

**WRIT NO. W87-96524-UT(A)**

**EX PARTE:** § **IN THE 283<sup>RD</sup> JUDICIAL**  
§ **DISTRICT COURT**  
**BENJAMINE JOHN SPENCER** § **DALLAS COUNTY, TEXAS**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On this 28<sup>th</sup> day of March, 2008, came on to be considered Applicant's Application for Writ of Habeas Corpus and the State's Amended Response. Having considered these pleadings, as well as all exhibits and affidavits offered by both parties, including Applicant's trial record, and the testimony adduced at a hearing conducted in July 2007, this Court enters the following findings of fact and conclusions of law:

**CASE HISTORY**

In October 1987, in cause number F87-79821-UT, Applicant was convicted of murder and sentenced to 35 years' confinement. A motion for new trial was granted in that case, Applicant was reindicted under cause number F87-96524-T, and Applicant was retried and convicted of aggravated robbery in March 1988. Applicant is currently confined pursuant to the judgment and sentence of the 283<sup>rd</sup> Judicial District Court of Dallas County, Texas, in cause number F87-96524-T, where Applicant was convicted by a jury for the felony offense of aggravated robbery. The jury assessed punishment at life confinement in the Texas Department of Criminal Justice, Institutional Division.

The Dallas Court of Appeals affirmed Applicant's conviction on direct appeal. *Spencer v. State*, No. 05-88-00397-CR (Tex. App.—Dallas May 3, 1989) (not designated for publication). This is Applicant's first Application for Writ of Habeas Corpus. The application was filed September 22, 2004.

### **GENERAL FINDINGS**

1. This Court takes judicial notice of the entire contents of the court's file in Cause No. F87-96524-UT.
2. This Court takes judicial notice that the reporter's record from Applicant's first trial, the jury trial in cause number F87-79821-T wherein a motion for new trial was granted, cannot be located and will not be cited in the Court's findings.
3. This Court takes judicial notice of the reporter's record of Applicant's second trial, the jury trial in cause number F97-96524-UT, which is the subject of the instant writ. Citations to the jury trial record will be to RR.
4. This Court takes judicial notice of the reporter's record from the writ hearing on the instant Application. Citations to the writ hearing record will be to WR.

### ***FAILURE TO DISCLOSE BRADY MATERIAL*** **Applicable Law**

5. The Court notes that the State has an affirmative duty to disclose all material, exculpatory evidence to the defense under *Brady v. Maryland*, 373 U.S. 83,87 (1963).

6. The Court notes that to establish a *Brady* claim, a habeas applicant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the applicant, and (3) the evidence was material. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Ex parte Kimes*, 872 S.W.2d 700, 702-3 (Tex. Crim. App.1993).
7. The Court notes that evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. at 682; *Ex parte Adams*, 768 S.W.2d 281, 289-90 (Tex. Crim. App. 1989).
8. The Court notes that a “reasonable probability” is a “probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. at 682; *Adams*, 768 S.W.2d at 289-90.
9. The Court notes that a due process violation will occur only if a prosecutor fails to disclose evidence favorable to the accused which creates a probability of a different outcome. *See Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).
10. The Court notes that *Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist. *See Hafdahl v. State*, 805 S.W.2d 396, 399 (Tex. Crim. App. 1990); *citing Thompson v. State*, 612 S.W.2d 925, 928 (Tex. Crim. App. 1981); *see also Ford v. State*, No. 05-00-01139-CR, 2002 Tex. App. LEXIS 1258 at \*9 (Tex. App.—Dallas Feb. 20, 2002, no pet.) (not designated for publication) (no *Brady* violation occurred because appellant failed to show that the prosecutor or the police involved in the prosecution of this robbery case knew about the man in the car or any reports about that incident).

11. The Court notes that the nondisclosure of information which is “repetitious, cumulative, or embellishing of facts otherwise known to the defense” does not satisfy the materiality requirement of *Brady*. *United States v. Agurs*, 427 U.S. 97, 110 (1976).

### **Ferrell Scott Allegations**

12. The Court notes that Applicant contends that the State failed to disclose to the defense Ferrell Scott’s statement to police that his friend, Michael Hubbard, committed the instant offense.
13. The Court finds that Ferrell Scott’s July 2004 affidavit alleges he went to the police in July or August of 1987 with his attorney Edwin Sigel and, at that time, Scott told the police that Michael Hubbard admitted to Scott that he had committed the instant offense. (App’s Hab. Ex. 24).
14. The Court finds that Scott also testified at the writ hearing that he and his attorney Ed Sigel went to talk to the police, but the police did not say anything, did not write anything down, and did not contact him again. (WR2: 167-68).
15. The Court finds that Ferrell Scott had four state convictions for possession of a firearm by a felon, possession of a controlled substance, and two possessions of a controlled substance with intent to deliver, and Scott also had one federal conviction for theft. (WR2: 173-74).
16. The Court finds that the lead detective on this offense, Dallas Police Detective J. S. Briseno, had never heard of Ferrell Scott until Scott was mentioned to him by Jim McCloskey of Centurian Ministries. (WR4: 166).

17. The Court finds that in his affidavit, Detective Briseno denied that any meeting between Ferrell Scott and the Dallas police ever occurred in this case. (State's Hab. Ex. A).
18. The Court finds that Briseno's affidavit states that even if Briseno was not present at the time of the visit, any officer who took information on the case would have told Briseno or would have made a note of it, and would have taken a statement from Scott, but no such note or statement exists. (State's Hab. Ex. A).
19. The Court finds that attorney Edwin Sigel stated in his affidavit that he had no independent recollection of any such visit or conversation with the police about this matter, nor does he have any notes reflecting that such a meeting with the police took place. (State's Hab. Ex. H).
20. The Court finds that Edwin Sigel testified at the writ hearing that he "would have remembered it" if he took Scott to meet with the police. (WR3: 44).
21. The Court finds that former prosecutor Jeff Hines, the prosecutor in Applicant's first trial, states in his affidavit that Applicant's trial file, in the possession of the District Attorney's office, contains no mention of Ferrell Scott, and Hines did not learn of Ferrell Scott until he read an article published in the Dallas Morning News in September 2004. (State's Hab. Ex. C).
22. The Court finds that prosecutor Andy Beach, the prosecutor in Applicant's second trial, states in his affidavit that he first heard of someone named Ferrell Scott when a Dallas Morning News reporter contacted him by phone in early 2003. (State's Hab. Ex. U).
23. The Court finds that Ferrell Scott is not a credible witness and is not worthy of belief.

