

Not Reported in S.W.3d, 2012 WL 4713562 (Tex.Crim.App.)
(Cite as: 2012 WL 4713562 (Tex.Crim.App.))

a subsequent application. See Art. 11.071. We further find that it fails to meet any of the exceptions provided for in Article 11.071, § 5. Therefore, we dismiss applicant's subsequent application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED.

COCHRAN, J., filed a concurring statement as to WR-29,980-03, in which JOHNSON and ALCALA, JJ., joined.

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*2 I agree that applicant is not entitled to habeas corpus relief on his legal claims. Nonetheless, I find this case quite troubling. Judge DeMoss, on the Fifth Circuit Court of Appeals, addressing the record from applicant's first capital-murder trial, stated that he had lain awake nights "agonizing over the enigmas, contradictions, and ambiguities which are inherent in this record."^{FN1} I feel the same way about the similar record from the second trial conducted twenty-five years later.^{FN2} There is something very wrong about this case, even if applicant has not established a prejudicial constitutional violation.

FN1. Soffar v. Cockrell, 300 F.3d 588, 613 (5th Cir.2002) (en banc) (DeMoss, J., dissenting), rev'd,

cause "except for the fact cited in Soffar's confession, which could have been controverted by that uncalled witness, there was no

applicant's capital-murder conviction and death sentence depend entirely upon the accuracy and reliability of his confession. But many, if not most, of the details concerning the triple murder that applicant related in his confession were contradicted by, or inconsistent with, the crime-scene evidence, the forensic evidence, and the statements or testimony of the sole surviving victim. In sum, applicant's confession does not inspire confidence in its accuracy; it appears to be a tale told by one who heard about the robbery-murders rather than by one who committed them.

A. The Bowling Alley Burglary and the Later Robbery-Murders.

On the evening of July 12, 1980, three teen-age boys broke into the Fairlanes Windfern Bowling Center on Highway 290 in Houston. They broke the glass panel of the side door and came inside to bowl. They took only a few coins from a vending machine. Because the boys had damaged the side door, the bowling alley could not be securely locked the next evening, so the manager asked two of his employees, Greg Garner and Tommy Temple, to stay until the cleaning crew arrived at 4:00 a.m. Stephen Sims, the assistant manager, locked the bowling alley doors at 11:30 p.m., and he stayed inside along with Greg, Tommy, and Tommy's girlfriend, Arden Felsher.

Shortly thereafter, a white male entered the bowling alley, shot all four people inside, and took approximately \$1,000 from the cash register as well as the victims' wallets. All but Greg Garner died at the scene. He survived, eventually recovered, and testified

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for the first time during applicant's second trial in 2006.^{FN3}

FN3. Greg Garner did not testify during applicant's first trial nor was his absence accounted for by the prosecution. See *Soffar v. State*, 742 S.W.2d 371, 373 & n. 1 (Tex.Crim.App.1987) (“Amazingly, the State presented no direct testimony or evidence at appellant's trial that would have accounted for Garner's absence at the trial.”); see also *Soffar v. Dretke*, 68 F.3d 441, 459 (5th Cir.2004) (granting habeas relief and remanding for a new trial; noting that “the State did not call Garner as a witness, but instead called Dr. Gildonburg, the neurosurgeon who operated on Garner, during its case-in-chief. Gildonburg testified that Garner could be suffering from retrogressed amnesia and that Garner could have created a false memory of events.”).

B. Greg Garner's 1980 Description of the Robbery—Murders.

During the course of approximately seven interviews over three weeks, Greg Garner was able to give police a detailed description of the robber and of how the murders had occurred. Greg explained that he was bowling on lanes 25 and 26 while Stephen was locking the front door. Tommy and Arden were together at the back of the bowling alley. Shortly thereafter, Stephen unlocked the front door to let in a man carrying a white plastic jug. The man said that he was having car trouble and wanted some water.

