No. 14-70040

In the United States Court of Appeals for the Fifth Circuit

MAX ALEXANDER SOFFAR

Plaintiff-Appellant,

v.

WILLIAM STEPHENS,
DIRECTOR, CORRECTIONAL INSTITUTIONS DIVISION,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Defendant-Appellee.

On Appeal From The United States District Court For The Southern District Of Texas, Houston

ORIGINAL BRIEF FOR APPELLANT

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INTRODUCTION

After thirty-five years of litigation, and on the eve of his death from inoperable cancer, Soffar's case now boils down to three distinct issues, each of which, independently, warrants a grant of habeas relief. Reviewing the district court's decision *de novo*—as this Court must—it is clear that the denial of habeas relief must be reversed.

Each of these three issues has been fully briefed in the parties' prior submissions to this Court and, consistent with this Court's March 14, 2016 order, this submission will not repeat the arguments already advanced.[1] Rather, the purpose of this submission is limited to addressing the applicable standards of review at this stage of the proceedings and to apprise the Court of several relevant decisions of other courts that have been entered since the time Soffar filed his Reply in Support of His Motion for a Certificate of Appealability.

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[1] In light of this Court's March 14, 2016 order, Soffar is not repeating the information required by Federal Rules of Appellate Procedure 28 or Fifth Circuit Rule 28. That information is already set forth in Soffar's Motion for a Certificate of Appealability and Brief in Support Thereof.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE STATE COURT'S EXCLUSION OF EVIDENCE UNDERCUTTING THE RELIABILITY OF THE STATEMENTS SOFFAR SIGNED WAS REASONABLE DESPITE *CRANE v. KENTUCKY*, 476 U.S. 683 (1986).

Contrary to the district court's decision, Soffar is entitled to a writ of habeas corpus as a result of the state court's refusal to allow him to present critical evidence undermining the veracity of his statements. That evidence would have shown that, notwithstanding the prosecutor's core argument to the jury, Soffar's statements did ***not*** contain any "secret" facts that only the true perpetrator could have known. In truth—but unbeknownst to the jury—the few accurate "facts" in the statements had been widely reported on television and in print news.

"In a federal habeas appeal, this court reviews the district court's grant of summary judgment *de novo*, 'applying the same standard of review to the state court's decision as the district court.'" *Proctor v. Cockrell*, 283 F.3d 726, 729-30 (5th Cir. 2002) (quoting *Beazley v. Johnson*, 242 F.3d 248, 255 (5th Cir. 2001)). With regard to the operative standards in assessing the state court's decision, it is significant that, in rejecting Soffar's media-report claim, the Texas

Court of Criminal Appeals assumed it was error to exclude the evidence but held that the error was harmless. *Soffar v. State*, No. AP-75363, 2009 WL 3839012, at *18-*22 (Tex. Crim. App. Nov. 18, 2009). Thus, because the Texas court did not reject the claim that there was constitutional error in excluding the evidence, review is *de novo* on that point, without any deference that might otherwise have been due under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). *See Cone v. Bell*, 556 U.S. 449, 472 (2009); *Mays v. Stephens*, 757 F.3d 211, 217 (5th Cir. 2014). On the issue of whether the error was harmless, this Court asks whether it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). When there is "grave doubt" about whether the error had such an effect or influence, the error is not harmless and the "petitioner must win." *Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013).

That the exclusion of the media reports was constitutionally erroneous and had a "substantial and injurious effect or influence" on the jury's verdict is self-evident in this case. The Supreme Court has recognized a defendant's fundamental constitutional right to present

exculpatory evidence and the powerful role such evidence can play when it undermines a purported confession. *See, e.g., Crane v. Kentucky*, 476 U.S. 683 (1986). The media-report evidence would have played that very role in this case, and he was prejudiced by its exclusion.

In addition to the authorities discussed in Soffar's earlier submissions, the Seventh Circuit has recently issued a ruling that is illustrative as to how *Crane* applies in cases involving false confessions. In *United States v. West*, 813 F.3d 619 (7th Cir. 2015), a trial court excluded expert testimony concerning the defendant's mental disabilities. *Id.* at 624-25. This "expert testimony would have explained West's low IQ and mental illness and how these combined conditions might have influenced his responses to the officers' questions while in police custody." *Id.* at 624. Citing *Crane*, the Seventh Circuit held that such evidence should have been admitted because courts "may not exclude from trial 'competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence.'" *Id.* (quoting *Crane*, 476 U.S. at 690). The court also concluded that "the erroneous exclusion of this testimony cannot be deemed harmless" because the government's case "rested

largely on West's confession" and the expert evidence might have led the jury to "discount[]" the statement. *Id.* at 625.

