No. 14-70040

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAX ALEXANDER SOFFAR,
Petitioner-Appellant,

v.

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

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

BRIEF OF RESPONDENT-APPELLEE

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Max Soffar, convicted of capital murder and sentenced to death, seeks habeas corpus relief. *See* 28 U.S.C. § 2254 (Westlaw 2016). This Court has granted a certificate of appealability (COA) in connection with three issues and ordered expedited briefing. *Soffar v. Stephens*, No. 14-70040 (March 14, 2016) (Order). Oral argument has been scheduled for 3 p.m. April 27, 2016.

STATEMENT OF THE ISSUES

Soffar alleges the following:

1. He was deprived of due process when the trial court excluded from evidence media reports (Original Br. for Appellant (Appellant's Br.) at 2–6);

2. He received ineffective assistance when trial counsel failed to interview Patrick Pye (*id.* at 6–10); and

3. Soffar's confession was involuntary (*id.* at 10–13).

PLEADING BACKGROUND

This Court has ordered expedited briefing and has told the parties they need not address any issue sufficiently addressed in COA-related briefings. Order. In line with the order, the Appellee, here called "the Director," relies and incorporates by reference prior briefing. The statement of the case, description of the crime, of the investigation, the guilt-innocence and punishment portions of trial, the appeal, and the

state and federal postconviction proceedings concerning Soffar's first and second trials are set out in the Brief In Opposition To Petitioner-Appellant's Motion For Certificate Of Appealability (COA Br.) at 3–10, *Soffar v. Stephens* (May 5, 2015).

And because this Court has allowed the parties to rely upon prior briefing wholly, the Director assumes that he may cite and rely upon portions of the prior COA-related brief.

STANDARD OF REVIEW

I. The Court Below.

When Soffar challenged the state court's decision, the court below reviewed that decision relying upon the federal habeas corpus standard of review. *See* § 2254(d). Under that standard, where a claim was adjudicated on the merits in state court, the court below could not grant relief unless the state court's adjudication 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. *See* § 2254(d)(1). Or the court below could grant relief if it found that the state-court decision was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. *See* § 2254(d)(2).

The court below could not grant relief even if it thought the state court decided the case wrongly. *(Terry) Williams v. Taylor*, 529 U.S. 362, 413 (2000). The court could grant relief only if it determined that the state court decided the case differently than the United States Supreme Court had on a set of materially indistinguishable facts. *See id.* If the court below found no direct conflict between Supreme Court and state court authority, the court could grant relief only if it determined that the state court decision was unreasonable, either factually or legally. *Montoya v. Johnson*, 226 F.3d 399, 404 (5th Cir. 2000). The reasonableness standard is objective. *(Terry) Williams*, 529 U.S. at 409.

In making its determination, the court below reviewed not the state court's written opinion but its decision only. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002); *see also Harrington v. Richter*, 562 U.S. 86, 98 (2011) (noting that statute does not require state court to give reasons for decision). And when the court below reviewed Soffar's petition, the factual findings of the state court were presumed to be correct. *See* § 2254(e)(1); *Jackson v. Johnson*, 150 F.3d 520, 524 (5th Cir. 1998). To

rebut that presumption, Soffar had to present evidence that was clear and convincing. *See* § 2254(e)(1); *Jackson v. Johnson*, 150 F.3d at 524.

In federal habeas review, an error is harmful only when it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Under this standard, a habeas petitioner may obtain plenary review of his constitutional claim, but he is not entitled to habeas relief based on trial error unless he can establish that the error resulted in "actual prejudice." *Id.*; *see also Fry v. Pliler*, 551 U.S. 112, 119–20 (2007).

II. In This Court.

This Court reviews findings of the court below for clear error, but reviews issues of law de novo. *Dyer v. Johnson*, 108 F.3d 607, 609 (5th Cir. 1997).

SUMMARY OF THE ARGUMENT

I. Regarding his claim that he was denied the opportunity to offer a defense, Soffar has waived the claim with insufficient briefing. In the alternative, were the Court to review the claim on the merits, Soffar would not be entitled to relief because (a) the State did not, in fact, argument that Soffar possessed a large cache of secret information, (b) a

an allegation that Soffar would confess to capital murder falsely was not credible, (c) Soffar would not have been capable using media reports to concoct a confession, (d) Soffar in fact did possess information known only to the killers, (e) the trial court did allow Soffar to question witnesses whether facts had been reported media, and (f) any presumed error is harmless.

