

NO. AP-75,363

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

MAX ALEXANDER SOFFAR,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

Trial Court Cause No. 319724
Appeal from the 23nd Judicial District
Harris County, Texas

The Honorable MARY LOU KEEL, Judge presiding

BRIEF FOR APPELLANT

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ORAL ARGUMENT
REQUESTED

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Identity of Parties and Counsel

Pursuant to TEX. R. APP. P. 38.1(a) (2005), the parties to this suit are as follows:

- (1) MAX SOFFAR, TDCJ # 000685, TDCJ Polunsky Unit, 3872 FM 30 South, Livingston, Texas 77351, is the appellant and was the defendant in the trial court.
- (2) The STATE OF TEXAS, by and through the Harris County District Attorney's Office, 1201 Franklin Street, Suite 600, Houston, TX 77002-1923, is the appellee and prosecuted this case in the trial court.

The trial attorneys were as follows:

- (1) Max Soffar was represented by KATHRYN M. KASE and JOHN P. NILAND of the TEXAS DEFENDER SERVICE, 412 Main Street, Suite 1150, Houston, Texas 78704.
- (2) The State of Texas was represented by CHARLES A. ROSENTHAL, Jr., District Attorney, and LYN MCCLELLAN, DENISE NASSAR, AND ALAN CURRY, Assistant District Attorneys, 1201 Franklin Street, Suite 600, Houston, TX 77002-1923.

The appellate attorneys are as follows:

- (1) Max Soffar is represented by DAVID R. DOW and JARED P. TYLER of the TEXAS DEFENDER SERVICE, 412 Main Street, Suite 1150, Houston, Texas 78704, and BRIAN W. STULL of the American Civil Liberties Union Capital Punishment Project, 201 W. Main Street, Suite 402, Durham, NC 27707.
- (2) The State of Texas is represented by CHARLES A. ROSENTHAL, Jr., District Attorney, and the Harris County District Attorney's Office, ALAN CURRY, Appellate Division Chief, 1201 Franklin Street, Suite 600, Houston, TX 77002-1923.

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TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

This brief is filed on behalf of Appellant, Max Alexander Soffar, by Professor David R. Dow of the University of Houston Law Center, Jared P. Tyler of the Texas Defender Service, and Brian W. Stull of the American Civil Liberties Union's Capital Punishment Project.

On August 7, 1980, Max Soffar was indicted on one count of capital murder. (SCR 4).¹ The indictment alleged that, while in the course of committing and attempting to commit the robbery of Stephen Allen Sims, he intentionally caused the death of Arden Alane Felsher by shooting her with a gun. (2 RR 3). The offense was alleged to have been committed in Harris County, Texas, on or about July 13, 1980. The cause number case was 319724, and the case was docketed into the 232nd District Court of Harris County, Texas. (1 CR 1).

In 1981, Appellant was convicted and sentenced to death in connection with these allegations. On direct appeal, this Court affirmed. *See Soffar v. State*, 742 S.W.2d 371 (Tex. Crim. App. 1987). In 1992, Appellant filed a state application for a writ of habeas corpus, alleging several claims, including ineffective assistance of counsel. *Soffar v. Dretke*, 368 F.3d 441, 461 (5th Cir. 2004). In 2004, the Fifth Circuit overturned his conviction and death sentence due to the constitutional ineffectiveness of his trial counsel. *Id.* at 478-80. The Fifth Circuit found counsel ineffective primarily because they failed to

¹ The citations to the record in this brief refer to the record volumes as follows: "RR" - Reporter's Record; "CR" - Clerk's Record; "SCR" - Supplemental Clerk's Record, filed on December 20, 2006; "SCR2" - Supplemental clerk's record, filed on March 28, 2007; "SE" - Supplemental Exhibits, filed January 26, 2007.

utilize the detailed statements of the only surviving victim, Greg Garner, to cast doubt on the only piece of evidence pointing to Max Soffar's guilt, his putative confession after three days in custody without an attorney. *Id.* at 475-76.

After the case returned to the District Court, an evidentiary hearing on the defense's motion to suppress Max Soffar's putative statements and physical evidence was held on October 19, 20, 21, and 24, 2005. (4 RR 19 - 7 RR 184). The trial court denied the motion in a written order setting forth its findings of facts and conclusions of law. (8 CR 2140-44). An evidentiary hearing on the defense's motion to dismiss the indictment due to lost evidence was held on October 21 and 24, 2005. (6 RR 45-91; 7 RR 6-25). The motion was denied on December 1, 2005. (9 RR 19). An evidentiary hearing concerning the exclusion of people of Hispanic origin and women in grand jury selection was held on October 24, 2005. (7 RR 129-158). The motion was denied the same day. (7 RR 158). On October 20, 21, 24, 25, and December 1 and 19, 2005, the court also addressed various defense motions for which no evidentiary hearings were held. *See* generally (5-10 RR).

Jury selection commenced on January 6, 2006, (11 RR 3), and the jury was sworn on February 6, 2006. (26 RR 6). The trial commenced on February 6, 2006, *id.*, and Appellant was found guilty as charged on February 22, 2006. (36 RR 4). The sentencing phase commenced the same day as the guilt- phase verdict. (36 RR 6). The court presented four special issues to the jury. On March 2, 2006, the jury answered special issue No. 1, the "deliberateness" issue, "Yes." (14 CR 4160). It answered special issue No. 2, the causation/intent issue required for parties liability, "Yes." (14 CR 4162). It also answered special issue No. 3, the "future dangerousness" issue, "Yes." (14 CR 4164). The

jury answered special issue No. 4, the "mitigating circumstances" issue, "No." (14 CR 4166). The Honorable Mary Lou Keel sentenced Appellant to death the same day. (14 CR 4168-69). A Motion for New Trial was filed on March 31, 2006. (14 CR 4185). Appeal in this case is automatic, pursuant to Tex. Code Crim. Proc. Art. 37.071 § 2 (h); Tex. R. App. P. 25.2(b), and this brief is filed accordingly.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant Max Soffar hereby requests oral argument. This is a capital case. Among the issues presented are:

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 armed robbery that he had previously shot four people in a bowling alley on Route 290 (Subpoint (a) of Appellant's First Point of Error).

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 (Subpoint (b) of Appellant's First 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 similar Fairlanes robbery-murders (Appellant's Third Point of Error).

The trial court violated Max Soffar's constitutional right to present a defense and basic evidentiary rules by precluding evidence showing that the Houston media broadcast details of the crime contained in Soffar's putative confession which the prosecutor claimed only the perpetrator could have known (Appellant's Fourth Point of Error).

The trial court committed reversible error by denying Max Soffar's Motion to Quash the Indictment on Account of the Violation of Equal Protection in the grand jury selection process (Subpoint (a) of Appellant's Fifth Point of Error).

The trial court committed reversible error by denying Max Soffar's Motion to Quash the Indictment Based on the Violation of Due Process and the right to a Fair Cross Section in the grand jury Selection Process (Subpoint (b) of Appellant's Fifth Point of Error).

