fourteenth Court of Appeals of Texas. Judgment entered February 28, 2008.
- *Marshal v. State*, No. PD-1199-08, Texas Court of Criminal Appeals. Judgment entered January 14, 2009.
- *Ex parte Marshal*, No. 1087328-A, 337th District Court of Harris County, Texas. Judgment entered December 23, 2020.
- *Ex parte Marshal*, No. WR-92,202-01, Texas Court of Criminal Appeals. Judgment entered November 10, 2021. Reconsideration denied May 2, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Antoin Denil Marshal, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's order denying habeas corpus relief without written order (App. 1) and denying reconsideration (App. 29) are unreported. The state district court's findings of fact and conclusions of law (App. 2-28) are unreported. The TCCA's order refusing discretionary review on direct appeal (App. 30-31) is unreported. The Texas Court of Appeals' unpublished opinion affirming the conviction on direct appeal (App. 32-48) is available at 2008 WL 516786. The judgment of the trial court (App. 49-55) is unreported.

JURISDICTION

The TCCA denied relief on November 10, 2021, and denied reconsideration on May 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal

prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Procedural History

Petitioner pled not guilty to capital murder in the 337th District Court of Harris County, Texas. The jury convicted him, and the court assessed punishment at life imprisonment without parole on December 14, 2006.

The Texas Court of Appeals affirmed petitioner's conviction in an unpublished opinion issued on February 28, 2008. The TCCA refused discretionary review on January 14, 2009. *Marshal v. State*, No. 14-06-01133-CR, 2008 WL 516786 (Tex. App.—Houston [14th Dist.] February 28, 2008, pet. ref'd).

Petitioner filed a state habeas corpus application on July 22, 2020. The trial court, after conducting a ten-day evidentiary hearing, recommended that the application be dismissed based on the doctrine of laches on December 23, 2020. The TCCA denied relief on November 10, 2021. Petitioner filed a suggestion for reconsideration on November 11, 2021. The TCCA

denied reconsideration on May 2, 2022. *Ex parte Marshal*, No. WR-92,202-01 (Tex. Crim. App. November 10, 2021).

B. Factual Statement

1. The Trial

Four female Houston Police Department (HPD) officers and one male officer were allowed to use an apartment at a complex near the police substation in exchange for providing "security" when off duty (2 R.R. 22-23). Officers Reuben DeLeon and Starlyn Martinez, both of whom were married to other people, had keys to the apartment and were involved in what Martinez described in her testimony as an "inappropriate romantic relationship" (2 R.R. 26).

Officers DeLeon and Martinez were in the apartment around 2:30 a.m. on October 26, 2005, when someone knocked on the door (2 R.R. 21-24, 45). Martinez looked through the peephole and saw a black male wearing a dark, "silky" jacket (2 R.R. 47). DeLeon told Martinez that he would see what the man wanted (2 R.R. 48). When DeLeon opened the door, he was shot and killed (2 R.R. 48-54; 3 R.R. 114-15).

Crime scene investigators found a do-rag (a head covering) in the grass between the apartment and the parking lot and the crystal from a man's watch in the stairwell across from the apartment (3 R.R. 13-16).

HPD Homicide Investigator Todd Miller testified that an anonymous caller informed CrimeStoppers

that he saw "Brandon," whom he knew, run out of the apartment complex that night (4 R.R. 62-63). Further investigation led the police to develop Brandon Zachary as a suspect (4 R.R. 62).

Calvin Finnels, Jr., a resident of the apartment complex, testified that he told Investigator Miller that he was talking on the phone on the balcony of his apartment between 2:30 a.m. and 3:00 a.m. when he saw two black males enter the building across the parking lot (4 R.R. 104-07, 110). About two minutes later, he heard gunshots and ducked down as they ran away (4 R.R. 111-12).

Zachary was arrested in Beaumont, Texas, on October 31, 2005 (3 R.R. 169). Finnels positively identified Zachary in a photospread and, thereafter, in a lineup (4 R.R. 66-68, 116-18). Martinez positively identified Zachary in a lineup as the man she saw through the peephole and also identified the blue New York Yankees jacket that he was wearing (3 R.R. 164-66).

Petitioner also became a suspect (4 R.R. 77). He was arrested in Wichita Falls, Texas, on November 2, 2005 (3 R.R. 180-81). Finnels identified him in a photospread and a lineup and also before the jury (4 R.R. 77-84, 112-14, 118-20). Thus, at the time petitioner was charged with capital murder, the State's evidence consisted of an identification by Finnels from his balcony in the dark at a distance.

Michael Buchanan, a career criminal who was awaiting trial in the Harris County Jail on a habitual offender burglary of a habitation charge while on

mandatory supervision on a 40-year sentence for a previous burglary conviction, testified that he wrote a letter to the district attorney's office on February 6, 2006, offering to testify against petitioner (2 R.R. 109-12, 115-19, 160).[1] Buchanan met with Assistant District Attorneys Craig Goodhart and Marc Brown (who were prosecuting petitioner) and, after he agreed to testify, pled guilty to burglary and was sentenced to two years in prison (2 R.R. 18, 122). Buchanan denied that he received this plea bargain as a result of his cooperation (2 R.R. 120, 123). Buchanan asserted that petitioner confessed in jail that he shot DeLeon, ran into a staircase, and fell down; when he reached the car, his do-rag and watch were missing (2 R.R. 146-47).

