

### Appellant's Sixth Point of Error

- (a) **The State's failure to preserve exculpatory evidence violated Appellant's rights to due process and a fair trial under the United States Constitution.**
- (b) **The State's failure to preserve exculpatory and valuable evidence violated Appellant's rights to due course of law under the Texas Constitution.**

The trial court violated Max Soffar's rights to due process and due course of law when it overruled his objection to facing trial after the state had lost critical evidence. (9 RR 19). Because the State failed to preserve crucial defense evidence, Appellant was denied his constitutional rights to due process, due course of law, and a fair trial. U.S. Const. amends. VI, XIV; Tex. Const. Art. I, §§ 10, 19.

**(a) The State's failure to preserve exculpatory evidence violated Appellant's right to due process and a fair trial under the United States Constitution.**

The Fourteenth Amendment to the UNITED STATES CONSTITUTION forbids states from destroying or losing exculpatory evidence, and forbids the bad-faith destruction or loss of potentially exculpatory evidence. *See Illinois v. Fisher*, 540 U.S. 544 (2004); *see also Jackson v. State*, 50 S.W.3d 579, 588-89 (Tex. App. – Ft. Worth 2001, *pet. ref'd*). Where the State destroys or loses evidence which is both material and exculpatory on its face, a due process violation is established. *United States v. Moore*, 452 F.3d 382, 388 (5th Cir. 2006) (citing *Illinois v. Fisher*). Where the lost or destroyed evidence is only potentially exculpatory, a due process violation is established by showing bad faith on the part of the state. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Moore*, 452 F.3d at 388.

Here, the State lost or destroyed evidence that was both exculpatory and material to Soffar's case at the guilt and punishment phases. In fact, most of the missing

exculpatory evidence was directly related to the “stark inconsistencies between Garner’s description of the shootings and the one that the officers testified that Soffar gave them.” *Soffar*, 368 F.3d at 471. *See also id.* at 456, 488 (Appendix A). Having won in the Fifth Circuit, Soffar’s success in the retrial would turn on whether the jury believed the account attributed to him or found a reasonable doubt based on Garner’s contrary statements. The missing evidence went to the heart of resolving this conflict.<sup>1</sup>

The police lost four audiotapes of Garner’s statements. (8 RR 3-44; 28 RR 145-46; 2 CR 507; 7 CR 1978). The tapes were exculpatory on their face because their contents differed so “dramatically” with the theory of guilt propounded by the State. *Soffar*, 368 F.3d at 456. The prosecution and its “expert” attacked Garner’s account as confused and a product of “potential” amnesia. (28 RR 108-48).<sup>2</sup> The missing tapes were critical to the jury’s adequate assessment of the State’s claim.

The police also failed to preserve the water jug officers found out of place on the control counter at the bowling alley. (26 RR 183-85; 27 RR 91). The police should have known of the jug’s potential relevance when they processed the scene because the Fairlanes manager, Jim Peters, was present and could have told the police that the jug was out of place and therefore significant. (26 RR 184). Because the police did not ascertain

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<sup>1</sup> The trial court stated it was denying Appellant’s motion to dismiss (and for other alternative remedies) due to lost and missing evidence because it raised a “legal question.” (9 RR 19). The court made no findings of fact. The standard of review is, thus, *de novo*. *Moff*, 154 S.W.3d at 601.

<sup>2</sup> Testifying for the prosecution, Dr. Leon Gildenberg claimed that his reading of transcripts of Garner’s statements “demonstrated” the type of concern he had about Garner’s memory. (28 RR 114). Had the tape of those interviews not been lost, the defense would have been able to test Dr. Gildenberg’s assertions by allowing the jury to hear how Greg Garner spoke in those interviews, his level of certainty, and whether his voice betrayed confusion.

its importance and preserve this jug, the defense could not test it for fingerprints or DNA which the perpetrator, who wore no gloves, might well have left. (33 RR 30). The State's failure to preserve the jug prejudiced Soffar's ability to exonerate himself.

Other missing evidence was relevant to whether there were four or five shots fired, including Sims's shirt,<sup>3</sup> bullets and bullet fragments. (33 RR 19, 58-59, 63,158; 35 RR 43-56; 43 RR State's Exhibit 192; 2 CR 514-16).<sup>4</sup> In addition, pieces of carpet and carpet padding the police had cut out from around the four bullet holes had all been lost. (43 RR State's Exhibit 197). The prosecutor and defense expert agreed that this evidence was relevant to whether four or five shots were fired. *See* (9 RR 16; 33 RR 84).<sup>5</sup>

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<sup>3</sup> Sims's shirt was also important because he spent a lot of time with the perpetrator. (32 RR 73, 80, 104, 137, 139, 145). For example, he went outside with the perpetrator to deal with his car trouble, *id.*, and emptied the cash register at the perpetrator's demand. (33 RR 84-85; 107-08). Because the shirt was lost, the defense could not have the shirt tested to determine whether the perpetrator had left biological evidence, including DNA, on Sims's shirt. Such testing could not have been done in 1981 even if Soffar had then had effective counsel investigating the case.

<sup>4</sup> By the time of Appellant's retrial, the police had destroyed the larger piece of carpet from which the carpet squares had been cut. (8 RR 37-38; 2 CR 531). Because the smaller carpet squares had been cut around the bullet holes in the carpet, this evidence would have been valuable to the defense to corroborate that Garner had correctly described the position of the victims during the shooting, not Max Soffar. (*Compare* 45 RR Joint Exhibit 3 with 43 RR State's Exhibit 207/Defense Exhibit 32; 30 RR 161). A chart the State admitted as Exhibit 129 in the first trial, which demonstrated the position of the bullet holes in the carpet, would have served a similar purpose, but it too had been lost. (2 CR 504, 6 RR 75-76; 7 RR 10).

<sup>5</sup> Although during the argument on the lost evidence motion the prosecutor argued to the court that lost evidence bearing on whether there were four, five or more shots was completely irrelevant because the number of shots was irrelevant, (9 RR 15), he argued to the jury that the issue was important and that the defense expert's testimony that five shots were fired (as Garner had said in his statements) represented a "magic bullet" theory. (35 RR 22, 96). Whether there were four or five shots fired was an important factual issue for the jury. *Soffar*, 368 F.3d at 476 (citing importance of ballistics expert on this issue).

due process.<sup>6</sup> Remedies include dismissal, *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993), or, in less egregious cases, an adverse inference instruction where evidence is lost or destroyed. *See Youngblood*, 488 U.S. at 51; *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000). This Court should reverse and render a judgment in Appellant's favor or order such other relief as justice may require.

**(b) The State's failure to preserve exculpatory evidence violated Appellant's right to due course of law under the Texas Constitution.**

In his concurring opinion in *Youngblood*, 488 U.S. at 60-61, Justice John Paul Stevens wrote that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith, but in which the loss or destruction of [potentially exculpatory] evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Id.* Numerous states have adopted Justice Stevens's rationale and rejected the bad-faith standard when interpreting their state constitutions.<sup>7</sup>

This Court, too, should abandon *Youngblood's* impractical bad-faith test by interpreting the Texas constitutional guarantee of due course of law to provide greater protections. *See* Tex. Const. Art. I, §§ 10, 19. This Court is not bound by *Youngblood*, *see Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998), and should follow other

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<sup>6</sup> If this Court finds any of this evidence not exculpatory on its face, it should find a due process violation due to the State's bad faith in losing "potentially" exculpatory evidence. The State knew at Soffar's original trial that the weight of the projectiles and fragments only added up to four bullets, not five. (7 CR 2133-34 (notes of assistant district attorney who prosecuted the case in 1981); 7 CR 2100 (HPD Firearms Section Worksheet)). It also possessed Greg Garner's account, which so dramatically differed from its trial theory at the first trial.

