

Appellant's First Point of Error

- (a) The trial court erred under TEX. R. EVID. 803 (24) in excluding statements against interest establishing that Paul Reid told an accomplice during a Houston robbery that he had previously shot four people in a bowling alley on Route 290.**
- (b) The trial court violated Max Soffar's federal and state constitutional rights to due process, compulsory process, and to present a defense by precluding evidence of Reid's admission to shooting four people in a bowling alley on Route 290.**

Max Soffar sought to defend himself against the State's capital murder charge by offering evidence that Paul Reid was the guilty party. In addition to erroneously-precluded evidence that Paul Reid's *modus operandi* in a spree of Tennessee robbery murders identified him as the perpetrator in the present case, *see Appellant's Third Point of Error, infra*, Soffar sought to introduce evidence that Reid admitted to Stewart Cook during their joint 1981 or 1982 Houston robbery/shooting that Reid had shot four people in a bowling alley on Route 290. (43 RR Defense Exhibit 40, ¶ 12; 5 CR 1485). The trial court's preclusion of this evidence violated Texas law and denied Soffar a "meaningful opportunity to present a complete defense," as guaranteed by the United States Constitution. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1731 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). The result was a blatantly unfair and one-sided trial, in which the jury heard only the prosecution's evidence.

Factual Background. Paul Reid is on death row in Tennessee for killing seven people in three different robbery-murders at restaurant establishments in that state. He was living in his native Houston in July of 1980. (45 RR Defense Exhibit P-39; 6 CR 1648, 1654, 1660-61). In the early 1980's, Reid committed numerous armed robberies in

the Houston area, many with Stewart Cook.¹ By Cook's estimate, they committed thirty to forty robberies together in 1981 and 1982. (5 CR 1483). Their method was to target businesses on the weekends, believing that more cash would be available. *Id.* They often entered the businesses under some pretext² near closing time, and forced the employees to get on the floor before they fled. *Id.* See, e.g., (8 CR 2304) (Reid admitting such a crime to corrections official).

Following their robbery of a home improvement store, an employee chased Reid and Cook on a bicycle. (6 CR 1536-38; 10 RR 10). When the employee caught up, Reid shot him. *Id.* In his sworn affidavit to Fried Frank Harris Shriver & Jacobson LLP ("Fried Frank"), Soffar's *pro bono* post-conviction counsel, Cook explained that he demanded to know why Reid had used his gun. (5 CR 1484). "Paul [Reid] brushed it off, telling [Cook] he'd done much worse during a robbery he had committed before [they had] started working together. Specifically, [Reid] said that he once had a 'problem' while he was robbing a bowling alley out on Route 290, and he had shot 'four people.'" (43 RR Defense Exhibit 40, ¶ 12; 5 CR 1484-85).³

¹ See (5 CR 1507-09 (*State v. Reid*, Cause No. 274209 (179th Dist. Ct., Harris Cty.)); 6 CR 1531-43 (Supplementary Offense Report, # 82-6304 (Pasadena Police Dept.) ("Having received his magistrate's warning, Reid was then interviewed about a series of robberies which he advised that he and Stewart Cook had committed")); 5 CR 1481-85 (affidavit of Stewart Cook); 5 RR 230; 30 RR 84 (prosecution acknowledging this history); 6 CR 1544 (article documenting Reid's history); 9 CR 2302-04 (Corrections Social and Criminal History)).

² For example, they feigned car trouble or a desire to obtain an employment application. (5 CR 1483).

³ As explained in detail in Appellant's Third Point of Error, Reid was finally caught and pleaded guilty to three robberies. (6 CR 1515-27). Following an incarceration of approximately eight years in Texas, he was released early on parole, moved to Tennessee, and resumed his pattern of robberies and murder robberies. See generally (6 CR 1549-50. Reid, who had successfully pleaded insanity in his 1977 robbery, (5 CR 1507-09; 6 CR 1656-57), is now on death row in Tennessee, but his execution has been delayed due to mental competency issues. (5 RR 227-28). See also *Reid v. State*, 197 S.W.3d 694 (Tenn. 2006).

At his 2006 trial, Soffar sought to introduce Reid's statement against interest through the testimony of Cook. Initially, the trial court ruled the statement admissible. (5 RR 234; 10 RR 12; 6 CR 1671-72).⁴ On the first day of trial, however, Stewart Cook stated under oath (and subpoena) that although his sworn affidavit to Soffar's attorney was true, he would plead the Fifth Amendment if asked about its contents or his conversation with Reid. (26 RR 91-94). Cook testified openly about the circumstances under which he signed his affidavit, and even swore it was true without pleading the Fifth Amendment. (26 RR 91; 93-94). Despite this ambiguity, the prosecution did not attempt to cross examine Cook on any topic, or to test whether Cook would plead the Fifth Amendment if asked about how and why he came to sign it. (26 RR 94). The State refused to grant Cook immunity, as did the trial court. (24 RR 4-5; 26 RR 99).⁵ The defense then proposed to call a Fried Frank attorney to introduce Cook's statement, explaining that both Cook and Reid's admissions were declarations against interest under TEXAS RULE OF EVIDENCE 803 (24). The defense explained that the prosecution could impeach Cook and Reid's credibility as contemplated by TEXAS RULE OF EVIDENCE 806, and could use a sworn Reid deposition, in which he denied committing the crime, to do so.⁶ (5 RR 233; 26 RR 99; 30 RR 83; 13 CR 3809-14). Over defense objections that the

⁴ The trial court also ruled admissible evidence showing Reid's presence in Houston at the time of Fairlanes crimes, and his physical similarity in 1980 to the Fairlanes perpetrator described by Greg Garner. (5 RR 234; 10 RR 12; 6 CR 1671-72).

⁵ The attempted murder with which Reid and Cook could be charged carries no statute of limitations. *See* TEX. CODE CRIM. PROC. Arts. 12.01 § 1 (A), 12.03 (a).

⁶ A federal habeas court ordered the deposition during the pendency of Soffar's habeas appeal when Reid's execution appeared imminent. (5 RR 227-28). Using Reid's sworn denial that he had committed the Fairlanes robbery-murders (at a deposition where the State was represented by the Attorney General's Office) was at least one

court was denying Max Soffar his right to due process, compulsory process, and to present a defense, the court precluded the proffered evidence at the prosecution's urging. (5 RR 233-34; 30 RR 79, 84; 32 RR 37, 44; 5 CR 1474-78; 13 CR 3796-3801).

The defense proffer of evidence included not only the Cook affidavit, (32 RR 39; 43 RR Defense Exhibit 40), but also additional evidence Appellant would have presented had the court permitted admission of Cook's affidavit, including: 1) the testimony of Edwin Cook, Stewart Cook's brother, who would have identified the composite created from Garner's description as resembling Reid in 1980, (32 RR 38-40);⁷ and 2) the testimony of Reid's ex-wife, who would have testified that they were married in July of 1980, providing a foundation for introducing Reid's wedding photograph and marriage license. (32 RR 38; 45 RR Defense Exhibits 37-39).⁸

(a) The trial court erred under TEX. R. EVID. 803 (24) in excluding statements against interest establishing that Paul Reid told an accomplice during a Houston robbery that he had previously shot four people in a bowling alley on Route 290.

Determining admissibility under TEXAS RULE OF EVIDENCE 803 (24)⁹ requires a two-step inquiry. *Davis v. State*, 872 S.W.2d 743, 747-48 (Tex. Crim. App. 1994). The

option for attacking the Reid admission in front of the jury (5 RR 233), as the prosecution did in arguments to the trial judge. (30 RR 82 (prosecution arguing from Reid's deposition); 6 CR 1646-70 (the deposition)).

⁷ By the time of the court's ruling precluding Reid's admission, it had already precluded evidence of Reid's *modus operandi* in his Tennessee and Texas crimes. (10 RR 11).

⁸ Reid's ex-wife would also have testified that their wedding photograph precisely portrays how Reid appeared in July of 1980 and that although he was living in Houston the night of the Fairlanes robbery murders, he was not with her. (30 RR 78). Of course none of the evidence about Reid or his appearance in 1980 would have been persuasive without the court's either allowing in the *modus operandi* evidence it excluded or Reid's admission.

⁹ TEXAS RULE OF EVIDENCE 803 (24) allows the admission of hearsay statements which make the declarant subject to criminal liability so long as they are accompanied by "corroborating circumstances . . ."

first step addresses “whether the statement tended to expose the declarant to criminal liability.” *Id.* at 747. One indication of such exposure is an invocation of the Fifth Amendment claim against self incrimination. *Id.* Another is a lack of “evidence indicating that [the speaker] would necessarily have been immune from prosecution.” *Id.* The second step requires a determination whether corroborating circumstances “clearly indicate the trustworthiness of the statement.” *Id.* at 747-48 (quoting TEXAS RULE OF EVIDENCE 803 (24)). Such corroborating circumstances include “when the guilt of [the hearsay declarant] is inconsistent with the guilt of the accused, [and] when the facts show that such party was so situated that he might have committed the crime.” The very fact that a statement is “genuinely self-inculpatory” is itself an indication of its trustworthiness. *Williamson v. United States*, 512 U.S. 594, 605 (1994).¹⁰

As shown below, both Reid’s statement to Cook and Cook’s statement to the Fried Frank attorneys were admissible as statements against penal interest.

