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

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

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). 1

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. 10

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. 19

TABLE OF AUTHORITIES

Page(s)

CASES

Blackburn v. Alabama,
361 U.S. 199 (1960) 20, 21

Brecht v. Abrahamson,
507 U.S. 619 (1993) 3, 10

Buchanan v. Kentucky,
483 U.S. 402 (1987) 9

Chambers v. Mississippi,
410 U.S. 284 (1973) 5

Colorado v. Connelly,
479 U.S. 157 (1986) 22

Cone v. Bell,
556 U.S. 449 (2009) 4

Crane v. Kentucky,
476 U.S. 683 (1986) 1, 2, 4, 5

Culombe v. Connecticut,
367 U.S. 569 (1961) 19, 20, 21, 23

Davis v. Ayala,
135 S. Ct. 2187 (2015) 3, 4

Dickerson v. United States,
530 U.S. 428 (2000) 19

Fikes v. Alabama,
352 U.S. 191 (1957) 21

Forsythe v. State,
664 S.W.2d 109 (Tex. App. – Beaumont 1983, pet ref'd) 5

TABLE OF AUTHORITIES (Cont'd)

Page(s)

Foster v. Townsley,
243 F.3d 210 (5th Cir. 2001) 6

Haliym v. Mitchell,
492 F.3d 680 (6th Cir. 2007) 14

Harrison v. Richter,
562 U.S. 86 (2011).. 11

Manson v. Brathwaite,
432 U.S. 98 (1977).. 14, 15

Martinez v. Dretke,
404 F.3d 878 (5th Cir. 2005) 11

Miller v. Fenton,
796 F.2d 598 (3d Cir. 1986) 21, 22

Miranda v. Arizona,
384 U.S. 436 (1966)... 19

Moss v. Hofbauer,
286 F.3d 851 (6th Cir. 2002) 14

Rogers v. Richmond,
365 U.S. 534 (1961)... 21

Rogers v. State,
774 S.W.2d 247 (Tex. Crim. App. 1989), *overruled on other grounds,*
Peek v. State, 106 S.W.3d 72 (Tex. Crim. App. 2003).......................... 14

Soffar v. Cockrell,
300 F.3d 588 (5th Cir. 2002) 20

Strickland v. Washington,
466 U.S. 668 (1984).. 10, 18

TABLE OF AUTHORITIES (Cont'd)

Page(s)

Teague v. Lane,
489 U.S. 288 (1989) 2

United States v. Bell,
367 F.3d 452 (5th Cir. 2004) 22

United States v. Jones,
287 F.3d 325 (5th Cir. 2002) 12

United States v. Long,
852 F.2d 975 (7th Cir. 1988) 23

United States v. Posada-Rios,
158 F.3d 832 (5th Cir. 1998) 23

United States v. Reliford,
210 F.3d 285 (5th Cir. 2000), *judgment vacated on other grounds sub nom Clinton v. United States*, 121 S. Ct. 296 (2000) 13

United States v. Rodgers,
186 F. Supp. 2d 971 (E.D. Wis. 2002) 22

United States v. Wade,
388 U.S. 218 (1967) 14

White v. Johnson,
153 F.3d 197 (5th Cir. 1998) 9

Woodward v. Epps,
580 F.3d 318 (5th Cir. 2009) 11

STATUTES

Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),
Pub.L. 104-132, 110 Stat. 1214 (1996) 3

TABLE OF AUTHORITIES (Cont'd)

Page(s)

RULES

TEX. R. EVID. 801(d) 5

INTRODUCTION

In stark contrast to Appellant's thirteen-page Opening Brief, which limited itself to setting forth the standards of review applicable at this stage of the proceedings and alerting the Court to newly-decided instructive opinions of other courts, Appellee has filed a thirty-five page brief that advances new arguments never before presented to any court and recasts many of the arguments he has previously made in novel ways. To the extent Appellant has already addressed arguments made by Appellee, he will not do so again here. Rather, this submission is limited to addressing the most egregiously erroneous of the newfound arguments and assertions.

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).

