No._____

In the Supreme Court of the United States

October Term, 2017

DANIEL CLATE ACKER,
Petitioner,
v.
LORIE DAVIS , Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

In this capital case, Daniel Clate Acker was tried, convicted, and sentenced to death and, as the Fifth Circuit Court of Appeals has acknowledged, "[i]t is true that the State's theory at trial was largely based on strangulation as the cause of George's [the victim] death." *Acker v. Davis*, 693 F. App'x 384, 394 (5th Cir. 2017) (Appendix A). Yet the State, in federal habeas proceedings, has admitted that the victim was not strangled and has disavowed the foundation of their trial case. Three different and contradictory theories have been advanced by the State or the federal courts as to what Mr. Acker supposedly did. The first was that he strangled the victim while driving. The second was that he pushed her out of the vehicle. The final theory arrived at by the federal district court and the Fifth Circuit was that the victim was knocked out by a blow in the vehicle, placed on the road, and then run over. This theory was not presented to Mr. Acker's jury.

From the time of his arrest, Mr. Acker has consistently asserted his innocence, and there is a wealth of evidence supporting that assertion and contradicting the State's theories.

This case therefore presents the following questions:

1. Whether it is unconstitutional to affirm a criminal conviction based on 1) a theory not submitted to the jury, and 2) false and erroneous testimony, where the State was responsible for the error, which was not apparent on appeal?

2. Whether due process is violated by a conviction based on false or erroneous evidence, regardless of the prosecution's knowledge, when the State was responsible for the error? (This question involves a circuit split of authority)

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Daniel Clate Acker, was the Petitioner before the United States District Court for the Eastern District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Acker is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The Director and her predecessors were the Respondents before the United States District Court for the Eastern District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Acker asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Daniel Clate Acker respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On August 14, 2017, the United States Court of Appeals for the Fifth Circuit issued an Opinion refusing to issue a certificate of appealability on four issues. This Opinion, reported as *Acker v. Davis*, 693 F. App'x 384 (2017), is attached as Appendix A. The docket entry of the denial of *en banc* rehearing on September 13, 2017 is attached at the end of Appendix A. The unpublished decision of the federal district court Mr. Acker sought to appeal, *Acker v. Director, TDCJ*, 2016 WL 3268328 (June 14, 2016), denying Mr. Acker's petition for writ of habeas corpus and a certificate of appealability, is attached as Appendix B.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 2253, the Fifth Circuit Court of Appeals had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Procedural Summary.

Mr. Acker is currently incarcerated on death row at the Polunsky Unit of the Texas Department of Criminal Justice at Livingston, Texas, in the custody of Respondent.[1] In March of 2001, Acker was convicted in the 8th District Court of Hopkins County, Texas of the capital murder of his girlfriend Marquetta George.[2] The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure article 37.071, and the trial court set punishment at death.[3]

On November 26, 2003 the Texas Court of Criminal Appeals ("TCCA") affirmed his conviction and sentence of death. *Acker v. State,* No. AP-74,109 (Tex. Crim. App. November 26, 2003)(not designated for publication).[4]

Mr. Acker sought state post-conviction relief and filed an application through court-appointed counsel Mr. Toby Wilkinson.[5] The initial state petition and a *pro se* petition were denied on November 15, 2006. *Ex Parte Daniel Clate Acker,* No. WR-56,841-01 and WR-56,841-03 (Tex. Crim. App. November 15, 2006)(*per curiam*)(not designated for publication).[6]

Mr. Acker filed his federal petition in the federal district court on November 14, 2007.[7] On December 12, 2007, the district court held proceedings in abeyance.[8] After the state court

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[1] The federal record on appeal in the Fifth Circuit is referred to as "USCA5.[page]." The trial Reporter's Record is referred to as "[volume number] RR [page]."

[2] USCA5.353-355 (indictment); USCA5.365 (verdict).

[3] USCA5.374-375 (judgment).

[4] USCA5.420-440.

[5] USCA5.378 (appointment); USCA5.443-519 (state post-conviction writ).

[6] USCA5.556-557.

[7] USCA5.94-350.

[8] USCA5.1040-1042.

dismissed his subsequent state application,[9] Mr. Acker filed his "Post-Exhaustion Petition for Writ of Habeas Corpus" in the district court. That Court ordered an evidentiary hearing on Claim One, relating to actual innocence. The hearing was held on June 16, 2011.[10] Post-hearing briefs were submitted.[11] The district court denied relief on July 8, 2016, a little over one month after the case had been transferred to a new judge, who also denied a certificate of appealability on all issues.[12]

Mr. Acker applied to the Fifth Circuit Court of Appeals for a certificate of appealability on four issues, and on August 14, 2017, a panel of that Court denied a COA on all four claims presented for review.[13] On September 13, 2017, the Fifth Circuit denied Acker's petition for rehearing *en banc*.[14]

B. Factual Summary.

i. Trial summary.

The following facts are taken from the summary in the opinion of the Fifth Circuit Court of Appeals:

In March of 2002, Acker and his fiancee Marquetta George were living together in a rented trailer home. On the evening of Saturday, March 11, 2000, they went to a nightclub, "Bustin' Loose" where they argued and then separated. Acker searched for George that night. During the search, Acker told his sister that if he found George with another man, "they will pay."

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[9] USCA5.25-26.
[10] USCA5.2058-2219 (transcript of hearing).
[11] USCA5.1827-1846 (Respondent's brief); USCA5.1847-1909 (Acker's brief).
[12] USCA5.1946-2054; *Acker v. Director, TDCJ*, 2016 WL 3268328 (E.D. Tex. June 14, 2016). (Appendix B herein).
[13] *Acker v. Davis*, 693 Fed. Appx. 384 (5th Cir. 2017). (Appendix A).
[14] Attached to the end of Appendix A.

Acker continued to look for George the rest of that night and 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 and told her that when he found them he was going to beat them and that nobody was going to make a fool out of him. That same morning, 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.

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. Acker said that he pushed her down on the couch and shook her. 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. 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. However, they did not make that statement to the police on the

day of George's death. 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 he was driving past a dairy farm on a county road that morning 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 without running over her. Young drove to the sheriff's office to report what he had seen. However, 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.

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. From the moment of his arrest, Acker proclaimed his innocence in the death of George, his girlfriend and fiancee.

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. 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 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.

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).

(*See Acker v. Davis*, 693 F. App'x 384, 385-389 (5th Cir. 2017). (Appendix A).

ii. The State's case was built around false testimony regarding strangulation.