*Cook’s Statement Was Admissible under TEXAS RULE OF EVIDENCE 803 (24).*¹¹

¹⁰ Interpreting TEXAS RULE OF EVIDENCE 803 (24), this Court has looked to federal authority interpreting the rule’s federal counterpart (FED. R. EVID. 804 (b) (3)), which is “virtually identical.” *Davis*, 872 S.W.2d at 748 n.13.

¹¹ **Standard of Review:** Because the admissibility of Reid’s statement against interest was a legal and constitutional issue not turning on an evaluation of the credibility and demeanor of live witnesses, *de novo* review applies. “When the resolution of a question of law does not turn on an evaluation of the credibility and demeanor of a witness, then the trial court is not in a better position to make the determination, so appellate courts should conduct a *de novo* review of the issue.” *State v. Moff*, 154 S.W.3d 599, 601 (2004). *See also Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (same) (citing *Villarreal v. State*, 935 S.W.2d 134, 139-41 (Tex. Crim. App. 1996) (McCormick, P.J., concurring)). Moreover, appellate courts “independently” decide questions of constitutional dimension. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999); *Ornelas v. United States*, 517 U.S. 690, 697 (1996). *But see Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001) (noting a defendant’s constitutional right to present a defense, but reviewing the preclusion of defense evidence employing an analysis of state evidentiary law and an abuse of discretion standard). *Id.* at 508 (Womack, J., concurring) (noting that constitutional principles discussed were “not implicated in this case”); *Cunningham v. State*, 877 S.W.2d 310, 312 (Tex. Crim. App. 1994) (reviewing a trial court’s decision whether to admit a statement against interest under an abuse of discretion standard when a defendant’s right to present a defense was not at issue).

Cook's statement that Reid admitted to shooting four people in a bowling alley on Route 290 while he and Cook were committing a Pasadena robbery and shooting for which both men were responsible obviously "tended to expose [Cook] to criminal liability." *Davis*, 872 SW.2d at 747. First, Cook admitted to being a party to an attempted murder, for which there is no statute of limitations. *See* TEX. CODE CRIM. PROC. Arts. 12.01 § 1 (A), 12.03 (a). Second, Cook stated in court that he would invoke his Fifth Amendment right against self incrimination if asked about this incident. Third, immunity from prosecution was not forthcoming. (26 RR 91-94; 24 RR 4-5; 26 RR 99). Each of these factors shows that Cook's statement tended to expose him to criminal liability.

Cook's statement is also accompanied by numerous corroborating circumstances clearly demonstrating its trustworthiness. Cook had nothing to gain by making his statement to Soffar's post-conviction attorney, who had nothing of benefit to offer him. *Burks*, 876 S.W.2d at 904-05.¹² Cook did not know Soffar, eliminating any inference that the statement was made out of affection for him. (30 RR 80).¹³ *Cf. Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (noting that disinterested testimony "would quite naturally be given much greater weight by the jury"). Independent facts also corroborate Cook's statement, including the extensive police report, setting forth the details of the crime

¹² Cook was neither being sought for his robbery/murder with Reid nor the Fairlanes robbery murders when he gave his statement, further eliminating the possibility that he was trying to "shift blame or curry favor." *Williamson*, 512 U.S. at 603.

¹³ Although Cook's statement could be characterized as "eleventh hour," Cook explained in his affidavit that he was coming forward out of a genuine feeling of remorse for failing to "make an earlier effort to turn Paul into the authorities before he committed the Tennessee murders," (5 CR 1488), and, in any event, the late nature of his statement does not in and of itself defeat the numerous indicia of its reliability. *Davis*, 872 S.W.2d at 749 (rejecting argument that "eleventh hour" nature of statement defeated other indicia of reliability).

Cook described. (6 CR 1531-43). The police report also contains Reid’s admission that he and Cook “committed . . . a series of robberies” in the Houston area around the time when this incident occurred. (6 CR 1539). In fact, every available piece of evidence corroborates Cook’s statements, and nothing but Reid’s spurious deposition refutes it.¹⁴

Cook’s affidavit was sworn, exposing him to the threat of perjury charges. *Williamson*, 512 U.S. at 598 (emphasizing importance of “the oath”).¹⁵ Moreover, the prosecution strictly controlled Cook’s availability for the jury to “observe [his] demeanor” and the “right . . . to cross examine.” *Id.* The prosecution could have “immunized [him], called him to testify at trial, and examined him.” *Alonso v. State*, 67 S.W.3d 346, 360 (Tex. App. – Waco 2001), *petition for discretionary review granted but dismissed as improvidently granted* by 158 S.W.3d 515 (Tex. Crim. App. 2005).¹⁶

Clearly, Cook’s statement was admissible as a declaration against interest.

Reid’s Statement Was Admissible under TEXAS RULE OF EVIDENCE 803 (24).

Reid’s statement to Cook that he shot four people in a bowling alley on Route 290

¹⁴ Compare with *Cunningham v. State*, 877 S.W.2d 310, 314 (Tex. Crim. App. 1994) (finding statement against interest untrustworthy because it conflicted in “significant aspects” with other evidence).

¹⁵ See also *United States v. Doerr*, 886 F.2d 944, 956 (7th Cir. 1989) (finding “circumstantial guarantee[] of trustworthiness” in part because hearsay statement at issue was made under oath).

¹⁶ Cook’s affidavit was executed in 2000, (5 CR 1488), and was provided to the State during post-conviction litigation around that time. (5 RR 227; 30 RR 80-81). At trial, the Harris County District Attorney’s Office acknowledged that it knew about the crime Cook referred to in his statement (and other crimes) when Reid and Cook pleaded guilty to another robbery. (30 RR 84). By never charging Cook in the first instance or even when it received his affidavit during the Soffar post-conviction litigation, yet declining to extend immunity to Cook so that he could answer questions, the prosecution has amply demonstrated that its only interest in this twenty-four-year old matter is to use it to dissuade Cook from testifying to Reid’s admission. Far from fulfilling its obligation to seek justice and the truth, *Berger v. United States*, 295 U.S. 78, 88 (1935), the prosecution was bent on winning a conviction against Max Soffar. Moreover, the issue here is not whether the prosecution was **required** to provide immunity (which is addressed as an alternative argument in Appellant’s Second Point of Error) but only whether it could easily have granted immunity, allowing Cook to testify on direct and under the state’s cross examination.

also was admissible as a statement against interest. Indeed, the trial court ruled that this layer of hearsay could be introduced through Cook, (5 RR 234; 10 RR 12; 6 CR 1671-72), and the appellate prosecutor who had the last word on the issue conceded that Reid's statement was a statement against interest. (30 RR 83-84). The prosecution's concession is not surprising. Reid admitted to a very serious crime,¹⁷ which certainly "tended to expose him to criminal liability." *Davis*, 872 SW.2d at 747. Reid stood nothing to gain and "must have been aware of the possibility that disclosure would lead to criminal prosecution." *Chambers*, 410 U.S. at 299, 301.

Corroborating circumstances clearly demonstrate the trustworthiness of Reid's statement as well. Reid's admission was "inconsistent with the guilt of the accused." *Davis*. 872 S.W.2d at 748. Furthermore, Reid made the statement in response to a casual inquiry by Cook, who had no connection to the Fairlanes robbery-murder. *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999) (finding casual and spontaneous statements to declarant's friend trustworthy). Reid was not then under suspicion for the crime, was not shifting blame, and certainly had no incentive to curry favor with Cook. *Williamson*, 512 U.S. at 603; *Burks*, 876 S.W.2d at 904-05.

In addition, independent corroborating facts showed that Reid was in a position to have committed the crime. *Davis*, 872 SW.2d at 749. Reid was in Houston in July of 1980, was married there only days after the robbery murders, (45 RR Defense Exhibit 39; 6 CR 1648, 1654, 1660-61), and his wife could not account for his whereabouts on the

¹⁷ Defense counsel relayed to the court that she knew of no other bowling alley murder "at that time," and no "other crime from July 14, 1980 through the present in Houston at a bowling alley where 4 people were shot and 3 people died other than this one." (30 RR 79). The prosecution did not dispute this information. *Id.*

night of the crime. (30 RR 79). These salient facts supported the defense theory that Reid committed the crime. *See Holmes*, 126 S. Ct. at 1731 (reversing due to preclusion of evidence of third party guilt where third party's alibi was refuted). Witnesses would have established that Reid's appearance during that time period strongly resembled the Garner composite. (32 RR 38-40 (Edwin Cook); 30 RR 78 (Reid's ex-wife)). So, too, would have Reid's wedding photograph. *Compare Joint Exhibit 6 with Defense Exhibit 37:*

Finally, Reid's *modus operandi* during numerous robberies in Houston and later in Tennessee strongly corroborated his guilt, and indeed indelibly marked him as the perpetrator of the Fairlanes robbery murders. *See Appellant's Third Point of Error, infra,*

incorporated herein.¹⁸

Even if this Court rules that the trial court did not err in keeping this crucial *modus operandi* evidence from the jury, the evidence still corroborates his admission to shooting

four

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Davis, 872 S.W.2d at

747-48.

