

**COURT OF CRIMINAL APPEALS OF TEXAS
APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM FINAL FELONY CONVICTION
UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07**

INSTRUCTIONS

- 1. You must use the complete form, which begins on the following page, to file an application for a writ of habeas corpus seeking relief from a final felony conviction under Article 11.07 of the Code of Criminal Procedure. (This form is not for death-penalty cases, probated sentences which have not been revoked, or misdemeanors.)**
- 2. The district clerk of the county in which you were convicted will make this form available to you, on request, without charge.**
- 3. You must file the entire writ application form, including those sections that do not apply to you. If any pages are missing from the form, or if the questions have been renumbered or omitted, your entire application may be dismissed as non-compliant.**
- 4. You must make a separate application on a separate form for each judgment of conviction you seek relief from. Even if the judgments were entered in the same court on the same day, you must make a separate application for each one.**
- 5. Answer every item that applies to you on the form. Do not attach any additional pages for any item.**
- 6. You must include all grounds for relief on the application form as provided by the instructions under item 17. You must also briefly summarize the facts of your claim on the application form as provided by the instructions under item 17. Each ground shall begin on a new page, and the recitation of the facts supporting the ground shall be no longer than the two pages provided for the claim in the form.**
- 7. Legal citations and arguments may be made in a separate memorandum that complies with Texas Rule of Appellate Procedure 73 and does not exceed 15,000 words if computer-generated or 50 pages if not.**
- 8. You must verify the application by signing either the Oath Before Notary Public or the Inmate's Declaration, which are at the end of this form on pages 11 and 12. You may be prosecuted and convicted for aggravated perjury if you make any false statement of a material fact in this application.**
- 9. When the application is fully completed, mail the original to the district clerk of the county of conviction. Keep a copy of the application for your records.**
- 10. You must notify the district clerk of the county of conviction of any change in address after you have filed your application.**

Case No. _____
(The Clerk of the convicting court will fill this line in.)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM FINAL FELONY CONVICTION
UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

NAME: George Robert Powell III

DATE OF BIRTH: January 14, 1973

PLACE OF CONFINEMENT: Walls Unit, Huntsville, Texas

TDCJ-CID NUMBER: 01612668 **SID NUMBER:** 07040098

(1) **This application concerns** (check all that apply):

- | | |
|---------------------------------------|----------------------------------------------------------------------------------|
| <input type="checkbox"/> a conviction | <input type="checkbox"/> parole |
| <input type="checkbox"/> a sentence | <input type="checkbox"/> mandatory supervision |
| <input type="checkbox"/> time credit | <input type="checkbox"/> out-of-time appeal or petition for discretionary review |

(2) **What district court entered the judgment of the conviction you want relief from?**
(Include the court number and county.)

27th Judicial District Court, Bell County

(3) **What was the case number in the trial court?**

63,436

(4) **What was the name of the trial judge?**

Judge Joe Carroll

(5) Were you represented by counsel? If yes, provide the attorney's name:

Michael Magana and Bobby Barina

(6) What was the date that the judgment was entered?

November 20, 2009

(7) For what offense were you convicted and what was the sentence?

Aggravated robbery

(8) If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?

Not applicable

(9) What was the plea you entered? (Check one.)

guilty-open plea

guilty-plea bargain

not guilty

nolo contendere/no contest

If you entered different pleas to counts in a multi-count indictment, please explain:

Not applicable

(10) What kind of trial did you have?

no jury

jury for guilt and punishment

jury for guilt, judge for punishment

(11) Did you testify at trial? If yes, at what phase of the trial did you testify?

Yes, at punishment

(12) Did you appeal from the judgment of conviction?

G yes

G no

If you did appeal, answer the following questions:

(A) What court of appeals did you appeal to? Third Court of Appeals

(B) What was the case number? 03-09-00730-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name:

Jeffrey D. Parker

(D) What was the decision and the date of the decision? Affirmed, April 15, 2011

(13) Did you file a petition for discretionary review in the Court of Criminal Appeals?

