Nos. 18-6086 & 18A311

IN THE

Supreme Court of the United States

In re DANIEL CLATE ACKER,
Petitioner,

On Original Petition for Writ of Habeas Corpus

PROOF OF SERVICE

I hereby certify that on 25th day of September, 2018, a copy of **Respondent's Brief in Opposition to Original Petition for a Writ of Habeas Corpus and Application for Stay of Execution** was sent by mail to: Ricard Ellis, Law Office of A. Richard Ellis, 75 Magee Avenue, Mill Valley, CA 94941-4532 & a.r.ellis@att.net. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION TO ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS AND APPLICATION FOR A STAY OF EXECUTION

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This is a capital case.

QUESTION PRESENTED

Whether this Court's original habeas jurisdiction should be invoked where the petition is plainly an attempt to circumvent AEDPA, where the underlying claim of actual innocence is not cognizable in federal court, and where a federal evidentiary hearing was already held on the claim and the petitioner failed to make a truly persuasive showing of innocence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

BRIEF IN OPPOSITION

Petitioner Daniel Clate Acker was convicted and sentenced to death for the capital murder of Marquetta George. He is scheduled to be executed **after 6:00 p.m. (Central Time), Thursday, September 27, 2018**. Acker has unsuccessfully challenged his conviction and death sentence in both state and federal court, raising claims of actual innocence, lack of due process, excluded evidence and ineffective assistance of state habeas counsel. But Acker was unable to demonstrate the validity of any of these claims even after a federal evidentiary hearing. Rather, Acker's assertions of innocence dispute only the victim's cause of death, which the jury determined was strangulation, blunt-force injury, or a combination of the two. Further, Acker's claims of false evidence rely entirely on differing expert testimony not inaccurate or deceitful evidence. Acker produces no new evidence showing he did not commit the crime but continues to assert that George's death resulted from her leap from the vehicle—a theory rejected by the jury at the time of trial. Two lower federal courts considering all the evidence, new and old, included and excluded at trial, already determined Acker could not meet the demanding *Schlup v. Delo*, 513 U.S. 298 (1995), but still lower than *Herrera v. Collins* 506 U.S. 390 (1993), standard. Now Acker asks this Court for the extraordinary remedy of an original writ making a free-standing actual innocence claim. But Acker's is not

the case to make such a leap of law. Acker is not innocent. And his petition does not merit any further review or a stay of execution.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider original writs of habeas corpus under 28 U.S.C. § 2241 (a). *See Felker v. Turpin,* 518 U.S. 651, 660-62 (1996).

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit Court of Appeals summarized the applicable facts from Acker's trial and federal evidentiary hearing as follows:

> Acker and Marquetta George moved into a rented trailer home together in February 2000, shortly after they met. On the evening of Saturday, March 11, they went to a rodeo and then to a nightclub, "Bustin' Loose." While at the nightclub, they argued. Witnesses who were at the nightclub testified at trial that Acker threatened to kill George that night. Acker was kicked out of the nightclub, but he returned several times, looking for George.
>
> When the nightclub closed at 1:00 a.m., Acker's sister saw him in the parking lot and gave him a ride to his truck, which he had parked up the road from the nightclub. Earlier that evening, Acker had given George's pocket knife to his sister and he asked her to return it. When she refused, Acker told her that if he was going to hurt someone he would not need a knife. He held up an axe and said that if he found George with another man, "they will pay."
>
> Acker continued to look for George the rest of that night. He believed she was spending the night with another man. On the morning of March 12, still looking for George, Acker went to his sister's house. He told his sister that when he found them he was going to beat them and that nobody was going to make a fool out of him.

Around 9:15 a.m. on March 12, Acker went to the home of George's mother, Lila Seawright, still searching for George. Seawright testified at trial that Acker told her that if he found out George had spent the night with another man, he was going to kill them. Seawright replied that no one was worth going to the penitentiary for murder. Seawright testified that Acker shrugged and replied, "Pen life ain't nothing. Ain't nothing to it."

Later that morning, after Acker had returned to the trailer he shared with George, Robert "Calico" McKee, who worked as a bouncer at Bustin' Loose, brought George to the trailer. George went inside. McKee told Acker that he had taken George to her father's home to spend the night. Acker testified that he did not believe McKee was telling the truth, because he had driven by George's father's house the previous night when he was looking for George. Acker testified that he went into the trailer and confronted George, who admitted that she had spent the night with Calico. When he inquired whether she had slept with Calico, she asked what difference it would make. Acker said that he pushed her down on the couch and shook her, with his hands on her shoulders and his thumbs more or less touching. Acker testified that he asked George where Calico lived and she said she would show him, but instead, she darted out of the trailer.

The neighbors, Mr. and Mrs. Smiddy, testified that George ran out of the trailer, screaming for them to call the sheriff. Acker followed George out of the trailer, grabbed her and threw her over his shoulder, forced her into his pickup truck, and sped away. George was crying and frightened. Mr. Smiddy testified that when George was being pushed into the truck, it was like watching someone try to push a cat into a bathtub. Both Mr. and Mrs. Smiddy testified that after Acker forced George into the truck, they heard a noise that sounded like a loud hit or slap, and did not see George any more after hearing that sound. They testified that as Acker drove away, the truck was swerving all over the road. Mr. Smiddy went inside and called the sheriff.