24. This Court notes that Applicant contends that the fact that Michael Hubbard was bench warranted in August 1987 corroborates Ferrell Scott's claim that Scott went to the police with information on Hubbard.
25. This Court finds that court documents show Hubbard was bench warranted back to Dallas County from prison in August 1987. (State's Hab. Ex. L & N).
26. This Court finds that in both cause numbers under which co-defendant Nathan Robert Mitchell was indicted for this offense, bench warrants were issued by this Court for Michael Hubbard on August 13, 1987 and March 28, 1988. (State's Hab. Ex. L & N).
27. This Court finds that the request for Michael Hubbard's bench warrant for March 28, 1988 was made by the defense. (State's Hab. Ex. LL).
28. This Court finds that notes obtained from the Texas Department of Corrections (TDCJ) show that Hubbard was bench warranted to the Dallas County jail by the defense to testify on behalf of Robert Mitchell at his trial, but he was not called to testify. (State's Hab. Ex. M & O - sealed exhibits).
29. The Court notes that Applicant contends that a fingerprint request form dated April 19, 1987, located in the police file in this case, contains Ferrell Scott's name in small print on the bottom right hand corner of the page and is additional proof that the State withheld information about Scott. (App.'s Hab. Ex. 5B, bates p. 80).
30. The Court finds that on April 15, 1987, Officer Donald Ortega took a call from Andy Konradi, a defense attorney representing Kelvin Johnson, and Konradi advised Ortega that Johnson informed him that a Michael Eugene Hubbard had told Johnson that Hubbard killed complainant Young; thereafter, both Ortega and Briseno

requested fingerprint comparisons of Michael Hubbard's prints to the prints lifted in this case. (State's Hab. Ex. S; App.'s Hab. Ex. 5B, bates pp. 79-80).

31. The Court finds that Officer James Vineyard received the fingerprint comparison requests from Ortega and Briseno, he performed the comparisons, he recognized the "Ferrell Scott" writing as his but does not remember why he wrote the name, and he knows that he would not have noted the name unless given the name by one of the requesting officers. (State's Hab. Ex. G).
32. The Court finds that Officer Ortega stated that his general practice in any murder investigation would be to request all arrest reports, prosecution reports, and criminal history of any suspects to look for any accomplices, and it is possible that the names listed on the bottom of this fingerprint request came from this type of research. (State's Hab. Ex. S).
33. This Court finds that there was no meeting between Ferrell Scott and the Dallas Police Department in 1987 and, therefore, there was no information for the prosecutors to release to the defense regarding this non-existent meeting.
34. This Court finds that Michael Hubbard was bench warranted back to Dallas County to testify for the defense in Mitchell's trial, and not to be questioned by the Dallas Police Department regarding Ferrell Scott's alleged information.
35. This Court finds that Ferrell Scott's name appears on Hubbard's fingerprint request form because of general police practices and not because Scott was known to possess any information regarding this case.
36. This Court concludes that the State did not violate *Brady* by failing to turn over information regarding Ferrell Scott's alleged

information on Michael Hubbard because they did not have that information.

### **Eyewitness Meeting Allegations**

37. The Court notes that Applicant claims that the State withheld knowledge of a secret meeting, prior to Applicant's arrest, between Detective Briseno and the State's eyewitnesses Gladys Oliver, Jimmie Cotton, Donald Merritt, and Charles Stewart.
38. The Court finds that Lonnie Lyons's 2003 affidavit claims that after the victim's body was found but before Applicant was arrested, Lyons saw "a Mexican detective," Stewart, Merritt, and Cotton coming out of Oliver's house. (App.'s Hab. Ex. 27).
39. The Court finds that when Lonnie Lyons spoke to the police on April 8, 1987, a few weeks after this offense, Lyons told the police he was a friend of co-defendant Mitchell; however, Lyons did not mention this alleged meeting of the eyewitnesses to the police. (App's Hab. Ex. 3, bates p. 34).
40. The Court finds that Detective Briseno's affidavit states that he never met with Oliver, Cotton, Merritt and Stewart together, that his notes do not reflect that any other officer had such a meeting, and that Briseno never went to Oliver's house until after Applicant was arrested. (State's Hab. Ex. A-1).
41. The Court finds that Briseno's affidavit states that Lyons's "allegations are completely false" and that Briseno did not work with the eyewitnesses to concoct their identifications of Applicant and co-defendant Mitchell. (State's Hab. Ex. A-1).

42. The Court finds that Detective Briseno is a credible person worthy of belief.
43. This Court concludes that the State did not violate *Brady* by failing to turn over information regarding a meeting that did not occur

### **CONCLUSIONS ON BRADY CLAIM**

44. This Court concludes that Applicant failed to demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the applicant, and (3) the evidence was material; therefore, Applicant has not established a *Brady* violation. *United States v. Bagley*, 473 U.S. at 682; *Ex parte Kimes*, 872 S.W.2d at 702-3.
45. This Court concludes that the State did not violate *Brady v. Maryland*, 373 U.S. 83,87 (1963).
46. **This Court recommends that relief be denied on this ground.**

### ***KNOWING USE OF FALSE TESTIMONY*** **Applicable Law**

47. The Court notes that a prosecutor's knowing use of perjured testimony violates the federal requirement of due process. *Ex parte Castellano*, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993).
48. The Court notes that to succeed on a claim of knowing use of false testimony, Applicant must establish three elements: 1) that false testimony was presented at trial; 2) that the prosecution had actual knowledge that the testimony was false; and 3) that the testimony was material. *Carter v. Johnson*, 131 F.3d 452, 458 (5th Cir. 1997).
49. The Court notes that a defendant raising the issue of knowing use of false testimony through a habeas corpus attack on his conviction

bears the “burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment.” *Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996).

### **Testimony of Danny Edwards**

50. The Court notes that Danny Edwards gave an affidavit to Applicant in 2002 in which Edwards alleged that his 1987 trial testimony and statement to police were false and the result of police coercion. (App.’s Hab. Ex. 41).
51. The Court notes that Applicant contends that the State was aware that Edwards’s testimony was false because the police pressured him into making his statement about Applicant.
52. The Court finds that Edwards gave an affidavit to the State in 2005 in which he states that some statements in his 2002 affidavit are not accurate or true. (State Hab. Ex. E).
53. The Court finds that in his 2005 affidavit, Edwards states that the only portion of his trial testimony which was not true was that Applicant told him those facts about the crime; instead, Edwards states that Applicant told those things to his cellmate who then told them to Edwards.
54. The Court finds that during the writ hearing, Edwards testified that Appellant first talked to Edwards’s wife on the phone about the Young murder, then Edwards’s wife talked to Edwards, and Edwards then talked to Applicant about the murder. (WR3: 68-69).
55. The Court finds that Edwards told the court during the writ hearing that what he knows about this case is “what my wife told me and what I have heard,” but Edwards never talked to Applicant directly about this offense. (WR3: 87-88).