Petitioner testified that he was in Beaumont at the time of the murder and did not shoot DeLeon (5 R.R. 38, 48-49).[2] He acknowledged that Zachary was a good friend and that he previously left his Yankees jacket in Zachary's car (5 R.R. 30, 33-35). He testified that he had never owned a do-rag, had never been to this apartment complex in Houston, and did not lose his watch there (5 R.R. 34, 38-39). He denied giving Buchanan information about the case (5 R.R. 82).

The prosecutors argued to the jury that petitioner shot and killed DeLeon during a burglary and, while

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[1] A person convicted of burglary of a habitation who has two prior final felony convictions, with the second conviction being for an offense committed after the first conviction became final, faces a punishment range of 25 years to life under Section 12.42(d) of the Texas Penal Code.

[2] Beaumont is about 90 miles from Houston.

fleeing, ran into the stairwell, broke his watch, and lost his do-rag (6 R.R. 9, 49-50); that Finnels identified petitioner as one of the men who ran out of the building after the shot was fired (6 R.R. 16); and, that petitioner gave information to Buchanan that only the killer would know (6 R.R. 50).

Defense counsel argued to the jury that Officer Martinez saw and heard only one man, whom she identified as Zachary (6 R.R. 31); that the CrimeStoppers tip implicated Zachary (6 R.R. 34); that Finnels could not accurately identify anyone in the dark because he was talking on the phone and not paying attention (6 R.R. 24-25); and, that Buchanan fabricated that petitioner had confessed to the murder in exchange for a two-year sentence on a habitual offender burglary charge (6 R.R. 21-22).

The jury convicted petitioner of capital murder, and the trial court sentenced him to life without parole.

2. The State Court Evidentiary Hearing

The trial court conducted a ten-day evidentiary hearing on allegations that the prosecutors suppressed favorable evidence and presented false and misleading testimony, and that defense counsel was ineffective. The court did not make findings of fact and conclusions of law on the merits. Instead, the court recommended that the application be dismissed based on the doctrine of laches because of the 11-year delay in filing it. The TCCA adopted these findings of fact and conclusions of law and denied relief without written order. The

questions presented in this petition concern the validity of the TCCA's application of the doctrine of laches to bar review of petitioner's substantial federal constitutional claims. Petitioner will summarize the most substantial claims to demonstrate the importance of this Court granting certiorari to determine whether the TCCA relied on an inadequate state law ground and violated due process by refusing to consider the merits based on the doctrine of laches.

a. The CrimeStoppers Tipster

Investigator Miller testified at trial that an anonymous caller contacted CrimeStoppers and said that he saw "Brandon," whom he knew, run out of the apartment complex (4 R.R. 62-63). The State deliberately misled the jury by omitting that the tipster also reported that Brandon was alone, with no one else in the area. Defense counsel performed deficiently by failing to discover the identity of the tipster and by failing to call him to testify.

Petitioner presented testimony at the habeas hearing that Fredrick Albert contacted CrimeStoppers, gave his name, signed a document waiving anonymity, and said that he saw "Brandon" run out of the apartment complex by himself, with no one else in the area (4 H.R.R. 42-45; 1 H.C.R. 616-18). CrimeStoppers provided this information to HPD and sent Albert to the Homicide Division to be interviewed (4 H.R.R. 45, 49; 1 H.C.R. 616-18). Albert gave a statement to HPD and said that he would be willing to testify at trial

(4 H.R.R. 49; 1 H.C.R. 609). HPD routinely forwards witness statements to the district attorney's office (9 H.R.R. 122). However, both HPD and the district attorney's office asserted in the habeas proceeding that they could not find Albert's statement (4 H.R.R. 10-13; 6 H.R.R. 7-8, 12, 17-19; 9 H.R.R. 35).

HPD Sergeant Brian Harris sent a letter to CrimeStoppers on December 8, 2005, that "Fred" had been interviewed and would be a vital part of the trial; recommended that "Fred" receive a $7,000 reward; and invited CrimeStoppers to contact Investigator Miller or him if there were any questions (4 H.R.R. 45-47; 1 H.C.R. 609). CrimeStoppers paid Albert $8,000 for his information in December of 2005 (4 H.R.R. 50). Neither Miller nor any other HPD officer prepared a supplemental offense report naming Albert (9 H.R.R. 128-29, 132). HPD omitted Albert's name from all documents sent to the district attorney's office that were disclosed to defense counsel, referring to him only as an "anonymous caller" (7 H.R.R. 97; 1 H.C.R. 597). Miller omitted from his offense report and trial testimony that Albert told CrimeStoppers that Brandon was alone, with no one else in the area (4 H.R.R. 62-63; 1 H.C.R. 597).

Defense counsel testified at the habeas hearing that he did not know the name of the tipster or that Albert had told CrimeStoppers that Brandon was alone, with no one else in the area; and that, had he known, he would have called Albert to contradict Finnels' testimony that Zachary and petitioner ran out of the apartment complex together (7 H.R.R. 87-89, 92-93; 9 H.R.R. 66-67).

Thus, the State suppressed Albert's identity and his statement to CrimeStoppers that Brandon was alone, with no one else in the area; and, it presented Investigator Miller's misleading testimony regarding the substance of the tip. Defense counsel performed deficiently by failing to request the substance of the tip and the identity of the tipster and by failing to call Albert to testify.

b. The Benefits Conferred On The Key Prosecution Witnesses

1. Michael Buchanan

Buchanan testified at trial that he was facing 25 years to life in prison as a habitual offender and had been in jail about nine months when he wrote the letter (2 R.R. 115-19). He asked the prosecutors to speak to his lawyer because he did not have good representation (2 R.R. 119-20). After the lawyers spoke, he pled guilty and was sentenced to two years in prison (2 R.R. 115-16, 121-22). Goodhart elicited that the prosecutors did not promise him a benefit in exchange for his testimony (2 R.R. 123). Goodhart then argued to the jury, "Did Buchanan get a deal? We didn't cut him a deal" (6 R.R. 14).