Try as he might, Appellee cannot mount any serious challenge to the inescapable conclusion that Soffar was deprived his constitutional right to present a defense. Soffar's life depended on showing the jury that (contrary to the prosecution's contentions) there were no "secret

facts" in the statements upon which his conviction rested. The way to do that—indeed, the only way to do that—was to introduce evidence identifying the specific facts the media had reported. This would have established that the very few accurate assertions in the statements were public knowledge. (Appellant's Mot. at 34-53; Appellant's Reply at 1-13; Original Brief at 2-6.) Given the context of the case, precluding Soffar from defending himself in that way was devastating.

As a threshold matter, Appellee's claim that "the Court's application of a new rule to Soffar's case would be barred by the rules against retroactivity" is meritless. (Appellee's Br. at 17 (citing *Teague v. Lane*, 489 U.S. 288, 301 (1989).) Appellant is not asking for any new rule to be adopted much less applied. Thirty years ago, the Supreme Court recognized that an accused's constitutional right to present a defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). That well-settled rule governs the outcome of this case: The media reports were competent, reliable evidence central to Soffar's claim of

innocence—that his statements were false and unreliable. (Appellant's Mot. at 41-45; Appellant's Reply at 9-10; Opening Br. at 3-4.) Accordingly, they should have been admitted.

Appellee's other three procedural arguments likewise fail. *First*, Soffar's "description of the standard of review" was not "mistaken." (Appellee's Br. at 8 (citing *Davis v. Ayala*, 135 S. Ct. 2187 (2015)). As here, the Supreme Court in *Davis* was faced with a situation in which the state court had assumed error but had ruled that the error was nonetheless harmlessness. *Davis*, 135 S. Ct. at 2196. Consistent with a long line of prior cases, and consistent with the standard Soffar articulated in his Motion for a Certificate of Appealability and Brief in Support Thereof (the "Motion"), (Appellant's Mot. at 45), the Supreme Court held that, with regard to the harmless error question, the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) applies and subsumes the deference afforded under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214 (1996). *Davis*, 135 S. Ct. at 2198-99. *Davis* has nothing to do with the well-settled rule that where, as here, a state court assumes an underlying constitutional violation, federal courts address that issue *de*

novo. *See, e.g., Cone v. Bell*, 556 U.S. 449, 472 (2009). Indeed, the Court in *Davis* decided the case based on the explicit assumption that an underlying constitutional violation had, in fact, occurred. *Davis*, 135 S. Ct at 2197.

Second, similarly inaccurate is Appellee's contention that Soffar has waived his right-to-present-a-defense claim by failing to brief before the district court "whether the 'trial court's decision was inconsistent with State law.'" (Appellee's Brief at 10-11 (citing ROA.1818.).) Appellant has repeatedly explained that he is not challenging (nor could he challenge in a federal habeas action) the exclusion of the media reports on state law grounds; rather he is challenging the denial of his federal constitutional right to present a defense. (Appellant's Mot. at 42 n.10; Appellant's Reply at 2 n.1.) It goes without saying that Appellant's constitutional right to present a defense requires an examination of the United States Constitution, not an assessment of whether state law was correctly applied. *See generally Crane*, 476 U.S. at 686-91 (exclusion of evidence relevant to the credibility of the confession violated Crane's Sixth and Fourteenth Amendment rights even though the evidence was properly excluded as a matter of state

law); *Chambers v. Mississippi*, 410 U.S. 284, 298-303 (1973) (Chambers had a constitutional right to present evidence of a third party's confession even though that evidence was not admissible under state hearsay rules). Thus, whether the media reports were properly excluded as a matter of Texas law is irrelevant to the question of whether Appellant's federal constitutional rights were violated.[1]

Third, a variation on that same theme—but equally incorrect—is Appellee's attempt to fault Appellant for supposedly not addressing the issue of "whether the State evidentiary rules regarding hearsay and relevance were arbitrary and disproportionate to the purpose they were designed to serve." (Appellee's Br. at 11.) Not so. Soffar specifically noted that "even the Texas court could articulate no legitimate purpose in barring the evidence—and even the prosecution had initially agreed that it was admissible." (ROA.1315.) Soffar's point, just like the points advanced by the defendants in *Crane* and *Chambers* and many other

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[1] Although not the basis of Appellant's claim, any hearsay objection is plainly wrong because the media reports were not being offered for the truth of the matters asserted. TEX. R. EVID. 801(d); *Forsythe v. State*, 664 S.W.2d 109, 115 (Tex. App. – Beaumont 1983, pet ref'd). Rather, they were offered to show that certain assertions in Soffar's statements—whether true or false—had been reported in the media. Indeed, in some instances (such as the positioning of the bodies at the time of the shooting) the media reports were wrong. Nonetheless, Soffar parroted back that incorrect information, demonstrating that his source of information was from media reports, not any firsthand knowledge. (*See* Appellant's Mot. at 48-49.)