G yes

G no

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? PD-0667-14

(B) What was the decision and the date of the decision? Refused, Nov. 19, 2014

(14) Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *this conviction*?

G yes

G no

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? WR-80,713-01

(B) What was the decision and the date of the decision? Granted, April 30, 2014

(C) Please identify the reason that the current claims were not presented and could not have been presented on your previous application.

The previous application did not challenge the conviction. It requested
permission to file a pro se PDR, which had previously been denied as
untimely.

(15) Do you currently have any petition or appeal pending in any other state or federal court?

G yes

G no

If you answered yes, please provide the name of the court and the case number:

(16) If you are presenting a claim for time credit, have you exhausted your administrative remedies by presenting your claim to the time credit resolution system of the Texas Department of Criminal Justice? (This requirement applies to any final felony conviction, including state jail felonies)

G yes

G no

If you answered yes, answer the following questions:

(A) What date did you present the claim? Not applicable

(B) Did you receive a decision and, if yes, what was the date of the decision?

Not applicable

If you answered no, please explain why you have not submitted your claim:

- (17) **Beginning on page 6, state *concisely* every legal ground for your claim that you are being unlawfully restrained, and then briefly summarize the facts supporting each ground. You must present each ground on the form application and a brief summary of the facts. *If your grounds and brief summary of the facts have not been presented on the form application, the Court will not consider your grounds.* If you have more than four grounds, use pages 14 and 15 of the form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence. The recitation of the facts supporting each ground must be no longer than the two pages provided for the ground in the form.**

You may include with the form a memorandum of law if you want to present legal authorities, but the Court will *not* consider grounds for relief set out in a memorandum of law that were not raised on the form. The citations and argument must be in a memorandum that complies with Texas Rule of Appellate Procedure 73 and does not exceed 15,000 words if computer-generated or 50 pages if not. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum.

GROUND ONE:

CLEAR AND CONVINCING NEW EVIDENCE, ESTABLISHES THAT APPLICANT,

GEORGE ROBERT POWELL III, IS INNOCENT.

FACTS SUPPORTING GROUND ONE:

1.A new, reliable, and accurate, scientific analysis of the store’s security video confirms that the actual perpetrator of this crime was no taller than 5’9.4”, and could have been as short as 5’5.8”.

Applicant, George Powell is 6’3” tall and is, therefore, scientifically excluded as the perpetrator.

2.One of the State’s key trial witnesses, Demetric Smith, who testified that Applicant admitted to the robbery when the two of them were incarcerated together in the Bell County Jail,has recanted that testimony.Smith has directly notified the Bell County District Attorney in a written affidavit, that his state sponsored trial testimony was a lie, and that Applicant never confessed or admitted guilt to him and, in fact, insisted that he was innocent. Smith has also given a detailed, audio-recorded interview,in which he explained,among other things,that he fabricated the lie,and “sold” it to the prosecutors, in order to get favorable treatment from the State as to his own pending criminal matter. 3.New, reliable forensic evidence has established that the voice of the robber, is not the voice of the Applicant, therefore excluding him as the perpetrator of the robbery. 4. At

trial, the State presented the eye-witness testimony of the victim of the 7-11 robbery, Melissa Keen, who had described the robber as 5'6" tall, was subjected to an unreliable pre-trial Identification procedure by Killeen police detective, Karl Ortiz, in which she mistakenly selected the photo of Applicant as that of the man who robbed her. The procedure used by Ortiz was unreliable and has been proven to cause mistaken eye-witness identifications, resulting in innocent people being wrongfully convicted. Because the technique used by Ortiz with Keen in 2008 has a proven history of producing wrongful convictions, Texas passed legislation in 2011, subsequent to Applicant's conviction, requiring law enforcement to cease using the unreliable technique Ortiz's used with Keen. Among other flaws, Ortiz did not administer the photographic array in a blind manner or in a manner consistent with other proven or supported best practices designed to prevent opportunities to influence the witness. Ortiz's outdated and prejudicial techniques unduly influenced Melissa Keen, who had described the perpetrator as 5'6", to mistakenly identify the photograph of the 6'3" Applicant.

