

No. 13-16-00427-CR

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
8/1/2017
DEANA WILLIAMSON, CLERK

Ex parte Osvaldo Garcia,

Appellee

Appeal from Cameron County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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2. **Once raised by the State, can a laches defense be forfeited by inaction when, as here, it did not become potentially dispositive until the habeas judge granted relief on the merits of an ineffective assistance of counsel claim?**

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellee, Samuel Osvaldo Garcia.
- * The trial Judge was the Honorable Leonel Alejandro, 357th District Court.
- * The habeas Judge was the Honorable Juan A. Magallanes, 357th District Court.
- * Trial counsel for the State was Christine Marie Gorman, 964 E. Harrison, Brownsville, Texas 78520.
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- * Counsel for Appellee at trial was Daniel Antonio Sanchez, 501 E. Tyler, Harlingen, Texas 78550.
- * Counsel for Appellee on habeas and on appeal was Rafael De La Garza, 4943 South Jackson Road, Edinburg, Texas, 78539.

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No. 13-16-00427-CR

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

Ex parte Osvaldo Garcia,

Appellant

Appeal from Cameron County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Whether *Ex parte De Los Reyes*' holding that *Padilla* claims are barred on post-conviction habeas applies to a claim of affirmative misadvice about deportation consequences is a controversial issue that this Court needs to decide. Some courts have determined that only claims involving the failure to advise (classified as true *Padilla* claims) are barred by non-retroactivity.

Additionally, it goes against traditional habeas practice to hold, as the court of appeals did, that the State forfeits a laches defense by failing to reurge it on remand at a live hearing held on an amended application after asserting it in its response.

Laches, as an alternative basis for denying relief, often does not become an issue of exclusive consequence until after relief on the merits is granted. Therefore, until the State affirmatively waives a previously asserted laches defense, it cannot be found to have been forfeited by inaction.¹

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellee pled guilty to possession of cocaine with intent to deliver. 1 CR 26-31. His ten-year prison sentence was suspended for ten years, and he was fined \$500. 1 CR 26-31. After being deported and then illegally returning to the United States, Appellee filed an Article 11.072² application for a writ of habeas corpus. He claimed that his trial counsel wrongly admonished him that he would not be deported if convicted. The habeas court granted relief. The Thirteenth Court of Appeals affirmed, holding that Appellee's affirmative misadvice claim is cognizable, not *Teague*-barred or barred under the doctrine of laches because the State forfeited it, and that he was denied effective assistance of counsel. *Ex parte Garcia*, __S.W.3d__,

¹ This pertains only to the State's right to invoke the defense. A habeas court, without regard to the parties, may raise laches on its own. *Ex parte Smith*, 444 S.W.3d 661, 668 (Tex. Crim. App. 2014).

² TEX. CODE CRIM. PROC. art. 11.072 (procedures for writs of habeas corpus when community supervision was granted).

No. 13-16-00427-CR, 2017 Tex. App. LEXIS 6488 (Tex. App.—Corpus Christi 2017).

STATEMENT OF PROCEDURAL HISTORY

The habeas court initially denied relief on Appellee’s TEX. CODE CRIM. PROC. art. 11.072 application. *See Ex parte Garcia*, No. 13-14-00501-CR, 2016 Tex. App. LEXIS 1117, at *3 (Tex. App.—Corpus Christi Feb. 4, 2016) (not designated for publication). The Thirteenth Court of Appeals remanded because the record was inadequate to address Appellee’s claims. *Id.* at *7-9. The habeas court held a live evidentiary hearing, entered findings and conclusions, and granted Appellee relief by vacating his conviction. 1 Supp. CR 4-5. The court of appeals affirmed. *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *1, 42.

GROUND FOR REVIEW

- 1. Is a claim that counsel misadvised a defendant about the deportation consequences associated with a guilty plea cognizable on habeas despite *Ex parte De Los Reyes*’ holding that *Padilla* does not apply retroactively on habeas?**
- 2. Once raised by the State, can a laches defense be forfeited by inaction when, as here, it did not become potentially dispositive until the habeas judge granted relief on the merits of an ineffective assistance of counsel claim?**

ARGUMENT

1. Background

Appellee was a lawful permanent resident of the United States since childhood. 1 CR 33, 50. In 2002, he pled guilty to possession of cocaine with intent to deliver; his sentence was suspended, and he was granted community supervision. 1 CR 26-31. As a result of the conviction, Appellee was deported to Guatemala. 1 CR 34. He remained in Guatemala for two months before illegally reentering the United States. 1 CR 32-61.

Appellee filed an Article 11.072 application for a writ of habeas corpus, challenging the 2002 possession conviction. 1 CR 32-61. He alleged that his trial counsel told him it “would probably be okay” and “probably not result in deportation” when Appellee inquired into the matter. 1 CR 34-39. The State filed a response, arguing that Appellee’s ineffective assistance of counsel claim is *Teague*-barred,³ barred by laches, and otherwise without merit. 1 CR 62-73. The habeas court denied relief. The Thirteenth Court of Appeals reversed and remanded because the habeas court did not comply with procedural requirements in Article 11.072. *Ex*

³ Adopting Justice Harlan’s understanding of habeas “cognizability,” the Supreme Court in *Teague v. Lane* held that a new rule of constitutional law is not applied retroactively to final convictions challenged on habeas. 489 U.S. 288, 306-10 (1989).

parte Garcia, No. 13-14-00501-CR, 2016 Tex. App. LEXIS 1117 (Tex. App.—Corpus Christi Feb. 4, 2016) (not designated for publication).

On remand, Appellee amended his application, claiming that his misadvice claim is not barred under the United State Supreme Court’s decision in *Chaidez v. United States*, 568 U.S. 342 (2013), which held that claims under *Padilla v. Kentucky*, 559 U.S. 356 (2009), are not retroactive for purposes of habeas. *Chaidez*, according to Appellee, left open the possibility that claims of ineffective assistance of counsel based on affirmative misadvice (versus no advice) about deportation consequences would not be *Teague*-barred. Finding Appellee’s allegations to be true, the habeas court granted relief. The Thirteenth Court of Appeals affirmed. It concluded that Appellee’s affirmative misadvice claim is not controlled by *Ex parte De Los Reyes*,⁴ which followed *Chaidez* and held that *Padilla* is not retroactive. *Ex parte Garcia*, 2016 Tex. App. LEXIS 1117, at *1, 42. The court of appeals also overruled the State’s request that the case be remanded for a ruling on laches. *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *40-42. It held that the habeas judge ruled on the State’s laches defense. *Id.* More specifically, the court explained, the habeas judge rejected the laches argument because, on remand, the State failed to re-plead laches when Appellee amended his writ application and did not raise it or object when it was

⁴ 392 S.W.3d 675 (Tex. Crim. App. 2013).

not litigated at the evidentiary hearing. *Id.*

2. On ineffective assistance of counsel claims, is there a deportation consequences “no advice” versus “misadvice” retroactivity dichotomy for purposes of habeas cognizability?

A. Law

In *Padilla v. Kentucky*, the Supreme Court held that for trial counsel to be competent, counsel must advise a client whether the client will be subject to deportation. 559 U.S. at 360. Padilla’s counsel “provided him false assurance that his conviction would not result in the removal from this country.” *Id.* at 368. The U.S. Solicitor General argued that Padilla was only entitled to relief under ineffective assistance of counsel “to the extent that he has alleged affirmative misadvice.” *Id.* at 369. The Court determined, however, that drawing such a distinction would lead to two absurd results: first, it would encourage counsel to stay silent on a matter fundamental to weighing the advantages and disadvantages to pleading guilty; second, it would deny a class of persons “rudimentary advice on deportation even when it is readily available.” *Id.* at 370-71.

Approximately three years later, in *Chiadez v. United States*, the Supreme Court addressed whether *Padilla* is retroactive under *Teague* for purposes of habeas corpus cognizability. 568 U.S. at 346. Chiadez’s attorney never informed her that she would be subject to deportation, so “at the time of her plea[,] she remained ignorant of it.”

Id. at 345. The Court held that *Padilla* announced a new rule of law and therefore it cannot be retroactively applied to final convictions. “It was *Padilla* that . . . made the *Strickland* test operative . . . when a lawyer gives (or fails to give) advice about immigration consequences.” *Id.* at 353.

This Court adopted *Chaidez*’s holding for purposes of Texas’ habeas jurisprudence in *Ex parte De Los Reyes*, 392 S.W.3d at 679. As a result, the Court denied relief on De Los Reyes’ claim that his attorney rendered ineffective assistance for failing to advise him that he would “almost certainly” be deported. *Id.* at 676, 679.

