IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,762-02

EX PARTE LOUIS ADAM CAUDILL, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 11627-B IN THE 115TH DISTRICT COURT FROM UPSHUR COUNTY

RICHARDSON, J., delivered the opinion for a unanimous Court.

OPINION

Applicant Louis Adam Caudill has filed a writ application pursuant to Texas Code of Criminal Procedure 11.07 claiming that he is entitled to have his twenty-two year old conviction set aside because his trial counsel was ineffective. Caudill was convicted in 1996 of the offense of indecency with a child. He was sentenced by the jury to ten years, probated for ten years. He did not appeal his conviction. In 1999, Caudill's probation was revoked, and he was then sentenced to six years' imprisonment. His sentence has been discharged, and he is no longer incarcerated; however, Caudill claims to suffer collateral consequences

due to having to comply with statutory sex offender registration requirements.[1] After conducting two writ hearings, the habeas judge has recommended that we grant relief. Based upon our own review of the record and the applicable law, we hold that Caudill is not entitled to habeas relief.

BACKGROUND

The indictment against Caudill charged him with the offense of aggravated sexual assault of a child, alleging that he:

> intentionally and knowingly cause[d] the penetration of the female sexual organ of [complainant], a child who was then and there younger than 14 years of age, by defendant's sexual organ.

The trial occurred in 1996 when Caudill was eighteen years old. The transcript from Caudill's trial was not submitted as part of the writ application. The Upshur County clerk's office does not have the trial transcript. Since Caudill did not appeal his conviction, we can only surmise that a written transcript of his trial was never created. All of our information regarding what transpired at trial is based upon what is alleged in Caudill's writ application and supporting memorandum and what his trial counsel testified to at the first writ hearing.

During the trial, the complainant purportedly testified that Caudill had raped her in the woods while holding a knife to her throat. The knife was apparently admitted into evidence. In addition, it appears that Caudill's written statement was admitted into evidence

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[1] *See Anderson v. State*, 182 S.W.3d 914, 917 (Tex. Crim. App. 2006) (statutorily mandated sex offender registration is a collateral consequence of a conviction for indecency with a child).

during the trial.[2] In the Voluntary Statement Under Arrest dated December 6, 1995, which was handwritten by Caudill and attached as State's Exhibit 1 to the writ hearing transcript sent to this Court, Caudill stated as follows, in pertinent part:

> Well, [complainant] would always throw herself at me. I didn't like her. Ever! I was always unattracted [*sic*] to her because she was a slut. She would take what she wanted – she was that type. She would flirt with every guy that she thought looked good. Well she started in on me but I cut her off. I didn't even listen to her because I loved her sister and was very faithful. She would sit next to us and cover us both up and she would touch my penis and she would jack me off. She was always very pushy when it came to something she wanted. This happened on many occasions.
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> I recall one night I spent at the [complainant's] residence. I was sleeping in my girlfriends [*sic*] bed, she was on the top bunk I was on the bottom one. Her sister [complainant] was sleeping somewhere else. Well, when it got late [complainant] got by the bed I was sleeping in and proceeded to touch my penis rubbing it through my clothes at first then she unzipped my pants and pulled out my penis. She jacked me off for awhile. Then she moved on to picking up my hands and rubbing them on her breasts. Then she gave me a blow-job, but I did not ejaculate. Then she took off her panties and got on top of me and tried to force intercorse [*sic*] with me. But luckily she was too small to do anything with me. The whole time this was happening I was pretending to be asleep. Eyes closed and everything because I didn't want her to think I was part of it or at least not enjoying it. It ended when [complainant] was rocking the bed so much her sister on the top bunk began to stir. I remember it well, her sister said "[complainant?]", in her sleep and [complainant] jumped off me and I rolled over and went back to sleep. That is the most that has or will ever happen between [complainant] and Adam Caudill.

At the conclusion of the trial, the court submitted a jury charge which included a lesser offense of indecency with a child. The jury charge defined indecency with a child as

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[2] A copy of this statement was attached as State's Exhibit 1 to the transcript of the first writ hearing.