Petitioner testified at the habeas hearing that he and defense counsel discussed the information contained in the State's file before trial (7 H.R.R. 41-42). Buchanan, age 40, befriended petitioner, age 18, in the jail and said that he was an experienced jailhouse lawyer who could help with petitioner's case (2 R.R. 115,

135-37; 11 H.R.R. 58-59). Petitioner did not realize that Buchanan wanted information about his case in order to contact the State and offer to testify that petitioner confessed to the murder in an effort to obtain leniency on his own pending habitual offender charge (11 H.R.R. 61). Petitioner gave Buchanan the information that he had received from counsel (11 H.R.R. 60, 70-74).[3] Petitioner asked Buchanan whether DNA could be obtained from the broken watch crystal and the do-rag because he wanted to know whether DNA testing could establish that another person wore these items and that he is innocent (11 H.R.R. 74-75).

Petitioner presented testimony at the habeas hearing that, when Buchanan wrote the letter to the district attorney's office and met with prosecutors Goodhart and Brown, the State's plea bargain offer was 40 years in prison (2 R.R. 118-19; 6 H.R.R. 59; 1 H.C.R. 133, 568-94). The State did not disclose, and defense counsel did not discover, the initial 40-year plea bargain offer (8 H.R.R. 39-44). The State reduced the charge of burglary "with intent to commit sexual assault" to burglary "with intent to commit assault"; waived the habitual offender enhancement; and, two months before Buchanan testified against petitioner, he pled guilty and was sentenced to two years in prison (4 H.R.R. 129-30 133-35, 139-40; 1 H.C.R. 134). Thus,

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[3] Petitioner acknowledged at the habeas hearing that he testified falsely at trial that he did not give Buchanan information about the case (11 H.R.R. 76).

Goodhart's closing argument was false, as Buchanan did get a deal as a result of his cooperation.

Thus, the State suppressed evidence that Buchanan received a benefit in exchange for his cooperation and presented his false testimony that he did not receive a benefit. Defense counsel performed deficiently by failing to discover and present testimony that the State's plea bargain offer was reduced from 40 years to two years after Buchanan wrote the letter and agreed to testify.

2. Calvin Finnels

Finnels was charged with misdemeanor theft on February 2, 2006 (6 H.R.R. 107; 1 H.C.R. 173-75). He was not arrested, did not post bond, and the charge was dismissed because of "insufficient evidence" on December 7, 2006, the day before petitioner's trial started (1 R.R. 1; 6 H.R.R. 108-10; 1 H.C.R. 173-75). The State failed to disclose that Finnels had a theft charge with an open warrant that was dismissed the day before petitioner's trial started (8 H.R.R. 80). Defense counsel performed deficiently by failing to discover and present this information (8 H.R.R. 74-81; 1 H.C.R. 173-75).

c. Calvin Finnels' "Eyewitness Identification"

Finnels testified at trial that he was talking on the phone on the balcony of his apartment between 2:30 a.m. and 3:00 a.m. when he saw two black males enter

the building across the parking lot, heard gunshots, and ducked down as they ran away (4 R.R. 104-07, 110-12). He positively identified Zachary and petitioner in photospreads and lineups and also identified petitioner before the jury (4 R.R. 66-68, 77-84, 112-14, 118-20).

Petitioner presented testimony at the habeas hearing that Investigator Miller and Sergeant Harris sent a crime scene officer to the apartment complex after dark on November 28, 2005, to take photos from the balcony of Finnels' apartment to show the view and the lighting conditions (12 H.R.R. 76-87, 100; 14 H.R.R. 22). The State did not offer any of those photos at trial (12 H.R.R. 99). Clearly, the State would have offered them had the prosecutors believed they showed Finnels could make a reliable identification from his balcony at that distance in the dark.

Petitioner also presented testimony at the habeas hearing from a private investigator who videotaped a reenactment of the view from the balcony of a black male on the ground to show that it is unlikely that a person standing on the balcony could identify a black male on the ground at night (5 H.R.R. 56-57, 61-62). Defense counsel testified that he went to the scene during the daytime and concluded that Finnels could not have made a reliable identification from his balcony (8 H.R.R. 64-65, 68, 87-88; 9 H.R.R. 69-70). However, counsel did not present evidence of same to the jury.

Thus, counsel performed deficiently by failing to go to the apartment complex at night and take photos

and/or a video of the view that Finnels had from his balcony (or offer the photos taken by HPD) to show that Finnels could not identify two black males (who were strangers to him) in the dark at that distance (8 H.R.R. 68-69; 1 H.C.R. 162-72).

d. The DNA Exclusion

Prosecutor Brown asked Sergeant Harris on direct examination whether the result of the DNA analysis on the do-rag was "positive or negative." Harris responded, "Negative" (3 R.R. 167). This was patently false. Neither Brown nor defense counsel presented additional testimony on the subject. The jury was left with the false impression that no DNA was found on the do-rag.