(b) The trial court violated Max Soffar's federal and state constitutional rights to due process, compulsory process, and to present a defense by precluding evidence of Reid's admission to shooting four people in a bowling alley on Route 290.

The United States Supreme recently reaffirmed that “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Holmes*, 126 S. Ct.

¹⁸ As described by a Tennessee detective, “Reid displayed a distinctive *modus operandi* in his crimes in Tennessee – he would gain entry to an establish[ment] at a time when the establishment was closed but employees were still present, by causing employees to let him in. [] Reid would steal cash and coins, often having an employee access the register or safe. [] Reid would then kill or attempt to kill all employees present at the time of the robbery, with a preference for forcing the employees to lie on the floor, face down, and then shooting them execution style, with a gun shot to the head.” (9 CR 2561). Cook’s affidavit sketched out a similar *modus operandi*, but Reid was generally not shooting the victims in those robberies. (5 CR 1483).

at 1731 (internal quotation omitted).¹⁹ The Court reversed a conviction where the trial court had relied on state evidentiary law to preclude admission of evidence that someone else had committed the rape/robbery/murder for which petitioner stood trial. *Id.* at 1735.²⁰ Notably, like here, the evidence of the third party's guilt included admissions that he was responsible for the crime. *Id.* at 1730-31.²¹ Although *Holmes* was decided after Appellant's retrial and thus the trial court could not have been aware of its precise language and holding, *Holmes* applies to this case.²² Reversal is required.

Appellant's constitutional right to present a defense required admission of Cook's vital statement.

Exclusion of Cook's statement certainly violated Max Soffar's constitutional right to present a defense.²³ First, Cook's statement was under oath, *Doerr*, 886 F.2d at 956,

¹⁹ The opinion reviewed the Supreme Court's long history of upholding the right to present a defense. *Holmes*, 126 S. Ct. at 1731-32 (citing *Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane*, 476 U.S. at 690 (finding violation of right to present defense where the defendant was prevented from introducing evidence to show at trial that his confession was unreliable, and neither the state court nor the prosecution "advanced any rational justification"); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (finding violation of right to present defense, in part, because court precluded statement against penal interest inculcating an alternative perpetrator); *Washington v. Texas*, 388 U.S. 14 (1967) (noting that the "right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury *so it may decide where the truth lies*") (emphasis added)).

²⁰ The Court reversed despite substantial forensic evidence that the petitioner was guilty, including DNA evidence, palm print and fiber evidence. *Holmes*, 126 S. Ct. at 1730.

²¹ Not unlike Paul Reid, (6 CR 1650-51), when brought before the trial court, the third party in *Holmes* denied having made these admissions. 126 S. Ct. at 1730-31.

²² See *Powel v. Nevada*, 511 U.S. 79, 80 (1994) (a "'rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . not yet final' when the rule is announced" (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987))); *Griffith*, 479 U.S. at 321 n.6 (noting that a criminal case is not final until the defendant is sentenced, takes a direct appeal, and files a petition for certiorari or the time for such a petition has expired).

²³ *Holmes*, 126 S. Ct. at 1731; *Coleman v. State*, 966 S.W.3d 525, 527-28 (Tex. Crim. App. 1998) (reversing conviction and recognizing the defendant's right to compulsory process in order to obtain the attendance and testimony of witnesses favorable to his defense); *Alonso*, 67 S.W.3d at 359-60. Summarizing the requirements of the same right-to-defense precedents the Supreme Court reviewed in *Holmes*, the *Alonso* court developed the

and its self-incriminating nature provides it with an inherent guarantee of trustworthiness. *Chambers*, 410 U.S. at 299. Second, as explained above, ample evidence, including contemporaneous police reports, strongly corroborated Cook's affidavit. *Id.*

Third, and crucially, Cook's statement was essential to Soffar's defense that his own putative confession should not have been credited because Paul Reid was responsible for the crime. Without his "alternative perpetrator" defense, Soffar was left only with an "easily discounted alibi defense composed of . . . family." *Alonso*, 67 S.W.3d at 360. Given that the court precluded evidence of Reid's *modus operandi* in other crimes to show his identity as the Fairlanes perpetrator, Cook's affidavit was the only remaining avenue available for Soffar to present his defense that Reid committed the robbery murders. *Cf. Ray v. State*, 178 S.W.3d 833, 836 n.1 (Tex. Crim. App. 2005) ("Had appellant chosen not to testify in her own defense, we would be faced with exclusion of clearly vital evidence, precluding altogether the presentation of the defensive theory."). Without Cook's affidavit, the prosecution was able to obtain its conviction by improperly arguing to the jury that the defense "didn't bring you any evidence that someone other than the Defendant committed this crime." (35 RR 9). Thus, the jury was left with a thoroughly misleading picture: the prosecution's theory of the case countered not by evidence of an alternative perpetrator, but by an alibi defense from a family member that was plausible yet uncorroborated.

following useful five-factor test for determining whether a defendant's right to present a defense required the admission of hearsay evidence proffered by the defense: [1] what was the inherent trustworthiness of the hearsay; [2] was there corroborating evidence that the hearsay is truthful; [3] how important to the determination of guilt/innocence is the hearsay; [4] did the State have an opportunity to examine the declarant of the hearsay; [5] did the State demonstrate the unreliability of the hearsay? *Id.* at 359-60.

Fourth, as noted, the prosecution could have cross examined Cook by “immuniz[ing] [him], call[ing] him to testify at trial, and examin[ing] him.” *Alonso*, 67 S.W.3d at 360. In addition, the prosecution declined to take the opportunity to cross examine Cook under oath about subject areas for which he did not invoke his privilege against self incrimination – including the circumstances under which he executed the affidavit. (26 RR 91-94). The prosecution knew about Cook’s affidavit and could not claim “unfair surprise.” *Alonso*, 67 S.W.3d at 360. In fact, the prosecution acknowledged that it had sent an agent to speak with Cook, but he refused to talk. (26 RR 98). Under TEXAS RULE OF EVIDENCE 806,²⁴ which defense counsel cited and referred to as a means for the prosecution to confront Cook and Reid’s hearsay statements, (5 RR 233; 26 RR 99; 30 RR 83), the prosecution could have introduced Cook’s refusal to cooperate to raise an inference of bias and to thereby impeach Cook’s statement; it also could have relied on Reid’s deposition in which he denied making the statement to Cook. (6 CR 1650-51). Combined, the numerous opportunities the prosecution had to cross examine and confront Cook’s assertions weigh heavily towards their admission. The predominant purpose of the hearsay rule is to prevent juries from hearing statements not tested in the crucible of cross examination. *Williamson*, 512 U.S. at 598. Applying the hearsay rule wholesale in this case was “arbitrary” because the purpose of the rule was not served where the prosecution had both actual opportunities to cross examine Cook, as well as practical

²⁴ TEXAS RULE OF EVIDENCE 806 provides in relevant part: “When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for that purpose if declarant had testified as a witness.”

substitutes for cross examination. *Holmes*, 126 S. Ct. at 1731.²⁵

A state cannot apply its hearsay rule to deprive a defendant of a right to present a defense. Max Soffar had a constitutional right to introduce the Cook statement.

Appellant's constitutional right to present a defense required admission of Reid's vital admission to the crime.

Appellant also had a constitutional right to introduce the Reid statement to Cook. As an admission to an extremely serious crime, Reid's statement was: (1) inherently trustworthy, *Alonso*, 67 S.W.3d at 359-60; (2) substantially corroborated by other evidence; (3) critical to Soffar's right to present a defense, *id.*, particularly where, without it, the prosecution was able to argue to the jury that the defense had not introduced evidence of an alternative perpetrator; and (4) subject to the State's cross examination at Reid's deposition, which would have been available to the jury had Reid's hearsay admission been permitted into evidence. *Id.*²⁶ TEX. R. EVID. 806.

²⁵ The prosecution attempted to cast doubt on Cook's statements in arguments before the judge by referring to his refusal to talk and to Reid's claim that Cook set up the whole story to win a book deal. (26 RR 98; 30 RR 82). While demonstrating the type of arguments it could have made before the jury to confront Cook's statement, these arguments do not establish that Cook's statement was not reliable. The prosecution made no effort to counter Cook's (police corroborated) rendition of the crime he and Reid committed when Reid made the statement. And neither Reid's claim about a book deal (among other fanciful, grandiose, and unsubstantiated claims in his deposition) nor Cook's refusal to talk to the prosecution's agent created anything more than a question for the jury about the reliability of Cook's statements. *See Holmes*, 126 S. Ct. at 1731 (noting that third party whose guilt the defense tried to establish denied making incriminating statements when brought before the trial court).

²⁶ The prosecution did nothing to call into question Reid's admission to killing four people in a bowling alley on Route 290. Whether Soffar's putative admission to the crime (with Bloomfield) or Reid's admission was true was purely a question for the jury. *Cf. Holmes*, 126 S. Ct. at 1731 (reversing conviction obtained through preclusion of evidence of third-party guilt, despite that third party denied his guilt and self incriminating statements).