<sup>7</sup> *See, e.g., Ex Parte Gingo*, 605 So. 2d 1237, 1241 (Ala. 1992); *Thorne v. Dept. of Public Safety*, 774 P.2d 1326, 1330-31 (Alaska 1989); *State v. Morales*, 657 A.2d 585, 591-92 (Conn. 1995); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992); *State v. Matafeo*, 787 P.2d 671, 673 (Haw. 1990); *Williams v. State*, 50 P.3d 1116, 1126 (2002); *State v. Chouinard*, 634 P.2d 680, 683 (N.M. 1981); *State v. Barnett*, 543 N.W.2d 774, 777-778 (N.D. 1996); *State v. Cheeseboro*, 552 S.E.2d 300, 307 (S.C. 2001); *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999); *State v. Gibney*, 825 A.2d 32, 42-43 (Vt. 2003); *State v. Osakalumi*, 461 S.E.2d 504, 512 (W. Va. 1999).

jurisdictions enunciating a standard that protects the rights of criminal defendants when the state negligently loses or destroys important evidence. The appropriate approach under the Texas due course of law provision was recently set forth by *Pena v. State*, 166 S.W.3d 274, 281-82 (Tex. App. – Waco 2005), *rev'd* 191 S.W.3d 133 (Tex. Crim. App. 2006).<sup>8</sup> If “potentially useful” evidence is lost or destroyed, the court must balance the degree of negligence involved, the significance of the destroyed evidence, and the sufficiency of the other evidence in support of the conviction. *Id.* at 282.

The missing evidence in this case is certainly exculpatory. It includes powerful evidence going to the heart of whether the jury should have believed Garner’s statements or Soffar’s statement. Moreover, even if this Court finds some or all of the evidence merely “potentially useful,” reversal of Soffar’s conviction and dismissal of the indictment is warranted given the volume of the lost evidence, the fact that only inexcusable neglect could have led to its loss in this capital case,<sup>9</sup> and that the remaining evidence in the case was far from overwhelming. *Soffar*, 368 F.3d at 478-79. This Court should reverse and render, or order other appropriate relief.

### **Appellant’s Seventh Point of Error**

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<sup>8</sup> This Court reversed the intermediate appellate court in *Pena*, not on the merits, but because the parties never briefed the state constitutional issue in the intermediate court. *State v. Pena*, 191 S.W.3d 133 (Tex. Crim. App. 2006). The intermediate court is now considering briefing on the state constitutional issue. *State v. Pena*, 192 S.W.3d 684 (Tex. App. – Waco 2006). Even though the court did not allow full briefing, its reasoning remains persuasive. The *Pena* court insightfully discussed the need for greater police incentives to preserve evidence and the concomitant damage to defendants’ rights when they fail to do so, as evidenced by the rash of lost and disturbed evidence in crime labs across the country, including Houston. *Pena*, 166 S.W.3d at 280-81.

<sup>9</sup> The police witness called upon to find lost evidence stored in the police property room provided no other explanation than that the District Attorney’s Office had checked out some of the evidence and that all of the records of the evidence, except log books, had been destroyed. (8 CR 33-39).

**Rooted in a completely unreliable confession, Appellant's conviction rests on legally and factually insufficient evidence and violates his right to due process of law.**

Max Soffar's conviction was built upon a confession dramatically at odds with the sole eyewitness's description of the crime and with the other testimonial and physical evidence. *Soffar*, 368 F.3d at 456. Soffar's putative confession came after he spent three days of isolation in police custody and after he signed two substantially different and less-inculpatory statements. None of Soffar's putative statements was written in his own hand or stated in his own words; instead, the police typewrote the statements for his signature. Only part of the first day of interrogation was recorded, and the little evidence available about the police interrogations indicated that officers fed Soffar information, including a description of the layout inside and outside of the bowling alley. (29 RR 147-51, 164-66; 31 RR 61-62, 128-29). The police officer who knew Soffar well as a police informant – and who was called upon when other officers hit a “brick wall,” (29 RR 187-88) – described him as “just not trustworthy” and as having “fried brains” and the mentality of a ten-year-old child. (29 RR 129, 134).

This Court may reverse a conviction based upon *legally* insufficient evidence, *Jackson v. Virginia*, 443 U.S. 307, 319, 326 (1979), or *factually* insufficient evidence. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). This Court should hold the purported confession unreliable as a matter of law. Various factors, individually or in combination, make it unreliable, including: (1) the circumstances under which it was taken; (2) its failure to comport with the physical and testimonial evidence; (3) its failure to contain any information not already known by the police; and (4) the fact that Soffar

gave numerous versions of the events.<sup>10</sup> Moreover, because the State's proof is not legally sufficient to identify Soffar as the perpetrator without his confessions, this Court should reverse his conviction because it is based on legally insufficient evidence. In the alternative, this Court should act as a "thirteenth juror" and reverse Appellant's conviction because of factual insufficiency. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). When a conviction appears "manifestly unjust" or "clearly wrong" because the "great weight and preponderance of the (albeit legally sufficient) evidence contradicts the jury's verdict," a new trial must be ordered. *Id.* For the reasons stated above, this is the rare case which meets this exacting standard.

### **Appellant's Eighth Point of Error**

**The trial court violated Appellant's constitutional right to present a defense by repeatedly precluding evidence which undermined the prosecution's case and impeached the police investigation.**

At Max Soffar's trial, the trial court repeatedly violated his constitutional right to present a defense, effectively blocking each new attempt to salvage what remained of the defense that both his confession and the police investigation were unreliable. *See also* U.S. Const. amends. VI; XIV; Appellant's First Point of Error, incorporated herein (collecting cases); *Ray*, 178 S.W.3d at 836 n.1 (cautioning against "precluding altogether the presentation of the defensive theory").<sup>11</sup>

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<sup>10</sup> *See, e.g., People v. Brensic*, 509 N.E.2d 1226, 1231-32 (N.Y. 1987) (finding confession "unreliable as a matter of law," where it was "the product of the custodial questioning of a 15-year-old boy for six and a half hours, without his parents' knowledge, by two police detectives," which contained "numerous versions of the events that led to [victim's] death").

<sup>11</sup> A *de novo* **standard of 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, and because the trial court's

First, the court repeatedly blocked cross examination designed to vindicate Soffar's constitutional right to prove that his confession was unreliable. *Crane*, 476 U.S. at 690. (29 RR 163-64 (precluding Clawson's testimony that he was concerned that Soffar "could not provide any details about the bowling alley" during custodial interrogation);<sup>12</sup> 30 RR 117-20 (precluding testimony from police witnesses about inconsistencies within Soffar's statements); 31 RR 157-58 (precluding police testimony that Soffar's statement kept changing from August 5 to 7, 1980)).

Second, the court refused to allow Soffar to attack the police investigation as unreliable.<sup>13</sup> *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (finding due process violation where prosecution suppressed evidence which defense could have used to "attack[] the reliability of the [police] investigation"). The information provided in Garner's police statements should have been the foundation of their investigation. Instead, they focused solely on Max Soffar, whose purported information was "dramatically at odds" with the information from Garner. *Soffar*, 368 F.3d at 456. A proper police investigation may well have led to someone else being charged with the crime.

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preclusion of this evidence implicated Appellant's constitutional right to present a defense. *Lilly*, 527 U.S. at 137; *Guzman*, 955 S.W.2d at 87.

<sup>12</sup> By contrast, defense objections to police officers testifying that it "appeared" that Max Soffar "understood" his *Miranda* rights were overruled. (29 RR 55-56).