HPD received a lab report in December of 2005 from Identigene, a private DNA lab, that a full male DNA profile that did not match petitioner, Zachary, or Officer DeLeon had been developed from the do-rag (4 H.R.R. 80-82; 1 H.C.R. 316-20). When Buchanan told the prosecutors in February of 2006 that petitioner said that he lost his do-rag as he fled after committing the murder, they should have doubted his truthfulness based on the DNA test results. Nonetheless, Brown argued to the jury that petitioner told Buchanan that he lost his do-rag as he fled (6 R.R. 50).

Brown testified at the habeas hearing that he intended to leave the impression on the jury that the do-rag belonged to petitioner (4 H.R.R. 90). He created this false impression by not eliciting that another

male's DNA was found on the do-rag. Defense counsel did not correct the false impression.

After the testimony at the habeas hearing had concluded, HPD disclosed to petitioner's counsel a "to do" list made by an unidentified officer that contained the notation, "Identify who owned the do-rag after sending the male profile to CODIS. Is this Gregory Cage?" (2 H.C.R. 3-4).[4] However, neither HPD nor the district attorney's office requested that the DNA profile be uploaded to the CODIS database (4 H.R.R. 17-18, 83; 6 R.R. 7).

Petitioner repeatedly requested a CODIS upload during the habeas proceeding, but the State refused to agree, and the court refused to order it (4 H.R.R. 17-24; 5 H.R.R. 10-21; 8 H.R.R. 6-20). Petitioner's counsel threw a "Hail Mary" during an overnight recess in the hearing, days before the November 2020 election for district attorney, and notified a journalist of the State's refusal to upload the DNA to CODIS. The journalist contacted the habeas prosecutor for comment. Once the media became involved, the Conviction Integrity Unit of the district attorney's office agreed to upload the DNA to CODIS. However, the DNA was not

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[4] Cage gave a written statement to HPD on October 27, 2005, that Dante Lindsey, while wearing a black do-rag, told Cage that he was going to kill the police officer that worked security at the apartment complex because the officer had arrested and beat up his brother; and, a day or two later, that Lindsey told Cage that he killed the officer, displayed a pistol, and had substantially changed his appearance (4 H.R.R. 69-71; 1 H.C.R. 197-99). The jury did not hear testimony about this.

uploaded before the testimony at the habeas hearing had concluded. Five days after the DNA was uploaded, the lawyers were notified that the DNA matched a named black male. Although this male's DNA was not in the CODIS database at the time of petitioner's trial in 2006, it was uploaded in 2007, after he was arrested for robbery (1 H.C.R. 842-43; 1 H.C.R. 800-37). Thus, there would have been a match in 2007 had HPD uploaded the DNA to CODIS in 2006 instead of waiting until 2020.

Thus, the State elicited Harris' false testimony that the do-rag was "negative" for DNA when, in fact, another black male's DNA was present. Defense counsel performed deficiently by failing to present testimony that the full male DNA profile from the do-rag did not match petitioner, Zachary, or Officer DeLeon. Had counsel presented this testimony, he would have impeached Sergeant Harris' testimony that the DNA analysis was "negative" and discredited Buchanan's testimony that petitioner confessed to losing the do-rag as he fled from the murder (7 H.R.R. 78).

e. Petitioner's Cellphone Records

Defense counsel told the jury in his opening statement that he would show that petitioner's cellphone was in Beaumont on the day of the murder (2 R.R. 17). Neither the State nor the defense offered those records, which were in the State's file (7 H.R.R. 106-09).

Petitioner testified on direct examination that he was in Beaumont at the time of the murder and did not

shoot Officer DeLeon (5 R.R. 38, 48-49). Goodhart asked on cross-examination, "Now, you said you hadn't been to Houston. Do you have any idea why your cellphone records show you were in Houston the day of the killing?" (5 R.R. 72). Petitioner responded, "My phone was guaranteed not to show no Houston calls." Defense counsel did not offer the records to support petitioner's testimony. Brown argued to the jury that defense counsel had not kept his promise to offer petitioner's cellphone records, but the State had kept its promises (6 R.R. 46).

Petitioner presented testimony at the habeas hearing that his cellphone records show that he was in Beaumont rather than Houston on the day of the murder (4 H.R.R. 107-09; 7 H.R.R. 108; 8 H.R.R. 27; 1 H.C.R. 176-95). The State could not produce any records showing that petitioner's cellphone was in Houston on the day of the murder (4 H.R.R. 15-16). To the contrary, the offense report contained a timeline regarding the locations of petitioner's cellphone on the day of the murder (4 H.R.R. 107; 1 H.C.R. 176). The timeline reflects that his phone "hits I-10 Walden Road Tower at 12:10 a.m."[5] The murder occurred about 2:30 a.m. in Houston (2 R.R. 45). The next call hit the same tower at 9:35 a.m. (1 H.C.R. 176). After the testimony at the habeas hearing had concluded, HPD disclosed to petitioner's counsel a report (that was not in the State's file) that contained the notation, "Not even phone places suspect near murder scene" (2 H.C.R. 3-4).

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[5] Walden Road Tower is in Beaumont (1 H.C.R. 177-78).

Goodhart and Brown testified at the habeas hearing that a prosecutor can properly assert while cross-examining a defendant before a jury that the State has evidence that it does not have in an attempt to bluff him into confessing (4 H.R.R. 111-15; 10 H.R.R. 97-104). Goodhart deliberately misled the jury by falsely asserting in his question that petitioner's cellphone records show that he was in Houston on the day of the murder and, after petitioner testified that this was not possible, by failing to correct his false assertion. Brown deliberately misled the jury during his closing argument, as he knew that petitioner's cellphone records did not place his phone in Houston on the day of the murder (4 H.R.R. 107-08). Goodhart's false statement that the State had incriminating evidence that it did not have—asserted as fact in a question—undermined petitioner's testimony that he was in Beaumont at the time of the murder and denied him a fair trial.