The State convicted Acker on the theory that, while driving his truck at high speeds, "it is likely that the decedent was strangled and probably dead or near death prior to being dumped from the vehicle." *Acker v. State*, No. 74,109 (Tex. Crim. App. Nov. 26, 2003) at *5.[15] However, in federal court, the State's own expert, Dr. Vincent DiMaio, opined at the federal evidentiary hearing that George was never strangled, agreeing with defense expert Dr. Glenn Larkin. The State's theory of death then changed and they contended that Acker pushed George from the truck, a theory never presented to Acker's jury. At trial, the State's case was based on the now-discredited strangling-while-driving hypothesis, a virtually impossible feat. The State's

[15] USCA5.424.

speculative and flawed strangulation theory was never effectively challenged by Acker's attorneys, mainly because the trial court obstructed their efforts to do so. Defense counsel's requests for forensic experts were denied on the basis that they had been provided with an investigator. But when the investigator attempted to show that Acker could not have pushed her out, the court ruled this inadmissable because his tests were not performed by the very experts for which the court had denied funding.

The following summary of eleven vital stages of the case shows the centrality of the "strangulation" theory used to convict Acker and sentence him to death.

1) The autopsy was based on the strangulation theory.

The"conclusions" part of the autopsy report, in its entirety, read as follows:

> It is our opinion that Marquette (sic) George, a 33-year old white woman, died as a result of homicidal violence, including strangulation. Several of the injuries identified could be consistent with blunt force injury resulting from an impact with or being ejected from a motor vehicle. *Some injuries (particularly those of the neck and perineum) are not consistent with ejection from or impact with a vehicle; the injuries observed in the neck are more consistent with strangulation.* Further, the dry parchment-like appearance of several abrasions, the lack of associated hemorrhage of the laceration of the right leg, the paucity of hemorrhage in the brain and the amount of body cavity hemorrhage in relation to the severity of the injuries indicate that these injuries were sustained postmortem or perimortem. *Given these findings, it is likely that the decedent was strangled and probably dead or near death prior to being dumped from the vehicle.*
> [USCA5.1009.] (emphasis added).

Thus, the "blunt force" injuries were not seen as a stand-alone cause of death, but injuries that followed the strangulation and occurred when the victim was "probably dead or near death prior to being dumped from the vehicle."

2) Strangulation was the basis of the indictment

The indictment states "strangulation....*and* blunt force injury," not "or blunt force injury." [USCA5.353, 355.]

3) The grand jury indicted on a strangulation theory.

Acker was indicted by a grand jury and the foreman of that grand jury, Clayton McGraw, testified as follows at Acker's trial:

> Q. Can you tell us was the Grand Jury able to determine what object was used in the course of the strangulation of Markie George?
> A. No, sir.
> Q. So it would be a true statement to say that it is unknown to the Grand Jury what object was used?
> A. Yes, sir.
> Q. Was the Grand Jury able to determine whether it was manual strangulation, that is, with somebody's hands, or ligature strangulation with an object such as a rope or a cord?
> A. No, sir.
> (19 RR 128.)

4) The opening statements told the jury the victim was strangled.

The prosecutor's opening statement told the jury:

> and the doctors tell us she died from strangulation as well as from blunt force trauma. Blunt force injuries. They cannot say which caused her death exactly, but both of her injuries were capable of causing her death. They cannot tell you that she was alive or dead at a particular time when she was run over. *But they can tell you that she was strangled first, and I believe they will, because of the way the body reacts after strangulation.*
> (19 RR 19.) (emphasis added).

The defense, in their opening statement, stated that George had on previous occasions twice tried to jump from the truck when Acker was driving it, but had been pulled back by him. (19 RR 20.) They also told the jury that tragically she succeeded in jumping from the truck on the day of her death. (19 RR 21.) However, various evidentiary rulings prevented the jury from hearing this evidence crucial to the central theory of the defense, that George jumped.

5) The testimony of the medical examiner was based on strangulation that preceded blunt force injuries.

The medical examiner/pathologist Dr. Morna Gonsoulin told the jury that:

a) “the [the “blunt force” head injuries] were most likely perimortem or postmortem.” (20 RR 207.)

b) The bleeding in the neck had to be a result of “some type of force or pressure to be placed upon a person’s neck to cause that type of bleeding...” (20 RR 213), the strangulation, and “from local pressure being applied to it.” (20 RR 214.)

c) The neck injuries were “not consistent with falling or being hit. It was more of being constricted rather than blunt force received from falling from a vehicle.” (20 RR 215-216.)

d) The cause of death was strangulation and she “[wasn’t] able to determine which manner of strangulation occurred but that strangulation did occur.” (20 RR 219.)

e) The blunt force injuries were either during or after death, hence after strangulation. (20 RR 219.)

f) Strangulation was sufficient, in itself, to cause death. (20 RR 220.)

g) It could not be determined what object caused the strangulation. (20 RR 220.)

h) Strangulation occurred first, but she “can’t determine which one she may actually have died from.” (20 RR 220-221.)

i) “She was strangled as a result of her injuries and she had blunt force injuries. That’s what I told the jury.” (20 RR 233.)

j) The strangulation could not have occurred in the trailer, as it would have immobilized the victim and “someone who is limp can’t jump out of a truck, can they? ...I would assume if they had an injury they wouldn’t.” (20 RR 268-269.)

k) The victim was strangled, but it could not be determined what was used to accomplish that. (20 RR 272.)

l) The victim was dead or near death "at the time that she was dumped from the vehicle..." (20 RR 273-274.)

m) The victim died from strangulation "and the blunt force injuries from impacting with something." (20 RR 274.)

6) Acker's cross-examination stressed strangulation.

The state cross-examined Acker on "strangulation":

Q. Did you know?
A. Did I know what?
Q. About strangulation.
A. Strangulation never took place. Markie [George] was never strangled.
Q. The Medical Examiners are just lying?
A. They are incorrect.
Q. They are incorrect.
A. Their opinions are wrong.
q. All those doctors are wrong?
A. Yes, sir.
(22 RR 7.)

Q. Now, the doctor's testimony was that she was strangled but you disagree with that?
A. Yes, sir.
Q. The doctor's lying about that?
A. Yes, sir.
Q. These photographs are lying about the blood in her throat?
A. The blood could have got there any kind of way.
Q. Oh, really.
A. Not necessarily—strangulation not the only thing that causes blood in your throat.
(22 RR 90-91.)

7) The jury charge on guilt stressed strangulation.

The jury was charged with five possibilities at the guilt phase of the trial [USCA5.358-360.] Of these five theories, three involved the now-discredited strangulation theory. The use of "strangulation" *and* "blunt force injury" in the indictment is pleading in the conjunctive, as the district court pointed out. [USCA5.2152-2153.] Unlike the indictment, which was pled in the conjunctive, the jury charge was in the disjunctive (using "or"). However, we do not know

whether Acker was actually convicted on one of the three now-discredited theories. The first one was strangulation alone, and the jury could well have convicted on that false theory without even considering the others.

8) The prosecution's final argument stressed strangulation.