*3 The man was in his mid-twenties, approximately 5 feet, 11 inches tall, with a medium build, and dark, curly, “weird” hair that fell over his ears but wasn't long enough to touch his collar. Stephen walked outside with the man. When they reappeared a few minutes later, the man was pointing a gun at Stephen. The intruder then asked Greg if he knew how to open the cash register. Greg said, “No.” The man

asked Stephen if anyone else was in the alley, and Stephen called Tommy and Arden to the front. The intruder calmly told Greg, Tommy, and Arden to lie face-down in a semi-circle. They did so. Then he told Stephen to bring him the money from the cash register. Stephen did so, and then he lay down on the floor with the others. They were all in a semi-circle facing the door, starting with Arden, then Stephen, Greg, and, finally, Tommy. The robber told his victims to hand over their wallets. They did. They lay quietly as the robber calmly said “goodbye” and methodically shot each one of them in the head.

When Greg regained consciousness, the robber was gone. Greg got up, walked over to the control-booth counter, and called his mother, telling her, “[S]omeone is here and I need help.” Greg didn't sound normal, so Mrs. Garner roused her husband, who got dressed and went to the bowling alley. While Greg was talking to his mother, the other bowling-alley phone line rang. Greg put his mother on hold and picked up the other line—it was Mr. Peters, the bowling alley manager. From the sound of Greg's voice, he, too, realized that something was wrong, so he called the police and drove over to the bowling alley.

Greg hung up the phone and went back to where the others were. He lay down next to Arden because she was still alive and making breathing sounds. Thus, when the police and his parents arrived, Greg was lying in a different spot than that when he was shot.

As soon as they were notified of the robbery-murders, the police descended upon the bowling alley. An officer saw the robber's white plastic water jug on the control-booth counter near Arden's purse, but he did not realize it might have significance to the robbery-murders, so he did not collect it as evidence. The water jug—clearly visible in a crime-scene photograph—was tossed out by the cleaning crew that morning. The police did not collect much forensic evidence from the bowling alley, but what little they

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Sheriff's Department because applicant had given Sgt. Clawson information in the past.

FN6. Applicant and his sister had watched a television news report several days earlier about the bowling-alley murders. Applicant had told his sister that the composite drawing of the murderer that Greg Garner had helped the police create looked like his friend, Latt Bloomfield. He told his sister, “[T]hat would be an easy way to get a \$10,000 reward would be to say that Latt did it.”

Sgt. Clawson came to the police station and went with applicant to municipal court for his magistrate's warnings. After briefly talking with applicant back at

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alley. But Greg Garner said that the sole intruder pulled his gun and pointed it at Stephen Sims's side only when he came back to the bowling alley after the two men had gone outside.

Applicant said that Bloomfield told the people in the bowling alley, "This is a robbery." But, according to Greg Garner, the intruder said no such thing.

Applicant said that Bloomfield pulled the man (presumably Stephen Sims) by his hair and forced him to his knees. But Greg Garner said that the intruder never touched any of the victims.

Applicant said that the three other victims were standing by the snack bar when he and Bloomfield came into the bowling alley. But Greg Garner said that he was bowling on lanes 25 and 26 while Tommy Temple and Arden Felsher were in the back of the bowling alley.

Applicant said that, as they lay on the floor, the order of the victims, starting closest to the door, was a man, woman, man, and a man. But Greg Garner said that the order was a woman and then three men. The ballistic evidence establishes that Greg Garner was correct in his positioning of the victims when they were shot.

Applicant said that the victims were lying in a straight line. Greg Garner said they were lying in a semi-circle.

Applicant said that Bloomfield fired "a warning shot." Greg Garner said there was no warning shot.^{FN8}

FN8. The ballistics evidence better supports Greg Garner's account of the murders than applicant's version.

Applicant said that Arden Felsher started to scream and Bloomfield ordered her to "shut up." Greg

Garner said that none of the victims screamed.

Applicant said that Bloomfield kicked Arden in the back. Greg Garner said that the robber did not touch any of the victims.

Applicant said that he shot a man and a woman and that Bloomfield shot two men. Greg Garner said that the one intruder shot all four victims.

Applicant said that, after shooting the victims, he ran around to look in the control booth cash register
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ing-alley murders, the police disbelieved much of applicant's confession.