"engag[ing] in sexual contact" with a child younger than 17 years and defined "sexual contact" as "any touching of any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." However, the application paragraph for the lesser offense instructed the jurors that they should find Caudill guilty of indecency with a child if he engaged in sexual contact with the complainant "by placing his hands or portions thereof upon and against the genitals or breast of [the complainant]" "with the intent to arouse or gratify the sexual desire of himself or the complainant."

It is undisputed that touching the breast of the complainant or touching the genitals of the complainant with the hand of Caudill are not lesser-included offenses of the offense of aggravated sexual assault of a child as it was presented in the indictment against Caudill.[3] However, Caudill's trial counsel testified at the writ hearing that he made a strategic decision to ask for that particularly worded lesser offense:

> [T]o be honest picking indecency with a child when my client was charged with aggravated assault of a child I thought that was good trial strategy and so I don't really remember whether I thought it was a lesser-included or not, I just felt kind of blessed that we were able to get it as a lesser-included because it took off the table the big numbers that might have been applicable [to] Mr. Caudill.

The jury found Caudill guilty of the lesser offense of indecency with a child and recommended that he be placed on ten years' probation. Judgment was rendered on June 5,

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[3] *See* TEX. CODE CRIM. PROC. art. 37.09(1); *Hall v. State*, 225 S.W.3d 524, 531 (Tex. Crim. App. 2007) ("An allegation of sexual abuse of a child by contact between the defendant's genitals and child's mouth will not support a lesser-included offense of indecency with a child."); citing *Martinez v. State*, 599 S.W.2d 622 (Tex. Crim. App. 1980).

1996.

On September 7, 1999, Caudill's probation was revoked for reasons not relevant to this writ application.[4] Caudill was sentenced to six years in prison. As noted above, although Caudill's sentence has discharged, he must still register as a sex offender.[5]

THE WRIT ALLEGATIONS AND THE TRIAL COURT'S FINDINGS

On February 26, 2018, this Court received Caudill's post-conviction writ application filed pursuant to Texas Code of Criminal Procedure article 11.07.[6] In three grounds, Caudill contends that his trial counsel rendered ineffective assistance of counsel:

1. Counsel failed to object to a jury charge that permitted a conviction for indecency with a child for conduct that was not a lesser-included offense of aggravated sexual assault of a child as alleged in the indictment.

2. Trial counsel was ineffective for failing to object to jury charge that allowed for a non-unanimous conviction for the "lesser-included" of indecency with a child committed in different ways.

3. Trial counsel was ineffective for advising Applicant that he should not

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[4] The Judgment Revoking Probation stated that the reason Caudill's probation was revoked was because he "failed to pay court assessed fees of $144.50 court cost; $10,000.00 fine; and $1,200.00 Attorney fee before the 20th day of each month at a rate of $115.00 per month for the months of January, February, April and June, 1999, and as a result thereof $419.50 is past due and owing in violation of condition 14a." The validity and constitutionality of Caudill's revocation has not been challenged. We therefore express no opinion related to his revocation, which, in any event, would not have affected his duty to register as a sex offender.

[5] Although Caudill is no longer confined, the State has stipulated that because Caudill is required to register as a sex offender for life, he is suffering a collateral consequence as a result of his conviction. TEX. CODE CRIM. PROC. art. 11.07 § 3(c).

[6] This is Caudill's second writ application; however, it is not barred for being a subsequent application. Caudill's first application was dismissed as noncompliant. TEX. R. APP. P. 73.1.

> appeal his conviction despite the erroneous jury charge. He claims that, but for counsel's erroneous advice, he would have appealed and prevailed on appeal. Applicant alleges that after he was convicted, he wanted to appeal, but his counsel advised him not to appeal because if he was successful, he could be retried for aggravated sexual assault and get a harsher sentence upon retrial. Applicant asserts that this advice was erroneous because, by virtue of being found guilty of the lesser-included offense, Applicant was acquitted of the aggravated sexual assault and could not be retried for that offense.