The same is true here. The media reports were "'competent, reliable evidence bearing on the credibility of [the] confession'" and were clearly "'central to the defendant's claim of innocence.'" *Id.* at 624 (quoting *Crane*, 476 U.S. at 690). Moreover, the exclusion of the media reports was far from harmless. The harmless error inquiry does not focus on the sufficiency of the other evidence. *Jensen v. Clements*, 800 F.3d 892, 904 (7th Cir. 2015). Rather, as described above, the inquiry is whether there is "grave doubt" that the constitutionally improper exclusion of the media-report evidence may have had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 901 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2197-98 (2015).)

Here, such "grave doubt" unquestionably exists. This Court has already acknowledged that the case against Soffar rests entirely on "an uncorroborated confession". *Soffar v. Dretke*, 368 F.3d 441, 478 (5th Cir. 2004); *see also Soffar v. State*, Nos. WR-29980-03, WR-29980-04, 2012 WL 4713562, at *2 (Tex. Crim. App. Oct. 3, 2012) ("The only connection between applicant and the 1980 triple murder at the Fair

Lanes Bowling Center in Houston is applicant's custodial confession to the police.") (Cochran J. concurring). In an effort to bolster that confession, the prosecutor strenuously argued to the jury that the statements contained secret facts.[2] (*See, e.g.,* 30 RR 11, 22-23.) The jury here was most certainly swayed by that claim, but the media-report evidence would have shown there were no such secret facts. Accordingly, the excluded media-report evidence would have led the jury to "discount" Soffar's statements and their exclusion was not harmless. *West*, 813 F.3d at 625. Soffar is entitled to issuance of the writ on this ground alone.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE STATE COURT PROPERLY APPLIED *STRICKLAND v. WASHINGTON,* 466 U.S. 668 (1984) WHEN IT FOUND COUNSEL EFFECTIVE DESPITE THEIR FAILURE TO INTERVIEW WITNESSES WHO WOULD HAVE STRONGLY SUPPORTED THE GUILT OF AN ALTERNATIVE PERPETRATOR.

Although trial counsel defended their performance against many of the ineffective-assistance-of-counsel claims Soffar lodged, trial

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[2] Several courts have recently recognized the important role "secret" facts can play in corroborating a confession. *See Howard v. State*, No. 01-14-00911-CR, 2015 WL 8486496, at *9 (Tex. Ct. App.-1st Dist. Dec. 10, 2015) (a confession containing secret facts was "strong evidence" of the defendant's guilt); *In re Payne*, 129 A.3d 546, 565 n.20 (Pa. 2015) (the inclusion of secret facts in a confession "clearly bolstered the weight" of that confession).

counsel acknowledged that they had no justification for failing to follow up on police reports pointing to an alternative perpetrator. (SHR 6822, 6834, 7409-10.) Had they done so, they would have learned that Paul Dennis Reid—the very man whose confession and *modus operandi* they were trying so hard to have admitted into evidence—was actually in an altercation with one of the victims at the bowling alley a week before the murders and, most critically, had threatened to return and "blow the head[]" off that victim. (SHR 5434.) All counsel had to do in order to learn this explosive information was exactly what habeas counsel later did: Simply follow up on the police reports and interview the witnesses identified in those reports.

As described above, this Court reviews the district court's rulings *de novo*. (*See supra* at 2.) The Texas court's determinations on both the "performance" and "prejudice" prongs of an ineffective assistance of counsel claim are entitled to respect, but not when they "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The district court erred in concluding that it was reasonable for the state court to find trial counsel effective despite their glaring omission. Rather, as described in Soffar's earlier submissions, the Texas court's rejection of Soffar's ineffective assistance of counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and numerous Supreme Court cases applying *Strickland*.

Several recent circuit court decisions have emphasized that ineffective assistance of counsel claims are particular strong where, as here, they involve counsel's failure to conduct an adequate investigation. For example, in *Campbell v. Reardon*, 780 F.3d 752 (7th Cir. 2015), the defense had failed to call two eyewitnesses—a decision the state courts held could have been a sound strategy. *Id.* at 764. The court of appeals rejected that conclusion, explaining that "[t]he fundamental problem with the state court's analysis—which made it not just incorrect but unreasonable—is that it ignores counsel's duty to perform a reasonable pretrial investigation *before* committing to a defense strategy." *Id.* at 763 (emphasis in original). *See also Rivas v. Fischer*, 780 F.3d 529, 550 (2nd Cir. 2015) ("Rather than investigate further, however, counsel's investigation inexplicably stopped there, a

decision [counsel] was unable to justify as consistent with his constitutional 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'") (quoting *Strickland*, 466 U.S. at 691).

