

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2009

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MAX ALEXANDER SOFFAR,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE TEXAS COURT OF CRIMINAL APPEALS

*PETITION FOR A WRIT OF CERTIORARI*

**THIS IS A DEATH PENALTY CASE**

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## CAPITAL CASE

### QUESTIONS PRESENTED

1. State courts of last resort and the United States courts of appeals are both split on when a criminal defendant enjoys a constitutional right to a grant of “use immunity” for a defense witness pleading the Fifth Amendment privilege against self-incrimination. When does the constitutional right to present a defense require that “use immunity” be granted to a defense witness?

2. The Texas Court of Criminal Appeals assumed a violation of Petitioner’s constitutional right to present a defense because the trial court excluded his evidence that the media broadcast an overwhelming number of correct details in his putative confession. Did the court violate *Chapman v. California*, 386 U.S. 18 (1967), by finding this inherently-prejudicial constitutional error harmless beyond a reasonable doubt without: 1) acknowledging that the excluded evidence was vital to Petitioner’s defense, 2) conducting the analysis in light of the entire record, 3) acknowledging that the State exploited the error in its jury summation, and 4) requiring the State to prove harmlessness beyond a reasonable doubt?

3. Under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny, may the State strike for cause a prospective juror because (as the state court found below) she “would require more than proof beyond a reasonable doubt to apply the death penalty”?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

---

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

1. Facts Pertaining to the Homicide ..... 2

    A. Midnight on July 13, 1980: four Houston youths shot and one survives..... 2

    B. Houston man resembling composite commits similar crimes ..... 3

    C. Media broadcasts details of the Fairlanes robbery murders ..... 4

    D. Soffar, a mentally-deficient man, falsely confesses to several crimes ..... 5

    E. Content of Soffar’s putative confessions, including undisputed false confessions ..... 7

    F. Prosecution and defense evidence contradicting Soffar’s putative confessions ..... 10

    G. Other evidence does not support Soffar’s guilt ..... 12

2. 1981 Trial, conviction, and death sentence ..... 14

3. 2004 Grant of habeas relief by Fifth Circuit ..... 14

4. 2006 Retrial in which trial court excluded key defense evidence of Soffar’s innocence, and 2009 decision affirming on direct appeal ..... 15

    A. Evidence of Paul Reid’s involvement excluded ..... 15

    B. Media evidence blocked ..... 17

    C. “For cause” exclusion of prospective juror who “would require more proof than proof beyond a reasonable doubt to apply the death penalty” ..... 19

REASONS FOR GRANTING THE WRIT .....	20
1. The Court should grant this petition to resolve a split in authority and determine when the accused enjoys a constitutional right to a grant of “use immunity” for a defense witness. ....	20
2. The Court should grant the petition to address the Texas court’s failure to follow this Court’s precedents governing constitutional harmless error review.....	26
A. The Texas court misapplied <i>Chapman</i> and its progeny .....	27
i. <i>The error was not unimportant or insignificant</i> .....	27
ii. <i>Error in failing to conduct analysis in light of entire record</i> .....	29
iii. <i>Error in failing to acknowledge significant harm caused by State’s summation</i> .....	33
iv. <i>Error in failing to require the State to prove the error harmless beyond a reasonable doubt</i> .....	34
B. The Court should grant the petition to address the harmless-error issue.....	37
3. The Court should grant the petition and hold that a prospective juror may not be excluded merely because she would require more than proof beyond a reasonable doubt to apply the death penalty. ....	37
CONCLUSION .....	40
APPENDIX	
<i>State v. Soffar</i> , Unpublished Decision (Tex. Crim. App. Nov. 18, 2009) .....	1a-112a
Postcard order of Texas Court of Criminal Appeals denying rehearing .....	113a

TABLE OF AUTHORITIES

FEDERAL CASES

*Arizona v. Fulminante*, 499 U.S. 279 (1991) ..... 33, 34

*Autry v. Estelle*, 706 F.2d 1394 (5th Cir. 1983) ..... 5

*Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982)..... 35

*Blissett v. Lefevre*, 924 F.2d 434 (2d Cir. 1991) ..... 22

*Brecht v. Abrahamson*, 507 U.S. 619 (1993)..... 26

*Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001)..... 14

*Chapman v. California*, 386 U.S. 18 (1967) .....passim

*Clemons v. Mississippi*, 494 U.S. 738 (1990)..... 33

*Crane v. Kentucky*, 476 U.S. 683 (1986) ..... 21, 27, 28

*Delaware v. Van Arsdall*, 475 U.S. 673 (1986) ..... 29

*Drew v. Collins*, 964 F.2d 411 (5th Cir. 1992) ..... 40

*Franklin v. Lynaugh*, 487 U.S. 164 (1988) ..... 20, 38, 39

*Fry v. Pliler*, 551 U.S. 112 (2007)..... 26

*Holmes v. South Carolina*, 547 U.S. 319 (2006) ..... 20, 27, 36

*Kokoraleis v. Gilmore*, 131 F.3d 692 (7th Cir. 1997) ..... 39

*Lockhart v. McCree*, 476 U.S. 162 (1986)..... 39

*McCleskey v. Kemp*, 481 U.S. 279 (1987) ..... 38, 40

*Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999)..... 39

*Neder v. United States*, 527 U.S. 1 (1999) ..... 34, 35

*Oregon v. Guzek*, 546 U.S. 517 (2006)..... 38

*Payne v. Tennessee*, 501 U.S. 808 (1991) ..... 38

<i>Rushen v. Spain</i> , 464 U.S. 114 (1983) .....	37
<i>Satterwhite v. Texas</i> , 486 U.S. 249 (1988) .....	30
<i>Scott v. Mitchell</i> , 209 F.3d 854 (6th Cir. 2000).....	39
<i>Smith v. Gibson</i> , 197 F.3d 454, 462 (10th Cir. 1999) .....	39
<i>Soffar v. Dretke</i> , 368 F.3d 441 (5th Cir. 2004).....	8, 10, 12, 14, 30
<i>United States v. Anderson</i> , 236 F.3d 427 (8th Cir. 2001).....	35
<i>United States v. Bowling</i> , 239 F.3d 973 (8th Cir. 2001).....	23
<i>United States v. Davenport</i> , 929 F.2d 1169 (7th Cir. 1991) .....	35
<i>United States v. Davis</i> , 132 F. Supp. 2d 455 (E.D. La. 2001) .....	39
<i>United States v. Frans</i> , 697 F.2d 188 (7th Cir. 1983) .....	23
<i>United States v. Gonzalez-Flores</i> , 418 F.3d 1093 (9th Cir. 2005) .....	26
<i>United States v. Gravely</i> , 840 F.2d 1156 (4th Cir. 1988) .....	23
<i>United States v. Hasting</i> , 461 U.S. 499 (1983) .....	27, 29
<i>United States v. Honken</i> , 378 F. Supp. 2d 1040 (N.D. Iowa 2004) .....	39
<i>United States v. Honken</i> , 381 F. Supp. 2d 936 (N.D. Iowa 2005) .....	40
<i>United States v. Krenzelo</i> k, 874 F.2d 480 (7th Cir. 1989).....	35
<i>United States v. Mackey</i> , 117 F.3d 24 (1st Cir. 1997) .....	22
<i>United States v. Smith</i> , 891 F.2d 703 (9th Cir. 1989) .....	35
<i>United States v. Vonn</i> , 535 U.S. 55 (2002).....	29
<i>United States v. Westerdahl</i> , 945 F.2d 1083 (9th Cir. 1991).....	22
<i>Virgin Islands v. Smith</i> , 615 F.2d 964 (3d Cir. 1980) .....	17, 22
<i>Ward v. Hall</i> , 592 F.3d 1144 (11th Cir. 2010) .....	39
<i>Washington v. Texas</i> , 388 U.S. 14 (1967).....	25, 37

<i>Wainright v. Witt</i> , 469 U.S. 412 (1985).....	40
<i>Williams v. Woodford</i> , 384 F.3d 567 (9th Cir. 2004) .....	39
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968) .....	i, 38

STATE CASES

<i>Barnes v. State</i> , 496 S.E.2d 674 (Ga. 1998) .....	39
<i>Bennett v. Com.</i> , 374 S.E.2d 303 (Va. 1988) .....	40
<i>Grey v. State</i> , 178 P.3d 154 (Nev. 2008) .....	35
<i>Harding v. People</i> , 708 P.2d 1354 (Colo. 1985) .....	21
<i>People v. Bradford</i> , 929 P.2d 544 (Cal. 1997) .....	40
<i>People v. Hunter</i> , 782 P.2d 608 (Cal. 1989) .....	21
<i>People v. Page</i> , 186 P.3d 395 (Cal. 2008) .....	39
<i>Smith v. State</i> , 70 S.W.3d 848 (Tex. Crim. App. 2002) .....	20
<i>Soffar v. State</i> , 742 S.W.2d 371 (Tex. Crim. App. 1987) .....	14
<i>State v. Belanger</i> , 210 P.3d 783 (N.M. 2009) .....	21, 24
<i>State v. Fair</i> , 557 S.E.2d 500 (N.C. 2001).....	40
<i>State v. Jeffers</i> , 661 P.2d 1105 (Ariz. 1983) .....	21
<i>State v. Hartman</i> , 42 S.W.3d 44 (Tenn. 2001).....	39
<i>State v. Roberts</i> , 574 A.2d 1248 (Vt. 1990) .....	21
<i>State v. Shomberg</i> , 709 N.W.2d 370 (Wis. 2006) .....	35
<i>State v. Whelchel</i> , 801 P.2d 948 (Wash. 1990).....	35