Brodie Young testified that on the morning of March 12, he was driving past a dairy farm on a county road when he saw a truck on the side of the road. As he passed the truck, he saw a man sitting in the driver's seat of the truck. The man looked "peculiar" and

seemed to be talking to himself. After Young passed the truck, he looked at his side mirror and saw a man get out of the truck on the driver's side, rush around the front of the truck, open the passenger's door, and pull a woman out of the truck. The man had his arms under the woman's arms and took three or four steps backward after he pulled her out of the truck, then laid her on the side of the road, got back in the truck, and drove away. Young drove to the sheriff's office to report what he had seen. On cross-examination, Young admitted that he had exaggerated when he initially told law enforcement officers that he had seen a man and woman fighting in the truck.

Sedill Ferrell, who owned the dairy farm, found George's body and contacted the sheriff's office. Acker turned himself in to a law enforcement officer and was arrested soon thereafter. George's body was found less than two and one-half miles from the trailer where she had lived with Acker.

The medical examiner, Dr. Gonsoulin, testified at trial that George had extensive injuries, including blunt force injuries to all parts of her body, particularly her head and neck. Her heart and lungs were lacerated, and her liver was pulpified. There was a large, deep laceration on her leg. The bones in her face were broken, her skull was shattered in all areas, and her head was crushed, consistent with being struck with some type of blunt instrument. The injuries on the neck indicated that a significant amount of pressure was applied around the neck and that it occurred while George was alive. The parchment-like abrasions seen on external examination were consistent with the kind of blunt force injuries sustained in motor vehicle accidents or accidents where people fall out of cars. The injuries to the neck were not consistent with falling or being hit, but were from constriction rather than blunt force received from falling from a vehicle. The neck injuries were consistent with strangulation. The blunt force injuries in and of themselves were sufficient to cause death, and so was the strangulation. It was her opinion that the cause of death was strangulation, either manual or ligature, or possibly both, as well as blunt force injury resulting from George being caused to impact a blunt object. Dr. Gonsoulin could not determine whether strangulation or blunt force caused George's death.

On cross-examination, Dr. Gonsoulin testified that it was possible George's neck injuries could have occurred forty-five minutes to an hour prior to her death. She also testified that George had road rash, consistent with jumping out of the vehicle and striking the ground. She testified that a downward force on the head can cause fracturing in the skull and with sufficient force, fracture the atlas. George had a pons medullary rent, meaning that her brain stem and medulla were torn where the base of her skull was crushed. Dr. Gonsoulin explained that death occurs instantaneously when the pons medulla is torn. She testified that George had a lot of injuries that would have killed her regardless of any strangulation, independent of it.

Acker's counsel asked Dr. Gonsoulin the following question: "If someone falls from a vehicle going 40 miles per hour and breaks or tears the medulla oblongata there's going to be instantaneous death, isn't that right?" The trial court sustained the prosecution's objection that the question assumed facts not in evidence (fall from vehicle, vehicle traveling forty miles per hour).

The first witness called by Acker was Sabrina Ball. The prosecutor requested a bench conference in which he objected on hearsay grounds to Ball's proposed testimony that George had told Ball that she tried to jump from Acker's truck two weeks before her death. Outside the presence of the jury, Ball described the events of the night of February 26, 2000, as follows: George rang her doorbell and knocked on the door. George was down on her hands and knees in the front yard, crying and saying, "help me, help me." George was hysterical, very upset, very shaky. Ball brought her inside and asked her if she had been hurt and what was wrong. George said that Acker was going to kill her, and that he was crazy. George called the sheriff's department. When Ball asked George what had happened, George said that she and Acker had been at Bustin' Loose and that a fight had started. They left the club and were driving to Acker's mother's house. Acker took her head and tried to beat it against the dash and she tried to jump out of the truck, but he grabbed her by the hair of the head and dragged her back in. She said that her face was inches from the pavement.

On cross-examination by the prosecution, still outside the presence of the jury, Ball testified that George told her that the fight

continued after they got to Acker's mother's home. Acker picked his mother up and threw her on the couch and ran off after breaking out a window.

Defense counsel argued that Ball's testimony was admissible under the excited utterance and present sense impression exceptions to the hearsay rule. The trial court ruled that it would allow as an excited utterance only George's statement, "help me, help me, he's crazy, he's going to kill me," and not the testimony about George's statement that she had tried to jump out of Acker's truck.

Next, Acker called Hopkins County Deputy Sheriff Anderson, who testified outside the presence of the jury about his involvement in the events of February 26. He responded to the call at Sabrina Ball's home and spoke to George, who appeared to be upset. George told him that she and Acker had gotten into an argument at Bustin' Loose and that she tried to jump out of his truck while they were driving to Acker's mother's residence, but that Acker grabbed her by the arm to keep her from getting out. On cross-examination, he testified that she told him that Acker picked his mother up and threw her on the couch and then ran through the sliding glass window at the back of the house to get away.

Defense counsel told the court they had also issued a subpoena for Lewis Tatum, whose testimony would be substantially the same as Anderson's.

Acker's mother, Nancy, testified outside the presence of the jury that she saw Acker shortly before noon on March 12 and he told her that George had jumped out of his truck and was dead. The trial court ruled that her testimony was not admissible under the excited utterance exception to the hearsay rule.

With the jury present, Mrs. Acker testified that she saw Acker on March 12, shortly before noon. He was very emotional and stressed. He was not wearing a shirt and his jeans were streaked from the knees down with a liquid substance that appeared to be blood.