It is upon these issues that oral argument is particularly sought. Undersigned counsel are of the opinion that oral argument would serve to emphasize and clarify these issues.

STATEMENT OF FACTS

Midnight on July 13, 1980: Four Youths Shot and Only Greg Garner Survives

At around midnight on July 13, 1980, someone shot four youths in the Windfern Fairlanes Bowling Center (“Fairlanes”) near Houston on Route 290. (26 RR 48). Three of the youths died, including bowling alley manager Stephen Sims, employee Thomas Temple, and Temple’s girlfriend, Alane Felsher. (27 RR 217, 219, 223; 32 RR 100). The fourth victim, Greg Garner, survived. Fairlanes had been burglarized the previous night, and the crimes were initially thought to be linked.²

July 17-20, 1980: Greg Garner Provides Police With Detailed Information

During his medical treatment at Hermann Hospital, Garner provided the police with information in at least five different interviews.³ (32 RR 62-149 (quoting 45 RR Joint Exhibits 1 (police interview of Greg Garner, July 17, 1980); 2 (interview of July 18); 4 (interview of July 19); and 5 (interview of July 20))).⁴ In general, this narrative

² (30 RR 21-23; 26 RR 183 (testimony of manager Peters), 43 RR Defense Exhibit 59 (summary of media exhibits), 43 RR State Exhibit 108).

³ Garner also provided similar details in an interview of July 30, 1980, but the police did not record that interview and the court precluded admission of its contents. *See* (2 SE Defense Exhibit 61).

⁴ The details of Garner’s statements are set forth in detail in the text which follows because they differed from Appellant’s putative confession in numerous respects, including as to the *number of perpetrators, how the perpetrator(s) entered the bowling alley, whether the door to Fairlanes was locked, whether the perpetrator(s) wore disguises, whether any victim was kicked or had screamed, the number of shots fired, and when the money was taken*. At the retrial, the prosecution sought to discredit Garner’s numerous statements to the police as the product of “potential” amnesia because the statements were inconsistent with Soffar’s putative confession. (28 RR 108-48). Over defense objections pursuant to *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), (25 RR 66-71), the neurosurgeon who had operated on Garner testified that his injury was “potentially” sufficient to affect his memory and that such an injury “could affect [the] memory” of any person sustaining such an injury. (28 RR 113-15). The expert was forced to concede that the length of time that Garner was unconscious was not indicative of memory loss, that his activities and level of consciousness at the scene (as documented by the paramedics and Life Flight team, (27 RR 10, 15-18, 21; 31 RR 85-87)) demonstrated a high level of functioning, that he did not note any memory loss in Garner’s charts, and that he scored a one hundred on an amnesia test, the highest possible score. (28 RR 121-23, 127-28). A defense expert refuted any suggestion that Garner had lost his memory and noted that the only test during Garner’s treatment suggesting memory loss indicated difficulty only with verbal tasks. (28 RR 135, 147; 32 RR 207-19). Subsequent footnotes in this section cite repeated instances where other witnesses and evidence corroborated Garner’s recollection of events.

was consistent and detailed.⁵

Garner explained that as he was bowling on lanes 25 and 26,⁶ a single assailant gained entry to the closed and locked bowling alley by convincing assistant manager Stephen Sims that he needed water (or air) to remedy a problem with his automobile. (32 RR 66, 71-74, 75, 79-80, 83, 101, 104, 136-38, 144). The assailant carried a pitcher for the water. (32 RR 72-74, 79-80, 83, 104-06).⁷ Sims then went outside with the assailant. (32 RR 73, 80, 104, 137, 139, 145). The assailant reentered the bowling alley with Sims, brandished a gun, made the victims lie on the floor, and obtained money by ordering Sims to open a cash register. (32 RR 69, 80, 84, 106-07, 112, 124, 126-27).

Garner lay between Tommy Temple and Steve Sims, with Temple to his right. Ms. Felsher was next to Sims. (32 RR 109).⁸ In a semi-circle, the order of the victims from the front doors was Felsher (the only female), Sims, Garner and Temple. *Id.*

⁵ One exception occurred during Garner's initial interview at the hospital when, perhaps due to difficulties with his language, Garner responded "yeah," when the police asked whether his assailant was a black man, and said that his assailant was close to his own height, twenty "foot" [sic] tall. (32 RR 63-64). Garner would later say that the lone perpetrator was white and over six feet tall. (32 RR 83, 131-32).

⁶ The police later corroborated this aspect of Garner's statement when they recovered Garner's rings between these lanes. (26 RR 84-85; 32 RR 47-49).

⁷ Photographs taken by crime scene investigators confirmed the presence of a water jug on the control booth counter near the entrance. (27 RR 90; 43 RR State Exhibit 39). In his trial testimony, Garner confirmed that employees never kept a water jug on the control booth. (28 RR 189). Manager Jim Peters testified that he did not know why that jug would be there. (26 RR 184).

⁸ The forensic evidence was completely consistent with Garner's description. The bullet wounding Garner passed through his head. (28 RR 110-11). The location of a bullet hole found in the carpet corroborated Garner's description of where his head was on the floor when he was shot. (31 RR 154-55 (testimony of Detective Kenny Williamson); 33 RR 87-88 (testimony of defense crime-scene expert)). A police photograph of this location does not include Garner himself because he had been removed for medical treatment, but it depicts the victims in a semi-circle in the positions Garner had described. *Compare* (43 RR State's Exhibit 5) with (45 RR Joint Exhibit 3). The position of the bodies when the police and other witnesses *arrived*, however, was different from Garner's description of where he was when *shot* because, unbeknownst to the police at the scene, Garner had changed positions on the floor after the shooting. Thus, when witnesses arrived, they saw the two injured victims (Garner and then Felsher) nearest the door. (26 RR 105-07).

As the four victims lay on the floor, none screamed or tried to run, and the assailant did not physically touch or hit them. (32 RR 69, 84, 86, 110-11, 130). The assailant then shot each victim once (for a total of four shots), took billfolds from the three men, and fled. (32 RR 70, 82, 113, 129, 130).

Garner lost consciousness for a few moments, got up, and walked to the control booth and telephoned his parents. (32 RR 82-83, 87-88, 113-14). While Garner was on this call, Fairlanes manager Jim Peters telephoned the bowling alley. (32 RR 87-88, 114).⁹ When Garner completed the two calls, he lay on the floor next to Alane Felsher because she was the only other victim still alive. (32 RR 114-15). This location was different from where Garner originally had lain down and been shot. (32 RR 114-15).

Garner testified at the retrial, but did not provide much detail because he no longer remembered most of what had occurred. (28 RR 152-53, 159-73, 180-81, 190). Garner did recall being present with the three other victims before the shooting, that he was bowling when he saw a man speaking with Sims, and that it was “standard procedure” for Sims to lock the doors when the bowling alley closed at 11:30 p.m. (28 RR 151-53). Garner remembered that the single assailant had a gun and asked him whether he could open the cash register. (28 RR 156). He also remembered handing his wallet to the perpetrator before being shot, and calling his parents afterward. (28 RR 158, 160, 162).