II. In connection with Soffar's claim that he received ineffective assistance with trial counsel failed to interview potential witness Patrick Pye, (a) defense counsel knew of Pye before trial and as a matter of strategy labeled him a low-priority witness, (b) Pye's affidavit was not persuasive in that it was based on a single-suspect photo identification, (c) Pye does not state he would have been available for trial, (d) because Pye has remained silent for decades, his credibility was questionable, (e) even were Pye's affidavit taken at face value, his statement would be weighed against Soffar's confession.

III. As for the voluntariness of Soffar's third written statement, (a) Soffar does not show he was coerced by police, (b) he does not show that at the time of the statement he was intoxicated, (c) he does not show he was the target of improper trickery, (d) any presume influence exerted

by Bruce Clawson on August 5 would have dissipated by August 7, the date of the confession, (e) an investigator's feigning friendship does not render a confession involuntary, (f) without police coercion, any presumed mental difficultly would not lead to an involuntary confession, (g) Soffar received constitutional warnings several times, (h) Soffar's did not invoke his right to counsel, and (i) this Court sitting en banc has previously found no Fifth Amendment violation.

ARGUMENT

I. The Trial Court's Exclusion Of Media Reports Did Not Deprive Soffar Of Due Process.

Soffar alleges he was deprived of due process when the trial court excluded from evidence certain media reports. (Appellant's Br. at 2–6.) He argues that the prosecutors were able to argue that his confession contained information that only the killer would know. (*Id.* at 2.) Had Soffar been allowed to introduce the news reports, he argues, he could have shown the jurors that the purportedly "secret" information was public knowledge. (*Id.*)

The Director's argument in this briefing supplements the arguments set out in prior briefing. (COA Br. at 19–30.)

A. Applicable law.

While the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, it leaves to trial judges wide latitude to exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. *See Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986). The exclusion of evidence under state rules violates due process when the state evidentiary rules infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Nonetheless, the accused does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996).

A restriction on the right to present relevant evidence violates due process only when the restriction offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Id.* at 43 (citing *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)). The state may, consistent with due process, limit the

introduction of relevant evidence in a criminal case. *Id.* at 53 (citing *Crane*, 476 U.S. at 690–91). The burden of showing that the state rule complained of violates a principle of procedure that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" lies upon the accused. *Id.* at 47 (citing *Patterson*, 432 U.S. at 202). The Supreme Court has only rarely held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence. *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013).

Soffar's description of the standard of review is mistaken. (Appellant's Br. at 3.) The Court of Criminal Appeals rejected Soffar's media-report claim on grounds that the reports' exclusion was harmless. *Soffar v. State*, No. AP-75363, 2009 WL 3839012, at *22 (Nov. 18, 2009) (unpublished). A state court's determination that an error is harmless constitutes an adjudication on the merits. *See Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (stating that state court holding that federal error harmless under *Chapman*,[1] constitutes an adjudication of the constitutional claim on the merits). As such, when reviewed by the

[1] *Chapman v. California*, 386 U.S. 18 (1967).

federal district court, the adjudication is entitled to the deference under AEDPA.[2] *See Ayala*, 135 S. Ct. at 2198. And when this Court reviews the lower court's decision, this Court need not agree with the lower court's analysis but may affirm the lower court's decision on any grounds supported by the record. *Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 221 (5th Cir. 2007).

B. Trial.

At trial the defense sought to introduce photocopies of newspaper stories and recordings of television news reports about the crime. The defense wished to show that the details included in Soffar's confession had been reported in the media and that contrary to the State's argument, Soffar possessed no secret information. (RR XXX: 101–02, 104.)[3] The State objected on hearsay grounds and on grounds that Soffar had not shown that he had read, seen, or been exposed to the news reports. (RR XXX: 102, XXXI: 4–5.) The trial court excluded the copies but allowed the defense to question witnesses about whether certain

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

[3] "RR" refers to the reporter's record of the trial testimony, followed by the volume number in a Roman numeral and the page number in Arabic.

details had been reported in the media. (RR XXXI: 107 (Det. Schultz), XXXI: 115–16 (Det. Williamson) and whether Soffar had seen or read the reports (XXXII: 238–39 (Jackie Soffar Butler).)