The prosecution had an opportunity to and in fact did cross examine Reid. (6 CR 1646-70). Thus, barring his admission did not serve the purpose of the hearsay rule. The ruling was “arbitrary” in the same sense that the rules Justice Alito reviewed in *Holmes* were arbitrary. The rules reviewed in *Holmes*, like the rule applied to exclude Reid’s statements, arbitrarily deprived the defendant of his constitutional right to present a defense. 126 S. Ct. at 1731-32, 1735. Specifically, just as in *Holmes*, the trial court’s arbitrary evidentiary ruling completely prevented Soffar from presenting an “alternative perpetrator” theory.²⁷

The one-sided presentation of evidence resulting from the court’s rulings was the picture of an unfair trial. Although appellate counsel contends that the Reid evidence demonstrates that Max Soffar is not guilty, that is not the issue for this Court to decide. Instead of opining on “whether it believe[s] the defendant’s defense was credible,” this Court should consider whether “*a jury could . . . properly convict [Soffar] absent the opportunity to hear the proffered testimony bearing upon the theory of defense and weigh its credibility along with the other evidence in the case.*” *Miller*, 36 S.W.3d at 506

²⁷ This Court has stated that the exclusion of evidence may establish a constitutional violation: “(1) when a state evidentiary rule categorically or arbitrarily prohibits the defendant from offering relevant evidence that is vital to his defense; or (2) when a trial court erroneously excludes relevant evidence that it is a vital portion of the case and the exclusion effectively precludes the defendant from presenting a defense.” *Ray v. State*, 178 S.W.3d 833, 835 (2005) (citing *Potier v. State*, 68 S.W.3d 657, 659-62 (Tex. Crim. App. 2002)). Appellant has demonstrated a constitutional violation under the second test, and the first is no longer an accurate statement of the law. *Potier* focused on whether the rule *itself* was arbitrary, rather than whether the court’s application of the rule was arbitrary. 68 S.W.3d at 666 (rejecting constitutional claim because the trial court’s action barring non-hearsay was merely the “misinterpretation” of a non-arbitrary rule). *Holmes*, decided after both *Potier* and *Ray*, rejected this type of analysis. See *Holmes*, 126 S. Ct. at 1735 (“*Interpreted in this way*, the rule applied by the State Supreme Court [but which was otherwise permissible] does not rationally serve the end that the . . . rule and its analogues in other jurisdictions were designed to promote . . .”) (emphasis added). Clearly, the arbitrary application of an otherwise permissible rule to preclude defense evidence is just as detrimental to a defendant’s rights and to the trial’s truth-seeking process as an inherently arbitrary rule.

(quoting *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977) (emphasis added)).

Clearly, the answer is no.

The Deprivation of Appellant's Right to Present a Defense Was Not Harmless.

The trial court's error in precluding the introduction of Paul Reid's admission violated Soffar's constitutional rights and was not harmless beyond a reasonable doubt. Under the test for constitutional error, this Court must reverse Soffar's conviction "unless [it] determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2 (a). *See also Chapman v. California*, 386 U.S. 18, 24 (1967) (same).²⁸ Further, even if this court finds only non-constitutional error, the error was not harmless. For non-constitutional error, the question is whether the error affected substantial rights No party should have a burden to prove harm from an error, and there ordinarily is no way to prove "actual harm." . . . In general, we look to the severity of the error . . . , to measures taken to cure the error, and to the *certainty* of conviction without the error.

State v. Anderson, 182 S.W.3d 914, 918-19 (Tex. Crim. App. 2006) (emphasis added).

As demonstrated below, here, no measures were taken to cure the error, it was severe, and the state cannot now show *any certainty of conviction* absent the error in excluding Reid's admission – particularly when combined with Reid's strong resemblance to the

²⁸ In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court made clear that the burden of proving harmless error falls on the prosecution. *Id.* at 297 (holding that "the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [constitutional error] was harmless").

perpetrator and his presence in Houston on the night of the robbery murders.

The trial court's preclusion of Reid's admission to the Fairlanes robbery-murder was not harmless under any standard. Constitutional error can be "harmless if [the admissible] evidence of the defendant's guilt is overwhelming." *Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986). The prosecution's case against Soffar was far from overwhelming. On the contrary, it was extraordinarily weak. As the Fifth Circuit stated after reviewing virtually identical evidence from Soffar's first trial:

No eyewitness testimony placed either Soffar or Bloomfield at the crime scene. No fingerprints lifted from the crime scene matched the fingerprints of either Soffar or Bloomfield. Nothing was taken from the crime scene and later found in the possession of either Soffar or Bloomfield. No blood or hair samples were found at the crime scene that matched those of Soffar or Bloomfield. The gun used to commit this crime was neither found nor introduced into evidence. Neither Soffar nor Bloomfield were linked to a weapon of the same caliber as the bullets recovered from the crime scene. Nothing Soffar told the police in his statements led the police to discover any evidence they did not already have relating to the bowling alley murders.

Soffar, 368 F.3d at 479. These observations are equally true of the second trial, where the only evidence against Soffar were his own highly questionable statements.

Soffar's statements themselves were implausible in light of the crime-scene evidence, the forensic evidence, the ballistics evidence, and the statements that the only surviving witness, Garner, provided to the police shortly after the shootings. As demonstrated more fully in the Statement of Facts, all of this evidence, as summarized in

the following chart, conflicted with Soffar’s putative confession.

| Varying Fact | Putative Soffar Confession | The credible evidence, including Garner’s statements |
|-----------------------------|--|--|
| Number of perpetrator(s)? | 2 ²⁹ | 1 ³⁰ |
| Use of Disguises? | T-shirt and ladies stockings used to hide perpetrators’ faces. ³¹ | Lone perpetrator wore no disguise. ³² |
| How perpetrator(s) entered? | Perpetrators walked through open door with gun. ³³ | Manager opened <i>locked</i> door to help lone perpetrator feigning car trouble using a white jug/pitcher. ³⁴ |
| Location of Cash Taken? | Snack bar and underneath counter. ³⁵ | Neither from snack bar nor under counter; only from control booth cash register. ³⁶ |
| Victim kicked? | Young woman kicked in head. ³⁷ | No one kicked. ³⁸ No one injured apart from bullet wounds. ³⁹ |
| Number of shots fired? | 5 ⁴⁰ | 4 ⁴¹ |

²⁹ See (30 RR 161).

³⁰ See (32 RR 63, 79, 100-01).

³¹ See (30 RR 161).

³² See (32 RR 89-90, 134-35).

³³ See (30 RR 161).

³⁴ See (32 RR 71-75, 79-80, 83, 10-06, 137-38, 144-46; 26 RR 184; 27 RR 90-91, 101; 43 RR State’s Exhibit 39).

³⁵ See (30 RR 162-63).

³⁶ See (26 RR 177-79).

³⁷ See (30 RR 162).

³⁸ See (32 RR 69, 84, 86, 110-11, 130).

³⁹ See (28 RR 18-21; 27 RR 234).

⁴⁰ See (30 RR 162).

⁴¹ See (28 RR 90; 33 RR 65-66, 127-28; 32 RR 69-70, 129).

| | | |
|--|--|--|
| When money taken? | After shooting victims ⁴² | Before shooting victims ⁴³ |
| Configuration of victims on floor when shot? | Straight line from the front doors in following order: male, female, male, male. ⁴⁴ | Victims in semi-circle in following order from front door: female, male, male, male. ⁴⁵ |

The unreliability of the Soffar statements was predictable. Knowing Soffar from his time as an informant, Sgt. Clawson believed that he was “just not trustworthy,” and his assertions could never be relied upon to obtain a warrant. (29 RR 103-05; 129, 134). Soffar’s brains were “fried” from drug use. (29 RR 134). He was like a ten- or eleven-year-old child. *Id.* Soffar did not appear to understand that this was a serious case, a capital case. (29 RR 163). Soffar asked Sgt. Clawson about possible reward money early on during the interrogation, (29 RR 186), consistent with Soffar’s perpetual search for the “big score” in his life. (29 RR 131).⁴⁶

Other evidence confirmed that Soffar was the type of person who would falsely confess. Soffar falsely claimed responsibility for a well-publicized burglary the night before the robbery murders, which the media had reported was possibly connected to the Fairlanes robbery murders. (30 RR 25, 189; 26 RR 183; 43 RR Defense Exhibit 59). By the time Soffar had made this claim, other suspects had already been arrested and charged

⁴² See (30 RR 162).

⁴³ See (32 RR 69, 84-85, 107-08, 111-12, 126-28).

⁴⁴ See (30 RR 161).

⁴⁵ See (33 RR 86-89; 109-10; 31 RR 155-56).

⁴⁶ False confessions are amongst the leading causes of wrongful convictions. See <http://www.innocenceproject.org/understand/False-Confessions.php> (Last visited April 19, 2007) (noting that 25% of DNA exonerations involve convictions based upon false confessions). Empirical evidence suggests that persons, like Soffar, who are impulsive, have low intelligence, have low self esteem, are prone to fantasy and disassociation, and/or are addicted to drugs, (6 RR 33-37; 4 RR 80-81, 88-89), are the most likely candidates for false confessions. GISLI GUDJONSSON, *The Psychology of Interrogations and Confessions: A Handbook*, 381, 388, 390, 396, 418-30 (2003).

with the burglary. *Id.* Similarly, the police learned that Soffar’s confessions to other area robberies, in which he again inculpated Bloomfield as an accomplice, were also false. (31 RR 26-28). During the police interrogation regarding the Fairlanes crime, Sgt. Clawson observed Det. Schultz interviewing Soffar and noted that Soffar was unable to say anything about the building, the roadway, or the “turn around” near the bowling alley. (29 RR 150-51). In a diagram Det. Schultz worked on with Soffar, Schultz had to draw in much of the crime scene, including the counter inside the bowling alley. (29 RR 151).⁴⁷ Det. Schultz’s interrogation made Sgt. Clawson concerned whether the police were obtaining accurate information. (29 RR 166). After the Schultz interrogation, in which Soffar inculpated Bloomfield and not himself, no other interrogations were recorded, raising the question whether unreliable interrogation tactics continued. (30 RR 176-78).