GROUND TWO:

STATE SPONSORED PERJURY DEPRIVED GEORGE ROBERT POWELL III OF DUE

PROCESS OF LAW

FACTS SUPPORTING GROUND TWO:

Applicant was convicted of an aggravated robbery of a 7-11 in Bell County, Texas, alleged to

have occurred on or about 06/09/08. Identity was Applicant's entire defensive issue. Applicant

maintained and has continued to maintain that he did not do it, and that the robbery was

committed by some other individual, who is unknown to him. In fact, the eye-witness/victim of the

robbery described the actual robber in a hand-written statement to the police given the night of

the robbery as 5'6". It is undisputed that Applicant is 6'3", nine inches taller than the victim's

description. In addition, the doorway height strips in the 7-11 security video shows the robber

to be approximately 5'7", eight inches shorter than Applicant. At trial, the State called Demetric

Smith as a witness. Mr. Smith testified that he and the Applicant had been housed together in the

Bell County Jail prior to Applicant's trial. He further testified that, on several occasions, Applicant

Admitted to Smith that he was guilty of the robbery he was charged with. Demetric Smith has

now recanted his state sponsored testimony, and has admitted that it was completely false. He has

sent a handwritten, sworn affidavit to Henry Garza, the elected District Attorney of Bell County

and has recently given an extensive, audio recorded statement confirming and further explaining
his state sponsored perjury and his subsequent recantation of that perjury. He now says that
although he and George Powell did talk in jail, Mr. Powell always insisted that he was innocent
and never said that he was guilty. Mr. Smith has explained that because Mr. Powell insisted on
on his innocence and would be going to trial, Smith believed that prosecutors would need
incriminating evidence and would reward him for testimony about Mr. Powell “confessing” to
him. Mr. Smith has stated that this expectation of a reward,in the form of leniency,on his pending
case is what motivated him to fabricate his lie, which he successfully sold to the prosecutors,who
used his perjured testimony at trial. Mr. Smith has stated that he also lied at trial when he stated
that he was not motivated by an expectation of reward from the prosecutors. Mr. Smith’s state
sponsored perjury went to the heart of Applicant’s identity defense. The lies Mr. Smith told
at trial were material and harmful.

GROUND THREE:

THERE IS NEW SCIENTIFIC EVIDENCE, INCLUDING THE STATE'S ORIGINAL

EXPERT'S CHANGED OPINION, THAT WOULD HAVE PREVENTED A CONVICTION.

FACTS SUPPORTING GROUND THREE:

Height was a critical issue at applicant's trial, since all of the witnesses described someone in the

Range of 5'6" to 5'9", and applicant is 6'3". To support their argument that the victims' height

Estimates were not accurate, the State used an expert, Michael Knox. Although he had never

Before estimated height based on photos or videos, he testified at trial that the robber was at least

6'1". Since the time of trial, Knox has been presented with the work of other experts, and has

revised his estimate to 5'10". The State also obtained another expert, who now says the

testimony provided by Knox at trial was "not supportable". With this new evidence, applicant

can establish by a preponderance of the evidence that he would not have been convicted at trial.

GROUND FOUR:

THE STATE USED MATERIALLY FALSE EVIDENCE CONCERNING THE HEIGHT OF
THE ROBBER, WHICH VIOLATED APPLICANT’S RIGHT TO DUE PROCESS

FACTS SUPPORTING GROUND FOUR:

Due process is violated whenever materially false testimony is presented by the state at trial,
even if no one recognizes it was false at the time. As established above, the State’s new expert
now recognizes that the testimony regarding the height testimony provided by Knox was false.
Since applicant’s defense was based on the argument that the identification was mistaken and
that he was significantly taller than the eye-witness descriptions of the robber there should be no
doubt this false “expert” testimony was material and contributed to his conviction.

