

Application for Writ of Habeas Corpus on May 24, 2005. The Court of Criminal Appeals denied relief without a written order on June 7, 2006. This is Applicant's fourth Application for Writ of Habeas Corpus.

II.

ACTUAL INNOCENCE

An applicant asserting that newly discovered or previously unavailable evidence demonstrates his actual innocence of the original offense must prove, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence. *See Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1997). The Court must decide whether the newly discovered evidence, considered in light of the other evidence presented at trial, would have convinced the jury to acquit the applicant. *Elizondo*, 947 S.W.2d at 209. The level of confidence required is exceedingly high and the Court must be convinced that the new facts "unquestionably establish" the applicant's innocence. *See Ex parte Thompson*, 153 S.W.3d 416, 425 (Tex. Crim. App. 2005) (Cochran, J., concurring). The "new" evidence which unquestionably establishes the applicant's innocence must be compared to the "old" evidence that was offered at the original trial. *Id.* at 426. The Court must then decide whether a rational trier of fact would necessarily acquit applicant based upon the comparison of the "old" and the "new" evidence. *Id.* at 427.

Additionally, where the applicant has previously filed an application for habeas corpus relief, the applicant must also establish that (1) the current claims and issues have not been and could not have been presented previously in an original

application or in a previously considered application filed under article 11.07 of the Texas Code of Criminal Procedure because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or (2) by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07(4)(a) (Vernon's Supp. 2010).

III.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On November 23, 1979, at approximately 10:00 p.m. in the City of Dallas, Dallas County, Texas, J.P. and his twenty-six year old, female companion, L.B., stopped at a liquor store located at 5405 Dolphin Road so that J.P. could purchase some cigarettes and L.B. could use the pay phone.
2. While using the pay phone, L.B. noticed two African-American males who approached to use the pay phone next to her. When L.B. finished her phone call, she returned to J.P.'s vehicle. J.P. helped her get into the passenger side of the vehicle and he went around the front of the vehicle to get into the driver's seat. One of the perpetrators, later identified as Applicant, followed J.P., produced a handgun, and ordered J.P. into the vehicle. The perpetrator entered the vehicle, got into the backseat, and put the gun to J.P.'s head.

3. The second perpetrator, later identified as Anthony Massingill, Applicant's co-defendant, ordered L.B. to move over in the front seat, while he forced his way into the vehicle's front seat next to L.B.
4. The perpetrators ordered J.P. to drive on the highway. While J.P. was driving, the perpetrators robbed L.B. and J.P. of their money.
5. The perpetrators then instructed J.P. to exit the highway and ordered him out of the vehicle. At this time, L.B. attempted to flee the vehicle, but was pulled back inside by one of the perpetrators. The perpetrators then drove the vehicle away, with L.B. still in it, leaving J.P. on the side of the road. J.P. contacted police, who arrived at the roadside scene within about ten minutes. After he told the police what had occurred, he joined the police in search for his vehicle and L.B.
6. Meanwhile, the two assailants drove L.B. to a nearby park, where each assailant vaginally sexually assaulted her inside the vehicle. While one perpetrator sexually assaulted her, 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.
7. After the perpetrators drove away, L.B. ran towards the nearest highway and collapsed, unconscious, on the edge of the roadway and the median. The entire incident lasted approximately one hour.

8. A passing police vehicle discovered L.B. a short while later. After reviving her, the police reunited the two victims and escorted them to a nearby police substation, where they were interviewed separately.
9. L.B. and J.P. described the first perpetrator, who was later identified as Applicant, as being an African-American male, approximately twenty-three years old, 180 pounds, 6 feet tall, with a moustache. The victims reported this perpetrator wearing a white stocking cap and a white waist-length jacket.¹
10. The second perpetrator, who was later identified as Mr. Massingill, was described as being a dark-complected African-American male, approximately twenty-three years old, 150 pounds, 5 feet 6 inches tall, with a medium-length “afro” hairstyle. The victims reported this perpetrator wearing a blue jacket and a light brown beanie cap.
11. Following the interviews, L.B. was taken to Parkland Hospital for a sexual assault examination. Pursuant to the examination, the hospital collected a sexual assault kit, which included the victim’s vaginal swab, vaginal smear slide, pubic hair combings, pubic hair cuttings, and a reference blood sample. Additionally, L.B. informed medical personnel that prior to the sexual assault earlier that evening, her last act of sexual intercourse occurred one month earlier.

