

II. STATEMENT OF FACTS

Crime, Investigation, and Trial

1. On April 3, 1980, a Dallas County jury found Cornelius Dupree, Jr. ("Applicant" or "Mr. Dupree") guilty of aggravated robbery with a deadly weapon and sentenced him to seventy-five years imprisonment. The crime for which Mr. Dupree was convicted involved the armed robbery of a 26-year-old female ("L.B.") and her male friend, J.P., on November 23, 1979. The offense was committed by two perpetrators who were strangers to both victims. During the offense, both perpetrators forcibly raped L.B.
2. The two perpetrators of the 1979 crime were African American males, both of whom were strangers to the victims. Both victims were white. The assailants approached the victims in the parking lot of a drive-in grocery store and forced them into Mr. P.'s car at gunpoint. Mr. P. was then compelled to drive on the highway, during which time the perpetrators robbed both victims of money and personal property.
3. The perpetrators then instructed Mr. P. to exit the highway and ordered him out of the vehicle. At this time, L.B. attempted to flee the vehicle, but she was pulled back inside by one of the perpetrators. The perpetrators then drove the vehicle away, with L.B. still in it, leaving Mr. P. on the side of the road. Mr. P. contacted police, who arrived at the roadside scene within about ten minutes. After he told the police what had occurred, the police and Mr. P. began a search for his vehicle and L.B.
4. The two assailants proceeded to drive L.B. to a nearby park, where each assailant vaginally raped her inside the vehicle. While each perpetrator raped L.B., the other perpetrator threatened her with a gun. After discussing whether they should kill L.B., the assailants instead forced her out of the car and threatened to find and kill her if she reported the incident to the police. They kept her I.D. card, informing her that they knew where she lived based on the address on the card.
5. Before they fled, the perpetrators threw the victim's pants out of the car. Among the articles stolen from the victim during the attack was a coat made of light and dark brown rabbit fur.
6. After the perpetrators drove away, L.B. ran towards the nearest highway and collapsed on the edge of the roadway and the median. The entire incident lasted approximately one hour.

7. A passing police vehicle discovered L.B., who was unconscious, a short while later. After reviving her, the police reunited the two victims and escorted them to a nearby precinct, where they were interviewed separately.
8. Following the interviews, the victims were taken to Parkland Hospital to treat the female victim and to conduct a sexual assault examination. At the hospital, L.B. informed medical personnel that prior to the rape earlier that evening, her last act of sexual intercourse occurred one month earlier. (*See* Exh. A annexed hereto (redacted)).
9. Both victims described the assailants as black males with dark complexions. The first perpetrator was described as being approximately 6 feet tall and weighing 180 pounds, wearing a white stocking cap and a white waist-length coat. The victims reported that he had a short-length “Afro” hairstyle and a moustache. The second perpetrator was described as approximately 5 feet 6 inches and weighing 150 pounds. The victims reported that he had a medium-length “Afro” hairstyle and wore a blue jacket and a light brown beanie cap.
10. The victims reported varying heights for the assailants. The investigating officer who took the descriptions from both victims later testified that she decided to merge the victims’ recollections to create a single, composite description of the perpetrators. Thus, when one victim reported the taller as being 5 feet 10 inches tall, and the other victim reported him as being 6 feet 2 inches tall, the detective averaged these estimations and recorded it as 6 feet tall.
11. Later, Cornelius Dupree was identified by both victims as being the man they believed to be Perpetrator #1, and his co-defendant, Anthony Massingill, as Perpetrator #2. At the time of his arrest, Mr. Dupree was determined by police to be 5 feet 8 inches tall and weighing 150 pounds.
12. During the medical examination of the female victim, standard samples of physical evidence were collected, including vaginal swabs and vaginal smear slides, pubic hair combings, pubic hair cuttings, and reference blood samples. Reference samples were also collected from Mr. Dupree and Mr. Massingill.
13. This evidence was examined at the Southwest Institute of Forensic Sciences (“SWIFS”) in Dallas. On November 27, 1979, Benita E. Harwood and Sarah (Sally) B. Williams of SWIFS published a

report of this examination indicating semen was present on the vaginal swabs and slides. In addition, the report indicated that spermatozoa were present in the vaginal smear slide. These findings were consistent with the victim's contemporaneous report to police that she believed both perpetrators had ejaculated.