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....	1, 18, 21
----------------------------	-----------

U.S. Const. amend. VIII.....	1, 38, 40
U.S. Const. amend. XIV .....	1, 21, 38, 40

FEDERAL STATUTORY PROVISIONS AND RULES

18 U.S.C. § 6003(a) (2010).....	22
28 U.S.C. § 1257 .....	1
SUP. CT. R. 10.....	25, 27

STATE STATUTORY PROVISIONS

Tex. R. App. P. 44.2.....	18, 26
Tex. Code Crim. Proc. art. 12.01 .....	16
Tex. Code Crim. Proc. art. 12.03 .....	16

OTHER AUTHORITIES

Brandon Garrett, <i>The Substance of False Confessions</i> , 62 Stan. L. Rev. __ (2010) (forthcoming) .....	10
Craig M. Bradley, <i>A (Genuinely) Modest Proposal Concerning the Death Penalty</i> , 72 Ind. L.J. 25 (1996) .....	39
Gisli Gudjonsson, <i>THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK</i> (2003) .....	10
Leonard B. Sand & Danielle L. Rose, <i>Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?</i> , 78 Chi.-Kent L. Rev. 1359 (2003).....	39
Leonard N. Sosnov, <i>Separation of Powers Shell Game: The Federal Witness Immunity Act</i> , 73 Temp. L. Rev. 171 (2000) .....	26
Margery Malkin Koosed, <i>Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt</i> , 21 N. Ill. U. L. Rev. 41 (2001).....	39
Note, <i>A Reexamination of Defense Witness Immunity: A New Use for Kastigar</i> , 10 HARV. J. ON LEGIS. 74 (1972) .....	25-26



Note, <i>Beyond All Doubt</i> , 91 Geo. L.J. 1065 (2003) .....	39
Note, <i>Separation of Powers and Defense Witness Immunity</i> , 66 Geo. L.J. 51 (1977) .....	26
Note, <i>The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses</i> , 91 HARV. L. REV. 1266 (1978) .....	26
Peter Westen, <i>The Compulsory Process Clause</i> , 73 MICH. L. REV. 71 (1974) .....	25
Stephen P. Garvey, <i>Aggravation and Mitigation in Capital Cases: What do Jurors Think?</i> , 98 Colum. L. Rev. 1538 (1998).....	39

## STATEMENT OF THE CASE

Petitioner Max Alexander Soffar seeks a writ of certiorari to the Texas Court of Criminal Appeals, which on November 18, 2009, affirmed his conviction for capital murder and his sentence of death.

### 1. Facts Pertaining to the Homicide

#### A. Midnight on July 13, 1980: four Houston youths shot and one survives

Near midnight on July 13, 1980, someone shot four youths in the Fairlanes Windfern Bowling Center (“Fairlanes”) near Houston, on Route 290. (26 T. 48).<sup>1</sup> Three of the youths died, including bowling alley manager Stephen Sims, employee Thomas Temple, and Temple’s girlfriend, Alane Felsher. (27 T. 217, 219, 223). The fourth victim, Greg Garner, survived. Fairlanes had been burglarized the previous night (26 T. 183); the media stated that the two crimes could be linked. (43 T. Defense Exhibit 59 (summarizing media reports)).

Garner described his assailant as a white male, just over six feet tall. (32 T. 83, 131-32). The assailant had light brown hair, combed back to reveal his entire forehead, cut just below the ears on the side, and reaching the collar on the back. (32 T. 132, 135). He had no facial hair, and was stronger and heavier than Garner, who weighed 155 pounds. (32 T. 132-34). He wore neither a mask nor a hat. (32 T. 89-90, 134). The police used this information to prepare the following composite, later distributed to various media outlets. *See* (32 T. 170-74; 43 T. Joint Exhibit 6).

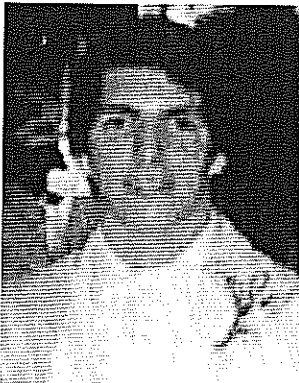
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<sup>1</sup> For convenience, the transcript is cited by volume number, followed by “T.”, followed by page number. The clerk’s record, setting forth motions, orders and other documents filed in the trial court’s clerk’s office, is cited as “CR”, using this same format.



**B. Houston man resembling composite commits similar crimes**

A dangerous criminal resembling this composite lived in Houston at this time. Now on Tennessee's death row for killing seven people in three different robbery murders, Paul Reid was married in Houston on July 23, 1980, just over a week after the Fairlanes robbery murders. (45 T. Defense Exhibits 37-39). The following photograph (45 T. Defense Exhibit 37) is from Reid's wedding:



The robbery murders Reid would later commit in Tennessee were strikingly similar to the Fairlanes robbery murders. In all of these crimes, the perpetrator:

- 1) gained entry to a retail establishment when it was closed but the employees were still there to let him in;
- 2) stole cash and coins, often having an employee access the register or safe; and
- 3) killed or attempted to kill all employees present, 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 in the early 1980's. During one of them, in 1982, Reid fired his pistol and Cook demanded an explanation. "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 (Cook affidavit)).

According to Reid's then wife, on the night of July 13, 1980, Reid was living in Houston but was not at home with her. (30 T. 78-79). As discussed below, the trial court blocked the introduction of all of this important defense evidence.

### **C. Media broadcasts details of the Fairlanes robbery murders**

The Houston television and print media widely publicized many details of the Fairlanes crime. Numerous stories reported that the shootings took place at the Fairlanes Windfern bowling center, that four people had been shot execution style, that one man survived, that one was a female, that money was taken from a cash register, that the office had not been entered. *See* (43 T. Defense Exhibit 59 (summarizing media reports)). 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 T. Defense Exhibit 66). On July 14, 1980, the Houston Chronicle reported that police recovered a victim's wallet in the parking lot of the bowling alley. (43 T.

Defense Exhibit 63). A Channel 13 News Report stated that the police suspected that the shooter used a .357 magnum. (43 T. Defense Exhibit 59). Television media repeatedly broadcast key images to the public, including the building's interior and exterior, the Fairlanes Windfern road sign, a closeup of the victims' wounds and bodies, and the composite drawing prepared by the police and Garner. (43 T. Defense Exhibit 58). *See also* (43 T. Defense Exhibit 71 (article including composite)). Numerous stories reported that reward money had been offered for information leading to the perpetrator's arrest. *See* (43 T. Defense Exhibit 59).

#### **D. Soffar, a mentally-deficient man, falsely confesses to several crimes**

Soffar, then twenty-four years old, also lived in Houston when these crimes occurred. As a teenager, he was hospitalized for a time at Austin State Hospital for mental health problems.<sup>2</sup> Rick Laminack, a child care worker there, recalled Soffar telling "whoppers," tall tales about the adventures he supposedly had on the several occasions when he and other children fled from the hospital grounds. (39 T. 4-6, 20-21, 27). Soffar later became a police informant known for his unreliable information and "drug-fried" brain. Sergeant Bruce Clawson knew him well. (29 T. 103, 105-06). He explained that Soffar's information was "just not trustworthy," and could "never" be used to get a warrant. (29 T. 128-29). Clawson observed that Soffar's brain was "fried" from drug and alcohol abuse, and he was like a ten or eleven year-old child. (29 T.

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<sup>2</sup> As a child, Soffar abused dangerous substances, had behavioral difficulties in school, and saw psychiatrists, who treated him for hyperactivity disorder and organic brain syndrome. (36 T. 42-43; 38 T. 129-31, 152-53; 39 T. 107-09, 117-19, 127-34, 226).

134). Clawson's brother, Officer Michael Clawson, made similar observations. (38 T. 105-06).<sup>3</sup>

Around August 1, 1980, Soffar told his sister, Jackie Soffar Butler, that there was a cash reward for the Fairlanes robbery murders, and that the composite looked a lot like his friend Latt Bloomfield. (32 T. 236-37). Soffar said he wanted to turn in Bloomfield. *Id.*

On August 5, 1980, police arrested Soffar for stealing a motorcycle in League City and providing the police with a false name. (29 T. 22, 25). Soffar told his arresting officer that he had information about the widely-publicized bowling alley murders in Houston. (29 T. 31). Soffar said he wanted to speak with Clawson, making apparent he was an informant. *Id.* The arresting officer noted that Soffar's eyes were dilated, his speech slurred, and his body smelled of alcohol. (29 T. 42-43).

Various law enforcement officials then interrogated Soffar. Police recorded and transcribed only Soffar's initial interrogation. The interrogation revealed that Soffar had learned about the case and the fifteen thousand dollars in reward money from the "news" and the "paper." (43 T. State's Exhibit 1A at 9, 25, 28, 36; 30 T. 94-95).