B. The “no advice”/”misadvice” on deportation issue in the context of retroactivity must be settled in Texas.

No advice. Misadvice. Should both claims be treated the same for purposes of habeas cognizability? This Court has indicated that they should. *See Ex parte Knelsen*, PD-1566-15, 2017 Tex. Crim. App. Unpub. LEXIS 432, at *9-10 (Tex. Crim. App. June 7, 2017) (not designated for publication) (applicant’s claim that counsel misrepresented that “an immigration benefit might result” is *Teague*-barred). Judge Alcala has registered her disagreement with this approach, however. *See Ex parte Salazar*, 508 S.W.3d 291, 293-294 (Tex. Crim. App. 2016) (Alcala, J., dissenting) (“Because he has shown that he was misadvised about an issue that was

crucial to his decision to plead guilty, which had been a basis for granting relief under this Court’s precedent long before *Padilla* was decided, applicant may be entitled to relief.”). And some federal courts, discussed below, have determined that misadvice claims do not fall under *Chaidez*’s non-retroactivity rule.

In this case, the Thirteenth Court Appeals joined those courts that apply *Chaidez* only to no deportation advice claims. Recognizing that misadvice claims have always been cognizable, the Thirteenth Court Appeals ruled that Appellee’s claim, based on counsel’s assurances about the unlikelihood of deportation, is not barred. In making its determination, the court was persuaded by the First Circuit United States Court of Appeals’ decision in *United States v. Castro-Tavera*, 841 F.3d 34 (1st Cir. 2016). In that case, the First Circuit in reconciling *Teague*, *Padilla*, and *Chaidez*, concluded that “*Padilla* and *Chaidez* left undecided the question of whether *Padilla*’s new rule excludes (or includes) misrepresentation claims.” *Castro-Tavera*, 841 F.3d at 46. The First Circuit ultimately held that *Padilla* did not embrace misadvice claims.

‘The legal landscape in the lower courts as of 2003 indicates that the underlying principle for *Padilla*’s misadvice holding—that an attorney’s misrepresentation, even on a collateral matter, may constitute ineffective assistance—was so embedded in the fabric of the Sixth Amendment framework that all reasonable jurists would have agreed that *Strickland* applied to misadvice claims on deportation consequences.’

Castro-Tavera, 841 F.3d at 51.

The Thirteenth Court also observed that the Ninth and Second Circuits have reached the same conclusion. *Id.* at 26 (citing *United States v. Chan*, 792 F.3d 1151 (9th Cir. 2015); *Kovacs v. United States*, 744 F.3d 44 (2nd Cir. 2014)). Therefore, it rejected the State’s reliance on the Seventh Circuit’s decision in *Chavarria v. United States*⁵ and intermediate Texas appellate court decisions,⁶ all of which treated “no advice” and “misadvice” claims as *Teague*-barred. *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *26-27.

There is a clear split among federal and state courts and Judges on this Court about retroactivity and deportation “misadvice” claims. The technical distinction being that “misadvice” claims are not true *Padilla* claims and thus retroactivity is a nonstarter. This Court has already expressed an interest in the matter. *Ex parte Aguilar* was filed and set to decide, “notwithstanding *Padilla*, whether a defendant’s guilty or no contest plea will be rendered involuntary if counsel affirmatively

⁵ 739 F.3d 360 (7th Cir. 2014).

⁶ *See Ex parte Valenzuela-Rodriguez*, No. 03-13-00249-CR, 2014 Tex. App. LEXIS 9397, *5-6 (Tex. App.—Austin Aug. 26, 2014) (not designated for publication); *Ex parte Vera*, No. 01-14-00146-CR, 2014 Tex. App. LEXIS 8187, at *5-6 (Tex. App.—Houston [1st Dist.] July 29, 2014) (not designated for publication); *Ex parte Chien*, No. 01-13-01042-CR, 2014 Tex. App. LEXIS 8051, at *4-7 (Tex. App.—Houston [1st Dist.] July 24, 2014) (not designated for publication).

misadvises a defendant about the immigration consequences of his plea.” *Ex parte Aguilar*, WR-82,014-01, 2016 Tex. Crim. App. Unpub. LEXIS 323, at *2 (Tex. Crim. App. Apr. 6, 2016). The State’s position in *Ex parte Aguilar* is that there is a justiciable IAC-based involuntary plea claim when counsel wrongly advised a defendant about immigration consequences (not just deportation consequences). *Ex parte Aguilar*, State’s Brief at 17-20. This Court should hold this case for *Ex parte Aguilar* or grant review if it concludes that the issue here is outside the scope of *Ex parte Aguilar*’s resolution.

3. Laches is still a live issue.

Alternatively, the court of appeals erred by denying the State’s request to remand for a ruling on laches. *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *34-42. And along the way, it erred to find that the habeas judge already ruled on the issue because the habeas court would not have abused its discretion in concluding that the State “waived” the issue because of the procedural posture of the case. *Id.*

As an initial matter, the court of appeals’ designation of “waiver” under these facts is more properly characterized as “forfeiture.” *Cf. Burt v. State*, 396 S.W.3d 574, 575 n.1 (Tex. Crim. App. 2013) (defining “forfeiture” as “an enforced and involuntary loss of a right” in comparison to “waiver,” which is “[t]he intentional relinquishment of a known right, claim, or privilege.”). Next, the events that make

up the procedural transactions do not, as a matter of common sense, support the lower court's basis for the habeas court's hypothetical rejection of laches. There is no valid argument to support forfeiture. And, as a consequence, there was no resolution of the issue.

The court of appeals first remanded the case because the habeas judge failed to comply with Article 11.072, which requires either a finding that the filing is frivolous or the entry of findings of fact and conclusions of law with an order granting or denying relief. TEX. CODE CRIM. PROC. art. 11.072 §§ 6(a), 7(a). In doing so, it stated that, "Nothing in this opinion today precludes the State from re-urging any of its arguments made in response to Garcia's habeas application." *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *9 n.2. This, in the court of appeals' view, supports the habeas court's supposed rejection of laches. But the court of appeals' interlocutory grant of permission is irrelevant. The State is not required to file an answer or plead laches. TEX. CODE CRIM. PROC. art. 11.072 § 5(b); *Ex parte Smith*, 444 S.W.3d at 669-70 (laches is not forfeited by the State's failure to plead it). So, having been raised, in the absence of any affirmative retraction (*i.e.*, waiver),⁷ the

⁷ As noted in the introduction, the State's ability to affirmatively waive laches would not prevent a habeas court from making it an issue on its own. *Ex parte Smith*, 444 S.W.3d at 668 ("Whether a habeas court properly raises laches calls for an elusive answer in the abstract. With its consideration of the totality of circumstances, the nature of equity itself defies definitive parameters.").

issue was not removed from the litigation, regardless of Appellee having filed an amended application narrowing his ineffective assistance theory. In fact, the court of appeals recognized laches' continued relevance when, in the next sentence, it asserted the habeas judge was likely mindful at the hearing on remand that the State had raised it in its response. *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *9 . If the habeas judge was on notice, then why should the State have filed another response reasserting it or have reurged it at the hearing? Declaring it both a non-issue and an issue at play based on the same pleading filed by the State makes no sense.

Faulting the State for not urging laches at the hearing also does not prove forfeiture. *See Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *38. In habeas cases, it is typical for habeas courts to restrict their focus by considering one issue or a set of interrelated issues. *See, e.g., Ex parte Gutierrez*, Nos. 83,981-01/02, 2016 Tex. Crim. App. Unpub. LEXIS 63, at *1-2 (Tex. Crim. App. Jan. 27, 2016) (not designated for publication). Other justiciable issues often remain and will only become relevant as the case progresses and the disposition of other claims becomes certain. *See Ex parte Reyes*, 474 S.W.3d 677, 681 (Tex. Crim. App. 2015) (“when an Article 11.072 habeas applicant advances multiple issues that would entitle him to relief, the trial court may limit its grant of relief to only one of the issues, as long

as the court does not neglect an issue that would result in greater relief than the one addressed.”). Here, the trial court closed the hearing without issuing a ruling, telling the parties he would rule the next day. 1 RR 78. Until the judge ruled, there was not an absolute need for the State to press laches, even though it may have been more sensible to have done so because it, like estoppel, bars consideration of the merits. The habeas court may have denied relief on the merits or because the claim was not otherwise cognizable (*e.g.*, *Teague*-barred). Had that happened, it would have been considered an example of judicial conservation to refrain from considering non-essential issues. *See Ex parte Reyes*, 474 S.W.3d at 681 (allowing habeas courts to limit their resolution of claims “serves the principle of judicial economy by allowing a court to grant relief on a claim when entitlement to relief is obvious without having to spend time and resources resolving more difficult claims that, even if decided in the habeas applicant’s favor, would afford him no greater relief.”). But that was not the outcome here. Further, there was always the possibility that the court of appeals would reverse the grant of relief. This would also have obviated the State’s need to resurrect laches. So remanding to the habeas court for a third time to rule on laches does not incentivize gamesmanship, as the court of appeals decries. *Ex parte Garcia*, 2017 Tex. App. LEXIS 6488, at *43.

The court of appeals correctly notes that the State could have filed objections

See Ex parte Garcia, 2017 Tex. App. LEXIS 6488, at *39. But that is not a requirement to “preserve” all defenses or merits responses that may also be applicable on habeas. *Compare with Ex parte Smith*, 444 S.W.3d at 663-64 (finding laches applicable even though the procedural history shows the State did not plead laches or object to the habeas court’s recommendation to grant relief). For the same reasons just stated, finding forfeiture under these circumstances does not make sense.