C. Analysis.

1. Waiver.

The Court of Criminal Appeals, assuming that the trial judge erred in excluding the reports, concluded that any constitutional error did not contribute to Soffar's conviction. *Soffar v. State*, 2009 WL 3839012, at *20. First, the court said Soffar failed to show that he had been exposed to the media reports. Second, he was able to offer general evidence to support his claim that the information was public knowledge. Third, the court said Soffar's August 7 confession included two unreported facts—that the office door at the bowling alley was locked and that the victims' wallets were taken during the offense. And fourth, Soffar had also independently confessed to two other individuals, Lawrence Bryant and Mable Cass. *Id.* at *20–21.

The court below rejected Soffar's claim on grounds that he had failed to offer sufficient briefing on the Texas evidentiary rules to allow the court to determine whether the "trial court's decision was

inconsistent with state law." *Soffar v. Stephens*, Civil Action No. H-12-3783, 2014 U.S. Dist. LEXIS 175331, at *104 (S.D. Tex. Dec. 18, 2014).

The trial court excluded the news reports because they contained hearsay, *see* Tex. R. Evid. 802, and material that was irrelevant, *see* Tex. R. Evid. 402. The prosecutor also argued that the defense offered no evidence that Soffar had read or seen the news reports or knew the substance of the reports. *See* Rule 402.

In the court below, in raising his due process claim, Soffar failed to address the issue of whether the state evidentiary rules regarding hearsay and relevance were arbitrary and disproportionate to the purpose they were designed to serve. (ROA.14-70040.1064–75.) *See Holmes*, 547 U.S. at 324. The court determined that without such analysis, it was unable to determine whether the state rules were wholly or in their application arbitrary and disproportionate. *Soffar v. Stephens*, 2014 U.S. Dist. LEXIS 175331, at *104. The court determined that Soffar had deprived it of an opportunity to assess the issue. And because Soffar had not shown that the exclusion violated state law, that the state law was capricious, or that the exclusion was fundamentally unfair, Soffar had not demonstrated a constitutional violation. *Id.*, at *105.

The court below rejected the due process claim on insufficient-briefing grounds, in short, on waiver. *Id.*, at *104. Nor, apparently, has Soffar addressed with this Court the issue of the state rules' arbitrariness or disproportionality. For such briefing failure, the issue is waived. *See* Fed. R. App. P. 28(a)(8)(A) & (B); *Foster v. Townsley*, 243 F.3d 210, 212 n.1 (5th Cir. 2001) (issues inadequately briefed are deemed waived). Nor does this Court's grant of COA resolve a procedural bar in the petitioner's favor. *See Nixon v. Epps*, 405 F.3d 318, 323 (5th Cir. 2005); *Soffar v. Dretke*, 391 F.3d 703, 703–04 (5th Cir. 2004) (clarifying on rehearing that a court's decision to grant COA on an issue neither precludes consideration of a procedural default nor resolves any questions concerning procedural default in the petitioner's favor).

2. Merits.

Soffar's secret-information argument is not supported by the record. The prosecutor at closing did not base his argument on Soffar's possessing a large cache of information known only to the killer. Nor did the prosecutor argue primarily that Soffar's knowledge was unavailable to the public or had been unreported. In fact, the prosecutor acknowledged that Soffar's defense was based, in part, on his having

cobbled together a false confession from news reports or information fed to him by police. (RR XXXV: 77.) The prosecutor asked the jurors to assume, for the sake of argument, that Soffar got his information from the media or from police. (RR XXXV: 77.) Assuming that, the prosecutor argued that Soffar's allegation that he confessed to capital murder falsely was not credible. (RR XXXV: 77.)

The prosecutor said, "Okay. Let's say [Soffar] got information from the media[;] why would he then tell the police that he committed the murder robbery?" (RR XXXV: 77.)

He continued. "[Assume] [h]e got the information inadvertently from the police. Well, if he did[,] why would he then use that [information] and admit that he committed capital murder?" (RR XXV: 77.)

The prosecutor did not argue that the information was unavailable to the public. He argued rather that Soffar's allegation that his confession was false was not believable.

The prosecutor also argued that Soffar would not have been capable of concocting a confession by recalling details from news reports. (RR XXXV: 82.) Rather than arguing that the information was unavailable,

the prosecutor argued that Soffar was not capable of consuming, retaining, and processing details from news reports to create a false confession.

To the extent that the prosecutor argued that Soffar was familiar with the crime scene (RR XXXV: 86–87), the prosecutor did not argue that such information was secret. Indeed, the bowling alley was a public place. Countless customers would have been familiar with the scene. The prosecutor argued merely that Soffar's familiarity with the crime scene was evidence that Soffar had been present.