Next, Acker called as a witness defense investigator John Riley Sands, from whom he sought to elicit testimony, regarding the distance from George and Acker's home to the location where her body was found and the time it took him to drive that distance. The trial court ruled that it would not allow Sands to testify as to the time it would take to drive from the mobile home to the crime scene because it would require assuming facts not in evidence, i.e., the speed that Acker was driving. Outside the presence of the jury, Sands testified that he had performed an experiment with a truck similar to the one Acker was driving on the day of George's death. He was not able to reach from the driver's seat to the passenger's side of the truck and open the door without extending himself quite a bit, resulting in him being unable to see above the dashboard. He did not think he would have been able to open the passenger's door and push someone out of the vehicle while driving. The prosecution objected and pointed out that the defense had an accident reconstruction expert appointed and that expert observed the vehicle Acker drove on March 12 and could have tested it if he had chosen to do so. The trial court sustained the prosecutor's objection.

Although he had previously said that he did not want to testify, Acker told the court that he had reconsidered. He testified that he carried George to his truck, but denied kidnaping her. He denied that he hit her and denied hearing a loud noise. He testified that when he began to drive away from the trailer, George opened the door and attempted to jump out of the truck, but he reached over and caught her by her jacket and her hair and pulled her back into the truck. He said that as he reached over to stop George from jumping out, his knee hit the steering wheel and the truck went into the ditch. He overcorrected and went into the ditch on the opposite side of the road and started fishtailing. He slapped George because she attempted to jump from the truck a second time. When a car approached on the one-lane road, he said that George succeeded in jumping from the truck. He said that he backed up as fast as he could and picked George up, intending to put her in his truck. However, there were some light bulbs on the seat, so he put her down so that he could move them. When he picked her up again, he realized that she was dead, panicked, went into shock, and left. He testified that he went to his place of employment to use the telephone, and his mother pulled up beside him. He told

her George had jumped out of the truck and was dead. He went to his sister's house, but his sister was not there. Then he went to his mother's house. Next, he went to Kenny Baxter's house, and then returned to his mother's house. He explained that he did not report the incident to the authorities immediately because he was scared, looking for somebody to comfort him, and feared being charged with driving while intoxicated. On cross-examination, he admitted that he packed some clothing when he was at his mother's house, and that he had thought about fleeing. On his way to Kenny Baxter's house, he hid the bag of clothes behind a tree.

The trial court sustained the prosecutor's objection to Acker testifying about George trying to jump out of the truck two weeks earlier, on February 26.

The indictment charged Acker with kidnaping George and murdering her by strangulation, blunt-force injury, or a combination of the two. The trial court instructed the jury on the theory that Acker killed George by strangulation and/or the use of blunt force. The trial court denied Acker's requests for jury instructions on attempted kidnapping, unlawful restraint, manslaughter, and criminally negligent homicide. It also denied his request for an instruction that the jury must acquit if it found that George jumped from a moving vehicle or had a reasonable doubt about it. The jury found Acker guilty of capital murder and answered the special issues in a manner that resulted in imposition of the death penalty.

* *

In June 2011, the district court (Judge Schell) conducted an evidentiary hearing on Acker's actual innocence claim. At that hearing, the new medical experts for both Acker and the State agreed that George's injuries were inconsistent with strangulation, and that she died from blunt-force injuries. The State's expert, Dr. Di Maio, testified that it was his opinion that George had been run over by a vehicle, because her injuries ("squashed" head, shredded brain, crushed chest, blown-out heart, internal-organ lacerations, and muscle tears) were too extensive to have been caused by jumping from or being pushed out of a truck. Acker's expert, Dr. Larkin, suffered a heart attack and was not

able to testify at the hearing, so his report was admitted into evidence. Dr. Larkin believed that George likely jumped from Acker's truck. Acker stipulated that if questioned, Dr. Larkin would concede that it is possible that George was run over and that, from the medical evidence alone, it is impossible to say whether George jumped or was pushed from the vehicle.

Acker presented evidence of George's attempts to jump from his truck while he was driving it, both on the day of her death and a couple of weeks earlier, including the evidence that the trial court had excluded. His mother testified that on the day of George's death, before Acker turned himself in to the authorities, Acker told her that George had jumped out of the truck and was dead. Mrs. Acker had heard that George had previously attempted to jump from a vehicle.

Sabrina Ball testified, as she did outside the presence of the jury at trial, about the events of February 26, when George told Ball that she had tried to jump out of Acker's truck but that Acker had grabbed her hair and pulled her back in. Ball's testimony was corroborated by her written statement, in which she stated that George told her, "I tried to jump out but he pulled me back in. My face was just a few inches from the pavement."

Lewis Tatum of the Hopkins County Sheriff's Office testified at the evidentiary hearing that on February 26, 2000, about two weeks before George's death, he took a statement from George. He testified that his report states that George told him she and Acker had gotten into a fight on the way home from a nightclub and that she had tried to jump out of the truck while Acker was driving, but that Acker caught her by the arm and pulled her back into the vehicle. The parties stipulated that Hopkins County Deputy Sheriff Anderson would also testify that George reported that she had attempted to jump from Acker's truck two weeks prior to her death.

Acker offered a stipulation that Walter Allen Story, the 911 communications supervisor for the Hopkins County Sheriff's Office, would have testified that the 911 radio log on March 12, 2000, recorded: a call from Mr. Smiddy at 11:45 a.m.; a call from Mr. Ferrell at 11:47 a.m.; Officer Hill's arrival at the location of

George's body at 11:51 a.m.; and Officer Hill's call to say there was no pulse at 11:53 a.m. Acker also presented a stipulation that Bill Reece of the Hopkins County Sheriff's Office would have testified that he interviewed Acker after Acker waved him down and surrendered.