<sup>13</sup> *See* (31 RR 15-16 (precluding testimony that the police "tip line" for the Fairlanes robbery murders, which had numerous callers, received no calls saying Max Soffar was the perpetrator); 31 RR 34 (precluding testimony that Latt Bloomfield was never charged with the crime); 31 RR 157 (precluding police testimony that Greg Garner's diagram of the bodies showed his own body in the same position as unaccounted for bullet hole, corroborating his own statements and undermining Soffar's); 31 RR 158 (precluding police testimony comparing Soffar's statement with Greg Garner's); 32 RR 169, 172, 174, 179; 34 RR 14-15 (precluding police testimony about Greg Garner's non-transcribed statements, introduced not for the truth of the matter asserted but to show that Garner's earlier transcribed statements were consistent with the answers he provided during weeks of police interviews)).

Third, just as the court precluded the admission of evidence of Reid's statement against interest, Tex. R. Evid. 803 (24), the court precluded the admission of evidence that people other than Reid and Soffar had admitted to the crime. (31 RR 17 (precluding testimony that other people confessed to the Fairlanes robbery murders); 31 RR 101-03 (precluding evidence that other suspects admitted to the crime to authorities)).

The trial court's rulings violated Appellant's rights to due process of law and to present a defense. Because the prosecution's evidence was extraordinarily thin, the court's error was not harmless under any standard. *Chapman*, 386 U.S. at 24; *Anderson*, 182 S.W.3d at 918-19.

### **Appellant's Ninth Point of Error**

**The court deprived Appellant of his rights under the Confrontation Clause by admitting testimonial hearsay evidence never properly tested in the crucible of cross examination.**

The Confrontation Clause forbids the introduction of an absent witness's prior testimony unless "the defendant had an adequate opportunity to cross-examine" the witness in the prior proceeding. U.S. Const. amends. VI; XIV; *Crawford v. Washington*, 541 U.S. 36, 57 (2004) (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-216 (1972) (other citations omitted)). Where the State seeks to introduce such testimony, it has the burden of establishing that the prior opportunity to cross examine was adequate.<sup>14</sup> The State failed to meet that burden when it introduced the testimony of Lawrence Bryant from the

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<sup>14</sup> *Russell v. State*, 604 S.W.2d 914, 919-20 (Tex. Crim. App. 1980) (citing *Carver v. State*, 510 S.W.2d 349, 351 (Tex. Crim. App. 1974)).

first trial,<sup>15</sup> and the trial court denied Max Soffar his right to confrontation when it admitted into evidence Bryant's prior testimony over defense objections.<sup>16</sup>

Max Soffar did not have an adequate opportunity to cross examine Bryant in the first trial because Soffar was represented by constitutionally-ineffective counsel. *Soffar*, 368 F.3d at 480. As this Court has stated, “[w]hether the requisite opportunity existed in a particular proceeding depends upon” a number of factors, including “intimations of ineffective assistance of counsel.” *Russell*, 604 S.W.2d at 921. *See also Mancusi*, 408 U.S. at 214-15 (stating that adequate prior opportunity would not exist if ineffectiveness caused the omission of a “significantly material line of cross-examination”).

As the Fifth Circuit held, Appellant's counsel was ineffective in 1981 by failing to elicit the “readily evident stark inconsistencies between [Greg] Garner's description of the shootings and the one that the officers testified that Soffar gave them.” *Soffar*, 368 F.3d at 471. Counsel's ineffectiveness led to the forfeiture of a significant line of cross examination of Bryant. For example, ineffective counsel in 1981 missed the opportunity to elicit that Soffar allegedly told Bryant that “as he was going out[,] somebody got in his way or something like that.” (2 CR 681 (Bryant's signed statement to the police)). Garner reported nothing like this in any of his statements. Ineffective counsel also failed to elicit that Soffar allegedly claimed to Bryant that “he seen the money laying there.” (2 CR 681). In fact, the evidence establishes that no “money” was “laying” anywhere. On

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<sup>15</sup> (32 RR 5; 2 CR 525-26; 6 CR 1717). Bryant's testimony alleged that Soffar spoke about bowling alley murders during a drug transaction.

<sup>16</sup> Because this is a purely legal question and raises a constitutional claim, the **standard of review** is *de novo*. *Guzman*, 955 S.W.2d at 89.

the contrary, Garner reported that the perpetrator took the money from the cash register, (32 RR 69, 84-85), and manager Jim Peters reported that money was never left anywhere but in the office or in the cash registers. (26 RR 178-79). Eliciting these stark inconsistencies would not only have shown that Appellant's putative statements were false but also would have established that his various alleged statements to the police and Bryant were all different from one another, further undermining their credibility.<sup>17</sup>

Finally, ineffective counsel missed the opportunity to impeach more forcefully and clearly Bryant's damaging claim on direct that Soffar said *he* shot three people and that *he* was responsible for the robbery. (32 RR 12-13, 31-34). An adequate cross examination would necessarily have elicited from Bryant in a clear way that Bryant's actual statement to the police was that Soffar stated "*if I told you who did it you wouldn't believe me,*" and that "three people *got shot* in the back." (2 CR 681 (emphasis added)).<sup>18</sup>

Because a violation of the right to confrontation affects "the framework within which the trial proceeds, rather than simply [causing] error in the trial process itself," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), this *Crawford* violation was a "structural error," not subject to harmless error analysis. *See id.* In the alternative, the State cannot prove that the admission of Bryant's non-confronted testimony was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The prosecution's case was extraordinarily weak. *See* Appellant's First Point of Error (harmless error discussion),

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<sup>17</sup> Soffar never claimed in any of his putative statements to the police that any money was "laying" there or that someone got in his way while he was leaving.

<sup>18</sup> That "three people got shot in the back" is also inconsistent with the crime-scene evidence establishing that four people were shot in the head.

*supra*. The State relied on Bryant’s testimony extensively in summation, underscoring its importance to the prosecution case. (35 RR 13-14, 81-85, 88-89). This error was not harmless. Reversal is required.

### **Appellant’s Tenth Point of Error**

- (a) **The police violated Soffar’s Fifth Amendment rights by continuing their custodial interrogation after he invoked his right to remain silent.**
- (b) **Sgt. Clawson’s misleading answers to Soffar’s question rendered invalid any purported waiver of his right to counsel.**
- (c) **The police obtained Soffar’s statements by failing to honor his invocation of the right to counsel under the Fifth Amendment.**
- (d) **Under Texas law, the police were required to clarify whether Soffar wanted counsel, if his invocation was ambiguous.**
- (e) **Soffar’s statements were involuntary and should have been suppressed.**

*Factual Background.* On August 5, 1980, Officer Raymond Willoughby pulled over Soffar, who was on a stolen motorcycle, in League City, Texas. (4 RR 20, 26).<sup>19</sup> After Soffar was arrested and read his *Miranda* rights,<sup>20</sup> he allegedly stated that he was not going to prison over any bike and that the police should check with Houston for “bigger” things. (4 RR 74). *See also* (4 RR 37). Soffar claimed that he had information about “the bowling alley murders” in Houston, and asked to speak with Sgt. Bruce Clawson of the Galveston County Sheriff’s Office. (4 RR 37-39). Sgt. Clawson was called to assist in Soffar’s interrogation, (4 RR 97), and his paper work indicated that he was called due to Soffar’s refusal to talk. (5 CR 1296).

As Sgt. Clawson’s paid informant, (4 RR 94), Soffar provided information about

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<sup>19</sup> All record citations are to the pretrial suppression hearing.