Finally, it should be noted that Texas Rule of Appellate Procedure 33.1, which dictates preservation requirements for appellate review, does not apply to habeas corpus proceedings. TEX. R. APP. P. 33.1. Therefore, Rule 33.1’s related precedent that requires the losing party to have advanced all arguments in the trial court and obtained a ruling before the issue can be deemed preserved for appellate review is not an impediment to this laches issue.

Because the court of appeals illegitimate reasons to support the habeas court’s hypothetical rejection of laches based on forfeiture, its final determination that the habeas judge did issue a ruling is not sustainable. If it is determined that Appellee is entitled to relief under ground one, then the case should be remanded for laches to be addressed by the habeas court.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant review, reverse the decision of the court of appeals, and order the court of appeals to remand for the trial court to rule on laches if necessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,859 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on July 25, 2017 *via* email or certified electronic service provider to:

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APPENDIX

(Court of Appeals' Opinion)

Ex parte Garcia

Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg

July 13, 2017, Delivered; July 13, 2017, Filed

NUMBER 13-16-00427-CR

Reporter

2017 Tex. App. LEXIS 6488 *; 2017 WL 2979898

EX PARTE SAMUEL OSVALDO
GARCIA

Notice: PUBLISH.

Prior History: [*1] On appeal from the 357th District Court of Cameron County, Texas.

Ex parte Garcia, 2016 Tex. App. LEXIS 1117 (Tex. App. Corpus Christi, Feb. 4, 2016)

Core Terms

misadvice, laches, deportation, guilty plea, parte, immigration consequences, new rule, advice, applicant's, trial counsel, court of criminal appeals, habeas relief, misadvice, announces, courts, consequences, attorney's, trial court, retroactive, court of appeals, collateral, collateral consequence, laches defense, citations, pet, defense counsel, fail to advise, former counsel, non-retroactivity, immigration

Judges: Before Justices Rodriguez, Benavides, and Hinojosa. Opinion by Justice Hinojosa.

Opinion by: LETICIA HINOJOSA

Opinion

Opinion by Justice Hinojosa

The State of Texas appeals from an order granting Samuel Osvaldo Garcia a post-conviction writ of habeas corpus. *See [Tex. Code Crim. Proc. Ann. art. 44.01\(k\)](#)* (West, Westlaw through Ch. 49 2017 R.S.) (authorizing the State to appeal an order granting habeas relief under [article 11.072](#)), [art. 11.072](#) (West, Westlaw through Ch. 49 2017 R.S.). In two issues, the State complains (1) that the habeas court erred in granting relief on the ground that Garcia's counsel was not ineffective; and (2) alternatively, that the trial court erred in not addressing the issue of laches. We affirm.

I. BACKGROUND

Garcia was born in Guatemala in 1969. When Garcia was approximately ten years old, his family immigrated to the United States. In 1987, Garcia became a lawful permanent resident.

A. Drug Charge, Deportation, and Illegal Re-Entry

In 2002, Garcia was indicted on a charge of

possession, with intent to deliver, of four grams or more but less than 200 grams of cocaine, a first-degree felony. *See* Act of Jun. 15, 2001, 77 Leg., R.S., 2001 TEX. SESS. LAW SERV. Ch. 1188 (amended 2009) (current [*2] version [Tex. Health & Safety Code Ann. § 481.112](#) (West, Westlaw through Ch. Ch. 49 2017 R.S.)). On December 5, 2002, Garcia, represented by counsel, pleaded guilty to the charged offense. The trial court found Garcia guilty and pursuant to a plea agreement, imposed a sentence of ten years' imprisonment, suspended the sentence, placed Garcia on community supervision for a term of ten years, and assessed a \$500 fine.

In 2003, the United States government placed Garcia in removal proceedings pursuant to the 2002 guilty plea. An immigration judge ordered Garcia removed from the United States that same year, and Garcia was deported to Guatemala. Garcia remained in Guatemala for approximately two months before illegally entering the United States in 2004. He has remained in the United States ever since. In the meantime, the State moved to revoke Garcia's community supervision.

B. Subsequent Arrest and Conviction for Illegal Re-Entry

In 2013, a police officer initiated a traffic stop on the pickup truck Garcia was driving because some lights were allegedly malfunctioning. Garcia could not produce a driver's license, but he identified himself. The officer was alerted to an arrest warrant for Garcia, and he was taken into police custody. [*3] Thereafter, the state district

court granted the State's motion to dismiss the motion to revoke. Garcia was tried in federal court for illegal re-entry, and he was sentenced to fifteen months' confinement. Upon completing his federal sentence, Garcia was remanded to a state correctional facility. He remains in custody to this date.

C. Initial Habeas Proceeding

In May 2014, Garcia filed an application for post-conviction writ of habeas corpus, alleging that his trial counsel denied him effective assistance of counsel. Garcia asserted that he "was not, at any time prior to or during the [2002 proceeding] advised that he would lose his Lawful Permanent Resident Status, he would be deported and that he would be inadmissible for re-entry into the U.S. as a direct result of pleading guilty [to the 2002 possession charge]." Garcia further contended, in a supporting affidavit attached to his habeas application, that he recalled asking his trial counsel, prior to pleading guilty, whether his guilty plea would result in his deportation and that trial counsel told him that he "would probably be okay" and that the charge "would probably not result in deportation." The State filed a response that [*4] refuted Garcia's allegations and also invoked the doctrine of laches. The habeas court summarily denied Garcia's application. A panel of this Court reversed the habeas court's denial of Garcia's application for post-conviction writ of habeas corpus and remanded the case for further proceedings. *See* [Ex Parte Garcia, No. 13-14-00501-CR, 2016 Tex. App. LEXIS 1117, 2016 WL 454997 at *4 \(Tex. App.—Corpus Christi Feb. 4, 2016, no pet.\)](#) (mem. op., not

designated for publication).

D. Subsequent Habeas Proceeding

On remand, Garcia amended his application for habeas corpus. He argued that *Chaidez* left open the possibility of ineffective assistance claims based on affirmative misadvice of former counsel. Garcia attached to his amended application: (1) a "Judgment of Conviction; Sentence Suspended; Placement on Community Supervision" signed by the trial court on January 29, 2003; (2) an affidavit that Garcia signed on May 1, 2014; (3) a "Written Waiver and Consent to Stipulation of Testimony, Waiver of Jury, and Plea of Guilty" signed by Garcia on December 5, 2002; (4) an affidavit signed by Garcia's trial counsel on July 25, 2014; (5) a transcript of a December 5, 2002 hearing; and (6) this Court's opinion in the aforementioned appeal. The State did not respond in writing to Garcia's [*5] amended application.

In May 2016, the habeas court held an evidentiary hearing at which four witnesses testified: Garcia; Garcia's trial counsel; Garcia's sister-in-law, Gloria Espinoza; and Garcia's brother, Marvin Garcia.

1. Garcia

Garcia testified that he had a "very brief" conversation with his trial counsel regarding his plea and its potential consequences on his immigration status. Garcia reiterated the assertion in his affidavit that his trial counsel "said that I should be okay, be fine" regarding his immigration status.

As for the underlying offense, Garcia explained that he "was at the wrong place, at the wrong time." Garcia did mechanic work "on the side" at a shop near his home. Garcia met a man named "Cruz Rodriguez" through this mechanic work. One day, as Garcia was leaving the shop, Rodriguez put "something" in Garcia's pocket. Garcia assumed the "something" was a monetary tip because Rodriguez was known for such gestures. However, it was cocaine. Garcia was confronted by Drug Enforcement Agency ("DEA") agents immediately upon leaving the shop. A DEA agent found the cocaine on Garcia's person. Garcia denied ownership, but he did not implicate Rodriguez out of fear.

2. Garcia's [*6] Trial Counsel

In 2003, Garcia's trial counsel was an assistant public defender who was appointed to represent Garcia. Garcia's trial counsel testified that he could not recall how many times he met with Garcia in either a court or an out-of-court setting. Trial counsel could not remember ever meeting with Garcia's family. He also had no independent recollection of any discussion with Garcia about immigration consequences stemming from Garcia's guilty plea. Trial counsel denied advising Garcia that his plea of guilty "would probably not result in deportation." When asked whether he was surprised by Garcia's assertion that such advice was given, trial counsel responded, "Well, it doesn't surprise me. When someone is filing an appeal, they might say whatever they want to say; but, whether I said that or not, I never would have told him that."

3. Espinoza

Espinoza attended the 2002 hearing where Garcia pleaded guilty. She served as a translator for Garcia and Garcia's mother, who only spoke Spanish. Espinoza recalled that Garcia's trial counsel was "in a hurry" the day Garcia pleaded guilty. Espinoza specifically recalled Garcia asking trial counsel if he "was going to be okay with his deportation [*7] and his green card," and he answered, "Yes."

4. Marvin

Marvin testified that he had met Rodriguez a couple of times, and Rodriguez "seemed like he had money." Marvin believed that Garcia pleaded guilty because he was afraid of Rodriguez.

