In the Court of Criminal Appeals of Texas

No. WR-93,841-01

EX PARTE ROGER EARL HAWKINS, JR.,

Applicant,

On Application for a Writ of Habeas Corpus
Cause No. C-371-W012068-0464520-A in the 371st District Court
Tarrant County

YEARY, J., filed a dissenting opinion in which SLAUGHTER, J., joined.

I dissent to granting Applicant relief in this case on the basis of his claim that he is actually innocent, under *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), and *Ex parte Tuley*, 109 S.W.3d 388

(Tex. Crim. App. 2002). I would also conclude that his other claims are barred by laches.

In 1991, Applicant was a nineteen-year-old high school student. At the writ hearing, conducted on February 17, 2022, he agreed with his counsel's suggestions that he was "slow," and, at the time of the offense, "in special education courses." Writ Hearing at 18. He also claimed to have been only "I guess 17," and "[t]urning 18, maybe" at the time he gave a statement about the offense to police. *Id*. at 35. But a police case report in the habeas record shows Applicant's date of birth as "10-14-72." If that date of birth is accurate, he was at least nineteen years old at the time of the aggravated sexual assault, which was alleged to have occurred on or about "the 15th day of November 1991[.]"

The complainant, in contrast, was a thirteen-year-old middle schooler. A one-count, two-paragraph, indictment was returned against Applicant alleging that, on or about November 15th, 1991, Applicant committed aggravated sexual assault against her, both by penile penetration (Paragraph I) and by digital penetration (Paragraph II). These were first-degree felony offenses, subjecting Applicant to at least potential imprisonment for 5 to 99 years or life. TEX. PENAL CODE §§ 22.021(e), 12.32(a). In June of 1993, Applicant ultimately pled guilty only to Paragraph II—involving the allegation of digital penetration—in exchange for six years' deferred adjudication community supervision.

Later, in December of 1996, Applicant pled true to several infractions of his community supervision. He was adjudicated guilty, and he received a ten-year sentence, which he has now completed. He now alleges, as a collateral consequence of this conviction, however, that

he has been required to register as a sex offender.

Applicant did not file this, his first post-conviction application for writ of habeas corpus until December of 2021, some twenty-eight years after originally pleading guilty to the offense. In addition to his claim of actual innocence, he also brings a *Brady* claim,[1] alleges ineffectiveness of both his guilty-plea and adjudication counsel, and he argues that his initial guilty plea was entered involuntarily. The Court today grants relief only on the actual innocence claim; it makes no ruling on Applicant's other claims.

This Court regards actual innocence relief as "a greater form of relief" than other forms of relief available in post-conviction habeas corpus proceedings.[2] But I do not think the record ultimately supports

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963). In his concurring opinion, Judge Walker argues that Applicant is entitled to relief on the basis of this claim in addition to his actual innocence claim. It is unclear to me why this Court would find it necessary to also grant Applicant relief on his *Brady* claim when it had already granted him "a greater form of relief" based on his claim of actual innocence. *See* note 2, *post*.

[2] *See Ex parte Chaney*, 563 S.W.3d 239, 286–87 (Tex. Crim. App. 2018) (Yeary, J., concurring) (questioning the holding of *Ex parte Reyes*, 474 S.W.3d 677, 681 (Tex. Crim. App. 2015), that an "actual innocence" claim calls for a "greater form of relief" than other habeas corpus claims, continuing to protest the nomenclature of "actual innocence" as inappropriate for an *Elizondo* claim, and expressing "serious doubts that this Court is either constitutionally or statutorily empowered to grant relief in habeas corpus proceedings that is any more extensive than setting aside the judgment and remanding an applicant to face the underlying charging instrument"). Today the Court indeed goes so far as to order the indictment set aside. *See* Majority Opinion at 2 ("The trial court shall issue any necessary orders to dismiss the indictment within ten days from the date of this Court's mandate."). To *that* form of relief, I most definitely dissent. As a practical matter, of course, given that the State agrees that Applicant is entitled to relief under *Elizondo*, it would likely move to

relief on that claim in any event. And for that reason, I would deny Applicant's actual innocence claim, even if I did not also believe it should be considered barred by laches.[3] As for Applicant's remaining claims, I would dismiss them as untimely raised under that doctrine.[4] Because the Court does not, I respectfully dissent.