56. The Court finds that Edwards said his wife talked to Applicant while on a three-way phone call with another woman and Applicant. (WR3: 83-84).
57. The Court finds that Edwards testified in the writ hearing that he told the truth when he said he talked to Applicant face to face and Edwards denied lying at Applicant's trial. (WR3: 69-70,73).
58. The Court finds that, during the writ hearing, Edwards denied that he had told defense counsel that he did not speak directly to Applicant. (WR3: 71).
59. The Court finds that Edwards admitted that it was his handwriting on his 2002 statement given to the defense which said "Ben Spencer never told me about no murder case," but Edwards stated that the man from Centurion Ministries told him if he "didn't do this" statement, his name would be "all over the newspaper." (WR3: 76-77,86).
60. The Court finds that the first people who talked to Edwards about this case came to see him in response to a jail "kite" sent for Edwards by another inmate, so these people were presumably Dallas police officers or representatives from the State. (WR3: 78,82-83).
61. The Court finds that Edwards spoke to these officers about this case before he testified in Applicant's trial but they did not give him details about the case; instead, Edwards told them what he had heard. (WR3: 79-80).
62. The Court finds that prosecutor Andy Beach denies that he was aware that any aspect of Edwards's testimony was false. (State Hab. Ex. U).
63. The Court finds that Beach states in his affidavit that Edwards never backed off his original statement given to the police regarding

Spencer, and Edwards never indicated to Beach that he had been lying about what Spencer had told him. (State Hab. Ex. U).

64. The Court finds that Andy Beach is a credible person worthy of belief.
65. The Court finds that prosecutor Andy Beach was not aware that any aspect of Edwards's testimony was false.
66. The Court finds that no testimony of Edwards was credible and further, if believed by a trier of fact, was not admissible as it was hearsay.

### **CONCLUSIONS ON FALSE TESTIMONY CLAIM.**

67. This Court concludes that if false testimony was presented at trial, the prosecution did not have actual knowledge that the testimony was false.
68. This Court concludes that Applicant's due process rights were not violated by the prosecution's use of testimony that prosecutors did not know to be false.
69. **This Court recommends that relief be denied on this ground.**

### ***INEFFECTIVE ASSISTANCE OF COUNSEL***

#### **Applicable Law**

70. This Court notes that the Sixth Amendment of the United States Constitution guarantees in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *See* U.S. Const. amend VI; *Cantu v. State*, 930 S.W.2d 594, 605 (Tex. Crim. App. 1996) (Baird, J., concurring).

71. This Court notes that the Sixth Amendment right to counsel includes the right to effective assistance of counsel. *See Ex parte Davis*, 947 S.W.2d 216, 230 (Tex. Crim. App. 1996) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The right to reasonably effective assistance of counsel does not, however, guarantee errorless counsel, or counsel whose competency is to be judged by hindsight. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993). Rather, the right to effective assistance of counsel means counsel reasonably likely to render reasonably effective assistance of counsel. *Id.*
72. This Court notes that the standard of review for effective assistance of counsel is gauged by the totality of the representation of the accused. *See Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995). In determining whether ineffective assistance of counsel has been shown, the Court of Criminal Appeals will presume that trial counsel “made all significant decisions in the exercise of reasonable professional judgment.” *See Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992); *see Cantu*, 930 S.W.2d at 605 (Baird, J., concurring) (“A member of the bar is presumed to possess the skills necessary to ‘fulfill the role in the adversary process that the [Sixth] Amendment envisions’”).
73. This Court notes that to prove ineffective assistance, Applicant must: (1) demonstrate that his counsel’s performance was deficient, in that counsel made such serious errors that he was not functioning effectively as counsel; and (2) show that this deficient performance prejudiced the defense to such a degree that Applicant was deprived of a fair trial. *See Strickland*, 466 U.S. at 687.
74. This Court notes that because counsel’s competence is presumed, Applicant must rebut this presumption by proving that his attorney’s representation was unreasonable under prevailing professional

norms and that the challenged action was not sound strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

75. This Court notes that a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making such evaluation, this Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, i.e., Applicant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 689.
76. This Court notes that the fact that other counsel might have tried the case differently does not show ineffective representation. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).
77. This Court notes that in a habeas proceeding, the applicant bears the burden of proving his factual allegations by a preponderance of the evidence. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).

### **Effectiveness of Trial Counsel Frank Jackson**

78. This Court finds that Applicant was represented at trial by defense counsel Frank Jackson.
79. This Court finds that Jackson testified at the writ hearing on the instant Application. (WR2: 5-91).
80. This Court finds that, at the time of the writ hearing, Jackson no longer had his file on Applicant's case and had to refresh his

memory by talking to Bruce Anton, his co-counsel at Applicant's first trial, as well as Jim McCloskey of Centurion Ministries and members of the District Attorney's staff. (WR2: 6-7).

81. This Court finds that Frank Jackson is a credible person worthy of belief.
82. This Court finds that Jackson investigated the facts of the case, filed pretrial motions, called numerous witnesses for the defense, made proper trial objections, made opening and closing arguments, and zealously advocated on behalf of Applicant.

#### **Failure to Call Sandra Brackens as a Witness**

83. The Court notes that Applicant claims that Jackson was ineffective for failing to call Sandra Brackens as a witness.
84. This Court finds that Jackson decided not to use Sandra Brackens as a witness after he and co-counsel Anton went to the Brackens home where Brackens' mother was very hostile and made it clear that she did not want her daughter involved in this case and that Sandra Brackens did not have any recollection of the facts. (State's Habeas Ex. XYZ).
85. This Court finds that Jackson tried to talk to Sandra Brackens but, although she was in the room with Jackson, she would not talk to him and her mother kept interrupting. (WR2: 89).
86. This Court finds that Brackens told police that a black male that she could not identify ran past her on the night of this offense. (App's Hab. Ex. 3, bates p. 35).
87. This Court finds that Brackens stated in sworn testimony in co-defendant Mitchell's 1988 trial that she did not see the face of the man who ran past her that night. (State's Hab. Ex. V, p. 46).

88. This Court finds that Jackson and Anton concluded that Brackens would not be a good witness because she was too equivocal. (WR2: 11).
89. The Court finds that it was an exercise of reasonable professional judgment for Jackson not to call Sandra Brackens as a witness.
90. This Court concludes that Applicant's claim of ineffective assistance of counsel based on counsel's failure to call Brackens as a witness is not supported by the record and has no merit.

#### **Failure to Call Kelvin Johnson as a Witness**

91. The Court notes that Applicant claims that Jackson was ineffective for failing to call Kelvin Johnson as a witness.
92. The Court finds that, at the time of Applicant's second trial, Jackson had a copy of Kelvin Johnson's affidavit that he gave to police, but the affidavit was unsigned and was not written in Johnson's handwriting. (WR2: 21,76-77).
93. The Court finds that, in the affidavit, Johnson states that Michael Hubbard said that he committed the instant offense. (WR2: 24) (App's Hab. Ex. 32, bates pp. 223-225).
94. The Court finds that Jackson believed that Johnson had recanted the statement he gave to the police. (WR2: 26).
95. The Court finds that at the time Johnson gave his statement to the police, he had committed about twenty aggravated robberies of restaurants and had reached a plea bargain agreement to be charged with three aggravated robberies and be sentenced to twenty years in prison. (WR2: 96-97,111).