E. Findings, Conclusions, and Habeas Relief

In June 2016, the habeas court signed findings of fact and conclusions of law. It found, among other things,

4. Former Counsel regularly represented multiple defendants. Former Counsel did not have an independent recollection of Defendant's case. Former Counsel only remembered that it was his custom to recite the statutory admonishments to criminal defendants before a plea.

5. Applicant never met with Former Counsel outside of the Court. Applicant only met with Former Counsel in Court on two occasions, for a short period of time on each occasion.

6. On or about December 2002, Former Counsel advised Defendant that the State was offering probation for ten (10)

years. Applicant inquired regarding the immigration consequences of his plea and was advised as follows:

*"I asked my attorney if I would be deported if I pled guilty to the charge and got probation. He said that I would probably be okay. He said that the charge [*8] would probably not result in deportation."*

7. The Applicant's sister in law was present at the hearing and overheard Former Counsel advise Applicant that he would be "okay" and that "the charge would probably not result in deportation."

8. The Applicant relied on Former Counsel's affirmative misadvice [sic] and entered a plea of guilty to the charge Possession of a Controlled Substance with Intent to Deliver on January 29 2003, in cause number 02CR 1042-E.

• . . .

10. The admonishments from the Court and the plea documents were ineffective [because] the Applicant had been previously misadvised by Former Counsel that he would be "okay" and that the "charge would probably not result in deportation."

• . . .

13. If Applicant had not been affirmatively misadvised, he would not have pled guilty. The Applicant would have requested a jury trial. Thus, but for Former Counsel's affirmative misadvice [sic] that Applicant would be "okay" and that "the charge would probably not result in deportation," the Applicant would have pled not guilty.

The habeas court granted the relief sought by setting aside and vacating the conviction rendered on January 29, 2003 in *State of Texas v. Samuel Oswaldo Garcia*, Cause No. 02-CR-1042- E, [*9] in the 357th Judicial District Court, Cameron County, Texas. The State filed no objections to the findings and conclusions. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In the State's first issue, it argues that Garcia is not entitled to habeas relief because the alleged misadvice he received regarding the immigration consequences of a guilty plea may not be used to advance an ineffective assistance of counsel claim. The State contends that the facts surrounding Garcia's ineffective assistance of counsel claim are "strikingly similar" to those of the habeas applicant in [*Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S. Ct. 1473, 176 L. Ed. 2d 284 \(2010\)](#). *Padilla* held that the *Sixth Amendment* requires that an effective criminal defense counsel inform her client whether his plea carries a risk of deportation. *See id.* The U.S. Supreme Court subsequently held that the right recognized in *Padilla* may not be used by a party to collaterally attack a judgment of conviction that became final prior to the issuance of *Padilla*. [*Chaidez v. United States*, 568 U.S. 342, 133 S. Ct. 1103, 1113, 185 L. Ed. 2d 149 \(2013\)](#). This is sometimes referred to as "non-retroactivity."

Garcia argues that his claim is not prohibited by *Chaidez* because it only dealt with instances where counsel provided *no advice* concerning immigration

consequences. According to Garcia, [*10] a different rule controls situations such as his: where counsel affirmatively provided *misadvice* concerning the immigration consequences of a guilty plea. Garcia contends that ineffective assistance of counsel claims such as his are not barred by the non-retroactivity holding in *Chaidez* and that a court may grant habeas relief even if the applicant's conviction became final prior to *Padilla's* issuance.

The State responds that under *Chaidez* and multiple Texas cases, *Padilla* is not retroactive in any sense, regardless of whether misadvice or no advice was rendered concerning immigration consequences of a plea.

Before delving into the state court and federal circuit authority and how such authority affects the parties' arguments, a brief review of three seminal opinions—*Teague*, *Padilla*, and *Chaidez*—will help frame the first issue and the parties' arguments.

A. [*Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 \(1989\)](#), articulated the modern test for determining when a U.S. Supreme Court opinion announces a "new rule" of constitutional law that precludes collateral attacks on a final judgment of conviction.

The *Teague* Court sought to "clarify how the question of retroactivity should be resolved for cases on collateral review." [*Id. at 300*](#). In doing [*11] so, it articulated that,

In general, however, a case announces a

new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 302 (internal citations omitted) (emphasis in original). No party disputes the test articulated by *Teague*: where a case announces a new rule, that rule is not retroactively available to overturn a final conviction on collateral review. Rather, the parties dispute the extent to which the seminal case of *Padilla v. Kentucky* announces a new rule.

B. *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*, held that a criminal-defense attorney is ineffective if he fails to provide advice to a client on whether a plea carries a risk of deportation.

In *Padilla*, the habeas applicant was a Honduran native and lawful permanent resident of the United States who pleaded guilty to transporting a large amount of marijuana on the advice of counsel that he "did not have to worry about immigration status since he had been in the country so long." *Padilla v. Kentucky, 559 U.S. 356, 359, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*. The Supreme Court granted certiorari "to decide whether, as a matter of federal [*12] law, [the habeas applicant's] counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." *Padilla, 559 U.S. at 359*. In its

concluding section, the majority wrote,

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding *Sixth Amendment* precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less. Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that [the applicant] has sufficiently alleged that his counsel was constitutionally deficient.

Id. at 374.

In explaining its holding, the Supreme Court addressed a rule developed by lower courts and the federal government's request for a narrower rule. The Court observed that lower courts had held that collateral consequences are outside the scope of representation required by the *Sixth Amendment*, and, therefore, the [*13] *failure* of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. *Id. at 365* (internal citations and quotation marks omitted) (emphasis added). The Court, however, disclaimed recognizing such a distinction. *Id.* ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional

assistance' required under *Strickland*."). The Court concluded that "advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel." *Id. at 366*. In other words, "*Strickland* applie[d] to [the applicant's] claim." *Id.*

The Court also addressed the federal government's request for a rule that *Strickland* apply to the applicant's claim only to the extent that he alleged affirmative misadvice. *Id. at 369*. The Court wrote that "there is no relevant difference between an act of commission and an act of omission in this context." *Id. at 370* (internal citations and quotation marks omitted). It concluded that a "holding *limited* to affirmative misadvice would invite two absurd results." *Id.* (emphasis added). The way the Court dismissed the federal government's [*14] request is telling. The majority viewed the requested rule barring misadvice on immigration consequences under *Strickland* to be "limited" as compared to the rule that the Court ultimately crafted.

A concurring opinion, authored by Justice Alito and joined by Chief Justice Roberts, highlights the distinction between a narrow rule, embracing only affirmative misadvice, and a broad rule, generally requiring more than no advice. *Id. at 375-388*. Justice Alito begins his opinion by writing, "I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland*, if the attorney misleads a noncitizen client regarding the removal consequences of a conviction." *Id. at 375* (internal citation omitted). In advocating for a rule on only

affirmative misadvice, Justice Alito argued,

As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not within the range of competence demanded of attorneys in criminal cases. By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. [*15] Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases.

Id. at 385 (internal citations and quotation marks omitted). Justice Alito further elaborated about how the lower courts had coalesced around a rule regarding affirmative misadvice,

[T]he conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, [t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice. At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least

in some circumstances. And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the *Sixth Amendment* even if those consequences might be deemed collateral. By contrast, it appears that no court of [*16] appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short, the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that Kentucky Supreme Court's position goes too far.

Id. at 386-87 (internal citations and quotation marks omitted) (emphasis in original).

C. *Chaidez v. U.S.*, 568 U.S. 342, 133 S.Ct. 1103, 185 L. Ed. 2d 149 (2013), prohibited applicants from collaterally attacking a final judgment of conviction premised on the "new rule" articulated by *Padilla*.

Padilla left open the question of whether it applies retroactively to those seeking to attack a final judgment of conviction in a collateral proceeding. That question was answered in the negative by the *Chaidez* Court.

In *Chaidez*, the *coram nobis*¹ applicant was

¹ A petition for a writ of *coram nobis* provides a way to collaterally attack a criminal conviction for a person who is no longer "in custody" and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241. *Chaidez* and the Government agreed that nothing in the case turned on the difference between a *coram nobis* petition and a *habeas* petition, and the Court assumed without deciding that the

a Mexican citizen and lawful permanent resident of the United States. *133 S.Ct. at 1105*. The applicant pleaded guilty to mail fraud, was sentenced to four years' probation, and ordered to pay restitution. *Id. at 1106*. Her conviction became final in 2004. *Id.* In 2009, immigration officials initiated removal proceedings against the applicant, and she sought to overturn the conviction. *Id.* The applicant [*17] argued that her former attorney's failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel under the *Sixth Amendment*. *Id.* As the applicant's post-conviction proceeding was advancing through the lower federal courts, *Padilla* was decided. *Id.* The federal government argued that the appellant could not benefit from *Padilla* because it announced a "new rule" and, under *Teague*, such rules do not apply in collateral challenges to already-final convictions. *Id.*

The Court's dissenting justices and the applicant asserted that *Padilla* did not announce a new rule and that it was instead a run-of-the-mill application of *Strickland*. *Id. at 1111*. As support for her proposition, the applicant pointed to three federal appeals courts allowing ineffective assistance of counsel claims when attorneys affirmatively misled their clients about the deportation consequences of guilty pleas. *Id.* The Court's majority disagreed. *Id.*