Against the backdrop of a prosecution case lacking “clear objective evidence of Soffar’s guilt,” 368 F.3d at 478-79, any additional relevant evidence the defense could offer was likely to tip the scales enough to create a reasonable doubt. *Chapman*, 386 U.S. at 25-26 (observing that an error is less likely to be harmless if the case is a close one). And a confession by a third party to the crime is particularly powerful evidence in favor of the accused. *See House v. Bell*, ___ U.S. ___, 126 S. Ct. 2064, 2084 (2006) (finding sufficient showing of “actual innocence” based in part on evidence of a third party confession). A third party’s resemblance to the possible perpetrator and other evidence of his guilt combine even more powerfully as a defense.⁴⁸

⁴⁷ Similarly, Det. Williamson drew most of the parts of the diagram he used in his interrogation with Soffar. (31 RR 61-62, 128-29, 131).

⁴⁸ *See Wilson v. Firkus*, 457 F. Supp. 2d 865, 891 (N.D. Ill. 2006) (finding unconstitutional preclusion of third party’s similar *modus operandi* in other crimes and resemblance to description of assailant not harmless where

Here, when combined with evidence that: 1) Reid’s July 1980 photograph was a virtual match with the composite prepared by Garner, *compare* (43 RR Defense Exhibit 38) *with* (45 RR Joint Exhibit 6), as set forth, *supra*, at 35, 2) Reid was in Houston at the time of the Fairlanes robbery murders, and 3) Reid’s wife could not account for his whereabouts on the night of the crime, Reid’s admission to killing four people in a bowling on Route 290 might well have created a reasonable doubt, leading to acquittal. Without this error permeating the trial, conviction would have been far from certain – indeed it would have been unlikely. *Anderson*, 182 S.W.3d at 918-19. This Court simply cannot conclude that preclusion of this evidence did not make any difference, beyond a reasonable doubt or otherwise. *Chapman*, 386 U.S. at 24.

Moreover, by successfully moving to exclude the Reid evidence, the prosecution was able to argue to the jury that the defense “didn’t bring you any evidence that someone other than the Defendant committed this crime.” (35 RR 9). This argument alone shows that the exclusion of the Reid evidence was not harmless by either standard because the prosecution would not have made it were it not for the reasonable possibility that lack of alternative perpetrator evidence would affect the outcome. *See Fulminante*, 499 U.S. at 297-98 (citing prosecution’s argument in summation as evidence that error was not harmless); *Chapman*, 386 U.S. at 25 (similar).

The court’s ruling, the lack of any measures to cure the error, *Anderson*, 182 S.W.3d at 919, and the prosecution’s argument, all combined to leave the jury with the following picture: that there was no credible evidence that the offense was committed by

habeas “[p]etitioner’s confession did not match the victim’s testimony in a very key aspect . . .” and where admission of the evidence “would have lent credibility to Petitioner’s contentions that someone else committed the crime and may very well have tipped the scale in his favor”).

an alternative perpetrator. This picture was false. Kept from the jury was evidence that Reid – not Max Soffar – committed the crime. It is impossible to eliminate the reasonable possibility that this constitutional and evidentiary error substantially contributed to the verdict. This Court must reverse.⁴⁹

Appellant’s Second Point of Error

- (a) The trial court violated Appellant’s constitutional right to present a defense by refusing to grant immunity to a witness who would have testified that Paul Reid told him during a crime that Reid had shot four people in a bowling alley on Route 290.**
- (b) The trial court violated Appellant’s constitutional right to present a defense by failing to compel Cook to testify because his invocation of the right against self incrimination was improper.**

Assuming *arguendo* that this Court rejects Appellant’s First Point of Error, this Court should find that the trial court erroneously failed to uphold Soffar’s right to present a defense by refusing to require Stewart Cook to testify. The court had two legal means to obtain such testimony. First, the court could have ordered “use immunity” for Cook. *Smith v. State*, 70 S.W.3d 848, 860 (Tex. Crim. App. 2002) (defining “use immunity”). Second, even if the court determined that Cook’s statement was not against interest and immunity was not warranted, it should have ruled that Cook’s invocation of the right against self incrimination was improper. The court’s failure to utilize either option was prejudicial error. Reversal is required.

- (a) The trial court violated Appellant’s constitutional right to present a defense by refusing to grant immunity to a witness who would have testified that Reid stated during a Houston armed robbery that he had shot four people in a bowling alley on Route 290.**

⁴⁹ This harmless error analysis presented above assumes that the trial court’s ruling precluding evidence of Reid’s *modus operandi* in the highly similar Tennessee crimes was correct. If, as Appellant argues in Appellant’s Third Point of Error, *infra*, those rulings were wrong, the cumulative harm of precluding all of the Reid evidence further supports the conclusion that the court’s error was not harmless. See Appellant’s Twenty-first Point of Error, *infra*.

A trial court must grant immunity without the prosecution's consent if it is necessary to uphold a defendant's right to compulsory process. *See* U.S. Const. amends. VI; XIV; *Norman v. State*, 588 S.W.2d 340, 345 (Tex. Crim. App. 1979) (finding error in refusal to grant "immunity for [the] informant" and a "denial of appellant's Sixth Amendment right to compulsory process and [to] present[] a defense");⁵⁰ *Miller v. State*, 36 S.W.3d 503, 506 n.4 (2001) (citing *Norman*). This case falls within the narrow class of cases where ordering immunity was required to uphold the right to present a defense.⁵¹

Defense counsel's request was for "use immunity," not transactional immunity. (13 CR 3793, 3796-3797, 3799, 3802). "Use immunity" is immunity from the State's use of self-incriminating statements (and their fruits) made during a witness's compelled testimony. *Smith*, 70 S.W.3d at 860.⁵² In *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983), the Fifth Circuit stated that a constitutional right to immunized testimony would exist to remedy prosecutorial "abuse of the immunity process." The *Autry* ruling requires a showing that "the state had no legitimate purpose for refusing immunity and did so to

⁵⁰ Although *Norman*'s rationale might have been that the invocation of the right against self incrimination in that case was ill founded, 588 S.W.2d at 344, by its own terms, *Norman* spoke of granting immunity to uphold a defendant's right to present a defense, as did the *Miller* opinion when it cited *Norman* in 2001. *Miller*, 36 S.W.3d at 506 n.4.

⁵¹ **Standard of Review:** The trial court's refusal to grant immunity or to rule that Cook's invocation of his right against self incrimination was improper implicated Appellant's Constitutional right to present a defense. Review of this question of constitutional law is *de novo*. *See Lilly v. Virginia*, 527 U.S. 116, 137 (1999); *Guzman*, 955 S.W.2d at 87. *De novo* review is also appropriate because "the resolution of [this] question of law [did] not turn on an evaluation of the credibility and demeanor of a witness." *Moff*, 154 S.W.3d at 601.

⁵² By contrast, "transactional immunity" is immunity from prosecution for any crime related to the compelled testimony. *Id.* TEXAS CODE OF CRIMINAL PROCEDURE Article 32.02, addresses, if anything, transactional immunity. Article 32.02 states that "the State may, by permission of the court, dismiss a criminal action . . ." "Transactional immunity" refers to the State refraining from bringing charges, rather than dropping them. Apparently, however, courts cite the statute in refusing to grant immunity because providing transactional immunity would sometimes require dismissing a criminal action already commenced. *See, e.g., Smith v. State*, 708 S.W.2d 518, 520 (Tex. Crim. App. – Houston 1986, *pet ref'd*) (citing Art. 32.02). "Use immunity," however, is clearly not implicated by TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 32.02, and neither requires the dismissal of a criminal action nor even requires a prosecutor to refrain from prosecution. No other provision of the Code of Criminal Procedure addresses immunity.

deprive the defense of essential exculpatory testimony.” *Id.* at 1402.

Appellant easily meets the *Autry* test. At trial, the prosecution acknowledged that the State knew about the attempted capital murder/attempted robbery about which Cook would testify (during which Reid made his admission) when Reid and Cook pleaded guilty to a robbery in 1982. (30 RR 84). Moreover, the prosecution received Cook’s affidavit in 2000. (5 RR 227; 30 RR 80-81). By never prosecuting him during the twenty-four years since he committed the crime, the State proved it had no legitimate purpose for refusing Cook immunity.

