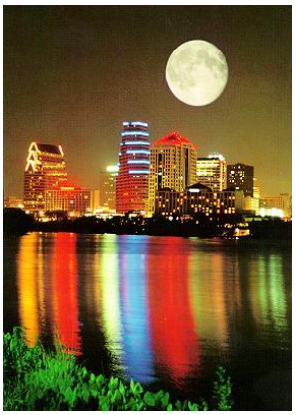

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Vol. 22, No. 40 - October 6, 2014

Case Name: Ex parte Al Letroy Smith

- OFFENSE: Post-Conviction Habeas Corpus / Assault on a Public Servant
- COUNTY: Potter
- CCA. CASE No. WR-790465-01 DATE OF OPINION: October 1, 2014
- DISPOSITION: Application Remanded for Fact Finding
- OPINION: Keasler, J. VOTE: 6-1-2
- TRIAL COURT: 47th D/C
- LAWYERS: John Bennett (Defense); John Owen (State)

561.05 Post-Conviction Proceedings / Procedures / Pleading Requirements: In June 2002, a jury found Applicant guilty of assault on a public servant, and the judge sentenced him to a term of eight years' confinement to run consecutively with another conviction. Appellate counsel was subsequently appointed, but no appeal was taken. In March 2013, Applicant filed an application under Article 11.07, C.Cr.P., alleging that he was denied his rights to appeal and effective assistance of appellate counsel. In April 2013, the State filed its answer generally denying Applicant's allegations and further informing the trial court that the State requested a response from appellate counsel it had not yet received. The State's answer did not plead laches or any theory of the case beyond a general denial. Following a remand from the Court of Criminal Appeals, and after considering appellate counsel's affidavit, in which he stated that he had no personal recollection of the case and that his file did not contain a notice of appeal, the habeas judge found that appellate counsel failed to invoke the court of appeals' jurisdiction. The judge concluded that Applicant received ineffective assistance of appellate counsel and recommended that Applicant be permitted to file an out-of-time appeal. The State did not object to the findings or conclusions. On its own motion, the Court ordered Applicant's application be filed and set to determine "whether the State must plead laches for a court to consider it in determining whether to grant equitable relief."

Holding: We have long acknowledged that the writ of habeas corpus is of common-law origin and governed by common-law equitable principles. *** Our first direct exposition on the laches doctrine's effect on an applicant's request for habeas corpus relief is found in Ex parte Carrio, 992 S.W.2d 486 (Tex.Cr.App. 1999)(see , Vol. 7, No. 50; 12/20/1999) *** Just two terms ago in Ex parte Perez, 398 S.W.3d 206 (Tex.Cr.App. 2013)(see , Vol. 21, No. 19; 05/13/2013), we abandoned Carrio's embrace of the federal approach in favor of a return to the common law's equitable principles that animate the laches doctrine. After Perez, the State is no longer required to make a particularized showing of prejudice, and the definition of prejudice has now expanded to include anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant. *** For the same reasons that we abandoned the federal approach to laches, we now hold that a court may sua sponte consider and determine whether laches should bar relief.

*** Accordingly, we remand this application to the habeas court to make findings of fact and conclusions of law consistent with this opinion . . ..

Concurring / Dissenting Opinions: Judge Meyers delivered a dissenting opinion in which he argued that the "majority is handicapping applicants and further aiding the State by not requiring the State to plead laches at all, but then forcing the applicant to show, in yet another court, why his application should not be barred. *** This process is particularly unkind to those applicants who had no idea why their case was not being advanced in the courts, as occurred here. As a consequence of his counsel's likely ineffective assistance, Applicant sat in jail for ten years before informing the courts that he never received his rightful appeal. Without a lawyer in jail with him, there is no reason an applicant should know the time limit for filing an application for a writ of habeas corpus."

Sidebars: (David A. Schulman) This opinion is both contradictory and wrong. It claims that the Court has "returned" to the common law approach, even as it sanctions a radical departure from the tradition that laches was a equitable defense which was required to be pled and proven. Traditionally, the "neutral and detached" magistrate did not meddle in the business of the parties and did not tell the parties how to conduct their case. Counsel for the State in this case is a well qualified and well seasoned prosecutor who I am sure is well familiar with the Court's holdings in Carrio and Perez, as well as Ex parte Young, 479 S.W.2d 45 (Tex.Cr.App. 1972), on which the majority claims Carrio was partially based, and who does not have a reputation as a "push over." Certainly, if counsel for the State had thought it was not "equitable" for Applicant to get relief, he would have done something to prevent it. At this point, I want to invoke Judge Meyers' comments in dissent to the Court's original remand in Ex parte Carrio, 992 S.W.2d 486 (Tex.Cr.App. 1999)(see 66, Vol. 7, No. 21; 05/31/1999): "It is for the Legislature, not the courts, to remedy defects or supply deficiencies in the laws . . ." Judge Meyers was joined in that dissent by Judge Womack, and he opined that the Court is without the authority to adopt laches into its habeas corpus jurisprudence ("In holding laches applicable to 11.07 petitions for post-conviction writs of habeas corpus, the Court is plainly legislating"). I wish the Court would stop tinkering with the habeas corpus process and leave well enough alone. If the Legislature wants to change things, they certainly know how to do that.