

No. 14-70040

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**In The  
United States Court of Appeals for the Fifth  
Circuit**

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MAX ALEXANDER SOFFAR,  
*Petitioner-Appellant,*

v.

WILLIAM STEPHENS, Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,  
*Respondent-Appellee.*

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On Appeal from the United States District Court  
For the Southern District of Texas, Houston Division

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**APPELLANT'S OPPOSITION TO MOTION TO DISMISS**

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April 25, 2016

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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s/ Andrew Horne  
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## **OPPOSITION TO MOTION TO DISMISS AS MOOT**

Despite his death, the issues in this case remain very much alive. For thirty-five years, Max Alexander Soffar has repeatedly professed his innocence. That includes decades in which this case has remained pending in the federal courts on habeas review. In those decades, several judges of this Court and the Texas Court of Criminal Appeals have gone to extraordinary lengths to point out the fundamental deficiencies in the state's case against Mr. Soffar and the real possibility that a miscarriage of justice has occurred. That miscarriage of justice should not be perpetuated by dismissing the case as Appellee suggests.

Indeed, there are three issues before this Court that raise serious constitutional questions regarding the validity of Mr. Soffar's conviction. There has already been full—and extensive—briefing on those points and Mr. Soffar has waited more than a year to get this appeal heard. Oral argument is set for only two days away. There are legitimate legal grounds for this Court to continue to adjudicate the matter, and, respectfully, we ask that the Court decline Appellee's request to simply dismiss the case without oral argument (which would include the question of mootness).

It is well-settled that a federal habeas petition does not become moot simply because the petitioner has ceased to be in custody. *See, e.g., Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968). Petitioners who suffer “collateral consequences” from a conviction retain “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.” *Id.* at 237. “Collateral consequences” exist here. By way of one example, Mr. Soffar has long planned—and his estate continues to plan—to eventually bring a civil action under 42 U.S.C. § 1983. That plan remains intact—and can be based on “issuance of a writ of habeas corpus[.]” *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Dismissing this case would, therefore, impact his estate’s right to pursue such a valid claim for damages.

The cases relied upon by Appellee are not to the contrary. Neither *Bruno v. Secretary of the Florida Department of Corrections*, 700 F.3d 445 (11th Cir. 2013) nor *Knapp v. Baker*, 509 F.2d 922 (5th Cir. 1975) addressed the issue of whether a petition remains alive where, as here, there are ongoing collateral consequences. *See Bruno*, 700 F.3d at 445; *Knapp*, 509 F.2d at 922. Indeed, it appears that in both *Bruno* and *Knapp*, the petitioner concurred in the dismissal of the petition. *Bruno*,

700 F.3d at 445; *Knapp*, 509 F.2d at 922. Mr. Soffar does not concur because there are ongoing collateral consequences. Whether the right to pursue a damages claim is a sufficient collateral consequence is an issue of first impression in this circuit. *But see McClendon v. Trigg*, 79 F.3d 557 (7th Cir. 1996) (Easterbrook, J.) (rejecting this argument but also vacating the lower court's ruling as part of dismissal).

Even if this Court were inclined to dismiss the case, the relief requested by Appellee is far too broad. The Court's grant of a certificate of appealability has called into question the decision of the lower court. As the Supreme Court stated in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), a court dismissing an appeal as moot must vacate the lower court's ruling "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41. At a minimum, therefore, this appeal should not simply be dismissed but the district court's judgment must be vacated as well.

Finally, the Court can, if it sees fit and consistent with how other judges have approached this case, note in its order that this case is very troubling. In particular, we respectfully ask that the order make clear that while the Court is dismissing the appeal and vacating the lower

court's judgment, this should not be taken, in any way, to suggest that Mr. Soffar's claims lack merit. This is a highly unusual case, in which a panel of this Court has once before granted habeas relief after recognizing the weaknesses of the case against Mr. Soffar, including the fact that the sole evidence against him is an uncorroborated confession. *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) (granting relief on one effective assistance of counsel ground). Indeed, a member of this Court, joined by two other members of the Court, has written, "I have laid awake nights agonizing over the enigmas, contradictions, and ambiguities which are inherent in this record." *Soffar v. Cockrell*, 300 F.3d 588, 613 (2002) (en banc) (DeMoss, J., joined by Parker and Dennis, JJ., dissenting). Similarly, three members of the Texas Court of Criminal Appeals have voiced the view that they "do not have great confidence" in Mr. Soffar's guilt and that "there is something very wrong about this case." *Ex parte Max Alexander Soffar*, Nos. WR-29980-03 -04, 2012 WL 4713562, at \* 2, 12 (Tex. Crim. App. Oct. 3, 2012). Including a statement acknowledging the limited basis upon which dismissal is being granted is highly important in this case to

avoid the appearance that this Court is affirmatively approving Mr. Soffar's conviction.

**CONCLUSION**

For the foregoing reasons, Mr. Soffar respectfully requests that the Court deny Appellee's motion to dismiss or, in the alternative, dismiss the appeal and vacate the judgment of the lower court with a clarifying statement that the dismissal does not pass judgment on the merits of the claims.

Respectfully submitted,

	<u>/s/ Andrew G. Horne</u>	
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April 25, 2016



## CERTIFICATE OF SERVICE

I hereby certify that on this 25th 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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## **CERTIFICATE OF COMPLIANCE**

This brief complies with Rule 27(d)(1)-(2) of the Federal Rules of Appellate Procedure. It is less than 20 pages, Microsoft Word 2011, Century Schoolbook, 14 points.

s/ Andrew Horne  
ANDREW HORNE

## **ELECTRONIC CASE FILING CERTIFICATIONS**

I certify that: (1) all required privacy redactions have been made; (2) this electronic submission is an exact copy of the paper document; and (3) this document has been scanned using the most recent version of a commercial virus scanning program and is free of viruses.

s/ Andrew Horne  
ANDREW HORNE