No.18-6086 & 18A311

In the Supreme Court of the United States

IN RE DANIEL CLATE ACKER,
Petitioner.

REPLY BRIEF OF PETITIONER
(ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS)

CAPITAL CASE
MR. ACKER IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 27, 2018

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Respondent's Brief In Opposition to Petitioner's Original Petition for a Writ of Habeas Corpus ("BIO") is based on assertions regarding the record, Mr. Acker's arguments, and the law that do not withstand scrutiny. Respondent argues that Petitioner is not entitled to the remedy he seeks (BIO at 14-16); that he fails to demonstrate that he is actually innocent (*Id*. at 17-30) and that he is not entitled to a stay of execution (*Id*. at 30-31). These arguments are all unavailing.

I. Introduction.

Although it may be difficult to discern from Respondent's BIO in this case and the companion petition for writ of certiorari (*Acker v. Davis*, No. 18-6075, 18A310), the State has disavowed the theory on which Mr. Acker was indicted, tried, found guilty and sentenced to death, and has now conceded, through their own expert, that the victim was not strangled. Respondent attempts to minimally characterize this petition as merely an attempt to circumvent the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), merely undercutting one of the theories of the cause of the victim's death, the re-presentation of evidence already presented at

trial, a futile attempt to prove innocence, or the opinion of one expert who differs from another. (BIO at 14-16).

Strangulation was not merely an alternative theory of the manner of the victim's death, it *was* the State's case, presented as such in the autopsy, the indictment, the grand jury proceedings, the prosecution's opening statements, the testimony of the medical examiner, the prosecutor's cross-examination of Acker, the jury charge, the prosecution's final arguments, the jury's sole inquiry at deliberations, the case on appeal, and the holding on state habeas.[1] Respondent's argument that strangulation was merely one of the State's theories blithely disregards the fact that it underpinned the State's case for Acker's guilt and its absence now vastly alters and enhances Acker's showing of innocence. Acker's jury was never presented a stand-alone theory of "blunt-force injuries," as the State now contends, but was told that these injuries followed the now-discredited strangulation. *See, e.g.*, ROA.1009 (autopsy); 19 RR 19 (opening argument); 20 RR 207, 219-221, 273-274 (coroner's testimony);[2] 23 RR 5-6, 26-30 (final argument); ROA.423-424 (holding on appeal). Essentially the State seeks to uphold Acker's death sentence on either of two new and incompatible theories never presented to his jury—that Acker either pushed the victim out of the truck, or laid her on the roadside and ran over her.[3] As discussed in the following section, these unusual and exceptional circumstances justify the use of this Court's original jurisdiction.

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[1] *See* Acker's petition (hereafter, "Application") at 28-37.

[2] "RR" refers to the Reporter's Record of the trial transcript.

[3] It is actually unclear what theory the State is now advocating, as it has gone from strangulation, to pushing the victim out of the truck, to adopting the district court's new theory that Acker ran her over while she was unconscious, as discussed herein.

II. Petitioner has shown he is entitled to the remedy of invoking the Court's original jurisdiction.

The State argues that Mr. Acker is not "entitled" to the relief his seeks in his original habeas petition. (BIO 14-16). Specifically, the State contends that Mr. Acker's innocence claim is "impermissibly successive under [28 U.S.C.] § 2244(b)(1)," (BIO at 14), and therefore, the petition should be denied. This contention, however, assumes that the legal strictures of § 2244(b) apply to original habeas petitions filed in this Court. As discussed below, this assumption does not follow from the Court's limited, but informative discussions and decisions involving original habeas petitions. Rather, the Court should "lean upon its original habeas power's jurisdictional, substantive, and remedial features in order to avoid wrongful executions," such as Mr. Acker's. *See* Lee B. Kovarsky, Original Habeas Redux, 97 VA L. REV. 61, 98-99 (2011).

When presented with the question of whether the limits of §2244(b)(1) and (b)(2) applied to original petitions, the Court declined to answer. *See Felker v. Turpin*, 518 U.S. 651, 662-63 (1996) ("Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions."). *Felker,* 518 U.S. at 658-61, also held that the limits on successive petitions in §2244(b)(1) and (b)(2) did not constitute a suspension of the writ, AEDPA's "provisions stripping its jurisdiction to review authorization denials did not apply to its original habeas power,"[4] and § 2244(b)(3)'s gate-keeping procedure did not apply to original habeas cases. *Id.* at 662-63. (BIO at 14).