cases, is that he has a fundamental federal constitutional right to present evidence key to his defense. He has responded to each and every attempt—no matter how absurd—by Appellee to justify that evidence's exclusion. There has been no waiver.[2]

Appellee's arguments on the merits also fail. *First*, in a novel move, Appellee now attempts to downplay the significance of the media reports by arguing that the "prosecutor at closing did not base his argument on Soffar's possessing a large cache of information known only to the killer." (Appellee's Br. at 12.) This new argument is squarely refuted by the trial transcripts that, as Appellant discussed in the Motion, clearly show that the prosecutor most certainly ***did*** contend that the statements were reliable precisely because they contained "secret" facts. (Appellant's Mot. at 39-40; Appellant's Reply at 5-7.) For example, the prosecutor asked the jury, in summation, how else Soffar could have known what kind of gun was used unless Soffar was there? (35 R.R. (Amend.) 22-23.) Unbeknownst to the jury, any watcher of

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[2] Appellee's reliance on *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001) is misplaced. (Appellee's Br. at 12.) In *Foster,* the court found that an argument was waived because appellant did not brief, ***on appeal***, his disagreement with the lower court's ruling. *Foster*, 243 F.3d at 212 n.1. Here, by contrast, Appellant has specifically, and repeatedly, explained his disagreement with the district court's ruling. (Appellant's Mot. at 42, 45-53; Appellant's Reply at 12-13; Opening Br. at 2.)

Channel 13 news was well aware of exactly what kind of gun was used because the media had publicized that the murder weapon was likely a .357 Magnum revolver. (43 R.R. Def. Ex. 59.)

Even had the prosecution not made these repeated arguments, Appellant's right to present evidence vital to his defense does not turn on what the prosecutor did or did not argue. Soffar had a constitutional right to present evidence supporting his defense that the statements were false. Appellee makes much of the fact that the prosecutor argued that no innocent person would ever confess, so it did not matter whether Soffar got information from the media. (Appellee's Br. at 12-14.) That completely misses the point. Without the media report evidence, the defense was unable to answer the jurors' inevitable question (whether suggested to them by the prosecutor or otherwise)—"well if Soffar is innocent, how did he possibly know all those facts?"

Second, Appellee fairs no better in arguing that any error was harmless because Soffar's statements did contain "secret" knowledge: That five shots were supposedly fired. (Appellee's Br. at 14.) As an initial matter, even Appellee concedes that any newspaper reader would

be able to “infer that ***at least*** four shots had been fired.” (*Id*. at 14 (emphasis added).) Soffar’s mention of five shots hardly proves that Soffar knew some “secret fact” only the guilty person would know. But more fundamentally, Appellee’s argument falters in the face of the evidence. The defense ballistics expert testified conclusively that only four shots were fired, (33 R.R. (Amend.) 55-56), and the state’s ballistics expert could ***not*** say how many shots there were, (28 R.R. 90). The evidence that four shots were fired further supports Appellant’s claim that his statements were rife with errors.[3]

Third, Appellee again trots out his argument that any error was harmless because “the trial court did allow the defense to question witnesses about whether certain facts had been reported in the media.” (Appellee’s Br. at 15.) As explained already, however, this argument is grossly disingenuous. (Appellant’s Mot. at 49; Appellant’s Reply at 5.) Being allowed to ask questions is of no avail when the witnesses do not know the information needed to answer them. That is what happened

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[3] Appellant has already addressed—and debunked—Appellee’s claims about other supposedly “secret” facts in Soffar’s statements and the lack of corroboration afforded by alleged statements made to Lawrence Bryant and Mable Cass. (*See* Appellant’s Mot. at 49-52; Appellant’s Reply at 10-11.)

here: The police witnesses were unable to answer questions about exactly which facts had been disseminated in the media. (*See, e.g.*, 30 R.R. (Amend.) 96, 107-08 (Detective Schultz denying knowledge of the contents of media reports).) Soffar had evidence that would have filled in the blanks, and the prejudice he suffered from its exclusion was not cured by being able to ask some questions that yielded no information.