John Riley Sands, the defense investigator at the 2001 trial, testified at the federal hearing that he drove the distance from Acker's residence to the crime scene, and it took about three to five minutes, a distance of a little over two miles. He also obtained a truck similar to the one Acker drove on the date of George's death. The interior of the truck was wider than a conventional sedan. He sat in the driver's seat and was unable to reach the passenger's door while still being able to see the road and drive. He testified that it would have been difficult to open the door and push someone out of the truck. The experiment was performed without anyone in the passenger seat. The presence of another person in the truck would have made opening the door more difficult, especially if that person were resisting. On cross-examination, Sands testified that the purpose of the experiment was to show that it was not possible for Acker to reach across and open the door while he was driving. He acknowledged that Acker was "a little bit" taller and perhaps could have reached farther. He also agreed that other variables, including arm length, torso and leg length, would affect the value of the experiment.

Acker presented a stipulation that Deputy Sheriff Chris Hill's report states that Mr. Smiddy told the 911 operator that Acker forced George into the truck and, while Acker was driving away, George tried to exit the vehicle, but Acker jerked her back in. Acker also offered a stipulation that Alicia Smiddy's statement to the Hopkins County Sheriff's Office stated: George came running out of their house yelling for the Smiddys to call the Sheriff. Acker came charging out of the house with no shirt, with an evil, mad look on his face. Acker picked George up over his shoulder. George was screaming, kicking, yelling, and trying to get loose. Acker shoved George into the truck on the driver's side. George was trying to get out, but Acker hit her, and shoved her on in. Holding her down, he spun off through the ditch, swerving all over the road.

> Tony Hurley of the Hopkins County Sheriff's Office was called as a witness by the State. He testified that he performed an investigation on a similar truck, a 1999 Ford F350 one-ton, with a bench seat. From window to window, the truck measured six feet and one-half inch; from door handle to door handle was sixty-seven inches, and from the center of the steering wheel to the passenger-side door latch was fifty-two inches. Hurley was two inches shorter than Acker and he was able to lean over and open the passenger door. Hurley testified that he interviewed Acker after he was arrested. Acker told Hurley that George was trying to get out of the truck while he was driving and he pulled her hair to hold her in the truck. He also hit her in the nose and mouth. When Hurley told Acker what the medical examiner had said about strangulation, Acker got angry, said that the medical examiner was lying, and continually stated that George jumped out of the truck. Hurley said that Acker told him that he felt responsible for George's death, because he had abducted her, but he did not intend her death.

Acker v. Davis, 693 F. App'x 384, 385-91 (5th Cir. 2017) (per curiam).

II. The State-Court and Federal Appellate Proceedings.

The Texas Court of Criminal Appeals (CCA) affirmed Acker's conviction and sentence on direct appeal. *Acker v. Texas*, No. AP-74, 109, 2003 WL 22855434 (Tex. Crim. App. Nov. 26, 2003) (not designated for publication). Acker also filed a state habeas application presenting forty-six claims of error. The trial court held an evidentiary hearing on those claims. While that application was pending, Acker filed a separate pro se application. The CCA considered the initial application on the merits and denied Acker's claims. *Ex Parte Acker*, Nos. WR-56, 841-01 & 841-03, 2006 WL 3308712 (Tex. Crim. App.

Nov. 15, 2006) (not designated for publication). The court also dismissed the pro se application on procedural grounds. *Id.* [1]

Acker then filed a timely first habeas petition in federal court. Because that petition presented claims that Acker had not raised in his initial state habeas application, at Acker's request, the district court held the proceedings in abeyance while Acker exhausted his state remedies. The CCA dismissed the resulting successive habeas application as an abuse of the writ. *Ex Parte Acker*, No. WR-56, 841-04 (Tex. Crim. App. Sep. 28, 2008) (per curiam).

Back in federal court, Acker filed his habeas petition. Acker sought, and the district court granted, an evidentiary hearing on his gateway actual-innocence claim to excuse his state-habeas procedural default. The district court denied Acker's petition, holding that he had failed to make a sufficient showing to overcome the procedural bar. *Acker*, 2016 WL 3268328. Sometime during the pendency of federal habeas proceedings, Acker filed another pro se state habeas application, which the CCA dismissed without prejudice. *Ex parte Acker*, No. WR-56,841-05 (Tex. Crim. App. May 14, 2014).

Acker then sought a certificate of appealability from the Fifth Circuit. In an unpublished per curiam opinion, the court denied that request. *Acker v. Davis*, 693 F. App'x 384 (5th Cir. 2017) (per curiam). Acker filed a petition for

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[1] *Ex Parte Acker*, No. WR-56, 841-02, denied leave to file a writ of mandamus.

rehearing en banc. No judge called for a response to the petition, and it was denied. Doc. No. 00514153810, *Acker v. Davis*, No. 16-70017 (5th Cir. Sept. 13, 2017). This Court denied certiorari review. *Acker v. Davis*, 138 S. Ct. 1546 (Apr. 16, 2018).

