



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783  
Austin, Texas 78767  
Tel. 512-354-7823  
Fax: 512-532-6282



Web Site: [www.texindbar.org](http://www.texindbar.org)

⚖ Vol. 21, No. 19, May 13, 2013

Case Name: **Ex parte Alberto Giron Perez**

- OFFENSE: Post-Conviction Habeas Corpus
- COUNTY: Cottle
- CCA. CASE No. AP-76,800                      DATE OF OPINION: May 8, 2013
- DISPOSITION: Remanded to Habeas Court
- OPINION: [Alcala, J.](#)                              VOTE: 7-1-1
- TRIAL COURT: 50th D/C; Hon. W.H. Heatley
- LAWYERS: [Earl Griffin](#) (Defense); [John Messinger](#) (SPA)

⚖ 561 **Post-Judgment Proceedings / Procedures (Doctrine of Laches Defense)**: Applicant was found guilty of murder, and his conviction was affirmed by the Court of Appeals in 1992 (unpublished). In 2011, almost twenty years later, Applicant filed this application for post-conviction writ of habeas corpus, contending that he was denied the opportunity to pursue PDR because his appellate counsel failed to notify him that his conviction had been affirmed until June 1993, by which time the deadline for filing a petition for discretionary review (PDR) had passed. He also claimed that appellate counsel's failure to timely notify him of his conviction's affirmance constituted ineffective assistance of counsel and that he should now be afforded the opportunity to file an out-of-time PDR. In response, the State invokes the equitable doctrine of laches and urges that applicant be barred from proceeding with his application for post-conviction relief.

**Holding**: Recognizing that our current approach to laches in the habeas corpus context has imposed an unreasonably heavy burden upon the State, we now adopt a revised approach that is consistent with the Texas common law definition of that doctrine. In doing so, we expand the definition of prejudice under the existing laches standard to incorporate all forms of prejudice so that a court may consider the totality of the circumstances in deciding whether to hold an application barred by laches.

**Concurring / Dissenting Opinions**: Judge Johnson concurred without note. [Judge Meyers](#) delivered a dissenting opinion in which he argued that "neither the State nor the majority has shown that the State's ability to defend longstanding convictions is prejudiced by us allowing Applicant to file an out-of-time PDR." He would grant the habeas application.

**Sidebars**: ([David A. Schulman](#)) Ultimately, I have to admit that this holding is no surprise. Additionally, I must agree that, in many cases, the result here will make much more sense than the "current approach." As to surprise, the Court cited to **Ex parte Carrio**, 992 S.W.2d 486 (Tex.Cr.App. 1999)(see ⚖, [Vol. 7, No. 50](#); 12/20/1999), in which it held that the court "may and should" employ the doctrine of laches in post-conviction habeas corpus cases. Since then, the Court has stuck to the idea that, "for laches to apply, the State must make a particularized showing that Applicant's unreasonable delay in filing his writ application prejudiced its ability to respond to the allegations raised in the writ application." See, e.g., **Ex parte Ruiz**, No. WR-75,296-02 (Tex.Cr.App.

11/09/2011)(unpublished). There have been numerous cases denying relief under laches, all in unpublished opinions. In reality, trial courts have been considering “all forms of prejudice” throughout the years since **Carrio**. As to the merits of this new “approach,” it has occurred to me on several occasions when I was seeking (for example) an out-of-time PDR for someone and the State was claiming laches, that it made little sense to give the person an out of time PDR, when we all knew the sole purpose of the proceeding was to get the habeas corpus case back into a time frame in which we could move into federal court, and the State’s laches claims went to its ability to defend the trial, not to defend the request for the out-of-time PDR. I think that successfully navigating the laches waters will now require defense counsel to demonstrate to the habeas court that it should ignore the State’s claims because they still have enough evidence, etc., to convict the client. All I can say is this is going to be weird.