During the initial interrogation, the police called Clawson when Soffar "refused to talk." (29 T. 106; 43 T. Defense Exhibit 25). Clawson understood that the other officers had hit a "brick wall," and that he was there to get Soffar to talk. (29 T. 182, 188).

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<sup>3</sup> The citations to volumes 36, 38 and 39 in this paragraph and the preceding note refer to the punishment phase of Soffar's 2006 trial.

Clawson observed some of the other officers' interrogation. 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 T. 150-51). In a diagram officers worked on with Soffar, they had to draw in much of the crime scene, including the counter inside the bowling alley. (29 T. 151). These tactics concerned Clawson about whether the police were obtaining accurate information. (29 T. 166).

**E. Content of Soffar's putative confessions, including undisputed false confessions**

As detailed below, it is undisputed that, during three days of custodial interrogation, Soffar falsely confessed to several crimes, including the widely-reported burglary of the Fairlanes the night before the robbery murders, as well as robberies he claimed to have committed with Bloomfield. He also told at least three different stories about participating in the Fairlanes robbery murders with Bloomfield, claims he later recanted and sought to demonstrate were false at trial.

Concerning the robbery-murders at the Fairlanes, Soffar signed three different written statements, prepared by detectives. With the exception of the initial oral interrogation session in which Soffar *did not* inculcate himself, the three sessions leading to the written statements were "neither tape recorded nor transcribed"; their "substance . . . was summarized by detectives and presented

to Soffar in the form of written statements for his signature.” *Soffar v. Dretke*, 368 F.3d 441, 453 n.19 (5th Cir. 2004).<sup>4</sup>

Soffar signed his first statement on August 5, 1980. Consistent with reports that the robbery murders at the Fairlanes and the burglary there the night before were linked, Soffar stated that he and Bloomfield burglarized a bowling alley and that the next night they drove to the same bowling alley. Bloomfield then entered with his pistol, while Soffar waited outside. (30 T. 21-23). The police knew the statement about the burglary the preceding night was false because they had already found the true perpetrators of that crime. (30 T. 25).

In his first statement, Soffar also claimed to have heard several shots and seen young people getting on their knees as Bloomfield directed. Bloomfield emerged with “a whole lot of money.” (30 T 22).

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 T. 140-48). Soffar repeated that he waited outside while Bloomfield went inside and heard shots, and added several details, including that Bloomfield wore a lady’s stocking over his head as a disguise. (30 T. 146).

In his third statement, at 9:25 p.m. on August 7, 1980, Soffar signed on to a third rendition of the crime. In this rendition, Soffar claimed that he and Bloomfield both entered the bowling alley in partial disguise: Soffar with a T-

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<sup>4</sup> As explained in the procedural history below, the Fifth Circuit decision provided Soffar with habeas corpus relief with respect to his 1981 conviction and death sentence. Soffar was retried, convicted, and sentenced to death in 2006. Pet. App. 1-2a. Where cited, the Fifth Circuit decision discusses evidence or facts common to the 1981 and 2006 trials.



shirt pulled over his nose and mouth and Bloomfield wearing a lady's stocking on his head. (30 T. 161-62). After they walked through an open front door, a "guy" asked what they were doing. *Id.* Bloomfield then put a gun in the man's face, and forced him down to his knees. *Id.* Three other people approached, "two dudes and a girl." *Id.* Bloomfield ordered them to the floor. *Id.* Bloomfield "fired a warning shot into the floor" when one of the men kept looking up. *Id.* When the girl screamed, Bloomfield kicked her in the back. *Id.* Bloomfield shot two of the young men in the back of the head and ordered Soffar to shoot the other two people. *Id.* Soffar shot the young man in the head and the girl "in the cheek." *Id.* Soffar then took money from the cash registers by the bowling shoes and the snack bar. (30 T. 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 T. 163). Soffar tried to enter an office door, but it was locked. (30 T. 162).

Between the interrogations at the police station, the police drove Soffar around Houston, interrogating him about various locations. Soffar pointed out locations he claimed to have robbed with Latt Bloomfield. (31 T. 26-28). The police quickly learned that these confessions were false. *Id.*

Soffar also told the police of a drug dealer named Pops, whom Soffar and Bloomfield had supposedly told about the Fairlanes crime while buying narcotics. (30 T. 153-54). The police never found "Pops," but did find someone pointed out by Soffar, Lawrence Bryant, known as "Papa," and his girlfriend, Mable Cass. (30 T. 155-56). Bryant claimed that Soffar (whom he knew only as

Max), and two other “guys” drove up, and the three talked about selling Papa a gun. (32 T. 10). As discussed in further detail, *infra*, Cass and Bryant variously reported that Max claimed involvement in a crime discussed on television that occurred in Galveston or Texas City (rather than Houston where this crime occurred). Cass said Max showed a gun he purportedly used in the crime, a semi-automatic, which had a clip that came out the bottom (31 T. 178, 184-85) – a detail inconsistent with the State’s ballistics evidence. (28 T. 92, 96).

The police also took Soffar to two different Fairlanes bowling alleys. Soffar allegedly said that the Fairlanes Windfern on 290, which has a huge sign bearing that name, “looked right,” (30 T. 152) – an oral statement introduced against him at trial, which the court below ruled was improperly admitted because it had not been recorded as required under Texas law. Pet. App., at 63a (finding this error harmless).

Soffar recanted his self-incriminating statements once he obtained counsel. *Soffar*, 368 F.3d at 458-59. He has consistently insisted on his innocence for nearly 30 years.<sup>5</sup>

#### **F. Prosecution and Defense Evidence Contradicting Soffar’s Putative Confessions**

Soffar was convicted solely on the basis of his incriminating statements. *Id.* at 478-79. No fingerprint, eyewitness, DNA, physical evidence, or other forensic

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<sup>5</sup> False confessions are a leading cause of wrongful convictions. See Brandon Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. \_\_ (2010), forthcoming (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1280254](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280254) (last visited on March 9, 2010)). Persons such as Soffar who are impulsive, have low intelligence, have low self-esteem, are prone to fantasy and disassociation, and/or are addicted to drugs, (6 T. 33-37; 4 T. 80-81, 88-89), are the most likely candidates for false confessions. Gisli Gudjonsson, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK*, 381, 388, 390, 396, 418-30 (2003).

evidence even hints at his guilt. Moreover, his “confession” contradicted virtually all of the other evidence introduced by both the prosecution and the defense. As summarized in the following table, Soffar’s statements proved implausible in light of the crime-scene evidence, the forensic evidence, and the statements of the only surviving witness, Garner:

<i>Soffar’s Putative Confession:</i>	<i>Credible Evidence:</i>
Soffar and Bloomfield burglarized the Fairlanes the night before the robbery murders. (30 T. 140-48).	Other youths committed that crime, were arrested and charged. (30 T. 25, 189) (police).
Money stolen from snack bar cash drawer. (30 T. 162-63).	No money taken from snack bar drawer. (26 T. 177-78) (bowling alley manager).
“[F]ifty or sixty dollars” stolen from a money bag underneath the counter. (30 T. 163).	Money not stored under the counter. (26 T. 178-79) (bowling alley manager).
Two perpetrators. (30 T. 161).	Single perpetrator (32 T. 63, 79, 101) (Garner).
Perpetrators wore disguises – lady’s stockings over Bloomfield’s head and T-shirt over Soffar’s face. (30 T. 161).	No disguise. (32 T. 89, 134) (Garner).
Young woman victim was kicked. (30 T. 162).	Medical evidence did not suggest she was kicked, and Garner said no one hit or touched them. (32 T. 69, 84, 86, 110-11, 130).
Young woman screamed during crime. (30 T. 162).	No one screamed. (32 T. 69, 84, 86, 110, 130) (Garner).
Perpetrators walked right into the bowling alley with a gun, and immediately confronted the victims. (30 T. 161).	Door of bowling alley was locked, and manager Sims let in the perpetrator because he pretended to be seeking assistance for his car, (32 T. 71-72, 79-80, 101, 138, 144), after which Sims went outside with perpetrator before perpetrator returned inside with a gun

	to rob them. (32 T. 80, 105-06, 125) (Garner). <sup>6</sup>
Five shots were fired. (30 T. 162).	Four shots were fired. (28 T. 90, 33 T. 65-66, 125, 32 T. 70, 129) (medical examiner on the scene, detective on the scene, defense crime scene expert, Garner).
Victims in straight line in this order from door: male, female, male, male. (30 T. 161, 43 T. State's Exhibit 207).	Victims in semi-circle in this order from door: female, male, male, male. <sup>7</sup> (33 T. 109-10; 45 T. Joint Exhibit 3; 31 T. 155-56; 33 T. 87-88 (Garner, police, defense crime-scene expert)).
Money taken from cash registers after shootings. (30 T. 162).	Money taken from registers before shootings. (32 T. 69, 84, 107, 112, 124, 126-27) (Garner).
Soffar and Bloomfield robbed other locations, including Weingarten's, and a U-Totem. (31 T. 26-28).	They did not commit these crimes. (31 T. 26-28) (police).