96. The Court finds that Detective Briseno told Jackson that if he called Johnson, Detective Briseno would take the stand and impeach Johnson. (WR2: 27).
97. The Court finds that Johnson would have been easily impeached due to his recantation of his statement to the police and his extensive criminal record.
98. The Court finds that Jackson did not want to “sabotage his whole case” by calling Johnson or by asking Detective Briseno about Johnson. (WR2: 28,78).
99. The Court finds that Jackson felt that he would lose credibility with the jury if he called a witness who was then impeached by a police officer. (WR2: 78).
100. The Court finds that Jackson felt that Johnson’s credibility had been destroyed, so Jackson would not call him under any circumstances. (WR2: 30,79).
101. The Court finds that Jackson’s trial strategy was to present an alibi defense, to cross-examine the witnesses vigorously, and to protect the record. (WR2: 66).
102. The Court finds that Jackson thought the testimony of Christi Williams, an All-State athlete who said she was with Applicant at the time of the offense, was very compelling, and Jackson “crafted” this case tightly using the alibi defense. (WR2: 71,73).
103. This Court finds that it was an exercise of reasonable professional judgment for Jackson to determine that the theory that Michael Hubbard committed this offense was not viable and that Kelvin Johnson was not a reliable witness.
104. The Court finds that it was an exercise of reasonable professional judgment for Jackson not to call Johnson as a witness due to his many credibility problems.

105. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure to investigate the claims of Kelvin Johnson or to call Johnson as a witness is not supported by the record and has no merit.

### **Failure to Develop Evidence Regarding Eyewitness Identification**

106. The Court notes that Applicant claims that Jackson should have challenged the eyewitness identifications by demonstrating the lack of adequate illumination, the significant distances involved, and the shortness of time for identifications to be made.
107. The Court finds that Jackson did not recall measuring the distances between where the witnesses said they were standing and where the victim's car was parked, but he thinks his investigator may have measured those distances. (WR2: 36).
108. The Court finds that Jackson went into Jimmie Cotton's house to look through the window from which Cotton observed Applicant, and Jackson believed that the reflection on the window would have made it "near impossible" for Cotton to see what he saw. (State's Hab. Ex. XYZ).
109. The Court finds that Jackson cross-examined the witnesses on the distances between where the witnesses were located and where Applicant was located when they saw him. (WR2: 36).
110. The Court finds that pursuant to Jackson's cross-examination at the trial, Jimmie Cotton admitted he was looking out a lighted room, through a glass pane, into the dark, looking at an angle down the alley. (RR1: 235).
111. The Court finds that, at trial, Jackson attacked Cotton's credibility by inquiring how Cotton could have identified Applicant getting out

- of the car because from the angle he saw Applicant he would have been looking at the back of his head. (RR1:238).
112. The Court finds that, at trial, Jackson attacked Charles Stewart's credibility for telling a different story at the first trial and Jackson confronted Stewart about differences between his trial testimony and his affidavit. (RR1: 190-213).
  113. The Court finds that Jackson could not remember why he did not get a lighting expert for this trial. (State's Hab. Ex. XYZ).
  114. The Court finds that defense expert Paul Michel's stated area of expertise is forensic visual science, and Michel admitted that he first read an article about this area of expertise in the late 1980s. (WR3: 22-23).
  115. The Court finds that Michel agreed that, in 1987, it would have been unusual for a Texas defense attorney to be aware of forensic visual science. (WR3: 24).
  116. The Court finds that Michel agreed that, in 1987, it "wasn't as common then as it is now in the legal field" to get experts to "assist a trier of fact on the issue of identifying a person's facial features to the exclusion of all other people." (WR3: 24).
  117. The Court finds that Jackson's trial strategy was to present an alibi defense, to cross-examine the witnesses vigorously, and to protect the record. (WR2: 66).
  118. The Court finds that it was an exercise of reasonable professional judgment in 1988 for Jackson to challenge the witnesses' identifications of Applicant through cross-examination as to lighting, distance, and opportunity to see Applicant, rather than by calling an expert to discuss the issues.

119. The Court finds that it was an exercise of reasonable professional judgment for Jackson to offer Applicant's alibi witness and thereby attempt to discredit the eyewitness testimony.
120. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure in 1988 to use an expert to demonstrate the lack of adequate illumination or light, the significant distances involved, and the shortness of time for such identifications to be made is not supported by the record and has no merit.

**Failure to Attempt to Locate Evidence  
to Challenge Gladys Oliver's Testimony**

121. This Court notes that Applicant claims that Jackson should have located witnesses, such as Marlan Oliver and Papa Lee (Leland Banks), and should have obtained copies of newspaper and broadcast announcements of a reward, to challenge Gladys Oliver's testimony.
122. This Court finds that Jackson used the State's failure to call Marlan Oliver as an argument for reasonable doubt at Applicant's trial, pointing out that because Marlan was not called by the State, he must not have helped the State's case by corroborating Gladys Oliver's testimony. (RR3: 573).
123. This Court finds that Jackson stated in his affidavit that he remembered Marlan Oliver and may have talked to him but he had "no independent recollection of an interview with him." (State's Hab. Ex. XYZ).
124. The Court notes that Applicant claims in his writ application that Marlan Oliver would have been able to corroborate Applicant's

testimony that he and Christie Williams left Williams's house together in Applicant's car.

125. The Court finds that Applicant's assumption that Marlan Oliver would have contradicted Gladys Oliver's testimony or supported Applicant's alibi defense is mere speculation, since there is no direct evidence regarding what Marlan Oliver may have observed on the night of the offense.
126. The Court finds that Applicant claims that testimony by Leland Banks would have had direct bearing on Gladys Oliver's statement to police that she talked to Banks shortly after seeing Applicant go through her yard.
127. The Court finds that Applicant's assumption that Papa Lee would have contradicted Gladys Oliver's testimony is mere speculation.
128. The Court finds that Jackson stated in his affidavit that he may have talked to Papa Lee (Leland Banks), but he had no independent recollection of talking to him. (State's Hab. Ex. XYZ).
129. The Court finds that Jackson used evidence that Gladys Oliver applied for the Crime Stoppers reward to impeach her credibility during Applicant's trial. (RR2: 313-317; WR2: 53-54).
130. The Court finds that Oliver applied for a reward and admitted receiving a \$580 reward, and it was therefore an exercise of reasonable professional judgment as to whether to pursue Oliver's knowledge of other rewards.
131. The Court finds that the passage of sixteen years between the time of Applicant's trial and the time Applicant filed his writ application has hampered Jackson's ability to answer these claims.
132. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure to attempt to discredit Gladys

Oliver in particular ways is not supported by the record and has no merit.