E. Applicant's Habeas Corpus Claims.

Both at trial and in his application for habeas corpus relief, applicant's theory is that he is wholly innocent of the bowling-alley robbery-murders, that he falsely confessed to committing them, and that the "real" murderer is a man named Paul Reid, who is currently on death row in Tennessee for killing seven people in three different robbery-murders.^{FN10} As one of applicant's counsel explained,

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We also sought to show that Mr. Soffar had a propensity to lie for personal benefit, unduly trusted police officers, and had other motives to fabricate a confession. We also sought to show that the major facts of the crime present in Mr. Soffar's confessions had been fully aired by the police to the local news media in the weeks prior to Mr. Soffar's arrest.^{FN13}

FN13. Kathryn M. Kase Affidavit ¶ 9; see also John Niland Affidavit ¶ 7.

*7 The jury in this case, as in so many cases in which the defendant “confesses,” concluded that only a guilty person would ever confess to murder. The trial prosecutor, in closing, quoted that accepted wisdom: “Why would a person admit to shooting ... people and killing them during the course of a robbery if he wasn't even there?” Juries routinely accept the notion that an innocent person would never confess to a crime he didn't commit; therefore, if a person has confessed, he must be guilty.^{FN14}

FN14. See Richard A. Leo, *Police Interrogation and American Justice* 196–97 (Harvard University Press 2008). Professor Leo explains what he calls “the myth of psychological interrogation” as being “that an innocent person will not falsely confess to police unless he is physically tortured or mentally ill. The logical corollary is that suspects who confess are guilty.” *Id.* at 196. Professor Leo notes that a survey of potential jurors showed that 68% of them believed that a suspect would confess falsely “not very often” or “almost never.” *Id.* He also notes that many police interrogators, prosecutors, and other criminal justice experts believe this “myth” as well. *Id.* at 197. Professor Leo explains that

[t]he myth of psychological interrogation

persists for several reasons. Most people do not know what occurs during interrogations because they have not experienced it firsthand and do not know anyone who has. They are also not familiar with how police are trained to interrogate suspects or with studies that describe actual interrogation practices. Most people are therefore unaware of the highly manipulative, deceptive, and stress-inducing techniques and strategies that interrogators use to elicit confessions. Nor are they aware that these methods have led to numerous false confessions.

Further, most people assume that individuals do not act against their self-interest or engage in self-destructive behaviors. They therefore assume that an innocent person would not confess to a crime he did not commit. Thus most people cannot imagine that they themselves would falsely confess, especially to a serious crime.

Id. at 197.

F. The Power of False Confessions.

Unfortunately, that common-sense position is not necessarily accurate. Legal literature is littered with cases in which innocent people confess to crimes that they have not committed. The infamous Central Park

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mitting the Central Park Jogger rape and robbery by himself. DNA tests showed that this man was the sole source of semen found on the victim's sock and in her vagina.^{FN17} The prosecution joined the defense in asking the New York courts to overturn the teen-agers' convictions, which had been based solely upon what were shown to be inconsistent and contradictory confessions.^{FN18}

innocent and only Ballard was guilty.^{FN25}

FN19. See *Tice v. Johnson*, 647 F.3d 87 (4th Cir.2011).

FN20. *Id.*

FN15. See *People v. Wise*, 752 N.Y.S.2d 837 (N.Y.Sup.2002)

FN16. *Id.* at 840, 845–47.

FN17. *Id.* at 844.

FN18. See *id.* at 846–47.