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

### G. Other evidence does not support Soffar's guilt

*Lineup*: Although Garner said he could probably identify his assailant, (32 T. 68, 118; 2 SE Defense Exhibit 61), he did not positively identify Soffar when he appeared in a lineup. (32 T. 193-94).<sup>8</sup>

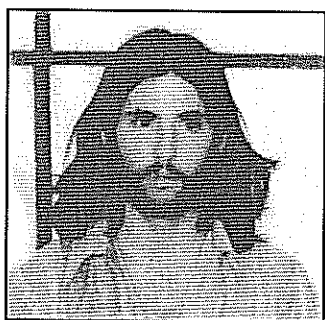
<sup>6</sup> Crime-scene investigators discovered a jug, otherwise out of place, on the control counter, (26 T. 184; 27 T. 90-91, 101; 43 T. State Exhibit 39), which corroborated Garner's statement that the perpetrator said he needed to fill a jug with water to remedy a car problem. (32 T. 72-74, 79-80, 104-06, 137-38, 144-46).

<sup>7</sup> 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 T. 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.

<sup>8</sup> Garner, who had consistently reported only a single perpetrator, said he was not sure whether his assailant appeared in either of the two lineups. (32 T. 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

*Alibi:* Soffar came home in the evening on July 13, 1980, tired from helping friends move over the previous two days. (32 T. 244-45).<sup>9</sup> He watched television and slept in his room. (32 T. 257). Because his bedroom had a door to the outside, his mother could not swear he did not leave home without her knowledge. (32 T. 266-68). But that seemed unlikely because she slept lightly while caring for her sick husband. (32 T. 247, 252-53). Moreover, she did not hear Max leave his nearby room, did not give him access to her car, which she monitored closely, and did not hear any vehicle approach her home or any other unusual noises (32 T. 246-47, 249, 253); but the family dog had barked loudly at Latt Bloomfield on previous occasions. (32 T. 270-71).

*Soffar's appearance.* While the shooter Garner described had no facial hair, and his hair was cut just below the ears on the side and at the collar on the back, (32 T. 132-35), a photograph of Soffar days after his arrest shows him with long hair and a beard:



43 T. Defense Exhibit 19.

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like” Bloomfield, who appeared in the second lineup. *Id.* at 194; (43 T. State’s Exhibits 201-202).

<sup>9</sup> During the move, Soffar collected “long neck” beer bottles for which he hoped to collect a deposit. (32 T. 249-50). On July 14, 1980, he drove with his mother to return the bottles. (32 T. 250-51). They were unable to return the bottles that day, but they were successful two days later, (32 T. 251), as corroborated by testimony from the bottle distributor and a receipt for \$2.52, dated July 16, 1980. (43 T. Defense Exhibit 41; 33 T. 6-8).

## **2. 1981 Trial, conviction, and death sentence**

Texas never charged Bloomfield with any crime, (31 RR 29-31), but tried Soffar on capital murder charges in 1981. Soffar was represented by Joe Cannon, the Texas lawyer infamous for having slept during his clients' capital trials. *See generally Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001). Cannon and his co-counsel failed to introduce evidence that Soffar's putative confession contradicted Garner's account and the crime-scene evidence. *See Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004). Soffar was convicted and sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. *Soffar v. State*, 742 S.W.2d 371 (Tex. Crim. App. 1987).

## **3. 2004 Grant of habeas relief by Fifth Circuit**

Soffar fought to overturn his conviction and death sentence from Texas's death row for nearly a quarter century. In 2004, the United States Court of Appeals for the Fifth Circuit overturned his conviction and death sentence due to the constitutional ineffectiveness of his trial counsel. *Soffar*, 368 F.3d at 478-80. The Fifth Circuit found counsel ineffective primarily because they failed to utilize the detailed statements by the surviving victim to cast doubt on the only piece of evidence pointing to Soffar's guilt, his putative confession after three days in custody without an attorney. *Id.* at 475-76. In finding prejudice resulting from counsel's failures, the Court noted Soffar's "history of confessing to crimes he did not commit," the lack of any evidence other than Soffar's self-incriminating statements, and that "[t]his is absolutely not a case where there

was clear objective evidence of Soffar's guilt." *Id.* at 478-79. Writing for the court, Judge Harold R. DeMoss, Jr., explained:

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

*Id.* at 479. These observations apply with equal force to the second trial.

**4. 2006 Retrial in which trial court excluded key defense evidence of Soffar's innocence, and 2009 decision affirming on direct appeal**

Texas retried Soffar in 2006, and again the State relied exclusively on Soffar's self-incriminating statements. Trying to defend himself, Soffar sought to introduce evidence of Paul Reid's guilt and evidence demonstrating that virtually the only correct details in his putative confession were widely known facts broadcast by the media. Because the trial court excluded both the evidence of Reid's guilt and the evidence of the media coverage, the jury heard only the State's evidence. It convicted Soffar and sentenced him to death.

**A. Evidence of Paul Reid's involvement excluded**

Soffar sought to introduce Reid's statement against interest that he shot four people in a bowling alley on Route 290 through the testimony of Stewart Cook. At trial, however, Cook stated that although his sworn affidavit to Soffar's habeas attorney was true, he would plead the Fifth Amendment if asked about

its contents or his conversation with Reid. (26 T. 91-94). In his 2000 affidavit, Cook had sworn that Reid made the confession during a 1982 (attempted-murder) robbery Cook and Reid were committing, in which Reid had fired a gun at a person.<sup>10</sup> (13 CR 3818-3825). At the 2006 trial, the State acknowledged that it knew about this 1982 crime when Reid and Cook pleaded guilty to a different robbery in 1982. (30 T. 84). In the intervening years, the State had received Cook's affidavit, (5 T. 227; 30 T. 80-81), but never prosecuted Cook for the 1982 crime.

When the defense requested that Cook be granted use immunity and compelled to testify, the State merely asserted that under Texas law, the trial court could not grant immunity over its objection. (24 T. 4-5). Soffar argued that the court should grant immunity over the State's objection to uphold Soffar's federal constitutional right to present a defense. (13 CR 3793, 3796-3797, 3799, 3802). The trial court denied this relief, and the jury never heard that Reid had admitted to the shootings for which Soffar stood trial. (26 T. 99). The trial judge also excluded the evidence of Reid's similar crimes in Tennessee, (10 T. 11), a ruling not at issue in this petition. The jury thus never learned any of the evidence pointing to Reid's involvement in the crimes. Exploiting the trial court's rulings in its favor, the State argued to the jury that Soffar's lawyers failed to present "any evidence that someone other than the Defendant committed this crime." (35 T. 9).

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<sup>10</sup> Since the shooting during a robbery could be charged as attempted murder, the crime carried no statute of limitations under Texas law. See TEX. CODE CRIM. PROC. arts. 12.01 § 1 (A), 12.03 (a).



On appeal, the Texas Court of Criminal Appeals rejected Soffar's argument that the trial court denied his federal constitutional right to present a defense by failing to order use immunity for Cook. The court rejected authority Soffar had cited from the U.S. Court of Appeals for the Third Circuit,<sup>11</sup> and held that in "Texas, a trial judge may grant immunity only with the consent of the State." Pet. App., at 34a. The court then stated that even if it were to agree with authority Soffar cited from the U.S. Court of Appeals for the Fifth Circuit,<sup>12</sup> stating that a court may order the government to provide use immunity where the State has no purpose for refusing immunity and does so to deprive the defense of essential exculpatory evidence, Soffar had failed to make the requisite showing because the "State informed the trial judge that Cook could not be granted immunity over its objection[,]" and thereby "notified the trial judge [that] leaving a future prosecution of Cook" for this decades-old crime was "within its discretion." Pet. App., at 35a.<sup>13</sup>

## **B. Media evidence blocked**

At trial, Soffar sought to introduce evidence that various media sources broadcast details of the crime. (33 T. 4-5, 7). Soffar argued that the evidence was admissible to support the defense theory that the correct information in his

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<sup>11</sup> See *Virgin Islands v. Smith*, 615 F.2d 964, 973-74 (3d Cir. 1980).

<sup>12</sup> See *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983).

<sup>13</sup> After oral argument below, but before the court's decision, the New Mexico Supreme Court decided *State v. Belanger*, 210 P.3d 783, 786 (N.M. 2009), holding that a court must uphold a criminal defendant's federal constitutional rights to compulsory process, due process, and confrontation by ordering use immunity – over the prosecutor's objection – in certain enumerated circumstances explained further below. Shortly after the *Belanger* decision, Soffar argued in a letter to the court that it should adopt *Belanger*, and that Soffar would prevail under that rule of law. Soffar's Post-Submission Letter, July 22, 2009. The Texas court did not address *Belanger* in its decision and denied Soffar's motion for rehearing in which he again raised *Belanger* as the appropriate federal standard. See Soffar's Reh'g Mot., Dec. 2, 2009, at ¶¶ 5-9.

statement merely reflected information broadcast to the general public. *Id.* See also (31 T. 4-8). Initially, the prosecution had agreed that this evidence was admissible, but it later changed its position. (31 T. 4). The trial court excluded the evidence over defense objections that the court was violating Soffar's federal constitutional right to present a defense. (33 T. 5). Although the trial judge did not state the basis for her ruling, *see id.*, she had earlier suggested that the evidence would be irrelevant without evidence that Soffar had specifically seen the media coverage he sought to introduce. (31 T. 6). When the court excluded the evidence (33 T. 4-5; 43 T. Defense Exhibits 58-60, 63-71), the defense sought the alternative remedy of admitting only evidence from media outlets Soffar regularly followed. (33 T. 5, 32 T. 238-40). The prosecution did not object to this alternative, (33 T. 4-5), and had even suggested in an earlier proceeding that this evidence would be admissible. (31 T. 4-5). The court, however, rejected this alternative remedy, too. (31 T. 8).

