Opinion issued July 28, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00728-CR

EX PARTE JAIME VASQUEZ

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Case No. 720173-A

O P I N I O N

Appellant, Jaime Vasquez, appeals the denial of his application for a writ of habeas corpus filed seventeen years after his 1997 guilty plea and judgment of conviction for the offense of indecency with a child. Vasquez successfully completed six years' deferred adjudication community supervision for the offense. The trial court denied Vasquez's habeas application both on its merits and,

alternatively, on the basis that the application was barred under the doctrine of laches because the delay in filing materially prejudiced the State. We affirm.

BACKGROUND

On May 28, 1996, Vasquez was charged with the felony offenses of aggravated sexual assault of a child under 14 years of age and indecency with a child by contact.[1] Pursuant to a plea agreement, the State abandoned the aggravated sexual assault charge. Vasquez pleaded guilty to the offense of indecency with a child by contact. On March 14, 1997, in accordance with the plea agreement, the trial court entered a judgment assessing punishment at six years' deferred adjudication community supervision. Vasquez did not appeal the judgment and the judgment subsequently became final. On March 18, 2003, Vasquez fulfilled the conditions of his community supervision, and he was discharged.

Prior to Vasquez's completing his community supervision in March 2003, a federal immigration court ordered Vasquez deported to his home country of Mexico because Vasquez was not a legal resident in the United States when he pled guilty to the offense of indecency with a child. On May 20, 2004, the Board of Immigration Appeals (BIA) affirmed the immigration court's determination that Vasquez was subject to removal.

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[1] *See* TEX. PENAL CODE ANN. §§ 21.11 (West 2011) (indecency with a child), 22.021 (West Supp. 2015) (aggravated sexual assault).

On September 23, 2014, while in custody after attempting to reenter the United States, Vasquez filed this application for a writ of habeas corpus—seventeen years after his guilty plea and the subsequent final judgment, eleven years after being discharged from community supervision, and ten years after the BIA's final order affirming his deportation. Vasquez asserts that he is currently confined and restrained because, as a result of the 1997 judgment, he was deported, cannot legally enter or remain in the United States, and is required to register as a sex offender. In requesting habeas relief, Vasquez complains that such collateral consequences of the 1997 judgment are an illegal confinement and restraint of his liberty because (1) he is actually innocent of the crime to which he pled guilty, (2) his guilty plea was involuntarily and unintelligently entered, and (3) he received ineffective representation from his defense counsel. On August 11, 2015, the trial court denied Vasquez's habeas application. On appeal, Vasquez challenges the trial court's determination that Vasquez failed to meet his burden to show that he is entitled to relief and that his claims are barred by laches.

DISCUSSION

In its findings of fact and conclusions of law, the trial court found that (1) Vasquez failed to demonstrate any of the three grounds for relief asserted in his habeas application and (2) to the extent that there was any merit to Vasquez's claims, the requested habeas relief was barred by laches because "determining the details of

the plea bargain, discussions among parties, and reprosecuting the case-in-chief- are difficult and prejudice the State."

I. Standard of Review

Texas Code of Criminal Procedure article 11.072 establishes the procedure for an applicant to seek habeas corpus relief "from an order or a judgment of conviction ordering community supervision." TEX. CODE CRIM. PROC. ANN. art. 11.072, § 1 (West 2005). Under article 11.072, we have jurisdiction to consider appeals of denials of habeas corpus relief from such orders or judgments. *Id*. art. 11.072, § 8.