[4] Kovarsky, *supra*, at 81.

Since *Felker*, some members of the Court have viewed this question more broadly to include whether AEDPA is applicable to original petitions at all.[5] *See In re Davis,* 130 S. Ct. at 2 (Stevens, J., concurring). In *Davis*, the petitioner filed for original habeas relief, requesting that the Court transfer his petition to the district court. *See* Petition for Writ of Habeas Corpus at 1, *In re Davis*, 130 S. Ct. 1 (2009) (No. 08-1443). The Court granted the transfer request in a one-paragraph opinion. *Id*. at 1. The Court's transfer order in *Davis* does not logically follow the idea that the restrictions of §2244(b)(1) and (b)(2) apply in original habeas proceedings. For one, the order instructs the district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *Id*. This directive is different from what is required under §2244(b)(2). Section 2244(b)(2) requires the prisoner to show that the factual predicate for the claim was "previously unavailable," but the *Davis* transfer order instructs the district court to consider any evidence discovered after trial, no matter what its prior availability. *See* 28 U.S.C. §2244(b)(2)(B)(ii); *Davis*, 130 S. Ct. at 1. Also, the *Davis* transfer order instructs the district court to determine if the present body of evidence clearly establishes the petitioner's innocence, whereas §2244(b)(2) also requires proof of an underlying constitutional error. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *Davis*, 130 S. Ct. at 1. Accordingly, the State's reliance on the restrictions of § 2244(b)(1)-(b)(2) as a bar to Mr. Acker's original habeas petition is unavailing.

[5] ADEPA enacted particularly restrictive rules for successive petitions under 28 U.S.C. § 2244(b). *See* Antiterrorism and Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220-21. This Court has repeatedly rejected a formalistic application of § 2244(b)(1) and (b)(2). *See Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (holding that, if a term in a statute is not self-defining, then you look to the prior successive petition law to determine its meaning); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–45 (1998) (holding that certain types of numerically successive petitions are not barred under § 2244(b) because doing so would functionally punish diligent claimants).

The State also concludes, without discussion, that Mr. Acker has not shown "any 'exceptional circumstances' to warrant the exercise of this Court's discretionary power." (BIO at 16.) For one, Mr. Acker petitions the Court under a sentence of death. This fact is "exceptional" and should weigh in favor of satisfying the substantive standard of Rule 20.4(a). Rule 20.4, itself, provides for certain procedural exceptions in capital cases. *See* S. Ct. R. 20.4(b) (providing that all original habeas proceedings proceed *ex parte*—except for capital cases). Capital cases are also unique in original habeas proceedings because they are the only cases that require the jailor to respond. *Id*. Moreover, Mr. Acker is due to be executed on September 27, 2018, based on a theory of liability that the State itself has repudiated in federal court. All facets of Mr. Acker's conviction were based on the State's theory and "evidence" that Mr. Acker strangled the victim, which has since been shown to be false. His appellate and state post-conviction proceedings were a complete farce. After adopting three different and incompatible theories of liability, the State has now settled on a theory that is not supported by witness testimony and was never presented to Mr. Acker's jury. Notwithstanding these exceptional circumstances, the State intends to proceed with Mr. Acker's execution. Additionally, as detailed in Mr. Acker's petition, since the Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), compelling reasons under the Eighth Amendment have emerged to recognize a free-standing actual innocence claim. Mr. Acker's case presents the "exceptional circumstances" necessary to warrant the Court's use of its discretionary powers.[6]

[6] Respondent claims Acker's "statistics regarding clemency and exonerations are highly suspect," because Acker asserted that "only 2 Texas inmates have been granted clemency against 553 executed," claiming that "in fact, thirty-two sentences have been commuted since 2004." BIO at 16 and n. 3. Yet Acker was counting clemency grants, not exonerations. Additionally, the website cited by Respondent, https://abc13.com/politics/clemency-rare-for-death-row-convicts-in-texas/3114938, states that of those 32 commutations, 28 were "death row inmates who had committed their crimes while they were under the age of 18," (*Roper v. Simmons*, 543

