

No. 22-63

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**

—◆—
PETITIONER'S REPLY BRIEF

—◆—
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INTRODUCTION

The State's egregious misconduct in obtaining petitioner's capital murder conviction should shock the conscience of any fair-minded jurist. The state courts did not rely on an independent and adequate state law ground and also violated due process by relying on the doctrine of laches to avoid deciding petitioner's compelling suppression of the evidence, false testimony, and ineffective assistance of counsel claims.

The State has consistently engaged in deception from the inception of this prosecution. Houston Police Department (HPD) officers suppressed favorable evidence, failed to upload to CODIS the DNA profile on the do-rag found outside the deceased's apartment after the shooting, and testified falsely at trial. Prosecutors suppressed the benefits conferred on an eyewitness and jailhouse informant, elicited the informant's false testimony that he did not receive a benefit, falsely represented the location of petitioner's cellphone on the day of the murder when cross-examining him, misled the jury that no DNA was found on the do-rag, and fought tooth and nail to prevent the DNA profile from being uploaded to CODIS until December 2020. State-sponsored deception of this magnitude requires a summary reversal and remand to the TCCA for consideration of the constitutional claims.

A HPD investigator wrote a false offense report and testified falsely at trial that an "anonymous caller" contacted CrimeStoppers and said that he saw "Brandon," whom he knew, run out of the apartment complex

alone after the shooting. In fact, the caller gave his name (Fredrick Albert), made a statement to HPD (that has not been disclosed to petitioner because it purportedly was “lost”), and received \$8,000 from CrimeStoppers. Suppressing Albert’s identity prevented petitioner from calling him to impeach the testimony of Calvin Finnels, the sole eyewitness, that he saw co-defendant Brandon Zachary and petitioner run out of the apartment complex together after he heard shots fired.

The State also suppressed evidence that prosecutors initially offered a 40-year plea bargain to Michael Buchanan on a habitual offender burglary-with-intent-to-commit-sexual-assault charge but, after he came forward and volunteered to testify that petitioner had confessed to him in jail, the offer was reduced to two years. Buchanan testified that he was sentenced to two years but falsely denied that it was a benefit for his cooperation.

The State also suppressed evidence that it dismissed Finnels’ misdemeanor theft charge the day before petitioner’s trial started.

Petitioner testified that he was in Beaumont, Texas—about 100 miles from Houston—at the time of the murder. A prosecutor asked on cross-examination whether petitioner had any idea why his cellphone records showed that he was in Houston on the day of the murder. Both trial prosecutors testified at the habeas hearing that they knew that the phone records placed petitioner in Beaumont on the day of the murder but

maintained that it is a legitimate tactic to misrepresent the evidence to the jury when cross-examining the defendant.

HPD, after learning that a full male DNA profile was found on the do-rag that the shooter lost outside the deceased's apartment after the shooting, failed to upload that profile to CODIS to identify the source, although an officer noted the need to do so on a "to-do" list. The prosecutors failed to have that DNA profile uploaded to CODIS before trial and presented misleading testimony that the result of the DNA analysis on the do-rag was "negative" without also eliciting that the do-rag contained a full male DNA profile that did not belong to petitioner, Zachary, or the deceased. The habeas prosecutor opposed a CODIS upload, and the court refused to order it. The habeas prosecutor subsequently recused himself from making this decision after a reporter contacted him towards the end of the hearing to ask why he opposed a CODIS upload. The Conviction Integrity Unit of the district attorney's office agreed to a CODIS upload after the hearing had concluded. CODIS identified the source of the DNA (a known gang member who had lived in the area). The State then doubled down on its argument that the trial court should not consider the merits of the constitutional claims because petitioner had unreasonably delayed filing the habeas application.

The state habeas trial court concluded that the doctrine of laches barred consideration of the merits of the constitutional claims because the eleven-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. The court did not address why the State would retry petitioner after another man had been identified as the source of the DNA on the do-rag. The Texas Court of Criminal Appeals (TCCA) summarily denied relief.

Respondent asks the Court to deny certiorari because petitioner's claims "are now ripe for him to raise in a federal habeas petition" in which "he may argue against any procedural default or deference review. . . ." Brief in Opposition (BIO) at 1. Petitioner's conviction became final on appeal in 2009. His deadline for filing a federal petition under the AEDPA expired in 2010. He filed the state application in 2020. Thus, respondent asks the Court to deny certiorari so petitioner can pursue federal habeas review that respondent knows is unavailable.

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ARGUMENT

I. A CERTIORARI PETITION FROM THE DENIAL OF STATE HABEAS CORPUS RELIEF IS PETITIONER'S ONLY VEHICLE TO OBTAIN FEDERAL REVIEW OF HIS CONSTITUTIONAL CLAIMS.