Further, Soffar did possess some information not available through news reports. He knew that five shots had been fired, one shot per victim and one warning shot. The State offered evidence of four bullet holes in the bowling alley's carpet (RR XXVIII: 33–34) and one slug recovered from the body of a victim (RR XXVII: 36). The evidence showed that three of the holes were from slugs exiting the victims, one slug remaining in one victim, and one from a warning shot. With four reported victims, a newspaper reader could infer that at least four shots had been fired. Soffar, however, knew of the fifth shot.

Soffar also knew that the office door at the bowling alley was locked and that the victims' wallets had been taken during the offense. (RR XLIII: SX 108.[4]) Nothing shows that these specific facts had been reported. (RR XLIII: DX 63–71.[5])

And the trial court did allow the defense to question witnesses about whether certain facts had been reported in the media (RR XXX: 33–34, 96, 107–08 (Gil Schultz); XXXI: 105 (Kenny Williamson)), and to question Soffar's sister about her brother's media consumption (RR XXXII: 239–40).

As noted in a previous brief (COA Br. at 28–29), had the copies of media reports been submitted to the jurors, the jurors would have had evidence that Soffar was not a keen consumer of news. When Soffar confessed, falsely, to the premurder burglary, police already had arrested the burglars and the arrests had already been reported in the newspapers. (RR XLIII: DX 64, 66.) Had Soffar been an avid newspaper

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[4] "SX" refers to the numbered exhibits offered and admitted into evidence at trial by the State.

[5] "DX" refers to the numbered exhibits offered and admitted into evidence at trial by the defense.

reader, he would have known of the arrests and would likely not have confessed to the burglary.

Nor was Soffar deprived of his right to offer testimony that he drew his information from media reports. He could have testified. While his testimony likely would have opened the door to crossexamination, when a defendant wishes to offer evidence in defense he must at times step out from behind his Fifth Amendment shield. *See, e.g., Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987) (holding that where defendant seeks to present psychiatric evidence in defense, prosecution may rebut this with evidence from the reports of the examination that the defendant requested; defendant would have no Fifth Amendment privilege against introduction of this psychiatric testimony); *White v. Johnson*, 153 F.3d 197, 200 (5th Cir. 1998) ("[A] defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind.").

The lower court's rejection of Soffar's constitutional claim is supportable. *See Sobranes Recovery Pool*, 509 F.3d at 221. Soffar failed to address the issue of whether the state evidentiary rules were arbitrary or disproportionate to their purposes. *See Holmes*, 547 U.S. at 324.

The substance of the media reports and the availability of the information did not play a large part in either the prosecution or the defense. The defense was able to offer evidence regarding Soffar's purported false confession and the prosecution did not rely on Soffar's possession of a large cache of "secret" information. The prosecution argued, at most, that Soffar's confession was consistent with the other evidence.

And even were the Court to presume error, the state court's harmlessness determination was not unreasonable. Therefore, any such error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. Again, the substance of the news reports did not play a major role in either the defense or the prosecution. The defense was able to offer its defense that much information was publicly available and the prosecution, assuming that information about the crime was publicly available, argued that Soffar likely would not confess falsely to capital murder.

Further, the Court's application of a new rule to Soffar's case would be barred by the rules against retroactivity. *See Teague v. Lane*, 489 U.S. 288, 301 (1989).

II. Counsel Was Not Required To Interview Patrick Pye.

Soffar alleges he received ineffective assistance when counsel failed to interview Patrick Pye. (Appellant's Br. at 6–10.) Soffar alleges that Paul Dennis Reid was the real killer. (COA Br. at 23–37.) Soffar argues that Pye placed Reid at the bowling alley in the weeks before the murders and that Reid had threatened to kill an employee. (Appellant's Br. at 7.) Soffar alleges he received ineffective assistance when trial counsel failed to interview Pye. (*Id.*) The arguments set out in this brief supplement the arguments made in the prior brief. (COA Br. at 30–54.)

A. Applicable law.

A defendant who wishes to demonstrate ineffective assistance of counsel must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See id.* at 690. The defendant must overcome the presumption that under the circumstances the challenged action might be considered sound trial strategy. *See id.* In fact, a conscious and informed decision on trial tactics and strategy cannot be

the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness. *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009); *Martinez v. Dretke*, 404 F.3d 878, 885 (5th Cir. 2005); *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002).

Surmounting *Strickland*'s bar is not easy. *Richter*, 562 U.S. at 105. The *Strickland* standard must be applied with scrupulous care, lest intrusive posttrial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under de novo review, the standard for judging counsel's representation is deferential. *Richter*, 562 U.S. at 105. Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. *Richter*, 562 U.S. at 105. The standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so. *Richter*, 562 U.S. at 105.

The absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (citing *Strickland*, 466 U.S. at 689).

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). "The defense of a criminal case is not an undertaking in which everything not prohibited is required." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992). Counsel, with limited time and resources, need not advance every non-frivolous argument. *Id.* "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

To prevail on an ineffective-assistance claim based on counsel's failure to call a witness, the petitioner must (1) name the witness, (2) demonstrate that the witness was available to testify and (3) would have done so, (4) set out the content of the witness's proposed testimony, and (5) show that the testimony would have been favorable to a particular defense. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

B. State and federal district court determinations.

The record before the state habeas court showed that trial counsel John Niland knew of Patrick Pye and evaluated his importance as a witness.

An offense report indicated that Pye told police he had seen a "rather strange looking" man at the alley. (03 SHCR XXV: 6432.)[6] Pye also said that he and Steve Sims, one of the murder victims, had a "run-in" with the man, presumably referring to the "rather strange looking" man, and had to eject him from the alley. (*Id.*) Pye told police that he later received a phone call from the man, who told Pye "you better be watching [over?] your shoulder." (*Id.*) Pye's recollection of a death threat is not recorded until some twenty-eight years later. (03 SHCR XXI: 5434.) The offense report recorded no such threat. (03 SHCR XXV: 6432.)

In a pretrial email to defense investigators, Niland asked investigator's to locate Pye and noted that Pye was a low-priority witness. (03 SHCR XXV: 6471–72.) It should be noted that trial counsel at Soffar's initial trial, the initial state habeas counsel, and the initial federal habeas counsel also failed to offer testimony from Pye.

The state habeas court, considering Pye's affidavit in connection with an actual-innocence claim, found the affidavit unpersuasive. (03

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[6] "03 SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court in connection with Soffar's third writ proceeding followed by the volume number in a Roman numeral and the page and paragraph numbers in Arabic.

SHCR XXXIII: 8917, para. 54.) The court said that even assuming that Reid appeared at the bowling alley one or more times before the murders, his mere presence neither established his guilt or Soffar's innocence. (*Id.*)

The state court found Pye's identification of Reid suspect because the identification had been made more than two decades after the murders with no indication of "any other familiarity with Reid." (*Id.*, para. 55.)

In connection with Soffar's ineffective-assistance claim, the state court found that counsel investigated, developed and presented evidence supporting the theory that Reid was the killer. (03 SHCR XXXIII: 8932, para. 112.)

It found that Soffar failed to show that additional witnesses, including presumably Pye, were available and that their testimony would have benefited the defense. (03 SHCR XXXIII: 8946, para. 163, *citing Wilkerson v. State*, 726 S.W.2d 542, 550–51 (Tex. Crim. App. 1986).)

Even had Pye seen Reid at the alley sometime before the murders, Reid's mere presence did not establish his guilt or establish the trial's outcome would have been different but for counsel's failure to present the evidence at trial. (03 SHCR XXXIII: 8946, para. 164.)

The state habeas court concluded that Soffar failed to show counsel's deficient performance or the required harm. (03 SHCR XXXIII: 8982, para. 14). And Soffar failed to overcome the presumption that counsel's actions "fell within the wide range of reasonable professional behavior and were motivated by sound trial strategy. (*Id.*, *citing Strickland*, 446 U.S. at 689; *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994)).

The court concluded that Soffar's ineffective-assistance claim based on alternatives in presenting evidence did not establish the merit of his allegation. (03 SHCR XXXIII: 8982–83, para. 16, *citing Strickland*, 466 U.S. at 689 (holding that there are "countless ways to provide effective assistance in any given case")).

These findings and conclusions were adopted by the Court of Criminal Appeals. *Ex parte Soffar*, No. WR–29980–03, 2012 WL 4713562, at *1 (Oct. 3, 2012).

Deferring to the state court's findings and taking a broader look at the evidence, the court below determined that the state court was not

unreasonable in denying Soffar's claim. *Soffar v. Stephens*, 2014 U.S. Dist. LEXIS 175331, at *123 (citing § 2254(d)(1)).

C. Analysis.

The only individual naming Reid as the killer was Stewart Cook, who refused to testify at trial (RR XXVI: 91–93), hoped to gain parole relief, and had a financial motive (03 SHCR XXXIII: 8921, para. 69; *see* 03 SHCR IX: 2347). It was only after Cook fingered Reid that the defense had a name and picture of an alternative suspect to bandy about seeking corroborating witnesses.

