No. 17-7045

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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REPLY BRIEF FOR PETITIONER

CAPITAL CASE

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Respondent's Brief In Opposition ("BIO") is based on assertions regarding the record, Petitioner's arguments, and the law that do not withstand scrutiny.

I. There is no "significant vehicle problem."

Respondent's first section attempts to show that there is a "significant vehicle problem" to this Court's review because Mr. Acker has allegedly "not presented the necessary antecedent question whether he can show actual innocence under the *Schlup* [*v. Delo*, 513 U.S. 298 (1995)] gateway for procedurally defaulted claims." (BIO at 7-16.) The assertion that "Petitioner did not

include this issue "in his questions presented" and "has thus forfeited review of this only issue actually decided below" (BIO at i, 10), is a misrepresentation.

Virtually the entire petition describes in detail how Acker has met the standard for "actual innocence" claims, argued that he has made a "showing that he is actually innocent of capital murder" (BIO at i), and that he has "satisfied *Schlup*'s actual-innocence gateway." (BIO at 7-10.) The factual summary (Petition at 4-24) and both questions presented deal with precisely that---the presentation by the State of false or erroneous evidence, the suppression of evidence indicating Acker's innocence, the State's three different theories of the murder, and both the State and defense experts discounting the trial theory of "strangulation"---all clearly present the actual innocence argument. The questions here are not barred from review simply because they are not framed or worded exactly as Respondent would prefer. Even so, *Schlup* was mentioned (Petition at 20) and both the district court and the Fifth Circuit reviewed this innocence claim on the merits, as Respondent acknowledges. (BIO at 6 ("the court extensively analyzed petitioner's gateway claim of actual innocence") and BIO at 8-16.)[1] This Court reviews judgments, not statements in opinions or briefs. *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015); *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99 (1991).

[1] However, in denying Acker a certificate of appealability ("COA") by examining the merits, the Fifth Circuit continues to disregard this Court's holding in *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) and elsewhere. ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' *Miller-El v. Cockrell,* 537 U.S. 322*,* at 327. This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.' *Id.,* at 336. 'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Id.,* at 336–337.)

II. The due-process claim is exhausted, and the State's new theory was never presented to Acker's jury.

A. The claim is exhausted.

Respondent asserts that "petitioner has not exhausted his state-court remedies." (BIO at 17-19.) This is simply incorrect, as even Respondent's own pleadings admit. When Acker moved to stay proceedings in the federal district court and return to state court to exhaust his claims, he fairly presented to the state courts what was then known about his actual innocence, the most important fact being defense expert Dr. Larkin's discrediting of the coroner's strangulation theory. The state court dismissed it as procedurally defaulted, *Ex parte Acker*, No. WR-56,841-04, 2008 WL 4151807 at *1, but, under the actual innocence exception to procedural default, both the district court and the Fifth Circuit considered Acker's due process claim on the merits.

Respondent's assertion that "Petitioner's current conception of his due-process claim—that he was convicted based on false evidence based on a theory that was never submitted to his jury...was never submitted to a state court for review" (BIO at 18) is doubly wrong. The due process claim that Respondent complains was not brought in his federal petition (BIO at 17-18) discusses the federal district court and the Fifth Circuit's new theory—that Acker immobilized the victim in the truck, placed her on the ground, and then ran her over. This theory *did not exist* when Acker filed his federal petition, as the district court and the Fifth Circuit had not yet formulated it or ruled. Acker cannot be faulted for failing to address a ruling or a theory which did not exist and he is limited on appeal and on *certiorari* to the holdings of the courts below.

Second, it is not true that "petitioner's claim relies almost entirely on new evidence from the federal evidentiary hearing—which petitioner never subsequently presented to a state court." (BIO at 18.) This "new evidence" is mainly *the State's new evidence*, their witness Dr. DeMaio's opinion discrediting the coroner's strangulation testimony, first presented at the federal evidentiary hearing. The rest of the evidence at this hearing---including Dr. Larkin's similar report discrediting the coroner Dr. Gonsoulin, evidence the victim had tried to jump from the truck a few days before her death, Broadie Young's false report of seeing two people arguing in the truck---was largely presented to the state court in the exhaustion petition. Acker had no reason, or even a valid rationale, to return to State court again while awaiting a ruling in the district court on the evidentiary hearing, a wait he could not have anticipated would last five years.

Even so, in federal habeas, both parties [USCA5.2070] and the district court explicitly stated it was considering "all the evidence" as *Schlup* and *House v. Bell,* 547 U.S. 518 (2006) make clear that a "holistic" view of all the evidence, that presented at trial and in the habeas proceedings, is properly under consideration. *House,* 547 U.S. at 539. [*See* USCA5.1872 n.26.] The claim was held to be exhausted in the courts below; likewise, it is exhausted here.

B. The State's new theory was not presented to Acker's jury.

Contrary to Respondent's arguments (BIO at 19-25) the State's new theory of blunt-force injuries was not presented to Acker's jury. Respondent ignores the fact that virtually all facets of Acker's conviction and death sentence, the indictment, the victim's autopsy, the grand jury indictment, the opening statements, trial testimony, closing arguments and jury deliberations, the appeal and state habeas, were based on the false theory that the victim had been *first* strangled by

Acker, and *then* the blunt force injuries occurred post-mortem. (*See* Petition at 7-15 for an extensive discussion.)

