



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-69,994-01**

**EX PARTE BENJAMIN JOHN SPENCER, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
CAUSE NO. F-87-96524-T IN THE 283RD DISTRICT COURT  
FROM DALLAS COUNTY**

*Per curiam.*

### ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of aggravated robbery and sentenced to life imprisonment. The Fifth Court of Appeals affirmed his conviction. *Spencer v. State*, No. 05-88-00397-CR (Tex. App.—Dallas, May 3, 1989, pet. ref'd).

Applicant contends, among other things, that he is actually innocent and that trial counsel rendered ineffective assistance. After holding a live evidentiary hearing and making findings of fact, the trial court concluded that Applicant had established that he is actually innocent and recommended that we grant relief. We believe that the record should be further developed. The trial

court shall make further findings of fact as to whether the evidence produced by Dr. Paul Michel's report was available in 1988, when Applicant was tried. *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006). Specifically, the trial court shall make findings as to what methods in visual forensic science Dr. Michel relied on his report and whether these methods were available and recognized by experts in the field in 1988. The trial court shall also make further findings as to whether Dr. Michel, in concluding that the identifications of Applicant were not credible, considered that they were not stranger-on-stranger identifications. Finally, the trial court shall make further findings as to whether Danny Edwards made a plea agreement with the State for pending aggravated robbery charges after he had met Applicant in jail; whether Edwards filed a pre-trial motion on Applicant's behalf; and whether there was evidence indicating that Applicant's fingerprints had been "sanded."

Applicant has alleged facts that, if true, might entitle him to relief. *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996); *Strickland v. Washington*, 466 U.S. 608 (1984). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court may hold another evidentiary hearing or order trial counsel to respond in a second affidavit. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d).

Applicant appears to be represented by counsel. If he is not and the trial court elects to hold another evidentiary hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent him at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

If the trial court finds that Edwards had not made a plea agreement with the State before he

met Applicant, Edwards had not filed a pre-trial motion on Applicant's behalf, and Applicant's fingerprints had not been "sanded," it shall determine whether trial counsel rendered ineffective assistance for failing to impeach Edwards's testimony at trial. The trial court shall also determine whether trial counsel rendered ineffective assistance for failing to impeach Edwards for bias and interest when he made his March 30, 1987 statement to the police and for failing to elicit testimony or introduce evidence showing that the police had ruled out Van Mitchell Spencer as a suspect. Finally, with respect to Applicant's ineffective assistance of counsel claims, the trial court shall determine whether the State, in raising laches, has made a particularized showing of prejudice, shown that Applicant caused this prejudice by his delay, and shown that Applicant has not acted with reasonable diligence. *Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999). The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claims for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. If any continuances are granted, a copy of the order granting the continuance shall be sent to this Court. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be returned to this Court within 120 days of the date of this order. A copy of Dr. James Hyzer's report shall also be returned to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: April 22, 2009  
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