Exploiting this ruling, the prosecution argued in summation that Soffar's confession was reliable because it contained correct details only the perpetrator could have known. (35 T. 11; 22-23). With this key evidence excluded, Soffar was again convicted and sentenced to death.

On appeal, the Texas court assumed a violation of Soffar's "Sixth Amendment right to present a defense" due to the trial judge's "refus[al] to admit [his] media evidence." Pet. App., at 43a. Nevertheless, the court stated that it concluded "beyond any reasonable doubt, that any constitutional error did not contribute to Soffar's conviction." *Id.* & n.57 (citing Tex. R. App. P. 44.2). As

discussed in further detail, *infra*, the court supported this conclusion with four rationales: 1) Soffar's theory was not "compelling" because it purportedly was not supported by evidence that he was exposed to the media stories; 2) he was permitted to present "general" evidence in support of this defense, allowing defense counsel to argue this theory in summation;<sup>14</sup> 3) his confession includes two facts the media did not explicitly report; and 4) Soffar had made incriminating statements to Bryant and Cass, reviewed *supra*, about which the court inaccurately claimed, "Soffar makes no argument in his brief that this particular admission was unreliable." Pet. App., at 43-46a. *Compare id. with* Soffar's Opening Brief on Appeal ("Opening Br." at 14) (demonstrating this admission is unreliable and inconsistent with the other evidence in this case); and Soffar's Reply Br. at 28 (same).

**C. "For cause" exclusion of prospective juror who "would require more proof than proof beyond a reasonable doubt to apply the death penalty"**

The trial court granted the State's challenge for cause of prospective juror Jonni Lisy, who had stated during voir dire that she would require more than proof beyond a reasonable doubt to apply the death penalty. (12 T. 214).

On direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's ruling. The court held:

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<sup>14</sup> In short, the Texas court cited testimony of police officers who admitted that the media reported on the crime, evidence that Soffar referred to the media reports of the crime in the recorded portion of his interrogation, evidence that Soffar relayed to his sister information about the media accounts and publicized reward money, evidence that Soffar watched television news and read the newspaper, and defense counsel's argument to the jury about this evidence. Pet. App., at 43-44a.

The record reflects that, on six occasions, Lisy stated that she would require more than proof beyond a reasonable doubt to apply the death penalty. She consistently asserted her need to “believe without any doubt in my mind.” Soffar contends that this heightened threshold constitutes desirable “residual doubt” appropriate for a juror in a capital trial. The Supreme Court, however, has explicitly denied the existence of a constitutional right to a heightened burden of proof in capital sentencing. Further, a potential juror’s imposition of a standard higher than beyond a reasonable doubt constitutes proper cause for the dismissal of that juror. Point of error twenty-five (a) is therefore overruled.

Pet. App., at 91-92a (*citing, inter alia, Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988)).

### **REASONS FOR GRANTING THE WRIT**

#### **1. The Court should grant this petition to resolve a split in authority and determine when the accused enjoys a constitutional right to a grant of “use immunity” for a defense witness.**

When the application of a state evidentiary rule operates to exclude vital defense evidence, this Court has repeatedly held that the rule must serve some “legitimate” interest. *Holmes v. South Carolina*, 547 U.S. 319, 325-26 (2006) (collecting cases). Otherwise, the rule violates the accused’s constitutional right to present a “complete defense.” *Id.* It follows, then, that a prosecutor must have a “legitimate” interest in withholding “use immunity” when a vital defense witness asserts his Fifth Amendment privilege.<sup>15</sup> But this Court has never addressed this question. As a result, both state courts of last resort and the United States courts of appeals are divided on when a prosecutor’s refusal to grant use immunity to a defense witness violates the constitutional right to present a defense.

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<sup>15</sup> “Use immunity” is immunity from the State’s use of self-incriminating statements (and their fruits) made during a witness’s compelled testimony. *Smith v. State*, 70 S.W.3d 848, 859-60 (Tex. Crim. App. 2002) (Cochran, J. concurring).

For example, in *State v. Belanger*, 210 P.3d 783, 786 (N.M. 2009), the Supreme Court of New Mexico held that a court must uphold a criminal defendant's federal constitutional rights to compulsory process, due process, and confrontation by ordering use immunity – over the prosecutor's objection – when the following test is met: “The defendant must show that the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. If the defendant meets this initial burden, the [trial] court must then balance the defendant's need for the testimony against the government's interest in opposing immunity.” *Id.* at 793.

Without enunciating a specific test, the Supreme Court of California has similarly stated that a case could arise in which judicially imposed use immunity would be necessary to “vindicate a criminal defendant's rights to compulsory process and a fair trial.” *See People v. Hunter*, 782 P.2d 608, 616 (Cal. 1989).

By contrast, other state courts of last resort have held that judicially-imposed use immunity is unavailable to protect a defendant's constitutional right to present a defense,<sup>16</sup> at least in the absence of prosecutorial misconduct. *See, e.g., State v. Jeffers*, 661 P.2d 1105, 1125 (Ariz. 1983); *Harding v. People*, 708 P.2d 1354, 1357-1358 (Colo. 1985); *State v. Roberts*, 574 A.2d 1248, 1251 (Vt. 1990).

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<sup>16</sup> “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment ... or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, ... the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and quotations omitted). The various decisions petitioner cites herein all address this same right, but are somewhat inconsistent in the constitutional provisions they cite in support of the right.

In the federal courts, where district courts lack statutory authority to grant use immunity without the government's request, 18 U.S.C. § 6003(a) (2010), the Court of Appeals for the Third Circuit has held that use immunity is available over the government's objection in two circumstances. See *Virgin Islands v. Smith*, 615 F.2d 964, 973-74 (3d Cir. 1980). First, the prosecutor may be forced to grant use immunity, or suffer a judgment of acquittal, where the accused shows prosecutorial misconduct in that the "government's decisions were made with the deliberate intention of distorting the judicial fact finding process." *Id.* at 968. Second, "even if there is no evidence of such prosecutorial misconduct, when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial." *Id.* at 974.

Other circuits have held that use immunity generally may not be judicially ordered, but divide on whether the government can be compelled to grant immunity to a potential defense witness to remedy prosecutorial misconduct. Compare *United States v. Mackey*, 117 F.3d 24, 27 (1st Cir. 1997) (stating that "in certain extreme cases of prosecutorial misconduct," government's refusal to grant immunity may justify dismissal of prosecution to protect defendant's right under Due Process Clause); *Autry v. Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983) (same); *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991) (same approach); *Blissett v. Lefevre*, 924 F.2d 434, 441-42 (2d Cir. 1991) (same);

*United States v. Gravelly*, 840 F.2d 1156, 1160 (4th Cir. 1988) (same); *United States v. Frans*, 697 F.2d 188, 191 (7th Cir. 1983) (same) *with United States v. Bowling*, 239 F.3d 973, 976 (8th Cir. 2001) (holding that district court has no authority to compel government to grant immunity in order to protect defendant's rights under Compulsory Process Clause, without acknowledging any exception for prosecutorial misconduct).

At his 2006 trial, Soffar asked the trial court to grant use immunity to Cook, who pled his right against self incrimination. 24 T. 4-5. Cook had previously signed an affidavit stating that Reid told him during a 1982 attempted-murder robbery they were committing together that "he once had a 'problem' while he was robbing a bowling alley out on Route 290, and he had shot 'four people.'" (5 CR 1485). The State lacked any legitimate interest in withholding immunity, as demonstrated by three facts: 1) the Harris County District Attorney (which prosecuted Soffar, as well as Reid and Cook for their crimes) knew about the 1982 attempted capital murder/attempted robbery about which Cook would testify when Reid and Cook pleaded guilty to another robbery in 1982, *but never prosecuted him*; 2) the State had received Cook's affidavit six years before Soffar's 2006 trial and still made no attempt to prosecute Cook; and 3) the State asserted no interest in prosecuting Cook, only that the trial court had no authority to order immunity over its objection. Having thus succeeded in ensuring the jury did not hear Cook's testimony, the State exploited the ruling by arguing in summation that the defense failed to prove someone else was the guilty party. (35 T. 9).

In denying this claim on appeal, the Texas court rejected the Third Circuit's holding in *Smith*, holding that, in "Texas, a trial judge may grant immunity only with the consent of the State." Pet. App., at 34a. The court then addressed the Fifth Circuit's standard in *Autry*: a court may order the government to provide use immunity where it "had no legitimate purpose for refusing immunity and did so to deprive the defense of essential exculpatory testimony." 706 F.3d at 1402. The Texas court ruled that, even if it were to agree with *Autry*, Soffar had failed to make the requisite showing because the "State informed the trial judge that Cook could not be granted immunity over its objection," and thereby "notified the trial judge [that] leaving a future prosecution of Cook" for this decades-old crime was "within its discretion." Pet. App., at 35a.