The district court distorted the import of the prosecution's final argument. [USCA5.1974-1975.] The court cited two portions of the argument relating to the discredited Broadie Young and concluded that "[a]lthough the prosecution referred to strangulation in this argument, the same argument could easily apply to running over Ms. George...whether or not she had been strangled." [USCA5.1975.] This is not a reasonable assessment, as the prosecution's final argument was focused on "strangulation," not Mr. Young's testimony. In a very short final argument of a little more than 17 pages of transcript (23 RR 3-7, 17-30), the prosecutor repeatedly emphasized "strangulation":

> a) "All these doctors ...say it is likely she was strangled and at or near death at the time she received the blunt force injury.
> The doctor told you that in her opinion the strangulation could have caused death. The doctor told you that in her opinion after she was strangled she would have been incapacitated, unable to move. Brain dead, I believe, is the testimony she gave. She could not have jumped out of that vehicle...
> ...She died from strangulation and blunt force trauma."
> (23 RR 5-6.)
>
> b) "These doctors gave their medical opinion on cases that are tried everyday. It is our opinion that Marquetta George died as a result of homicidal violence including strangulation."
> (23 RR 20-21.)
>
> c) "But yet when he's pulling out of that driveway he's leaning over down into the floorboard doing something. And he can't stay on the road. Just like Mr. McDowell says, you can't drive down the road straight and strangle somebody. That's why he was all over the ditch because he had her right then strangling her."
> (23 RR 26-27.)

d) "He's brought down to the Sheriff's office for an interview. What did he tell y'all yesterday? Nobody at this point knows anything's happened to Markie regarding the strangulation but him. Nobody knows. The doctors haven't looked at her yet. You can look at the outside of her body and you can't tell she's been strangled. There's no fingerprints there. There's no cord cut in her neck."
(23 RR 28.)

e) "He starts lying right then when nobody is asking questions about her being strangled. He lies and he lies and he lies."
(23 RR 29.)

f) "The doctor says she was strangled. There is no controversy of that. Nobody controverted that. She was alive and well when she left the house. She was physically exerting herself to fight against being taken, kidnaped. She was strangled in the course of continuing that kidnaping. She died from it. Capital murder. He's guilty. You know it....."
(23 RR 29-30.)

Thus, "strangulation" was not only central to the State's case at final argument, it *was* their case, and this is what the jury last heard immediately before they retired to deliberate.

9) The jury inquired about strangulation during deliberations.

During jury deliberations, the jury sent a note to the Court asking for three items, one of which was "pictures of neck from autopsy where layers of skin were peeled away and four sets of pictures at scene where victim was laying on ground at scene." (23 RR 32.) This indicates that the jury was focused on "strangulation" as that is what the pictures of the victim's neck purported to depict. This also weighs against the hypothesis that the jury convicted on "blunt force" injuries alone.

10) On appeal, Acker was held to have strangled the victim.

As the TCCA held on direct appeal, "[t]he State's theory of the case, as expressed in the opening statement... was that the defendant strangled the victim, pulled her out of his truck, and then ran over her body with the truck." *Acker v. State,* No. 74,109 at *14. [USCA5.433.] From the outset, the State's theory was that the victim had first been strangled and the "blunt force"

trauma occurred only after that "strangulation." Strangulation figured heavily in the opinion denying Acker's appeal as to several points of error. The TCCA first summarized Dr. Gonsoulin's findings in detail and then stated that "[t]his testimony was consistent with the autopsy report, which came to the following conclusion" and then quoted verbatim that section of the autopsy report given *supra*. *Acker v. State,* No. 74,109 at *4- *5. [USCA5.423-424.]

The TCCA then added more detail on the "neck injuries" of the victim:

> On cross-examination, Gonsoulin admitted that crushing the brain stem—which occurred here—was an injury of the type that would cause instantaneous death by stopping the heart from beating, and thus could explain the lack of hemorrhaging in other parts of the body. The medical examiner also testified that it was possible for one to receive the neck injuries observed and survive. On redirect, however, the medical examiner testified that the neck injuries were so severe that a person suffering from them would have been incapacitated and might be brain dead, even if the heart were still beating. Gonsoulin also testified that the neck injuries occurred within hours of the victim's death.
>
> Appellant testified at trial. He denied strangling the victim and denied squeezing or gripping her neck.

Id. at *5. [USCA5.424.]

Point of error number three was ultimately rejected by the TCCA with the finding that "[w]hile appellant's self-serving statement [that the victim jumped] was at odds with the conclusions in the autopsy report, evidence does not become admissible...simply because it may lead to a different conclusion than other, admitted evidence." [*Id.*]

11) On state habeas, strangulation was again featured.

Similarly, the state habeas proceedings, such as they were given the illiterate and incoherent writ filed on Acker's behalf, are now rendered erroneous by the false "strangulation" testimony. The "State's Proposed Findings of Fact and Conclusions of Law" [USCA5.529-550], adopted by the trial court and the TCCA, contained many references where the absence of "strangulation" would have made a difference. For instance:

1) As to Claim No. 2, the trial court held that "[t]estimony by Dr. Morna Gonsoulin indicated that the victim could not have jumped out of the vehicle due to her being incapacitated [by strangulation]." [USCA5.531.]

2) As to Claim No. 14, the Court held that "Applicant has failed to show that had Mr. Sands testified as a criminologist, there is a reasonable probability that the outcome of the trial would have been different." [USCA5.536.] This finding is not now tenable in that "strangulation" has been ruled out.

The Fifth Circuit also acknowledged that "[i]t is true that the State's theory at trial was largely based on strangulation as the cause of George's death." *Acker v. Davis*, 693 F. App'x 384, 394 (5th Cir. 2017) (Appendix A).

iii. Wrongly excluded evidence of innocence also deprived Acker of due process and a fair trial.

The trial court erroneously sustained objections to witnesses who were highly relevant to Acker's case of actual innocence. Most seriously, the trial court gutted the defense's case at the guilt/innocence phase by disallowing probative evidence that the victim had previously tried to jump from the truck while Acker was driving it. The trial court disallowed other crucial evidence pointing to Acker's innocence:

a. Crucial testimony from the medical examiner was excluded.

The trail court did not allow a hypothetical question to be asked of medical examiner Gonsoulin regarding injuries that would be sustained if a person had jumped from a moving vehicle. (20 RR 257-258.) The questioning was as follows:

> Q. (Defense counsel) So if the medulla oblongata, the brain stem, was torn because of a fall from a vehicle...
> Mr. Long: Again I'm going to object. There's been no evidence of a fall from the vehicle.

The Court: Sustained.
(20 RR 258.)

The defense responded that it was entitled to ask a hypothetical question, which it then did:

> Q. Let me ask you a hypothetical. If someone falls from a vehicle going forty miles an hour and breaks or tears the medulla oblongata there's going to be instantaneous death, isn't that right?
> (*Id.*)

The Court stated that it was not based on the evidence and sustained the objection. (20 RR 259-260.)