Finally, Appellee puts forward the outlandish claim that Soffar cannot complain about the exclusion of the media reports because ***he*** could have testified about their contents. (Appellee's Brief at 16.) In other words, in Appellee's world, Soffar was required not only to give up his Fifth Amendment right, but that he was also required to have the jury decide the issue of what information was in the public domain based solely on his own testimony (which the jury might have assumed was self-serving), as opposed to objective documentary evidence leaving no doubt about the issue.[4]

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[4] The two cases upon which Appellee relies are completely inapposite because they do not involve the question of whether a defendant must testify in order to present a defense. Rather, they stand for the unremarkable proposition that if a defendant wishes to present his own psychiatric evidence he must also give the state the opportunity to interview him to develop its own rebuttal evidence. *See Buchanan v. Kentucky*, 483 U.S. 402, 424-25 (1987); *White v. Johnson*, 153 F.3d 197, 200 (5th Cir. 1998).

In sum, showing that the few accurate assertions in Soffar's statements were a matter of public knowledge was—by the prosecutor's own admission—a central part of Soffar's defense. Because the media reports were reliable, competent evidence going directly to that point, their exclusion violated Soffar's constitutional right to present a defense. The district court's holding to the contrary should be reversed, and relief should be afforded because the constitutional violation "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

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.

One can scour Appellee's briefs again and again and still find no explanation of why an effective lawyer could possibly have deemed Patrick Pye a "low-priority witness" and never followed up on locating and interviewing him. A key focus of the defense was building its case against a third party—Paul Dennis Reid. (*See, e.g.,* Appellant's Mot. at 55-57.) It is impossible to defend trial counsel's blunder in not

interviewing a bowling alley employee who was witness to an altercation and death threats at the bowling alley in the week prior to the murder. Indeed, even defense counsel acknowledged there was no justification whatsoever for failing to locate and interview Pye and the two other bowling alley witnesses. (*See, e.g.,* S.H.R. 6855.)

It is black-letter law that, absent a competent investigation, a lawyer cannot possibly make a reasonable strategic choice about whether to call a witness. (*See* Appellant's Mot. at 65-66; Opening Br. at 8-9.) This case bears no similarity, then, to the four cases Appellee cites regarding deference to counsel's strategic decisions. (Appellee's Br. at 24.) Each of those cases involves respect for considered strategic decisions counsel made with knowledge of the relevant facts. *See Harrison v. Richter*, 562 U.S. 86, 109 (2011) (trial counsel had explained his strategic reasons for directing his investigation as he did); *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (counsel made "strategic choices . . . showing sound trial strategy"); *Martinez v. Dretke*, 404 F.3d 878, 885 (5th Cir. 2005) (counsel conducted a "reasonable investigation into Martinez's mental health history" before choosing to pursue other strategies); *United States v. Jones*, 287 F.3d 325, 331 (5th

Cir. 2002) (counsel consciously chose a tactic of admitting responsibility at the guilt phase that "may have been the best available tactic").

Turning to the prejudice element, Appellee has not even attempted to defend the state court's plainly unreasonable conclusion that establishing Reid's "mere presence" at the bowling alley would not have been highly significant. (ROA.1831.) The core of Appellant's claim is that Pye reported Reid's threat to kill Steve Sims (one of the murder victims) shortly before the murders. The state court thus rejected a claim Soffar was not advancing and flatly ignored the actual argument Soffar was putting forth.

Instead of defending that decision, Appellee offers a potpourri of purported explanations as to why Soffar was not prejudiced by trial counsel's inexcusable failure to interview Patrick Pye, Thomas Cadena, and Danny Cane. None of these has any merit.

First, Appellee claims that Pye's identification "ought not be taken at face value" because it occurred so many years after he observed the man in the bowling alley and because he made the identification from photographs of Reid as opposed to a photo array. (Appellee's Br. at 25-26.) This argument is fatally flawed.