Police Investigation

The perpetrator of the Fairlanes robbery murders left no clues at the crime scene as

⁹ In their testimonies, parents Nellie and Ira Garner and bowling alley manager Jim Peters all corroborated this part of Greg Garner’s statement. (26 RR 43, 46, 66, 130-31).

to his identity, at least none the investigators thought to check.

Crime scene investigators dusted various areas for fingerprints, including the front door area and around the cash register in the control booth. (27 RR 142). None of the collected fingerprints led to a suspect. (27 RR 160, 194, 203). Police photographs show a white jug on the control counter. (43 RR State Exhibit 39). Although the police had the manager, Peters, available to them at the scene to explain that the jug was out of place, (26 RR 184), they did not recover the jug because “it did not appear to be evidence at the time.” (27 RR 91). By the time the police spoke with Garner, realized the significance of the jug and called Peters, Peters had already had the bowling alley cleaned and he did not know what had happened to the jug. (26 RR 183-85).¹⁰

With no fingerprints, DNA, or other physical evidence, the police used Garner’s information to attempt to solve the crime. Garner described his assailant as white and just over six feet tall. (32 RR 83, 131-32). He told the police that the assailant had light brown hair, combed back to reveal his entire forehead, and cut just below the ears on the side and reaching the collar on the back. (32 RR 132, 135). The shooter did not have any facial hair, and was stronger and heavier than Garner, who weighed 155 pounds. (32 RR 132-34). The shooter wore neither a mask nor a hat. (32 RR 89-90, 134). Garner told the police he could probably identify him. (32 RR 68, 118; 2 SE Defense Exhibit 61)). The police officers were confident enough in Garner’s description to prepare a composite, later distributed to various media outlets. *See* (32 RR 170-74). The composite is set forth in

¹⁰ Detective Leonard Cooper, the latent finger print examiner offered conflicting and insufficient explanations as to whether the jug had been dusted for fingerprints and, if not, why not. (27 RR 166-171, 175).

Joint Exhibit 6 (43 RR) and below:¹¹



Houston Man Resembling Composite Commits Similar Crimes

A dangerous criminal resembling this composite was living in his native Houston at the time of the robbery murders. Now on Tennessee's death row for killing seven people in three different robbery murders at retail fast-food establishments,¹² Paul Reid was married in Houston on July 23, 1980, just over a week after the Fairlanes robbery murders. (45 RR Defense Exhibits 37-39). The following photograph, (45 RR Defense Exhibit 37) is from Reid's wedding:

¹¹ At least 50 copies of the composite and press release were distributed to the media. (32 RR 173-74). A volunteer "portrait artist" created a second composite with Garner, but it was never distributed. (32 RR 180). The portrait is too dark to reproduce here, but can be found in the volume of exhibits. (45 RR Joint Exhibit 7).

¹² See *State v. Reid* ("Reid I"), 91 S.W.3d 247, 261-62 (Tenn. 2002); *State v. Reid* ("Reid II"), 164 S.W.3d 286, 298 (Tenn. 2005); *State v. Reid* ("Reid III"), 213 S.W.3d 792, 805 (Tenn. 2006).



The robbery murders Reid would later commit in Tennessee were strikingly similar to the Fairlanes robbery murders. 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).

Reid and his long-time friend, Stewart Cook, also committed a series of robberies in Houston. During one of them, in 1982, Reid fired his pistol and Cook asked him why. As Cook has explained in an affidavit, “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.’” (6 CR 1485).

At Max Soffar's retrial, the trial court refused to allow the jury to hear any of this evidence showing that Reid committed the Fairlanes robbery murders. (26 RR 97-99; 30 RR 76-85; 32 RR 38-45). Taking full advantage of the court's ruling, the prosecution argued in summation that the defense had not "br[ought the jury] any evidence that someone other than the Defendant committed this crime." (35 RR 9).

The Media Informs the Public About the Details of the Fairlanes Robbery murders

Between July 14, 1980, and August 1, 1980, the Houston television and print media widely publicized various details of the robbery murders. Numerous stories reported that reward money had been offered for information leading to the arrest of the perpetrator. *See* (43 RR Defense Exhibit 59). Numerous stories also reported that four people had been shot execution style, that one man had lived, that one of the victims was a female, that money was taken from a cash register and that the shootings took place at the Fairlanes Windfern bowling center. *See* (43 RR Defense Exhibit 59 (chart summarizing media sources and information provided)). Several stories reported that the bowling alley had been burglarized the night before. *Id.* On July 15, 1980, the Houston Post reported that the female victim had been shot in the cheek. *Id.*; *see also* (43 RR Defense Exhibit 66). A Channel 13 News Report stated that a .357 magnum was thought to have been used. (43 RR Defense Exhibit 59). Television media repeatedly broadcast key images to the public, including the interior and exterior of the building, the Fairlanes Windfern road sign, a closeup of Greg Garner's gunshot wound and the other victims' bodies inside the bowling alley, and the composite drawing prepared by the police and Garner. (43 RR

Defense Exhibit 58).¹³ *See also* Defense Exhibit 71 (article including composite)). The court blocked all defense attempts to introduce this evidence.¹⁴ Capitalizing on the court's ruling, the prosecution misleadingly argued in summation that the only way Soffar could have known certain details was if he were responsible for the crime. (35 RR 11, 22-23).

Looking for a Reward, Max Soffar Becomes a Suspect

Jackie Soffar Butler, Max Soffar's sister, learned about the bowling alley murders around the first of August, 1980, from her brother, Max, as they were driving to the doctor's office together. (32 RR 236). Soffar told her there was a cash reward and that the composite looked a lot like his friend Latt Bloomfield. *Id.* Soffar said he wanted to turn in Bloomfield. (32 RR 236-37).

Although Ms. Butler did not live at home with her parents and her brother, Max, she was a frequent visitor. (32 RR 238). The Soffar family typically watched Channel 13 News (32 RR 239), and her parents subscribed to the Houston Post. *Id.*

On August 5, 1980, Soffar was arrested after stealing a motorcycle in League City and providing a false name to the police. (29 RR 22, 25). Soffar told his arresting officer that he had information about the widely-publicized bowling alley murders in Houston. (29 RR 31). He said he wanted to speak with a Sergeant Clawson, which the arresting

¹³ Several stories explained where the building was situated in the parking lot and the location of the front doors. (43 RR Defense Exhibit 60).

¹⁴ Over defense objections based on Max Soffar's Sixth Amendment right to present a defense, the court also precluded cross examination of interrogating officers regarding these details and introduction of evidence that any of these stories appeared in the media. (30 RR 101-06; 33 RR 4-5). The defense theory of admissibility of the media evidence was that the information in Max Soffar putative confession reflected nothing more than information broadcast to the general public. *Id.* *See also* (31 RR 4-8).

officer interpreted as meaning that Soffar was an informant. *Id.* The arresting officer noted that Soffar's eyes were dilated, his speech slurred, his body smelled of alcohol, all indicative of someone under the influence of alcohol or drugs. (29 RR 42-43).