Defense counsel testified at the habeas hearing that he forgot to offer the cellphone records during the defense's case because he was upset and angry at the prosecutors for failing to disclose to him a letter that petitioner wrote from the jail that Goodhart used to impeach petitioner's testimony (7 H.R.R. 111-15; 8 H.R.R. 23). However, counsel could have elicited the location of petitioner's cellphone on cross-examination of the police officers, before he became upset and angry (8 H.R.R. 23-24). Counsel performed deficiently by failing to object to Goodhart's question to petitioner that assumed a fact not in evidence and by failing to present records or testimony to show that petitioner's

cellphone was not in Houston on the day of the murder (8 H.R.R. 27-29, 31-34). Had counsel presented those records, Goodhart could not have asked petitioner why they showed that his phone was in Houston on the day of the murder.

f. Laches

Petitioner's conviction became final on appeal in 2009. He filed the habeas corpus application in 2020. He anticipated that the State would contend that the TCCA should not consider the merits of the constitutional claims based on the doctrine of laches because of the 11-year delay in filing the application. As a result, he proactively argued in his brief that application of the doctrine of laches would violate the Due Process Clause of the United States Constitution and, in any event, that the TCCA should consider the merits based on the equities (H.C.R. 11-18).

Petitioner presented testimony at the habeas hearing that he diligently sought legal representation in a habeas corpus proceeding after he was convicted (5 H.R.R. 118). He wrote letters to the Innocence Networks at the University of Houston Law School in 2007 and the University of Texas Law School in 2009. Each rejected his case in 2012 (5 H.R.R. 81-82; 11 H.R.R. 79-80; 1 H.C.R. 702, 705-06).

Petitioner's family hired the National Legal Professional Associates (NLPA) in February of 2012 and completed payment for the representation in July of

2014 (5 H.R.R. 82-84, 95-97; 1 H.C.R. 386-87).[6] The NLPA sent a letter in 2012 to Chris Goldsmith, a lawyer in Houston, asking whether he would represent petitioner in a post-conviction proceeding (5 H.R.R. 91; 1 H.C.R. 56-57). Petitioner's family paid Goldsmith an additional $7,000 between 2015 and 2017 (5 H.R.R. 97).

The NLPA sent drafts of a habeas corpus application and a memorandum of law to petitioner and Goldsmith in 2014 and 2018 (5 H.R.R. 94, 99, 102, 104; 1 H.C.R. 358-85, 389-433). Petitioner refused to sign or authorize Goldsmith to file either application (5 H.R.R. 103-06).[7]

Petitioner wanted to hire another lawyer in August of 2018, but his family could not afford to do so (5 H.R.R. 108). The family hired undersigned counsel to conduct a habeas investigation in April of 2019 (5 H.R.R. 109). Counsel provided an evaluation of the case in August of 2019. The family hired counsel to file a habeas application in June of 2020 (5 H.R.R. 109-10).

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[6] The NLPA is an organization of paralegals founded by a disbarred lawyer following his release from federal prison on mail fraud convictions (5 H.R.R. 86-87, 91-92, 112; 1 H.C.R. 434-53).

[7] Had Goldsmith filed the application, it would have been dismissed because it was not on the form required by the TCCA. Had it been on the correct form, relief would have been denied because it stated general conclusions rather than facts demonstrating any legal basis for relief. It did not include any of the issues raised in this habeas proceeding (5 H.R.R. 103-05; 11 H.R.R. 81).

Counsel filed the application, brief, and exhibits in August of 2020.

Petitioner argued that his good faith reliance on the NLPA and Goldsmith—both of whom failed to investigate the case—constituted a reasonable justification for the delay in filing the application, and that the delay did not affect the credibility of his claims (13 H.R.R. 26); that the State was not materially prejudiced in defending the habeas proceeding as a result of the delay (13 H.R.R. 21-25);[8] and, that the State would not be materially prejudiced at a retrial as a result of the delay (13 H.R.R. 25-26).[9]

Petitioner also argued that the State should be estopped from relying on the doctrine of laches because it caused the delay by failing to upload the DNA profile from the do-rag to the CODIS database until 2020. Had it uploaded the profile in 2006, there would have been a match in 2007, when the black male's DNA was uploaded to CODIS after he was arrested for robbery. It would be the ultimate due process violation for the courts to refuse to consider the merits of the constitutional claims after the State waited 14 years to upload the suspect's DNA to CODIS, suppressed favorable

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[8] Although Goodhart testified that he has a diminished memory, he acknowledged that he has had "chemo brain" since he contracted cancer in 2010 (10 H.R.R. 155).

[9] Finnels died in 2014 (13 H.R.R. 25). Arguably, his former testimony would be admissible at a retrial as an exception to the hearsay rule pursuant to Rule of Evidence 804(b)(1)(B). Thus, if any party would be prejudiced by his death, it would be petitioner, who could not cross-examine him.

evidence (including the identity of a critical witness), and used false testimony (13 H.R.R. 81, 89)

g. The Trial Court's Findings And Conclusions

The trial court concluded that the doctrine of laches barred consideration of the merits because the 11-year delay in filing the application was unreasonable, the State was materially prejudiced in defending the habeas proceeding, and the State would be materially prejudiced at a retrial (1 H.C.R. 844-51).[10] Applicant filed objections that, *inter alia*, application of the doctrine of laches violated the Equal Protection Clause of the Fourteenth Amendment because the TCCA has granted habeas relief in numerous other cases despite the unexplained, lengthy delay in filing the application (1 H.C.R. 861-62). Nonetheless, the TCCA summarily denied relief (App. 1).