I. ACTUAL INNOCENCE

A. The Standard

A post-conviction habeas corpus applicant can obtain relief under *Elizondo* if he can show by clear and convincing evidence that, in light of new evidence, no reasonable jury would have convicted him. 947 S.W.2d at 209. Such a claim is available even if the applicant pled guilty to the charged offense. *See Tuley*, 109 S.W.3d at 390 ("We filed and set the case to determine whether the applicant's guilty plea precludes his actual innocence claim under *Elizondo*. We conclude that it does not."). But I disagree with the Court that Applicant has met his burden to satisfy *Elizondo* in this case.

Moreover, Applicant's claim should fail for another, perhaps more legalistic, reason as well. One of the prerequisites for obtaining relief on

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dismiss the indictment of its own accord, in the ordinary course of events. But it is not for us to do so at this juncture.

[3] There was some suggestion in *Ex parte Perez*, 398 S.W.3d 206, 218 (Tex. Crim. App. 2013), that a post-conviction application for writ of habeas corpus that might otherwise be time-barred may nevertheless be entertained as a matter of judicial discretion if the applicant can demonstrate that he is "actually innocent" under the standard in *Elizondo*. In any event, for reasons upon which I will elaborate in the text, I do not believe Applicant has made such a demonstration.

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

an *Elizondo* claim is that the evidence that would change the jury's verdict must be "new." It is not enough that the applicant was not aware of the evidence as of the time of his trial or guilty plea; it must also be the case that the evidence could not have been known to him at that time "even with the exercise of due diligence." *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). And that is where Applicant's claim again falls short, in my judgment. There is no reason that Applicant could not have uncovered the "new" evidence in this case before he pled guilty. Indeed, it is that lack of diligence that gives rise to Applicant's claim that his trial/guilty-plea counsel performed in a constitutionally ineffective manner.

B. The Facts—Insofar as We Know Them . . .

A Fort Worth Police Department offense/incident report included in the habeas record shows that, on November 27, 1991, a rape crisis counselor told police that the complainant had reported being raped. According to the counselor, the complainant stated that, on the date of the alleged offenses—November 15, 1991, she was home from school sick when, between 11 a.m. and noon, three suspects knocked on her front door, forced their way into her residence, and raped her.

The next day, on November 28, 1991, the case was assigned to Detective Dameron for a follow up investigation. On Sunday, December 1, 1991, Dameron met with the complainant at her residence. She explained to him that she had overheard a conversation at a football game about who was responsible for a flood that occurred in a high school in October. After overhearing that conversation, the complainant advised her middle school principal about having heard who was

responsible, although she did not know that person. According to the complainant, shortly after she made the report, five males whom she did not know confronted her at a location in the neighborhood where she lived. She reported that, in retaliation for reporting the name of the person responsible for the flood, these males struck her in the face. She also reported that the same five males also harassed her at a middle school basketball game.

According to Dameron's report, the complainant alleged that, on November 15, 1991, she stayed home from school because she did not feel well. After she woke up and took a shower, she heard the doorbell. She cracked the door to see who it was, and the same five males who had previously confronted her in her neighborhood and harassed her at a basketball game pushed open the door. Three of them, who according to the complainant were white males, sexually assaulted her on the floor of her residence, just a few feet from the door. Two of the boys, one of whom was Black and the other Hispanic, did not participate in the sexual assault, but the black male "KEPT TELLING THE WHITE MALES THAT WERE ASSAULTING THE COMPLAINANT, TO HURRY UP AS WE NEED TO GET OUT OF HERE." The complainant did not immediately inform her parents about the assault, but she told her sister, who did.

Dameron next obtained "high school annuals" from Southwest High School and from Crowley High School, and then he met with the complainant again. After looking at the photographs in the Crowley High School annual, the complainant identified Applicant—and only Applicant—whose photograph appeared on page 120. According to

Dameron, upon seeing Applicant's photograph, the complainant began to cry, stating: "THIS IS ONE OF THEM WHO DID IT TO ME."