To begin with, Appellee ignores the fact that Pye's identification of Reid was corroborated by Cain, who (during a separate interview) independently identified Reid as having been in the bowling alley several times during the month before the murders. As Cain put it, "[n]o one could mistake Paul's eyes, even after all of these years." (S.H.R. 4398.)[5] And in describing a man who was hanging around the bowling alley in the weeks before the murders, Cadena swore, "I remember this particular individual, Paul Reid, mainly because of the eyes." (S.H.R. 764.) These independent, corroborating witnesses most certainly add to the power of Pye's identification. *See United States v. Reliford*, 210 F.3d 285, 304 (5th Cir. 2000), *judgment vacated on other grounds sub nom Clinton v. United States*, 121 S. Ct. 296 (2000) (pre-trial identifications, even if suggestive, were reliable in light of "the corroborating testimony of other witnesses").

Appellee's contention also ignores the fact that Pye's identification was not a classic "stranger ID," which provokes concerns about suggestive procedures. Pye, Cain, and Cadena all knew Reid, having

[5] In an earlier filing, Cain's affidavit was cited mistakenly to the wrong page of the record. This is the accurate citation.

seen him on multiple occasions—a fact that, standing alone, tends to establish the reliability of an identification. As the Sixth Circuit has explained, "[t]he 'primary concern expressed in cases discussing the problems with eyewitness identification relates to a witness observing and subsequently identifying a stranger.'" *Haliym v. Mitchell*, 492 F.3d 680, 706 (6th Cir. 2007) (quoting *Moss v. Hofbauer*, 286 F.3d 851, 862 (6th Cir. 2002); *see generally United States v. Wade*, 388 U.S. 218, 241 n.33 (1967) (whether the witness knows the suspect has "important bearing" on the reliability of an identification).

Beyond all that, when evaluated under the established factors for assessing reliability, Pye's identification emerges as powerful. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).[6] To be sure, it was obviously removed in time from the events at issue, but that is just one of the five factors that go into a reliability determination. With regard to the other factors, Pye's identification carries strong indicia of

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[6] *Manson* is discussed here only because it sets forth the classic reliability factors for eyewitness identification. *Manson* has no effect on the actual admissibility of Pye's (and Cain's and Cadena's) testimony at trial because *Manson* and other restrictions on the admission of testimony involving suggestive identifications only apply when a suggestive identification was the product of official police action. *See Rogers v. State*, 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds, Peek v. State,* 106 S.W.3d 72 (Tex. Crim. App. 2003).

reliability: (a) in contrast to a witness who sees a suspect for a fleeting moment, Pye had an extended "opportunity to view" the person in the bowling alley on several occasions; (b) as someone who was involved in an argument with the person in the bowling alley, Pye's "degree of attention" was heightened; (c) as set forth in his declaration, Pye's "level of certainty" was powerful; and (d) Pye's description of the individual as "about 22 or 23 years of age, 6'1" or 6'2" matches Reid who was 22 years old, and stood 6'2."[7] (S.H.R. 816; S.H.R. 5254.) Thus, under the "totality of the circumstances" inquiry that *Manson* sets forth, (*Manson*, 432 U.S. at 110), Pye's identification is solid—even without taking into account Cane's and Cadena's corroboration.

More generally, the state would have had every opportunity to challenge the reliability of the identifications by cross-examining Pye and the others at an evidentiary hearing in the state habeas court. Soffar strenuously sought such a hearing, (*see, e.g.,* S.H.R. 6917-43), but the state fought against it and none was held. Having done that,

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[7] Cadena also described Reid as in his early 20s, about 6 feet tall. (S.H.R. 764.) Although Pye mentioned a "strong build," (S.H.R. 5254), and Cadena mentioned an "average build," (S.H.R. 764), there is no way to gauge how different people describe build, as compared to age and height.

Appellee must not now be heard to claim that Pye's and the others' identifications can be casually dismissed as unreliable.

Second, Appellee next claims that Pye's identification of Reid is of no value because (apparently according to a Tennessee newspaper article) Garner, the surviving victim, once failed to identify Reid as the murderer. (Appellee's Br. at 25-26.) As a threshold matter, the hypocrisy of this claim must not be overlooked. Appellee's argument is based solely on rank hearsay contained in a newspaper article. (*Id.*) It is astonishing that Appellee asks this Court to rely on a media report for the truth of a matter asserted while continuing to defend the trial court's refusal to allow Soffar to introduce media reports to show what details of the murders (whether true or false) were in the public domain—a plainly non-hearsay use.