Finally, less than a month before his scheduled execution date, Acker filed another subsequent state habeas application seeking review of the procedurally defaulted claims he had litigated in federal court and adding a new claim based in state law. The court held that Acker "has failed to meet the requirements of Article 11.071 § 5 and Article 11.073. Accordingly, we dismiss this application as an abuse of the write without reviewing the merits of the claims raised." *Ex parte Acker*, No. WR-56,841-06, slip op. at 3 (Tex. Crim. App. September 18, 2018). Acker has also filed a certiorari petition from these proceedings. Presently, Acker filed an original writ asking this Court to decide his free-standing claim of actual innocence.

ARGUMENT

Acker asks the Court to exercise its power to grant an extraordinary writ and reconsider its decision in *Herrera v. Collins* 506 U.S. 390 (1993), on his claim that he is actually innocent. But he fails to justify the extraordinary remedy that he seeks.

Supreme Court Rule 20.4 (a) provides that, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances

warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See Felker*, 518 U.S. at 665 (explaining that Rule 20.4 (a) delineates the standards under which the Court grants such writs). For the reasons explained below, Acker fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

I. Acker is Not Entitled to the Extraordinary Remedy He Seeks.

Acker's request that the Court reconsider *Herrera* should be refused. As Acker admits he cannot meet the strictures of 28 U.S.C. § 2244 (b). Pet. at 26. Acker is thus attempting to circumvent the plain language of AEDPA, and his attempt to do so should not be condoned; his petition should be denied.

While § 2244 (b)(3)(E) did not repeal the Court's authority to entertain original habeas petitions, § 2244 (b)(1)–(2) "inform [the Court's] consideration of original habeas petitions. *Felker*, 518 U.S. at 662–63; *see also In re Davis,* 557 U.S. 952 (2009) ("Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the [AEDPA]") (Scalia, J., dissenting). Acker's actual innocence claim is plainly successive and does not satisfy § 2244 (b) because Acker already litigated his actual innocence claim through the federal courts. Therefore, his claim is impermissibly successive under § 2244 (b)(1).

Moreover, Acker's "new" evidence does not demonstrate a prima facie showing of actual innocence. § 2244 (b)(2)(B)(ii). As will be discussed at length in the next section, Acker could not prove his actual innocence under the less demanding *Schlup* standard.[2] And Acker's claims of false and improperly excluded evidence have been thoroughly rejected. Further, Acker's citation to *In re Davis,* is unavailing. In *Davis*, the petitioner requested and received a federal evidentiary hearing to prove the substance of his actual innocence claim. But Acker has already had such a hearing before the federal district court. Indeed, it is that court's findings which Acker opposes, claiming in his certiorari petition that it is a due process violation for his conviction to rest on a "new" theory of guilt.

Finally, Acker's reasons for re-examining *Herrera* either do not apply to his case or are false. Acker is not relying on DNA evidence or any kind of new scientific evidence—indeed, Acker's evidence is the same as he presented, or

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[2] *Schlup* requires that, "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt . . . ." *House*, 547 U.S. at 538. Whereas, *Herrera* states that assuming for the sake of argument "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." 506 U.S. at 417.

attempted to present, at trial. Acker's statistics regarding clemency and exonerations are highly suspect.[3] Further, in *Herrera*, this Court "made clear that federal habeas relief would only be available if there was no state procedure for making such a claim." *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) (citing *Herrera,* 506 U.S. at 417). Texas has an avenue by which to pursue actual-innocence claims. *Ex parte Elizondo*, 947 S.W.2d 202, 208-09 (Tex. Crim. App. 1996). Again, Acker's petition is a poor vehicle for the consideration of such important legal precedent and would require this Court to explicitly overrule itself.

Rule 20.4 (a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case, the reasons are clear: Acker admits he cannot meet the successive petition requirements of 28 U.S.C § 2244 because he has already litigated this claim in a live evidentiary hearing. Acker has not shown any "exceptional circumstances" to warrant the exercise of this Court's discretionary power.

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[3] Acker, relying on an anti-death penalty group's website, asserts that only 2 Texas inmates have been granted clemency against 553 executed. Pet. at 32. But, in fact, thirty-two sentences have been commuted since 2004: https://abc13.com/politics/clemency-rare-for-death-row-convicts-in-texas/3114938/ (last visited September 24, 2018). This disparity leaves much room for doubt in his citation to the same group's number of exonerations from death row. Pet. at 32.

II. Acker Fails to Demonstrate He is Actually Innocent.

It is well established that a federal court may not grant a petition for a writ of habeas corpus where the state court expressly denied the claim based on an independent and adequate state procedural bar. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). But throughout federal habeas proceedings, Acker attempted to get around this procedural default by claiming that his is the "narrow" exception where "the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). That actual-innocence claim—"a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," *Schlup*, 513 U.S. at 315—was foreclosed by both federal courts. Thus, there is no need to consider Acker's free-standing actual innocence claim in a vacuum.

The federal district court—and, as part of its limited review for the purpose of assessing Acker's application for a certificate of appealability, the Fifth Circuit—followed *Schlup* to the letter. The district court exhaustively reviewed all the evidence in this case, including new evidence presented at the federal hearing as well as evidence excluded from the trial on evidentiary grounds but reoffered by Acker at the federal evidentiary hearing. After

considering the totality of the evidence, the district court determined that no reasonable juror would have found Acker not guilty beyond a reasonable doubt. *Acker*, 2016 WL 3268328, at *7-24; *see House v. Bell,* 547 U.S. 518, 537-38 (2006) (discussing standard); *Schlup*, 513 U.S. at 332 (same). And the court of appeals—after conducting its own exhaustive review of the evidence—held that that ruling was not debatable. *Acker*, 693 F. App'x at 392-97.