III. Respondent's contentions that Mr. Acker has not shown that he is actually innocent.

The bulk of Respondent's substantive argument (BIO at 17-30) is devoted to showing that Mr. Acker has not shown that he is actually innocent. Yet that argument is based on factual errors and misrepresentations largely adopted from the federal district court's hastily-written opinion. Even Respondent's own summary of the evidence, mostly adopted from the Fifth Circuit's holding, shows strong indicia of innocence. The trial testimony established that "Acker...grabbed George, threw her over his shoulder, and forced her into his pickup truck..." (BIO at 3, quoting the Fifth Circuit opinion, *Acker v. Davis*, 693 F. App'x 384, 385-91 (5th Cir. 2017) (per curiam). Yet this is never acknowledged as evidence that George did not want to be in the truck and was trying to escape[7]---by jumping---as they drove away, and tragically succeeded just a few minutes later.[8] Nor is Acker's desire to bring her to a meeting with the man with whom George had spent the night ever acknowledged as a lack of a motive for Acker to suddenly change course, push her out and kill her *en route* to that meeting within a matter of a few minutes.[9]

U.S. 551 (2005)), Supreme-Court-mandated commutations not likely to reoccur.

[7] Eyewitness Thomas Smiddy described George as like "a cat trying to be pushed into a bathtub." (19 RR 147-148.)

[8] Instead, despite this evidence and Acker's testimony, Respondent repeats the federal district court's holding that there was "no actual evidence" that George had jumped on the day of her death. (BIO at 22, citing *Acker*, 2016 WL 3268328 at *21.)

[9] Instead, Respondent implies that Acker's motive was his anger toward George for her perceived unfaithfulness. (BIO at 19-20.) This ignores the fact that when George returned, Acker did not attempt to kill her, his previous-day threats were mainly conditioned on whether he found out she had been unfaithful, and Acker had no way of knowing for sure whether she had been unfaithful when George returned. To find out, he forced her into his work utility truck for a face-to-face meeting with the man with whom she spent the night. There was no motive for Acker to kill George *en route* to that meeting. The theory that Acker killed her *en route* or pushed her out is also incompatible with the Smiddys' evidence that, just a few minutes before her death, George was trying to get out.

As for Respondent's contention that "the [federal district] court scoured the trial record for evidence bearing on whether Acker was actually innocent," BIO at 19, any "scouring" was limited to misconstruing alleged evidence of Acker's guilt, while evidence of his innocence was largely ignored. While the State, following the district court, cites alleged threats against George by Acker (BIO at 19-20, citing 19 RR 71; 19 RR 73-74;19 RR 89-115), Acker *did not* kill George upon her return and these alleged threats were directed at *both* George and the man he suspected she had been sleeping with.

Acker's jealousy was directed at finding out whether George had been unfaithful, his reason for abducting and driving away with her in the truck. Acker's threats, jealousy, and obsessive searching for George the night prior explain the motive for her abduction. They do *not* explain why Acker would abduct George and then push her out of the truck or kill her *en route*, whereas just minutes before her death he had been trying to keep her in the truck and she had been trying to get out.[10]

Respondent's attempts to show that the federal district court's analysis was not one-sided actually show the opposite. The district court is credited for "discounting" the strangulation evidence (BIO at 22), even though the State itself had already discounted it and admitted there was no strangulation. Respondent also credits the district court for "taking into account" other evidence the State had already conceded—Dr. Larkin's and the State's own expert Dr. Di

[10] Respondent seriously misrepresents the record in claiming that "[t]he trial record further establishes that when Acker finally caught up with George the morning of her death he assaulted her" and "when Acker arrived back at the trailer house he shared with George, George ran out of the house..." (BIO at 20.) This inaccurately portrays Acker as pursuing George and immediately assaulting her. The record is clear that Acker was at the trailer when George returned; they talked amicably when she arrived; that she then went into the trailer and came back outside and they talked with the man who had dropped her off; that George was again in the trailer for about a half hour before she ran out, after Acker learned that George had spent the night with a Mr. McGee. (19 RR, 140-146, 161-162, 21 RR 211-225.)