Appellee's argument is astonishing for another reason: He puts great weight on Garner's supposed inability to identify Reid while, at the same time, dismissing Garner's failure to identify Soffar. (*See* S.H.R. 8909 (F.F. ¶ 34).) Indeed, the state secured its conviction of Soffar by, in part, arguing that Garner's memory is too faulty to be trusted. (*See, e.g.,* 35 R.R. (Amend.) 18.) Yet Appellee now argues that

Garner's alleged inability to identify Reid is conclusive evidence that Reid did not commit the crime. (Appellee's Br. at 25-26.) There is one thing we do know about Garner's observations of the murderer: the composite sketch prepared from Garner's description right after the murders is agreed by all to closely resemble Reid. (*Compare* 43 R.R. Def. Ex. 38 *with* 45 R.R. Joint Ex. 6.)

Finally, Appellee rehashes a series of claims he advanced in his earlier briefs—but instead of addressing the defects Soffar has exposed in each, Appellee has simply repeated them. For example, Appellee incomprehensibly persists in claiming that Pye has not stated "he would have been available for trial." (Appellee's Br. at 26.) But Appellee never explains how it can honestly make this assertion when Pye's affidavit states explicitly:

> I was not contacted by an attorney for Max Soffar at any point prior to May 2008. I would have spoken with Mr. Soffar's attorneys and ***would have testified to the facts and circumstances set forth in this affidavit*** if I had been given the opportunity to do so.

(S.H.R. 5255 at ¶ 8.)

Appellee is on no sounder ground when it tries to avoid the showing of prejudice by speculating that perhaps Pye would have been

a poor witness if called at trial, or maybe (despite the absence of any evidence that this ever happened) the investigators would have testified that they followed Pye's leads back at the time of the murder and found them unfruitful, or maybe, just maybe, investigators would have been able to find some evidence controverting Pye's testimony. (Appellee's Br. at 26-27.) This layer-upon-layer-of-speculation approach makes a mockery of *Strickland v. Washington*, 466 U.S. 668 (1984)—for the same kinds of "maybe" and "perhaps" claims could be offered to *per se* negate the prejudice element in each and every ineffective assistance of counsel claim based on a failure to locate and/or call a critical witness. And, as described above, Appellee's arguments are particularly distasteful given the state's objections to an evidentiary hearing at the state habeas level. (*See infra* at 15.)

At the end of the day, there is no possible justification for counsel's failure to follow up on an obviously significant lead with great potential to affect the case, and there is no possible way to characterize the impact of that failure as anything but prejudicial in the extreme. Accordingly, the district court's ruling should be reversed and relief should be granted.

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.

Appellee's arguments concerning the voluntariness—or lack thereof—of Soffar's statement is based on two clear misstatements of law and a disingenuous mischaracterization of the facts. Once they are cast aside, Soffar's entitlement to relief on this claim is clear.

First, as a matter of law, Appellee continues—as the district court did—to confuse the issue of due process voluntariness (which is the basis for Soffar's claim) and the issue of whether he validly waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (Appellee's Br. at 29, 33-35; ROA.1801.) It is well-settled that a statement made after an accused has waived his *Miranda* rights can nonetheless be involuntary. *See Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry.").

For that reason, Appellee misses the mark when he asserts that "this Court, sitting *en banc*, in connection with Soffar's confession found no Fifth Amendment violation." (Appellee's Br. at 34 (citing *Soffar v.*

Cockrell, 300 F.3d 588, 592-98 (5th Cir. 2002)).) As Judge DeMoss noted in his dissent, while the majority had considered whether Soffar voluntarily waved his *Miranda* rights, the majority did ***not*** address the separate due process voluntariness question.[8] *Soffar*, 300 F.3d at 611 (DeMoss dissenting). Because this Court has ***never*** ruled on that due process question, the decision of this panel will be the very first Fifth Circuit ruling on the issue.

Second, Appellee also misstates the law with his sweeping assertion that Soffar's claim fails because he "does not show that he was coerced by investigators." (Appellee Br. at 29.) That assertion reads the case law far too narrowly. As the Supreme Court has repeatedly held, physical coercion is not required. *Culombe v. Connecticut*, 367 U.S. 569, 635 n.97 (1961) (the defendant was not physically coerced but was subjected to "pressures . . . of a subtler sort".); *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960) ("this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.").

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[8] For that very same reason, Appellee's arguments concerning Soffar's "invocation of [his] right to counsel," (Appellee's Br. at 33), are irrelevant because that is not the basis of Soffar's claim.