Thereafter, Soffar spoke with a number of different police officers and law enforcement officials. Soffar's initial interrogation, by Detective Gil Schultz, was tape recorded and transcribed, revealing that Soffar had learned about the case and the fifteen thousand dollars in reward money from the "news" and the "paper." (43 RR State's Exhibit 1A at 9, 25, 28, 36; 30 RR 94-95).

In the course of the interrogation by Det. Schultz, Sergeant Bruce Clawson of the Galveston County Sheriff's Department was called when Soffar "refused to talk." (29 RR 106; 43 RR Defense Exhibit 25). Sgt. Clawson formed the impression that the police had hit a "brick wall" with Soffar and understood he was there to get Soffar to talk. (29 RR 182, 188). When Soffar asked Sgt. Clawson how long it would take to get an appointed lawyer, (29 RR 114-15), Clawson provided what the Fifth Circuit called "misleading" answers. *Soffar v. Cockrell*, 300 F.3d 588, 596 (5th Cir. 2002).¹⁵

Sgt. Clawson observed some of the interrogation performed by Det. Schultz. Sgt. Clawson noted that it did not appear that Soffar knew the part of Houston where the bowling alley was located or 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

¹⁵ The details of Clawson's responses are discussed in detail in the 5th Circuit opinion and in Appellant's Ninth Point of Error.

the bowling alley. (29 RR 151).¹⁶ Det. Schultz's interrogation made Sgt. Clawson concerned about whether the police were obtaining accurate information. (29 RR 166).

Sgt. Clawson knew Max Soffar well as a police informant. (29 RR 103, 105-06). Sgt. Clawson explained that Soffar's information was "just not trustworthy," and could "never" be used to get a search warrant. (29 RR 128-29). According to Sgt. Clawson, Max Soffar was always looking for "the big score" in life. (29 RR 131). Ten to fifteen thousand dollars, Sgt. Clawson believed, would be a big score for Max Soffar. *Id.* Sgt. Clawson came to know Soffar as having brains "fried" from the use of drug and alcohol, and as like a ten or eleven year-old child. (29 RR 134).

Content of Max Soffar's Putative Confessions

Soffar signed three written statements, prepared by detectives, in which he first implicated Latt Bloomfield and then himself in robbery-murders at a bowling alley. He was convicted based solely upon these statements.¹⁷ Consistent with the prevailing view that the robbery murders at the Fairlanes and the burglary there the night before were linked, in Soffar's first statement, on August 5, 1980, he told the police that he and Latt Bloomfield burglarized a bowling alley and that the next night they drove to the same bowling alley and Bloomfield entered with his pistol while Soffar waited outside. (30 RR

¹⁶ Similarly, Detective Kenny Williamson drew most of the parts of the diagram he used in his subsequent interrogation with Soffar. (31 RR 61-62, 128-29, 131).

¹⁷ See *Soffar*, 368 F.3d at 479 (summarizing lack of evidence linking Soffar to crime *in terms equally applicable to facts of retrial*); (35 RR 25 (prosecution summation argument: "The Defendant tells you that he did it. What other evidence do you need? That's the best kind of evidence you'll ever have in a case. What's the one thing that can ensure that you have no doubt. Words from a person. You don't say you were some place if you weren't. You don't ever say you shot somebody if you didn't.")).

21-23). The police knew the statement about the burglary the preceding night was false.¹⁸

In his first statement, Soffar also claimed to have heard several shots and seen young people getting on their knees at Bloomfield's direction. Bloomfield emerged with "a whole lot of money." *Id.*

In his second statement, on August 6, 1980, Soffar again falsely claimed that he and Bloomfield had burglarized the bowling alley the night before the robbery murders and embellished that story even further. (43 State's Exhibit 109; 30 RR 140-48). Soffar also stated that the next night he waited outside and heard shots while Bloomfield went inside the bowling alley. *Id.* Several details were added to the first statement, including that Bloomfield wore a lady's stocking over his head as a disguise. (30 RR 146).

In his third statement, signed at 9:25 p.m. on August 7, 1980,¹⁹ Soffar gave his third different rendition of what happened the night of the robbery murders. Soffar claimed that he and Bloomfield both entered the bowling alley in partial disguise: Soffar with a T-shirt pulled over his mouth and Bloomfield wearing a lady's stocking over his head. (30 RR 161). After walking through the open door to the bowling alley, a "guy" asked what they

¹⁸ Det. Schultz, who took this statement, knew that the burglary, which had been publicized in connection with the search for the murder suspect, was not committed by Soffar and Bloomfield. (30 RR 25). Other suspects had already been arrested and charged for that offense by the time Soffar made his statement. *Id. See also* (30 RR 189).

¹⁹ By the time Soffar signed his third written statement, he had been interrogated several times, including the interrogation before each typewritten statement and during a drive around the Houston area when detectives attempted to collect more evidence. *See, e.g.*, (29 RR 191-92; 30 RR 173-78). Out of all of these conversations and contacts between the police and Soffar, only the initial interrogation was taped or transcribed, even though the Houston Police Department possessed tape recording devices. (30 RR 176-78). Detective James Ladd conceded the benefits of recording such interactions, including that a tape preserves precisely what was said for years, and captures the change in tone and pace of voice of speakers, none of which is accomplished by a written statement. (30 RR 180). As the Fifth Circuit noted in reviewing the evidence, the interrogation sessions were "neither transcribed nor recorded;" their "substance . . . was summarized by detectives and presented to Soffar in the form of written statements for his signature." *Soffar*, 368 F.3d at 453, n.19.

were doing. *Id.* The statement continued:

Lat pulled the revolver and stuck it in this guys face and said, "This is a robbery." Lat pulled this guy by the hair and made him get down on his knees. Three other people were over by the snack bar and they saw the man on his knees and xx [sic] walked up. This was two dudes and a girl. Lat told them to get on the floor and if they didn't do what he told them that he would shoot this first guy who was already on the floor. . . . They were laying from the door so that there was a dude and then a girl and then another dude and then the last dude. The second dude was trying to look up and Lat told him not to be looking and to turn around and lay facing the way all the others were. . . . The second dude kept looking around so Lat fired a warning shot into the floor. The girl screamed and then Lat told her to shut up and she kept screaming. Lat kicked the girl in the back and then the second dude who was the one who kept looking up started to raise up. He was about half way up when Lat shot him in the back of the head. Then Lat just turned around and shot the third dude. This third dude was the first one Lat grabbed and made get on the floor. He shot him the same way as the first one that he shot. Lat threw me the gun and told me to shoot the other two. I hesitated and then he said, "Shoot them now." I aimed the gun and the other guy who was still left who was closest to the door and fired one time. I hit him in the back of the head behind the ear. I walked around the other side of them and hesitated [sic] and Lat said, "Shoot her." She had her face down and she just looked up at me and I aimed and turned my head and shot her. I think I hit her in the cheek.

(43 State's Exhibit 110, 30 RR 161-62).²⁰ The positioning of the victims from the door was "dude and then a girl and then another dude and then the last dude." (30 RR 161).