<sup>20</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). The police read Soffar his *Miranda* rights several times during subsequent interrogations. *See, e.g.*, (5 RR 72).

narcotics sales in exchange for money and for assistance when Soffar got into legal trouble. (4 RR 95, 117). Sgt. Clawson knew that Soffar suffered from a drug problem, acted impulsively and child-like, had a poor grasp of reality, and displayed an unusual eagerness to please those in positions of authority.<sup>21</sup> (4 RR 117-19). Sgt. Clawson knew that Max Soffar considered him a friend and trusted him. (4 RR 123-24).<sup>22</sup>

Sgt. Clawson and Officer Willoughby escorted Soffar to a magistrate for his “magistrate” warnings, (4 RR 42-44), which referred to the only charge at the time: unauthorized use of a motor vehicle. (4 RR 62). Upon returning to the police station, Officer Willoughby noticed that Soffar’s eyes were bloodshot, his pupils dilated, his speech slurred, and he smelled of alcohol, (4 RR 53-54) – even though Soffar had been pulled over approximately forty minutes before. (4 RR 58-59).

Soffar told Sgt. Clawson that he did not wish to talk to Officer James Palmire, who had called Soffar a “punk” as part of a good cop/bad cop routine. (4 RR 76, 82, 91, 102). Sgt. Clawson left with Officer Palmire and returned with Det. Schultz. (4 RR 104). Det. Schultz noted that Soffar looked disheveled, as though recovering from intoxication. (4 RR 200-01). He knew that Soffar had spent three years in Austin State Mental Hospital. (4 RR 204; 43 RR State’s Exhibit 1A at 10). Soffar told Det. Schultz that the police had subjected him to a “little threat,” but Det. Schultz did not investigate it. (4 RR 208).

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<sup>21</sup> Indeed, Soffar was a police informant for three to four police departments. (4 RR 120).

<sup>22</sup> Sgt. Clawson’s brother, Detective Michael Clawson, also used Soffar as an informant. (6 RR 31-32). Michael Clawson found Soffar’s information useless because it was not truthful, and found Soffar amenable to suggestion during interrogation. (6 RR 33-37). Officer James Palmire acknowledged that Appellant was impulsive, acted on the spur of the moment, did not give thought to the consequences of his actions, and had a history of illegal drug use. (4 RR 80-81, 88-89).

Det. Schultz spoke with Soffar until Soffar no longer desired to speak and the interrogation “hit a brick wall.” (4 RR 131-32). Sgt. Bruce Clawson then took over, questioning his informant in private. (4 RR 107-08). Soffar asked Sgt. Clawson how to get an attorney. (4 RR 107-08; 7 RR 93-95). Sgt. Clawson responded by asking Soffar whether he could afford an attorney, *id.*, even though that he *knew* that Soffar could *not* afford an attorney (7 RR 102-04). Soffar asked Sgt. Clawson how long it would take to get a public defender. (4 RR 107). Clawson responded that he did not know, maybe a day, a week, or a month. (4 RR 108).<sup>23</sup> Soffar asked Sgt. Clawson whether he thought he should get an attorney and Clawson responded “if you’re guilty talk to the police and if you’re not guilty you should get an attorney.” (4 RR 109). Finally, when Soffar asked Sgt. Clawson if he was on his own, Sgt. Clawson confirmed that Soffar was on his own. (4 RR 110). Soffar responded, “I’m on my own.” (7 RR 94).

After digesting Sgt. Clawson’s answers to his questions, Soffar spoke with Det. Schultz again and provided his first statement, which was tape recorded. (4 RR 110). This statement led to follow-up interrogations, yielding two additional typewritten statements, as Soffar remained in isolation in police custody on August 6 and 7, 1980. The interrogation sessions leading to the second two statements were neither tape recorded nor transcribed. (5 RR 93). Instead, the substance of the sessions was summarized by detectives and presented to Soffar as written statements for his signature. (5 RR 70-71; 7 RR 31-32, 39-40, 174-75; 43 RR State’s Exhibit 109, 110).

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<sup>23</sup> Sgt. Clawson knew that in Harris County a suspect had to be released or charged within seventy-two hours, but claimed not to make any “correlation” between this fact and the availability of counsel. (4 RR 108-09).

Soffar stated during his initial interrogation by Det. Schultz that he knew about the reward for information in the bowling-alley murders case. (43 RR State's Exhibit 1A at p. 36). In addition, Det. Schultz answered Soffar's questions about the details of the crime, including how many people were shot, their ages, and whether anyone survived. *Id.* at 29-30. Thereafter, in Soffar's first signed statement, he claimed that he and Latt Bloomfield burglarized a bowling alley and that they returned the next night when Bloomfield entered the bowling alley with a pistol while Soffar waited outside and heard shots. (43 RR State's Exhibit 108). The content of the second statement was similar. (43 RR State's Exhibit 109). When he asked Soffar to sign the statements, Det. Schultz knew that two other suspect had confessed to the burglary of Fairlanes on the night before the robbery murders. (4 RR 190-91). Similarly, the police knew that Soffar falsely confessed to other robberies with Bloomfield when they took him for a ride around Houston after his second statement. (5 RR 112; 7 RR 38, 69-71). After Soffar became upset when the police told him that they had released Bloomfield for lack of evidence, Soffar signed his third statement. (5 RR 86-87; 7 RR 41-43). In this detailed typewritten statement, Soffar for the first time inculpated himself (as well as Bloomfield) in the shooting of four people during a bowling alley robbery. (43 RR State's Exhibit 110).

**(a) Sgt. Clawson's misleading answers to Soffar's question rendered invalid any purported waiver of his right to counsel.**

As noted above, when Soffar asked about his right to counsel, Sgt. Clawson said on the first day of interrogation that it could take up to a month to get an attorney, told Soffar he was on his own, told him to get a lawyer only if he was innocent, and

inappropriately questioned whether Soffar could afford an attorney. As the Supreme Court has held, “any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.” *Miranda*, 384 U.S. at 476. *Cf. Missouri v. Seibert*, 542 U.S. 600, 613-14 n.5 (2004) (forbidding misleading tactics which render the warnings ineffective).<sup>24</sup>

When faced with an ambiguous or equivocal statement regarding an attorney, a police officer may “clarify whether or not he actually wants an attorney,” *or* continue questioning him. *Davis v. United States*, 512 U.S. 452, 460-61 (1994). Neither *Davis* nor any other authority, however, allows the government to respond to such a statement by *misleading* the suspect about his right to counsel in violation of *Miranda*’s prohibition against using trickery to obtain a waiver. Indeed, both this Court and the Fifth Circuit expressly forbid such conduct.<sup>25</sup>

Clawson’s statements rendered any purported waiver(s) unknowing, involuntary, and unintelligent in violation of Soffar’s Fifth Amendment rights. Accordingly, the trial court erred in failing to suppress the signed statements.

**(b) The police obtained Soffar’s statements by failing to honor his invocation of**

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<sup>24</sup> A trial court’s ruling on a motion to suppress is generally reviewed for abuse of discretion. *Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002). Although a trial court’s determination of historical facts supported by the record is entitled to deference, where, as here, the issues before the appellate court involve the constitutional implications of the undisputed facts, such deference is inapplicable. *Guzman*, 955 S.W.2d at 89.

<sup>25</sup> See *Thompson v. Wainwright*, 601 F.2d 768, 770, 772 (5th Cir. 1979) (disapproving of an interrogating officer’s statement to the defendant that “if he told an attorney [his story] first he would not be able to talk to [the officers] and tell [them] his side of the story,” and warning that “any” explanation offered by an interrogating officer about the consequences of speaking with counsel is “perilous and, if given, must not be materially incorrect” and that “advice about what is best for the suspect to do is for counsel, not the interrogator, to give”); *Russell v. State*, 727 S.W.2d 573, 577 (Tex. Crim. App. 1987) (citing *Thompson* and holding that “an interrogating officer may not use the guise of clarification in order to coerce or intimidate the accused into making a statement”). On *habeas* review, the Fifth Circuit rejected Max Soffar’s claim that Clawson’s conduct violated his *Miranda* rights. *Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002).