All that is required is a showing that, by virtue of police action, the accused's "will has been overborne and his capacity for self determination critically impaired." *Culombe*, 367 U.S. at 602 (citing *Rogers v. Richmond*, 365 U.S. 534 (1961)).

It is for that reason that courts must look at the "totality of the circumstances" in assessing a due process voluntariness claim. *Id.* at 606; *Blackburn*, 361 U.S. at 206 ("this Court has insisted that the judgment in each instance be based upon consideration of 'the totality of the circumstances.'") (citing *Fikes v. Alabama*, 352 U.S. 191, 197 (1957)). Here, for the reasons Appellant has already set forth (reasons that will not be repeated here), the "totality of the circumstances" clearly demonstrates that the police overreached and Soffar's will was overborne. (Appellant's Mot. at 89-104.)

Lastly, Appellee ignores the need to consider the "***totality*** of the circumstances," (*Culombe*, 367 U.S. at 606 (emphasis added)), and instead cherry picks various aspects of Soffar's personality and the circumstances of his interrogation arguing that each, standing alone, does not render the statement involuntary. (Appellee's Br. at 29-33.) As the court in *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986)—a case

upon which Appellant relies—put it, "[w]e cannot reach a conclusion simply by scrutinizing each circumstance separately, for the concept underlying the phrase 'totality of the circumstances' is that the whole is somehow distinct from the sum of the parts." *Id*. at 605.[9]

Given these rules, Appellee's responses to Soffar's claim miss the point. For although any one of the factors Appellee identifies might not be sufficient in-and-of-itself to compel a finding of involuntariness, when they are taken together—along with all of the other factors demonstrating how the police overreached and overbore Soffar's will—a conclusion of involuntariness is the only conclusion that can be deemed reasonable.[10] (Appellant's Mot. at 89-104.) That is particularly so since

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[9] *Miller* is entirely distinguishable. There, unlike here, the defendant was "a mature, experienced man, who was suffering from no mental or physical illness and was interrogated for less than an hour at a police station close to his home." *Miller*, 796 F.2d at 612. Similarly, in *United States v. Rodgers*, 186 F. Supp. 2d 971 (E.D. Wis. 2002), another case upon which Appellee relies, the "defendant's background did not render him particularly vulnerable to psychological ploys," "[o]nly one officer participated in the interrogation, and the actual questioning lasted only forty-five minutes," no promises or threats were made, and there was no "browbeating. *Id*. at 979-80.

[10] The cases upon which Appellee relies are inapposite. In *Colorado v. Connelly,* 479 U.S. 157 (1986), the claim of involuntariness was solely predicated on the defendant's mental health, as he had spontaneously approached an off-duty police officer and (without any questioning) announced that he had committed a murder. *Id*. at 160-61. In *United States v. Bell*, 367 F.3d 452 (5th Cir. 2004) "[t]he officers' misrepresentation about the existence of physical evidence [was] the only potentially coercive conduct at issue". *Id*. at 462. In *United States v. Posada-Rios*,

the police were well-aware of Soffar's mental limitations, brain damage, susceptibility to suggestion and pressure, impulsiveness, unjustified trust of police officers, and history of making false confessions. (*See id.*) Given those facts, for the state court to conclude that Soffar's statement was voluntary "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" in, among other cases, *Culombe v. Connecticut*, 367 U.S. 569 (1961) . The lower court's decision to the contrary was incorrect and should be reversed. Relief is warranted.

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158 F.3d 832 (5th Cir. 1998), the only alleged coercive conduct was an expression of sympathy and the creation of an atmosphere of trust by a police officer. *Id.* at 866. And in *United States v. Long*, 852 F.2d 975 (7th Cir. 1988) the only coercive factor was an implied promise that cooperation would be brought to the attention of the court. *Id.* at 978. Here, by contrast, there is a mountain of factors pointing towards involuntariness and impermissible overreaching. (*See* Appellant's Mot. at 89-104.)

CONCLUSION

For the foregoing reasons, those set forth in Appellant's Motion for a Certificate of Appealability and Brief in Support Thereof, those set forth in Appellant's Reply in Support of His Motion for a Certificate of Appealability, and those set forth in the Original Brief for Appellant, 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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CERTIFICATE OF SERVICE

I hereby certify that on this 15th 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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