Respondent asks the Court to deny certiorari from the denial of state habeas relief because petitioner's claims are "ripe for federal habeas review." BIO at 14-15. Citing Justice Stevens' opinion

respecting the denial of certiorari in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990), respondent contends that petitioner’s arguments “belong in the district court in a federal habeas corpus petition, which he has not yet filed.” BIO at 15.

Respondent’s position is untenable. Justice Stevens’ statement was made before the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted in 1996 to limit a federal court’s ability to grant relief from a state conviction. For this reason, the Court has shown a greater willingness to grant review to decide federal constitutional issues raised in state post-conviction proceedings during the past decade. *See, e.g., Z. Payvand Ahdout, Direct Collateral Review*, 121 COLUM. L. REV. 159, 163-64 (2021) (“Although the Supreme Court originally hewed to its presumption against conducting direct collateral review, granting cases in only the rarest of circumstances, by the 2015 Term, the Court silently reversed course and exhibited the exact opposite preference: a propensity for granting cases from state collateral review as against federal habeas review.”).

Respondent faults petitioner for failing to seek federal habeas review—where petitioner supposedly can “argue against any procedural defaults or deference review”—and for “filing this petition as opposed to filing with the federal district court.” BIO at 1, 8, 15. Respondent ignores the AEDPA. Petitioner had one year from the date that his conviction became final on appeal to file a federal habeas petition under 28 U.S.C. § 2244(d)(1)(A). His conviction became final on appeal

in 2009. He filed his state habeas application in 2020. Thus, his federal deadline expired ten years before he filed the state application. Indeed, the primary issue in this petition is whether the TCCA properly refused to consider his claims because the state application was filed eleven years after his conviction became final. Clearly, federal habeas review is barred by the AEDPA.

Respondent also contends that “[p]rudence calls for the Court to deny certiorari.” BIO at 15. To the contrary, prudence calls for the Court to grant certiorari and reject respondent’s attempt to mislead it regarding the availability of federal habeas review.

II. THE COURT HAS NOT RESOLVED 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 CONSTITUTIONAL CLAIMS.

Respondent contends that the TCCA’s discretionary decision to apply laches is a state procedural ruling that does not merit the Court’s consideration. BIO at 4-5. Whether a state procedural ruling is adequate to bar federal review is a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). The relevant inquiry is whether the state rule in question was “firmly established and regularly followed” or was applied in an “exorbitant” manner. *Id.* at 376. That a state procedural ruling was discretionary does not automatically

preclude the Court's review. *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).

Respondent observes that the Court "has long declined to construe the language of a state statute more narrowly than the construction given by that State's highest court." *See* BIO at 1. This is irrelevant, as no Texas statute provides that the doctrine of laches applies in a state habeas proceeding or when laches will bar relief. Laches is solely a common-law doctrine in Texas habeas cases. The TCCA's caselaw demonstrates that whether it applies laches in a habeas case depends on the luck of the draw. Petition at 23-25.

Respondent contends that the Court foreclosed petitioner's arguments in *Walker v. Martin*, 562 U.S. 307, 310-22 (2011). Respondent asserts that *Walker* established that a state court's practice of barring post-conviction review of "substantially delayed" habeas claims constitutes an independent and adequate procedural bar to federal habeas review. BIO at 5-6. Respondent categorizes the TCCA's "sparing application of the doctrine in a narrow set of circumstances" to be "appropriate considering the broad array of cases it reviews." BIO at 6.

Walker declined to hold that California's application of laches was an "inadequate" state procedural bar even though the state appellate courts occasionally exercised their discretion and *denied* relief on the merits instead of relying on laches. *Walker*, 562 U.S. at 319 ("We see no reason to reject California's time bar simply because a court may opt to bypass the . . .

assessment and summarily dismiss a petition on the merits, if that is the easier path.”). Conversely, the TCCA, by frequently *granting* habeas relief without mentioning laches despite the unexplained passage of time, has not consistently applied the doctrine. Petition at 23-25.

The inconsistent application of a state procedural rule renders that rule “inadequate” to bar consideration of federal constitutional claims unless the state court “strictly and regularly” followed that rule at the time it was applied. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Respondent asserts that *Ford* “stands for the proposition that a state court cannot announce a new procedural requirement and then retroactively fault a defendant for having failed to satisfy it.” BIO at 6. Respondent reads *Ford* too narrowly. The relevant inquiry for present purposes is whether the state procedural rule is “firmly established and regularly followed.” Clearly, the TCCA’s application of laches is, to be charitable, wildly inconsistent. Thus, this issue is ripe for review and can be considered only on certiorari from the denial of state habeas relief.