¹ A Dallas police officer testified at trial that the police combined the descriptions given by both L.B. and J.P. in order to come up with the listed description for the suspects in the police report. For example, the victims gave a description of the “tall” perpetrator – who was later identified as Applicant – as being between 5 feet 10 inches and 6 feet 2 inches tall. So, the police “went between” the two heights and listed a reported height of 6 feet tall. (RR: 161-64).

12. Five or six days after the rape and robbery, and before Applicant and Mr. Massingill were arrested, the police discovered that two African-American males had entered a small grocery store in Dallas, located approximately two miles south from where the victims were originally accosted, and tried to sell a rabbit-fur coat that matched the description of the coat L.B. lost during the attack. J.P.'s car, taken by the perpetrators, was also found abandoned in the parking lot of that same store.
13. During the course of the investigation, the police interviewed the two women employed at the store and determined that Applicant was not one of the men who had attempted to sell the coat.
14. On December 1, 1979, at approximately 11:15 p.m., Applicant and Mr. Massingill were stopped, frisked, and taken into custody as they walked on a street approximately two miles from the location where the victims in the instant case were originally accosted.
15. Police initially stopped these two men 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 sexual assault and robbery committed against different victims on the previous day, November 30, 1979).²

² A Dallas County grand jury later declined to issue a True Bill of Indictment against Applicant for these offenses.

16. Upon arrest, police recovered a four-barrel handgun from the person of Anthony Massingill; Applicant was unarmed. At trial, both victims testified that the handgun found on Mr. Massingill at the time of his arrest on December 1, 1979 was generally similar in color and size to the gun used during their attack, though neither victim had been able to see either the handle or the barrel end of the weapon during the incident.
17. On December 2, 1979, L.B. selected Applicant's and Mr. Massingill's photographs from a photo array as the individuals she believed to be the perpetrators. J.P., however, did not identify either defendant in the same photo array.
18. Evidence from the sexual assault kit was examined at the Southwest Institute of Forensic Sciences ("SWIFS") in Dallas after the offense. On November 27, 1979, SWIFS issued a report revealing that acid phosphatase, indicative of seminal fluid, was detected in the vaginal swab. Additionally, 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.

19. At the identification hearing and trial, which took place approximately four months after the attack, both victims identified Applicant in court as one of the two perpetrators.³
20. At trial, Applicant presented a cross-racial misidentification defense. He did not dispute that a violent rape and robbery had occurred, rather he maintained that the victims had misidentified him as one of the perpetrators due, in part, to viewing the actual perpetrators under highly traumatic and stressful conditions during the offense. Applicant also presented testimony, and argued, that he was not either one of the men who tried to sell L.B.'s coat soon after the offense at the same small grocery store where J.P.'s car had been abandoned.
21. On April 3, 1980, a jury convicted Applicant of the aggravated robbery of J.P., and set punishment at seventy-five years' imprisonment.
22. After this conviction, the State dismissed the charge against Applicant for the aggravated rape of L.B. 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

³ During the identification hearing, however, L.B., on cross examination, initially misidentified a photo of Mr. Massingill as Applicant (even though Applicant was in the courtroom at that time) before finally identifying it as Applicant's photograph. (RR: 21-22). On redirect examination, the prosecutor clarified the record to show that when L.B. made this misidentification, defense counsel was holding the Polaroid photo of Mr. Massingill for identification by the witness, who was on the witness stand, all the way from counsel table. (RR: 23).

prison time, given the term to which Applicant had already been sentenced on the aggravated robbery conviction.

23. Applicant was incarcerated in the Texas Department of Corrections in May, 1980. He was released on parole on July 22, 2010, having served thirty years of his seventy-five year sentence.
24. During his incarceration, Applicant appealed and/or filed collateral challenges to his conviction on a number of grounds. Each challenge to his conviction was denied.
25. Each of Applicant's prior writs were filed and adjudicated well before Applicant obtained the exclusionary DNA test results upon which the claim for relief in the instant Application is based.

Post-Conviction DNA Testing

26. Forensic DNA testing was unavailable in any form at the time of Applicant's trial in 1980.
27. In 2006, at the request of the Innocence Project, counsel for Applicant, the Dallas County District Attorney's Office initiated a search for physical evidence pertaining to Applicant's case that might be suitable for DNA testing. On July 6, 2007, Assistant District Attorney Michael Casillas was informed by SWIFS that the only evidence in this case located at SWIFS was L.B.'s pubic hair combings and cuttings.