REASONS FOR GRANTING REVIEW

This case lies at the crossroads where dishonest prosecutors meet incompetent defense counsel. The jury did not know that the State had rewarded Buchanan and Finnels for their cooperation; that Finnels' identification of petitioner was unreliable, and that a known CrimeStoppers tipster could have contradicted

[10] The trial court did not address whether the State would retry petitioner after the CODIS upload revealed that another man was wearing the do-rag.

Finnels' testimony that petitioner and Zachary ran out of the apartment complex together; that the DNA analysis on the do-rag was positive, and there was a full DNA profile that belonged to a male other than petitioner, Zachary, or Officer DeLeon; and, that petitioner's cellphone records placed him in Beaumont rather than Houston on the day of the murder—as he testified at trial. Neither the habeas judge nor any judge on the TCCA had a problem with any of this, and relief was denied without consideration of the merits of these substantial constitutional claims. This case demonstrates how Texas courts use the doctrine of laches to protect wrongful convictions and perpetuate injustice.

I. The TCCA's Application Of The Equitable Doctrine Of Laches Does Not Constitute An Independent And Adequate State Law Ground That Bars Review Of Petitioner's Substantial Constitutional Claims.

It is well-established that a state court cannot invoke a rule of procedure to bar review of a federal constitutional claim unless it strictly and regularly followed that procedural rule at the time it was applied. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). In *Ford*, the Georgia Supreme Court held that the petitioner's equal protection claim was procedurally barred as untimely under Georgia law. *Id*. at 413. This Court granted certiorari to decide whether the procedural rule constituted an independent and adequate state law ground that would bar review of the federal constitutional

claim. *Id*. at 418. The Court reaffirmed the principle that a state court can invoke only a "firmly established and regularly followed state practice" to bar review of a federal constitutional claim. *Id*. at 423-24. Because this procedural rule was not strictly and regularly followed in Georgia, the Court remanded the case for consideration of the merits of the constitutional claim. *Id*. at 425.

The TCCA has not consistently applied the doctrine of laches to bar review of federal constitutional claims. To the contrary, it has granted habeas corpus relief in the following categories of cases despite the lengthy, unexplained delay in filing the application: (1) involuntary guilty pleas;[11] (2) suppression of favorable evidence or use of false testimony;[12] (3) ineffective

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[11] *See Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000) (seven years); *Ex parte Evans*, 537 S.W.3d 109 (Tex. Crim. App. 2017) (six years); *Ex parte Garcia*, 547 S.W.3d 228 (Tex. Crim. App. 2018) (12 years); *Ex parte Westerman*, 570 S.W.3d 731 (Tex. Crim. App. 2019) (Yeary, J., dissenting) (28 years); *Ex parte Hill*, No. WR-83,074-03, 2018 WL 2327177 (Tex. Crim. App. May 23, 2018) (unpublished) (16 years); *Ex parte Kaunda*, No. WR-89,533-01, 2020 WL 1161353 (Tex. Crim. App. Mar. 11, 2020) (unpublished) (16 years); *Ex parte Rios*, No. WR-90,525-01, 2020 WL 3582420 (Tex. Crim. App. July 1, 2020) (unpublished) (11 years); *Ex parte Massey*, No. WR-93,646-01, 2022 WL 1160822 (Tex. Crim. App. Apr. 20, 2022) (unpublished) (14 years).

[12] *See Ex parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002) (eight years); *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) (20 years after conviction became final on appeal and 15 years after initial habeas application denied); *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (12 years after conviction became final on appeal and two years after initial habeas application denied); *Ex parte Harbin*, No. WR-82,672-01, 2015 WL 3540861 (Tex. Crim. App. June 3, 2015) (unpublished) (23 years);

assistance of counsel;[13] (4) newly available scientific evidence;[14] (5) double jeopardy;[15] (5) invalid cumulation order;[16] (6) out-of-time appeal based on ineffective assistance of appellate counsel;[17] and (7) out-of-time

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Ex parte Mozee, No. WR-82,467-01, 2018 WL 345057 (Tex. Crim. App. Jan. 10, 2018) (unpublished) (16 years); *Ex parte Allen*, No. WR-56,666-03, 2018 WL 344332 (Tex. Crim. App. Jan. 10, 2018) (unpublished) (13 years); *Ex parte Nolley*, No. WR-46,177-03, 2018 WL 2126318 (Tex. Crim. App. May 9, 2018) (unpublished) (18 years); *Ex parte Cooper*, No. WR-46,766-07, 2018 WL 3133966 (Tex. Crim. App. June 27, 2018) (unpublished) (15 years); *Ex parte Stewart*, No. WR-84,558-02, 2018 WL 7568246 (Tex. Crim. App. Nov. 21, 2018) (unpublished) (29 years); *Ex parte Jaile*, No. WR-89,729-01, 2019 WL 2870946 (Tex. Crim. App. July 3, 2019) (unpublished) (26 years); *Ex parte Damaneh*, No. WR-75,134-03, 2020 WL 1161203 (Tex. Crim. App. Mar. 11, 2020) (unpublished) (10 years); *Ex parte Gutierrez*, No. WR-91,233-01, 2020 WL 3594815 (Tex. Crim. App. July 1, 2020) (unpublished) (24 years); *Ex parte Dyson*, 631 S.W.3d 117 (Tex. Crim. App. 2021) (Richardson, J., concurring) (23 years); *Ex parte Nicholson*, 634 S.W.3d 743 (Tex. Crim. App. 2021) (37 years).