In reviewing a trial court's ruling on a habeas corpus application, we view the facts in the light most favorable to the trial court's ruling and uphold that ruling absent an abuse of discretion. *See Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). In an article 11.072 post-conviction habeas corpus proceeding, the trial judge is the sole finder of fact. *See Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). Thus, in conducting our review, we defer to the trial court's factual findings when supported by the record. *See Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006); *Ex parte Thompson*, 153 S.W.3d 416, 417–418 (Tex. Crim. App. 2005). We similarly defer to the trial court's rulings on the application of the law to fact questions if the resolution of those ultimate questions turns on an evaluation of

credibility and demeanor. *See Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), o*verruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

II. Actual Innocence

Vasquez's first ground for habeas relief alleges that he is actually innocent of the offense of indecency with a child and that the complainant "has recently come forward and recanted her original statements to the police." When asserting a claim of actual innocence based on newly discovered evidence, the evidence presented by the habeas applicant must constitute affirmative evidence of the applicant's innocence. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002). Not only must the habeas applicant make a truly persuasive showing of innocence, he must also prove that the evidence he relies upon is "newly discovered" or "newly available." *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). To succeed in an actual innocence claim, the habeas applicant must demonstrate by clear and convincing evidence that no reasonable juror would have found him guilty in light of the new evidence. *Ex parte Navarijo*, 433 S.W.3d 558, 560 (Tex. Crim. App. 2014). For the reasons below, we uphold the trial court's denial of Vasquez's actual innocence claim.

A. Newly Discovered Evidence

Vasquez's claim of actual innocence rests upon his assertion that complainant recently recanted her statements. A request for habeas relief on a claim of actual innocence requires that the applicant demonstrate that his claim is based upon "newly discovered" or "newly available" evidence:

> Not only must the habeas applicant make a truly persuasive showing of innocence, he must also prove that the evidence he relies upon is "newly discovered" or "newly available." The term "newly discovered evidence" refers to evidence that was not known to the applicant at the time of trial and could not be known to him even with the exercise of due diligence. He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions, such as a motion for new trial.

Brown, 205 S.W.3d at 545; *see also Ex parte Holloway*, 413 S.W.3d 95, 97 (Tex. Crim. App. 2013) ("An applicant for habeas relief based on a claim of actual innocence must demonstrate that the newly discovered evidence, if true, creates a doubt as to the correctness of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different on retrial."). Accordingly, habeas relief on Vasquez's actual innocence claim would be unavailable if the complainant's recanting was either known to the defense at the time of Vasquez's guilty plea or could have been known with proper diligence. *See Brown*, 205 S.W.3d at 545 (citing *Ex parte Briggs*, 187 S.W.3d 458, 465 (Tex. Crim. App. 2005), and *Ex parte Tuley*, 109 S.W.3d 398, 403 (Tex. Crim. App. 2002)).

The trial court held that Vasquez failed to demonstrate any newly-discovered evidence in support of his actual innocence claims. In holding that complainant's recanting was not new evidence, the trial court found that "[a]ccording to documentation included in the State's file, [complainant] recanted to the Child Protective Services counselor, the Prosecutor and her mother, Mrs. Vasquez, prior to the date of Applicant's plea of guilty." The record contains evidence from the prosecution's file supporting the trial court's findings, including (1) a note on the inside front cover of the state's file stating that "CW recanted;" (2) a note referencing a conversation the prosecutor had with a caseworker that reads, "her impression is that CW's mom got so hysterical that CW changed story. She thinks something [between defendant and] CW happened. She didn't think CW made all this up . . . . CW and her mom are very close. CW wants to go home with mom." and (3) a note from a March 13, 1997 interview of complainant by the prosecutor stating that complainant told the prosecutor that it "[did not] happen" and that "she misses her mom." Accordingly, the record contains evidence of multiple instances in which the complainant recanted before Vasquez's guilty plea in 1997.