28. 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. Upon information and belief, those items were previously destroyed and/or disposed of pursuant to SWIFS and Dallas Police Department policy.
29. With consent of the State, the Innocence Project arranged for DNA testing of the pubic hair combings and cuttings to determine whether Applicant and/or Mr. Massingill could be eliminated as the source of spermatozoa found, if any.
30. In accordance with an agreement between the Dallas County District Attorney's Office and the Innocence Project, the sole remaining physical evidence was sent from SWIFS to Forensic Science Associates ("FSA") in Richmond, California, to undergo forensic DNA testing.
31. 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" epithelial cells were present on the victim's pubic hair cuttings.
32. FSA extracted the sperm and epithelial cells from a washing of L.B.'s pubic hair cuttings and amplified these cells using Polymerase Chain Reaction ("PCR") DNA technology.

33. After using the differential extraction method of analysis to isolate sperm cells, FSA performed both STR and Y-STR DNA testing on the material obtained from L.B.'s pubic hair cuttings. FSA reported that it had identified two distinct male DNA profiles (one "major" and one "minor" profile) from the spermatozoa found in L.B.'s pubic hair cuttings in this case, each of which would be suitable for comparison to the defendants.
34. After conducting the first round of testing, FSA proceeded to conduct testing on buccal swab reference samples obtained from Applicant and Mr. Massingill. These samples were collected by representatives of the State at the Dallas County Jail in June, 2010, under strict conditions designed to ensure the samples' integrity and chain of custody.
35. On July 30, 2010, FSA issued a written report concluding that, after comparing the known DNA profiles of the defendants against the profiles obtained from the washing of the pubic hair cuttings, both STR and Y-STR testing established that Applicant and Mr. Massingill were excluded as the sources of each of the male DNA profiles found in the sperm fraction of the cell debris harvested from L.B.'s pubic hair cuttings – *i.e.*, the spermatozoa was deposited by two males other than Applicant or Mr. Massingill.
36. 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.

37. 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. 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.
38. Although Applicant was convicted of aggravated robbery rather than aggravated rape, the State alleged at trial, and the record clearly shows, that there were only two perpetrators involved in this single, criminal transaction, and that the individuals who perpetrated the sexual assault against L.B. also committed the aggravated robbery for which Applicant was convicted.
39. This Court FINDS that the two male DNA profiles derived from the sperm fraction extracted from the cell debris during the washing of the pubic hair cuttings came from the two assailants.
40. The Court FURTHER FINDS that neither Applicant nor Mr. Massingill were involved in this criminal transaction, as evidenced by the STR and Y-STR DNA testing results excluding them as contributors of the spermatozoa found adhered to L.B.'s pubic hair cuttings.

41. This Court FINDS that the current claims and issues presented by Applicant in this writ have not been and could not have been presented previously in an original application or in a previously considered application filed under art. 11.07, because the legal and factual basis for his claim was unavailable on the date Applicant filed his previous application.
42. This Court FINDS that Applicant has established all of the prerequisites that entitle him to relief under art. 11.07.
43. This Court has weighed the evidence presented in this Application for Writ of Habeas Corpus and FINDS that the evidence is credible and that it is newly discovered evidence.
44. This Court FINDS that Applicant has established by clear and convincing evidence that no reasonable juror would have convicted him of this offense in light of the new evidence.
45. This Court FINDS that Applicant is actually innocent of the offense for which he was charged and convicted.
46. This Court FURTHER FINDS that Applicant is entitled to habeas corpus relief from his conviction and sentence under article 11.07 and *Elizondo*.

ORDERS OF THE COURT

In implementing the Court's Findings of Fact and Conclusion of Law, the Clerk will:

1. Prepare a transcript of the papers in this cause and transmit the Court's Findings and Order, including the Judgment, Sentence, Indictment, docket sheets, and other exhibits and evidentiary matter filed in the trial records of this cause, to the Court of Criminal Appeals as provided by Article 11.07, of the Texas Code of Criminal Procedure.
2. Send a copy of these Findings of Fact and Conclusions of Law, and the Order thereon, to the Applicant and his counsel by depositing the same in the United States Mail.

Signed and entered this ____ day of January, 2011.

PRESIDING JUDGE
CRIMINAL DISTRICT COURT NO. 2

AGREED AS TO BOTH FORM AND SUBSTANCE:

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