On December 9, 1991, Dameron advised Applicant about his investigation. Applicant then gave Dameron a written statement claiming that he met the complainant at a basketball game on a Tuesday, about two weeks earlier. Applicant claimed that, after a friend said he thought the complainant, a cheerleader, was "cute in the face," Applicant "told her to smile," and she complied. According to Applicant, "I said okay," and then the complainant went back and cheered some more. After the game, according to Applicant, he asked the complainant for her picture, which she provided to him along with her phone number. About 30 minutes later, Applicant claimed he called the complainant from someone named Jack Snow's house, and they spoke for about 30 minutes. Applicant related that he called her one other time, and the complainant's sister answered and said the complainant was not allowed to talk after 9:00 p.m. He claimed he only knew her first name, he did not know her last name, he never met her before the basketball game, and he did not have her address nor did he know where she lived, other than that he knew she lived in Fort Worth because of her phone number.

When Applicant's statement was complete, an appointment was made for him to come back on December 13, 1991, to take a polygraph. Applicant appeared for that appointment, and during his polygraph, he told the examiner that he had lied in his previous statement and wanted to tell the truth. Applicant then spoke with Sergeant Anderson and admitted to sexual contact with the complainant. After that, Dameron

took a second written statement from Applicant.

In his second written statement, Applicant claimed that he had met the complainant several weeks *before* November 15th, 1991, at the house of a friend named Dusty. When Dusty left Applicant and the complainant alone in the house, Applicant maintained, he engaged in some sexual activity with the complainant in which he penetrated her vagina with his finger, but nothing more.

This second statement seems to have at least possibly contributed to the inclusion of Paragraph II of the indictment against Applicant. But both the allegation in Paragraph I (penetration by penis) and the allegation in Paragraph II (penetration by finger) were alleged to have occurred "on or about" November 15, 1991, even though Applicant had claimed in his second statement that the incident involving digital penetration had happened some weeks before that date. When Applicant was arrested in January of 1992, however, he recanted his written confession of sexual contact with the complainant.[5]

Dusty Hoipkemier also gave police a sworn statement, in December of 1991, in which he confirmed that "one day," on an occasion after the November 15th assault, Applicant "came to his house" and "[the complainant] was there." Dusty explained that Applicant asked him "if he could have a word with [the complainant] by himself." Dusty said he "asked [Applicant] why and [Applicant] said he shouldn't say."

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[5] The police report reflects that, upon arrest on January 11, 1992, Applicant "denied any sexual contact with" the complainant, and he confirmed that he had made this recantation when he testified at the writ hearing on February 17, 2022. He also insisted at the hearing, consistently with his recantation, that the digital penetration incident never occurred.

Dusty said he "asked [Applicant] if it had something to do with five guys and [Applicant] said 'yeah.'" According to Dusty, Applicant asked the complainant "why she pointed him out in the year book[,]" and she said "she did not so that [Applicant] would not do anything to her." Dusty stated that he knew "that [the complainant] felt uncomfortable around [Applicant]." He claimed that he asked her whether Applicant "had done this to her" and he explained that "she would say no because [Applicant] would always be there with us." But Dusty also said, "One day, when it was just me and [the complainant] alone, she told me that [Applicant] did rape her."

Dusty also claimed in his sworn statement that Applicant "asked [him] to say that the first time he ever met [the complainant] was at [his] house." But, according to Dusty, he "knew it to not be true." Dusty went on to add that Applicant "told him about the false statement that he made"—the "second statement which he gave Detective Dameron . . . after the lie detector told him that [Applicant] was lying." Dusty said that Applicant told him that "he had told [police] that it happened at [Dusty's] house." When Dusty asked him why he told the police that, "[Applicant] said that the lie detector had already said he had lied so he decided to change everything and [Dusty's] name was the first thing that came into his head."[6]

Applicant pled guilty to Paragraph II on June 9, 1993. The

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[6] It is unclear whether Dusty's statement was revealed to Applicant's trial/guilty-plea counsel before Applicant's guilty plea, although Applicant testified at the writ hearing on February 17, 2022, that he had been unaware of it at the time of the guilty plea on June 9, 1993. For his part, trial/guilty-plea counsel testified at the writ hearing that he could not "remember either way" whether Dusty's statement was provided to him.