The trial court further found that there was no evidence in the record that complainant's recanting was hidden from the defense. Rather, evidence before the trial court suggested that complainant's recanting was known to the defense or could have been known with proper diligence. At the habeas hearing, Vasquez's defense

counsel initially testified that he was unaware of complainant's recanting until the habeas proceeding, but he also testified that his memory had faded and that he had no reason to believe that the prosecution withheld evidence of the complainant's recanting. Counsel subsequently confirmed that the complainant's recanting may have been the basis for obtaining dismissal of the aggravated sexual assault charge as part of the plea agreement with the State, even though counsel could not recall any discussion due to the passage of time:

> Q. Okay. And part of your plea negotiations, you were able to secure, I guess, a reduced plea on the indecency case and you got the aggravated sexual assault case dismissed?
>
> A. Yes, ma'am.
>
> Q. Okay. Do you feel that that was based on mitigating evidence that was involved; or why do you think you were able to secure that plea, if you remember?
>
> ***
>
> A. Well, the only – the only thing I could say is that there must have been some mitigating circumstances; and I don't recall, you know, whether her recanting of her testimony was involved at that time or it came along later. I couldn't tell, and I couldn't tell by looking at the file . . . . It just says it was recanted, and so I don't know that – if that – if that came through, you know, came through to start with or later became an issue.

Because defense counsel's files have been destroyed, they are unavailable to demonstrate whether the complainant's recanting was discussed during the plea negotiations. The affidavit of Devon Anderson, the prosecutor who noted complainant's recantation in the State's file, similarly states that she cannot recall the plea discussions with defense counsel. She averred, however, that the

information regarding complainant's recanting would have been made available to the defense and "likely would have been part of any plea bargaining discussion with defense counsel, as well as part of the decision to abandon the Aggravated Sexual Assault of a Child paragraph and only proceed on the lesser Indecency with a Child charged in paragraph two."

Moreover, for evidence to be considered "newly discovered evidence," it must not only be unknown by the applicant but also must not have been capable of being known with reasonable diligence. *See Brown*, 205 S.W.3d at 545. Vasquez's denial that he actually knew of the recantation does not satisfy the requirement that the recantation could not have been known with reasonable diligence. Vasquez has provided no evidence demonstrating that he could not have known that the complaining witness had recanted despite due diligence. The trial court's findings were material to determining whether complainant's recanting to her mother, who was married to Vasquez, and to other identifiable witnesses was capable of being known with reasonable diligence.

Because some evidence supports the trial court's findings that complainant's recanting either was known or could have been known with reasonable diligence prior to Vasquez's guilty plea in 1997, we hold the trial court did not err in finding that evidence of complainant's recanting cannot be considered newly discovered evidence supporting a claim of actual innocence. *See Brown*, 205 S.W.3d at 545.

Accordingly, we uphold the trial court's denial of Vasquez's actual innocence claim for failing to demonstrate newly-discovered evidence supporting his claim of actual innocence. [2]

B. Evidence of Innocence

Even if complainant's recanting is considered new evidence, it was within the trial court's province as the finder of fact to conclude that Vasquez failed to meet his burden, by clear and convincing evidence, to establish his actual innocence. The trial court had before it some evidence to find that complainant's outcries during the

[2] Vasquez did not raise, in either the trial court or before this Court, any failure by the State to comply with any obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Even assuming that Vasquez had raised a failure to comply with *Brady*, we note that the record contains the prosecutor's affidavit that (1) "[i]t was [her] customary habit and practice at the time to inform defense counsel of this type of information," (2) complainant's recanting "likely would have been part of any plea bargaining discussion with defense counsel, as well as part of the decision to abandon the Aggravated Sexual Assault of a Child paragraph and only proceed on the lesser Indecency with a Child charged in paragraph two," and (3) "it is, as it was then, [her] standard practice as a prosecutor to comply with any and all *Brady* requirements." Vasquez did not challenge the veracity of these statements in the trial court. The prosecutor's affidavit was found to be credible by the trial court and is further supported by defense counsel's trial testimony, stating that the complainant's recantation may have been both discussed in connection with, and the basis for, obtaining the plea agreement. Vasquez bears the burden to claim and demonstrate a *Brady* violation. *See Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) ("Under *Brady*, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure."). This burden does not shift to the State when an applicant raises an actual innocence claim in a habeas application but remains with the habeas applicant. *See Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995) ("The burden of proof in a writ of habeas corpus is on the applicant to prove by a preponderance of the evidence his factual allegations."). Thus, we reject any contention that a *Brady* violation supports Vasquez's claim of actual innocence.

period of the offense and Vasquez's guilty plea were more credible than her recantation. In weighing the conflicting evidence before it, the trial court found complainant's testimony in support of Vasquez's habeas application not entirely credible. For the reasons below, we defer to the trial court's credibility determinations because they are supported by the record. *See Ex parte Thompson*, 153 S.W.3d at 417–18.