The trial court held a live evidentiary writ hearing. Trial counsel was the only witness to testify at this hearing. He said that, during the first trial, Caudill's written statement was admitted into evidence, and in that statement, Caudill admits to touching the breast of the complainant. Trial counsel said that "probably the reason [he] was able to get the lesser-included in was [because of Caudill's] statement admitting that he touched the breast." Trial counsel believed that it was better for Caudill if the jury could consider convicting him of "an offense that was not as harsh as the one that he was charged [with] in the indictment." Trial counsel said that he was "very worried during that trial." He recalled that "[t]he victim got up on the stand and was very articulate and said in no uncertain terms that Mr. Caudill raped her at knife point in the woods and there was no wishy-washy aspects to her statement so I was worried during the trial that Mr. Caudill might get some big numbers if they did believe her." Trial counsel also said that he "was very anxious to get the lesser-included in because it was something else the jury could do besides the aggravated sexual assault and there is unfortunately some language by Mr. Caudill in that statement of his that does indicate some guilt of sexual activity toward this girl."

When trial counsel was asked whether he discussed all of this with Caudill, he said that he recalled having a conversation with Caudill, but he did not remember it word-for-word. He did say, however, that he "practiced criminal law for many years and it was always [his] practice and policy to discuss fully all decisions that had to be made with [his] client, both the legal ramifications as well as the factual dangers so [he] did have that conversation with Mr. Caudill." Because Caudill was convicted of the lesser offense and his sentence probated, trial counsel believed that he "had done [his] job well for Mr. Caudill and kept him out of prison at that point in time."

After the first writ hearing, the trial court made findings of fact and conclusions of law recommending that we set aside Caudill's conviction. The pertinent factual findings made by the trial court are summarized as follows:

1. On June 5, 1996, the jury held Caudill guilty of the lesser offense of indecency with a child, a second degree felony. The lesser offense was submitted to the jury after trial counsel and Caudill discussed the advantages and disadvantages of submitting to the jury indecency with a child as a lesser-included offense of aggravated assault of a child.

2. The jury charge allowed Caudill to be convicted of indecency with a child if the jury found that he touched the breast or genital with his hand or a part thereof.

3. Caudill was convicted of indecency of a child and sentenced to 10 years in prison, probated for 10 years. Trial counsel advised Caudill about the merits of filing an appeal and advised Caudill that a retrial of the case, if so ordered by an appellate court, would result in the retrial only of the offense of indecency with a child, and not aggravated sexual assault of a child. Caudill agreed not to appeal.

4. On August 24, 1999, Caudill's probation was revoked and he was sentenced

to 6 years in prison. He is required to register as a sex offender for life.

5. Caudill was 18 years of age at the time of his trial. He had a 9th grade education and was unsophisticated. He relied on the advice of his attorney.

6. Trial counsel admitted that touching the breast and touching the genitals are separate and distinct offenses, but that he did not recognize this at the time of trial. Trial counsel believed that the reason he did not object to the lesser-included offense charge was because Caudill gave a statement, admitted into evidence, that contained admissions that he had engaged in conduct that was consistent with the offense of indecency with a child. Trial counsel admitted that this statement was an admission of an extraneous offense that had nothing to do with the indicted offense.

7. Caudill would have filed a notice of appeal had he known that the lesser offense for which he was convicted was not a lesser offense of the indicted offense. Had he known he had been "acquitted" of the greater offense, he would have appealed.

8. The State of Texas has stipulated that the lesser offense as written in the jury charge was not a lesser-included offense of the charged conduct, and, as such, the jury charge was erroneous.

9. Had these issues come to the court's attention in a timely manner, the trial court would have granted Caudill a new trial.

10. Trial counsel testified at an evidentiary hearing and explained his trial strategy in seeking the lesser-included offense in the jury charge. Trial counsel discussed with Caudill the advantages and disadvantages of allowing the inclusion of a lesser offense of indecency with a child in the court's charge. Trial counsel reminded Caudill that the victim had testified to the jury that there had been an aggravated sexual assault, with Caudill holding a knife to her throat. The knife was admitted into evidence.