When asked its position, the prosecution offered no legitimate reason for withholding immunity. (24 RR 4-5). Instead, it merely argued that the court could not grant immunity over its objection. *Id.* The State wholly lacked a legitimate justification for withholding immunity. It claimed no prosecutorial interest in a crime it had known about for twenty-four years because it had none. The State then capitalized on the Court’s refusal to grant immunity by arguing to the jury that the defense failed to prove that someone else was responsible for the Fairlanes robbery murders. (35 RR 9). The inescapable inference from its conduct and words is that the prosecution withheld immunity from Stewart Cook to keep him from relaying to the jury that someone else had admitted to the crime. *See Virgin Islands v. Smith*, 615 F.2d 964, 969 (3d Cir. 1980) (finding deliberate intent to distort fact-finding process because the witness would have been “severely damaging” and the prosecution gave no justification for not immunizing the witness). Such an abuse of the immunity process required the trial court to intervene and uphold Appellant’s constitutional rights. The trial court’s failure to do so was error.

Moreover, even absent abuse of the immunity process, granting immunity is

required when: 1) immunity is properly sought; 2) the witness is available; 3) the witness's testimony is exculpatory; 4) the testimony is essential; and 5) the prosecution has no strong countervailing interest. *See United States v. Cohen*, 171 F.3d 796, 801-02 (3d Cir. 1999). Cook's testimony clearly meets this test. Immunity was properly sought for testimony which could have inculpated him in an attempted capital murder, which has no statute of limitations. *See* TEX. CODE CRIM. PROC. Arts. 12.01 §§ 1 (A), 12.03 (a). Cook was available. (26 RR 91-94). His testimony was certainly exculpatory and essential to Soffar's case where Soffar's attempted defense was that someone else was guilty of the offense, and where the prosecution specifically argued to the jury that the defense had failed to bring forth evidence of an alternative perpetrator. (35 RR 9). Finally, the State has shown absolutely no interest in prosecuting Cook for either the Fairlanes murders (in which he was not a suspect) or for his 1982 crime with Reid.

Thus, even if the Court finds no abuse of the immunity process, this Court should hold that the trial court erred in denying Appellant's request to order immunity for Cook.

(b) The trial court violated Appellant's constitutional right to present a defense by failing to compel Cook to testify because his invocation of the right against self incrimination was improper.

In arguing against immunity, the prosecution suggested that Cook no longer was in jeopardy of prosecution for his 1982 robbery and attempted murder. (30 RR 84-85). Defense counsel responded by seeking an order directing Cook to testify and a ruling that he had no Fifth Amendment privilege. *Id.* After the trial court refused to grant immunity and refused to allow admission of Cook's affidavit as a declaration against interest, defense counsel again asked the trial court to declare that Cook's invocation of the right against incrimination was improper and to compel him to testify. (32 RR 40-44).

Defense counsel cited Max Soffar's constitutional rights to compulsory process and to present a defense. (32 RR 44).⁵³ The court denied Appellant's motion without ever determining whether Cook's invocation of his Fifth Amendment rights was proper. (30 RR 84-85; 32 RR 43-44).

A witness's ability to rely on the Fifth Amendment privilege against self incrimination to avoid testifying is not absolute. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself[;] his say-so does not of itself establish the hazard of incrimination. *It is for the court to say whether his silence is justified . . . and to require him to answer if it clearly appears to the court that he is mistaken.*" *Id.* (internal citations and quotation marks omitted) (emphasis added). A trial court's role in determining whether the privilege is properly invoked is crucial when the privilege threatens "the right to present a defense." *Norman*, 588 S.W.2d at 345 (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). *See also Reese v. State*, 877 S.W.2d 328, 337 (Tex. Crim. App. 1994) (finding error where trial court sustained witness's claim against self-incrimination because it was "too broad and therefore . . . spurious").

In *Norman*, this Court criticized the trial court's failure to determine whether a witness properly invoked the right against self incrimination. 588 S.W.2d at 344. As in *Norman*, the court below erred in accepting Cook's invocation of his right against incrimination without the necessary inquiry and without finding that the invocation was

⁵³ Defense counsel's perseverance underscores the crucial nature of Reid's admission to the defense case.

proper. Cook's invocation of his Fifth Amendment rights did not "itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486. It was for the trial court to say whether his "silence [was] justified." *Id.* And it could not do so without conducting "a searching inquiry into the validity and extent of [Cook's] Fifth Amendment claims." *United States v. Waddell*, 507 F.2d 1226, 1228 (5th Cir. 1975). However, the trial court here made no inquiry. When Cook testified that he "believe[d] that any testimony might incriminate [him] regarding possible acts that were committed back in 1982, 83," (26 RR 92), the court asked him nothing about this belief or anything else. (26 RR 91-94).

Moreover, the court failed to ask the prosecution, which had authority both over Soffar and Cook's Harris County cases, whether Cook had a legitimate basis for fearing prosecution for a 24 year-old crime. The prosecutors were duplicitous about Cook's exposure. When the issue was whether Cook's statement was against his penal interests, the prosecution implied that Cook would not be prosecuted because the "State was aware of those aggravated robberies" when Cook pleaded guilty to them. (30 RR 84). When the issue was the propriety of Cook's invocation of his Fifth Amendment rights, however, the prosecution argued that "based upon the advice of counsel . . . [Cook has] invoked [the] Fifth Amendment privilege [and] does have liabilities in that situation." (30 RR 85). The trial court should have directly asked the State for its position on Cook's exposure and required a straight answer. By not doing so, the court enabled the prosecution to take contradictory positions. It could successfully oppose both Appellant's motion to introduce Cook's statement as a declaration against interest and his alternative motion for a ruling that Cook's invocation of his right against self incrimination was improper. This type of gamesmanship must not be countenanced.

The court's failure to rule on the validity of Cook's invocation of his Fifth Amendment rights and failure to conduct a searching inquiry by asking Cook and the State about Cook's perceived criminal exposure for the 1982 crime violated Max Soffar's constitutional right to present a defense and to compulsory process.

For the reasons stated in Appellant's First Point of Error, the court's constitutional error was not harmless beyond a reasonable doubt. This Court must reverse.

Appellant's Third Point of Error

The trial court denied Max Soffar his constitutional right to present a defense by precluding evidence of Paul Reid's distinctive *modus operandi* in his brutal Texas and Tennessee crimes, which marked him as the perpetrator of the remarkably similar Fairlanes robbery-murders.

Paul Reid is on death row for killing seven people in Tennessee in three different robbery-murders at business establishments. Reid's *modus operandi* in those cases was remarkably similar to the Fairlanes robbery-murders, which were committed: 1) in a nearly identical way, 2) on a night when Reid was living in Houston and his wife could not account for his whereabouts, (30 RR 78) and 3) by a perpetrator strongly meeting Reid's description. *Compare* (43 RR Defense Exhibit 38) *with* (45 RR Joint Exhibit 6). The trial court violated Max Soffar's constitutional right to present a defense by precluding this compelling evidence. *Holmes*, 126 S. Ct. at 1731. Without this evidence, Max Soffar did not have a fair trial and the jury lacked the information it needed to determine where the truth lies. *Washington*, 388 U.S. at 19.

Factual Background. The Fairlanes robbery murders occurred on a Sunday. (26 RR 42). By feigning car trouble, a single perpetrator entered the bowling alley after it had been closed. (32 RR 66, 71-74, 75, 79-80, 83, 101, 103-04, 136-38, 144). The

perpetrator wore no mask or disguise. (32 RR 89-91, 131-34). He made each of his victims lie face down and shot them in the head only after completing his robbery. (32 RR 69-70, 80, 84-85, 106-07, 112, 124, 126-29). The perpetrator discarded their wallets on a nearby roadway. (27 RR 119). The perpetrator was white, just over six feet tall, (32 RR 83, 131-32). His hair was light brown, worn combed back, revealing his complete forehead, and cut just below the ears on the side and at the collar on the back. (32 RR 132-33; 135). He was stronger and heavier than the surviving victim, Garner, who weighed one hundred and fifty-five pounds. (32 RR 133).

Paul Reid's crimes in Tennessee possessed remarkably similar characteristics. As described by Det. Postiglione, who investigated his crimes there, "Reid displayed a distinctive *modus operandi* in his crimes in Tennessee – he would gain entry to an establish[ment] at a time when the establishment was closed but employees were still present, by causing employees to let him in. [] Reid would steal cash and coins, often having an employee access the register or safe. [] Reid would then kill or attempt to kill all employees present at the time of the robbery, with a preference for forcing the employees to lie on the floor, face down, and then shooting them execution style, with a gun shot to the head." (9 CR 2553, 2561 (affidavit of Det. Patrick Postiglione)).⁵⁴ See also Appendix A (chart summarizing similarities amongst Reid's robbery murders).

None of the three Tennessee businesses Reid robbed were open to the public or

⁵⁴ Reid's method with Cook in their thirty to forty robberies was similar. (5 CR 1483). The two men would target businesses on the weekends, believing that more cash would be available. *Id.* They often entered businesses under some pretext and near closing time, and the businesses' employees were often forced to get on the floor before they fled. *Id.* See, e.g., (8 CR 2304) (describing Reid's admission to law enforcement to such a crime).

showed signs of forced entry.⁵⁵ Thus, as at Fairlanes, Reid devised a way to either force or deceive his way into these businesses.⁵⁶ Like the Fairlanes, two of the Tennessee businesses, Baskin-Robbins and McDonald's, were robbed after closing time at night.⁵⁷ Reid also had initially attempted to rob the other one, Captain D's, at night, but this plan failed, and he had to return and rob that business the next morning, before it had opened for business.⁵⁸ Like the Fairlanes, the Captain D's and McDonald's were robbed on weekends, which was also consistent with Reid's methodology when he was committing robberies in Houston in the late 1970's and early 1980's. (5 CR 1483).