In rejecting the applicant's argument that *Padilla* did not announce a new rule, the Court addressed the distinction that had

parties were correct. *Chaidez v. U.S.*, 568 U.S. 342, 133 S.Ct. 1103, 1106 n.1, 185 L. Ed. 2d 149 (2013).

evolved in the lower courts between direct and collateral consequences. *Id.* The Court noted that its first order [*18] of business in *Padilla* was "to consider whether the widely accepted distinction between direct and collateral consequences categorically foreclosed Padilla's claim, *whatever the level of his attorney's performance.*" *Id.* (emphasis added). The Court emphasized that it "did not eschew the direct-collateral divide across the board." *Id.* (internal citations omitted). In addressing the three federal cases, the Court wrote,

True enough, three federal circuits (and a handful of state courts) held before *Padilla* that misstatements about deportation could support an ineffective assistance claim. But those decisions reasoned only that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter, however related to a criminal prosecution. They co-existed happily with precedent, from the same jurisdictions (and almost all others), holding that deportation is not "so unique as to warrant an exception to the general rule that a defendant need not be advised of the [collateral] consequences of a guilty plea." So at most, [the applicant] has shown that a minority of courts recognized a separate rule for material misrepresentations, regardless [*19] whether they concerned deportation or another collateral matter. That limited rule does not apply to [the applicant's] case. And because it lived in harmony with the exclusion of claims like hers from the *Sixth Amendment*, it

does not establish what she needs to—that all reasonable judges, prior to *Padilla*, thought they were living in a *Padilla*-like world.

Id. at 1112 (internal citations omitted).

D. The authority referenced by the State does not adequately address the intricacies of *Padilla* and *Chaidez*.

In support of its first issue, the State refers us to one federal circuit court opinion, [Chavarria v. United States, 739 F.3d 360 \(7th Circ. 2014\)](#), and two unpublished state-court memorandum opinions. See [Ex parte Chien, No. 01-13-01042-CR, 2014 Tex. App. LEXIS 8051, 2014 WL 3697918 \(Tex. App.—Houston \[1st Dist.\] Jul. 24, 2014, no pet.\)](#) (mem. op., not designated for publication), [Ex parte Valenzuela-Rodriguez, No. 03-13-00249-CR, 2014 Tex. App. LEXIS 9397, 2014 WL 4363140 \(Tex. App.—Austin Aug. 26, 2014, no pet.\)](#) (mem. op., not designated for publication).²

In *Chavarria*, a defendant pleaded guilty to four counts of distributing cocaine in 2009, a year before *Padilla* was decided. [739 F.3d at 361](#). The applicant, proceeding *pro se*, collaterally attacked his final judgment of conviction on the ground that his criminal defense counsel misadvised him regarding his deportation inquiries. *Id.* According to the applicant, his "attorney had checked with the Bureau of Immigration and

²Our research has found a third state-court opinion with a holding and rationale similar to *Wei His Chien* and *Valenzuela-Rodriguez*. See [Ex parte Vera, No. 01-14-00146-CR, 2014 Tex. App. LEXIS 8187, 2014 WL 3738089 \(Tex. App.—Houston \[1 Dist.\] Jul. 29, 2014, no pet.\)](#) (mem. op., not designated for publication).

Customs Enforcement . . . and they said [*20] they were not interested" in deporting the applicant. *Id.* The federal district court ultimately held that the retroactivity of the applicant's claims was controlled by the retroactivity of *Padilla*. *Id. at 361*. The U.S. Court of Appeals for the Seventh Circuit affirmed. *Id. at 364*. Its rationale focused on the fact that prior to *Padilla*, deportation had been regarded by some courts as a "collateral" consequence of a guilty plea, and for which the failure to advise of such consequences could not serve as a basis for a claim of ineffective assistance,

A lawyer's advice about matters not involving the "direct" consequences of a criminal conviction—collateral matters—is, in fact, irrelevant under the *Sixth Amendment*; such advice is categorically excluded from analysis as professionally incompetent, as measured by *Strickland*. . . . Thus, regardless of how egregious the failure of counsel was if it dealt with immigration consequences, pre-*Padilla*, both the *Sixth Amendment* and the *Strickland* test were irrelevant.

The *Chaidez* majority jointly referred to both misadvice and non-advice throughout its opinion. There is no question that the majority understood that *Padilla* announced a new rule for all advice, or lack thereof, with respect to the consequences [*21] of a criminal conviction for immigration status.

Id. at 362-63 (internal citations omitted). In holding that the applicant's misadvice

theory could not be recognized as a pre-*Padilla* rule, the *Chavarria* Court observed that,

At the time [the applicant's] case became final, precedent did not dictate that preclusion of an ineffective assistance claim was unreasonable when it arose from an attorney's material misrepresentation of a deportation risk. Thus, even if this Court were to find the misadvice/nonadvice distinction relevant to this analysis, it does not have the clear precedential weight to be considered a pre-*Padilla* rule.

Id. at 364.

We respectfully conclude that the authority from intermediate appellate courts referenced by the State fails to appreciate the subtleties at work in *Padilla* and *Chaidez*. In *Wei His Chien*, the court affirmed a denial of habeas relief under *Strickland's* second prong. [2014 Tex. App. LEXIS 8051, 2014 WL 3697918 at *2](#) ("Even if Chien could make a case under pre-*Padilla* law that his counsel's performance was constitutionally deficient, we conclude, based upon our review of the trial court's findings and the record, that Chien failed to prove the second prong of his ineffective assistance claim."). In *Valenzuela-Rodriguez* and [*22] *Vera*, the state appellate courts affirmed the denial of habeas relief on a belief that *Padilla* articulated a "new rule" for both no advice and misadvice, and therefore the trial courts did not abuse their discretion in holding that the applicants could not benefit from retroactive application of *Padilla*. *See*

[Valenzuela-Rodriguez, 2014 Tex. App. LEXIS 9397, 2014 WL 4363140 at *3](#) ("[E]ven if we were to conclude that appellant's trial counsel incorrectly advised appellant as to immigration consequences of the plea agreement, we reject appellant's contention that such advice—as opposed to a counsel's failure to inform a defendant of immigration consequences—dictates a different result under pre-*Padilla* law."); see also [Ex parte Vera, No. 01-14-00146-CR, 2014 Tex. App. LEXIS 8187, 2014 WL 3738089 \(Tex. App.—Houston \[1st Dist.\] Jul. 29, 2014, no pet.\)](#) (mem. op., not designated for publication) (concluding that the non-retroactivity of *Padilla*, as recognized by *Chaidez*, applied to the misadvice context).

The intermediate appellate courts rely on two opinions from the Texas Court of Criminal Appeals. However, neither opinion from the court of criminal appeals directly addresses the viability of misadvice as to immigration consequences. In *Ex Parte De Los Reyes*, the habeas applicant asserted that his defense counsel failed to advise him of the immigration consequence of pleading guilty to a misdemeanor [*23] theft charge. [392 S.W.3d 675, 676 \(Tex. Crim. App. 2013\)](#). The court of criminal appeals declined to exercise its discretion and permit *Padilla* to have retroactive effect under state habeas law. [Id. at 679](#). The opinion in *Ex Parte Oranday-Garcia*, deals with a subsequent application for habeas relief that the convicting court recommended denying. [410 S.W.3d 865, 866 \(Tex. Crim. App. 2013\)](#). Admittedly, the applicant alleged that his defense counsel

was deficient "by advising him that [the] conviction for [the] offense would not result in deportation." *Id.* The court of criminal appeals, without any analysis, summarily equated the applicant's misadvice claim with the non-retroactivity accorded to a no-advice claim. [Id. at 869](#).

We conclude that *Oranday-Garcia* does not control our disposition because it, like *De Los Reyes*, did not squarely address the no-advice and misadvice distinction. In other words, the court of criminal appeals has not definitively answered whether affirmative misadvice is barred by the non-retroactivity accorded to a no advice claim.³ Given the situation, we turn to on-point federal authority for guidance.

E. A majority of federal circuits have held that an applicant may collaterally attack a final conviction on the ground [*24] that his trial counsel was ineffective for misadvising him regarding immigration consequences.