### **the right to counsel under the Fifth Amendment.**

If an accused “indicates in any manner and at any stage of [custodial interrogation] that he wishes to consult with an attorney before speaking there can be no questioning.”<sup>26</sup> *See also* U.S. Const. amends. V; XIV; TEX. CODE CRIM. PROC. Art. 38.22. The issue is whether ““a reasonable police officer in the circumstances would understand the [accused’s] statement to be a request for an attorney.”” *Dinkins v. State*, 894 S.W.2d 330, 352 (Tex. Crim. App. 1995) (quoting *Davis*, 512 U.S. at 459). Courts look to the totality of the circumstances surrounding the interrogation, the suspect, and the invocation to determine whether an accused’s statement can be construed as an invocation of his right to counsel. *See Dinkins*, 894 S.W.2d at 351. Even without an explicit request for an attorney, an accused’s statements may constitute an invocation of his right to counsel.<sup>27</sup>

Max Soffar invoked his right to counsel. Soffar asked Sgt. Clawson *how* he could get an attorney, *how long* it would take for a public defender to appear, and whether he was “on his own.” (4 RR 107-10; 7 RR 94). Sgt. Clawson knew that Soffar trusted him and considered him a friend. (4 RR 122-24). He also knew Soffar’s serious mental limitations. (4 RR 117-19). Moreover, Sgt. Clawson came to speak with Soffar privately

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<sup>26</sup> *Miranda*, 384 U.S. at 444-45; *Ochoa v. State*, 573 S.W.2d 796, 800 (Tex. Crim. App. 1978) (holding that “*Miranda* [should be read] literally; where a defendant indicates in any way that he desires to invoke his right to counsel, interrogation must cease”).

<sup>27</sup> *See Ochoa*, 573 S.W.2d at 800-801 (recognizing that although the defendant did not make a “formal request” or absolute demand for a lawyer, he invoked his right to counsel by stating he “might possibly want to talk to an attorney” or he “probably ought to talk to a lawyer”); *Stanton v. State*, 953 S.W.2d 832, 834-835 (Tex. App. – Amarillo 1997, *no pet.*) (finding invocation of right to counsel when accused stated that ““he was not doing any tests”” and ““you are trying to incriminate me and without an attorney””; the Court held that there was “no question that appellant plainly expressed his desire for an attorney”).

when other officers had hit a “brick wall” with Soffar. (4 RR 131-32).<sup>28</sup> Under “the totality of the circumstances,” Soffar invoked his right to counsel. *Ochoa*, 573 S.W.2d at 800-801; *Stanton*, 953 S.W.2d at 834-835. Because any reasonable police officer would have interpreted Soffar’s statements as a request for counsel, the police were prohibited from interrogating him until counsel was present. *Miranda*, 384 U.S. at 473-74. The subsequent statements Soffar signed without counsel should have been suppressed.

**(c) The police violated Soffar’s Fifth Amendment rights by continuing their custodial interrogation after he invoked his right to remain silent.**

Hitting a “brick wall” with Soffar, (4 RR 131-32), Sgt. Clawson recorded in his written report that Soffar “refused to talk.” (5 CR 1296). *See also* (7 RR 91 (“Max stopped talking to” Det. Schultz and to Sgt. Clawson)). A defendant invokes his right to cut off questioning during custodial interrogation merely by indicating that he does not want to answer questions. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 101-02 (1975).<sup>29</sup> Once Soffar invoked that right, the police were obligated to “scrupulously honor” it. *Maestas v. State*, 987 S.W.2d 59, 61-62 (Tex. Crim. App. 1999) (quoting *Mosley*, 423 U.S. at 103-04). Instead, the police sent Sgt. Clawson, whom Soffar trusted, to continue the interrogation despite Soffar’s invocation of his right to remain silent. The resulting signed statements obtained thereafter should have been suppressed as a violation of

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<sup>28</sup> The request for counsel Soffar conveyed to Clawson (his sometime handler) during an entire conversation about getting an attorney was far clearer than the isolated and ambiguous statement in *Davis*, 512 U.S. at 462 (finding insufficient invocation of right to counsel where suspect merely said once, “Maybe I should talk to a lawyer,” and thereafter clarified that he did not want a lawyer).

<sup>29</sup> *See also Kelly v. Lynaugh*, 862 F.2d 1126, 1130-31 (5th Cir. 1988) (holding that a suspect invoked his right to remain silent by declining to talk); *Hearne v. State*, 534 S.W.2d 703, 704 (Tex. Crim. App. 1976) (finding *Miranda* violation where the accused did not want to talk to a police officer, but the police officer persisted in questioning the accused until the accused confessed).

Soffar's Fifth Amendment rights.

**(d) Under Texas law, the police were required to clarify whether Soffar wanted counsel, if his invocation was ambiguous.**

If this Court determines that Soffar did not invoke his right to counsel with sufficient clarity under *Davis, supra*, it should hold as a matter of Texas law that the police were required to clarify whether Soffar wanted counsel.<sup>30</sup> Texas has a long history of protecting the rights of suspects during custodial interrogation. The Texas legislature has codified *Miranda* and, long before *Miranda*, required that suspects be forewarned that their statements could be used against them.<sup>31</sup>

This Court should continue its strong protection of the rights of suspects during custodial interrogation, hold that Texas constitutional and statutory law required the police to cease questioning *or* clarify whether Soffar wanted counsel, and suppress his statements. *See* Tex. Const. Art. I, § 10; TEX. CODE OF CRIM. PROC. Art. 38.22.

**(e) Soffar's statements were involuntary and should have been suppressed.**

To be voluntary, a confession must be “the product of an essentially free and unconstrained choice.” *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). *See also* U.S. Const. amends. V; XIV. To determine the voluntariness of a statement, courts look to the totality of the circumstances surrounding the statement. *Jurek v. Estelle*, 623 F.2d 929,

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<sup>30</sup> *See, e.g., State v. Chew*, 695 A.2d 1301, 1316-18 (N.J. 1997) (requiring police officers to clarify an ambiguous request for counsel or cease questioning as a matter of New Jersey constitutional law); *State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994) (adopting four-judge concurrence in *Davis* which would require police to clarify an ambiguous request for counsel or cease questioning as a matter of Hawaiian constitutional law).

<sup>31</sup> *White v. State*, 289 S.W.2d 279, 281 (Tex. Crim. App. 1956) (citing, *inter alia*, TEX. CODE OF CRIM. PROC. Art. 727; *Reese v. State*, 151 S.W.2d 828, 839 (Tex. Crim. App. 1941) (citing *McVeigh v. State*, 62 S.W. 757, 757 (Tex. Crim. App. 1901))).

939 (5th Cir. 1980); *Penry v. State*, 903 S.W.2d 715, 748 (Tex. Crim. App. 1995).

The totality of the circumstances here shows that: 1) the police knew that they were dealing with a “child-like” suspect, with a poor grasp of reality,<sup>32</sup> who was accustomed to seeking approval from authority figures as an informant; 2) when the police hit a “brick wall” in the interrogation, they sent in the officer whom Soffar trusted the most, Sgt. Clawson, his handler when he acted as an informant; 3) Soffar asked about his right to counsel and only signed statements after being misled about that right; 4) Soffar was isolated in police custody during three days of on and off interrogation; 5) Soffar was intoxicated when he first mentioned the bowling-alley murders and was coming down from the intoxication near the time the police hit the “brick wall;” 6) Soffar, who was ordinarily paid for his information, knew about the reward money for information about the robbery murders; and 7) Soffar’s third statement, in which he made a detailed claim that he and Bloomfield were responsible for the robbery murders, was dramatically different from his earlier statements that only Bloomfield was responsible, substantially increased the possibility that he would be subjected to the death penalty, and occurred only after the police purposefully notified Soffar that they had released Bloomfield in an apparent attempt to goad Soffar into providing more information. These circumstances directly mirror the circumstances under which the United States Court of Appeals for the Fifth Circuit came to the “inescapable conclusion” that a “mentally deficient” defendant’s confession was involuntary. *Jurek*, 623 F.2d at 942.