A complainant's recantation of earlier outcry testimony does not destroy the probative value of that testimony. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). The fact finder is entitled to reconcile conflicts in the testimony and to disbelieve a recantation. *Id*. at 461; *see also Saldaña v. State*, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd) ("Furthermore, when a witness recants prior testimony, it is up to the fact finder to determine whether to believe the original statement or the recantation. A fact finder is fully entitled to disbelieve a witness's recantation."); *Jackson v. State*, 110 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) ("[A] criminal conviction, which requires proof beyond a reasonable doubt, may rest on hearsay despite the lack of the complainant's testimony or even the complainant's recantation.").

The trial court, as the trier of fact, was the judge of the credibility of the witnesses and could have chosen to believe all, some, or none of complainant's testimony recanting her claims. *See Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim.

App. 2012) ("The factfinder exclusively determines the weight and credibility of evidence."). When a witness recants prior testimony, the factfinder determines whether to believe the original statement or the recantation and is entitled to disbelieve a witness's recantation. *See Chambers*, 805 S.W.2d at 461 (holding that outcry evidence, even if contradicted at trial by complainant, retains probative value sufficient to prove an essential element of indecency with a child); *see also Bargas v. State*, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that outcry testimony retains probative value even if contradictory evidence admitted); *Saldana v. State*, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd) ("Furthermore, when a witness recants prior testimony, it is up to the fact finder to determine whether to believe the original statement or the recantation. A fact finder is fully entitled to disbelieve a witness's recantation."). Here, complainant's recent recantation conflicted with complainant's initial statements.

Complainant's recantation was inconsistent with her initial outcry to her mother and with multiple statements made by the complainant during the investigation of the case. In addition to complainant's initial outcry to her mother that Vasquez "sort of touched her," the record includes an April 8, 1996 police report indicating that complainant provided a detailed statement to police on March 22, 1996 in which she (1) stated that during the month of April 1995, when she was eleven years old, Vasquez "was touching her inappropriately;" (2) described at least

two times that Vasquez came into her room and touched "inside her shirt" and "inside her shorts," stating that once he "put his finger inside of her vagina and moved it around;" and (3) stated that Vasquez "sometimes smelled like he had been drinking beer." However, given the passage of time since she gave her statements to the police, complainant testified at the habeas hearing that she could not remember the specifics of what she told the police in her statement regarding the allegations against Vasquez:

> Q. Then the police almost immediately get involved; and do you remember making a statement to the police the very next day, March 22, 1996?
>
> A. I remember speaking to a few people with my mom with me.
>
> Q. Okay.
>
> A. But –
>
> Q. Do you remember speaking to a detective and going over details of the abuse that you were claiming at the time?
>
> A. I want to say that – I can't remember specifics; but, I mean, I do recall speaking with a few different people.
>
> Q. Okay. Do you remember telling the police officers specific details about whether the lights were on or whether the lights were off during the abuse?
>
> A. No.
>
> Q. Okay. Do you remember making specific details about the position that you were laying in when you were speaking to the police?
>
> A. No.
>
> Q. Do you remember giving specific details about how the defendant – I'm sorry – how Jaime Vasquez was kneeling down next to the bed or walking into the room?

A. No. I mean, I see certain times where I could have said certain things just because the way our set-up of the house was.