GROUND FIVE:

APPLICANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE

FAILURE TO OBTAIN AN EXPERT TO REVIEW/REBUT THE TESTIMONY BY KNOX

FACTS SUPPORTING GROUND FIVE:

As already noted, the testimony provided by Knox was a critical part of the State's case. Counsel

made no attempt to rebut or explain it, and the failure to provide another expert was emphasized

by the State in closing arguments. As seen above, had they obtained their own expert, they could

have obtained testimony that supported their defense. They could have also established that

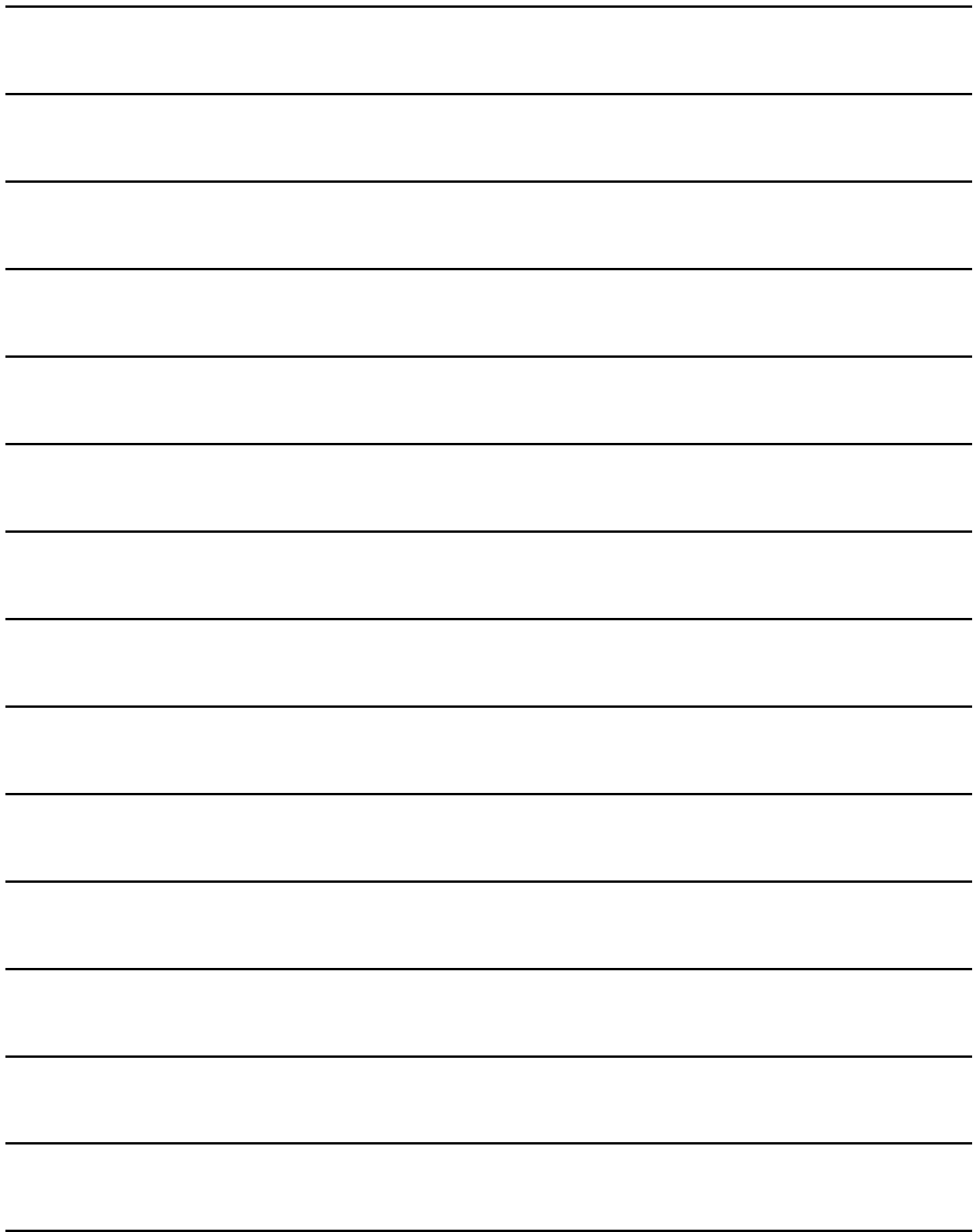
Knox's calculations-and therefore his estimates-are wrong. Knox's new evidence is based on