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<sup>32</sup> The United States Supreme Court has recognized that mental illness is a significant factor in the voluntariness calculus. *Colorado v. Connelly*, 479 U.S. 157, 181 (1986); *see also Jurek*, 623 F.2d at 937.

Soffar's confession, too, was involuntary and should have been suppressed.

*Harmless Error Analysis.* Soffar's signed statements were the lynchpin of the case against him. Without them, there was absolutely no proof of his involvement in the robbery murders. The court's unconstitutional admission of his statements was clearly not harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

### **Appellant's Eleventh Point of Error**

**The trial court committed reversible error by admitting Appellant's alleged oral statements in violation of Texas Code of Criminal Procedure 38.22.**

Following Appellant's second putative statement to the police, the police took Appellant to two bowling alleys: (1) the Fairlanes-Bunker Hill; and (2) the Fairlanes-Windfern, where the robbery murders had taken place. They went to Bunker Hill to "see what his reaction would be," (30 RR 151), and Appellant allegedly stated "that this did not look like the right place." (30 RR 152). The police then took Appellant to the Fairlanes-Windfern "to see what his reaction would be," and Appellant allegedly said that "this looked like the correct location." (30 RR 152-53). Because these oral statements resulted from custodial interrogation and were not recorded, as required by TEXAS CODE OF CRIMINAL PROCEDURE Article 38.22 § 3 (a)(1), the trial court erred in admitting them into evidence over the defense's objections. (30 RR 151, 153).<sup>33</sup> *See also* (31 RR 70).

Under Texas statutory law, "[n]o oral [] statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding

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<sup>33</sup> Although defense counsel did not cite the recording requirement of Article 38.22 chapter and verse and failed to object the second time the oral statements were erroneously admitted, (31 RR 70), he certainly placed the court on notice of the problem with admitting these oral statements in the first instance. To the extent that this Court finds otherwise, it should find defense counsel ineffective because there could be no strategic reason for this error. *See Appellant's Twentieth Point of Error.*

unless [] an electronic recording . . . is made of the statement.” TEX. CODE CRIM. PROC. Art. 38.22 § 3 (a) (1). The police admitted to purposely eliciting Appellant’s putative oral statements at the two bowling alleys during the course of a “tour” designed to collect evidence. (30 RR 150-53). Thus, the oral statements were the product of custodial interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *Bush v. State*, 697 S.W.2d 397, 403 (Tex. Crim. App. 1985) (finding custodial interrogation because “trip in whole appeared to be geared to obtaining this information from the appellant”).<sup>34</sup>

These oral statements were not recorded (30 RR 176-78), and “the trial court erred in permitting [their] introduction as direct evidence of appellant’s guilt.” *Wortham v. State*, 704 S.W.2d 586, 589 (Tex. App. – Austin 1986, *no pet.*). Given the extraordinarily weak nature of the prosecution’s case, the prosecution’s reliance on these oral statements in summation, (35 RR 24, 61, 83, 85-86, 88), and that nothing was done to cure the error, the error of admitting this evidence was not harmless. *Anderson*, 182 S.W.3d at 918-19.

### **Appellant’s Twelfth Point of Error**

**The prosecution deprived Appellant of a fair trial by making several factually inaccurate or misleading arguments to the jury.**

The prosecution’s misleading lines of argument at Soffar’s trial violated his constitutional right to due process of law and to a fair trial on several grounds, including:

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<sup>34</sup> *See also United States v. Webb*, 755 F.2d 382, 389 (5th Cir. 1985) (finding statements not involving express questioning “reasonably likely to elicit an incriminating response, and [the officer] should have known that such a response was reasonably likely”); *Drury v. State*, 793 A.2d 567, 571 (Md. 2002) (confronting accused with physical evidence of crime is functional equivalent of interrogation); *People v. Ferro*, 472 N.E.2d 13, 17 (N.Y. 1984) (same).

1) they misrepresented the truth, *see Napue v. Illinois*, 360 U.S. 264, 269-72 (1959);<sup>35</sup> and  
2) they impermissibly shifted the burden of proof to Soffar to prove that his statements  
were unreliable and that someone else committed the crimes. *See, e.g., McKenzie v.  
State*, 617 S.W.2d 211, 221 (Tex. Crim. App. 1981); *See also* U.S. Const. amends. V, VI,  
XIV. The prosecution’s argument fell far outside the permissible bounds of proper  
argument. *See Westbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).  
Moreover, the court violated Max Soffar’s right to due process of law when it condoned  
the prosecution’s improper argument over defense objection. (35 RR 82).<sup>36</sup>

First, during summation, the prosecution misled the jury by arguing that “with this  
well prepared defense if” mental health records existed to support the defense contention  
that Soffar had been admitted to Austin State Mental Hospital because of a mental  
problem, “we would have them” and that Soffar’s commitment was a “criminal”  
commitment. (35 RR 82). In fact, the prosecution knew full well that such records  
existed and that the commitment was non-criminal: it had cited directly to Soffar’s Austin

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<sup>35</sup> *See also Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (granting writ of habeas corpus where prosecutor falsely argued to jury, and presented evidence, that paint on article of clothing was actually blood); *Giglio v. United States*, 405 U.S. 150, 153 (1959) (similar); *Mooney v. Holohan*, 294 U.S. 103, 112-14 (1935); *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002) (“[I]t is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt[.]”); *United States v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) (granting new trial because prosecutor misled jury); *United States v. Dailey*, 524 F.2d 911, 917 (8th Cir. 1975) (same); *Periu v. State*, 490 So. 2d 1327, 1328-29 (Fla App. 3d Dist. 1986) (same); *People v. Moya*, 529 N.E.2d 657, 659 (Ill. App. 1 Dist. 1988) (reversing where “prosecutor argued that defendant’s mother was not in court because she did not want to lie on his behalf,” when, in fact, the defense had been precluded from explaining her absence).

<sup>36</sup> Although the defense did not object to the prosecution remarks that only the perpetrator could have known the details in Soffar’s putative confession and that the defense presented no evidence of an alternative perpetrator, these errors are not waived because the prosecution’s argument was “so egregious that no instruction to disregard could possibly cure the harm.” *Willis v. State*, 785 S.W.2d 378, 385 (Tex. Crim. App. 1989).

State medical records in its pretrial submissions. (8 CR 2205, 2394).<sup>37</sup>

Second, after precluding defense evidence that the media broadcast details about the crime, *see Appellant's Fourth Point of Error*, the prosecution argued to the jury that the confession was credible because Soffar knew details known only to the perpetrator. (35 RR 11, 22-23).<sup>38</sup> Third, unfairly capitalizing on the preclusion of the Paul Reid evidence, the prosecution argued in summation that the defense “didn’t bring you any evidence that someone other than the Defendant committed this crime.” (35 RR 9). Fourth, the prosecution improperly commented on Soffar’s failure to testify with its comment about Soffar’s failure to adduce evidence of a third party’s guilt and its claim that Soffar “didn’t bring . . . any evidence that [he] falsely confessed to this. *Id.*”<sup>39</sup>

Because the prosecution’s evidence was thin and the issues of the reliability of the confession and identity of the perpetrator were central, the court’s error was not harmless under any standard. *Chapman*, 386 U.S. at 24; *Anderson*, 182 S.W.3d at 918-19.