[13] *See Ex parte Callaway*, No. WR-87,705-01, 2018 WL 7570476 (Tex. Crim. App. Oct. 31, 2018) (unpublished) (13 years); *Ex parte Staley*, No. WR-89,262-01, 2018 WL 6626641 (Tex. Crim. App. Dec. 19, 2018) (unpublished) (eight years) *Ex parte Vasquez*, No. WR-90,156-01, 2021 WL 264736 (Tex. Crim. App. Jan. 27, 2021) (unpublished) (nine years).

[14] *See Ex parte Gandy*, No. WR-22,074-10, 2019 WL 2017291 (Tex. Crim. App. May 8, 2019) (unpublished) (25 years).

[15] *See Ex parte Timmons*, No. WR-92,604-02, 2021 WL 4301844 (Tex. Crim. App. Sept. 22, 2021) (22 years).

[16] *See Ex parte Simmons*, No WR-16,370-02, 2015 WL 6653232 (Tex. Crim. App. Oct. 28, 2015) (unpublished) (22 years).

[17] *See Ex parte Dotson*, No. WR-74,562-02, 2022 WL 791666, ___ S.W.3d ___ (Tex. Crim. App. Mar. 16, 2022) (10 years).

PDR based on ineffective assistance of appellate counsel.[18]

The Court should grant certiorari to determine whether the TCCA's application of the equitable doctrine of laches constitutes an independent and adequate state law ground that bars review of petitioner's substantial constitutional claims. The TCCA had no constitutionally sound justification to refuse to consider the merits of petitioner's claims in view of the fact that it has granted relief to numerous other similarly situated habeas applicants. The Court should vacate the judgment and remand with instructions to consider the merits of the claims pursuant to *Ford v. Georgia*, *supra*.

II. The TCCA's Application Of The Equitable Doctrine Of Laches To Bar Review Of The Merits Of Petitioner's Substantial Constitutional Claims Violated His Right To Due Process Of Law. Alternatively, The Prosecution Is Estopped From Relying On The Doctrine Of Laches When Its Misconduct Caused The Delay In Filing The Habeas Corpus Application.

"The doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert

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[18] *See Ex parte Henry*, No. WR-91,675-01, 2021 WL 4186463 (Tex. Crim. App. Sept. 15, 2021) (unpublished) (nine years); *Ex parte Sadler*, 638 S.W.3d 711 (Tex. Crim. App. 2022) (Yeary, J., dissenting) (16 years).

right or claim which, taken together with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. Also, it is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done." BLACK'S LAW DICTIONARY 875 (6th ed. 1990).

The doctrine of laches evolved in civil cases. In Texas, laches is an affirmative defense that a defendant in a civil case must plead and prove under Rule of Civil Procedure 94. A successful laches defense requires two elements: (1) the plaintiff must unreasonably delay asserting a legal or equitable right; and (2) the defendant must suffer a good faith and detrimental change in position caused by the delay. *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998). The measure for the change in position must be so dramatic that the defendant cannot be restored to his former position if the plaintiff's rights are enforced. *Culver v. Pickens*, 176 S.W.2d 167, 170-71 (Tex. 1943). Laches "does not bar a plaintiff's suit before the statute of limitations has run unless estoppel or 'extraordinary circumstances' are present." *Bluebonnet Sav. Bank, FSB v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 912 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Laches, by definition, is intended to apply in civil cases decided in courts of equity.

No statute of limitations governs habeas applications filed in non-death penalty cases under article 11.07 of the Texas Code of Criminal Procedure. However, in 1995, the legislature enacted a statute of

limitations governing habeas applications filed in death penalty cases under article 11.071, § 4(a). The enactment of a statute of limitations in death penalty cases demonstrates that the legislature does not intend that habeas applications in non-death penalty cases be filed within a time certain. *See Ex parte Carrio*, 992 S.W.2d 486, 490 (Tex. Crim. App. 1999) (Meyers, J., dissenting). Nonetheless, a majority of the TCCA accepted the State's argument in *Carrio* that the doctrine of laches applies to non-death penalty cases and remanded the case to the trial court to develop the record on laches. *Id*. at 488.

The TCCA expanded the doctrine of laches in *Ex parte Perez*, 398 S.W.3d 206, 215 (Tex. Crim. App. 2013), holding that the State need not make a particularized showing of prejudice—anything that puts the State in a less favorable position, including its ability to retry the case, can constitute sufficient prejudice to apply laches and refuse to consider the merits. The TCCA decides whether to apply laches on a case-by-case basis. *Id*. at 216-17. It can refuse to apply 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 new evidence that shows that he is innocent of the offense or, in some cases, that he is reasonably likely to prevail on the merits. *Id*. at 218.

The TCCA further expanded the doctrine of laches in *Ex parte Smith*, 444 S.W.3d 661, 667 (Tex. Crim. App.

2014), holding that it would decide *sua sponte* whether laches bars relief even when the State does not raise that defense. The TCCA thereby placed the burden on a habeas applicant to prove that the claim is not barred by laches—even when the State does not assert that it is. *Id*. at 671 (Meyers, J., dissenting). Thus, a habeas petitioner has a burden of proof that is not imposed on a plaintiff in a civil case, in which the doctrine was intended to apply.