The question was actually based on a reasonable conjecture about the evidence that had been presented through the medical examiner and the question was proper. As this was the defense's theory of the case, it greatly hindered and prejudiced Acker.

b. Erroneous exclusion of witness Sabrina Ball's testimony.

Ms. Sabrina Ball made a statement that two weeks prior to her death, George told Ball that George had tried to jump from the truck in circumstances similar to those on the day of her death. (21 RR 8-13, 20.) Ball's statement was offered by the defense under the excited utterance exception to the hearsay rule. (21 RR 14.) When George first showed up, she was hysterical but gradually calmed down once she was inside and made the call to the police. (21 RR 22-23.) However, the fight in the truck, when she attempted to jump, was mentioned first by George, when she was excited. (21 RR 25.)[16]

[16] *See also* USCA5.1913, her original statement.

The court went to great lengths to keep out this evidence. It first ruled that a spontaneous utterance must be a spontaneous reaction to an exciting event. (21 RR 29.) It then analyzed whether the entire statement was an excited utterance:

> Then she said five minutes had passed by then. And that's my question is we've gone probably five to seven minutes so far. There reaches a point where the excited utterance is no more and then it becomes hearsay.
> (21 RR 28.)

Even though the court held that "this is a close call", it then ruled that only the "first" part of the victim's statement, about Acker being crazy and threatening to kill George, was admissible, but the "latter" part about jumping out of the truck was not, because it was not an excited utterance as she was being questioned about the events. (21 RR 30.)

Thus, the court adopted a strained definition of "excited utterance" to keep out any part of the conversation that would have been probative to Acker's actual innocence and allowed in only the remarks that would have been harmful. The court's ruling flew in the face of the actual testimony as the witness had testified that George at first was more concerned with the fight in the truck, when she had attempted to jump, than with the later fight at the house, where the alleged threats were made by Acker. (21 RR 25.) There was also no clear indication that although some later statements were made about the truck incident under questioning, that these were not also made spontaneously at first. The bifurcation of this conversation into "excited" and "non excited" was clearly erroneous and shows the lengths the court went to in order to suppress the defense claims of actual innocence. The prejudice suffered by Acker was considerable, as the jury was unable to hear that the victim had previously jumped from the truck just a few weeks before the incident that led to her death.

c. Erroneous exclusion of witness William Brandon Anderson and Lewis Tatum's testimony.

The trial court also excluded Hopkins County Sheriffs Anderson and Tatum's testimony and statements regarding Ms. Ball's statement two weeks prior to George's death. Anderson testified *in camera* (21 RR 37-40) and Tatum's testimony would have been the same as Anderson's and the court ruled that both would be excluded. (21 RR 41.)

d. Erroneous exclusion of the testimony of defense investigator John Riley Sands.

Mr. Sands was the defense investigator. He testified *in camera* about his tests. (21 RR 129-142.) He told the court that he could not have opened the door and pushed someone out of the vehicle while driving on the road. (21 RR 142.) An objection to his evidence was sustained. (21 RR 143.) The trial court had earlier denied funds for a defense forensic expert because they had this investigator, but then refused to let him testify as to these forensic matters. As Mr. Ferguson testified at the trial court habeas hearing, "we asked for a criminologist; we were told to use Mr. Sands. We tried to use Mr. Sands, and we were unable to get that [the truck tests] in." (State Habeas Transcript at 173.)

The trial court refused to appoint a crime scene expert (6 RR 18-20) who could have performed these tests. Even if there was an expert so appointed, the court's ruling was in error because no special level of expertise was required for these tests. Additionally, seemingly forgotten by the trial court, was the fact that the prosecution had previously stipulated that Sands was a crime scene expert. (6 RR 19.) As such, the ruling was erroneous.

The TCCA's denial of Point of Error 5 was erroneous as that Court ruled as follows:

> Moreover, even if there were error, it would be harmless. The State's theory of the case, as expressed in the opening statement and closing argument, was that the defendant strangled the victim, pulled her out of his truck, and then ran over her body with the truck. The extensiveness of the victim's blunt force injuries suggests that she did not incur them simply by falling or being pushed out of a moving truck. Young's testimony also bolstered the theory that the victim was never pushed out of the truck but was strangled and then later pulled out of

> the truck from the passenger side onto the ground. Confirmation from a defense investigator that the victim could not have been pushed out of the truck would have done nothing to answer the State's case, and, in fact, could have been viewed as supporting Young's testimony and the State's theory that the victim was pulled out of the truck after being strangled.
> [USCA5.433.]

iv. Appellate and state post-conviction proceedings.

The miscarriages of justice continued on appeal when appellate counsel filed a 10-page brief, one of the shortest ever filed in Texas.[17] Even worse, if possible, were Acker's state post-conviction proceedings, where the vast majority of the application consisted of Acker's own memos and letters, submitted verbatim without even basic editing and sometimes without even changing them from the first person vernacular.[18] To characterize Acker's state habeas petition as incoherent would be an understatement. This woefully incompetent pleading was the subject of widespread media attention and incredulity.[19]

v. Federal habeas proceedings: the state repudiates its trial theory.

The evidence the jury heard at Acker's trial was significantly different from that adduced at a 2011 hearing in federal court, where the State had to repudiate its strangulation theory.

At the federal evidentiary hearing, both sides agreed that "strangulation was not the cause of death" of the victim, Marquetta George. [USCA5.2066.] Respondent replied that "[t]he

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[17] USCA5.380-392.

[18] *Compare* USCA5.443-519 (Acker's state application) *with* USCA5.586-627. (Acker's letters to appellate counsel attached to his response to contempt proceedings.) State habeas counsel copied them virtually verbatim into his writ application.

[19] *See* USCA5.872-891 (newspaper articles relating to Acker's state petition and others by state habeas counsel). Some of the media comments were that "the writ echoes Acker's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper" [USCA5.874]; that it was "filled with gibberish" [USCA5.878]; and that it "reads as if it was written by someone with an 8th Grade education. In fact, most of it was." [USCA5.879.] However, the only comment this petition elicited from the district court was to point out that "there were 39 actual claims" filed and to characterize criticism of it as "harsh." [USCA5.1993-1994.]

indictment in this case alleged three alternatives. Strangulation was Part Two of them. The third alternative was that Mr. Acker caused her death by blunt-force injuries." [USCA5.2067.][20] It was also agreed that "strangulation is not a viable theory here." [USCA5.2068.]