In Texas, hence, a defense witness may not be granted immunity, over the State's objection, to protect the accused's constitutional right to present a defense. To the extent immunity would be available where the prosecutor lacks a valid purpose for refusing it, that test would be met so long as the State merely asserts that the trial court may not grant immunity over its objection. *Id.* A prosecutor's refusal to grant immunity suffices, no questions asked.

In many other jurisdictions, however, Soffar would have prevailed. For example, in New Mexico, Cook's testimony about Reid's statements would certainly have been admissible, relevant and material. *Belanger*, 210 P.3d at 786. Without it, Soffar's ability to present a defense suffered tremendously. *See id.* And the State offered no reason for withholding immunity, *see id.*, other than its belief that the "trial court generally does not have the authority to either



grant immunity to a witness, or again, over the State's objection to do so." (24 T. 4). Soffar also would have prevailed under the Third Circuit's standard because, here, "a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and . . . the government has no strong interest in withholding use immunity." *Smith*, 615 F.2d at 974. Even under a test of whether "the fact-finding process is intentionally distorted by prosecutorial misconduct," *Westerdahl*, 945 F.2d at 1086, Soffar would have prevailed because the State had no stated interest in prosecuting Cook – only an interest in keeping his testimony from the jury – and the prosecution intentionally distorted the fact-finding process by refusing to grant use immunity and then arguing in summation that the defense failed to prove that someone else committed the crime.

The search for "where the truth lies," *Washington v. Texas*, 388 U.S. 14, 19 (1967), should not depend on geography. Whether the accused's constitutional rights entitle him to immunity for vital witness testimony should not depend on whether he lives on one side or the other of the Texas-New Mexico border, or whether he lives in California or Arizona. This Court should grant certiorari to establish a single constitutional rule. *See* SUP. CT. R. 10 (b).

This issue is ripe. The courts of appeals and state courts of last resort have grappled with the issue for decades. And commentators have long argued that use immunity for defense witnesses can be necessary to protect a defendant's rights under the Compulsory Process Clause.<sup>17</sup>

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<sup>17</sup> *See generally* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974); Note, *A Reexamination of Defense Witness Immunity: A New Use for Kastigar*, 10

This case presents an ideal vehicle for addressing this important constitutional question. Soffar's entitlement to relief hinges on how this Court answers the question presented. The issue was fully briefed and argued in the Texas courts. *See* Pet. App., at 29-35a. The Court should grant the petition.

**2. The Court should grant the petition to address the Texas court's failure to follow this Court's precedents governing constitutional harmless error review.**

A violation of the federal constitutional right to present a defense is "by nature prejudicial."<sup>18</sup> The Texas Court of Criminal Appeals assumed the trial court violated this important right by excluding relevant and admissible media accounts broadcasting almost all of the correct details from Soffar's otherwise factually incorrect confession. Although the State never argued harmless error,<sup>19</sup> the court purported to find that constitutional violation harmless "beyond any reasonable doubt." Pet. App., at 43a & n.57 (*citing* TEX. R. APP. P. 44.2). The court did so only by applying this Court's harmless-error precedents in a way that contradicts numerous state courts of last resort and United States

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HARV. J. ON LEGIS. 74 (1972); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); Note, *Separation of Powers and Defense Witness Immunity*, 66 Geo. L.J. 51 (1977); Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 Temp. L. Rev. 171, 172 (2000) (arguing against an "interested party" possessing authority to decide "whether or not evidence is to be admitted").

<sup>18</sup> *Fry v. Pliler*, 551 U.S. 112, 124 (2007) (Stevens, J., dissenting in part and concurring in part, joined by Ginsburg, J., Souter, J.) (finding violation of defendant's constitutional right to present a defense met the more demanding harmless error test applied in federal habeas review under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)); *id.* at 126 (Breyer, J., concurring in part and dissenting in part) (finding that "for purposes of deciding whether [such] error exists, the question of harm is inextricably tied to other aspects of the trial court's determination").

<sup>19</sup> *Compare with United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100-1101 (9th Cir. 2005) (collecting cases from nine other circuits stating that sua sponte harmless error analysis is reserved for cases with simple and short records, and where harmless error is certain rather than debatable).

courts of appeals, see SUP. CT. R. 10 (b), and “in a way that conflicts with relevant decisions of this Court.” SUP. CT. R. 10 (c).

**A. The Texas court misapplied *Chapman* and its progeny**

The Texas court misapplied *Chapman v. California*, 386 U.S. 18 (1967), and this Court’s other precedents. These precedents teach that: 1) *Chapman* harmless-error analysis aims to find only “unimportant and insignificant” errors, *id.* at 22; 2) reviewing courts must conduct this analysis in light of the entire record, see *United States v. Hastings*, 461 U.S. 499, 509 (1983); 3) the State’s exploitation of constitutional error in its jury argument weighs heavily against a finding of harmlessness, *Chapman*, 386 U.S. at 24-25; and 4) the burden of proving a constitutional error harmless beyond a reasonable doubt falls exclusively on the State, “the beneficiary of the error.” *Id.* at 24.

**i. The error was not unimportant or insignificant**

While the Court has stated that a deprivation of the right to present a defense is subject to harmless error review, *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986), the Court has also indicated that such a deprivation is inherently prejudicial. Because it occurs only when the exclusion of evidence “undermine[s] fundamental elements of the defendant’s defense,” *United States v. Scheffer*, 523 U.S. 303, 315 (1998),<sup>20</sup> a violation of a defendant’s constitutional right to present a defense is “by nature prejudicial.” *Fry*, 551 U.S. at 124 (Stevens, J., dissenting in part and concurring in part).

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<sup>20</sup> This Court’s precedents illustrate what constitute “fundamental elements of the defendant’s defense.” *Scheffer*, 523 U.S. at 316. See, e.g., *Holmes*, 547 U.S. at 323-24 (trial court excluded evidence that another person was the guilty party) (and cases cited therein).

By contrast, *Chapman* analysis aims to identify only “unimportant and insignificant” errors. 386 U.S. at 22. While the Court appears to have left open the possibility that this type of error could be harmless, *Crane*, 476 U.S. at 691, the error below was certainly anything but unimportant and insignificant. At oral argument on appeal, Soffar’s attorneys presented a power-point presentation depicting his purported confession with the incorrect details crossed out and the details coming from media accounts **emphasized**.<sup>21</sup> Here is the substance of that slide:

Lat pulled right to the front door so that the passenger side was next to the bowling alley. I think that there was a couple of cars in the parking lot when Lat pulled to the door. ~~Lat pulled a stocking over his hair so that his hair would be pulled back. I pulled up my t-shirt over my nose and mouth.~~ **Lat has his 357 revolver** which I think is an R-G model. This gun had about a three inch barrel. He had the gun under his shirt ~~when we walked in a guy asked what we were doing. 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 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 shot this first guy who was already on the floor. They got down on their knees away from the counter and Lat made them come back closer to the control counter and they did.** ~~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. He then turned around so that they were all facing back towards the snack bar. 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 half way up when Lat shot~~

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<sup>21</sup> Every detail crossed out, and thus incorrect, is addressed in the table at 11-12, *supra*. Details stated in bold are addressed at 4-5, *supra*, and summarized in the record below at 43 T. Defense Ex. 59.

**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 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 at me and I aimed and **turned my head and shot her. I think I hit her in the cheek.** I had the gun and ran around and looked **in the cash register over by where you get the shoes. I got all the bills and a little of the change and then went to the office but the door was locked.** ~~I went over to the cash register by the snack bar and took bills out of it too.~~ I put the money in my pockets. **I went back by the office and tried to force the door open but I couldn't get it opened.** Lat was looking under the counter for a money bag and I think he got 50 or 60 dollars. He walked over by the office and I told him I thought I saw some headlights. I went outside but I didn't see anyone so when I came back in Lat was rumageing [sic] through their pockets and took the wallets out of their pockets. He took the money and I think that he kept the wallets.

The Texas court failed to acknowledge that an overwhelming number of correct facts in Soffar's confession were published in the media. Without the media evidence, Soffar could not make this argument to his jury. Soffar's media evidence was vital to his defense. The Texas court's harmless-error analysis improperly treated this error as unimportant. Pet. App., at 43-46a. It was not.

***ii. Error in failing to conduct analysis in light of entire record***

The Texas court also failed to conduct its harmless error analysis in light of the entire record. *Hasting*, 461 U.S. at 509. *See also United States v. Vonn*, 535 U.S. 55, 68 (2002) (analysis must be conducted in light of "entire record"); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (same). The court analyzed

only portions of the record, failing to address the arguments for and against a finding of harmless error and the record's concomitant parts. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249, 259-60 (1988) (reviewing evidence both in support of harmless error and against, and finding constitutional error not harmless). Rather, the court selectively analyzed the record to support its own four rationales. *See* Pet. App., at 43-46a.