The impropriety of defending a failure to investigate as "strategic" is particularly acute when, as in this case, defense counsel have sworn that they simply blundered. (*See* SHR 6822, 6834, 7409-10.) The court made this clear in *Doe v. Ayers*, 782 F.3d 425 (9th Cir. 2015), when it explained that "the trial strategy presumption does not apply when it 'would contradict [defense counsel's] testimony rather than filling a gap in memory, contravening the Supreme Court's admonition against adopting 'a *post hoc* rationalization of counsel's conduct' instead of relying on an 'accurate description of their deliberations' [when one exists].'" *Id.* at 445 (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)).

For the reasons explained in the earlier submissions, it was unreasonable for the Texas court to hold that the failure to investigate here was defensible as part of a sound strategy or—to the extent the

Texas court addressed it—that the absence of this testimony was not prejudicial. A writ of habeas corpus should issue on this ground.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE STATE COURT REASONABLY APPLIED *CULOMBE v. CONNECTICUT*, 367 U.S. 568 (1961) WHEN IT CONCLUDED THAT SOFFAR SIGNED THE STATEMENT VOLUNTARILY.

It was also error for the district court to conclude that the state court reasonably determined Soffar voluntarily signed the third statement. Soffar was a twenty-four year old, mentally disabled, sleep-deprived, drug-addicted man who had left school in seventh grade and had a long psychiatric history. He was functionally isolated from all but his interrogators over the course of three days during which he was subjected, without the assistance of counsel, to hours of purposeful and highly-suggestive interrogations (only a small fraction of which was recorded) by a procession of detectives and an assistant district attorney, all of whom were determined to solve what was fast appearing to be an unsolvable crime. As part of that process, the police cynically exploited Soffar's mental limitations by enlisting the help of a police officer whom Soffar regarded as his friend. That officer tricked Soffar into waiving his *Miranda* rights and convinced him that he was "on his

own." (*See* 4 RR 110.) Based on the "totality of the circumstances," there is no doubt that Soffar did not sign the statement voluntarily, and the Texas court's decision to the contrary was an unreasonable application of numerous Supreme Court decisions, including *Culombe v. Connecticut*, 367 U.S. 568 (1961).

As is the case with regard to Issue II, this Court reviews the district court's decision *de novo*, while the Texas court's decision is analyzed under the AEDPA standards. (*See supra* at 7.) Had the district court engaged in the appropriate inquiry, it would have, for the reasons set forth in Soffar's prior submissions, been compelled to find that the state court acted unreasonably in rejecting Soffar's voluntariness claim. And it would also have been compelled to find that the admission of the statement was not harmless error.

Over the past year, several courts have driven the point home that the wrongful admission of a confession is rarely harmless. As the Ninth Circuit explained, because a confession "may be 'the most . . . damaging evidence that can be admitted' against a defendant . . . courts must exercise 'extreme caution . . . before determining that the admission of [a] confession at trial was harmless.'" *Garcia v. Long*, 808 F.3d 771, 784

(9th Cir. 2015) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)) (granting a writ of habeas corpus and finding that the wrongful admission of a confession had a "substantial and injurious effect on the jury's decision" regardless of the sufficiency of other evidence); *see also Grueninger v. Director*, 813 F.3d 517, 532 (4th Cir. 2016) (admission of a confession was not harmless error "[g]iven the centrality of the confession to this case."); *Sharp v. Rohling*, 793 F.3d 1216, 1240 (9th Cir. 2015) (admission of involuntary statements was erroneous and harmful where "the parties paid great time and attention to these statements" and that "both statements featured prominently in opening and closing arguments.") The reasoning of those courts applies with equal, if not more, force here. Soffar's conviction rests entirely on his uncorroborated statements. *Soffar*, 368 F.3d at 478; *see also Soffar*, 2012 WL 4713562, at *2. Needless to say, and as the district court noted, "Soffar's police statements were the focal point of the prosecution's case." (ROA.1753.) The district court judge should, therefore, have had at least "grave doubt about whether [the] trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Davis*, 135 S. Ct. at 2198. This is,

therefore, another independent ground entitling Soffar to habeas corpus relief.

CONCLUSION

For the foregoing reasons, those set forth in Appellant's Motion for a Certificate of Appealability and Brief in Support Thereof, and those set forth in Appellant's Reply in Support of His Motion for a Certificate of Appealability, Appellant respectfully requests that this Court reverse the judgment of the district court and order that a writ of habeas corpus be issued.

Respectfully submitted,

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April 4, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2016, I served true and correct copies of the foregoing Original Brief for Appellant via this Court's CM/ECF system on the following counsel:

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