convicting court's docket entry for June 9th indicates that, "[a]fter hearing the evidence, the Court found that the evidence substantiates the defendant's guilt." *See* TEX. CODE CRIM. PROC. art. 1.15 (requiring the State in a guilty plea proceeding to "introduce evidence into the record showing the guilt of the defendant"). Boilerplate language in the June 9th order placing Applicant on deferred adjudication community supervision indicates that he "agreed that the testimony may be stipulated[,]" but it does not specify what that stipulated "testimony" might have been, or whether Applicant may have judicially confessed in support of the guilty plea. The plea papers do not appear to be in the record presently before us. Nor is there a transcript of the court reporter's notes from that proceeding in the habeas record; and the record does not otherwise reflect what specific evidence the State presented to substantiate Applicant's guilt for Paragraph II—the only allegation to which he pled guilty. Applicant ultimately served a ten-year sentence after he was adjudicated guilty in 1996. He remains a registered sex offender.

Fast forward to 2016. One day that year, according to the complainant, she heard a voice as she was pumping gas that sounded to her like one of her gang-rape assailants. She also claimed to have recognized the man whose voice she heard as one of those assailants, but when she went home and looked Applicant up on the internet, he did not look like the man she had seen at the gas station. Sometime after that, she contacted the Conviction Integrity Unit of the Tarrant County District Attorney's Office "as a gesture of good faith for them to investigate accordingly."

In 2018, she was interviewed by investigators for the State, and the habeas record contains a partial transcription of that statement. In that setting, she expressed doubts about her doubts.[7] In 2020, however,

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[7] At least judging by the statement that the complainant gave to State's investigators in 2018, she seems completely unsure of her memory, at least as it relates to the allegation in Paragraph I of the indictment (penetration by penis). "To be honest with you," she told them at one point, "I just question myself now, because I don't know what I really remember or what . . . I'm just questioning myself on everything. Is that the way . . . ? I remember the way I felt. I don't remember all the details. I'm just questioning everything, at this point."

She went on to say other curious things as well, such as:

- When I originally called you, I thought I recognized that voice. But now I'm like, 'Did I?' I don't know.
- I don't know. I don't know.
- I can't think of anything, but—I just I don't know. I don't know what's real anymore.
- And I want to say, I wish I hadn't because I don't—I think I was mistaken. So . . . this is not what I was expecting, so.
- Well, like that, yeah, I think like, I'm questioning why that voice scared me, I'm questioning it. I mean, did I…? I don't know, I just . . .
- And I don't know. Maybe I was wrong. I don't know.
- Maybe I didn't recognize the voice. Maybe . . . I don't know.

Nevertheless, she seemed to express no doubt during at least the recorded part of this statement with respect to the digital penetration incident described by Applicant's confession made in his second written statement to police. She acknowledged that, since she learned Applicant had been imprisoned for that offense, she had maintained that it "didn't happen[,]" and she asserted once again to the investigators that "[i]t definitely didn't."

she also signed an affidavit in which she expressed doubt about Applicant's participation in the November 15th assault, and—more to the point of Applicant's *Elizondo* claim—asserted that the allegation in Paragraph II of the indictment is "false," and that the digital penetration incident that Applicant initially claimed, but shortly thereafter recanted, simply never occurred. And, although she continues to maintain that the gang rape *did* happen, she has now "expressed doubt" that Applicant "was a perpetrator" of that offense.

The habeas record also contains three "statement[s]" that appear to be signed by teachers from Crowley High School: one on June 4th, 1993, another on June 9th, 1993, and the third on June 10th, 1993. These statements appear to demonstrate that Applicant was in school on the day of the alleged offense—November 15, 1991—between the hours of 8:40 a.m. and 12:02 p.m. Because the rape crisis counselor who informed police about the complainant's claim reported that the complainant told her that the rape happened between 11:00 a.m. and 12:00 p.m. on that same day, the teachers' statements obviously represent some evidence that might have been used by Applicant to demonstrate that the complainant's claim of rape (or at least Applicant's involvement in it) was false, had Applicant been put to a full-blown trial on that allegation.

The complainant herself, however, was not called to testify at the writ hearing held on February 17, 2022. Could she have been mistaken about the time of the assault when she first reported it to the rape crisis counselor? Might she have been able to offer some reasonable explanation for how Applicant could have been one of her attackers and

also have been demonstrably present in school until 12:02 on the day of the offense? Without the complainant's testimony, we have no way of knowing how she might have responded to such inquiries. And we certainly do not know how she would have responded had she been called as a witness against Applicant at a trial, some 28 years ago.