Additionally, the TCCA’s inconsistent application of laches does not constitute an “adequate” procedural bar because its discretion is tied to its review of the merits of federal constitutional claims. For example, laches does not apply when, notwithstanding significant and unexplained delay in filing a state habeas corpus application, the applicant is “reasonably likely to prevail on the merits.” *Ex parte Perez*, 398 S.W.3d 206, 218 (Tex. Crim. App. 2013). A state procedural bar that

depends on the threshold determination of whether the federal constitutional claim has merit is not an “independent and adequate state law ground” sufficient to justify the state court’s refusal to consider the merits. As the Court concluded in *Ake v. Oklahoma*, 470 U.S. 68 (1985):

[T]he state has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and our jurisdiction is not precluded.

Id. at 75.

The TCCA’s application of laches differs substantially from the California Supreme Court’s application of that doctrine that the Court discussed in *Walker*. The TCCA exercises its discretion not to apply laches to a meritorious claim without any discernible standard (which does not constitute an “adequate” procedural bar) and its exercise of that discretion depends on its threshold determination that the federal constitutional claim has merit (which does not constitute an “independent” procedural bar). Thus, the Court should

vacate the TCCA's judgment and remand for consideration of the merits of petitioner's compelling constitutional claims. *See Ford*, 498 U.S. at 425 (vacating state appellate court's judgment and remanding for consideration of the petitioner's federal constitutional claim after concluding that the state court's procedural bar was not an independent and adequate state law ground).

III. THE TCCA'S RELIANCE ON THE DOCTRINE OF LACHES VIOLATED DUE PROCESS.

Respondent contends that due process requires only that a habeas petitioner have a "fair opportunity" to present his claims, and petitioner received that opportunity when the TCCA reviewed his application. BIO at 11-12. Respondent elaborates that petitioner "had his chance to demonstrate his innocence with new evidence under state law" but "failed to establish his actual innocence, and opted to dismantle a longstanding equitable doctrine, using a generalized due process argument, and forcing the TCCA to review a decades-old conviction." BIO at 12.¹

Respondent's argument is reminiscent of the child who killed his parents and begged the judge for mercy at sentencing because he is an orphan. Petitioner could not raise an actual innocence claim without the result of the CODIS upload. Neither HPD nor the district

¹ Petitioner's conviction had been final on appeal for eleven years when he filed the state application. Referring to the conviction as "decades-old" is a gross exaggeration.

attorney' office would upload the DNA profile to CODIS before the 2006 trial. The State refused to upload the profile to CODIS throughout the habeas proceeding, and the trial court refused to order the State to do so. After the habeas prosecutor recused himself, the Conviction Integrity Unit agreed to a CODIS upload after the habeas hearing had concluded in December 2020. The result indicating that another man wore the do-rag demonstrated that Buchanan had testified falsely that petitioner confessed that he shot the deceased, ran into a staircase, fell down and, when he reached the car, his do-rag and watch were missing. The CODIS match, by itself, does not establish that petitioner is actually innocent. That said, the State, having denied petitioner access to the evidence necessary to establish his innocence for fourteen years, now seeks to profit from its misconduct by blaming petitioner for not raising an actual innocence claim. The Court cannot tolerate such hypocrisy.

At the very least, even if there was no due process violation, the TCCA's reliance on laches constituted an "exorbitant" procedural bar because the State had unclean hands. *Lee*, 534 U.S. at 376. The Court should vacate the TCCA's judgment and remand for consideration of the constitutional claims.

IV. RESPONDENT DID NOT ADDRESS PETITIONER'S ARGUMENT THAT THE STATE IS ESTOPPED FROM RELYING ON THE DOCTRINE OF LACHES BECAUSE ITS MISCONDUCT CAUSED THE DELAY IN FILING THE HABEAS CORPUS APPLICATION.

The only portion of respondent's brief that addressed petitioner's estoppel argument is his contention that the Court would have to make a factual determination that petitioner's delay in filing the application was the result of the State making "a conscious decision not to upload the full male DNA profile from the do-rag found at the murder scene to the CODIS database in 2006." BIO at 9.

Petitioner's "allegation" not only is true, but also the State has never disputed it. If HPD or the prosecutors had the DNA profile uploaded to CODIS in 2006, there would have been a match in 2007, when the perpetrator's DNA was entered into CODIS. Had the State notified petitioner and his appellate counsel of this exculpatory evidence in 2007, he could have filed a habeas application when his conviction became final on appeal in 2009, and laches would not have been an issue. Respondent does not counter petitioner's argument that the State is estopped from relying on laches to bar review of the constitutional claims because its deliberate ignorance and willful blindness caused the delay in filing the application.

At the very least, the Court should vacate the TCCA's judgment and remand with instructions to

address petitioner's compelling argument that the State is estopped from relying on laches as a procedural bar in view of its unclean hands. *Lee*, 534 U.S. at 376.



CONCLUSION

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

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