The statement continued that Soffar took money from the cash registers by the bowling shoes and the snack bar. (30 RR 162-63). Meanwhile, Bloomfield took 50 to 60 dollars from money bags under the counter, and then rummaged through the victims' pockets and took their wallets. (30 RR 163). After they left, Soffar and Bloomfield bought "preludins," went to Soffar's house, took all of the pills, stayed up all night, and went to

²⁰ The statement is reproduced exactly as typewritten by the police; errors and omissions are in the original. As this Court noted on Appellant's appeal from Soffar's original conviction and the Fifth Circuit noted on habeas review, neither this statement nor Max Soffar's two previous statements, set out "the date, county, city, state, nation, street address or name of the bowling alley, the name of any victim, or any other fact which might expressly reflect that appellant's statement relates to the offense for which he was tried, convicted, and given the death sentence." *Soffar*, 368 F.3d at 456 n.25 (quoting *Soffar*, 742 S.W.2d at 375).

the park the next day. (30 RR 164).

At 9:33 p.m., Detectives M.F. Kardatzke and R.D. Cain signed a diagram with Max Soffar's name on it, containing claims in the first-person such as "I shot the girl last." (43 RR State's Exhibit 207/Defense Exhibit 32). The diagram depicts the scene of the crime as described by Soffar in his third statement. *Id.*; *see also* (30 RR 161). The positioning of the victims was a straight line of people ordered male, female, male, male. (43 RR State's Exhibit 207/Defense Exhibit 32).²¹

Tour of Crime Scene, Places Soffar Falsely Claimed to Have Robbed, and Other Places

After Soffar's third statement, the police took him for a ride to show him the various places mentioned in his statements. (30 RR 150). But before doing so, Detective Kenny Williamson drew a map of Fairlanes Windfern and showed it to Soffar. (31 RR 61-62; 43 RR State's Exhibit 206).²² After Soffar's exposure to that map, and to the images of the outside of Fairlanes Windfern broadcast by the media, (43 RR Defense Exhibits 58, 63, 66) (which the jury was precluded from hearing about), the police drove Max Soffar to a different Fairlanes bowling alley, the Bunker Hill location, to see "what his reaction would be . . ." (30 RR 151). Over a defense objection based on CRIMINAL CODE OF PROCEDURE ARTICLE 38.22, the prosecution elicited testimony that Soffar said it

²¹ No doubt aware that the difference between Max Soffar's diagram and the one prepared by Greg Garner cast serious doubts on Soffar's guilt, the prosecutor implausibly argued to the jury that Max Soffar did not prepare the diagram. (35 RR 99). The prosecution itself, however, introduced the diagram into evidence (31 RR 90), and did not seriously dispute that the exhibit was prepared from information provided by Max Soffar.

²² The map shows a box, indicating the building, the "feeder" road leading to the bowling alley from the freeway, and the parking lot lines in front of the entrance. *Id.* Det. Williamson drew all of these areas. (31 RR 60-66, 128-29). According to Det. Williamson, Soffar "may have" drawn in lines indicating where he and Bloomfield had parked the car. (31 RR 131).

“did not look like the place.” (30 RR 151-52). The police then drove to Fairlanes Windfern, which is marked on Highway 290 by a large red sign bearing its name. (43 RR Defense Exhibits 1-3). Over the same defense objection, the prosecution elicited that Soffar then said that “this looked right.” (30 RR 152).

After the bowling alley visits, the police drove to find a man named “Pops,” from whom Soffar had said he and Bloomfield had bought narcotics after the crime. (30 RR 153-54). The police never found “Pops,” but did find someone, allegedly pointed out by Soffar, named “*Papa*” and his girlfriend, Mable Cass. (30 RR 155-56). The police interviewed Papa²³ on the side of the road for two to three hours and then at the station for six to seven hours. (32 RR 20). Papa claimed that Soffar (whom he knew only as Max), a fat guy, and a slim guy drove up and the three talked about selling Papa a gun. (32 RR 10). They then had a conversation about a robbery in Galveston or Texas City that Papa had heard about on the news. (32 RR 12). As Papa claimed to the police in his written statement, Max allegedly said “if I told you who did it, you wouldn’t believe me.” At the retrial, Mable Cass testified that she overheard a conversation in which someone named “Max” claimed to have shot four people in a bowling alley. (31 RR 194). The bowling alley was in Galveston, and Max said it had been on television. (31 RR 183, 194). Max then allegedly showed them the gun he had used, a semi-automatic,²⁴ which had a clip

²³ Papa, whose real name was Lawrence Bryant, testified at the 1981 trial, and the prosecution read his testimony into the record at the retrial over defense confrontation objections. (32 RR 4).

²⁴ Contrary to Cass’s story (or the story she purported to recount from “Max”), the prosecution’s own firearm expert believed that the shooter did not use a semi-automatic because no casings had been left at the scene and because the bullets recovered lacked the characteristic lead “melting” caused by a semi-automatic. (28 RR 92, 96).

which came out the bottom. (31 RR 178, 184-85). When she allegedly heard about this crime, she did not report it to the police; instead, she “let it slide.” (31 RR 196).

The police then took Soffar to a number of locations which he claimed he and/or Bloomfield had robbed before and after the bowling alley murders. First, they went to a Weingarten’s store which Soffar had claimed Bloomfield had robbed some six months earlier. (31 RR 26-27). Police investigated and found that the claim, too, was false. *Id.* Then, Soffar took them to a U-Totem store in Galveston which Soffar had claimed he and Bloomfield had robbed after they left the Fairlanes on July 14, 1980. (31 RR 27). Police investigated and found that the claim was false.²⁵ (31 RR 28).

Prosecution and Defense Evidence Contradicting Soffar’s Putative Confession

Soffar’s “confession” was inconsistent with virtually all of the other evidence introduced by both the prosecution and the defense. As the defense argued, Soffar’s statements were implausible in light of the crime-scene evidence, the forensic evidence, the ballistics evidence, and the statements of the only surviving witness, Garner, provided to the police shortly after the shootings:

- 1) Contrary to Soffar’s “confession,” (30 RR 162-63), the perpetrator took no money from the snack bar cash drawer. The bowling alley manager testified that no money was taken from the snack bar and its cash drawer was found locked safely in the office. (26 RR 177-78).
- 2) Contrary to Soffar’s “confession,” (30 RR 163), the perpetrator did not take “fifty or sixty dollars” from a money bag underneath the counter. Money was stored in the cash registers or in the office at Fairlanes, never under the counter. (26 RR 178-79).
- 3) Contrary to Soffar’s putative claim that he *and* Latt Bloomfield committed the

²⁵ The police claimed that information Soffar provided about non-specified other crimes was correct. (31 RR 45).

offense, (30 RR 161), Garner reported only a single perpetrator. (32 RR 63, 79, 101).

4) Contrary to the Soffar claim that the perpetrators wore disguises, including lady's stockings over Bloomfield's head and a T-shirt over his own face, (30 RR 161), Garner reported that the perpetrator wore no disguise. (32 RR 89, 134).