### **Failure to Locate Van Mitchell Spencer and Luther Bivens as Witnesses**

133. This Court notes that Applicant claims that Jackson should have located other witnesses, such as Van Mitchell Spencer and Luther Bivens, to challenge the State's testimony.
134. This Court notes that Applicant alleges that Van Mitchell Spencer's testimony was required to attack the credibility of Edwards' statement and to show that Van Mitchell Spencer had nothing to do with this offense and did not know Applicant.
135. This Court notes that Applicant alleges that Luther Bevin's testimony was necessary to contradict Charles Stewart's description of the BMW's course of travel and the way Young's body came out of the car.
136. This Court finds that Jackson testified at the writ hearing that he interviewed everyone who would talk to him, although there "were a lot of witnesses that didn't want anything to do with us." (WR2: 68).
137. This Court finds that Jackson testified that even the witnesses who talked to him were reluctant and getting them to talk was very difficult. (WR2: 68).
138. This Court finds that Jackson stated in his affidavit and during the writ hearing that he remembers the name Van Mitchell Spencer but has no recollection of interviewing him. (WR2: 68) (State's Hab. Ex. XYZ).
139. The Court finds that in the police reports associated with this case, Bivens told police that he saw a body dumped out of the car, but

there is no mention of Bivens stating which direction the BMW was driving. (App.'s Hab. Ex. 3, bates p. 19).

140. The Court finds that Bivens did not give a statement about what direction he saw the BMW traveling until he so stated in his affidavit in 2003. (App.'s Hab. Ex. 28).
141. The Court finds that Applicant's condemnation of defense counsel's failure to locate Van Mitchell Spencer and Luther Bivens impermissibly rests on hindsight.
142. The Court finds that the passage of sixteen years between the time of Applicant's trial and the time Applicant filed his writ application has hampered Jackson's ability to answer these claims.
143. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure to locate witnesses Van Mitchell Spencer and Luther Bivens is not supported by the record and has no merit.

#### **Failure to "Develop Critical Areas of Cross-Examination"**

144. This Court notes that Applicant claims that Jackson should have cross-examined Charles Stewart regarding the direction and course of travel of the BMW, so that he could have cast doubt on Stewart's and Merritt's credibility.
145. This Court finds that Jackson chose to attack Stewart's credibility by questioning his identification of Applicant, as shown by the first twenty pages of counsel's cross-examination where Jackson confronts Stewart for allegedly lying in his statements. (RR1: 189-209).

146. This Court finds that the way Jackson chose to conduct his cross-examination of Charles Stewart was an exercise of reasonable professional judgment.
147. This Court notes that Applicant claims that Jackson should have cross-examined Detective Briseno regarding various issues that Applicant now believes to be important.
148. This Court finds that Jackson specifically addressed his very careful cross-examination of Detective Briseno in his affidavit as follows:
- I do specifically remember that there were things that the police were saying and there were rumors. I did not want to open the door with any police officer to these rumors and innuendoes. I was very careful not to open to the door to hearsay or other portions of their investigation which I thought would be detrimental to this case. I was very careful about the issues that I cross-examined Detective Briseno about. (State's Hab. Ex. XYZ).
149. This Court finds that the way Jackson chose to conduct his cross-examination of Detective Briseno was an exercise of reasonable professional judgment.
150. This Court finds that the fact that Applicant and his counsel, in hindsight, now allege that Jackson should have asked different questions and pointed out more discrepancies in testimony does not render counsel's representation ineffective.
151. This Court finds that the fact that other counsel might have tried the case differently does not show ineffective representation.
152. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure to "develop critical areas of cross-examination" is not supported by the record and has no merit.

### **Failure to Cross-Examine Gladys Oliver about Certain Issues**

153. This Court notes that Applicant claims Jackson was ineffective for failing to cross-examine Oliver about what she said or did not say to Papa Lee (Leland Banks) and Mr. Scott when she spoke with them outside of her house the night of the offense, and failing to cross-examine Oliver about differences between her affidavit given to police and her trial testimony.
154. This Court finds that asking about Oliver's conversation with Banks and Scott would have given Oliver a chance to reinforce her testimony about Applicant's actions and would not necessarily have benefited Applicant.
155. This Court finds that in her affidavit given to police, Oliver was identifying the person she saw exiting the BMW and explaining the facts surrounding her identification, rather than giving every detail of her evening, while at trial, the prosecutor asked about the details of her evening to show the timing of her observations and when and how often she opened her front door.
156. This Court finds that Jackson's failure to question Oliver about the inclusion of certain minor details in her trial testimony but not her police affidavit is inconsequential in light of Jackson's trial strategy.
157. This Court finds that Jackson chose to impeach Gladys Oliver in a different way, by asking her about applying for reward money from Crime Stoppers. (WR2: 52-53).
158. This Court finds that, as an exercise of reasonable professional judgment, Jackson chose to offer Applicant's alibi witness and thereby discredit the eyewitness testimony.

159. This Court finds that the way Jackson chose to conduct his cross-examination of Gladys Oliver was an exercise of reasonable professional judgment.
160. This Court finds that the fact that Applicant and his counsel, in hindsight, now allege that Jackson should have asked different questions and pointed out more discrepancies in testimony does not render counsel's representation ineffective.
161. This Court finds that the fact that other counsel might have tried the case differently does not show ineffective representation.
162. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure to cross-examine Oliver about certain issues is not supported by the record and has no merit.

#### **Failure to Cross-Examine Danny Edwards about Certain Issues**

163. This Court notes that Applicant claims Jackson was ineffective for failing to cross-examine Edwards about his plea agreement and any benefits he received, his parole status, the pretrial motions Edwards had allegedly filed for Applicant, and Edwards's claim that Applicant had rubbed off his fingerprints.
164. This Court finds that records show that the aggravated robbery case against Edwards was filed on March 25, 1987; Edwards gave his affidavit to police on March 30, the same day attorney Ed King was appointed to represent him; Edwards received a ten-year sentence on the lesser-included-offense of robbery on April 13, 1987; Applicant's first trial was held in October 1987; and Applicant's second trial was held in March 1988. (WR2: 49-50).
165. This Court finds that Edwards testified at trial that on March 30, 1987, Edwards contacted Detective Briseno and gave him an

- affidavit about what Applicant had said, and Briseno did not give Edwards any benefits or promises. (RR2: 356-57).
166. This Court finds that Jackson believed that Edwards would testify that he already had a deal and Jackson did not want to give Edwards the opportunity to say he had no deal and thereby reinforce his credibility. (WR2: 51-52).
  167. This Court finds that Jackson believed questioning Edwards about his deal would open “some very, very volatile areas of inquiry.” (WR2: 47).
  168. This Court finds that it was an exercise of reasonable professional judgment for Jackson not to question Edwards any further about his plea bargain and any benefits he did or did not receive.
  169. This Court notes that Applicant contends that Edwards’s early parole date, if stressed before the jury, could have had some effect on their perception of Edwards’s bias and his need to provide favorable testimony for the State.
  170. This Court finds that releasing an inmate on parole is a decision made solely by the Texas Department of Criminal Justice, according to the formulas set by the legislature to determine parole eligibility, and the fact that Edwards was parole eligible in fifteen months did not mean that he was going to be released on parole.
  171. This Court finds that, because the District Attorney’s Office does not determine parole eligibility, it would have been irrelevant for Jackson to point out to the jury when Edwards was parole eligible.
  172. This Court finds that Jackson was not ineffective for failing to mention Edwards’s parole eligibility date.
  173. This Court notes that Applicant claims that Jackson should have challenged Edwards’s claim that he prepared pretrial motions for

Applicant, which established that he had a relationship with Applicant.