Both counsel agreed that "the court can consider all the evidence, even though it may not have been admissible at trial, such as hearsay." [USCA5.2070.][21] The Court asked whether "the prosecution advanced either strangulation, blunt force, or both." [USCA5.2071.][22] Acker's counsel observed that there was no stand-alone theory of blunt-force injury [USCA5.2073], that the State's case at trial depended on strangulation, and that their theory was that the victim was first "strangled to death and then, and only then, blunt-force injuries occurred." [USCA5.2151.] Attorney for Respondent stated "I think it's impossible to say that it [the State's theory at trial] was not strangulation...it's something they argued." [USCA5.2157-2158.]

Nancy Acker, Petitioner's mother, testified that on the day of George's death, before he turned himself in to the police, Acker told her that George had "jumped out of the truck and she was dead;" he was upset and "looked frantic." [USCA5.2087.] Mrs. Acker had heard that George had previously attempted to jump from a vehicle. [USCA5.2088.]

Sabrina Ball, a neighbor of Mr. Acker's mother in 2000, testified that the victim Ms. George, two weeks before her death, George came to Ms. Ball's door and said that she had an

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[20] This is incorrect. The indictment actually alleged "manual strangulation *and* ligature strangulation with an object, the exact nature of which is unknown to the grand jury, and blunt force injury resulting from causing her to impact a blunt object...." [USCA5.353, 355.]

[21] *See House v. Bell*, 547 U.S. 518, 538 (2006) ("*Schlup* [*v. Delo,* 513 U.S. 298 (1995)] makes plain that the habeas court must consider 'all the evidence,' old and new, incriminatory and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'")

[22] As shown herein, these theories were given in the charge to the jury, but not in the broad sense of the prosecution's overall trial theory. In virtually every other aspect of the trial, the State's position was that there was no "stand alone" theory of blunt force injuries and "strangulation" allegedly preceded the "blunt force injuries."

argument with Acker as they drove back from the club "Bustin Loose." [USCA5.2161.] George told Ms. Ball that she [George] had tried to jump out of the truck and "he [Acker] grabbed her by the hair of the head and pulled her back in." [*Id.*] In Ball's three-page statement, two weeks prior to George's death, [USCA5.2163] 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." [USCA5.1924.]

Regarding this incident, Lewis Tatum of the Hopkins County Sheriff's Office testified that about two weeks prior to the victim's death, he wrote in a report that Acker and George had gotten into an argument while driving home from a local club called "Bustin Loose" [USCA5.1913, 2098] and "Ms. George had tried to jump out of the pickup" while it was being driven by Acker. [USCA5.2096, 2099.] The statement also said that "he caught her by the arm and pulled her back into the vehicle." [USCA5.1913, 2096.] Acker's jury was not allowed to hear Tatum's testimony. (21 RR 41.) Another stipulation, from William Brandon Anderson of the Hopkins County Sheriff's Department [USCA5.1922] related to the same incident, when George attempted to jump from the truck two weeks prior to her death.

The third stipulation was to Walter Allen Story, of the same office, and it was regarding the times of the calls to the police on March 12, 2000. The 9-1-1 log recorded a call from Mr. Smiddy at 11:45 a.m., a call from Mr. Ferrell at 11:47 a.m., and Officer Hill arrived at the scene of the body at 11:51 a.m., and at 11:53 a.m., he called in to say that there was no pulse. [USCA5.2135.] This was his trial testimony. [USCA5.2137.] There was a stipulation that Acker surrendered to Sheriff Bill Reece after waving him down. [USCA5.2138.]

John Riley Sands, the defense investigator at the 2001 trial, testified that he drove the distance from Acker's residence to the crime scene, and it took about three to five minutes. [USCA5.2141-2142.] Mr. Sands also obtained a truck similar to the one used by Acker on

March 12, 2000. [USCA5.2142.] The inside was wider than a conventional sedan. [USCA5.2143.] The witness sat in the driver's seat and was unable to reach the driver's door while still being able to see the road and drive. [USCA5.2144.] It would have been difficult to open the door and push someone out of the truck. [*Id.*] This experiment was performed without anyone in the passenger seat who would have made the reach to the door further or who may have been resisting. [*Id.*] Acker was "a little bit" taller than the witness. [USCA5.2146.] The presence of another person in the truck would have made the opening of the door more difficult. [USCA5.2149.][23]

Another stipulation was entered into regarding witness Mr. Smiddy's statement about George's abduction a few minutes before her death. [USCA5.2169-2170.] The report read in part:

> dispatch advised him that complainant, being Mr. Smiddy, saw the male subject force the female subject into a white truck and then drive off. And while driving off, the female subject tried to exit the vehicle, and the male subject jerked her back in.
> [USCA5.2170; report is at USCA5.1928.]

There was an additional statement given by witness Alicia Smiddy, Mr. Smiddy's wife, on the day of George's death, March 12, 2000. [USCA5.2177]:

> Marquetta came running out of their house yelling for us to call the sheriff that he's not going to beat me! She got behind me so he couldn't get her, my 1- yr.-old was in the stroller by me. He came charging out of the house with no shirt with an evil mad look on his face, never saying anything, walked by my 1-yr.-old, picked Marquetta up over his shoulder, She was screaming, kicking, yelling No Daniel, No Daniel, trying her best to get loose. She started crying, he shoved her into a white utility truck on the Driver Door (sic) side. She was trying to get out. He hit her, shoved her on in, holding her down, spun off through the ditch. She

[23] The district court denigrated this testimony, holding only that Sands could not state that the truck was *exactly* the same as Acker's and that Sands was four inches shorter than Acker, [USCA5.1983], despite the fact that arm-reach was in issue, not height.

> was trying to get out he was swerving all over the road turned and went towards Mahoney. That was the last we saw.
> [USCA5.1930; 2177-2178.]

As to Dr. Larkin's testimony, it was stipulated that it was a possibility that George was 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." [USCA5.2176.]

Toney Hurley, of the Hopkins County Sheriff's Office performed an investigation on a similar truck, a 1999 Ford F350 one-ton with a bench seat. [USCA5.2181.] From window to window, the truck measured six feet and one-half inches and from door handle to door handle it is sixty-seven inches. [USCA5.2182.] This witness was two inches shorter than Acker; he was able to lean over and open the passenger-side door. [USCA5.2183.]

The district court held only that Hurley "was able to open the passenger side door from the driver's seat, though it was difficult," and "he is not as tall as Petitioner [by two inches] but was still able to reach and open the passenger side door." [USCA5.1983.] The district court focused on a possibly irrelevant two-inch height differential rather than what was in issue, arm-reach. Ignored was Hurley's testimony that "*from the center of the steering wheel with the wheels turned straight is 52 inches to the passenger-side door latch*." [USCA5.2182.] Of course, Acker would have had to reach further than that if he had attempted to push her out, as he would have had to hold the door open. Had any reasonable juror been shown how difficult such a long reach was, even without any resistance, there is little doubt they would have held that Acker did not push her out. These tests were done while the truck was stationary, no one else was in the truck, no one was trying to resist, there was nothing on the seat. [USCA5.2183-2184.]