The most recent circuit court opinion that closely reads *Padilla* and *Chaidez* is [United States v. Castro-Taveras, 841 F.3d 34 \(1st Cir. 2016\)](#). In it, the applicant appealed the

³On October 5, 2016, the Texas Court of Criminal Appeals heard oral argument in [Ex parte Aguilar, No. WR-82,014-01, 2016 Tex. Crim. App. Unpub. LEXIS 323 \(filed and set April 6, 2016\)](#); submitted Oct. 5, 2016). The court ordered the application in *Aguilar* filed. The court set *Aguilar* for submission to determine, among other things, "whether the rationale of *Padilla* should be extended to the facts of [Aguilar's] case" and "notwithstanding *Padilla*, whether a defendant's guilty or no contest plea will be rendered involuntary if counsel affirmatively misadvises a defendant about the immigration consequences of his plea." Our finding that Texas law is unsettled regarding whether affirmative misadvice on immigration consequences may serve as a basis for an ineffective assistance of counsel claim is further supported by the court of criminal appeals' submission of *Aguilar*.

denial of *coram nobis* relief, which he sought on the basis that his criminal defense counsel was ineffective for misadvising him on the immigration consequences of pleading guilty to insurance and mail fraud. *Id.* at 36. The federal appellate court recognized that in *Padilla*, the Supreme Court held that an attorney's incorrect advice or failure to advise on the deportation consequences of a criminal conviction provides a basis for an ineffective assistance of counsel claim. *Id.* at 38. It also recognized that *Chaidez* decided that *Padilla* announced a new rule at least as to failure-to-advise claims concerning immigration matters. *Id.*

The *Castro-Taveras* Court reconciled *Teague*, *Padilla*, and *Chaidez* in light of a subtle and confounding distinction in *Padilla*: The applicant in *Padilla* alleged misadvice, according to the Supreme Court's opinion,⁴ but the rule announced by the majority was to "failure-to-advise" situations. *Castro-Taveras*, 841 F.3d at 38. In analyzing *Padilla* and *Chaidez*, the *Castro-Taveras* Court observed,

We do not go so far as to say, however, [*25] that *Padilla* and *Chaidez* have to be read as affirmatively excluding misrepresentation claims from the scope of the new rule. . . . Moreover, as we previously noted, *Chaidez* contains language suggesting that both

misadvice and non-advice claims are part of the new rule[.]

. . . .

Certain language in *Chaidez*, however, as well as the absence of any acknowledgment in *Padilla* that misadvice claims had been subject to *Strickland* theretofore in the lower courts, precludes us from construing the two decisions as affirmatively excluding misadvice claims from the scope of the new rule.

Castro-Taveras, 841 F.3d at 45-46 (internal citations omitted). In conducting the *Teague* analysis, the court wrote:

[T]he legal landscape in the lower courts as of 2003 indicates that the underlying principle for *Padilla's* misadvice holding—that an attorney's misrepresentation, even on a collateral matter, may constitute ineffective assistance—was so embedded in the fabric of the *Sixth Amendment* framework that all reasonable jurists would have agreed that *Strickland* applied to misadvice claims on deportation consequences.

Castro-Taveras, 841 F.3d at 51 (internal citations omitted). The court also noted that a reasonable expectation that defense counsel not misadvise a client regarding immigration [*26] consequence may implicate *Fifth Amendment* concerns about the voluntariness of a defendant's guilty plea. See *id.* at 51 n.14.

The *Castro-Taveras* Court ultimately held that *Padilla's* misadvice holding did not

⁴"In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'" *Padilla v. Kentucky*, 559 U.S. 356, 359, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

constitute a new rule and did not bar applicant's claim for post-conviction relief. *Id.* at 51. It vacated the district court's summary denial of relief and remanded for an evidentiary hearing. *Id.* at 54. Two other federal circuits have reached the same conclusion. See *U.S. v. Chan*, 792 F.3d 1151 (9th Cir. 2015); *Kovacs v. U.S.*, 744 F.3d 44 (2nd Cir. 2014).

F. A habeas applicant's claim of ineffective assistance of counsel premised on affirmative misadvice regarding immigration consequences is not barred by the holding in *Chaidez* that *Padilla* articulated a "new rule" and that new rule is non-retroactive.

The holding in *Chavarria*, 739 F.3d at 364, cannot be reconciled with the holdings in *Castro-Taveras*, 841 F.3d at 51, *Chan*, 792 F.3d at 1158, and *Kovacs*, 744 F.3d at 54. With all due respect to the *Chavarria* Court, its belief that no advice and misadvice are two sides of the same coin fails to appreciate the intricacies in *Padilla*. *Padilla*'s requirement that an effective counsel advise her client as to immigration consequences of a guilty plea is a broad, new rule that encompassed an already existing rule that a defense attorney renders ineffective assistance if she affirmatively misadvises a client as to immigration [*27] consequences.

Justice Alito's concurrence in *Padilla* supports a reading that misadvice was an older and narrower rule than no advice. First, he recognized that "reasonably competent attorneys should know that it is not appropriate or responsible to hold

themselves out as authorities on a difficult and complicated subject matter with which they are not familiar." *Padilla*, 559 U.S. at 385 (J. Alito, concurring). Second, Justice Alito observed that at least three federal circuit courts, including the Fifth Circuit,⁵ had held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances. *Id.* at 386; cf. *Rosa v. State*, No. 05-04-00558-CR, 2005 Tex. App. LEXIS 6924, 2005 WL 2038175, at *3-4 (Tex. App.—Dallas Aug. 25, 2005, pet. *ref'd*) (concluding that a plea counsel was ineffective for misadvising a client that a plea of guilty on a charge of "family violence" was not a "deportable" offense when it was in fact and reversing the denial of a motion for new trial as to that offense). Third, he noted that "no [federal] court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance." *Id.* (emphasis in original).

Our reading of *Padilla* and *Chaidez* [*28] is further supported by the Supreme Court's recent decision in *Lee v. United States*, 198 L. Ed. 2d 476, 2017 WL 2694701 (2017). In *Lee*, a habeas applicant attacked a criminal conviction that became final in the federal courts before *Padilla* was decided. *Lee v. United States*, No. 2:09-CR-20011-BBD, 2014 U.S. Dist. LEXIS 36432, 2014 WL 1260388, at *4-5 (W.D. Tenn. Mar. 20, 2014), *aff'd*, 825 F.3d 311 (6th Cir. 2016),

⁵ *Padilla v. Kentucky*, 559 U.S. 356, 386 n.3, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (J. Alito, concurring) (citing *Santos-Sanchez v. United States*, 548 F.3d 327, 333-34 (5th Cir. 2008)).

rev'd and remanded, [198 L. Ed. 2d 476, 2017 WL 2694701 \(2017\)](#). A federal magistrate court found that the applicant received ineffective assistance of counsel on the ground that his trial counsel affirmatively misadvised him regarding the immigration consequence of a guilty plea and that such misadvice was determinative. [United States v. Lee, Civ. No. 10-02698-JTF-dkv, Crim. No. 09-20011, 2013 U.S. Dist. LEXIS 186239, 2013 WL 8116841, at *2 \(W.D. Tenn. Aug. 6, 2013\), adopted in part and rejected in part by 2014 U.S. Dist. LEXIS 36432, 2014 WL 1260388, at *3 \(W.D. Tenn. Mar. 20, 2014\)](#). The magistrate court read *Padilla* and *Chaidez* in almost the same way that we do.⁶ The federal district court adopted the magistrate court's recommendation regarding the no advice and misadvice distinction. [Lee, 2014 U.S. Dist. LEXIS 36432, 2014 WL 1260388, at *9](#). That holding was not appealed, and the

federal appellate court affirmed the district court's denial of relief. [825 F.3d 311, 316](#).

In reversing the federal appellate court, the Supreme Court does not mention *Chaidez* and the non-retroactivity of the rule in *Padilla*. [198 L. Ed. 2d 476, 2017 WL 2694701 \(2017\)](#). Instead, it references *Strickland* throughout the opinion, and writes in one of the concluding paragraphs that, "Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence." [198 L. Ed. 2d 476, \[WL\] at *10](#). The Court concludes that "Lee has demonstrated a reasonable probability [*30] that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (internal quotations and citation omitted). Had the Supreme Court viewed Lee's misadvice claim as being barred by the non-retroactivity of *Padilla's* rule, it could have denied the writ.

⁶Specifically, the magistrate court wrote,

The "new rule" identified by the Court in *Chaidez* as having been announced in *Padilla* is one that speaks to the attorney's obligation to act (specifically, to advise). However, if, as Lee suggests, there was a rule in place at the time of his conviction that spoke not to the obligation [*29] to act, but rather to the obligation to, once choosing to act, do so competently by rendering accurate advice then, according to the Court's opinion in *Chaidez*, that rule is "separate" from and undisturbed by the *Padilla* rule. Such a "separate rule" lives in harmony with a pre-*Padilla* and post-*Padilla* world. Now, instead of limiting ineffective-assistance claims in this context to cases of affirmative misadvice, courts post-*Padilla* recognize such claims based on failure to advise as well. Thus, to the extent Lee's claim relies on a "separate rule" for affirmative misadvice in place at the time of his conviction, the fact that *Padilla* is not retroactive is inconsequential to Lee's case.

[United States v. Lee, Civ. No. 10-02698-JTF-dkv, Crim. No. 09-20011, 2013 U.S. Dist. LEXIS 186239, 2013 WL 8116841, at *8 \(W.D. Tenn. Aug. 6, 2013\), adopted in part and rejected in part by 2014 U.S. Dist. LEXIS 36432, 2014 WL 1260388, at *3 \(W.D. Tenn. Mar. 20, 2014\)](#).