Maio's testimony. (BIO at 19, citing *Acker*, 2016 WL 3268328 at *10-24.) Respondent also argues the district court "credited Acker with producing 'at least some evidence' that George had previously attempted to jump from Acker's truck." (BIO at 22.) That evidence was also undisputed, but the district court summarily dismissed it by "noting the incontrovertible fact that there was 'no actual evidence' that George had done so on the day of her death." (BIO at 22, citing *Acker*, 2016 WL 3268328 at *21.)[11]

a. Respondent's theory of liability, mirroring the federal district court, is multiply flawed.

Most seriously, Respondent credits the testimony of Broadie Young (BIO at 3, 4, 21, 24, 26), and repeatedly cites the district court's holdings based on Young's alleged testimony (BIO at 24, 26) as their theory of Acker's liability, while ignoring the fact that Young gave inconsistent versions and did not even testify as the district court held he did. The apparent current operative theory of Acker's liability, the State's third such version, is the federal district court's holding that "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 Mr. George with his truck, and that was the cause of her death." (BIO at 24, citing *Acker v. Director*, No. 4:06-cv-469, 2016 WL 3268328 at *24 (E.D. Tex. June 14, 2016)). *Yet neither Mr. Young nor any other witness ever testified that Acker deliberately ran over the victim. In fact, Mr. Young explicitly denied it.*[12] Respondent and

[11] Unless "actual evidence" means "eyewitness evidence," this is inaccurate, as the Smiddys both saw George struggling to get out of the truck mere minutes before she was found dead. (19 RR 146-149; 179-181.) This is strong evidence that she continued her attempts to jump as they drove away, but it is never mentioned as such by either the district court nor Respondent. Acker himself has always consistently told the authorities that George jumped, and his accounts have never been inconsistent, from turning himself in, to his post-arrest police interviews, to his trial and evidentiary hearing testimony.

[12] Mr. Young, who told differing versions of his story, including one that claimed he saw Acker and the victim arguing in the truck, testified that Acker pulled her out of the truck and took a few steps backward and then laid her on the side of the road and got back in his truck and took off.

the federal courts have based their current theory of liability on a witness who was discredited as a liar and testified contrary to that theory.

1. Broadie Young told inconsistent stories and was discredited as a liar.

Respondent (and the district court and the Fifth Circuit) never mention the inconvenient fact that Young---upon whom Respondent's argument and the district court and Fifth Circuit holdings rely--- was discredited as someone who initially told a story that buttressed the State's theory---before they changed it. Young's initial statement, given to Officer Wright on the day of the incident, was that Young saw a man and a lady fighting in the truck. (19 RR 225-228.) "I retracted that later on because I realized that was a false statement...after I thought about it." (19 RR 226.)[13] Young admitted he never saw a man and a woman fighting in the truck, but he first told Officer Wright that he did. (19 RR 226.) Young said that "I retracted that statement because I found out later, after I thought about it a while, I didn't see but one person there." (19 RR 213.)[14] Young admitted "exaggerating some." (19 RR 228.) In all, he gave three statements about the incident. (19 RR 227.) In a second statement given at Officer Wright's office, he said the person in the truck appeared to be talking to himself. (19 RR 229-230.) In the statement he said that the man had her underneath her arms and pulled her out of the truck, holding her like someone who has gone to sleep. (19 RR 230.)

(19 RR 208.) The truck headed south. (19 RR 210.) *It did not run over the woman.* (19 RR 231.)

[13] There is a disturbing pattern of retracted, false and suppressed statements regarding Acker's innocence throughout this case.

[14] The distance traveled from Acker's home and the short time until the body was found would have made this impossible. In actuality, the testimony was that the distance was 2.2 to 2.4 miles. (21 RR 139-140, testimony of John Sands). Walter Allen Story, a 9-1-1 communications supervisor in Hopkins County, testified *in camera* that he received a call from Mr. Thomas Smiddy at 11:45 a..m. on March 12th. (21 RR 44.) The first call that said a body had been found came in at 11:47 a.m., from Mr. Sedill Ferrell. (21 RR 51.)