The standard is that "it is more likely than not that no reasonable juror viewing the evidence as a whole would lack reasonable doubt." *House*, 547 U.S. at 554. Applying that standard, Respondent's logic is seriously flawed. For instance, Respondent (BIO at 25) and the district court emphasized the jury instructions, which included one theory, that of blunt force injuries. [USCA5.1963-1965.] But simply because the jury was given two options out of five[2] that death was caused by blunt-force injuries does not show that the jury *would have* convicted Acker using that theory, only that the jury *could have* convicted him on that theory. This is not the correct test for the actual innocence review. The totality of the evidence must be weighed, not just the one jury instruction emphasized by Respondent and the district court.

While the jury was given the option of finding Acker guilty based solely on a finding that George died from "blunt force" injuries, this theory was actually presented at trial as part of the wider "death by strangulation" theory. As Acker has shown (Petition at 7-15) there was no "stand alone" theory of blunt-force injuries; blunt-force injuries were alleged to have occurred *after* a fatal strangulation we now know never happened. The fact that the prosecution may have covered all their bases in the jury instructions does not equate to a coherent theory of "blunt force" injuries, standing alone.

The lack of a "stand-alone" theory of blunt-force injuries can be seen from the record. *See, e.g.*, USCA5.1009 (autopsy); 19 RR 19 (opening argument); 20 RR 207, 219-221, 273-274

[2] Not four as the district court indicated. [USCA5.1963-1965.] The guilt-phase jury instructions are at USCA5.357-361.

(coroner's testimony);[3] 23 RR 5-6, 26-30 (final argument); USCA5.423-424 (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 then ran over her.[4]

Respondent fundamentally misconstrues the entire argument in asserting that "the due-process concern in the line of cases petitioner points to was the possibility that the defendant had 'been punished for noncriminal conduct'" (citing *Chiarella v. United States*, 445 U.S. 222, 237 (1980), and that Acker "merely contends that his trial focused principally on one method of committing capital murder (strangulation) as opposed to another (blunt-force injury)." (BIO at 19.) This misses the central and obvious point: that Acker did neither, that the victim jumped, and that the State's reliance on false evidence of strangulation rendered his trial unfair. Even now the State cannot formulate a coherent theory of Acker's guilt.

Here "one method" (BIO at 19)---blunt force injuries caused by jumping, being hit by the protruding utility bed, causing a failure to clear the truck's path and then being run over--- means that Acker did not commit capital murder. Acker is not contending that the trial merely wrongly focused on one manner of committing capital murder instead of another, but that it focused on strangulation, which has now been disproved, which, added to his other evidence, means he is

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

[4] It is actually unclear what "blunt force injuries" theory the State is now advocating, as it has gone from strangulation, to pushing the victim out of the truck, to hitting her on the head while in the truck, to now apparently adopting the district court's new theory that Acker placed her on the road and then ran her over while she was unconscious.

innocent of capital murder. The trial references to blunt force injuries referred to injuries that *followed* strangulation.[5]

The record shows that Acker's trial, appeal and state habeas were all based on the State's now-disavowed strangulation theory. (Petition at 7-15.) This is not a matter of merely "precisely how [Petitioner] killed [the victim]," as the Director contends. (BIO at 20.) Rather, the basis of the State's case has now been shown to be false.

C. Respondent's distinction between direct appeal and habeas is unavailing.

Respondent attempts to limit the cases Acker cited (Petition at 25-27) to applying only to direct appeal, asserting that Petitioner "ignores the distinction between a direct appeal and habeas review," and the issue is "whether petitioner has met his burden on his gateway actual-innocence claim" (BIO at 19-22.) This is also unavailing and misleading. Respondent attempts to differentiate this habeas case from appellate review, citing the district court's habeas role as making "*a probabilistic determination on a totality of the evidence, including newly adduced evidence*." (BIO at 20 citing *Acker*, 2016 WL 3268328 at *11 [USCA5.1966] (emphasis in original).) But this ignores Acker's showing that the district court never made a reasonable probabilistic determination and ignored virtually all of Acker's evidence of innocence. Far from "scour[ing] the trial record" for evidence of Acker's innocence (BIO at 12), as Respondent contends, the district court ignored most of Acker's argument regarding the centrality of "strangulation" to the State's case. The district court's review was so cursory and hurried[6] that it mistakenly construed Acker's showing of the difficulty to near impossibility of his pushing

[5] *E.g.,*19 RR 19 (opening argument); 20 RR 207, 219-221, 273-274 (coroner's testimony); 23 RR 5-6, 26-30 (final argument).

[6] The opinion was issued only a few weeks after the case had been reassigned to it.

George out of the truck, because she presumably would have resisted, as inconsistent with his argument that she jumped. [USCA5.1984.]