14. SWIFS proceeded to conduct ABO blood group (serology) testing on the vaginal swabs. The blood group antigens detected were consistent with the victim's own, which did not permit any conclusions to be drawn about the potential blood type(s) of the perpetrators.
15. On December 1, 1979, while on their way to a party, Mr. Dupree and Mr. Massingill were stopped, frisked, and taken into custody as they walked past a police vehicle on a street approximately two miles from the location where the victims were originally accosted.
16. Upon information and belief, police initially stopped Mr. Dupree and Mr. Massingill because they appeared roughly similar to the descriptions of two African-American suspects whom the police were seeking in connection with a separate investigation (a two-perpetrator rape and robbery committed against a different victim, "D.B.," on the previous day, November 30, 1979.) A Dallas County grand jury later declined to issue a True Bill of Indictment against Mr. Dupree (a/k/a "no-billed" the charges) for the crimes against D.B.
17. Upon arrest, police recovered a weapon from the person of Anthony Massingill; Mr. Dupree was unarmed. The handgun found on Mr. Massingill was identified by both victims at trial as one they believed was generally similar in appearance to the gun used during the attack, though neither victim had been able to see either the handle or the barrel end of the weapon during the incident.
18. On December 2, 1979, police showed an array of six photographs, which included photographs of Mr. Dupree and Mr. Massingill, to each victim separately. Mr. P. did not identify any of the individuals depicted in the array as the perpetrators. He later testified that at the time he viewed the photos, his vision was impaired due to a stigmatism that, without medication, blurred his vision for approximately one hour after waking. He claimed that when the police showed him the photographs he had just woken up and had not used any medication.

19. Later that day, police showed the same photo arrays to the female victim, L.B., who identified Mr. Dupree and Mr. Massingill as the men she believed were the perpetrators.
20. At the identification hearing and trial, which took place approximately four months after the attack, both victims identified Mr. Dupree and Mr. Massingill in court as the men they believed were the perpetrators. During the identification hearing, however, L.B. repeatedly misidentified a photo of Mr. Massingill as Mr. Dupree (even though Mr. Dupree was in the courtroom at that time) before finally identifying it as Mr. Dupree's photograph.
21. Five or six days after the rape and robbery, and before Mr. Dupree and Mr. Massingill were arrested, two black males entered a grocery store in Dallas and tried to sell a coat that matched the description of the coat the female victim had lost during the attack.
22. When police questioned the two women employed at the store and showed them Mr. Dupree's photograph, however, the women did not identify him as one of the men who had attempted to sell the coat.
23. Mr. Dupree's conviction was premised almost entirely on the victims' cross-racial identification of him as Perpetrator #1.
24. The female victim (L.B.), however, was extremely traumatized throughout the attack, continuously crying and shouting at the assailants. One of the patrolmen who discovered her on the highway reported that she was "hysterical" upon regaining consciousness. Moreover, during the attack, L.B. was not wearing the glasses for which she had a prescription to correct her nearsightedness.

Conviction and Sentence

25. On April 3, 1980, a jury convicted Mr. Dupree of the aggravated robbery of J.P. and set punishment at seventy-five years' imprisonment.
26. After this conviction, the State dismissed the charge against Mr. Dupree for aggravated rape arising from this same incident. As recorded in the trial prosecutor's Motion to Dismiss Prosecution, the dismissal was sought due to the expense involved in a subsequent jury trial and in light of the fact that a conviction on the aggravated rape charge would not have resulted in the imposition

of any additional prison time, given the term to which Mr. Dupree had already been sentenced on the aggravated robbery conviction.