In lieu of live testimony, the parties submitted an agreed stipulation of what the complainant would say if she were to be called to support Applicant's actual innocence claim. That stipulation avers that, "[e]ver since being informed" of the allegation in Paragraph II of the indictment, the complainant "has repeatedly and consistently stated that those allegations are false and that [Applicant] never assaulted her" as alleged in Paragraph II. There is no indication in the record, however, whether either the State or the defense ever contacted the complainant before Applicant pled guilty to Paragraph II, in order to verify with her whether that offense happened, or whether she might have been digitally penetrated during the assault that she claims to this day occurred at her home. Applicant's trial/guilty-plea counsel, who did testify at the writ hearing, was never even asked whether he had spoken with the complainant, or at least tried to, prior to Applicant's guilty plea.

For his part, Applicant testified at the writ hearing that, during his incarceration before his plea, he was assaulted by another inmate who knocked out several of his teeth. He testified that, while in jail awaiting trial, he insisted to his court appointed attorney that he was innocent of all charges, and that he wanted a trial to clear himself.[8]

[8] Applicant's trial/guilty-plea attorney was not asked at the writ hearing whether Applicant had insisted upon his innocence.

Applicant claimed that, only when his attorney informed him that he would likely spend *another* year and a half in jail before a trial date could be set did he agree to accept the State's offer. Applicant also claimed that he had "told everybody [he] had to have been in school" on November 15th of 1991. He maintained that, when he told investigators that he "had to [have] be[en] in school" when the alleged gang rape occurred, they told him there were no records to confirm that.[9]

The habeas record also reveals that, about two weeks before the plea hearing, the prosecutor handling the case interviewed the complainant and formulated the opinion that she was not credible. He simply did not believe her claims beyond a reasonable doubt, and he observed that the case would not likely result in a conviction. It is not entirely clear, however, whether the prosecutor's reticence to pursue a

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[9] It turns out that there were indeed school records to confirm that Applicant was in school at the time when the complainant seems to have alleged that she was gang raped, at least as reported to police by the rape crisis counselor. It is unclear whether either the State or Applicant's own counsel actually obtained those records prior to Applicant's guilty plea in June of 1993. Applicant's trial/guilty-plea counsel testified at the writ hearing that he simply did not "remember either way" whether he contacted the school "to see if [Applicant] was in school that day[.]" Applicant also could not remember whether counsel tried to obtain the school records. When shown the actual school records during the writ hearing, trial/guilty-plea counsel testified: "This is the first time I've seen these *that I can remember*." (Emphasis added.) He also had "[n]o recollection either way" whether the State ever contacted Applicant's teachers to confirm whether Applicant had been in school. When shown the statements taken from those teachers in the days surrounding Applicant's guilty plea in June of 1993, showing that Applicant was in school, trial/guilty-plea counsel first stated that he had "no recollection." But then he asserted: "I have never seen these before today much less before the plea was entered." Later he confirmed that his "[b]est recollection" was that he was *not* aware of the school records before Applicant entered his guilty plea.

trial on the indictment was ever communicated to Applicant or to his trial/guilty-plea counsel prior to the plea proceeding.

When asked at the writ hearing whether the State ever informed him of its concerns about the complainant's credibility, trial/guilty-plea counsel first responded that he could not "recall either way[.]" He later testified that he thought he *would* have remembered had he been actually informed of the prosecutor's doubts. In any event, those doubts would seem to explain the State's generous plea offer with respect Paragraph II—six years' deferred adjudication community supervision for a first-degree felony offense.

C. Questions Do Not Equate to Innocence

There is no doubt that Applicant has presented some evidence that could call his guilt into question. But we have said that establishing a right to relief based on *Elizondo* is a "Herculean task." *Brown*, 205 S.W.3d at 545. In other words, Applicant must make "an exceedingly persuasive case that he *is* actually innocent." *Id.* (emphasis added). And he must show "by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence." *Id*. Applicant has not done that here.

The complainant claimed that she was sexually assaulted by three white males on or about November 15, 1991. Even to this day she has not changed her story about that. She picked Applicant out of an entire high school annual and, while becoming emotional, pointed to him, and named him as one of the males who sexually assaulted her. She also confided in Dusty Hoipkemier, shortly after being in

Applicant's presence at Dusty's home, that Applicant had indeed raped her.