This Court has stated that it is exceedingly difficult to pass through the *Schlup* gateway: "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt . . . ." *House*, 547 U.S. at 538. Simply establishing "reasonable doubt" is insufficient. *Schlup*, 513 U.S. at 329. That is because the standard "does not merely require a showing that reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* A petitioner "comes before the habeas court with a strong—and in the vast majority of cases conclusive—presumption of guilt." *Id.* at 326 n.42. Not surprisingly, then, successful gateway claims of actual innocence are "extremely rare," *id.* at 321, with relief reserved for the "extraordinary case" (*Murray v. Carrier*, 477 U.S. 478, 496 (1986)) where there was "manifest injustice," *Schlup*, 513 U.S. at 327.

In assessing a gateway claim of actual innocence, the federal court "consider[s] 'all the evidence,' old and new, incriminating and exculpatory,

without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327-28). "Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *Id*. (quoting *Schlup*, 513 U.S. at 329).

In keeping with the *Schlup* standard, the district court engaged in a wide-ranging analysis of the record in Acker's case, taking into account all the evidence, including new evidence derived from the federal evidentiary hearing, and assessing the credibility of that evidence and witness testimony. *Acker*, 2016 WL 3268328, at *10-24. The court of appeals then did so again, albeit in the threshold posture of assessing whether Acker was entitled to a certificate of appealability. *Acker*, 693 F. App'x at 385-97.

The district court first examined the indictment and jury instructions, correctly noting that the jury could properly have convicted Acker under a theory of strangulation, blunt-force injury, or a combination of the two. *Acker*, 2016 WL 3268328, at *10-11. The court then scoured the trial record for evidence bearing on whether Acker was actually innocent. *Id*., at *13-16. As part of that review, the court properly took account of the several witnesses who testified that Acker threatened George the night before, and the morning of, her death. These included Mary Peugh who witnessed the heated argument between Acker and George at the nightclub the night before George's death,

and who heard Acker say, "I'm going to kill that bitch," after the argument at the nightclub. 19 RR 25. Similarly, Timothy Mason testified that Acker told him that same night that "he was going to kill" George. 19 RR 41. As Acker's friend of fifteen years (19 RR 42), Mason would have been in a good position to know if these were just idle words. But he found the threat credible enough to warn George himself before leaving the nightclub because he "wanted to get away from there." 19 RR 41.

After staying out all night looking for George, Acker made similar threatening statements to George's mother about his desire to find George and the man he suspected she had been sleeping with, and to kill them. 19 RR 89-115. Further buttressing that claim was testimony from Acker's sister, Dorcas Vittatoe, who saw an emotionally distraught Acker the morning of George's death, searching for George and talking about what he would do to her. 19 RR 73-74. The night before, Acker also made similar threatening statements to Vittatoe about George. 19 RR 71.

The trial record further establishes that when Acker finally caught up with George on the morning of her death, he assaulted her. *See, e.g.*, 21 RR 224-25; 22 RR 50-56. Acker's neighbor, Thomas Smiddy, testified that when Acker arrived back at the trailer house he shared with George, George ran out of the house toward Smiddy, sought shelter behind Smiddy's wife (who also testified in Acker's murder trial), and yelled at the Smiddys to call the sheriff.

19 RR 146. Acker came over to them, Smiddy's terrified wife got out of Acker's way, and Acker picked up George, threw her over his shoulder, and put her in the cab of the truck. 19 RR 147. The whole time, George was kicking and screaming. 19 RR 147. Smiddy heard what sounded like George being hit. 19 RR 148, 175. Smiddy called the sheriff; meanwhile, Acker took off swerving back and forth down the road, with George not visible in the truck. 19 RR 149.

The district court also took account of the testimony of Brodie Young, who saw Acker sitting seemingly alone in his truck on the side of the road, "looking peculiar," "like maybe he was talking to himself." 19 RR 205. After driving by Acker, Young observed in his side mirror Acker getting out of the truck, rushing around to the front, opening the passenger side door, and pulling a lady out. 19 RR 206. "Then it looked like he laid her on the side of the road and then got back in his truck." 19 RR 208; *see also* 19 RR 218 ("I seen him get out of the truck and rush around in front of it and open the front door and pull the lady out. Then he had his arms under her arms and put her down real quick and then got back in the truck and took off. And that's when I took off."). Young said that Acker "just put her down on the side of the road right off the edge of the grass and the blacktop." 19 RR 208.

The district court also took into account evidence favorable to Acker. *Acker*, 2016 WL 3268328, at *16-24. The district court, though, was free to make different assessments of that evidence besides what Acker might have

preferred. For instance, in looking to the hearsay testimony Acker had wanted to introduce at trial, the court credited Acker with producing "at least some evidence" that George had previously attempted to jump from Acker's truck, while also noting the incontrovertible fact that there was "no actual evidence" that George had jumped from Acker's truck on the day of her death. *Acker*, 2016 WL 3268328, at *21.

The court also took due consideration of the fact that Acker maintained in his defense that George died as a result of jumping from his moving truck, while also taking into account the obvious "self-serving nature" of that testimony. *Id*. And the court considered the proffered testimony from Acker's private investigator, whose experiment tended to suggest that it would have been impossible or at least very difficult for Acker to push George out of his truck, while also discounting its probative value due to the experiment's flawed characteristics. *Id*.