174. This Court finds that Edwards testified that he and Applicant were placed in the same tank at Lew Sterrett Jail, Edwards gave Applicant some candy and medicine for his migraines, they talked about their cases, and Edwards filed some motions for Applicant. (RR2: 344-46,348-49).
175. This Court finds that, even if Jackson confronted Edwards about a lack of the pretrial motions in Applicant's file, this would not have erased Edwards's other testimony about his interactions or relationship with Applicant.
176. This Court finds that Jackson was not ineffective for failing to challenge Edwards's testimony about the pretrial motions.
177. This Court notes that Applicant claims Jackson should have shown that Applicant had fingerprints that could be printed and thereby challenged Edwards's claim that Applicant said he had filed his fingerprints off by rubbing them against concrete.
178. This Court finds that Jackson chose to make other challenges to Edwards's credibility, by pointing out his prior convictions and establishing that Edwards was mad at Applicant when he testified. (RR2: 367-71,374-75).
179. This Court finds that Jackson was not ineffective for failing to challenge Edwards's testimony about Applicant's fingerprints.
180. This Court finds that the fact that Applicant now alleges that Jackson should have asked different questions and pointed out more discrepancies in testimony does not render counsel's representation ineffective.
181. This Court finds that the fact that other counsel might have tried the case differently does not show ineffective representation.

182. This Court concludes that Applicant's claim of ineffective assistance of counsel based on Jackson's failure to confront Edwards about various issues is not supported by the record and is without merit.

### **CONCLUSIONS ON INEFFECTIVE ASSISTANCE CLAIM**

183. This Court finds that Applicant fails to prove by a preponderance of the evidence that Jackson's performance was deficient.
184. This Court finds that Applicant fails to prove by a preponderance of the evidence that Jackson's performance harmed him.
185. This Court concludes that Jackson's conduct falls within the wide range of reasonable professional assistance that constitutes effective assistance of counsel.
186. This Court concludes that Applicant's counsel Frank Jackson rendered effective assistance at trial.
187. **This Court recommends that relief be denied on this ground.**

### ***ACTUAL INNOCENCE***

188. This Court concludes that the only evidence inculping Spencer at his March 1987 trial consisted of:
- a) testimony of Danny Edwards about a "jail house confession," and;
  - b) testimony of Jimmy Cotton, Gladys Oliver, and Charles Stewart that they saw Spencer exit Young's BMW immediately after it was parked in the alley off of Harston between Angelina and Calypso in West Dallas. [Transcript, *State v. Spencer*]

189. This Court concludes that there was no physical evidence presented by the State connecting Spencer to the abduction/murder of Jeffrey Young. [Transcript, *State v. Spencer*]

### **DANNY EDWARDS**

190. This Court concludes that none of Danny Edwards' testimony was credible and, when viewed in the light most favorable to the State, was inadmissible hearsay.

### **EYEWITNESS TESTIMONY**

191. This Court notes that forensic visual science is the application of the physiology of the eye to issues of visual identification. [WR 2:194]
192. This Court notes that that Forensic visual scientific analysis is frequently used in crime scene investigations, motor vehicle accidents and cases involving police shootings. [WR2:194]
193. This Court notes that forensic visual science evaluates what a person could or could not see under a given set of circumstances. [WR 2:194]
194. This Court notes that the field of forensic visual science was developed in the late 1980s. [WR 3:23]
195. This Court notes that Dr. Paul Michel is an expert in forensic visual science. [WR 2:197-201; Writ Ex. 204]
196. This Court notes that the State waived its right to a hearing to challenge the admissibility of forensic visual science or Dr. Michel's qualifications as an expert in that field of science.

197. This Court finds that of the trial of this case in 1987, the evidence generated by the application of forensic visual science was unavailable and undiscoverable. [WR 3:24]
198. This Court notes that Dr. Michel has previously been qualified as an expert witness on matters pertaining to visual science as it relates to instant scene investigation, motor vehicle accidents and police officer involved shootings. [WR 2:194; Writ Ex. 204]
199. The Court finds that Dr. Michel is a credible witness and is worthy of belief.
200. This Court finds that Dr. Michel visited the scene of the alley off of Harston and the street area between Calypso and Angelina in west Dallas on three occasions: a) March 25, 2003 between 8:00 p.m. and 11:00 p.m.; b) July 22, 2007 at night; and c) July 23, 2007 at night. [WR 2:203]
201. This Court finds that prior to visiting the scene, Dr. Michel read the trial testimony of Gladys Oliver, Jimmy Cotton, and Charles Stewart from both the *Spencer* and *Mitchell* trials. [WR 2: 205; Writ. Ex. 49, pp. 286-291]
202. This Court finds that the purpose of Dr. Michel's visit to the scene was to determine the impact of various factors upon a person's ability to make a facial identification of someone exiting a car. [WR2:203]
203. This Court finds that during Dr. Michel's inspection on March 25, 2003, there were substantially the same moon conditions as on March 22, 1987. [WR 2:204]
204. This Court finds that March 22, 1987 was a moonless night. [WR 2:204]
205. This Court finds that at the time of Dr. Michel's inspection of the scene, the street light on Harston between Angelina and Calypso was

either the same or better lighting than existed in 1987. [WR 2:139-144]

206. This Court finds that during his March, 2003 visit, Dr. Michel put himself in the locations identified by Cotton, Stewart, and Oliver to assess the factors impacting their ability to make facial identifications. [WR 2:205]
207. This Court finds that in March 2003, Dr. Michel went into the kitchen where Jimmy Cotton testified that he had been cooking on March 22, 1987. [WR2:216-225; Writ Ex. 49]
208. This Court finds that in March 2003, Dr. Michel stood in front of the kitchen window looking out onto Harston Street. [WR 2:208]
209. This Court finds that using the descriptions provided in the 1987 trial testimony of the location of the BMW in the alley and a police diagram prepared in advance of the October 1987 trial, Dr. Michel was able to closely approximate the location of the BMW in the alley. [WR 2:208-214, 224-225]
210. This Court finds that Cotton was approximately 100 feet from the passenger door of the BMW. [WR 2:230-231; Hearing Ex. 206]
211. This Court finds that Cotton was in a lighted kitchen that caused his vision to be adapted to daylight conditions and less able to view darkness. [WR 2:215; Writ Ex. 49]
212. This Court finds that Cotton was approximately 113 feet from Gladys Oliver's fence. [WR 2:226-227, 240; Writ Ex. 206]
213. This Court notes that in Dr. Michel's expert opinion, Cotton was not visually capable of making a facial identification of any person exiting the BMW on March 22, 1987. [WR 2:208, 214-236; Writ Ex. 49]
214. This Court notes that in Dr. Michel's expert opinion, Cotton's vision was adversely impacted by the adaptation to daylight while viewing

a dark environment; reflections from a surface of glass; low levels of illumination; time limitations; and distance. [Writ Ex. 49, pp. 288-289]