Applicant has demonstrated that school records existed, at the time the charges in this case were leveled against him, that could have been used to demonstrate that he was in school at least until 2 minutes past the time of the alleged offense, on the day it was alleged to have occurred, at least according to the report about the time of the offense as relayed by the rape crisis counselor who interviewed the complainant. These records certainly seem in hindsight to have exculpatory value. But we have no idea whether they would have definitively proven the offense did not happen (or at least Applicant did not participate) had their existence been known when Applicant pled guilty. Insofar as the record reveals, nobody has asked the complainant whether the potential discrepancy in time could have been explained.

There is also the matter of the prosecutor's notes, from a meeting with the complainant a few weeks before Applicant's plea, that reflect his lack of confidence in the credibility of the complainant's claims. That also presents a very suspicious anomaly, but because of the long delay in the bringing of this habeas application, we may never know the truth about whether Applicant or his counsel was made aware of these concerns, prior to the decision to plead guilty. Applicant's testimony at the habeas hearing, that he was not aware of the prosecutor's concerns, is questionable because it is self-serving.

Then there is the affidavit from Applicant's friend, Dusty, that corroborates Applicant's claim that he lied to the police about the incident in which he admitted to digitally penetrating the complainant's

sexual organ at Dusty's house about two weeks before the date of the alleged gang rape. Applicant apparently made this admission to police after they told him that he had failed a polygraph designed to test the veracity of his first statement. Also, the complainant herself more recently has suggested that the event described in Applicant's second statement to police "never happened."

But even if Applicant's own claim about digitally penetrating the complainant's sexual organ at Dusty's house was false, the complainant to this day still claims she was gang raped, just as she alleged all those years ago. She has simply begun to have doubts more recently about whether Applicant might have been one of her attackers after a more recent, curious incident at a gas station. Her doubts, however, are not definitive. She even called them into question herself when she was interviewed about them by police in 2018.[10]

Moreover, Applicant did not plead guilty to digitally penetrating the complainant's sexual organ on or about some date two weeks before November 15, 1991. He pled guilty to sexually assaulting her in that particular way *on or about November 15, 1991*, the same date she alleged she was raped in her home by three white males, pursuant to a pleading that alleged it occurred by digital penetration. And the habeas record does not reveal the details of the rape as the complainant would surely have revealed them, had she been asked to describe those details closer in time to the actual events. Consequently, even if we were satisfied that Applicant has definitively disproven the events he described to police in his confession of digital penetration at Dusty's house, as reported in his

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[10] *See* note 7, *ante*.

second written statement, no evidence shows that there was not also digital penetration, either alone, or in addition to penile penetration, involved in the sexual assault that the complainant still says happened on or about November 15, 1991, inside her own home.

The definition of the offense of aggravated sexual assault of a child does not concern itself with the thing that is used to penetrate the child's sexual organ. The offense is an offense whether the penetration occurred by finger, or by penis, or by both, and neither of those means of penetration reflects a statutory requirement for commission of the offense. The statute under which Applicant was convicted provides that an offense is committed if the defendant penetrates the sexual organ of a child "by any means[.]" TEX. PENAL CODE § 22.021(a)(B)(i). So, whether the Applicant penetrated the complainant's sexual organ with his finger, or with his penis, or both, on or about November 15, 1991, is not actually material to his guilt for the offense.

And whatever doubts the complainant more recently has had about Applicant's identity as one of the people who sexually assaulted her on November 15, 1991, in her home, those doubts do not overcome her apparent certainty closer in time to the date of the crime. First, at the behest of Dameron to identify her attackers, the complainant selected Applicant's photograph, alone, from an entire high school annual, while becoming emotional and claiming that Applicant was one of the people who had raped her. Dusty Hoipkemier also confirmed that, after being in Applicant's presence at Dusty's home about ten days after the date of the offense, the complainant confided in him that, in fact, *Applicant had raped her*. And Dusty confirmed that Applicant also

asked him to lie on Applicant's behalf in relation to the circumstances surrounding the complainant's allegations.