After a careful reading, *Padilla* was a case about misadvice that produced a new rule regarding failure to advise. In other words, *Padilla's* rule regarding failure to advise is a broad "new rule" that encompassed a well-recognized standard—an effective counsel may not affirmatively misadvise a client concerning immigration consequences. A reading of *Chaidez's* holding that the "new rule" articulated by *Padilla* encompasses its misadvice factual roots is simply too simplistic. Given this perspective, a *Teague* retroactivity analysis is unnecessary because the misadvice rule was not "new."⁷

⁷We are aware that in [Ex Parte Martinez, No. 13-10-00391-CR](#),

G. The trial court did not abuse its discretion in granting habeas relief.

The burden is on the habeas corpus applicant to prove his claims by a preponderance of the evidence. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002). The habeas court is the sole finder of [*31] fact in an *Article 11.072* habeas case. *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011).

When reviewing a habeas court's decision to grant or deny habeas relief in an *Article 11.072* habeas case, we apply the highly deferential *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997), standard of review. *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013); *Ex parte Garcia*, 353 S.W.3d at 788. Under this standard, we afford almost total deference to the habeas court's findings of historical fact that are supported by the record. *Ex parte*

*2013 Tex. App. LEXIS 7276, 2013 WL 2949546, at *3* (Tex. App.—Corpus Christi Jun. 13, 2013, no pet.) (mem. op. on remand, not designated for publication) we held "applying pre-*Padilla* law as we must, we conclude that counsel's advice to [the habeas applicant] that he *could* be deported if he pleaded guilty, when the actual consequence was automatic deportation, does not constitute ineffective assistance of counsel." (emphasis in original). The argument raised and addressed in *Martinez* is different than the one in this case. The applicant in *Martinez* did not argue that there was a difference between affirmative misadvice and no advice. To the contrary, the applicant argued that "the trial court erred in denying his writ of habeas corpus because *Padilla v. Kentucky* should apply retroactively . . ." *2013 Tex. App. LEXIS 7276, [WL] at *2*. In other words, the applicant tied his success on appeal to *Padilla*. In fairness to the applicant, he did not have the benefit of *Chaidez*. The applicant's brief before this Court was filed on January 29, 2013, and *Chaidez* was decided on February 20, 2013. We issued our opinion on remand in *Martinez* on June 13, 2013, before *Padilla* and *Chaidez* were framed by the federal courts in *U.S. v. Castro-Taveras*, 841 F.3d 34 (1st Cir. 2016), *U.S. v. Chan*, 792 F.3d 1151 (9th Cir. 2015), and *Kovaacs v. U.S.*, 744 F.3d 44 (2nd Cir. 2014).

Amezquita, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006). Likewise, we will defer to the habeas court's rulings on "application of law to fact questions" if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds by* *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). On the other hand, if the resolution of the ultimate question turns on an application of legal standards absent any credibility issue, we review the determination de novo. *Ex parte Peterson*, 117 S.W.3d at 819.

The State's preserved arguments do not assail the findings of fact,⁸ which evidence the habeas court's belief in the recollections of Garcia, Espinoza, and Marvin over trial counsel's testimony. Thus, the State is bound by the habeas court's findings that misadvice regarding immigration

⁸ In its reply brief, the State asserts that Garcia admitted he knew he would be deported because he testified at one point, "I knew I was going to get deported, so I went on and I—I reported for, like seven to eight months; doing good on my probation." The State waived this argument by failing to present it in its initial brief. See *Tex. R. App. P. 38.3* ("The appellant may file a reply brief addressing any matter in the appellee's brief."); see also *Lopez v. Montemayor*, 131 S.W.3d 54, 61 (Tex. App.—San Antonio 2003, pet. denied).

Even if the issue were properly before us, it would still fail. The habeas court's factual findings provide that "If Applicant had not been affirmatively misadvised, he would not have pled guilty." As the judge of a witness's credibility and demeanor, the habeas court may have viewed the snippet of Garcia's testimony referenced by the State as a misstatement. *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds by* *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007); see also *In the Interest of H.S.V., No. 04-12-00150-CV, 2012 Tex. App. LEXIS 6933, 2012 WL 3597211 at *4* (Tex. App.—San Antonio Aug. 22, 2012, pet. denied) (mem. op.) (providing that a trial court, sitting as the factfinder in a case, may have found any misstatements or contradictions in a witness's testimony to be minor errors).

consequences was given and that such misadvice was consequential in Garcia's decision to accept the plea agreement. Perhaps recognizing this limitation, the State makes two predominately legal [*32] arguments.

First, it argues that there is no distinction between misadvice and failure to advise. Therefore, according to the State, *Chaidez* held that the rule articulated by *Padilla* is non-retroactive and bars Garcia from collaterally attacking his conviction. The State's first argument fails to appreciate the intricacies at play. As noted above, *Padilla*'s rule encompassed a well-recognized standard—an effective counsel may not affirmatively misadvise a client.

Next, the State makes a *Teague*-like argument and tries to use the collateral consequences distinction that *Chaidez* acknowledged was percolating in lower courts. It contends that "[a]t the time [Garcia's] case became final herein, precedent did not dictate that preclusion of an ineffective assistance claim was unreasonable when it arose from an attorney's material misrepresentation of a deportation risk." At oral argument, the State elaborated that Texas courts "never allowed *Strickland* to be applied to collateral consequences."

Under *Teague*, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." [*33] [489 U.S. at 302](#). Even if we indulged the State and looked for existing precedent, the State fails to refer us to any opinion—from

Texas or elsewhere and from 2002 or before—that holds a defendant may not assert an ineffective assistance of counsel claim based on affirmative misadvice regarding immigration consequences because immigration consequences are "collateral."⁹ Neither Justice Alito when he concurred in *Padilla* nor this Court has found any such opinion. [559 U.S. at 385](#) (J. Alito, concurring) ("[I]t appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance.") (emphasis in original). In other words, as for misadvice, *Padilla* did not announce a new rule. In 2002, when Garcia pleaded guilty, criminal defense attorneys were expected to not hold themselves out as experts in areas where they were not.

We overrule the State's first issue.

III. LACHES

In the State's second issue, it alternatively argues that "the trial court erred in failing to address the issue of laches." The State further argues that "there is nothing in the trial record, other than the length of delay, [*34] from which to ascertain whether laches has been proved." It contends that under [Ex Parte Bowman \(I\), 447 S.W.3d 887 \(Tex. Crim. App. 2014\)](#) (per

⁹The closest the State comes is [State v. Jimenez, 987 S.W.2d 886, 887 \(Tex. Crim. App. 1999\)](#), a case dealing with no advice. *Id.* ("Appellee filed an application for writ of habeas corpus, alleging that her guilty plea was involuntary because she *had not been admonished* that she could be deported as a result of her pleading guilty.") (emphasis added).

curiam),¹⁰ "the proper course of action in such situation is to remand to the trial court for a hearing on the laches issue."

A. The standard of review regarding laches is governed by the general framework for all habeas issues.

We will continue to apply the highly deferential [Guzman, 955 S.W.2d at 89](#), standard of review to the issue of laches. Laches is a question of fact and, in proceedings governed by [article 11.072](#), the trial court is the sole finder of fact. [Bowman, 447 S.W.3d at 888](#).

B. The question of laches is governed by equitable considerations.

Over the past four years, the court of criminal appeals has altered the rules governing laches in habeas proceedings. An overview of the three cases effectuating this change—*Perez, Smith, and Bowman (II)*—is helpful to understanding our disposition.

1. From the Federal Standard to the Common Law

In *Ex Parte Perez*, the court of criminal appeals replaced the federal standard for analyzing laches, which Texas courts had followed, with a "common-law standard" that "better comports with equitable

considerations." [398 S.W.3d 206, 215 \(Tex. Crim. App. 2013\)](#). The court explained that the defense of laches "typically requires proof by a preponderance [*35] of the evidence of two elements: unreasonable delay by the opposing party and prejudice resulting from the delay." [Id. at 210 n.3](#) (citing [Caldwell v. Barnes, 975 S.W.2d 535, 538 \(Tex.1998\)](#)). Thus, the defense of laches will bar habeas corpus relief "when an applicant's unreasonable delay has prejudiced the State, thereby rendering consideration of his claim inequitable." [Id. at 219](#) (citing [Ex parte Carrio, 992 S.W.2d 486, 487 \(Tex. Crim. App. 1999\)](#)).

2. Sua sponte review by a habeas court

In *Ex Parte Smith*, a habeas court recommended to the court of criminal appeals that the applicant be permitted to file an out-of-time appeal under [article 11.07, 444 S.W.3d 661, 664 \(Tex. Crim. App. 2014\)](#). Even though the State neglected to plead laches and present any evidence of it, the court of criminal appeals held that a habeas court "may *sua sponte* consider and determine whether laches should bar relief." [Id. at 667](#). It abated the proceeding and remanded for findings of fact and conclusions of law on the issue.