To begin, the court's analysis wholly failed to acknowledge – much less dismiss or refute – the powerful record-based arguments in Soffar's appellate brief demonstrating that the error could not have been harmless. As Soffar's brief explained, his trial-court argument that the media provided the correct information in his otherwise inaccurate confession was supported by other evidence that his confession was false, including:

(1) Soffar's false claim (which police witnesses conceded was false) to have committed the burglary at the Fairlanes the night before the murders, (30 T. 25, 189); (2) Sgt. Clawson's testimony that Soffar, a former paid police informant, (29 T. 105-06), was 'just not trustworthy,' (29 T. 129); (3) evidence that Soffar lacked specific information about the crime, (29 T. 147-48; 164-66; 31 T. 60-66; 128-29) Showing the jury that the content of news stories broadcast was the same as the content of Soffar's statements would have transformed a plausible defense theory into one overwhelmingly supported by compelling evidence.

(Opening Br. at 73). His defense was also supported by evidence, which the Fifth Circuit found compelling enough to support the grant of habeas corpus relief, that Soffar's putative confession did not match the facts. *See Soffar*, 368 F.3d at 474. As discussed further below, Soffar also argued on appeal that "absent the [trial] court's error, the prosecution would not have been able to mislead the jury by arguing that Soffar's confession was reliable because he was able to give

details about the inside of the bowling alley that could only be known by the perpetrator. (35 T. 11, 22-23).” *Id.* at 73-74.

The Texas court neither addressed these facts nor disputed their significance. Similarly, the court failed to acknowledge the powerful jury argument Soffar could have made that nearly all of the correct details in his otherwise factually inaccurate statement were broadcast by the media. *See* § 2 (B)(i), *supra*.

The court’s first rationale was that Soffar’s argument was “weak” and not “compelling” because he did not establish any “affirmative link between his statements about the offense and the various media reports that were issued about the offense.” Pet. App., at 43a. But the record unequivocally establishes otherwise, as Soffar’s briefing demonstrated: “The prosecution itself provided direct evidence that Max Soffar had heard about the Fairlanes robbery murders in the ‘paper’ and on the ‘news’ before his putative confessions.” (Opening Br. at 71 (citing 43 T. State’s Exhibit 1A at 9, 25, 28, 36-37; 30 T. 95-96) (transcription of Soffar’s initial interrogation)). Moreover, Soffar’s sister, “Jackie Soffar Butler, testified that [their] family typically watched Channel 13 eyewitness news on television and that the family subscribed to the Houston Post.” (Opening Br. at 67 (citing 32 T. 238-40). Read in its entirety, the record provides the affirmative link the court believed was missing for this defense to be “compelling.”<sup>22</sup>

In its second rationale, the Texas court stated that “Soffar was not prevented from presenting general evidence in support of his claim that his

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<sup>22</sup> In demonstrating that he established the link needed to make his defense compelling under the Texas court’s theory, Soffar does not concede that he had to show his theory was compelling or that an affirmative link was necessary or relevant. The burden of proving harmlessness rested with the State. *Chapman*, 386 U.S. at 24.

confession was unreliable because it could have been gleaned from media reports about the offense.” Pet. app. at 43a. In support of this rationale, the court cited the very affirmative link it claimed was missing in its first rationale, including: (1) testimony that “the media reported on the crime”; (2) Soffar’s statements to the police “that he had seen and heard about the crime, the reward, and the surviving victim on the news”; (3) Soffar’s sister’s testimony “that Soffar generally read the newspaper and listened to the news on television and the radio.” Pet. App., at 43-44a. With this rationale, the court failed to recognize that the evidence Soffar was able to introduce, and the jury argument he was able to make, paled in comparison to the arguments he could have made had the media evidence been admitted. See § 2 (B)(i), *supra*. Moreover, the court failed to acknowledge that the evidence Soffar was able to introduce was ineffectual against the prosecutor’s argument that Soffar knew details about the inside of the bowling alley because he was the perpetrator. (35 T. 11, 22-23).

In its fourth rationale,<sup>23</sup> the court pointed to statements Soffar allegedly made to Cass and Bryant about committing the crime, Pet. App., at 45-46a, and asserted, “Soffar makes no argument in his brief that this particular admission was unreliable.” Pet. App., at 46a. To the contrary, Soffar established in his opening brief that Soffar supposedly told Bryant about a robbery “in Galveston or Texas City that Papa had heard about on the news,” not a robbery in Houston. (Opening Br. at 14 (citing 32 T. 12)). Concerning Mable Cass, she “testified that she overheard a conversation in which someone named ‘Max’ claimed to have

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<sup>23</sup> The flaws in the Texas court’s third rationale do not necessarily concern the requirement that an appellate court analyze harmless error in light of the entire record; the flaws in the third rationale are addressed at pp. 34-36, *infra*.



shot four people in a bowling alley . . . in Galveston, and Max said it had been on television.” *Id.* at 14-15 (citing 31 T. 183, 194). “Max then allegedly showed them the gun he had used, a semi-automatic, which had a clip which came out the bottom.” *Id.* (citing 31 T. 178, 184-85). But “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.” *Id.* at 15 n.24 (citing 28 T. 92, 96). Thus, as Soffar argued in his reply brief, if anything, Soffar’s incorrect statements about the crime’s location and the gun used “constitute[] further proof that Soffar had no personal knowledge regarding the Fairlanes robbery-murders in Houston.” (Reply Br. at 28). Had the court’s analysis taken into account the entire record, it could not have placed much, if any, reliance on this equivocal evidence.

In short, the Texas court contravened this Court’s holdings by repeatedly failing to take into account the *entire* record in its harmless error analysis.

***iii. Error in failing to acknowledge significant harm caused by State’s summation***

The *Chapman* line of cases teaches that the State’s exploitation of constitutional error in its summation weighs heavily against a finding of harmless error. 386 U.S. at 24-26 (finding constitutional error harmful and relying in part on prosecutor’s summation exploiting that error); *Arizona v. Fulminante*, 499 U.S. 279, 297-300 (1991) (same); *Clemons v. Mississippi*, 494 U.S. 738, 753-754 (1990) (same).

Here, the Texas court completely ignored the State's exploitation in closing of the trial court's unconstitutional ruling. At trial, having succeeded in keeping out the media evidence, the State falsely argued to the jury that it should find Soffar guilty because he knew facts about the bowling alley that only the perpetrator could have known. (35 T. 11, 22-23). The State could not have made this damaging argument but for the trial court's constitutional error. The court below, thus, misconstrued another of *Chapman's* basic dictates.

***iv. Error in failing to require the State to prove the error harmless beyond a reasonable doubt***

Under *Chapman*, the "burden [is] on the beneficiary of the error [the State] either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." 386 U.S. at 24. This burden is "beyond a reasonable doubt." *Fulminante*, 499 U.S. at 297. A reviewing court asks whether a rational jury could possibly have reached a different verdict absent the constitutional error, *Neder v. United States*, 527 U.S. 1, 19 (1999), not whether a rational jury could have still convicted absent the error. The analysis of the court below relieved the State of its burden, affirming Soffar's conviction because the State might still have been able to convict him absent the constitutional error.

In its third rationale for finding harmless error, the court contended, "Had Soffar's attorneys been permitted to present the media evidence to the jury and compare the specific facts contained in Soffar's statements with those reported by the media to show that Soffar's confession was unreliable, the State could have easily rebutted this argument" by showing that his statement contained two facts not explicitly reported by the media: 1) that the office door was locked;

and 2) the perpetrator took the victims' wallets. Pet. App., at 45a. The court assumed that the jury would have had to credit this "rebuttal" argument and therefore reject Soffar's contention that all the correct details in his confession were contained in media reports. As shown below, that simply is not so.

Regarding the victims' wallets, the court correctly stated that Soffar said he and Bloomfield took the wallets, a crime-scene fact not explicitly reported by the media. Pet. App., at 44-45a. But as the court acknowledged, the media *did* report that "one of the victims' wallets was found in the parking lot of the bowling alley." Pet. App., at 45a. And the court refused to draw the obvious conclusion – the jury may well have determined that Soffar figured out from the media that the perpetrator took the wallets. How else did one of the wallets end up outside? Additionally, the court failed to recognize that a rational jury could just as easily have found that media report about the wallet *corroborated* Soffar's defense theory: the report that a victim's wallet was found outside essentially said the same thing as Soffar's confession – that the victims' wallets were taken during the crime. *See Neder*, 527 U.S. at 19 (teaching that *Chapman* analysis asks whether, absent the constitutional error, "the record contains evidence that could rationally lead" a jury to acquit).<sup>24</sup> By failing to determine whether a rational jury considering the State's hypothetical rebuttal to Soffar's defense

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<sup>24</sup> *See also United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2001) (same); *United States v. Davenport*, 929 F.2d 1169, 1175 (7th Cir. 1991) (same); *United States v. Smith*, 891 F.2d 703, 709 (9th Cir. 1989) (same); *United States v. Krenzelok*, 874 F.2d 480, 483 (7th Cir. 1989); *Bell v. Watkins*, 692 F.2d 999, 1006 (5th Cir. 1982) (same); *Grey v. State*, 178 P.3d 154, 163 (Nev. 2008) (same); *State v. Welchel*, 801 P.2d 948, 958 (Wash. 1990) (same); *State v. Shomberg*, 709 N.W.2d 370, 377 (Wis. 2006) (same).

could have voted to acquit, the court relieved the State of proving the error harmless beyond a reasonable doubt.