27. Mr. Dupree was incarcerated in the Texas Department of Corrections in May, 1980. He was released on July 22, 2010, having served thirty years of his seventy-five year sentence.
28. During his incarceration, Mr. Dupree appealed and/or filed collateral challenges to his conviction on a number of grounds. Each challenge to his conviction was denied.
29. Applicant has previously filed three petitions for a writ of habeas corpus. The last one, filed *pro se* on May 16, 2005, did not challenge the instant conviction, but did challenge the procedures through which parole had been denied to him, including his refusal to admit guilt and to enroll in a sex offender treatment program as a prerequisite to obtaining parole. The State court denied this application without written order.¹
30. Each of Applicant's prior writs were filed and adjudicated well before Applicant obtained the exclusionary DNA test results upon which the claims for relief in the instant Application are based.

Post-Conviction DNA Testing

31. Forensic DNA testing was unavailable in any form at the time of Mr. Dupree's 1980 trial.
32. At the request of the Innocence Project, counsel for Mr. Dupree, the Dallas County District Attorney's Office initiated a search for physical evidence pertaining to Mr. Dupree's case in 2006 that might be suitable for DNA testing. On July 6, 2007, Michael Casillas, Esq., Assistant District Attorney, was informed by Vicki Hall and Angela Thomas of SWIFS that the only evidence in this case located at SWIFS was the female victim's pubic hair combings and cuttings. (*See Exhibit B attached hereto.*)
33. Over the next two years, the parties conducted an exhaustive search for additional items of DNA evidence (including, in particular, the victim's vaginal swabs and slides), to no avail.

¹ The only published record pertaining to any of Applicant's appeals and/or writs is *Dupree v. Quarterman*, 2006 WL 3091598 (N.D. Tex. October 31, 2006). That decision reflects the dismissal of Applicant's *pro se* federal habeas corpus petition (filed in July, 2006), and notes that the petition raised "issues of parole revocation" similar to that raised by Applicant in his most recent state habeas petition.

Upon information and belief, those items were previously destroyed and/or disposed of pursuant to SWIFS and Dallas Police Department policy.

34. With consent of the State, the Innocence Project arranged for DNA testing of the pubic hair combings and cuttings to determine whether Mr. Dupree and/or Mr. Massingill could be eliminated as the source of any spermatozoa found.
35. In accordance with an agreement between the Dallas County District Attorney's Office and the Innocence Project, the relevant physical evidence was sent from SWIFS to Forensic Science Associates ("FSA") in Richmond, California, to undergo forensic DNA testing.
36. On May 10, 2010, FSA issued a report of its initial findings. After conducting a microscopic examination of the hairs to identify whether sperm was present on the evidence, FSA determined that, while no biological deposits appeared on the pubic hair combings, a "very large quantity" of spermatozoa and "many" skin cells were present on the victim's pubic hair cuttings.
37. FSA extracted the sperm and skin cells from the victim's pubic hair cuttings and amplified these cells using Polymerase Chain Reaction ("PCR") DNA technology. After using the differential extraction method of analysis to isolate spermatozoa cells from other forms of DNA material, FSA determined that the biological material on the victim's pubic hair cuttings contained three genetic profiles: two male and one female.
38. Each sample was then subjected to two types of DNA testing: Standard Tandem Repeat (STR) and Y-STR methodology. STR testing is a highly sensitive and discriminating form of DNA testing that may yield interpretable male or female DNA profiles unique to the human population. Y-STR technology analyzes up to 17 different DNA markers found on the "Y" chromosome, which only males possess; as such, it permits analysis of trace amounts of male DNA and may determine with certainty the number of male contributors in a given sample.
39. FSA performed STR and Y-STR DNA testing on the material obtained from the victim's pubic hair cuttings. Its initial report, dated May 10, 2010, reported that it had identified two distinct male DNA profiles (one "major" and one "minor" profile) from the spermatozoa found in the pubic hair cuttings of the female victim in this case, each of which would be suitable for comparison to the

defendants. (*See* Exhibit C attached hereto) (to be filed under seal by agreement of the parties in order to preserve confidentiality of victim information).