11. Caudill's written statement was introduced into evidence. Within the body of that statement, Caudill admitted to touching the breast of the complainant, which is an indecency with a child offense.

12. Trial counsel's testimony was credible and supported by the record.

The writ application, trial court findings, and recommendation were forwarded to this Court. The State did not raise the equitable defense of laches. However, this Court *sua sponte* decided to consider whether the doctrine of laches applied.[7] We remanded the case to the trial court to make additional findings of fact and conclusions of law on the issue of laches.[8] The trial court held another hearing and made the following additional findings:

1. Caudill is unsophisticated. His testimony and affidavit were credible.

2. He relied heavily on his trial counsel's advice regarding his right to appeal.

3. He was afraid to appeal because he believed he could get a harsher prison sentence, and thus he did not appeal.

4. Caudill spoke to lawyers about appealing, but this was after the time to file a notice of appeal had passed.

5. Caudill was not able to hire a lawyer to review his case. He lacked funds and was not able to find a lawyer who would listen to him.

6. Only after Caudill's mother gave him money and after he obtained a monetary settlement after injuring his finger did he have enough money to hire a lawyer to review his case.

7. Caudill did not understand the legal issues in his case.

8. Caudill's delay was unintentional. He had difficulty obtaining assistance. The court finds the delay was excusable and not unreasonable.

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[7] *See Ex parte Smith*, 444 S.W.3d 661, 667 (Tex. Crim. App. 2014) (holding that, "a court may *sua sponte* consider and determine whether laches should bar relief").

[8] *See Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960) (holding that the trial court is the appropriate forum for findings of fact).

9. The trial court would have granted Caudill a new trial.

10. The State offered no evidence that it has been prejudiced by the delay. The court finds that there was no prejudice to the State.

11. The trial court believes that Caudill would prevail if he were tried again.

The trial court concluded that, because Caudill "would have been acquitted but for errors of trial counsel," and that he "would prevail on the merits," his claims of ineffective of counsel should not be barred by laches.

ANALYSIS

Caudill seeks relief based upon claims of ineffective assistance of counsel. "In a post-conviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief."[9] It is therefore Caudill's burden to prove facts that would support his claim of ineffective assistance of counsel.

Under *Strickland v. Washington*, an applicant alleging ineffective assistance of counsel has the burden of showing by a preponderance of the evidence that (1) "his counsel's performance was deficient," and (2) "there is a 'reasonable probability'–one sufficient to undermine confidence in the result – that the outcome would have been different but for his counsel's deficient performance."[10] "[T]he benchmark for judging any claim of

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[9] *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985); *See also Ex parte Tovar*, 901 S.W.2d 484, 486 (Tex. Crim. App. 1995) ("[A] post conviction habeas corpus application must allege facts which show both a cognizable irregularity and harm[.]").

[10] *Ex parte Chandler*, 182 S.W.3d 350, 353 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[11] An applicant establishes that his counsel's performance was deficient if he shows that his counsel's performance fell below an objective standard of reasonableness.[12] After examining all of the facts and circumstances involved in a particular case, we judge whether counsel's performance fell below an objective standard of reasonableness based on "prevailing professional norms."[13]

In this case, Caudill must show that his trial counsel "was not acting as 'a reasonably competent attorney,' and that the advice of his counsel was not 'within the range of competence demanded of attorneys in criminal cases.'"[14] In this case, Caudill must overcome the "strong presumption" that, under the circumstances, counsel's conduct fell within the "wide range of reasonable professional assistance," and could be considered "sound trial strategy."[15] We "must be highly deferential to trial counsel and avoid the deleterious effects of hindsight."[16] However, if no reasonable trial strategy could justify counsel's conduct, his

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[11] *Ex parte Ellis*, 233 S.W.3d 324, 329-30 (Tex. Crim. App. 2007) (quoting *Strickland*, 466 U.S. at 686).

[12] *Strickland*, 466 U.S. at 687-88.