5) Contrary to Soffar's claims that the young woman screamed and was kicked, (30 RR 162), the medical evidence established none of the shooting victims had been kicked, beaten, or injured apart from their shooting wounds. (32 RR 69, 84, 86, 110-11, 130). Similarly, Garner reported that no one screamed, and that the assailant did not physically touch or hit them. (32 RR 69, 84, 86, 110-11, 130).

6) Contrary to Soffar's claim that the perpetrators simply walked right in the bowling alley with a gun and immediately confronted the victims, (30 RR 161), Garner reported that the door of the bowling alley was locked and that the assistant manager, Steve Sims, had to unlock the door for the single perpetrator who entered with a water pitcher, not a gun. (32 RR 71-72, 79-80, 101, 138, 144). Only after Sims stepped outside with the perpetrator and they returned inside did the perpetrator brandish a gun and commence the robbery. (32 RR 80, 105-06, 125).

7) Contrary to Soffar's claim that five shots were fired, (30 RR 162), only four shots were fired, as determined by the prosecution's own firearms expert, (28 RR 90), the medical examiner on the scene, a detective on the scene, and the defense crime scene expert. (33 RR 65-66, 125). Garner also reported that only four shots were fired. (32 RR 70, 129).

8) Contrary to Soffar's putative placement of the victims in a straight line from the front doors in the following order: male, female, male, male, (30 RR 161; 43 RR State's Exhibit 207/Defense Exhibit 32 (Soffar's diagram)), Garner and the crime-scene evidence demonstrated that the victims were situated in a semi-circle in the following order from the front doors: female, male, male, male. (33 RR 109-10; 45 RR Joint Exhibit 3 (Garner's diagram); 31 RR 155-56 (testimony of Det. Williamson); 33 RR 87-88 (testimony of defense crime-scene expert)).²⁶

9) Soffar did not mention the ruse Garner reported the perpetrator used to gain entry – the supposed need to fill the jug with water (or get some air) to remedy a car problem. (32 RR 72-74, 79-80, 83, 104-06, 137-38, 144-46). The crime scene investigators discovered a jug, otherwise out of place, on the control counter. (26 RR 184; 27 RR

²⁶ The police and paramedics entered to find Garner lying closest to the door, the spot to which he had moved after calling his parents. (32 RR 114-15). The Fifth Circuit found that "the arguably incorrect pattern of the shootings deduced by the police from the victim's ultimate floor positions led to statements by Soffar fitting that pattern." *Soffar*, 368 F.3d at 479.

90-91, 101; 43 RR State Exhibit 39).

10) Contrary to Soffar's putative claim that the perpetrators obtained the money from the cash registers only *after* all of the shootings, (30 RR 162), Garner reported that the perpetrator ordered Steve Sims to open the cash register *before* anyone was shot. (32 RR 69, 84, 107, 112, 124, 126-27).

See also Soffar, 368 F.3d at 474 (reviewing seven of these inconsistencies).

Other evidence, too, was inconsistent with Soffar's guilt. Between Soffar's first and second statement, he and Latt Bloomfield were placed in separate lineups. *See* (43 RR State's Exhibits 201 (Soffar lineup), 202 (Bloomfield lineup)). Greg Garner was unable to positively identify either of them. (32 RR 193-94).²⁷

In the afternoon on August 7, 1980, the police released Latt Bloomfield from custody at the direction of the Harris County District Attorney's Office because they possessed no evidence to hold him. (31 RR 29-30). The police informed Soffar of this development, and Soffar was upset because he wanted to see Bloomfield implicated in the murders. (31 RR 30). Unlike Bloomfield, Soffar was charged with the murders. (31 RR 30). Soffar then made his third statement, set forth *supra* at 10-12, the only one in which he implicated himself as a shooter inside the bowling alley.

According to the testimony of Appellant's mother, Zelda Soffar, from his first trial,²⁸ "Max" came home in the evening on July 13, 1980, tired from helping a friend move

²⁷ Garner consistently said that a single assailant committed the crime, and told the police that he would be able to identify him. (32 RR 68, 118). Garner said he was not sure whether his assailant appeared in either of the two lineups. (32 RR 193-94). A police witness testified that Garner said that his single assailant "might be" Soffar or another man in the first lineup of five men, *id.* at 193, and that he was not positive but his assailant "would look like" Bloomfield, who appeared in the second lineup. *Id.* at 194; (43 RR State's Exhibits 201-202).

²⁸ Mrs. Soffar died before the retrial.

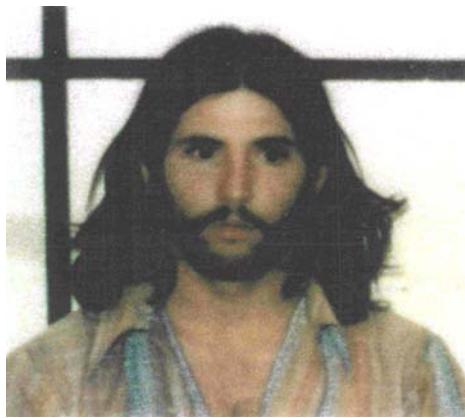
over the previous two days. (32 RR 244-45). He watched television and went to bed in his room. (32 RR 257). Because his bedroom had a door to the outside, Mrs. Soffar could not say with complete certainty that he never left home. (32 RR 266-68). Nevertheless, she slept lightly because her sick husband needed her assistance, (32 RR 247, 252-53), and she did not hear Max leave his nearby room, did not give him access to her tightly-monitored vehicle, and did not hear any vehicle approach her home (the only one on the block) or any other unusual noises. (32 RR 246-47, 249, 253). She noted that the family dog had barked at Latt Bloomfield on previous occasions. (32 RR 270-71).

The people Soffar helped move gave him “long neck” beer bottles for which he hoped to collect a deposit. (32 RR 249-50). The next morning, July 14, 1980, he drove with his mom to his sister’s home in Alvin and tried to return the bottles. (32 RR 250-51). They were unable to return the bottles that day, but they were successful two days later. (32 RR 251). The defense presented testimony from the distributor verifying that Max Soffar returned the bottles on July 16, 1980, and a receipt for \$2.52 to prove it. (43 RR Defense Exhibit 41; 33 RR 6-8).²⁹

Jackie Soffar Butler corroborated that her brother and mother came to her home in Alvin at approximately 9 or 10:00 a.m. on July 14, 1980. (32 RR 234). Butler remembered this occasion because Soffar had brought her a birthday card that morning. (32 RR 235). In those days, Soffar wore his hair a little longer than shoulder length, a

²⁹ At the penalty phase, the defense called Carol Ann Schaub, who testified that Soffar assisted her family member moving all day on July 12 and 13, 1980. (39 RR 58-67). Soffar and all of the movers were very tired at the end of two full days of moving in the middle of summer. (39 RR 66). Soffar did not receive any pay, but did receive some long neck beer bottles for his help. (39 RR 66-67). Soffar received a ride home on July 13 at around 7:00 or 7:30 p.m. (39 RR 66).

beard and moustache. (32 RR 235-36). A photograph of Soffar after his arrest is set forth in Defense Exhibit 19 (43 RR) and below:³⁰



Conviction: Unable to inculpating Paul Reid broadcast of details that the

present the evidence and of the media prosecutor claimed

Soffar could have known only if he had been at the scene, Soffar was convicted of capital murder as charged. (36 RR 4).