Additionally, Hurley interviewed Acker the day after George's death, and when told that the medical examiner opined that George was first strangled and then run over, "Acker got very angry;" stated "the medical examiner is lying;" and "continually stated that Markie jumped out of the truck." [USCA5.1933, 2188.] Mr. Acker stated that he felt responsible for the death of the victim, as had abducted her, but he did not intend her death. [*Id.*]

The federal district court, barely over a month after being assigned this matter, denied relief by ignoring the many clear signs pointing to Acker's innocence.

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS UNCONSTITUTIONAL TO AFFIRM A CRIMINAL CONVICTION BASED ON 1) A THEORY NOT SUBMITTED TO THE JURY AND 2) FALSE AND ERRONEOUS TESTIMONY, WHERE THE STATE WAS RESPONSIBLE FOR THE ERROR WHICH WAS NOT APPARENT ON APPEAL.

As discussed *supra,* the State has advanced three different and conflicting theories of Acker's guilt. At trial, the State contended that Acker strangled the victim while driving, and any blunt-force injuries preceded the strangulation. In federal habeas proceedings, when the strangulation was discredited by their own expert, the State shifted to the theory that Acker pushed the victim out of the truck. Now, however, the theory has once again shifted, and the district court and the Fifth Circuit held that Acker inflicted blunt force injuries on the victim, laid her on the road and then ran over her. *Acker v. Davis*, 693 F. App'x at 395-396. This theory was not submitted to his jury at trial.

This Court has repeatedly held that "we cannot affirm a criminal conviction on the basis of a theory not submitted to the jury." *Chiarella v. United States*, 435 U.S. 222, 236 (1980). In *Dunn v. United States,* 442 U.S. 100, 106 (1979) this Court held that "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented at trial offends the most basic notions of due process." This is because "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn* at 106 (citing *Eaton v. Tulsa,* 415 U.S. 697, 698-699 (1974); *Garner v. Louisiana,* 368 U.S. 157, 163-164 (1961); *Cole v. Arkansas,* 333 U.S. 196, 201 (1948); *De Jonge v. Oregon,* 299 U.S. 353, 362 (1937)). *Dunn* held"[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.,* citing *Cole v. Arkansas, supra,* 333 U.S. at 201.

Dunn focuses on "the theory on which the case was tried and submitted to the jury." *Dunn,* 442 U.S. at 106. The *Dunn* court "regarded tangential references to [the alternative theory] as insufficient because, in the Court's view, the prosecution did not 'build its case' on such evidence." *Dunn,* 333 U.S. at 106.

Similarly, in *Chiarella ,* 445 U.S. at 236, this Court held that

> [w]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury. Even though, as here, the jury was given some words, from which the jury could have inferred a theory of guilt, the inclusion in the jury instructions of words sufficient to include the conviction may be insufficient if they fail to convey the 'nature and scope' of the charged offense.

In *Chiarella,* this Court regarded isolated phrases or side-references to the appellate theory as also constitutionally insufficient. *Chiarella* at 237 n. 21.

As was held in *Cola v. Reardon,* 787 F.2d 681, 697 (1st Cir. 1986)*, "Dunn* requires the appellate theory to be present in the indictment *and* the proof at trial [because] a fundamental sixth amendment concern [is] that guilt be initially adjudicated before a jury based on the government's cases as presented at trial." Because the references to that theory were "at best incidental" the conviction was reversed. *Id.* As that court put it, "where the prosecution's case at trial does not meaningfully reflect the appellate theory, due process cannot be reinstated through implicit references in the indictment." *Id.*

Similarly, in *Rewis v. United States,* 401 U.S. 808 (1971), this Court held the conviction invalid where the government offered an interpretation of the criminal statute upon which the defendant was not convicted. *Rewis* at 813-814. Even though there may have been "occasional situations" where the charged conduct may have violated the act in question, the conviction was reversed because the jury was not charged with this theory. *Id.* In *McCormick v. United States,* 500 U.S. 257 (1991), this Court held that interpreting the criminal statute at issue contrary to the

jury instructions resulted in the defendant's conviction being affirmed on legal and factual grounds that were never submitted to the jury.

These cases discuss the due process violation when an appellate court upholds a conviction based on a theory that was not submitted to the jury. The district court made the distinction that this claim is not presented on direct appeal [USCA5.1967] and dismissed Acker's analysis of these cases as "unsupported." [USCA5.1968.] The Fifth Circuit simply agreed with the district court without directly addressing the due process issue. *Acker v. Davis*, 693 F. App'x at 394.

Of course, this claim could not have been presented on appeal because it was only in federal habeas proceedings that the State changed its theory of the case. Appellate proceedings are limited to the trial record, which did not and could not show that Gonsoulin's testimony was false. Additionally, the State is responsible for the error, as their witness Dr. Gonsoulin presented it to Acker's jury. In these circumstances, the consistent holdings of this Court---that a conviction cannot be upheld based on a theory not submitted to the defendant's jury—must be applied to Mr. Acker's case.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER WHETHER DUE PROCESS IS VIOLATED BY A CONVICTION BASED ON FALSE OR ERRONEOUS EVIDENCE, REGARDLESS OF THE PROSECUTOR'S KNOWLEDGE, WHEN THE STATE WAS RESPONSIBLE FOR THE ERROR.

A. False testimony undermines due process and a fundamentally fair trial.

Acker presents a due process claim that State's presentation of the false (and later repudiated) evidence from State's witness Dr. Gonsoulin denied Acker a fundamentally fair

trial.[24] Acker has shown that the medical examiner presented false testimony at trial, violating his due process rights. Accordingly, Acker has shown the requisite constitutional error that would entitle him to proceed on his claims under 28 U.S.C. § 2244(b)(2)(B)(ii). That section permits relief to petitioners who can show by "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [them] guilty."

The Fifth Circuit held that "[i]t is true that the State's theory at trial was largely based on strangulation as the cause of George's death." *Acker v. Davis*, 693 F. App'x at 394. Yet that Court also held that "the federal habeas experts' disagreement with Dr. Gonsoulin's testimony that George was strangled does not mean that he testimony was necessarily 'false.'" *Id.* at 397. That holding ignores the fact that the State itself, through its own expert Dr. DiMaio, has repudiated the "strangulation" theory, so it is *de facto* false by the State's own admission at the federal evidentiary hearing [USCA5.2066-2068] and elsewhere. [USCA5.1827-46; 2157-58].

Acker's due process claim and the question of fundamental fairness at trial under the Due Process Clause presents a mixed question of law and fact. *Wilkerson v. Cain*, 233 F.3d 886, 890 (5th Cir. 2000); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997) (admission or exclusion of evidence under the Due Process Clause is a mixed question of law and fact).