[13] *Id*.; *see Ex parte Scott*, 541 S.W.3d 104, 115 (Tex. Crim. App. 2017).

[14] *Ex parte Chandler*, 182 S.W.3d at 354 (quoting *Strickland*, 466 U.S. at 687).

[15] *Ex parte Ellis*, 233 S.W.3d at 330 (citing *Strickland*, 466 U.S. at 668, 689).

[16] *Id*. (citing *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)).

conduct is considered deficient as a matter of law.[17] If an applicant establishes that his counsel's performance was deficient, we then look at whether such deficient performance prejudiced his defense—i.e., whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[18] "A reasonable probability is a probability sufficient to undermine confidence in the outcome,"[19] when considering the "totality of the evidence before the judge or jury."[20]

Caudill complains that his counsel was ineffective for advising him not to appeal his conviction. It is undisputed that the lesser offense submitted in the jury charge was erroneous. The offense of indecency with a child by touching the breasts is not a lesser-included offense of the charged offense of aggravated sexual assault of a child by penetration of the sexual organ.[21] Moreover, as worded, the application paragraph allowed for a nonunanimous verdict.[22] Because of such an erroneous jury charge, the trial court recommended that relief be granted, concluding that, but for counsel's errors, Caudill would

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[17] *Ex parte Scott*, 541 S.W.3d at 115.

[18] *Ex parte Chandler*, 182 S.W.3d at 354 (quoting *Strickland*, 466 U.S. at 694).

[19] *Strickland*, 466 U.S. at 694.

[20] *Id*. at 695.

[21] *Supra* note 3.

[22] *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (unanimity means every juror agrees that the defendant committed the same, single, specific criminal act); *Aekins v. State*, 447 S.W.3d 278 (Tex. Crim. App. 2014) ("A person who commits more than one sexual act against the same person may be convicted and punished for each separate and discrete act, even if those acts were committed in close temporal proximity.").

have prevailed on appeal. However, this conclusion is not supported by the record nor by applicable law because the trial court did not factor in the doctrine of invited error. Not only did Caudill's counsel not object to the inclusion of the lesser offense, *he testified that he affirmatively requested it.* Under the doctrine of invited error, if a party requests or moves the court to make an erroneous ruling, and the court rules in accordance with the request or motion, the party responsible for the court's action cannot take advantage of the error on direct appeal.[23] A party is estopped from seeking appellate relief based on error that he induced.[24] "To hold otherwise would be to permit him to take advantage of his own wrong."[25] A defendant who affirmatively requests a lesser-included instruction cannot later complain that the instruction was given, inasmuch as he induced the alleged error.[26] Thus, the doctrine of invited error would have precluded Caudill's ability to prevail on direct

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[23] *See Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) ("The law of invited error provides that a party cannot take advantage of an error that it invited or caused, even if such error is fundamental.") ("If a party affirmatively seeks action by the trial court, that party cannot later contend that the action was error."). *Id.* at n.12.

[24] *Id*.

[25] *Id.*

[26] *See Druery v. State*, 225 S.W.3d 491, 506 (Tex. Crim. App. 2007); *See also Ex parte Pete*, 517 S.W.3d 825, 832-33 (Tex. Crim. App. 2017) (holding that "[a] defendant who positively asks the trial court to grant a mistrial *that is limited to the punishment phase* may not be heard later to complain, after the trial court grants his request, that the limited mistrial compromised his right to have 'the same' jury resolve both phases of his trial."); *State v. Yount*, 853 S.W.2d 6, 9 (Tex. Crim. App. 1993) (Defendant, who was on trial for manslaughter requested and received an instruction on the lesser offense of driving while intoxicated, complained that his conviction for the lesser offense was barred by limitations. We held that because he had requested the lesser-included offense instruction, Yount was estopped from attacking his conviction for that offense on limitations grounds.).

appeal because Caudill would have been estopped from seeking appellate relief based on error that he induced. "To hold otherwise would be to permit him to take advantage of his own wrong."[27] Caudill is therefore not entitled to relief on his claim that his counsel was ineffective for advising him not to appeal his conviction since he would not have prevailed on appeal in any event.[28]