Young also gave a statement to defense counsel, claiming the only thing he "retracted out of the statement is the first time I said I saw a man arguing with a lady or fighting with a lady. Later on, I retracted that and said I just saw a man sitting in the truck." (19 RR 234, 237.) Young testified that "I realized that I hadn't saw her fighting in the truck because I was exaggerating on that and I changed it later." (19 RR 238.) He claimed that the only time he saw the lady is when she was pulled out of the truck. (19 RR 238.)[15]

The federal district court relied heavily on Young's testimony, even though he was exposed as a liar: "Mr. Young's testimony that contradicts and virtually destroys Petitioner's story," *Acker*, 2016 WL 3268328 at *23; "[h]is testimony of Ms. George's jumping and his attempt to retrieve her body from the road, in particular, is not credible in the light of Mr. Young's testimony." *Id.* at *24.

The fact that both the State and the federal district court completely ignored Young's inconsistent statements is sufficient to belie the State's claims that the court "scoured the trial record for evidence bearing on whether Applicant was actually innocent." (BIO at 19.)[16]

2. Young never testified that Acker ran over the victim; in fact, he denied it.

Respondent egregiously misleads the Court in omitting the crucial fact that Young denied that Acker placed George on the road and then ran over her. Young's third version of what he saw, his trial testimony, was that when he passed Acker's truck, he looked in the rearview mirror and saw a person get out and open the passenger door and pull a lady out. (19 RR 206-207.)

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[15] It is significant that on the day of the victim's death, Young gave a story that he later repudiated when it became inconsistent with the State's theory that Acker had strangled George while driving.

[16] Additionally, the Fifth Circuit relied on Young for its holding but criticized Acker for relying on his statement that he did not run over the victim. *Acker v. Davis*, 693 F. App'x 384, 396 n. 1 (5th Cir. 2017).

That person took a few steps backward and then laid her on the side of the road and "got back around to the truck and took off." (19 RR 208, 218.) The truck headed south. (19 RR 210.) Young explicitly testified that *Acker did not run over the woman*:

> Q. You stated: He pulled her out of the truck and laid her on the side of the road. He ran back around the front of the truck, got in the truck, and sped off.
> A. Right.
> Q. *Now when he laid her on the road did he run over her when he drove off?*
> A. *No, because she was on the side. She was on the side of the road between the truck and the grass so he didn't.*
> Q. *He didn't run over her?*
> A. *Huh-uh.*
> Q. And that's the last time you saw the truck as he sped off?
> A. Right.
> (19 RR 231) (emphasis added).

At trial, Acker testified that after George jumped, he picked her up, opened the door to the truck to put her in, and then saw the light bulbs and placed her back on the road. (22 RR 243-244.) This could well have been what Young saw.

3. This was never a homicide case.

As homicide in Texas requires the intent to kill, this case was never a homicide, but rather a kidnaping or manslaughter. Texas law has repeatedly and unequivocally held that capital murder requires a specific intent to kill: "Capital murder is a result-of-conduct oriented offense; the crime is defined in terms of one's objective . . . ." *Roberts v. State*, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008); *see Black v. State*, 26 S.W.3d 895, 898 (Tex. Crim. App. 2000); *Medina v. State*, 7 S.W.3d 633, 639 (Tex. Crim. App. 1999); *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994); *Alvarado v. State*, 704 S.W.2d 35, 36 (1985); *see also Schroeder v. State,* 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (reiterating that intentional murder under sec. 19.02(b)(1) is a "result of conduct" offense); *Cook*, 884 S.W.2d at 490 ("We have long held that intentional murder is a 'result of conduct' offense."); *Martinez v. State,* 763 S.W.2d 413,

419 (Tex. Crim. App. 1988) (same); *Lugo-Lugo v. State*, 650 S.W.2d 72, 80, 88 (Tex. Crim. App. 1982) (same). As the Texas Court of Criminal Appeals has explained, a "result of conduct" offense is defined by specific intent to bring about a prohibited result: "what matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified." *Cook*, 884 S.W.2d at 490 (citing *Alvarado*, 704 S.W.2d at 39)(emphasis in original). The "required culpability" for capital murder is to intentionally or knowingly bring about the death of another person. Tex. Penal Code sec. 19.03(a). The Texas Penal Code states that an offender acts intentionally "with respect to . . . a result of his conduct when it is his conscious objective or desire to . . . cause the result." Tex. Penal Code sec. 6.03(a); *see also Martinez*, 763 S.W.2d at 419. Thus, capital murder "is defined in terms of one's objective to produce a specified result. . . . [The offender] must have specifically intended that death result from his conduct." *Kinnamon v. State*, 791 S.W.2d 84, 88 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook*, 884 S.W.2d at 491; *see Morrow v. State*, 753 S.W.2d 372 (Tex. Crim. App. 1988).[17] This case was a tragic accident, not a homicide.

b. Respondent mistakenly assumes that jumping out of the truck precluded George then being run over by the truck, as did the district court and the Fifth Circuit.