215. This Court notes that in Dr. Michel's expert opinion, Cotton could not have seen the face of the person exiting the BMW because of darkness, distance, and movement. [WR 2:222-224]
216. This Court finds that Cotton did not actually see the face of the person exiting the BMW. [WR 4:75-77]
217. This Court notes that Dr. Michel also evaluated Cotton's trial testimony that he was able to identify a person jumping the fence that was behind Gladys Oliver's house. [WR 2:238]
218. This Court notes that in Dr. Michel's expert opinion, Cotton would not have been able to make a facial identification of a person jumping the fence behind Gladys Oliver's house. [WR2:240]
219. This Court notes that Dr. Michel also evaluated Cotton's testimony that he saw Spencer go between Gladys Oliver's house and Leland Banks' house and determined that Cotton could not have made an identification at that point [WR 2:244]
220. This Court finds that Cotton was not able to make an identification of the person he claimed to have seen at that point. [WR 4:75-77]
221. This Court finds that during the writ hearing Mr. Cotton indicated that he was not sure that the man who got out of the car was the Applicant and that his identification was based on seeing Applicant some time later. [WR 4:78]
222. This Court finds that in light of Dr. Michel's report and Mr. Cotton's inconsistent testimony that Mr. Cotton is not a credible witness and is not worthy of belief.

223. The Court finds after observing Mr. Cotton's demeanor and conduct while testifying during the writ hearing that Mr. Cotton is not a credible witness and is not worthy of belief.
224. This Court notes that Dr. Michel also assessed the ability of Charles Stewart to make a facial identification. [WR 2:245; Writ Ex. 49]
225. This Court finds that Charles Stewart testified at Spencer's trial that he was standing in the driveway of his grandmother's house when he saw Spencer exit from the BMW. [RR 2:178]
226. This Court finds that the distance from the northern end of Stewart's grandmother's driveway to the parked BMW was more than three hundred feet. [WR2:247]
227. This Court finds that the distance from the southern end of Stewart's grandmother's driveway to the parked BMW was approximately two hundred and forty feet. [WR2:245]
228. This Court finds that at the closest point, Stewart was approximately 220 feet to 240 feet from the back of the BMW. [WR2:245, 248, 250; Writ Ex. 210]
229. This Court notes that in Dr. Michel's expert opinion, it was physically impossible for Charles Stewart to have made the facial identification of a person exiting the passenger side of the BMW as Stewart had claimed. [Writ Ex. 49, p. 289]
230. This Court notes that in Dr. Michel's expert opinion, Stewart's vision was adversely impacted by distance; low levels of illumination; time limitations; and movement. [WR 2:250; Writ Ex. 49, pp 289-290]
231. This Court finds that Stewart was so far from the BMW that even in daylight it would take super human abilities to make a facial identification. [WR 2:251]
232. This Court finds that Charles Stewart is deceased. [WR2:249]

233. This Court finds that it was not possible for Charles Stewart to see well enough to make facial identifications of any persons exiting the BMW.
234. This Court finds that Gladys Oliver testified at Spencer's trial that barking dogs caused her to look out her window to the alley behind her house. [RR 2:287]
235. This Court finds that Oliver testified that she saw a BMW parked in the alley.
236. This Court finds that Oliver testified that she saw Spencer exit the BMW and run towards the Brackens' yard. [RR 2:291-293, 295, 332]
237. This Court finds that Oliver's window was approximately 123 feet away from the BMW. [WR 2:255; Writ Ex.205]
238. This Court notes that in Dr. Michel's expert opinion, Gladys Oliver could not have made the facial identification of a person exiting the passenger side of the BMW as Gladys Oliver claimed. [WR2:255 – 257]
239. This Court notes that in Dr. Michel's expert opinion, Gladys Oliver's vision was adversely impacted by distance; low levels of illumination; time limitations; and movement. [WR 2:255 – 257]
240. This Court notes that the State retained Dr. James Hyzer, a forensic visual science expert, who conducted an evaluation of the evidence regarding Gladys Oliver's ability to identify Spencer. The State's expert stated in his report that "it is scientifically unreasonable that Gladys Oliver was able to discern and identify, from a distance of 113 feet, the facial features of the two individuals she testifies exited the vehicle." [Forensic Visibility Analysis – State of Texas v. Benjamine Spencer ]

241. This Court finds that it was not possible for Gladys Oliver to see well enough to make facial identifications of any persons exiting the BMW.
242. This Court finds, in light of Dr. Michel's testimony and Dr. James Hyzer's reports, that Gladys Oliver is not a credible witness and is not worthy of belief.
243. The Court finds after observing Gladys Oliver's demeanor and conduct while testifying during the writ hearing that Gladys Oliver is not a credible witness and is not worthy of belief.
244. This Court finds that the identification testimony given by Jimmy Cotton, Charles Stewart, and Gladys Oliver was not truthful.
245. This Court finds that it was physically impossible for Jimmy Cotton, Charles Stewart, and Gladys Oliver to make any facial identification of a person exiting the BMW on March 22, 1987.

### **MICHAEL HUBBARD**

246. This Court finds that Kelvin Johnson and Michael Hubbard were good friends having grown up together in west Dallas. [WR2:101]
247. This Court finds that during the early part of 1987, Hubbard, Johnson, and other were involved in a string of restaurant robberies.
248. This Court finds the last robbery that Johnson, Hubbard, and the others committed was the robbery of the Chez Gerard restaurant. [WR 2:98]
249. This Court finds The Chez Gerard restaurant robbery was on March 28, 1987. [Writ. Ex. 31B, p.189]
250. This Court finds that shortly after the Young murder, Michael Hubbard started talking about the "white man who got killed in West Dallas". [WR2:98, 102]