Caudill also claims that his trial counsel was deficient for not objecting to the erroneous inclusion of the lesser-but-not-included offense of indecency with a child. It is in conjunction with our analysis of this particular claim for relief that we must also consider the application of the doctrine of laches. The doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights.[29] Neglect to assert one's right, combined with an unreasonable and unexplained length of time, and other circumstances causing prejudice to an adverse party, operate as a bar in a court of equity.[30] As we said in *Ex parte Smith*, "it behooves a court to determine whether an applicant has slept on his rights and, if he has, whether it is fair and just to grant him the relief he seeks.[31]

The inquiry into whether laches applies must be done on a case-by-case basis. As we

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[27] *Prystash*, 3 S.W.3d at 531.

[28] *Strickland*, 466 U.S. at 694 (there was not a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

[29] *Ex parte Smith*, 444 S.W.3d at 666 (citing Black's Law Dictionary 875 (6th ed. 1990)).

[30] *Id.*

[31] *Id.* (citing *Ex parte Perez*, 398 S.W.3d 206, 218 (Tex. Crim. App. 2013)).

explained in *Ex parte Perez*, the equitable doctrine of laches must not be applied mechanically, but rather may be applied only after a weighing of equitable interests as they appear from the facts of each case.[32] In *Perez*, we held that an applicant's delay may be excused when the record shows that (1) the 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 he is actually innocent of the offense.[33] Lack of funds, *pro se* status, and/or the lack of sophistication of the law would not, without more, excuse Caudill's twenty-two year delay. However, if there are other compelling reasons to support equitable relief, such as facts showing that Caudill would have prevailed on the merits,[34] then the interests of justice may weigh against the application of laches.

Caudill's twenty-two year delay in filing for habeas relief, even if justified, has nevertheless hindered his ability to meet his burden of proof. As explained below, without more, based upon what has been presented to us, we are unable, as the ultimate factfinder,[35] to conclude that Caudill is entitled to relief. Caudill's counsel testified in the first writ hearing that it was his trial strategy to seek the lesser-included offense. When an applicant's

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[32] *See* 398 S.W.3d at 216.

[33] *Ex parte Smith*, 444 S.W.3d at 667; *Ex parte Perez*, 398 S.W.3d at 218.

[34] *Ex parte Perez*, 398 S.W.3d at 218.

[35] *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (in post-conviction writ proceedings, the convicting court is the original factfinder, and this Court is the ultimate factfinder).

claim of ineffective assistance turns on whether trial counsel's strategy was reasonable or unreasonable, we must assess trial counsel's strategy according to prevailing professional norms.[36] Even if trial counsel's tactics are "risky, and perhaps highly undesirable to most criminal defense attorneys," they may still not be unreasonable.[37] On the other hand, a decision that counsel defends as trial strategy might nonetheless be objectively *un*reasonable. "The magic word 'strategy' does not insulate a decision from judicial scrutiny."[38] Nevertheless, if counsel's tactics could have achieved the desired result,[39] we are hesitant to say that *no* reasonable trial attorney would pursue such a strategy.[40] We must review the performance of counsel by considering the totality of the circumstances as they existed at the time of trial.[41] We will not consider trial counsel's strategy in this case to be deficient "unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'"[42]

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[36] *See Strickland*, 466 U.S. at 688.

[37] *See Ex Parte Walker*, 425 S.W.3d 267, 268 (Tex. Crim. App. 2014).

[38] *Ex parte Saenz*, 491 S.W.3d 819, 829 (Tex. Crim. App. 2016) (citing *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim, App. 2007)).

[39] *Ex parte Ellis*, 233 S.W.3d at 336.

[40] *Id*. at 331.

[41] *Ex parte Scott*, 541 S.W.3d 104, 115 (Tex. Crim. App. 2017).