The evidence Applicant points to in this habeas proceeding certainly raises some questions about Applicant's guilt. But those questions do not show that he did not, in fact, on or about November 15, 1991, sexually assault the complainant, who was a thirteen-year-old child at that time. And I cannot say that no reasonable juror would have found him guilty of sexual assault against the complainant in light of the evidence he now points out. I cannot therefore join the Court's decision granting him relief under *Elizondo*.

D. No Due Diligence

And there is another, legal question that should give the Court pause before making its declaration of innocence in this case. Does the complainant's present assertion that the digital penetration incident alleged in Paragraph II, to which Applicant pled guilty, never happened truly constitute "newly discovered" or "newly available" evidence in contemplation of the *Elizondo* standard?[11] It is not, insofar as can be determined from the record, a classic "recantation," in the sense that the complainant denies some earlier assertion that the digital penetration

[11] In its recommended findings of fact and conclusions of law, the convicting court describes the complainant's denial that the digital penetration incident ever occurred as "new" in finding that Applicant has satisfied the *Elizondo* standard. Findings of Fact and Conclusions of Law at 8, # 44; *id*. at 10, #4. But it has made no recommended findings and conclusions with respect to whether her denial could have been ascertained in the year-and-half before Applicant's guilty plea, with the exercise of due diligence. Thus, there are no findings and conclusions with respect to this issue to which the Court might defer, even assuming the record supported them.

incident *did* take place.[12] The present record does not definitively establish that Applicant's trial/guilty-plea counsel was unaware that the complainant would deny the incident ever occurred at the time of the plea. *If* he knew, but never informed his client prior to the plea, then that might support an ineffective assistance of counsel claim. But it would *not* support an *Elizondo* claim, since the evidence would not be "newly discovered" or "newly available." *Brown*, 205 S.W.3d at 545. *If*, on the other hand, trial/guilty-plea counsel was *not* aware of what the complainant would say about Paragraph II prior to Applicant's guilty plea, then the question becomes, why not? If he was in fact so unaware, then there was a lack of diligence on his part in exposing this glaring deficiency in the State's case, and that lack of diligence would prove equally fatal to Applicant's present *Elizondo* claim. *Id.* ("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*.") (emphasis added).

Applicant testified that, during his year-and-a-half sojourn in jail, he consistently maintained to trial/guilty-plea counsel that he was innocent, that the digital penetration incident never occurred, and that he wanted to proceed to trial. It is simply inconceivable that trial/guilty-plea counsel would not have sought to ascertain what the complainant

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[12] Had trial/guilty-plea counsel actually spoken to the complainant before the plea, and she had told him that the digital penetration incident *did* occur, then her present insistence that it did *not* happen would constitute a recantation, and it might very well constitute new evidence in support of an *Elizondo* claim. The present record, however, simply does not reveal what the complainant may have said about that incident, had she been asked about it at that time.

had to say before advising his client to accept the State's plea offer, generous though it might have seemed. There is no suggestion that there was anything in the State's file—which trial/guilty-plea counsel testified he reviewed—that could have revealed what the complainant had to say about the digital penetration charge, since the State apparently also failed to ask her about it prior to the plea.[13] Under the circumstances, I cannot conclude that the evidence in this case—at least as it pertains to the digital penetration charge to which Applicant actually pled guilty—was "new" in the sense that it could not have been ascertained even "with the exercise of due diligence." *Id*. Applicant's trial/guilty-plea counsel either knew about it, or else he should have *inquired* about it, before advising Applicant to accept the State's plea offer.

II. APPLICANT'S OTHER CLAIMS

The truth of the matter is that we do not know (and probably cannot reliably know) what any of the parties knew at the time of the plea because too much time has gone by—28 years—since Applicant pled guilty. Applicant has been slumbering on his rights for at least twenty of those 28 years, from the time he was adjudicated guilty and sentenced

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[13] There is the note from the prosecutor in the State's file in which he expresses doubt about the complainant's story. But he says nothing that explicitly refers to whatever the complainant might have had to say about the digital penetration incident. Maybe she denied it, and that is one of the "glaring inconsistencies" to which the prosecutor alluded in seeming to reject her claim of gang rape. If we could say for sure that the prosecutor directly asked her, and that she had told him that the incident simply never occurred, then we would have a serious *Brady* issue—the correct resolution of which I express no opinion about. *See Ex parte Palmberg*, 491 S.W.3d 804, 814 n.18 ("It is unclear whether or not *Brady v. Maryland* goes so far as to render guilty pleas involuntary if the prosecution does not disclose exculpatory information at the time of the plea[.]").