Similarly, the court pointed to evidence that the bowling alley's office door was locked, a fact not reported in the media but contained in Soffar's putative confession. But, as the court was forced to acknowledge, "three [media] sources reported that the office had not been entered." Pet. App., at 45a. As the jury could readily have concluded, many readers of the media accounts would have inferred that the door was probably locked. Moreover, this was a predictable fact: office doors in public establishments are frequently locked. The court's finding that its hypothetical rebuttal argument would "easily" have defeated Soffar's defense again failed to acknowledge that a rational jury could just as easily have rejected the rebuttal argument as weak. *Cf. Holmes*, 547 U.S. at 330 (observing that "the true strength of the prosecution's proof cannot be assessed without considering challenges to [its] reliability").

The court's analysis improperly relieved the State of its burden of proving harmlessness beyond a reasonable doubt. *See also* Pet. App., at 43a (finding harmless error because Soffar did not prove media evidence was "particularly compelling," instead of asking if a rational jury could have credited it); *id.* (same where Soffar purportedly did not "establish[] any affirmative link between his statements about the offense and the various media reports that were issued about the offense"); *id.*, at 45-46a (crediting testimony of Cass and Bryant as evidence of guilt, without analyzing whether a rational jury could have

dismissed this proof as further evidence of Soffar's unreliable statements about the crime).

**B. The Court should grant the petition to address the harmless-error issue.**

*Chapman* analysis "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman*, 386 U.S. at 21. See also *Rushen v. Spain*, 464 U.S. 114, 120 (1983).

By misapplying *Chapman*, failing to conduct its analysis in light of the entire record and in light of the State's summation, and failing to hold the State to its burden of proof, the Texas court decided this important federal question in a way that conflicts with several decisions by state courts of last resort and United States courts of appeals, see note 24, *supra*, as well as this Court's relevant decisions. By failing to adhere to the requisite *Chapman* analysis, the Texas appellate court affirmed a verdict returned by a jury blindfolded to "where the truth lies." *Washington*, 388 U.S. at 19. The Court should grant the petition to address these questions of federal law and to bring Texas in line with the constitutional harmless-error jurisprudence of other jurisdictions and this Court.

**3. The Court should grant the petition and hold that a prospective juror may not be excluded merely because she would require more than proof beyond a reasonable doubt to apply the death penalty.**

A growing number of Americans are concerned about the execution of innocent persons.<sup>25</sup> This Court should decide whether a prospective juror can be

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<sup>25</sup> According to a November 2009 poll by Rasmussen Reports, "[w]hile the majority of Americans support use of the death penalty, 73% are at least somewhat concerned that some people may be executed for crimes they did not commit. Forty percent (40%) are very

excluded for cause under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny, merely because the juror shares this concern and, therefore, would require “more than proof beyond a reasonable doubt to apply the death penalty.” Pet. App., at 91-92a.

Contrary to the Texas court’s decision in this case, *see id.*, and as explained by this Court in *Oregon v. Guzek*, 546 U.S. 517, 525 (2006), “*Franklin v. Lynaugh*, 487 U.S. 164 (1988),] did not resolve whether the Eighth Amendment affords capital defendants” a right to have their sentencers consider residual doubt. *See also Guzek*, 546 U.S. at 525 (“we once again face a situation where we need not resolve whether such a right exists”); *id.* at 526-27 (finding rule “restricting defendant’s ability to introduce new alibi evidence” mitigated by rule allowing defendants “the right to present to the sentencing jury *all* the evidence of innocence from the original trial regardless”) (emphasis in original).<sup>26</sup>

The Eighth Amendment mandates that a capital sentencer be permitted to consider any “relevant circumstance that could cause [the sentencer] to decline to impose the [death] penalty.” *McCleskey v. Kemp*, 481 U.S. 279, 306

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concerned.” (available at [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/november\\_2009/73\\_worry\\_some\\_may\\_be\\_executed\\_for\\_crimes\\_they\\_didn\\_t\\_commit](http://www.rasmussenreports.com/public_content/politics/general_politics/november_2009/73_worry_some_may_be_executed_for_crimes_they_didn_t_commit) (last visited Mar. 15, 2010).

<sup>26</sup> Some members of this Court have stated that the Eighth Amendment does not require that a capital sentencer be permitted to consider residual doubt. *See Guzek, supra*, at 528 (Scalia, J., concurring); *Franklin, supra*, at 188 (O’Connor, J., concurring). Justice O’Connor has argued that residual doubt does not relate to the nature and circumstances of the offense or the character and background of the defendant. *Id.* Even if this approach is correct, however, this Court has recognized that some relevant sentencing considerations do not relate to the nature and circumstances of the offense or the character and background of the defendant. *See Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (holding victim impact evidence admissible even when it does not relate to defendant’s blameworthiness); *id.* at 830-31 (O’Connor, J., concurring) (“Given that victim impact evidence is potentially relevant [at a capital sentencing proceeding], nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence.”).

(1987). Although this Court has yet to decide the issue it left open in *Franklin*, *supra*, it and other courts have recognized “residual doubt . . . as an extremely effective argument for defendants in capital cases.” *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (citations and internal quotations omitted).<sup>27</sup> And many commentators have asserted that jurors should be permitted to impose a higher standard than proof beyond a reasonable doubt before imposing a death sentence.<sup>28</sup>

Nevertheless, despite the overwhelming weight of this authority, a number of courts have permitted the State to exclude for cause prospective

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<sup>27</sup> See also *Ward v. Hall*, 592 F.3d 1144, 1170 (11th Cir. 2010) (finding pursuit of residual doubt defense effective trial strategy); *Moore v. Johnson*, 194 F.3d 586, 618 (5th Cir. 1999) (same); *Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir. 2004) (same); *Scott v. Mitchell*, 209 F.3d 854, 881-82 (6th Cir. 2000) (same); *Smith v. Gibson*, 197 F.3d 454, 462 (10th Cir. 1999) (same); *Kokoraleis v. Gilmore*, 131 F.3d 692, 696-97 (7th Cir. 1997) (same); *Com. v. Meadows*, 787 A.2d 312, 319, 321 (Pa. 2001) (same); *State v. Webb*, 680 A.2d 147, 189 (Conn. 1996) (same); *People v. Gay*, 178 P.3d 422, 443 (Cal. 2008) (finding “reasonable possibility the jury would have selected . . . life imprisonment without the possibility of parole had it been allowed to hear and consider the compelling defense of lingering doubt in full”). See also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (national capital jury study found that residual doubt is the most effective strategy to avoid death sentence).

Additionally, numerous courts recognize that “residual doubt” is an appropriate consideration for a capital juror. See, e.g., *United States v. Davis*, 132 F. Supp. 2d 455, 468 (E.D. La. 2001); *United States v. Honken*, 378 F. Supp. 2d 1040, 1041 (N.D. Iowa 2004) (following *Davis*); *People v. Page*, 186 P.3d 395, 432 (Cal. 2008), *cert. denied*, 129 S. Ct. 495 (2008); *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998); *State v. Hartman*, 42 S.W.3d 44, 57-58 (Tenn. 2001).

<sup>28</sup> See Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code’s Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41 (2001) (proposing that, following the Model Penal Code, jury should have to make a finding of no lingering doubt before proceeding to the penalty phase); Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 Ind. L.J. 25 (1996) (similar); Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 Chi.-Kent L. Rev. 1359 (2003) (similar); Note, *Beyond All Doubt*, 91 Geo. L.J. 1065 (2003) (similar).

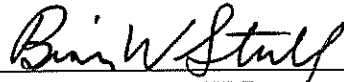
jurors who require a higher standard than proof beyond a reasonable doubt before imposing a death sentence. *See* Pet. App, at 92a.<sup>29</sup>

Given the power of residual doubt in capital sentencing, the decision below does not comport with the Eighth Amendment's mandate that a capital sentencer be permitted to consider any "relevant circumstance that could cause [the sentencer] to decline to impose the [death] penalty." *McCleskey*, 481 U.S. at 306. *See also Wainwright v. Witt*, 469 U.S. 412, 420 (1985) (juror can be excused for cause based on death penalty views only if juror "substantially impair[ed]" in ability to follow the law). This Court should grant this petition and hold that a prospective juror may not be excused for cause merely because the juror would require "more than proof beyond a reasonable doubt to apply the death penalty."

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 29, 2010  
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<sup>29</sup> *See also Drew v. Collins*, 964 F.2d 411, 417 (5th Cir. 1992) (affirming cause exclusion of prospective juror who would "apply a standard higher than what he understood as the reasonable doubt standard" in a capital case); *United States v. Honken*, 381 F. Supp. 2d 936, 994-995 (N.D. Iowa 2005) (same); *State v. Fair*, 557 S.E.2d 500, 512-13 (N.C. 2001) (similar); *People v. Bradford*, 929 P.2d 544, 571 (Cal. 1997) (similar); *Bennett v. Com.*, 374 S.E.2d 303, 316 (Va. 1988) (similar).