IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-76,082-03

EX PARTE CARLTON MCEWEN, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-08-904053-C IN THE 403RD DISTRICT COURT
FROM TRAVIS COUNTY**

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

DISSENTING OPINION

Applicant was convicted for indecency with a child—four counts by contact and one count by exposure. He was sentenced to imprisonment for life for counts one through four and to imprisonment for twenty years for count five. In 2009, the Third Court of Appeals affirmed Applicant's five convictions. *McEwen v. State*, No. 03-08-00522-CR, 2009 WL 2902702 (Tex. App.—Austin Aug. 26, 2009) (mem. op., not designated for publication). For the next ten years, as Applicant sat incarcerated in the Mark W. Stiles Unit in Beaumont, he did nothing.

Last September, Applicant's trial counsel passed away, and within three weeks of his counsel's death, Applicant filed this application for habeas relief, claiming that his counsel rendered constitutionally ineffective assistance. *See* TEX. CODE CRIM. PROC. art. 11.07. Because the well-settled doctrine of laches bars relief in cases that look a lot like this one, I cannot agree with my colleagues' decision to grant relief in the form of a new punishment hearing on count five.

Laches is defined as "neglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." *Ex parte Perez*, 398 S.W.3d 206, 210 (Tex. Crim. App. 2013) (citing BLACK'S LAW DICTIONARY). That neglect must be "for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done." *Id*. Texas' laches doctrine is broad: courts should consider "anything that places the State in a less favorable position." *See id*. at 215. This should be determined on a case-by-case basis, and relevant factors include "the length of applicant's delay in requesting equitable relief, the reasons for the delay, and the type of prejudice borne by the State resulting from applicant's delay." *Ex parte Smith*, 444 S.W.3d 661, 666–67 (Tex. Crim. App. 2014).

The doctrine contemplates cases just like this one. Applicant's decade-long delay is exacerbated by the fact that his trial counsel is now deceased—out of the picture and unable to defend himself. It is difficult to imagine how the State could not be severely prejudiced in responding to his post-conviction claims. We will never know what prior criminal activity Applicant might have discussed with his trial counsel. The one prior conviction

used to enhance his punishment is the only one the county prosecutors are "aware of." But the State now cannot use Applicant's trial counsel for further fact development—placing it in a less favorable position—all because Applicant waited until after his lawyer's death to impugn his effectiveness.

Whatever the independent merit of Applicant's claims, his unexplained, prolonged, and prejudicial procrastination at least potentially bars his ability to raise them. Trial counsel's death is important to this Court's ineffective assistance of counsel analysis because "counsel should ordinarily be accorded an opportunity to explain [his] actions before being condemned as unprofessional and incompetent." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). The year after *Bone*, this Court reiterated that sentiment in *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Both *Bone* and *Rylander* were direct appeal cases, so the record had not been developed enough to reveal the motives behind trial counsel's decisions. *Bone*, 77 S.W.3d at 835; *Rylander*, 101 S.W.3d at 110–11. Because the record was not developed, this Court held that the appellants could not establish that trial counsel's performance fell below the objective standard of reasonableness required by *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and affirmed the judgments and sentences of the trial courts. *Bone*, 77 S.W.3d at 836; *Rylander*, 101 S.W.3d at 111.

Here, Applicant's ineffective assistance of counsel claims are before us on an application for the writ of habeas corpus, not on direct appeal. Counsel's death means that the record is, and forever will be, as deficient as it would be had these claims been raised on direct appeal. Counsel is now unable to explain his actions, a fact Applicant knew when

he filed this writ application, ten years after his conviction was affirmed and mere weeks after his trial counsel's death.

Before granting a new punishment hearing on count five, I would remand it to the convicting court for a laches inquiry. Because the Court does not, I respectfully dissent.

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