Application of the doctrine of laches in a habeas corpus proceeding violates the Due Process Clause of the Fourteenth Amendment. Due process requires that a person receive notice of what conduct is prohibited and what conduct is required to comply with the law. *Cf*. *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989). A habeas applicant does not have notice of when he must file the application to avoid dismissal under the doctrine of laches in the absence of a statute of limitations or clear, written guidelines. It is arbitrary and capricious for a court to apply laches on a case-by-case basis. Indeed, the CCA has applied laches inconsistently since it recognized the doctrine. *Compare Ex parte Gonzalez*, No. WR-90,849-01, 2020 WL 1542124 (Tex. Crim. App. Apr. 1, 2020) (unpublished) (applying laches to reject trial court's recommendation to grant relief on claim that counsel's inadequate advice caused defendant to reject plea bargain where defendant waited four-and-one-half years to file application) *with Ex parte Massey*, No. WR-93,646-01, 2022 WL 1160822 (Tex. Crim. App. Apr. 29, 2022) (unpublished) (disregarding laches to grant relief on claim

that guilty plea was involuntary because counsel failed to advise defendant that she would have to register as sex offender despite 14-year delay in filing application).

Several state courts have held that the doctrine of laches does not apply in a habeas corpus proceeding—especially when the legislature has not enacted a statute of limitations. *See State v. Cynkowski*, 88 A.2d 220, 223-24 (N.J. Super. Ct. App. Div.1952) ("[D]elay in petitioning for relief is not a sound reason for denying relief on Habeas corpus. The longer the unlawful imprisonment, the greater the wrong that the prisoner has suffered, and the stronger, not the weaker, are the reasons for judicial interference."); *Prater v. Commonwealth*, 474 S.W.2d 383, 383 (Ky. 1971); *In re McNair*, 615 P.2d 916, 917 (Mont. 1980); *In re Stewart*, 438 A.2d 1106, 1110 (Vt. 1981) (holding that the requirements that habeas petitioner prove that constitutional errors denied fair trial "adequately protect the state's interest in finality, and render the application of laches unnecessary"); *Pugh v. Leverette*, 286 S.E.2d 415, 421-22 (W.Va. 1982) (13-year-delay in filing petition did not preclude relief where statute provides that habeas petition may be filed any time after defendant sentenced, and appeal waived or concluded); *Jackson v. Jones*, 327 S.E.2d 206, 208 (Ga. 1985); *Wills v. State*, 859 S.W.2d 308, 310 (Tenn. 1993) ("[T]he goal of finality is better achieved by a statute of limitations . . . than by impressing an equitable doctrine such as laches on a distinctly criminal constitutional case"); *State v. Sutphin*, 164 P.3d 72, 76 (N.M. 2007) ("[I]t would be

fundamentally unjust to deny a valid habeas petition merely because of the passage of time"); *Akau v. State*, 439 P.3d 111, 114 (Hawaii 2019).

However, other state courts have held that the doctrine of laches applies in a habeas corpus proceeding. *See Paxton v. State*, 903 P.2d 325, 327 (Okla. Crim. App. 1995); *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997); *Dickinson v. Mullaney*, 937 A.2d 667, 673 (Conn. 2007); *Kirksey v. Warden*, No. 49140, 2009 WL 2601577, at *8 (Nev. Aug. 21, 2009) (unpublished); *State ex rel. Wren v. Richardson*, 936 N.W.2d 587, 600-01 (Wis. 2019). Thus, the states are divided on this critical issue.

The TCCA cases holding that the doctrine of laches can bar review of the merits did not involve claims of prosecutorial misconduct. *Carrio* involved a claim of ineffective assistance of trial counsel. *Perez* and *Smith* involved claims of ineffective assistance of appellate counsel. None of these cases involved the suppression of favorable evidence, the use of false testimony, or the refusal to test potentially exculpatory evidence.

To enforce a right in a court by equity, a party must come into court with "clean hands." *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 702 (Tex. 1936). A party with "unclean hands" will not be permitted to pursue equitable relief. *Foxwood Homeowners Ass'n v. Ricles*, 673 S.W.2d 376, 379 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The State's hands were filthy in petitioner's case.

The TCCA's reliance on the doctrine of laches to bar review of the merits of petitioner's substantial constitutional claims is perverse. The district attorney's office and HPD made a conscious decision not to upload the full male DNA profile from the do-rag to the CODIS database in 2006. Had it been uploaded at that time —as the unidentified HPD officer wrote in his report that he intended to do—there would have been a match in 2007. Assuming that the State had notified petitioner and his appellate counsel of this exculpatory evidence (a dubious proposition for the Harris County District Attorney's Office), petitioner could have informed the innocence projects in the letters that he wrote in 2007 and 2009 that the DNA on the do-rag matched another black male. Even though his family could not afford to hire habeas counsel at that time, an innocence project surely would have accepted his case and filed a habeas application after his conviction became final in 2009. Thus, the State's deliberate ignorance and willful blindness caused the delay in filing the application. The State should be estopped from relying on the doctrine of laches to bar review of the merits of the constitutional claims because its misconduct caused the delay. The TCCA, by accepting the State's laches argument, rewarded egregious prosecutorial misconduct, thereby encouraging other unscrupulous prosecutors to engage in similar misconduct in the future.

The Court should grant certiorari to determine whether application of the doctrine of laches violates the Due Process Clause of the Fourteenth Amendment

in the absence of a statute of limitations or fair notice as to when the application must be filed—especially when the delay was caused by the prosecution's suppression of favorable evidence, use of false testimony, and refusal to upload the full male DNA profile from the do-rag to the CODIS database for 14 years.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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