Sentencing Phase: As a result of original trial counsel's ineffective assistance of counsel, and the 23 year delay before the Fifth Circuit granted *habeas* relief, the defense faced a daunting task at sentencing in attempting to unearth mitigating evidence and Soffar's life history, including investigation as far back as Soffar's childhood in the 1950's

and 1960's.³¹ Many of the witnesses who knew the most about Soffar's life, including his

³⁰ See also (43 RR State's Exhibit 103).

³¹ Citing various legal arguments, the defense unsuccessfully moved to preclude the death penalty due to the inherent unfairness in forcing Appellant to defend against the death penalty 26 years after the alleged capital crime. (2 CR 499-718). See also Appellant's Sixth Point of Error and Twenty-Second Point of Error (in proffer brief).

mother, had died by the time of the retrial, (2 CR 500, 531-34), and the court precluded introduction of their affidavits into evidence. (40 RR 64-65). The few defense witnesses available to testify were subject to prosecution attacks on their ability to recall decades-old events. (38 RR 82-85; 39 RR 41-43, 47-48).

Doctors noted at birth hard neurological signs of brain dysfunction and damage, including an abnormal palate and facial asymmetry. (39 RR 114-15). Soffar was adopted by older parents who ran a business and did not have the wherewithal or time to care for him. (36 RR 96; 38 RR 150; 39 RR 139, 233). As an infant, he was irritable and agitated. (39 RR 119-20). Incompetent as a parent, his mother put phenobarbital, a barbiturate and central nervous system depressant, in his bottle. *Id.* Soffar's father was a heavy drinker, addicted to sleeping pills, and was mostly absent from his life. (38 RR 25-26, 31-32; 39 RR 140, 169-170). A relative of Soffar's father noted that the Soffar family home lacked any discipline. (38 RR 20-21). Soffar's juvenile probation officer, who had known the Soffar family for years, believed that his parents were unable to provide the discipline and structure that he desperately needed. (36 RR 95-96).³²

Soffar began ingesting dangerous substances at a young age. He sniffed modeling glue and leaded gasoline, and took his mother's blood pressure pills and anything else he could find in the family's medicine cabinet. (38 RR 129-31; 39 RR 127-28).³³ According to Dr. Susan Stone, a board-certified psychiatrist, Soffar was self medicating his brain

³² The probation officer came to the conclusion that young Max could not help his behavior. (36 RR 97).

³³ As the defense expert noted, exposure to lead and other solvents causes severe damage to the neural pathways in a developing brain. (39 RR 128).

damage.³⁴ (39 RR 128-29). Due to these and other behavioral difficulties as well as problems at school, Soffar's parents took him to psychiatrists beginning at age six. (36 RR 42-43; 38 RR 152-53; 39 RR 107). The first psychiatrist prescribed Ritalin. (39 RR 107). Soffar was psychiatrically hospitalized at St. Mary's Hospital at age 11, and at the University of Texas Medical Branch and Austin State Hospital³⁵ at age 12. (39 RR 108-09). The diagnoses were attention deficit hyperactivity disorder and organic brain syndrome. (39 RR 108, 117-19, 131, 133-34, 226).

Max Soffar stayed at Austin State Hospital until age 14. (36 RR 42; 39 RR 109). According to Dr. Stone, this hospital was a "warehouse" for children with "really severe problems." (39 RR 109). Rick Laminack, a child care worker there during Soffar's hospitalization, (39 RR 4-6), described its conditions. It was "dark, drab, [and] lifeless," and smelled of urine and defecation left in the hallways and never cleaned. (39 RR 9-10). There was "nothing on the walls [and] no furniture to speak of." *Id.* The bed linens were not laundered for weeks at a time. *Id.* The hospital had a "quiet room," in which misbehaving children were placed, usually naked. (39 RR 11-12, 15). A 10 feet by 10 feet "solitary confinement cell [with] hard floors, hard walls, high ceilings," the room had a big wooden door with a grate through which to pass meals. (39 RR 11-12). There were no toilet facilities, no shower, and "not a stick of furniture." (39 RR 12). In Laminack's

³⁴ Dr. Stone was a former Associate Medical Director of the Texas Department of Mental Health and Retardation and former Ethics Advisor for the Texas Department of Criminal Justice. (39 RR 104-06).

³⁵ Soffar had psychotic episodes leading to the hospitalization, including hallucinations that monsters were in his window and other strange perceptions. (39 RR 142). His diagnosis on admission said to "rule out" childhood schizophrenia. (39 RR 187-89).

opinion, putting a child in this room was “the most dehumanizing, horrible, ugly and horrible thing” to do to the child. (39 RR 15).

Laminack first met Soffar when a fellow worker called him to help stop Soffar from banging his head against the floor in the quiet room. (39 RR 10-11). He found the child bruised, red, scratched, scabbed, tense all over, and crying uncontrollably. (39 RR 11). Laminack worked the afternoon shift and arrived to find Soffar confined in the quiet room eight to twelve times, (39 RR 44), for several days without clothes. (39 RR 47). *See also* (39 RR 148 (expert reviewing documentation of use of quiet room on Soffar)). Laminack did not see Soffar or the other children receiving any treatment. (39 RR 29). Hospital records revealed that Soffar received such age-inappropriate and risky treatments as electroconvulsive therapy and powerful psychotropic medication. (39 RR 144-47).³⁶

Laminack assisted Soffar with his homework, and observed that Soffar struggled and performed several grade levels lower than appropriate for his age. (39 RR 25-27). Soffar was known to tell “whoppers,” tall tales about the adventures he supposedly had on the several occasions when he and other children fled from the hospital grounds. (39 RR 20-21, 27). He saw Soffar act out, mutilate himself and start fights. (39 RR 18-20, 25). When Soffar was given positive attention and reinforcement, Laminack saw him do quite well, working hard on his school work and helping with the younger children during recreational activities. (39 RR 26).

³⁶ Assisted by Laminack’s information, the State legislature investigated Austin State Hospital for its mistreatment of patients at the time Soffar was there. (39 RR 32-34). The jury never heard this evidence, however, because the court precluded its admission. *Id.*

After Soffar left Austin State Hospital, he continued to have behavioral problems and, at age 16, was placed in a program called Boy's Country. (36 RR 77). He was ultimately expelled from that program. (36 RR 88). Still 16, Soffar was then sent to Gulf Coast Trade Center, a vocational school. (36 RR 89-90). The executive director there remembered Soffar well and testified that the teenager succeeded in the shops and did poorly in the classroom. (38 RR 67-68, 79). Soffar was not violent (violent students were removed from the program), but had a serious substance abuse problem: he sniffed paint, paint thinner and anything else at hand. (38 RR 72-73). When the executive director drew the line for him, Soffar learned to respond well to authority. (38 RR 71). Although most students stayed three months, Soffar stayed nine. (38 RR 74).