[42] *Ex parte Harrington*, 310 S.W.3d 452, 459 (Tex. Crim. App. 2010) (citing *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

The following facts and circumstances are relevant to the issue of whether trial counsel's strategic decision to request the lesser-but-not-included offense constituted deficient performance:

1. Trial counsel said he thought it was "good trial strategy" to ask for the lesser offense because it "took off the table the big numbers that might have been applicable [to] Mr. Caudill." However, no explanation was given related to the non-unanimity problem with the wording of the lesser offense.

2. Trial counsel said Caudill's written statement (which was admitted into evidence) admits to touching the breast of the complainant, and that was the reason he asked for and was able to get the lesser offense submitted to the jury.

3. Trial counsel thought it was better for Caudill if the jury could consider convicting Caudill of "an offense that was not as harsh as the one that he was charged [with] in the indictment."

4. Trial counsel said that he was "very worried during that trial" because the victim convincingly testified that Caudill raped her at knifepoint.

5. Trial counsel said the knife was admitted into evidence.

6. In Caudill's written statement, he admitted that the complainant "pick[ed] up [his] hands and rubb[ed] them on her breasts." Caudill said that the complainant "took off her panties and got on top of [him] and tried to force intercorse [*sic*] with [him]." Caudill said he was "pretending to be asleep" because he "didn't want her to think [he] was part of it."

As noted above, Caudill did not provide a copy of the trial transcript nor was the Upshur County Clerk able to provide us with a copy of the trial transcript. Thus, there is no way to verify whether trial counsel did indeed ask for the lesser offense; whether trial counsel

did or did not object to the lesser offense; what was said about the non-unanimity problem; whether the complainant's testimony regarding the commission of the offense was convincing and credible; how Caudill's written statement came into evidence; what other evidence was presented by the State to support its case; whether Caudill's counsel presented any evidence in defense of the claim; and how the case was argued to the jury. Caudill's counsel maintained that his strategic decision to ask for the lesser offense was a reasonable decision. However, without the trial transcript, which does not seem to exist, Caudill is unable to overcome the presumption that his counsel's strategy was reasonable, particularly in light of the trial court's finding that trial counsel was credible.

While we may be sympathetic to Caudill's reasons for waiting twenty-two years to file his writ application, those justifications do not excuse the laches bar to equitable relief when Caudill has not met his burden to prove that he is entitled to habeas relief.[43] Without the trial transcript from 1996, we cannot predict what the jury would have done had it not been given the option of convicting Caudill of the lesser offense. And, even though Caudill's counsel seems to have misinterpreted the inculpatory impact of Caudill's written statement, that alone does not render his decision to ask for the lesser offense deficient as a matter of law.[44] The

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[43] *See Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) (citing *Ex parte Chandler*, 182 S.W.3d 350 (Tex. Crim. App. 2005); *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002) (Applicant must prove the constitutional violation and his entitlement to habeas relief by a preponderance of the evidence.).

[44] *Ex parte Scott*, 541 S.W.3d at 115.

decision to submit a lesser offense to the jury is a gamble. However, even if erroneously worded, the option of convicting on a lesser offense can be advantageous under certain circumstances. Since Caudill was given what could be considered the relatively "light" sentence of probation for a second degree sexual offense, the decision to ask for the lesser offense may have been a good one. But without the trial transcript, it is virtually impossible to second guess counsel's trial strategy. Thus, we cannot say that Caudill's counsel was not acting within the range of competence demanded of an attorney trying a similar case at a similar time. Caudill has not met his burden to overcome the strong presumption that, under the circumstances, counsel's conduct fell within the "wide range of reasonable professional assistance," and could be considered "sound trial strategy."[45]

We hold that the record does not support the trial court's conclusion that Caudill is entitled to relief on his claim of ineffective assistance of counsel, and the record does not support the trial court's conclusion that laches should not bar equitable relief. Based upon our own review of the record and the applicable law, we deny habeas relief.

DELIVERED: January 30, 2019

DO NOT PUBLISH

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[45] *Ex parte Ellis*, 233 S.W.3d at 330 (citing *Strickland*, 466 U.S. at 668, 689).