Reid never wore a mask or shielded his face during his robbery-murders.⁵⁹ He was described in his Tennessee crimes much the same as the Fairlanes perpetrator was described: a large white male, with slicked or pushed back hair, long in the back. *Reid I*, 91 S.W.3d at 262-63; *Reid III*, 213 S.W.3d at 805. Reid would use a gun to force people to lie in a group, either in a walk-in freezer or on the floor.⁶⁰ As at the Fairlanes, the

⁵⁵ *Reid I*, 91 S.W.3d at 261 (witness found doors locked when he appeared for work at Captain D's before bodies discovered); *Reid II*, 164 S.W.3d at 297 (witness arrived to find door unlocked after business closed and employees missing); *Reid III*, 213 S.W.3d at 805.

⁵⁶ *Reid I*, 91 S.W.3d at 263 (eyewitness saw Reid standing outside Captain D's talking to one of the victims with a white paper in his hand at 8:50 a.m.); *Reid III*, 213 S.W.3d at 805.

⁵⁷ *Reid II*, 164 S.W.3d at 298 (eyewitness account showed Reid committed robbery of Baskin-Robbins store after it closed at 10:00 p.m.); *Reid III*, 213 S.W.3d at 805-06 (Reid robbed the McDonald's in Tennessee after the late night shift on a Saturday). See also *Reid II*, 164 S.W.3d at 300 (Reid suggested to coworker robbing fast food establishment in the middle of the night, when there were no witnesses); *Reid III*, 213 S.W.3d at 806 (same).

⁵⁸ *Reid I*, 91 S.W.3d at 261-62 (Captain D's robbery in Tennessee occurred before opening time on a Sunday, the morning after Reid had attempted to enter at night under the guise of applying for a job).

⁵⁹ *Reid I*, 91 S.W.3d at 263 (observing that Reid was seen outside without a mask on); *Reid II*, 164 S.W.3d at 298 (stating that Reid was observed in the store without a mask on prior to the robbery's occurring); *Reid III*, 213 S.W.3d at 805; (5 CR 1484).

⁶⁰ *Reid I*, 91 S.W.3d at 261 (stating that both victims were found shot dead and lying face down on the floor in the walk-in cooler); *Reid III*, 213 S.W.3d at 805 (observing that the four victims were ordered at gunpoint to lie face-down on the floor before they were shot). See also (5 CR 1483-84 (Cook affidavit reporting that this was Reid's

victims were “probably” shot with a revolver. *Reid I*, 91 S.W.3d at 261, 264. At the Tennessee trial relating to the shooting of the McDonald’s employees, testimony established that Reid owned a small caliber handgun. *Reid III*, 213 S.W.3d at 806. As at the *Fairlanes*, the robbery witnesses were shot in the head execution style. *Reid I*, 91 S.W.3d at 261; *Reid III*, 213 S.W.3d at 805.

Reid’s “signature” on the Captain D’s and McDonald’s robbery/murders was so strong that the Tennessee trial judge trying the Captain D’s case ruled that the testimony of an eyewitness of the as yet untried McDonald’s robbery/murder could be introduced in the Captain D’s trial on the issue of identity. (8 CR 2349-57). In support of this ruling, the Tennessee court cited the testimony of Det. Postiglione, (8 CR 2354), and emphasized the similarities: the description of the suspect (“[o]ne large male, white, dark hair”); both robberies “occurred on Sunday”; both businesses were closed as well as locked at the time of the robberies; “[n]o forced entry was used at either locations”; and all six victims were “required to lay on stomach” and were shot in the head. *Id.* The Tennessee court found that the McDonald’s evidence was “highly probative on the issue of identity in the Captain D’s trial.” (8 CR 2355).⁶¹

At the sentencing phase of Reid’s trial on the McDonald’s crime, the jury heard about Reid’s 1984 Texas robbery conviction from a Texas Assistant Attorney General. *Reid III*, 213 S.W.3d at 806. In addition,

Detective Postiglione pointed out the similarities between the crimes in this case and those that the defendant had committed earlier at a nearby Captain D’s restaurant.

tactic in Houston, although they did not typically shoot)).

⁶¹ Subsequently, the court reversed itself, not on the merits of the question, but based solely on the danger that admission of this evidence would be found to be unduly prejudicial on appeal. (8 CR 2276-77).

According to the officer, the two separate criminal episodes took place at fast food restaurants. Both occurred on a Sunday while the restaurants were closed. In each instance, the restaurants had been locked following the crimes. In addition, there was no sign of forced entry at either restaurant. The defendant had used a small caliber weapon and in each incident, the victims were forced to lie face down in an isolated area of the restaurant before they were murdered. Each of the murder victims suffered two gunshot wounds to the head. Detective Postiglione testified that the *modus operandi* in each case was unlike any other that had been used in Davidson County in at least fifteen years.

Id. at 806-07.⁶²

Soffar's counsel sought to introduce evidence of Reid's *modus operandi* to show that Reid committed the Fairlanes crime. Emphasizing Soffar's constitutional right to present a defense, (5 RR 233-34; 9 RR 20-23), counsel provided the information about Reid set forth above in written motions, accompanied by extensive documentation in supporting exhibits. (5 CR 1442- 6 CR 1672; 8 CR 2227-2366). To serve judicial economy, the defense proposed to introduce the voluminous information about Reid's criminal history in Tennessee and Texas through two "summary" witnesses, *see* TEX. R. EVID. 1006, one for each state. (5 RR 230-34). As an example, defense counsel presented an affidavit from Det. Postiglione. (10 RR 3; 9 CR 2553-61). Defense counsel also proposed a crime-scene expert who could testify about the similarities between the Tennessee crimes and the Houston crime. (10 RR 3). The court's ruling precluding the admission of such evidence appeared to be based on hearsay, rather than any question about whether Reid's crimes in Tennessee were sufficiently similar. (5 RR 234; 6 CR 1671-72; 9 RR 20 (noting that its concern was about hearsay, "not how similar [the

⁶² Tennessee would undoubtedly disagree with the Soffar prosecution's arguments that not even the Tennessee crimes were similar. (9 CR 2548). *See also State v. Reid*, 2005 WL 1315689, *49 (Tenn. Crim. App. Nashville 2005) ("The State cited to fourteen similarities between the Captain D's crimes and the McDonald's crimes to establish that the crimes were committed in a similar fashion in a common scheme or plan. The trial court did not err in permitting Det. Postiglione to testify as to the similarities in the crimes to establish the . . . aggravating circumstance."), *aff'd*, 213 S.W.3d 792 (2006).

crimes] are”). Thereafter, defense counsel offered two alternatives solutions, some six weeks before the trial commenced. (10 RR 11). First, counsel proposed bringing in witnesses with direct knowledge of the crimes in Tennessee. *Id.* Second, counsel proposed that the court could take judicial notice of the facts found by the Tennessee courts on appellate review and allow an expert to testify about such facts. *Id.* The court, however, announced that it would not reconsider its ruling. *Id.* As a result, the jury convicted Max Soffar of capital murder without ever hearing evidence that a Houston man who fit the description of the perpetrator had committed crimes strikingly similar to the Fairlanes robbery murders.

Argument. Under TEXAS RULE OF EVIDENCE 404 (b), a party may introduce evidence of a person’s “other crimes” to establish the identity of the actual perpetrator of a crime where, as here, that issue is in dispute. *See, e.g., Johnson v. Texas*, 68 S.W.3d 644, 650-52 (Tex. Crim. App. 2002) (upholding the use of Rule 404 evidence to prove identity during crime spree).⁶³ The “extraneous offense must be so similar to the charged offense as to mark the offenses as the” person’s “handiwork.” *Id.* at 650-51.

The rule is often applied to allow admission of other crimes evidence against a defendant to prove identity. *See, e.g., id.; Lane*, 933 S.W.2d at 519.⁶⁴ As courts have noted, however, Rule 404 “should cut both ways and benefit an accused in appropriate circumstances just as it does the State.” *Renfro v. State*, 822 S.W.2d 757, 759 (Tex. App.

⁶³ *See also Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996) (allowing the state to introduce 404 (b) evidence of murder in a different state to establish identity); JUDGE CATHY COCHRAN, TEXAS RULES OF EVIDENCE HANDBOOK 238 (6th ed. 2005).

⁶⁴ Here, where the events in question are very highly unusual, and the similarities to Reid’s crimes are overwhelming, the repetition of events also makes it likelier that Reid committed the Fairlanes murder than that the similarities were caused by chance. *See Fox v. State*, 115 S.W.3d 550, 559-62 (Tex. App. – Houston 2002, *pet. ref’d*) (noting that Texas courts accept the defendant’s use of the chances doctrine).