Trial counsel knew of Pye and evaluated Pye's importance to the case. (03 SHCR XXV: 6471–72.) Thus, Soffar's complaint regarding counsel's failure to interview Pye is a complaint about counsel strategy. And Soffar fails to show that counsel's strategy was so ill chosen that it permeated the entire trial with obvious unfairness. *See Richter*, 562 U.S. at 107 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."); *Woodward*, 580 F.3d at 329; *Martinez*, 404 F.3d at 885; *Jones*, 287 F.3d at 331.

Although Pye purported to recall Reid at the bowling alley weeks before the murders, his statement and his recollection ought not be taken at face value. In his affidavit, Pye says he was shown "several photographs of a white male from the early 1980's." (03 SHCR XXI: 5435, para. 7.) He does not say when he was shown the photos but likely the identification procedure occurred shortly before the affidavit was executed on May 27, 2008. (03 SHCR XXI: 5436.) Pye identified the individual in one of the photographs, presumably Reid, as the man he and Sims ejected from the alley some twenty-eight years before. (*Id.*)

For due process purposes, a single-photograph identification procedure is impermissibly suggestive. *See United States v. Sanchez*, 988 F.2d 1384, 1389 (5th Cir. 1993) (citing *Manson v. Brathwaite*, 432 U.S. 98, 108–09 (1977)).[7] The surviving witness, Greg Garner, however, did have the opportunity to identify Reid in a photo array. In about 2000, in an identification procedure conducted by a newspaper, Garner was shown an array that included a 1982 mug shot of Reid and similar-looking death-row inmates from Georgia and Arizona. Garner said that

[7] The Director assumes that the caution applies to several photographs portraying a single individual.

none of the individuals in the array, including Reid, looked like the gunman. (03 SHCR IX: 2347.) Thus, Pye's decades-old identification is unreliable and of scant relevance. Even if Pye did, in fact, see Reid at the bowling alley weeks before the murders, the surviving witness did not identify Reid as the gunman.

Nor does Pye state that he would have been available for trial. *See Day*, 566 F.3d at 538. Also, while defense counsel's affidavits are largely silent as to their strategy regarding Pye, *see Titlow*, 134 S. Ct. at 7, defense attorney Kathrine Kase did not say that had defense counsel "uncovered the evidence contained" in Pye's affidavit, counsel would have presented Pye as witness. She said only that counsel would have presented the information to the Court "in connection with our efforts to secure the admission of alternative-perpetrator evidence." (*Id.*)

Soffar must show actual, not conceivable, prejudice. Assuming that Pye testified consistently with his affidavit, Soffar has not shown that the testimony would have led to the introduction of Reid's criminal history. And the record offers nothing to suggest that Pye's testimony would have held up under crossexamination. Indeed, the State undoubtedly would have raised the inherent suggestiveness of a one-

person lineup, would have noted that police in 1980 did not record a death threat, and would have noted that despite widespread news coverage of the case, Pye had for decades remained silent and had not come forward. Further, had Pye testified about his conversations with police after the murders, the investigators may well have testified in rebuttal that they followed Pye's leads and found them not fruitful and Pye not credible.

And had Pye placed Reid at the bowling alley prior to the murders, the State may well have offered evidence controverting the testimony.

Had Pye testified that Reid had caused a ruckus in the bowling alley and even had Pye testified that Reid in a phone call threatened him—neither of which is assured—the prosecution still had Soffar's confession and knowledge of the five shots. Hence, even if deficient counsel performance is given, Soffar cannot show the required prejudice under the doubly deferential federal habeas corpus standard. *See Richter*, 562 U.S. at 105.

III. Soffar's Confession Was Knowing And Voluntary.

Soffar alleges that his confession should have been excluded because it was involuntary. (Appellant's Br. at 10–13.) In arguing this issue, the Director relies, in part, upon his previous briefing. (COA Br. at

55–72.) At issue is Soffar's third written statement. (Order.) (RR XLIII: SX 110.)