in 1996, until he was informed at some point that the complainant had come forward in 2016 to express her doubts about the gang-rape case and to disown the digital penetration incident.[14] If "[a] ten-and-a-half year delay is extraordinary[,]" *Ex parte Smith*, 444 S.W.3d 661, 670 (Tex. Crim. App. 2014), a delay of almost twice, or even thrice, that long is that much more extraordinary. Even recognizing that the "mere passage of time" will not be sufficient to impose a laches bar, *Ex parte Perez*, 398 S.W.3d 260, 219 (Tex. Crim. App. 2013), it is clear enough that a substantial and unjustified period of delay in this case has made it impossible to reliably determine the merits of Applicant's various other claims. For this reason, I would dismiss Applicant's other claims as barred by laches.

At this late date, we simply cannot ascertain with any degree of confidence what either the prosecutors or trial/guilty-plea counsel knew,

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[14] When asked at the writ hearing why he did not challenge his guilty plea any sooner, Applicant replied: "I didn't know that I could. I mean, when you asked me about it and you're telling me I could have, I didn't know anything about that. So no one ever approached me about I could have challenged my guilty plea." Only after he was contacted by the Conviction Integrity Unit did Applicant investigate the possibility of a post-conviction challenge, he said. But there is no reason to believe that it would not have been fruitful to contact the complaining witness at any time prior to her coming forward herself, in 2016, to (among other things) refute the digital penetration allegation. Applicant's explanation, such as it is, actually establishes a want of due diligence in pursuing a post-conviction remedy, not an acceptable excuse for failing to do so. The "circumstances" certainly "permit[ed] diligence" in this case. *See Ex parte Smith*, 444 S.W.3d 661, 666 (Tex. Crim. App. 2014) (defining "laches" in terms of an applicant "slumbering" on his rights "under circumstances permitting diligence") (quoting *Ex parte Carrio*, 992 S.W.2d 486, 487 n.2 (Tex. Crim. App. 1999) (citing, in turn, BLACK'S LAW DICTIONARY 875 (6th ed. 1990)). Applicant was given an opportunity to explain his delay, *id*., at 670, and he has failed to adequately do so.

or what investigations they undertook, to inform Applicant's decision whether to accept the State's lenient plea offer. For reasons undisclosed by the present record, the prosecutors who handled the case have not come forward to testify, either in support of or against Applicant's *Brady* claim—even assuming that such a claim would be cognizable in a post-conviction application for writ of habeas corpus following a plea of guilty.[15] We have no idea what these prosecutors might have said, but "[s]ociety's interests" in the integrity of convictions must "endure despite the State's silence on them." *Smith*, 444 S.W.3d at 669.

For his part, Applicant's trial/guilty-plea counsel could remember practically nothing about the case, and he was not even asked whether he ever attempted to interview the complaining witness before advising Applicant to plead guilty. So, we cannot say with any true assurance whether he performed deficiently, or whether any deficiency of counsel caused Applicant to plead involuntarily, much less whether we can accept Applicant's present self-serving claim that he would have insisted on going to trial had either the prosecutors and/or his trial/guilty-plea counsel better informed him. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice prong of a claim of ineffective assistance of counsel in a guilty plea proceeding is a function of whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have

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[15] *See* note 13, *ante* (citing *Ex parte Palmberg*'s observation that the Court has yet to determine *Brady*'s application in the guilty-plea context). In any case, most of the exculpatory evidence Applicant alleges the State withheld prior to his guilty plea was only relevant to exculpate him from the penile-penetration allegation in Paragraph I of the indictment. Both Applicant and Judge Walker exaggerate the exculpatory significance of Dusty's statement with respect to Paragraph II.

pleaded guilty and would have insisted on going to trial."). Equitable relief would not be appropriate under these circumstances.

III. CONCLUSION

For the reasons I have explained, I would *not* grant Applicant relief on his *Elizondo* claim; and even if I thought that claim was meritorious, I would certainly *not*, at this stage, order a dismissal of the indictment.[16] Moreover, I would dismiss Applicant's remaining claims as barred under the doctrine of laches. I respectfully dissent.

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[16] *See* note 2, *ante*.