40. After conducting the first round of testing, FSA proceeded to conduct testing on reference samples from Mr. Dupree and Mr. Massingill. These samples were collected by representatives of the State at the Dallas County Jail in June, 2000, under strict conditions designed to ensure the samples' integrity and chain of custody.
41. On July 30, 2010, FSA completed its DNA testing on the samples from both defendants and issued a second written report. The report concluded that both Mr. Dupree and Mr. Massingill were conclusively excluded as the sources of the male DNA profiles found in the sperm fraction of the victim's pubic hair cuttings – *i.e.*, the DNA in the spermatozoa was deposited by two males other than Mr. Dupree or Mr. Massingill. (*See* Exhibit D annexed hereto) (to be filed under seal by agreement of the parties in order to preserve confidentiality of victim information).
42. The crime for which Mr. Dupree was convicted involved the rape by two male perpetrators against a female victim. At the time of the assault, the victim was separated from her husband. During her medical examination after the attack, the female victim told the examining physician that she had last engaged in sexual intercourse approximately one month prior to the incident. The DNA profiles reflected in Exhibit B were obtained from seminal fluid in the victim's pubic hair, further indicating relatively recent time of deposit.
43. Although Mr. Dupree was convicted of robbery rather than rape, the State alleged at trial, and the record clearly shows, that there were only two perpetrators involved in this single incident, and that the individuals who perpetrated the rape against Ms. B also committed the aggravated robbery for which Mr. Dupree was convicted.
44. In light of the foregoing undisputed facts, the STR and Y-STR DNA results therefore demonstrate that the two male DNA profiles on the pubic hair cuttings came from the two assailants.
45. The parties, thereafter, agreed to conduct further DNA testing to confirm that the female DNA profile found on the evidence in question corresponds to L.B.'s genetic profile. L.B. provided the State with a buccal swab reference sample for comparison

purposes in October, 2010. The State sent the sample to FSA, maintaining proper chain of custody, and was received by FSA on October 26, 2010.

46. In a report dated December 15, 2010, FSA confirmed that the female DNA from the non-sperm fraction extracted from the pubic hair cutting cell debris on the hairs in question is consistent with the DNA sample from the victim. (*See* Exhibit E annexed hereto) (to be filed under seal by agreement of the parties in order to preserve confidentiality of victim information). This testing thereby confirms that the hairs submitted to FSA for DNA testing are the same samples collected from L.B. immediately after the offense at issue.
47. Because the parties agree, and the undisputed facts of the case establish, that the male DNA profiles obtained by FSA came from the two perpetrators in this case, and Applicant is conclusively excluded as the source of each of these profiles, the DNA test results establish his actual innocence.
48. Accordingly, he is entitled to habeas corpus relief from his conviction and sentence under TEX. CODE CRIM. PROC. ANN. Art. 11.07. *See Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).
49. The Dallas County District Attorney's Office has informed undersigned counsel that it agrees that the new DNA test results establish that Cornelius Dupree, Jr., is actually innocent of aggravated robbery and will fully support the instant application for habeas corpus relief to this Court.

III. RELIEF REQUESTED

- A. That this Court, after considering the evidence presented in this petition and reviewing a written response that will be filed by the State, as well as Agreed Findings of Fact and Conclusions of Law to be submitted jointly by the parties, thereafter enter findings of fact consistent with the foregoing stipulations and exhibits; and
- B. That this Court, after considering this newly discovered evidence, enter conclusions of law setting forth that (1) the factual basis for the claim of actual innocence in this petition (*i.e.*, the DNA test results issued in the reports dated July 30, 2010, and December 15, 2010) were unavailable at the time Applicant filed previous applications for relief under this Article; and (2) that the newly discovered evidence

would have convinced the original jury, or a new jury, by clear and convincing evidence, that the Applicant is actually innocent; and

- C. That this Court recommend that habeas corpus relief be granted under Article 11.07, Texas Code of Criminal Procedure and *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

WHEREFORE, PREMISES CONSIDERED, Applicant, with the support of the District Attorney's Office, respectfully requests this Court enter findings of fact and conclusions of law in accord with the aforementioned history and requests.

Dated this ____ day of January, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have hand-delivered a true and correct copy of the foregoing Application for a Writ of Habeas Corpus and Memorandum in Support of Application to Michael Ware, Dallas County District Attorney's Office, Appellate Division, 133 N. Riverfront Blvd., LB 19, Dallas, Texas 75207, on this _____ day of January, 2011.

Robert C. Hinton, Esq.