A. Applicable law.

An accused is deprived of due process if his conviction rests wholly or partially on an involuntary confession. *Sims v. Georgia*, 385 U.S. 538, 543–44 (1967). To be involuntary there must be coercion by government agents. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). A habeas petitioner has the burden of proving facts that would lead the court to conclude that the confession was not voluntary. *Uresti v. Lynaugh*, 821 F.2d 1099, 1103 (5th Cir. 1987). The voluntariness of a confession is a mixed question of law and fact. *Evans v. McCotter*, 790 F.2d 1232, 1235 n.1 (5th Cir. 1986). A state court's factual findings upon which a finding of voluntariness is based are entitled to a presumption of correctness. *Id.* "'[O]ne who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.'" *Colorado v. Spring*, 479 U.S. 564, 573 (1987) (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)). A voluntariness inquiry examines whether defendant's will was overborne. *See Dickerson v. United States*, 530 U.S.

428, 434 (2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973)).

B. Analysis.

Soffar does not show that he was coerced by investigators. After he was arrested the morning of August 5, 1980, in connection with the motorcycle theft, it was he who volunteered the subject of the bowling-alley murders. (RR IV: 4, 48.) And although the arresting officer thought Soffar at the time of the arrest was under the influence of an intoxicant (RR IV: 46), Soffar offered the confession at issue only after he had sobered up during his forty-eight hours in jail (RR XLIII: SX 110). Soffar offers no evidence that at the time of the confession he was under the influence of drugs or alcohol.

As for any presumed trickery by investigators—and the Director does not acknowledge any trickery—this Circuit has held that so long as it does not deprive the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them, trickery by investigators does not render a confession involuntary. *See United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004) ("This Circuit has held that trickery or deceit is only prohibited to the extent that it

deprives the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."); *Soffar v. Cockrell*, 300 F.3d 588, 596 (5th Cir. 2002) (en banc) ("[C]ourts have found waivers to be voluntary even in cases where officers employed deceitful tactics.") (citing *Spring*, 479 U.S. at 575).

As for any argument that the presence and statements of Sgt. Bruce Clawson rendered Soffar's confession involuntary, at issue is the third written statement only. (Order.) Soffar was arrested in connection with the motorcycle theft the morning of April 5, 1980. (RR IV: 20.) Clawson met with Soffar that day shortly after 10 a.m. (RR IV: 98.) Clawson and Soffar had a longer conversation later that day. (RR IV: 100.) Clawson did not meet or speak with Soffar after that date. (RR IV: 111.) Soffar gave his first written statement that day, at about 2:05 p.m., August 5th. (RR XLIII: SX 108.) He gave his second statement about twenty-four hours later at 1:25 p.m., August 6th. (RR XLIII: SX 109.) He gave his third statement, the statement at issue, more than twenty-four hours later, at 8:37 p.m., August 7th. (RR XLIII: SX 110.) Whatever influence Clawson may have exercised on August 5 would have dissipated by the time Soffar gave this third statement forty-eight hours later.

As for any suggestion that a confession is rendered involuntary by an investigator's feigning friendship or offering kind words or assistance, case law shows otherwise. *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 866 (5th Cir. 1998) (holding confession not involuntary where police used friend of defendant's sister to interview defendant for personal history); *United States v. Long*, 852 F.2d 975, 978 (7th Cir. 1988) (finding confession voluntary where investigator made promise to bring the defendant's cooperation to the attention of the prosecutor); *Miller v. Fenton*, 796 F.2d 598, 609–10 (3d Cir. 1986) (finding confession not involuntary where detective told defendant that defendant was "not a criminal" and where detective's interrogation strategy was to present himself as a friend to whom defendant could unburden himself); *United States v. Rodgers*, 186 F. Supp. 2d 971, 979 (E.D. Wis. 2002) ("Further, the detective's statement that cooperation cleanses the soul was also relatively innocuous and unlikely to elicit a false confession.")

Nor may Soffar argue that his history of mental difficulties made his confession involuntary. Absent coercive police conduct causally related to the confession, "there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *See*

Connelly, 479 U.S. at 164. For example, a defendant's mental compulsion to confess, absent police coercion, does not, for due process purposes, render the confession involuntary. *Id.*

Without showing police coercion, Soffar cannot argue that a mental condition led to an involuntary confession. The record shows, however, that police, rather than coercing Soffar, accommodated him. After Soffar voluntarily broached the subject of the bowling-alley murders, he more than once received his *Miranda*[8] warnings. (COA Br. at 60–68.) After his arrest he requested and received the opportunity to speak with Clawson. (RR IV: 39, 97–98.) When Officer Palmire sought to question Soffar about certain of Soffar's statements, Soffar cut off the conversation. (RR IV: 74.) When Soffar expressed a disinclination to speak with two specific interrogators, the interrogators in question withdrew. (RR XXIX: 112.) Nothing in the record shows that Soffar was promised benefits, threatened, or abused (RR IV: 171, 172; V: 72–73), or deprived of food, drink, or bathroom breaks. Indeed, the record shows that Soffar exerted a large amount of control over the interview process. Nothing in the