Q. You don't remember the specific statements?

A. Exactly.

Q. Okay. Do you remember telling the police that Jaime Vasquez smelled like alcohol when he came into your room and would do this to you?

A. No, not really. Sorry.

Q. Okay. And do you recall telling the police that this happened many times over a one-month period?

A. No.

Q. Okay. Do you remember actually, I think, detailing four specific instances, four specific separate instances to the police, or do you just kind of remember a general picture?

A. It's more of a generality, yeah.

Complainant also testified that due to her allegations, she was removed from her home and lived with her biological father whom she did not know. She testified that when she initially recanted before Vasquez pleaded guilty, she wanted to return home with her mother and siblings rather than live with her father. Regarding her more recent recantation, complainant admitted that her family wanted Vasquez to return to the United States to care for her mother. Thus, although complainant denied it, there was evidence that the trial court could credit that (1) complainant's initial recantation was made because she did not want to live with her biological father and wanted to return home; and (2) her more recent recantation was made in an attempt to have Vasquez return to the United States to care for her mother.

In denying Vasquez's actual innocence claim, the trial court resolved the conflicting evidence and made a credibility determination to believe evidence of complainant's specific and detailed outcries provided in 1996 rather than her recent recantation. Considering the evidence, the trial court was within its discretion to conclude that complainant's recantation was not credible to overcome the specific detailed outcry she made to police. Accordingly, we defer to the court's credibility determinations because there is support in the record for the court to believe evidence of complainant's outcries and to disbelieve her conflicting testimony regarding appellant's innocence. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014).

Ex parte Tuley is distinguishable from this case based on the differing conclusions of the trial court as the fact finder. 109 S.W.3d 398. In *Tuley*, the habeas applicant pleaded guilty to the offense of aggravated sexual assault and was placed on deferred adjudication community supervision for ten years. *Id.* at 395. After the trial court adjudicated guilt, the applicant filed an application for writ of habeas corpus asserting actual innocence based on evidence that the complaining witness had recanted her inculpatory statements before and after the trial. *Id.* After weighing the evidence, the trial court found that the applicant had met his burden of proving actual innocence and recommended that the Court of Criminal Appeals grant habeas corpus relief. *Id.* at 397. The Court of Criminal Appeals held that "[t]he record

supports a finding that the recantation in this case is more credible than the testimony at trial." *Id*. at 397. In contrast, here the trial court found complainant's outcries more credible than her recantation and denied habeas relief. Vasquez requests that we overturn the convicting court's denial of habeas relief and reject the trial court's findings regarding the credibility of the complaining witness.

Furthermore, *Tuley* involved a habeas claim under article 11.07 whereas Vasquez asserts a habeas claim under article 11.072. An article 11.07 habeas claim is procedurally different because "our review of an article 11.072 habeas claim is more limited than that of the court of criminal appeals's review of an article 11.07 habeas claim." *Ex parte Mello*, 355 S.W.3d 827, 841 (Tex. App.—Fort Worth 2011, pet. ref'd). In *Garcia*, the Court of Criminal Appeals explained that "[t]here is at least one significant distinction between the posture of article 11.07 habeas cases" and article 11.072 habeas cases:

> In article 11.07 habeas cases, this Court is the ultimate finder of fact; the trial court's findings are not automatically binding upon us, although we usually accept them if they are supported by the record. In an article 11.072 habeas case, however, the trial judge is the sole finder of fact. There is less leeway in an article 11.072 context to disregard the findings of a trial court. Because the court of appeals and this Court are truly appellate courts in the article 11.072 context, it makes sense as a matter of logic that the *Guzman* [*v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)] standard would control.

353 S.W.3d at 787-88 (citations omitted). In *Guzman*, the Court of Criminal Appeals held that "as a general rule, the appellate courts, including this Court, should afford

almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Thus, we affirm a trial court's decision on whether to grant the relief requested in a habeas corpus application absent an abuse of discretion. *See Garcia*, 353 S.W.3d at 787. Because the trial court's findings are supported by the record and the applicant bears the burden of proof, we hold that the trial court acted within its discretion in denying the requested relief.