After Gulf Coast, Soffar became a police informant. (38 R 109). Officer Michael Clawson³⁷ testified that Soffar had mental health problems, a drug-“fried” brain, and was not very smart. (38 RR 105-06). During this period, Soffar saved Sgt. Bruce Clawson’s life when his cover was blown during an undercover narcotics purchase. (40 RR 5-6).

Soffar went to state prison in 1981 and eventually matured. He participated in a religious ministry programs for over 20 years, and formed strong bonds with the people who ministered to him. (39 RR 70-87, 91-95). Clarence Brandley, once imprisoned on Texas’s death row but ultimately exonerated,³⁸ worked with Soffar in a prison factory and observed him during recreation time over a four-year period. (40 RR 11-13). Brandley

³⁷ Michael Clawson is Sgt. Bruce Clawson’s brother; they worked for different police agencies. (38 RR 109).

³⁸ See, e.g., *Ex parte Brandley*, 781 S.W.2d 886, 894-95 (Tex. Crim. App. 1989). See also Chuck Lindell, *The Great Writ and Some Who Were Exonerated*, AUSTIN AMERICAN-STATESMAN, Oct. 29, 2006, at A1.

never saw Soffar have trouble with inmates or guards. (40 RR 10-13). Soffar made handicrafts for a cousin, Carol Schaub, and impressed her with his new-found faith and mature manner. (38 RR 40-47). Acclaimed writer Kinky Friedman was working on a news story when he met Soffar in prison, and they formed a friendship sustained through correspondence. (40 RR 17-23). Soffar eventually married, and formed a loving relationship with his wife, Sandra Soffar. (40 RR 24-35).

To convince the jury that Max Soffar “would commit criminal acts of violence that would constitute a continuing threat to society,” TEX. CODE CRIM. PROC. 37.0711 § 3 (b), the prosecution introduced 26 year-old and older allegations of violence for which he had never been charged or convicted. These allegations included a rape in 1979, and threatening a girlfriend with a gun in 1980. (37 RR 96-117; 146-52). The last allegation was a 1996 disciplinary infraction based on an alleged verbal threat to inflict harm on a corrections officer. (38 RR 12). The prosecution also relied on prior low-level convictions for marijuana possession, reckless conduct,³⁹ resisting arrest, enticing a child, making a “terroristic” threat, burglary, and burglary of a coin-operated machine. (38 RR 37-38; 45 RR State’s Punishment Exhibits 7-12, 16-18). The prosecution went as far back as Soffar’s childhood, focusing on incidents when Soffar ran away, and when he was referred to juvenile probation for what his probation officer referred to as “several minor offenses,” including misdemeanor thefts. (36 RR 70-77). Finally, the prosecution relied

³⁹ The prosecution introduced evidence alleging that the reckless conduct conviction arose out of an incident where Appellant threatened the police with a gun when they came to his sister’s home during a Christmas party in 1979. *See, e.g.*, (37 RR 19-29).

on a series of similarly-stale prison disciplinary infractions clustered around the mid-eighties, the latest of which was for possession of marijuana and tobacco in 1998. (38 RR 12).⁴⁰ The vast majority of the infractions did not involve allegations of violence.

Over defense objection, the prosecution introduced victim-impact evidence related to Steve Sims, even though Soffar was neither indicted nor convicted of killing Sims. (40 RR 37-44). The verdict sheet indicated a sentence of death, but the jury was discharged “from further duties” by the court before its foreperson had signed the last page of the verdict sheet. (15 CR 4678; 42 RR 6-7). Over defense objection, the court reconstituted the jury so that the foreperson could sign the last page of the verdict sheet. (42 RR 7-8).

Summary of Argument

At his 2006 retrial, in addition to eliciting the “stark inconsistencies between [the sole witness Greg] Garner’s description of the” robbery murders at a bowling alley on Route 290 in Houston “and the one that the officers testified that Soffar gave them,” *Soffar*, 368 F.3d at 471, Max Soffar attempted to defend himself in two principal ways. First, he attempted to introduce compelling evidence that Paul Reid, a dangerous Houston criminal in 1980, was responsible for the crime. Second, Soffar – a former police informant known to be unreliable, unintelligent and a drug addict – sought to attack his putative confession by introducing evidence that it consisted only of details disseminated

⁴⁰The most serious prison allegations were from 1984 and 1985, when Appellant allegedly threw urine at a corrections officer and possessed a shank. (37 RR 183-84; 38 RR 6-8). The other violations not addressed in the text were for possession of contraband in 1982, indecent language and threatening an officer in 1984, failure to obey orders in 1984, disobeying an order in 1984, level one possession of weapon in 1985, damaging or destroying property and refusal or failure to obey orders in 1985, refusal to obey order in 1985, threatening to inflict harm on inmate in 1987, being out of place in 1987, refusing or failure to obey order in 1989, damaging or destroying property and threatening to inflict harm on inmate in 1990, possession of contraband in 1995, and use of intoxicating inhalant, paint thinner, in 1997. (38 RR 10-12). *See also* (45 State’s Punishment Exhibit 33).

to the public through the media. The trial judge committed reversible errors and rendered Soffar's retrial fundamentally unfair by blocking *both* of these lines of defense.

Jurors are truth seekers, and they cannot determine where the "truth lies" when they hear only one side's evidence. *Washington v. Texas*, 388 U.S. 14, 19 (1967). For these reasons, among the others set forth in this brief, under the Constitution, a court may not prevent an accused from presenting evidence in support of his chosen defense unless the state demonstrates a legitimate justification. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1731 (2006).

At Max Soffar's retrial, he had a constitutional right to present evidence that Paul Reid was the guilty party and the state offered no legitimate justification for preventing him from doing so. As demonstrated, *infra*, Reid: (1) admitted to Stewart Cook that he shot four people in a bowling alley on Route 290; (2) strongly resembled the composite prepared from Garner's description; and (3) was convicted in Tennessee of a series of execution-style multiple robbery murders remarkably similar to the 1980 Houston triple robbery murders. *See, e.g.*, (9 CR 2553, 2561; Appendix A to Brief). Evidence of Reid's statement against interest and *modus operandi* were admissible under Texas evidentiary rules, TEX. R. EVID. 803 (24), 404 (b), and the State had absolutely no legitimate justification to block its admission. *Holmes*, 126 S. Ct. at 1731. Similarly, evidence of the media dissemination of information contained in Soffar's confession – which the prosecutor argued only the perpetrator could have known – was highly relevant and the jury should have been permitted to hear it. Again, the State had absolutely no legitimate justification to block its admission.

Due to these and the other errors discussed below,⁴¹ Soffar’s retrial was grossly and fundamentally unfair. It was also thoroughly inconsistent with constitutional, statutory and common law mandates. Reversal is required.

⁴¹ In the interests of economy, Appellant seeks leave to file this summary focusing only on the above issues instead of a discussion of all 21 Points of Error raised. *See Tex. R. App. P. 38.1 (g).* In addition, with leave of the Court, the issues listed in the Table of Contents will serve as the “Issues Presented.” *Tex. R. App. P. 38.1 (e).*