New evidence discovered after trial is not alone a basis for federal habeas corpus relief, it must be material to some underlying constitutional violation to warrant habeas relief.[25] The

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[24] This argument is based on the analyses of the Courts in *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001); *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010); and *Pierre v. Vannoy,* 2016 WL 9024952 (E.D. La. 2016).

[25] In *Mooney v. Holohan,* 294 U.S. 103, 112 (1935), this Court held that it was impermissible for the prosecution to deceive the court and jury with the presentation of known false evidence. The Supreme Court later expanded this rule to include situations in which the prosecution does not solicit the false evidence but "allows it to go uncorrected when it appears." *Napue v. Illinois,* 360 U.S. 264, 269 (1959). As this Court in *Napue* explained, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the

evidence discovered post-trial that Dr. Gonsoulin's testimony was false, the State's admission that it was false, coupled with the wrongly-excluded evidence, rendered Acker's trial fundamentally unfair in violation of his due process rights under the Fifth and Fourteenth Amendments. At the time of the trial, it was not known that Dr. Gonsoulin's "strangulation" testimony was false. Nor could it have been known or revealed on appeal, as an appeal is limited to the four-corners of the trial record.

In some contexts, courts have found that the due process right to a fundamentally fair trial is violated only when substantial error that probably affected the verdict has occurred. For example, when a habeas petitioner challenges a state court's denial of a motion for a mistrial, federal habeas corpus relief is warranted only if the denial was an " 'error ... so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause.'" *Hernandez v. Dretke*, 125 F. App'x 528, 529 (5th Cir. 2005) (quoting *Bridge v. Lynaugh*, 838 F.2d 770, 772 (5th Cir. 1988)) (ellipsis in original). To obtain relief on such a claim, a petitioner must show that the trial court's error had a "substantial and injurious effect or influence in determining the jury's verdict." [The petitioner] must show that "there is more than a mere reasonable possibility that [the error] contributed to the verdict. [The error] must have had a substantial effect or influence in determining the verdict." In determining harm, this Court should consider (1) the importance of the witness's testimony; (2) whether the testimony was cumulative, corroborated, or contradicted; and (3) the overall strength of the prosecution's case. *Id.* (quoting *Brecht v.*

Fourteenth Amendment." *Id.* Thereafter, in *Brady v. Maryland,* 373 U.S. 83, 87 (1963) this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Abrahamson, 507 U.S. 619, 623 (1993); *Woods v. Johnson*, 75 F.3d 1017, 1026 (5th Cir. 1996)) (citing *Sherman v. Scott*, 62 F.3d 136, 142 n.6 (5th Cir. 1995)).

Acker clearly meets this standard, as the Fifth Circuit has acknowledged that the State's case was "largely based on strangulation," *Acker v. Davis*, 693 F. App'x at 394 (Appendix A), and without it, the State's case would have been crippled.

Similarly, when the exclusion of evidence at trial is alleged to deny "a fundamentally fair trial, the evidence must be 'material,' in the constitutional sense that it 'creates a reasonable doubt that did not otherwise exist' as evaluated 'in the context of the entire record.' *Jimenez v. Walker*, 458 F.3d 130, 146 (2nd Cir. 2006) (quoting *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.' But 'if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.' " *Id*. at 146-47 (quoting *Agurs*, 427 U.S. at 112-13). Here the trial court excluded several important items that pointed to the fact that George jumped from the vehicle.

Acker's fundamental fairness claim for habeas corpus relief is that he is entitled to a new trial based upon this newly discovered evidence that there was no strangulation. Although unknown at the time of trial, it was material to the case against Acker, which, as discussed *supra*, was based substantially on the State's theory that the victim was strangled, as the Fifth Circuit has acknowledged. *Acker v. Davis*, 693 F. App'x at 394.

In evaluating the significance of newly discovered evidence, the standard in the Fifth Circuit relative to the issue of whether a motion for new trial should be granted based upon newly discovered evidence is set forth in *Berry v. State*, 10 Ga. 511, 1851 WL 1405 (1851). Such standard is known as the *Berry* rule and has been recognized by the Fifth Circuit as the

applicable standard under the circumstances. *See U.S. v. Piazza*, 647 F.3d 559 (5th Cir. 2011). Under the *Berry* rule, the four (4) elements that a defendant must show to obtain a new trial based upon newly discovered evidence are: ["](1) that the evidence is newly discovered and was unknown to him at the time of trial; (2) that the failure to discover the evidence was not due to his lack of diligence; (3) that the evidence is not merely cumulative, but is material; and (4) that the evidence would probably produce an acquittal. *U.S. v. Blackthorne*, 378 F.3d 449, 452 (5th Cir. 2004).[26]

Although the Fifth Circuit's decisions in *Piazza* and *Blackthorne* (which are cited in some of the district court habeas corpus cases listed above) involved motions for a new trial pursuant to FED. R. CRIM. P. 33 by defendants who had been convicted in federal court, the Fifth Circuit has also applied the *Berry* rule in cases alleging that newly discovered evidence justified habeas corpus relief, such as *Bell v. Cockrell*, 31 F. App'x 156 (5th Cir. 2001), cert. granted & judgment vacated on other grounds, 536 U.S. 954 (2002), and *Lucas*, 132 F.3d at 1074, 1075 n.3 (citing *United States v. Freeman*, 77 F.3d 812, 816-17 (5th Cir. 1996); *Berry*, 10 Ga. at 511). In these cases, the Fifth Circuit applied the *Berry* factors as a threshold step in evaluating whether the petitioner had presented enough newly discovered evidence to assert an underlying constitutional claim, such as a claim of actual innocence (*Lucas*) or ineffective assistance of counsel (*Bell)*. *See*

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[26] *See also, Spring v. Sec'y, La. Dep't of Corr*., No. 11-308-BAJ-CN, 2012 WL 1065530, at *6 (M.D. La. Mar. 8, 2012), report & recommendation adopted, 2012 WL 1065498 (M.D. La. Mar. 28, 2012);24 *accord Holton v. Cain*, No. 3:11-CV-00749-BAJ-RL, 2014 WL 3189737, at *8 (M.D. La. July 8, 2014) (citing *Piazza*, 647 F.3d at 565); *Kuenzel v. Allen*, 880 F. Supp. 2d 1162, 1177 (N.D. Ala. 2009), *aff'd sub nom. Kuenzel v. Comm'r, Ala. Dep't of Corr*., 690 F.3d 1311 (11th Cir. 2012) (citing *Lucas v. Johnson*, 132 F.3d 1069, 1074, 1075 n.3 (5th Cir. 1998)); *Smith v. Quarterman*, No. SA-07-CA-399-XR, 2008 WL 2465400, at *6 (W.D. Tex. June 17, 2008) (citing *Blackthorne*, 378 F.3d at 452); *Jacobs v. Waller*, No. 1:05CV130-LG-RHW, 2008 WL 681034, at *8 (S.D. Miss. Feb. 6, 2008) (citing *Lucas*, 132 F.3d at 1076); *Baker v. Cain*, No. 05-3772, 2007 WL 1240203, at *6 (E.D. La. Apr. 26, 2007) (citing *Lucas*, 132 F.3d at 1076)

Kuenzel, 880 F. Supp. 2d at 1177 (A threshold question is whether "evidence proffered in support of an innocence claim is new. 'New evidence' has not been defined by the Supreme Court or the Eleventh Circuit Court of Appeals in the context of the actual innocence gateway, but the Fifth Circuit Court of Appeals, evaluating both a free-standing actual innocence claim and a 'gateway' claim in *Lucas* ..., set the same evidentiary standard for both.")