[8] *Miranda v. Arizona*, 384 U.S. 436 (1966).

record suggests that police deliberately or inadvertently fed Soffar details about the crime. Soffar was familiar with the workings of the criminal justice system. He had been arrested previously (RR VI: 31) and had acted as an informer for both Bruce Clawson and Clawson's brother, Michael Clawson, also a police officer (RR IV: 94–95, VI: 31). It was only after Soffar learned that his partner, Latt Bloomfield, had been released without charges—Bloomfield declined to speak to investigators—that Soffar gave the confession at issue. (RR V: 86, 87.) Nothing in the record shows that his will was overborne. *See Dickerson*, 530 U.S. at 434.

Regarding evidence concerning Soffar's receipt of his *Miranda* rights, the Director relies upon his prior briefing. (COA Br. at 60–68.)

As for an invocation of right to counsel, such an invocation must be clear and unambiguous. *See Davis v. United States*, 512 U.S. 452, 458–59 (1994) (holding that law enforcement officers are not required to cease questioning when a suspect makes an ambiguous or equivocal request for counsel). The clarity requirement serves a purpose. The court hearing the invocation-related testimony must evaluate the credibility of the witnesses and must draw inferences from the circumstances in which various conversations and bits of conversation arose. For example, when

Clawson agreed with Soffar's statement that Soffar was "on his own," Clawson's agreement was not a statement denying counsel but rather a statement by Clawson that the officer could not, in this instance, fix the situation for Soffar. (RR IV: 142.) And Soffar's expression of dislike of certain interrogators also was not an express invocation of right to counsel or of the privilege of silence. (RR XXIX: 112.)

And as mentioned in the previous briefing, this Court, sitting en banc, in connection with Soffar's confession found no Fifth Amendment violation. *See Soffar v. Cockrell*, 300 F.3d at 592–98. The Court found no clear invocation of the right to counsel, *id.* at 594–95, found his waiver or rights valid, *id.* at 596, and found no trickery that was improper. *Id.*

The court below found this Court's previous analysis instructive. *Soffar v. Stephens*, 2014 U.S. Dist. LEXIS 175331, at *63. The court said:

> The evidentiary picture has not meaningfully changed since Soffar's initial state and federal actions. Soffar has not pointed to any intervening Supreme Court authority that would determinatively alter the federal consideration of his claims. Crucially, the federal courts adjudicated his early claims under pre-AEDPA law. Soffar's nearly identical legal challenges now come before the court under a much more deferential standard than those the en banc Fifth Circuit rejected in the first round of habeas review. The adjudication of those claims under the pre-AEDPA standards informs this court's review of whether the state courts were unreasonable in rejecting Soffar's claims.

Soffar v. Stephens, 2014 U.S. Dist. LEXIS 175331, at *63.

As noted by the court below, the facts regarding Soffar's arrest and interrogation have not changed. The presentation of those facts in the prior trial and in prior postconviction proceedings is largely the same as those presented in these proceedings to the trial court, court below, and to this Court. And the court below reviewed the state court adjudication under AEDPA's deferential standard.

The trial court heard the witnesses in a four-day suppression hearing and reached a decision that reflected a reasonable application of Supreme Court precedent. *See* § 2254(d)(1). The state court's factual findings are presumed correct. *See* § 2254(e)(1). Soffar before the court below offered nothing to rebut the presumption of correctness and merely asks this Court to take the state court's evidence and reach a different conclusion. Soffar has not shown that the state court decision was unreasonable, *see* § 2254 (d)(1); *(Terry) Williams*, 529 U.S. at 409–11, or that the lower court's decision was incorrect.

CONCLUSION

The judgment of the court below should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH ECF FILING STANDARDS

I do hereby certify that (1) all required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, (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.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32 (a)(7)(B) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century and, excluding the parts of the brief exempted by Rule 32 (a)(7)(B)(iii) of the appellate rules, contains about 6,884 words.

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CERTIFICATE OF SERVICE

I do hereby certify that on April 13, 2016, I electronically filed the forgoing pleading with the Clerk of the United States Court of Appeals for the Fifth Circuit, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Docket Activity" to the following attorney of record, who consented in writing to accept this Notice as service of this document by electronic means:

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