### **Appellant’s Thirteenth Point of Error**

**(a) The trial court committed reversible error by refusing to instruct the jury that it should disregard Appellant’s putative confession if the State failed to prove he waived his right to remain silent and to counsel during custodial interrogation.**

**(b) The trial court committed reversible error by refusing to instruct the jury to**

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<sup>37</sup> Soffar’s Austin State Mental Hospital records were introduced in the penalty phase of the trial as a joint exhibit. (45 RR Joint Exhibit No. P-1). The records establish that the commitment was civil. *Id.*

<sup>38</sup> *See, e.g., Paxton v. Ward*, 199 F.3d 1197, 1213 (10th Cir. 1999) (granting habeas corpus relief where prosecutor’s “objections had prevented” defendant from presenting evidence which the prosecutor later argued in summation that the defendant should have offered if his defense were credible).

<sup>39</sup> *See also Griffin v. California*, 380 U.S. 609 (1965) (forbidding comment on defendant’s failure to testify on Fifth Amendment grounds); *Livingston v. State*, 739 S.W.2d 311, 337 (Tex. Crim. App. 1987) (same).

- disregard Appellant’s putative confession if it found the confession untruthful.**
- (c) The trial court committed reversible error by refusing to instruct the jury to disregard Soffar’s putative confession if it found that intoxication rendered his confession involuntary.**
- (d) The trial court committed reversible error by refusing to instruct the jury to disregard Appellant’s confession if it was the fruit of an illegal police threat.**
- (e) The trial court committed reversible error by refusing to instruct the jury not to hold against Appellant any delay in prosecuting this case.**
- (f) The trial court committed reversible error by refusing to instruct the jury that it could draw an adverse inference against the State if its explanation for losing important evidence was inadequate.**
- (g) The trial court denied Max Soffar his constitutional right to avoid *ex post facto* punishment by refusing to instruct the jury on the more demanding standard of proof for circumstantial evidence applicable at the time of the crime.**

“[A] defendant is entitled to an instruction on every issue raised by the evidence, whether produced by the State or the defendant, and whether it be strong, weak, unimpeached, or contradicted.” *Thompson v. State*, 521 S.W.2d 621, 624 (Tex. Crim. App. 1974). Ignoring this principle, the trial committed reversible errors by refusing to instruct the jury on the issues set forth below in violation of Soffar’s constitutional rights to present a defense and to due process of law, as well as Texas statutory law. *See* U.S. Const. amends. VI, XIV; *Barker v. Yukins*, 199 F.3d 867, 875-76 (6th Cir. 1999).<sup>40</sup>

- (a) The trial court committed reversible error by refusing to instruct the jury that it should disregard Appellant’s putative confession if the State failed to prove he waived his right to remain silent and to counsel during custodial interrogation.**

TEXAS CODE OF CRIMINAL PROCEDURE Art. 38.22 § 7 *requires* trial judges to instruct the jury that the prosecution must prove a defendant’s knowing, voluntary, and

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<sup>40</sup> Defense counsel preserved these claims. (14 CR 4083-4103; 34 RR 3-11). The **standard of review** applied to a “trial court’s decision to deny a requested defensive instruction . . . [requires appellate courts to] view the evidence in the light most favorable to the *defendant’s* requested submission,” rather than applying “the usual rule of appellate deference to trial court rulings.” *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006) (emphasis added).

intelligent waiver of his *Miranda* rights beyond a reasonable doubt, if the issue is raised by the evidence. *See, e.g., White v. State*, 779 S.W.2d 809, 827 (Tex. Crim. App. 1989).<sup>41</sup> A trial court's refusal to do so when requested by the defense is reversible error. *See White v. State*, 289 S.W.2d 279, 281 (Tex. Crim. App. 1956); *Bandy v. State*, 159 S.W.2d 507, 508 (Tex. Crim. App. 1942).

Here, the evidence clearly raised an issue as to the validity of the Soffar's waiver of his right to counsel and to remain silent. When the police "hit a brick wall" during Soffar's custodial interrogation because he refused to talk (43 RR Defense Exhibit 25), they asked Sgt. Clawson – who knew Soffar as an informant – to persuade him to talk. (29 RR 182-83, 187-88). Soffar asked Sgt. Clawson a series of questions about his right to counsel, (29 RR 114-17), and Sgt. Clawson provided "misleading" answers, *Soffar*, 300 F.3d at 596, including telling Soffar that it could take up to a month to get an appointed lawyer. (29 RR 115). *See also Appellant's Tenth Point of Error*.

Even if this Court should disagree with Appellant's Tenth Point of Error, the validity of Soffar's purported waiver of his right to remain silent and to counsel remained a factual issue for the jury under Texas law. Three judges on the Fifth Circuit found Soffar's waiver invalid, *Soffar*, 300 F.3d at 609-10 (DeMoss, J., dissenting), and the split in the Fifth Circuit undeniably demonstrates that reasonable jurors could have found that the State failed to prove that such waivers were valid beyond a reasonable doubt. The

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<sup>41</sup> *See also Corwin v. State*, 870 S.W.2d 23, 34 n.15 (Tex. Crim. App. 1993); *Moon v. State*, 607 S.W.2d 569, 571 (Tex. Crim. App. 1980); TEX. CRIM. JURY CHARGE § 12:900.14.

trial court erred by refusing to submit this issue to the jury. (14 CR 4092).

Because Soffar suffered far more than “some harm” from the court’s instructional error, and because his putative confession was the lynchpin of the prosecution’s case, this error was not harmless under any standard. *Chapman*, 386 U.S. at 24; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Reversal is required.

**(b) The trial court committed reversible error by refusing to instruct the jury to disregard Appellant’s putative confession if it found the confession untruthful.**

When the credibility of a defendant’s confession is central to his claim of innocence, the jury must be permitted to pass on the credibility of the confession. *See* U.S. Const. amends. VI; XIV; *Crane*, 476 U.S. at 690; *Myre v. State*, 545 S.W.2d 820, 825 (Tex. Crim. App. 1977).<sup>42</sup> Failure to instruct the jury that it must find a confession “true [and] correct” is error. *Anzaldua v. State*, 502 S.W.2d 19, 23 (Tex. Crim. App. 1973). Here, evidence of Soffar’s overall lack of credibility, his false confessions to burglarizing the bowling alley the night before the robbery murders and to committing other robberies with Bloomfield, and the dramatic inconsistencies between his putative confession and the other evidence warranted such an instruction. By refusing to instruct the jury on this issue, (9 CR 2458; 34 RR 3), the trial court deprived Appellant of his constitutional right to present a defense, *United States v. Lewis*, 592 F.2d 1282, 1286 (5th Cir. 1979), and deprived the jury of the guidance it needed to do its job. Because Soffar’s conviction is rooted in his confession and because the court’s failure to give this

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<sup>42</sup> *See also Wilson v. State*, 451 So. 2d 724, 726 (Miss. 1984) (noting defendant’s right to “*have the jury pass upon the factual issues of [confession’s] truth and voluntariness and upon its weight and credibility*”) (emphasis added) (citation omitted).

instruction severely harmed Soffar's defense that the confession was false, the court's error was not harmless under any standard.

**(c) The trial court committed reversible error by refusing to instruct the jury to disregard Soffar's putative confession if it found that intoxication rendered his confession involuntary.**

An instruction that the jury must disregard a confession rendered involuntary by intoxication, when raised by the evidence, is crucial to a jury's decision on voluntariness. *See, e.g., Murray v. State*, 505 S.W.2d 589, 592 (Tex. Crim. App. 1974); TEX. CRIM. JURY CHARGE. § 12.900.13. Here, the evidence clearly raised the issue of whether Soffar was intoxicated. Soffar stated during his initial interview with Det. Schultz that he was then "coming down" from a narcotic high. (30 RR 55-55). The trained police officer who arrested Soffar stated that he had blood-shot eyes and slurred speech, and that he smelled of alcohol. (29 RR 49-50). The officer suspected that Soffar was under the influence of alcohol and some type of drug. (29 RR 42-43). These undisputed facts raised the issue of intoxication. Thus, an instruction on the effect of intoxication on the voluntariness of Soffar's statements was required. *See Thompson*, 521 S.W.2d at 624. The court erred in refusing to issue this instruction. (14 CR 4089). The error caused more than "some harm," *Almanza*, 686 S.W.2d at 171, and is not harmless under any standard. Properly instructed, the jury could have disregarded Soffar's initial statement on August 5, 1980, and any fruits thereof, including his subsequent statements.