In *Piazza*, the Fifth Circuit affirmed the trial court's finding that the "proposed testimony would probably produce an acquittal for [defendant]" because it was more likely than not that the Piazza brother who sold the guns to the buyer was his brother rather than the defendant. Piazza, 647 F.3d at 568- 569. "The totality of the new evidence could rise to the level of creating a reasonable doubt" that the defendant had committed the crime. *Id.* at 570 (emphasis added).

In Acker's case, the totality of the false strangulation evidence and the wrongfully excluded evidence makes it more likely than not that a reasonable doubt about his guilt would be created in the minds of the jury. The evidence that the victim was not strangled; was struggling to get out of the truck just minutes prior to her death; evidence that it would have been virtually impossible to push the victim out of the vehicle; and evidence that she had tried to jump from the same truck on February 26, 2000, just two weeks prior to her death, all rise to the level of creating a reasonable doubt about Acker's guilt.

B. The Second and Ninth Circuits hold that a constitutional due process violation can result from false testimony when the prosecutor did not know of the falsity.

The United States Courts of Appeals for the Second and Ninth Circuits have both held that a federal constitutional due process violation can result from false testimony at trial, even

when there is no knowledge or misconduct by the prosecutor. As explained by a district court in the Second Circuit,

> [a] petitioner's claim that his or her conviction was based on perjured testimony is analyzed under the Due Process Clause of the Fourteenth Amendment. The threshold question is whether the witness in fact committed perjury. 'A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory.'
>
> Once that threshold determination has been met, '[w]hether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury.' 'Where the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' When there is no indication the government knew that the testimony may have been perjured, "a new trial is warranted only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted."

Thornton v. Smith, No. 14-CV-3787, 2015 WL 9581820, at *11 (E.D.N.Y. Dec. 30, 2015) (citing Napue, 360 U.S. at 269) (quoting *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001); *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)) (internal citations and quotations omitted) (emphasis added); *see also Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010) (quotation and citations omitted) ("A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness.").[27]

In *Napue v. Illinois,* 360 U.S. 264, 269 (1959), this Court explained that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *See*

[27] Although some of the cases cited herein deal with perjured testimony, the main cases also refer to false testimony and use the terms interchangeably. *See, e.g. Maxwell,* 628 F.3d 486 at 499; *Wallach*, 935 F.2d at 456.

also United States v. Agurs, 427 U.S. 97, 103 (1976) (stating that "the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair"). Similarly, a defendant's due process rights are violated when it is revealed that false evidence brought about a defendant's conviction. *See, e.g., Killian v. Poole,* 282 F.3d 1204 (9th Cir.2002).

A constitutional error resulting from the use of false evidence by the government requires a new trial, "if the false testimony could ... in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States,* 405 U.S. 150, 154 (1972) (quoting *Napue,* 360 U.S. at 271). Here, the false testimony was clearly material and undermines confidence in the judgment of the jury. *See Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

Review of the state court's factual determination is controlled by 28 U.S.C. § 2254(d)(2). AEDPA § 2254(d)(2) authorizes federal habeas relief in those cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See Miller–El v. Cockrell,* 537 U.S. 322, 324 (2003).

As Gonsoulin's testimony was false, the state court determination was based on an unreasonable determination of the facts. The next question is whether being convicted on the basis of the false testimony violated Acker's right to due process under the Fourteenth Amendment. *See Agurs,* 427 U.S. at 103. First, because the state court's decision was "based on an unreasonable determination of the facts" under § 2254(d)(2), the false evidence of strangulation, the AEDPA deference no longer applies. *Detrich,* 619 F.3d at 1059. Therefore, the Court " 'resolve[s] [the]claim without the deference AEDPA otherwise requires.' " *Panetti v. Quarterman,* 551 U.S. 930, 953 (2007). As explained in *Detrich v. Ryan,* 740 F.3d 1237 (9th Cir. 2013), this is in accord with the deference principles of AEDPA because—in light of the state

court's reliance on incorrect facts—"we do not know what the state court would have decided ... [and] there is no actual decision to which we can defer." *Id.* at 1060.

C. The Fifth Circuit has held that the prosecution must have knowingly used the false testimony.

In contrast, however, the majority of federal circuit courts, including the Fifth Circuit, decline to follow the Second and Ninth Circuits and instead require a petitioner to prove governmental knowledge of the false testimony as a prerequisite to a new trial or habeas relief. "The Fifth Circuit has long abided by the standard requiring that for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction." *Black v. Collins*, 962 F.2d 394, 407 (5th Cir. 1992); *see also United States v. Puma*, 210 F.3d 368 (5th Cir. 2000) (In a 28 U.S.C. § 2255 case, resolving petitioner's "allegation of a due process violation based on a coconspirators's [sic] perjured testimony is unnecessary because even if he could establish that the testimony was perjurious, he failed to make any showing that the Government knew that the testimony was untrue.); *May v. Collins*, 955 F.2d 299, 315 (5th Cir. 1992) (Petitioner must show that (1) a witness "gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false.").

As one Court has observed, "[t]he United States Supreme Court has not resolved this split among the circuit courts, leaving no 'clearly established Federal law, as determined by the Supreme Court' to guide the lower courts in applying the Section 2254(d)(1) standard of review." *Pierre v. Vannoy,* 2016 WL 9024952 (E.D. La. 2016). *See also Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting from denial of certiorari) (The Ninth Circuit "stretched the Constitution, holding that the use of false testimony violated the Fourteenth

Amendment's Due Process Clause, whether or not the prosecution knew of its falsity. We have never held that, and are unlikely ever to do so. All we have held is that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."); *Kinsel v. Cain*, 647 F.3d 265, 271 (5th Cir. 2011) (The Supreme Court has never clearly established whether a due process violation occurs "when perjured testimony is provided by a government witness even without the government's knowledge."); *but see Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of certiorari) (urging that the Supreme Court had not, but should, consider whether due process is violated by a conviction based on perjured or false testimony regardless of the prosecutor's knowledge).

A grant of certiorari is needed to resolve this split of authority.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to consider the questions presented by this petition.

Respectfully Submitted,

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