recalculating his original data, and not on new evidence. He could have done that if the errors

had been pointed out to him prior to trial, as they were recently. Applicant was prejudiced by the

failure to secure an expert, because he was left without any basis for challenging Knox's false

and very damaging testimony.



GROUND SIX:

APPLICANT’S TRIAL COUNSEL WERE INEFFECTIVE IN THEIR FAILURE TO SECURE

AN EXPERT TO COMPARE APPLICANT’S VOICE TO THE ROBBER’S

FACTS SUPPORTING GROUND SIX:

Some witnesses in this case were asked to listen to the audio of an uncharged robbery, which

Police believed was also committed by Applicant. The witnesses positively identified the voice

in the uncharged robbery, as the same as the man who robbed them, who they identified as

the Applicant. The victims in the uncharged case however, stated applicant was not the person

who robbed them. Counsel did not obtain an expert to review the audio, which could have been

easily done. An audio analysis was done after trial, and the results show that the voice did not

belong to applicant, which corroborates the victims in the uncharged case who said Applicant

was not the robber. Since establishing applicant did not commit the uncharged robbery

establishes that he did not commit the charged robbery in this case, he was prejudiced by the

failure to obtain an expert.

WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE MAY BE ENTITLED IN THIS PROCEEDING.

VERIFICATION

This application must be verified or it will be dismissed for non-compliance. For verification purposes, an applicant is a person filing the application on his or her own behalf. A petitioner is a person filing the application on behalf of an applicant, for example, an applicant's attorney. An inmate is a person who is in custody.

The inmate applicant must sign either the *Oath Before a Notary Public* before a notary public or the *Inmate's Declaration* without a notary public. If the inmate is represented by a licensed attorney, the attorney may sign the *Oath Before a Notary Public* as petitioner and then complete *Petitioner's Information*. A non-inmate applicant must sign the *Oath Before a Notary Public* before a notary public unless he is represented by a licensed attorney, in which case the attorney may sign the verification as petitioner.

A non-inmate non-attorney petitioner must sign the *Oath Before a Notary Public* before a notary public and must also complete *Petitioner's Information*. An inmate petitioner must sign either the *Oath Before a Notary Public* before a notary public or the *Inmate's Declaration* without a notary public and must also complete the appropriate *Petitioner's Information*.

OATH BEFORE A NOTARY PUBLIC

STATE OF TEXAS

COUNTY OF _____

_____, being duly sworn, under oath says: I am the applicant / petitioner (circle one) in this action and know the contents of the above application for a writ of habeas corpus and, according to my belief, the facts stated in the application are true.

Signature of Applicant / Petitioner (circle one)

SUBSCRIBED AND SWORN TO BEFORE ME THIS ____ DAY OF _____, 20____.

Signature of Notary Public

PETITIONER=S INFORMATION

Petitioner=s printed name: _____

State bar number, if applicable: _____

Address: _____

Telephone: _____

Fax: _____

INMATE=S DECLARATION

I, _____, am the applicant / petitioner (circle one) and being presently incarcerated in _____, declare under penalty of perjury that, according to my belief, the facts stated in the above application are true and correct.

Signed on _____, 20____.

Signature of Applicant / Petitioner (circle one)

PETITIONER=S INFORMATION

Petitioner=s printed name: _____

Address: _____

Telephone: _____

Fax: _____

Signed on _____, 20____.

Signature of Petitioner