**(d) The trial court committed reversible error by refusing to instruct the jury to disregard Appellant's confession if it was the fruit of an illegal police threat.**

Soffar told Det. Schultz that another officer had given him “a little verbal threat” during his interrogation. (43 RR State’s Exhibit 1A at 22). TEXAS CODE OF CRIMINAL PROCEDURE Art. 38.23 forbids the introduction of a confession (or any fruits thereof) obtained through violations of Texas or federal law. Threatening a defendant to obtain a confession violates both Texas and federal law, *see. e.g., Miranda*, 384 U.S. at 476, and when evidence showing a threat is introduced, an instruction on this issue is required. *See, e.g., Patterson v. State*, 847 S.W.2d 349, 351-53 (Tex. App. – El Paso 1983, *pet. ref’d*). *See also* TEX. CRIM. JURY CHARGE § 12:900.16. Because the threat issued to Soffar undoubtedly contributed to his decision to make a statement, the court’s erroneous refusal to instruct the jury on this issue was reversible error under any standard.

**(e) The trial court committed reversible error by refusing to instruct the jury not to hold against Appellant any delay in prosecuting this case.**

Max Soffar was tried in 2006 for a 1980 crime. Because the jury might well have improperly inferred that Soffar caused this 26-year delay, the defense requested that the jury be instructed not to hold any delay in prosecuting the case against him. (14 CR 4086). The prosecution did not oppose this instruction, so long as the State was not blamed for the delay. (34 RR 5-9). The trial court, however, refused this instruction. (34 RR 9). By so doing, the court created an impermissible risk of prejudice to Appellant, denying him a fair trial on the facts in evidence. *See* U.S. Const. amends. VI; XIV.<sup>43</sup>

This error was not harmless under any standard.

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<sup>43</sup> *Cf. Beathard v. State*, 767 S.W.2d 423, 432 (Tex. Crim. App. 1989) (“Upon a timely request, a defendant who does not testify during the punishment phase is entitled to an instruction that the jury is not to draw any adverse inference from his failure to testify.”).

**(f) The trial court committed reversible error by refusing to instruct the jury that it could draw an adverse inference against the State if its explanation for losing important evidence was inadequate.**

In *Youngblood*, 488 U.S. at 57-58, the Court held that the State’s loss of potentially exculpatory evidence is not a due process violation unless the defense proves the loss was caused by the State’s bad faith. *Id.* The instruction given in *Youngblood* informed the jury that if it “found the State had destroyed or lost evidence, they might ‘infer that the true fact is against the State’s interest.’” *Id.* at 54 (quoting trial transcript). Because the State lost or destroyed important evidence in this case without an adequate explanation, (8 RR 325-41; 26 RR 183-87; 27 RR 90-91; 7 CR 1978), the defense requested an instruction, similar to the one given in *Youngblood* that required the jury to “weigh the explanation, if any, given for the loss or unavailability of the evidence” and to draw an “inference unfavorable to the State” if it found that “any such explanation [was] inadequate.” (14 CR 4102).<sup>44</sup> Asking jurors to draw such an inference here was a legitimate defense raised by the evidence.<sup>45</sup>

As but one example, while the State attempted to argue that Garner was confused or suffering from amnesia during his police interviews, (28 RR 113-15; 35 RR 91), it lost crucial evidence with a tendency to resolve this conflict – the actual tapes of Garner’s

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<sup>44</sup> The *Youngblood* instruction is a version of standard instruction in Arizona. See, e.g., *State v. Tucker*, 759 P.2d 579, 588 (Ariz. 1988) (citing *State v. Willits*, 393 P.2d 274 (1964)).

<sup>45</sup> See *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721-22 (Tex. 2003) (citing “roots going back to the English common law” and “Texas jurisprudence for over a century,” for the proposition that a “jury instruction regarding spoliation is proper when a party has deliberately destroyed evidence *or* has failed to either produce relevant evidence or explain its nonproduction”) (emphasis added).

interviews. (8 RR 35-41). Appellant should have received the benefit of a fair jury instruction on whether the jury could infer that the tapes were favorable to the defendant if it found the State's explanation inadequate. The trial court's erroneous preclusion of this instruction denied Appellant his constitutional right to due process and to present a defense, and was not harmless under any standard. *See* U.S. Const. amends. VI; XIV.

**(g) The trial court denied Max Soffar his constitutional right to avoid *ex post-facto* punishment by refusing to instruct the jury on the more demanding standard of proof for circumstantial evidence applicable at the time of the crime.**

In Soffar's 1981 trial, the jury was given a circumstantial evidence instruction, as was then required under Texas law for cases like this one, built upon circumstantial evidence. *See Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1981) (abolishing circumstantial evidence charge).<sup>46</sup> The circumstantial evidence charge requires that "all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved" and that the prosecution's evidence "exclude, to a moral certainty, every other reasonable hypothesis except the Defendant's guilt." (14 CR 4083 (quoting instruction from 1981 trial)). The trial court refused Appellant's request for this circumstantial evidence instruction, *id.*, and instead told the jury to require proof beyond a reasonable doubt, without defining that standard. (14 CR 4111).

The *Ex Post Facto* Clause of the United States Constitution forbids states from applying laws which "alter[] the legal rules of evidence, and receive[] less, or different, testimony, than the law required at the time of the commission of the offence, in order to

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<sup>46</sup> This Court decided *Hankins* in November of 1981. Soffar was convicted on March 31, 1981.

convict the offender.” *Carmell v. Texas*, 529 U.S. 513, 522 (2000) (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798) (explaining U.S. Const., Art. I, § 10)). At the time of the offense in 1980, the burden of proof for cases built solely on circumstantial evidence required all of the facts to be consistent and the exclusion to “a moral certainty” of every “reasonable hypothesis except the defendant’s guilt.” (14 CR 4083). Under the standard applied at Appellant’s 2006 trial, however, the prosecution was neither required to prove that all of the facts were consistent<sup>47</sup> nor required to exclude to a moral certainty every reasonable hypothesis except guilt. This standard of proof is more “‘rigorous.’” *Hankins*, 646 S.W.2d at 198 (quoting *State v. LeClair*, 425 A.2d 182, 184 (Me. 1981)). The court’s refusal to instruct the jury on circumstantial evidence lowered the prosecution’s burden of proof from that required at the time of the offense, and violated the *Ex Post Facto* Clause of the United States Constitution.

Because this constitutional error constituted a structural defect in the trial, reversal is automatic. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). In the alternative, the prosecution cannot prove that the error was harmless beyond a reasonable doubt, *Chapman*, 386 U.S. at 24, because it was impossible to eliminate every reasonable hypothesis except the defendant’s guilt and to show that all of the facts are “consistent with each other and with the main fact sought to be proved.” (14 CR 4083).

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<sup>47</sup> The facts of this case amply demonstrate why requiring all of the facts to be *consistent* is a higher burden of proof than that required in non-circumstantial cases. Given the dramatic difference between Garner’s statements and those attributed to Soffar, the prosecution might well have failed to meet this standard in the retrial, even if it technically met the lesser burden of merely showing proof beyond a reasonable doubt.