– Houston 1992, *pet. ref'd*). Indeed, because “risks of unfair prejudice do not appear” when it is the defense seeking to introduce the evidence, the burden of admissibility for “other crimes” evidence is lower for defendants. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 115, at 685, 684-87 (West 2005).⁶⁵ *See also* COCHRAN at 264. This lowered burden unquestionably applies to cases, like this one, where a third party suspect has “committed one or more additional offenses that are strikingly similar to the charged offense[.]” MUELLER ET AL., § 115 at 685.⁶⁶

Under any burden of admissibility, Reid’s crimes in Tennessee mark him as the true perpetrator of the Fairlanes robbery murders.⁶⁷ His Tennessee and earlier Houston crimes were remarkably similar to the Fairlanes murders in: (1) selection of the target, (2) time of the robbery, (3) method of entry, (4) position of victims on the floor, (5) manner of execution of the victims, and (6) disposal of the victim’s wallets by the roadside.⁶⁸ *See* Appendix A. The trial court appeared to agree, focusing its concerns only on a perceived (though, as shown below, ultimately non-existent) hearsay problem. (9 RR 20). And the Tennessee court that tried Reid found that the similarities of the crimes in Tennessee were

⁶⁵ TEXAS RULE OF EVIDENCE 404 is derived from and shares many characteristics with FEDERAL RULE OF EVIDENCE 404. *See* COCHRAN, at 236-37.

⁶⁶ *See also* *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991) (allowing “reverse 404(b)” evidence to negate proof of identity and collecting cases); *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989) (“When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent”); *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1970) (lower standard of admissibility applies to defendant’s proffered other crimes evidence due to defendant’s “right to present a vigorous defense”); *Wilson v. Firkus*, 457 F. Supp. 2d 865, 891 (N.D. Ill. 2006) (granting habeas relief where state court precluded third-party guilt defense based on third party’s other similar crimes); *United States v. Stamper*, 766 F. Supp. 1396, 1406 (W.D. N.C. 1991) (noting lower standard); *State v. Garfole*, 388 A.2d 587, 591 (N.J. 1978) (similar).

⁶⁷ **Standard of review:** *De novo* review is required because “the resolution of [this] question of law [did] not turn on an evaluation of the credibility and demeanor of a witness.” *Moff*, 154 S.W.3d at 601. In addition, the trial court’s preclusion of the Reid evidence implicated appellant’s constitutional right to present a defense. Review of this question of constitutional law is *de novo*. *See Lilly*, 527 U.S. at 137; *Guzman*, 955 S.W.2d at 87.

⁶⁸ *See Reid I*, 91 S.W.3d at 262 (content of victim’s wallet found on roadside).

“highly probative on the issue of identity.” (8 CR 2355).

In the court below, the prosecution argued to the trial court that Reid’s Tennessee robbery-murders were not “distinctively” similar to the Fairlanes robbery-murders. (9 CR 2544, 2547). The prosecution’s arguments addressed the weight, not the admissibility of the Reid evidence. Mere differences between crimes do not defeat admissibility. Instead, the requirement is “*some* distinguishing characteristic common to both [the other crime(s)] and the offense for which the accused is on trial.” *Walker v. State*, 588 S.W.2d 920, 923-24 (Tex. Crim. App. 1979) (emphasis added) (citations omitted). “[R]emoteness or dissimilarity do not per se render an extraneous offense irrelevant.” *Thomas v. State*, 126 S.W.3d 138, 144 (Tex. App. - Houston 2003, *pet ref’d*).

Therefore, the “extraneous offense and the charged offense can . . . be different offenses, so long as the similarities between the two offenses are such that the evidence is relevant.” *Id.* For example, it is irrelevant that in his Baskin Robbins robbery-murder, Reid departed from his ordinary *modus operandi* when he took the young counter workers from the store and stabbed them in a park. *Reid II*, 164 S.W.3d at 297-98.⁶⁹ Other parts of this crime remained similar, including the mode of entry, and that the crime took place at night after the establishment had closed. *Id.* The differences in the Baskin Robbins crime certainly did not render Reid’s “signature” illegible.

When combined with Reid’s resemblance to the perpetrator described by Greg Garner, his crimes in Tennessee and Houston “show a nexus between the crime charged and the alleged alternative perpetrator.” *State v. Wiley*, 74 S.W.3d 399, 406 (Tex. Crim.

⁶⁹ In addition to using a gun, Reid was known to have used knives in connection with his murderous assaults. (8 CR 2311; 2328; 2358; 2360-61).

App. 2002) (internal quotes and citations omitted). A sufficient nexus exists when evidence shows that the alternative perpetrator exists, resembles the defendant, and his other crimes were sufficiently similar to be introduced as reverse 404 (b) evidence. *Id.* at 407 n.20 (citing *Stevens*, 935 F.2d at 1401-06 (finding error in identification case to exclude testimony by another victim that a different person resembling the defendant assaulted her in similar manner in a nearby location)). Here, Reid fit the description of the assailant, and his *modus operandi* fit the Fairlanes robbery murders like a glove.⁷⁰

The prosecution also argued that the difference in time and proximity between the Fairlanes robbery murders and Reid’s Tennessee robbery murders rendered Reid’s *modus operandi* inadmissible. This Court has allowed admission of 404(b) evidence based on similarities between crimes despite time gaps and differences in location. *Lane*, 933 S.W.2d at 519 (allowing the state to introduce 404(b) *modus operandi* evidence from a decade earlier in Kansas). As this Court has stated, “[t]he common distinguishing characteristic may be the proximity in time and place *or* the common mode of the commission of the offenses.” *Johnson*, 68 S.W.3d at 651 n.25 (quoting *Ransom v. State*, 503 S.W.2d 810, 813 (Tex. Crim. App. 1974) (emphasis added in *Johnson*)). Here, the “common mode” is certainly present. In any case, the prosecution below greatly overstated the difference in time and proximity. (9 CR 2548). In fact, the proximity criterion actually *avored* admissibility, for all four crimes occurred in the vicinity of Reid’s whereabouts. As for the difference in time between the 1980 and 1997 crimes,

⁷⁰ As shown elsewhere, the Reid declaration against interest should have been permitted. Appellant’s First and Second Points of Error. Although Reid’s description, presence in Houston, and *modus operandi* were certainly enough to establish a nexus, his declaration against interest even further strengthens the nexus. The present Point of Error stands apart from the first two, but Appellant urges the Court to consider the powerful defense case which could have been presented had both Reid’s declaration against interest and his *modus operandi* been admitted.

Reid spent at least eight of the intervening years in prison. (8 CR 2328). Subtracting the time Reid was in prison and could not commit these types of crimes, as would be appropriate in analogous contexts, *see* TEX. R. EVID. 609 (b), results in a shorter period of time between the crimes occurring a decade apart in *Lane*. (17 years (period between crimes) – 8 years (Reid’s time in prison) = 9 years).

Reid’s stamp is unmistakable. He left it in Texas. He left it in Tennessee. The jury should have known about it before being asked to convict Max Soffar.

Furthermore, the court’s hearsay concerns were groundless. Responding to these concerns (5 RR 234), defense counsel proposed to present the testimony of witnesses with direct knowledge of Reid’s crimes. (10 RR 11-13). In other words, the defense proposed to employ the method typically used by the prosecution, i.e., *live witnesses*. *See, e.g., Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980). Obviously, testimony from witnesses with direct knowledge would not implicate the hearsay rule.

Additionally, to the extent that the court wanted to minimize the amount of time the jury would spend listening to such testimony, defense counsel proposed two viable options. First, the court could have taken judicial notice of the facts found by the Tennessee appellate courts. (10 RR 11). *See, e.g., Adams v. Adams*, 787 S.W.2d 619, 620 (Tex. App. - San Antonio 1990, *no pet.*) (taking judicial notice of Tennessee Supreme Court decision). Second, the court could have permitted a summary witness with direct knowledge of the investigation of Reid’s lengthy criminal history. *See* TEX. R. EVID. 1006.⁷¹ A summary witness to establish Reid’s signature would have been particularly

⁷¹ For example, Det. Postiglione testified at Reid’s trial to the similarities amongst Reid’s crimes, including his Texas robbery from 1982. *Reid III*, 2005 WL 1315689, at *12.

appropriate given that the State has never challenged the reliability of the allegations against Reid in Texas or Tennessee. *See, e.g.*, (9 CR 2544-51) (arguing that Reid's crimes are not "distinctively similar," not that they did not occur or that accounts of them are unreliable). In short, the court had three eminently reasonable and appropriate options: it could have allowed witnesses with direct knowledge of Reid's criminal acts; it could have allowed a summary witness; or, it could have taken judicial notice of facts found by the Tennessee courts. Instead, it precluded this vital defense evidence.

The essential nature of the right to present a defense is explained in Appellant's First Point of Error. Precluding Reid's *modus operandi* evidence for no legitimate reason denied Max Soffar his right to present a defense. *Holmes*, 126 S. Ct. at 1731. Without admitting evidence regarding either Reid's *modus operandi* or his confession to Cook, evidence of his presence in Houston in 1980 and resemblance to the perpetrator were meaningless. The court's ruling below was arbitrary because it served no legitimate state interest or rule. *Id.* It was highly prejudicial because it deprived Soffar of a powerful defense. *See Ray*, 178 S.W.3d at 835. The court's rulings allowed the prosecutor to argue to the jury that the defense had not presented evidence that someone else was responsible. (35 RR 9). The one-sided result was not a fair trial. For the reasons stated in the harmless error analysis in Appellant's First Point of Error, the trial court's constitutional error was not harmless by any standard.