The district court also extensively analyzed the medical expert testimony offered at the federal evidentiary hearing. *Id*. at *16-22. As a result of that testimony, in making its assessment of Acker's actual innocence, the court discounted evidence presented at trial suggesting that he had strangled George. *See, e.g., id*. at *12 ("Here, it is clear that one of the prosecution's theories—strangulation—is effectively negated by the evidence provided by both Acker's and the State's medical experts, post-conviction. The Court must

consider that evidence in making its probabilistic determination [of what a reasonable jury would do].").

The court took into account the opinion of Acker's medical expert, Dr. Larkin, that George's injuries were sustained by falling from the truck as well as his "plausible alternative scenario" in which he concluded that George voluntarily jumped. *Id*. at *19; see also id. at *18, *22. At the same time, though, the court took account of stipulations entered into by Acker's and the State's medical experts—that "from the medical evidence alone it is impossible to say whether there was a pushing or a jumping of the victim from the vehicle" and that "if questioned, Dr. Larkin would . . . concede that it's possible that Ms. George was run over"—which tended to undercut the weight of that testimony in light of other evidence in the case. *Id*. at *22.

The court also analyzed the testimony of the State's new expert, Dr. Di Maio. *Id*. at*16-22. Dr. Di Maio opined that George suffered numerous external and internal injuries (including a shredded brain, crushed chest, a blown-out heart, internal-organ lacerations, and muscle tears) consistent with having been run over. Id. at *19 (discussing R.2111). As to some of George's injuries, Dr. Di Maio testified, "the only way you could have got it is a tire going over." *Id*. at *22 (discussing R.2111). Dr. Di Maio concluded that George's head was "squashed," id. at *17 (discussing R.2109)—a conclusion very similar to that reached by the state's medical expert at trial, that George's "head was

crushed," 20 RR 208. In Dr. Di Maio's opinion, George could not have gotten those injuries merely by jumping or being pushed out of the truck. 2016 WL 3268328, at*20.

Only after considering and analyzing all the evidence from the trial and evidentiary hearing pertaining to Acker's actual innocence did the district court conclude that Acker did not meet the "daunting" task of showing that "he did not commit the crime of conviction." *McGowen v. Thaler*, 675 F.3d 482, 499 (5th Cir. 2012). That is, the court "clearly appl[ied] *Schlup's* predictive standard regarding whether reasonable jurors would have reasonable doubt." *House*, 547 U.S. at 540. And its conclusion was hardly equivocal: "[T]he totality of the evidence, if presented to a reasonable jury, overwhelmingly supports the strong inference that Ms. George was unconscious or incapacitated when Mr. Young saw Acker pull her from the truck and lay her along the road in front of the truck, that Acker subsequently ran over Ms. George with his truck, and that event was the cause of her death." *Acker*, 2016 WL 3268328, at *24.

For the same reason—that is, Acker's inability to prove actual innocence in light of all the evidence, old and new—the district court correctly rejected Acker's "pro forma attempt" to make out a "'freestanding' claim" of actual innocence. *Acker*, 2016 WL 3268328, at *9. This Court has not resolved whether such a standalone claim even exists and it should not use this

improper vehicle to do so now. *See, e.g., McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

In any event, the "new" theory Acker complains of—murder by blunt-force injury—*is not new*. The theory that Acker killed George by blunt-force injury featured prominently in every stage of his prosecution. The prosecution's case featured a blunt-force-injury theory right from the beginning. There is no question that Acker was in fact charged with causing George's death by inflicting blunt-force injury. As the district court recognized, *see Acker*, 2016 WL 3268328, at *11, however, it is "well settled that, under Texas state law, the indictment may allege differing methods of committing an offense in the conjunctive, and a defendant may be found guilty under any of the theories." *Johnson v. Thaler*, No. 3:11-CV-3032-B (BH), 2012 WL 4866500, at *6 (N.D. Tex. Sept. 29, 2012) (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991)). Whether Acker thinks phrasing this in the disjunctive might have made more sense is irrelevant, since "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) quotations omitted). In sum, the district court correctly concluded that a reasonable jury would have convicted Acker of capital murder, "on the theory of the indictment and as presented to the jury," of death by blunt-force trauma. *Acker*, 2016 WL 3268328, at *24; *see also Acker*, 693 F. App'x at 389, 393-96.

Acker also claims that the specific theory of Acker having run over George with his truck was not presented to his jury. But as the court of appeals observed, "[t]he theory that Acker deliberately ran over George with his truck is neither new nor fanciful." *Acker*, 693 F. App'x at 396. The prosecutor stated in his opening argument that medical experts "cannot tell you that she was alive or dead at a particular time when she was run over." *Id.*; 19 RR 19. And the prosecutor returned to this theme in his closing argument. *Acker*, F. App'x at 396. Trial witness Brodie Young also testified that he saw Acker "take a woman's limp body from the passenger side of the truck and place it on the side of the road." Id. The Texas Court of Criminal Appeals, in denying Acker's direct appeal, referred to "the State's theory of the case" as including the proposition that he "ran over her body with the truck." R.433.

Acker also points to a series of evidentiary rulings that he says impacted the fairness of his trial and deprived him of due process. But Acker does not show how these various, unconnected trial-court rulings "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). This Court has consciously avoided establishing itself as a "rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967). In that vein, federal courts do not have authority to review the mine-run of evidentiary rulings of state trial courts. *See, e.g., Estelle*

v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *accord Marshall v. Longberger*, 459 U.S. 422, 438 n.6 (1983). The evidentiary rulings of which Acker complains do not meet that high bar. There was nothing "fundamental[ly]" unfair about these rulings. *Spencer*, 385 U.S. at 563-64.