III. Involuntary Plea and Ineffective Assistance of Counsel

The doctrine of laches bars habeas relief "when an applicant's unreasonable delay has prejudiced the State, thereby rendering consideration of his claim inequitable." *Ex parte Perez*, 398 S.W.3d 206, 219 (Tex. Crim. App. 2013); *see also Ex Parte Smith*, 444 S.W.3d 661, 666-67 (Tex. Crim. App. 2014). Since the Court of Criminal Appeals' decision in *Perez*, no "particularized showing of prejudice" is required of the State and prejudice has been broadly defined "to permit consideration of anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant, so that a court may consider the totality of the circumstances in deciding whether to grant equitable relief." *Perez*, 398 S.W.3d at 215. Proof of prejudice is applied on a sliding scale where "the longer the delay, the

less prejudice must be shown." *Id.* at 219 (citing *Smith v. Caterpillar, Inc*., 338 F.3d 730, 733 (7th Cir. 2003)).

In denying Vasquez's habeas application on the basis of laches, the trial court found that Vasquez's "unreasonable delay in filing this claim has prejudiced the State in its ability to respond and has placed the State in a less favorable position due to the significant passage of time caused by Applicant's unreasonable delay in filing his claim." Because we uphold the trial court's denial of Vasquez's actual innocence claim on the merits, we do not reach the issue of whether his actual innocence claim was also barred by laches.

For the reasons below, we uphold the trial court's finding that Vasquez's involuntary plea and ineffective assistance of counsel claims were barred by laches. *See Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex. Crim. App. 2014) ("[L]aches is a question of fact and, in Art. 11.072 cases, the trial judge is the sole finder of fact.") (internal quotations omitted); *Ex parte Garcia*, 353 S.W.3d 785, 787–88 (Tex. Crim. App. 2011) (unlike in Article 11.07 habeas cases, in Article 11.072 habeas cases "the trial court is the sole finder of fact" and "[t]here is less leeway in an article 11.072 context to disregard the findings of a trial court.").

A. Unreasonable Delay in Filing

Although the Court of Criminal Appeals has not adopted a bright-line rule as to the amount of delay for which a habeas application should be denied due to laches,

the court has recognized that a delay longer than five years after a judgment becomes final "may generally be considered unreasonable in the absence of any justification for the delay." *Perez*, 398 S.W.3d at 216 n.12. Vasquez's habeas application was filed more than seventeen years after the judgment ordering community supervision became final and more than ten years after Vasquez was discharged from community supervision. Vasquez's application challenges a plea agreement and defense counsel's performance, which took place over seventeen years ago, and the application was filed approximately fourteen years after defense counsel's retirement from the practice of law.

As discussed above regarding Vasquez's actual innocence claim, the record contains evidence of prior instances in which the complainant recanted, including before Vasquez's guilty plea in 1997, and there is no evidence in the record that her recantation was hidden from the defense. As the trial court noted, complainant averred that "she has been proclaiming Applicant's innocence anytime the case was brought up since *before* Applicant pled guilty." (emphasis in original).

Vasquez's application argues that he is confined and restrained as a result of the 1997 judgment because he (1) was deported from the United States because he was ineligible for any immigration relief, (2) cannot legally enter or remain in the United States, and (3) is required to register as a sex offender for life. But Vasquez knew these consequences of his guilty plea at least by the time that he was deported

in 2000 and his deportation was affirmed in 2004. In addition, he has been legally required to register as a sex offender since 1997. *See* TEX. CODE CRIM. PROC. ANN. arts. 62.001(6)(A) (defining "sexually violent offense" to include indecency with a child) and 62.101(a)(1) (requiring lifelong registration for sexually violent offenses) (West Supp. 2015).