Another well-known example is the “Norfolk Four,” in which four sailors were arrested, interrogated, and confessed to the rape-murder of Michelle Bosko, a young navy wife in Norfolk, Virginia, in 1997.^{FN19} Three years later, Omar Ballard, an inmate who had been convicted of attacking two other females in the vicinity during the same month, pled guilty to being Michelle's sole rapist and murderer. DNA found at the murder scene was consistent with his DNA.^{FN20} Just one month earlier, a jury had convicted Derek Tice of Michelle's rape and murder as one of the “Norfolk Four” based on his confession.^{FN21} He, like the other three sailors, had given a false confession after lengthy interrogation; that confession was inconsistent with the details of the crime, and there was no physical corroboration of its details.^{FN22} So strong is the human urge to accept the truth of a suspect's confession to crime that Tice was convicted in a second jury trial even after Ballard had pled guilty to being solely responsible for Michelle's rape and murder.^{FN23} The prosecutor repeatedly told the jury that an innocent person does not confess to murder,^{FN24} and the jury agreed, despite all of the physical and testimonial evidence showing that Tice was in-

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*8 In Texas, the false confession by Christopher

People just do not confess, particularly, to something of this magnitude, this heinous, this vicious, without having participated in it. It's just not natural, it's just not reasonable. People just don't do this, ladies and gentlemen.

* * *

[F]or somebody to confess to a crime that the defense alleged in their opening that he didn't commit is just not reasonable.... No, ladies and gentlemen, he confessed because he thought he did it, because he knew he had done it. That's why he told them that he did it.... [Y]ou have no reason put before you from this trial that this man was going to confess to this, other than the fact that he did it ... he gave his statement.

* * *

[L]adies and gentlemen, if you don't believe that Omar Ballard did this by himself, then you have to believe that the Defendant was there, and his confession tells you that he was there. There's no other reasonable conclusion to reach in this case, you can't disregard his confession.

Id. Never mind that the confession was demonstrably inaccurate in its details of the crime.

FN25. For a complete retelling of the “Norfolk Four” saga, see RICHARD A. LEO & TOM WELLS, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (The New Press 2008).

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sets out an extensive list of witnesses, testimony, and documentation challenging the voluntariness and reliability of applicant's confession in the various proceedings over the past thirty years.

FN36. See *Ex parte McFarland*, 63 S.W.3d 743, 748 (Tex.Crim.App.2005) (claims that have been raised and rejected on direct appeal normally cannot be re litigated in the context of an application for a writ of habeas corpus); *Ex parte Drake*, 883 S.W.2d 213,215 (Tex.Crim.App.1994).

H. Applicant's Claim that His Trial Counsel Were Ineffective For Failing to Retain an Expert Witness on False Confessions.

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experts, in addition to those already consulted and used during the original trial and habeas proceedings, in their preparation for applicant's retrial; these included

[FN50](#). Kathryn M. Kase Affidavit ¶ 11; John Niland Affidavit ¶ 9.

*11 psychologist J. Ray Hays who testified at guilt/innocence regarding Greg Garner's functioning and memory; Ken Braunstein, who testified at guilt/innocence regarding the crime scene investigation and ballistics evidence; psychiatrist Susan

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FN54. Id. No. 142.

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FN55. *Basso v. State*, No. 73672, 2003 WL 1702283, at *6 (Tex.Crim.App. January 15, 2003) (not designated for publication).

FN56. *Scott v. State*, 165 S.W.3d 27, 54–58 (Tex.App. Austin 2005) rev'd on other grounds, 227 S.W.3d 670 (Tex.Crim.App. 2007) (trial judge did not abuse his discretion in limiting the testimony of Professor Richard Leo on defendant's "false confession" issue which led to defense decision not to call Leo at all).

*12 I therefore agree with the trial judge's ultimate conclusion that "applicant's habeas claims of ineffectiveness based on alternatives in strategies or the presentation of evidence do not establish the merits of the applicant's allegations." *Strickland [v. Washington]*, 466 U.S. 668 (1984) at 689 (holding that there are 'countless ways to provide effective assistance in any given case').^{FN57}

FN57. Conclusions of Law No. 16.

In sum, although I personally do not have great confidence in the reliability or accuracy of applicant's written statements and hence in his culpability for the triple murders, I was not the chosen factfinder. Applicant's experienced and extremely capable counsel presented the jury with all of the information it needed to decide that applicant made a false confession and that he was not involved in the bowling-alley murders. The jury rejected that factual conclusion, as it was entitled to do. I therefore must join in the Court's order denying applicant relief on his constitutional claims.

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Ex Parte Soffar

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