Moreover, the federal district court considered—and even explicitly addressed—each piece of excluded evidence in assessing his gateway claim of actual innocence to excuse his procedural default. *Acker*, 2016 WL 3268328, at *16- 20; *see also Acker*, 693 F. App'x 390 (discussing this evidence). That is because Acker reoffered this evidence at his federal evidentiary hearing. In keeping with the *Schlup* standard, the district court considered this evidence in reaching its probabilistic determination that a reasonable jury presented with all the evidence would still find Acker guilty of capital murder. *Acker*, 2016 WL 3268328, at *24. These evidentiary issues call for no more scrutiny than that. *See, e.g., United States v. Agurs*, 427 U.S. 97, 112-13 (1976) ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.").

Acker also suggests that his conviction and sentence rest on false evidence. But this is not a false-evidence case. The Fifth Circuit correctly

observed that the federal habeas experts' disagreement with one part of the medical examiner's expert opinion testimony at trial does render that earlier testimony "false." *Acker*, 693 F. App'x at 397. Acker points to no evidence, new or old, suggesting that the medical examiner lied or fabricated results, intentionally or unintentionally. Acker does not, for instance, claim that the medical examiner misled anyone about her qualifications or falsified her credentials, thus possibly rendering the "basis for [her] testimony as an expert witness" false. *Bonar v. Dean Witter Reynolds Inc*., 835 F.2d 1378, 1381, 1385 (11th Cir. 1988). The testimony by later experts looking at the same evidence reached conclusions that overlapped in some respects, and diverged as to others does not render the trial testimony false.

It is hardly uncommon for trained experts, bringing their knowledge to bear on the same issue, to reach diverging opinions. *See, e.g., United States v. McBride*, 786 F.2d 45, 51 (2d Cir. 1986); *United States v. Hall*, 664 F.3d 456, 463-67 (4th Cir. 2012). That one expert opinion conflicts to some degree with another has never been held to render one or the other false. *See, e.g., Harris v. Vasquez*, 949 F.2d 1497, 1524 (9th Cir. 1990) (holding that new expert opinions "that are not entirely consistent" with previous expert testimony does not make that previous testimony "'false' or 'materially inaccurate' "); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) ("mere inconsistencies in testimony by government witnesses do not establish knowing use of false

testimony"); *cf. Campbell v. Gregory,* 867 F.2d 1146, 1148 (8th Cir. 1989) (observing that testimony of an expert is not perjury merely because it differed from opinions of other experts); *In re Schwab*, 531 F.3d 1365, 1366-67 (11th Cir. 2008) (per curiam) (holding, in a case in which a "clinical psychologist who testified for the State at the sentencing hearing" changed his opinion after trial and agreed with the defense, that the habeas petitioner "does not assert a constitutional error, just a change in the opinion of an expert witness"). As one state court put it, "[i]f the expert's opinion is contradicted by the opinion of another expert, it merely suggests the first expert may have reasoned incorrectly; it does not suggest his general untruthfulness as a witness." *Kennemur v. California*, 133 Cal. App. 3d 907, 923- 24 (Cal. Ct. App. 1982).

This accords with more general notions of what it means to take some action that can be deemed false. For instance, cases brought under the False Claims Act routinely deal with the issue of falsity: The operative issue there is whether false claims were presented to the government for payment or approval. 31 U.S.C. § 3729(a)(1). In that context, courts have made the intuitive observation that unlike "expressions of fact," which are subject to determinations of falsity, "[e]xpressions of opinion are not actionable." *Harrison v. Westinghouse Savannah R. Co.*, 176 F.3d 776, 792 (4th Cir. 1999). And that is because, as is commonly understood, "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable

minds may differ cannot be false." *United States ex rel. Roby v. Boeing Co*., 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000).

Acker's claims of actual innocence, improper evidentiary rulings, and false evidence have all been thoroughly litigated. Acker is not entitled to the extraordinary remedy of this Court's original jurisdiction to consider the application of a standard he clearly cannot meet. For these reasons, Acker is not entitled to further habeas corpus review.

III. Acker Is Not Entitled to a Stay of Execution.

A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough,* 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rather, the inmate must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id*. (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceed; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A federal court must consider "the State's strong interest

in proceeding with its judgment" and "attempt[s] at manipulation." *Nelson*, 541 U.S. at 649–50 ((citing *Gomez v. U.S. Dist. Court for Northern Dist of California,* 503 U.S. 653, 654 (1992)).

As demonstrated above, Acker's claim is plainly successive, not cognizable, and without merit. Thus, Acker cannot demonstrate the likelihood of success on the merits of his claim on appeal; nor can he demonstrate that his ground for relief amounts to a substantial case on the merits that would justify the granting of relief.

Further, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Acker's challenges to his death sentence have persisted since 2008, and he seeks further unjustifiable delay through his litigation here. Indeed, Acker has sought to discredit the medical examiner's findings prior to trial and on appeal, received an evidentiary hearing in state court, and even received funding in federal court but presented no new evidence. Acker cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him to a stay of execution. Under the circumstances of this case, a stay of execution would be inappropriate.

CONCLUSION

The Court should deny Acker's petition, and deny his motion for stay.

Respectfully submitted,

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