Accordingly, we hold that the trial court acted within its discretion in finding that Vasquez unreasonably delayed in filing his habeas application by waiting until September 2014 to file it.

B. Prejudice to the State

The trial court found that "Applicant's unreasonable delay in filing this claim has prejudiced the State in its ability to respond and has placed the State in a less favorable position due to the significant passage of time caused by Applicant's unreasonable delay in filing this claim." In evaluating prejudice to the State, "[t]he longer an applicant delays filing his application, and particularly when an applicant delays filing for much more than five years after conclusion of direct appeals, the less evidence the State must put forth in order to demonstrate prejudice." *Perez*, 398 S.W.3d at 217–18. "The rationale for this sliding-scale approach is based on the common-sense understanding that the longer a case has been delayed, the more likely it is that the reliability of a retrial has been compromised." *Id.* at 218. This approach "permit[s] courts to more broadly consider the diminished memories of

trial participants and the diminished availability of the State's evidence, both of which may often be said to occur beyond five years after a conviction becomes final." *Id*. at 216. Vasquez delayed filing his habeas application until approximately seventeen years after the judgment became final and ten years after he completed his community supervision ordered by the judgment. In light of this delay and the sliding scale applied in determining prejudice to the State, the record in this case sufficiently supports the trial court's finding that the State was materially prejudiced by Vasquez's delay.

This record support includes affidavits and testimony that the trial court found to be credible from George Delaney (Vasquez's defense counsel), Devon Anderson (the prosecutor who handled Vasquez's case), and Denise Bradley (another prosecutor who assisted in Vasquez's case). The trial court's findings regarding laches include:

> According to the credible affidavit and testimony of George Delaney, the significant passage of time has inhibited his ability to respond to Applicant's claims, both because his memory has faded over the eighteen (18) years it has taken applicant to file this Writ of Habeas Corpus and because Mr. Delaney's files have been destroyed for at least seven (7) years making it impossible for Mr. Delaney to review any documentation he may have had regarding the Applicant's claims. Mr. Delaney is only able to generally respond to Applicant's claims based on his standard practice as a defense attorney.
>
> According to the credible affidavit of Devon Anderson, the significant passage of time has limited her ability to respond to Applicant's claims. Mrs. Anderson has no independent

> recollection of this case or of any discussions related to this case with Mr. Delaney. Mrs. Anderson is able to confirm that she is one of the prosecutors that handled this case based on identifying her handwriting and her initials, "DW," throughout the file. Mrs. Anderson is only able to respond to Applicant's first ground for relief based on her notes in the file and her standard practice as a prosecutor to comply with any and all *Brady* requirements. Mrs. Anderson is unable to respond to any other claims made by the Applicant due to the significant delay in Applicant's filing.
>
> According to the credible affidavit of Denise Bradley, the significant passage of time has made it impossible for her to have any independent recollection of this case. She is able to say that she was assigned to the 177th District Court while Judge Davies was on the bench and that her name at that time was Denise Nassar, seen on the front of the State's file and on the plea paperwork. Mrs. Bradley is unable to answer any of the specific claims the Applicant has made due to the Applicant's delay in pursuing his claim.

Because the trial court's findings are supported by the record, we hold that the trial court reasonably concluded that the State had been materially prejudiced by Vasquez's delay. *See Ex parte Amezquita*, 223 S.W.3d at 367; *Ex parte Thompson*, 153 S.W.3d at 417–418. Accordingly, we uphold the trial court's ruling that Vasquez's involuntary plea and ineffective assistance of counsel claims were barred under the doctrine of laches.

CONCLUSION

We hold that the trial court did not err in denying Vasquez's habeas application on the basis that (1) he failed to demonstrate a claim of actual innocence and (2) his involuntary plea and ineffective assistance of counsel claims were barred by the doctrine of laches. We therefore affirm the order of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Keyes, and Bland.

Jennings, J. dissenting.

Publish. TEX. R. APP. P. 47.2(b).