251. This Court finds that the reference to the “white man who got killed in West Dallas” was a reference to the Jeffery Young abduction/murder.
252. This Court finds Hubbard told Kelvin Johnson that he had robbed the white man who was recently found on a street in west Dallas. [WR2:98]
253. This Court finds Hubbard told Kelvin Johnson that he had robbed the man and put him in the trunk of the car. [WR 2:99]
254. This Court finds Hubbard told Kelvin Johnson not to tell anyone about it. [WR 2:108]
255. This Court finds Hubbard said that he had decided to rob Ninfa’s restaurant at Inwood and Stemmons but that he left because the restaurant had security guards. [WR 2:98, 102; Writ. Ex. 24, pp. 169 -171]
256. This Court finds that Hubbard said that he saw the “white dude” trying to lock the office door. [WR2:108]
257. This Court finds that Hubbard said that the office phone was ringing. [WR 2:98]
258. This Court finds that Hubbard said that the man told him that it was the alarm company. [WR]
259. This Court finds that Hubbard said that he stole a jam box and portable TV. [WR2:110]
260. This Court finds that Hubbard said that he took those items to a cocaine dealer. [WR 2:110]
261. This Court finds that Hubbard said that he parked the car in an alley. [Writ Ex. 32, p. 224]
262. This Court finds that Hubbard said that he ran through the alleys. [Writ Ex. 32, p. 224]

263. This Court finds that Hubbard said that he was afraid that someone may have seen him. [WR 2:115]
264. This Court finds that on April 2, 1987, Johnson was arrested for the restaurant robberies. [WR 2:95, 100, 134; Writ. Ex. 31B, p. 190]
265. This Court finds that when Mitchell was arrested, he was put into the tank with Kelvin Johnson. [WR 2:105, 130]
266. Johnson was aware that Mitchell had attempted to kill himself on two occasions. [WR 2:106]
267. This Court finds that after one of the suicide attempts, Johnson told Mitchell that he knew that he had not killed the white man and that he knew who did. [WR 2:107]
268. This Court finds that during this time, Johnson was represented by Andy Konradi. [WR 2:110]
269. This Court finds that Johnson told his lawyer about what Hubbard had told him about the murder. [WR 2:110]
270. This Court finds that on or about April 15, 1987, Andy Konradi called the Dallas Police Department informing them that his client, Kelvin Johnson, had told him that Michael Hubbard had killed Young. [Writ Ex. 3, p. 39]
271. This Court finds that on April 19, 1987, Det. Briseno interviewed Kelvin Johnson at the police department. [Writ Ex. 3, p. 42; WR 2: 92, 95-96, 121]
272. This Court finds that Johnson told Briseno that he had been sharing a cell with Robert Mitchell who had told Johnson that he was being charged with a murder that he did not commit. [Writ Ex. 3, p. 42]
273. This Court finds that Johnson told Briseno that Mitchell had twice attempted suicide. [Writ Ex. 3, p. 42]

274. This Court finds that Johnson told Briseno that he and Michael Hubbard had an agreement that if they got arrested for the robberies that they would “fall together”. [Writ Ex. 3, p. 42]
275. This Court finds that Johnson told Briseno that he had bonded Hubbard out when he got arrested. [Writ Ex. 3, p. 42]
276. This Court finds that Hubbard did not bond Johnson out. [Writ Ex. 3, p. 42]
277. This Court finds that Johnson felt that Hubbard had left him holding the bag. [Writ Ex. 3, p. 42]
278. This Court finds that because he was upset with Hubbard, Johnson was willing to tell what Hubbard had said about the Young murder. [Writ Ex. 3, p. 42]
279. This Court finds that Johnson told Briseno details of what Hubbard had told him. [WR 2:107-110]
280. This Court finds that Briseno wrote those details in an “Affidavit in any Fact”. [Writ Ex. 32, pp. 223 - 225; WR 2:92, 94]
281. This Court finds that Johnson did not sign that affidavit. [WR 2:92, 94]
282. This Court finds that after Johnson had pled his case and was awaiting transfer to TDC, he had a conversation with Hubbard in the recreation yard at Lew Sterrett. [WR 2:114]
283. This Court finds that Hubbard asked Johnson whether he (Johnson) had said anything to the police about the white man being killed in West Dallas. [WR2:95, 115]
284. This Court finds that a copy of the unsigned statement of Kelvin Johnson was provided to Frank Jackson. [WR 2:20]
285. This Court finds that a jam box, Seiko watch, and money were stolen from Jeffery Young. [WR 4:109; Writ Ex. 33, p. 227]

286. This Court finds that the police never publicly disclosed that a jam box, Seiko watch and money were taken from Young. [WR 4:116]
287. This Court finds that Johnson's statement contained accurate information that was not publicly known at that time. [WR 4:114, 117-118]
288. This Court finds that between the unsigned Affidavit in Fact provided by Kelvin Johnson and the signed statement by Danny Edwards, on their face, the Johnson statement is more consistent with the actual facts of the murder and therefore more credible. [WR 4:182]

### **CONCLUSIONS OF LAW**

289. There was no constitutional error in the trial proceeding.
290. The purpose of criminal proceedings is to separate the guilty from the innocent. From time to time something goes awry in the process by which a defendant is convicted. The error occurs within the judicial system though it happened through no fault of the convicting court or the parties. It is appropriate for the judicial system to correct the error through habeas corpus. Ex parte Tuley, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002)
291. The newly discovered evidence consists of Danny Edwards' testimony that he did not speak directly with Benjamine Spencer.
292. The newly discovered evidence also includes the testimony of Kelvin Johnson as to the confession of Michael Hubbard to the abduction and robbery of Jeffery Young, which confession was much more consistent with the actual facts of the offense than the testimony given by Danny Edwards.

293. The newly discovered evidence also includes the expert testimony of Dr. Paul Michel that the now developed field of forensic visual science conclusively establishes that it was physically impossible for the purported eyewitnesses to make the identification that they claimed.
294. The newly discovered evidence also includes the report of Dr. James Hyzer that the now developed field of forensic visual science conclusively establishes that it was physically impossible for the Gladys Oliver to make the identification that she claimed.
295. A conviction should not be overturned lightly and the burden on the applicant, who has had error-free proceedings, is exceedingly heavy to take into account society's and the State's interest in finality. *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002)
296. To determine whether a habeas applicant has reached this level of proof, the convicting court weighs the evidence of the applicant's guilt against the new evidence of innocence. ID
297. In the instant case, after considering the newly discovered evidence consisting of the expert testimony of Dr. Paul Michel that the three eye witnesses could not have seen what they testified to, the only remaining evidence of Applicant's guilt is the testimony of Danny Edwards which was at best inadmissible hearsay. Thus, there remains no evidence of Applicant's guilt.
298. The applicant has met his burden of proving by clear and convincing evidence that no reasonable juror could have convicted applicant of aggravated robbery in light of the newly discovered evidence. *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex.Crim.App.1996).
299. Applicant has carried his burden of production and persuasion and the writ should issue.

300. **The Court recommends that relief be granted on the grounds of actual innocence.**

|s| R H Magnis

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Judge Rick Magnis  
283<sup>rd</sup> Judicial District Court  
Dallas County, Texas