3. An Opportunity to Follow *Perez*

In *Ex Parte Bowman (II)*, [447 S.W.3d at 888](#), the State raised the issue of laches for the first time on appeal. The First Court of Appeals rejected the State's defense of laches on, among other grounds, lack of preservation. *Id.* Relying on *Smith*, the court of criminal appeals held that the laches

¹⁰The *Bowman* habeas proceeding has thus far spawned three appellate opinions. The initial opinion came from the First Court of Appeals. See [Ex Parte Bowman \(I\), 444 S.W.3d 272, 278 \(Tex. App.-Houston \[1st Dist.\] 2014\)](#), *rev'd by* [447 S.W.3d 887 \(Tex. Crim. App. 2014\)](#) (per curiam). The second came from the court of criminal appeals. See [Bowman \(II\), 447 S.W.3d 887, 888 \(Tex. Crim. App. 2014\)](#). The third, came from the First Court of Appeals on remand. See [Bowman \(III\), 483 S.W.3d 726, 737 \(Tex. App.-Houston \[1st Dist.\] 2016, pet. filed\)](#) (op. on remand)

argument was not waived and that when the record is silent as to laches, the proper course of action [*36] is to remand to the habeas court for a hearing on the laches issue.

4. The Current Standard

In determining the issue of laches in habeas corpus proceedings, habeas courts are to consider the totality of the circumstances, i.e., "factors such as the length of the applicant's delay in filing the application, the reasons for the delay, and the degree and type of prejudice resulting from the delay." *Perez*, 398 S.W.3d at 217. In regard to prejudice, "a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial." *Id.* However, even if the State presents proof of prejudice, a court still "must then weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief." *Id.*

In regard to the degree of proof required, "the extent of the prejudice the State must show bears an inverse relationship to the length of the applicant's delay." *Id.* Thus, "the 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." [*37] *Id.* at 217-18. Although a delay of more than five years "may generally be considered unreasonable in the absence of any justification for the delay," the court of criminal appeals refused "to adopt a

rebuttable presumption of prejudice to the State after [any] specified period of time." *Id.* at 210, 216 n.12. Thus, even in such instances, the State must still present *some* evidence of prejudice.¹¹

In summing up its "expan[sion] of the scope of the prejudice inquiry," the court of criminal appeals was careful to emphasize that it was "leav[ing] intact the equitable principles" that necessarily defeat the State's reliance upon the defense of laches when a record reveals:

- an applicant's delay was not unreasonable because it was due to a justifiable excuse or excusable neglect;
 - the State would not be materially prejudiced as a result of the delay;
- or
- the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he is actually innocent of the offense or, in some cases, that he is reasonably likely to prevail on the merits.

Id. at 218 (citing *Ex parte Blue*, 230 S.W.3d

¹¹ On remand, the First Court of Appeals again reversed the habeas court's denial of relief. *Ex Parte Bowman (III)*, 483 S.W.3d at 737 (citing 398 S.W.3d at 210, 216 n.12). It noted that *Perez*, expressly refused "to adopt a rebuttable presumption of prejudice to the State after [any] specified period of time." *Id.* The court of criminal appeals explained that "the 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." *Ex Parte Perez*, 398 S.W.3d 206, 217-18 (Tex. Crim. App. 2013) (emphasis added). However, the State, in asserting the defense of laches must necessarily present *some* evidence of material prejudice actually caused by an unreasonable delay. *Id.* at 219 ("Though proof of mere passage of time will continue to be insufficient to raise laches, we will weigh all relevant equitable considerations in determining whether a long-delayed application for post-conviction relief should be barred by laches.").

[151, 170 \(Tex. Crim. App. 2007\)](#) (Keller, P.J., concurring) (explaining that courts possess "equitable discretion" to ensure "federal constitutional errors do not [*38] result in the incarceration of innocent persons") (quoting [Herrera v. Collins, 506 U.S. 390, 404-05, 113 S. Ct. 853, 122 L. Ed. 2d 203, \(1993\)](#)); [Ex parte Scott, 190 S.W.3d 672, 675 \(Tex. Crim. App. 2006\)](#) (Cochran, J., concurring) (suggesting equitable relief was warranted notwithstanding applicant's delay in seeking habeas corpus relief where applicant showed that the court of appeals wrongly affirmed his conviction)).

C. The habeas court did not abuse its discretion in rejecting the State's defense of laches.

After *Perez*, *Smith*, [Bowman \(I\), 444 S.W. at 278 \(Tex. App.—Houston \[1st Dist.\] 2014\)](#), *rev'd by* [447 S.W.3d 887 \(Tex. Crim. App. 2014\)](#), and *Bowman (II)*, a panel of this Court reversed the habeas court's summary denial of relief and remanded for further proceedings. [Garcia, 2016 Tex. App. LEXIS 1117, 2016 WL 454997, at *4](#). We remanded to the habeas court "to allow [it] to conduct further proceedings it deem[ed] necessary to provide us with an adequate record." [2016 Tex. App. LEXIS 1117, \[WL\] at *3](#). We also expressly provided that nothing in our opinion "preclude[d] the State from re-urging any of its arguments made in its response to Garcia's habeas application." [2016 Tex. App. LEXIS 1117, \[WL\] at *3 n.2](#). Garcia amended his application for habeas relief; the State did not amend its written response. The habeas court held an evidentiary hearing. At that hearing, the State presented no evidence

regarding material prejudice even though *Perez*, a case the State briefed in its initial written response, held that the mere passage of time alone was insufficient to raise the defense of laches [*39] and burdened the State to present *some* evidence of material prejudice actually caused by an unreasonable delay. [Perez, 398 S.W.3d at 219](#). The order granting habeas relief does not mention laches, and the State neither objected to the order nor requested additional findings and conclusions.

The State argues that it either did not or could not waive laches, contending that in *Bowman (II)*, the court of criminal appeals "noted that the issue of laches is not waived, even if the State fails to plead laches in the trial court." [447 S.W.3d at 888](#). But *Bowman (II)* is distinguishable. The *Bowman* applicant first moved for habeas relief sometime after April 2013 and the First Court of Appeals finally decided the initial appeal in August 2014. [444 S.W.3d at 276, rev'd by 447 S.W.3d 887](#). Both events pre-date the court of criminal appeals' decision in *Smith* instructing habeas courts to sua sponte consider the issue of laches. [Smith, 444 S.W.3d 661](#). Contrary to the State's belief, the court of criminal appeals' decision in *Bowman (II)* did not exempt the State from basic error preservation. Instead, it implicitly gave retroactive effect to *Smith*.

The discretion *Smith* vests in habeas courts to sua sponte consider laches is instructive on the issue of waiver surrounding the State's assertion [*40] of laches in this case. [Id. at 668](#). Under *Smith*, habeas courts have discretion to "consider sua sponte the interests of the judicial system and society

generally." *Id.* "In a sua sponte laches inquiry, a court may excuse an applicant's delay when the record demonstrates that his delay was the result of justifiable excuse or excusable neglect based on the totality of circumstances. . . ." *Id.* If a habeas court has discretion to excuse an applicant's pre-litigation delay, it also has discretion to weigh dereliction by any party, including the State, that occurs after a habeas application is filed. To hold otherwise would mean that a habeas court's "sua sponte discretion" may only be exercised to benefit the State.

We conclude that the habeas court rejected the State's laches defense. Unlike in *Bowman (I)*¹² and *Smith*,¹³ the State pleaded laches in this case. After our request for an "adequate record" and our admonishment that the State was free to re-urge any of its arguments made in its response to Garcia's habeas application, the habeas court ordered an evidentiary hearing. From the order granting relief,¹⁴ the habeas court was likely mindful that the State had since June 2014, when it first pleaded [*41] laches, to gather any evidence on the issue. The State did not mention laches at the hearing, and it did not seek a continuance. The State's failure to present any evidence on laches may have

¹² [444 S.W.3d at 278](#) ("Here, the State did not plead or otherwise assert the doctrine of laches in the trial court as a bar to appellant's requested habeas relief."), *rev'd by* [447 S.W.3d 887](#).

¹³ *Ex Parte Smith*, [444 S.W.3d 661, 664 \(Tex. Crim. App. 2014\)](#) ("The State's answer did not plead laches or any theory of the case beyond a general denial.").

¹⁴ The order that granted relief in this case provides that the habeas court considered, among other things, "the State's response," which included the defense of laches.

been viewed by the habeas court as waiver. *Cf.* [Perez, 398 S.W.3d at 210](#) (declining to adopt a rebuttable presumption regarding laches). Furthermore, given that laches is largely governed by equitable principles, *see id. at 218*, and that habeas courts enjoy sua sponte discretion in considering the issue of laches, [Smith, 444 S.W.3d at 668](#), we cannot say that the habeas court abused its discretion in rejecting the State's laches defense.

Lastly, practical considerations further support our conclusion that the habeas court did not abuse its discretion in finding waiver on the State's part and support our decision to decline the State's request to return Garcia's application to the habeas court for a second evidentiary hearing. Permitting such a return would needlessly consume judicial resources—on the habeas court and potentially this Court should a third appeal materialize—and incentivize gamesmanship by allowing the State to reserve the laches issue as an automatic reversal in case habeas relief is granted. Both parties should be encouraged to [*42] present all of their evidence to the habeas court through the adversarial process as efficiently as possible.

We overrule the State's second issue.

IV. CONCLUSION

We affirm the judgment of the habeas court.

LETICIA HINOJOSA

Justice

Publish.

Tex. R. App. P. 47.2(b).

Delivered and filed the
13th day of July, 2017.

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