Respondent's argument assumes that when George exited the truck she was not then immediately run over or that Acker is arguing that George was not run over. *See, e.g.,* BIO at 8, quoting Fifth Circuit's holding ("Dr. Di Maio testified that...[George's] injuries were too extensive to have been caused by jumping or being pushed out of a truck); BIO at 9 ("Dr. Larkin would...concede that it is possible that Ms. George was run over"); BIO at 24 (discussion of Dr. Di Maio's testimony, concluding that "[i]n Dr. Di Maio's opinion, George could not have gotten

[17] As the prosecutor Mr. Long admitted at trial: "They have to find an intentional murder [for the jury to convict Mr. Acker of capital murder]." (22 RR 114.)

those injuries merely by jumping or being pushed out of the truck," citing the federal district court, *Acker*, 2016 WL 3268328 at *20).

Respondent's assertions mirror the federal district court's error in holding that

> Dr. Di Maio also testified that these injuries could not have occurred simply by being ejected (either jumping or being pushed) from the truck. Ms. George would have 'tumbled' and the energy of the fall dissipated without injuries of that nature. In fact, Dr. Di Maio, an expert forensic pathologist, testified that she would have tumbled across the highway if she had exited the truck while it was moving. *Id.* at 53. Nothing to which Dr. Di Maio testified indicated a likelihood of jumping or being pushed from the truck and immediately falling *under* the truck to receive the diverse injuries at the extremes of her body.
> (*Id*.)

Dr. Di Maio *did not* testify as the district court held and Respondent argues. Dr. Di Maio repeatedly said in his report and his testimony that George either jumped or was pushed out of the truck and that she was then run over by the truck, which could have been a result of her attempt to jump. *E.g.,* Exhibit 11 to the TCCA application, Dr. Di Maio's letter to the State's attorney ("As to whether Ms. George jumped or was pushed from the truck, it is impossible to say...all that one can say from the autopsy findings is that she incurred her injuries from going out a moving vehicle and being run over by the vehicle"); Exhibit 3 to the TCCA application, transcript of federal evidentiary hearing, at 61 ("if you assume that the individual went out [of] the truck while the truck was moving, you can't tell from the injuries whether the person was pushed or jumped"); (*Id*. at 65) ("they're the type of injuries that you get whether you jumped or you were pushed. You can't tell from the injuries themselves"); (*Id*. at 67) (Dr. Di Maio's bottom line was that George was either pushed or jumped from the truck "and was run over"); *Id*. at 119 (stipulation that George was possibly run over by the truck and 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.")

Dr. Di Maio's testimony is clear that he thought that George's injuries could not have been sustained from jumping or being pushed *alone,* without also being run over, which Acker has never denied. Respondent misleads by arguing that Acker is arguing that the victim was not run over, whereas the victim's "blunt-force" injuries were a result of her jump going awry, hitting the protruding utility bed while the truck was moving, and then flipping under the truck. The holding that when George exited the vehicle she was not immediately run over is a serious factual error by the district court, adopted by Respondent.

IV. Conclusion.

In essence, the State of Texas seeks to execute Daniel Acker on a speculative theory, now in its third version, which was never presented to Acker's jury; which is based on an inconsistent statement by an unreliable witness that runs counter to that witness' actual trial testimony; where the State's own expert witness discredited the prosecution's theory of the victim's death; where the trial court excluded evidence that the victim had attempted to jump from Acker's truck only days prior to her second and fatal jump from the same truck; where witnesses saw the victim attempting to jump from the truck only minutes prior to her death; where his appeal was 10 pages long and his state writ was incoherent gibberish.

This Court should decline this invitation. For the forgoing reasons, the Court should grant the original petition for writ of habeas corpus to consider the questions presented by this petition and grant the accompanying motion for a stay of execution.

Respectfully Submitted,

s/s A. Richard Ellis

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