The main case Respondent cites for distinguishing between habeas review and direct appeal, *Gattis v. Snyder,* 278 F.3d 222 (3d Cir. 2002) (BIO at 19- 21), is easily distinguishable, as in the very same footnote quoted (BIO at 19-20) the court stated it denied relief in *Gattis* because

> the indictment...did not charge him with killing her in a particular manner...the evidence used to support the government's different accounts (to the extent that they are different) of what happened is exactly the same in each case... Indeed, it is unclear that there was a different "theory" here in the sense at issue in *Dunn* [*v. United States,* 442 U.S. 100 (1979)] and *Cola* [*v. Reardon,* 787 F.2d 681 (1st Cir. 1986)]; the only variation concerns precisely how Gattis killed Slay: did he kick open the door, walk up to Slay and shoot her at close range between the eyes or kick open the door and shoot her at close range between the eyes at the door, perhaps by reaching around it?
> *Gattis,* 278 F.3d at 238 n.7.

Additionally, the *Gattis* court held that "the state's theory played a small role, if any, in the courts' reasoning." *Gattis,* 278 F.3d at 238. None of these factors are present here. Respondent misleads in arguing that *Gattis* was decided on the basis that the claim was brought not on direct appeal but on state habeas. Respondent quotes *Gattis* as holding "'[t]he fundamental flaw' in that argument to be that '[t]he allegedly different theory of guilt was not presented on direct appeal in support of his conviction but in the course of a post-conviction hearing" (BIO at 21), but misleadingly omits the rest of the sentence: "held in connection with his claim that counsel was ineffective for failing to present expert testimony concerning the implausibility of the state's account of the murder." *Gattis,* 278 F.3d at 238. Thus, unmentioned by Respondent, the court in *Gattis* denied relief on an entirely different claim.

III. Acker has made a strong showing that false evidence was introduced at his trial and of his innocence.

A. False evidence.

Respondent seeks to reduce Acker's innocence claim to a dispute between two experts who simply disagreed as to the cause of death. (BIO at 31-37). However, Respondent fails to address much of Acker's claim and even her own summary of the evidence shows strong indicia of innocence. The trial testimony establishes that "Petitioner...grabbed George, slung her over his shoulder, and forced her—kicking and screaming—into his pickup truck..." (BIO at 2), yet this was 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. She succeeded just a few minutes later.[8] Acker's desire to bring her to a meeting with the man with whom George had spent the night (BIO at 2) was never reconciled with the State's theory that Acker supposedly deliberately killed her *en route* to that meeting, when his only plausible motive for her abduction was to have her present at the meeting with the man with whom she spent the night. The Director also falsely states that "Petitioner was quickly arrested," (BIO at 3), but the record is clear that he voluntarily turned himself in. [USCA5.2138, 2188, 2232.]

Likewise, Respondent attempts to explain away the "oft-denied circuit split" regarding the introduction of false evidence by claiming no false evidence was introduced here. (BIO at 31-39.) But this Court has long considered arguments that the introduction of faulty evidence violates a petitioner's due process right to a fundamentally fair trial—even if that evidence does

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[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 district court's holding that there was "no actual evidence" that George had jumped on the day of her death. (BIO at 14, citing USCA5.1983.)

not specifically qualify as "false testimony." *See Estelle v. McGuire,* 502 U.S. 62, 68–70 (1991); *Dowling v. United States,* 493 U.S. 342, 352–53 (1990).

The ultimate holding of the panel and the district court on the due process/innocence claim is based on false and discredited evidence:

> the totality of the evidence, if presented to a reasonable jury, overwhelmingly supports the strong inference that Ms. George was unconscious or incapacitated when Mr. Young saw petitioner pull her from the truck and lay her along the road in front of that truck, that petitioner subsequently ran over Ms. George with his truck, and that event was the cause of her death.
> (*Acker v. Davis*, 693 F. App'x at 394.)[9]

No witness, including Young, ever testified to this at trial, the witnesses upon which it relies (the Smiddys[10] and Young) told inconsistent stories, and it is a purely speculative assumption by the district court which was adopted by the Fifth Circuit. Respondent never

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[9] Acker's conviction on appeal was also upheld based on a theory that has now been completely discredited and disavowed by the State:

> *Extremely damaging evidence* came from the medical examiner's testimony and her autopsy. As we have summarized above, the medical evidence showed that *the victim was strangled to the point of death or near-death before she received any blunt-force injuries*. *After strangulation, she was in no condition to move, much less jump out of a vehicle.*
> *State v. Acker*, 2003 WL 22855434 (Tex. Crim. App. Nov. 26, 2003) at *12. [USCA5.431] (emphasis added).

The Director ignores the fact that due process is primarily concerned with the fairness and accuracy of the result. Here, as the State was responsible for the error, the standard for materiality is low: that the false testimony contributed to the conviction. *United States v. Bagley,* 473 U.S. 667, 678-680 (1985).

[10] The Smiddys, witnesses to Acker's abduction of George, testified inconsistently with their initial statements regarding George trying to get out of the truck and Mr. Smiddy's original statement "does not include that he heard a noise that sounded like someone being hit and then did not see George, as he testified at trial." *Acker*, 693 F. App'x at 395. Yet the opinion relies on this testimony to conclude that George was rendered "unconscious or incapacitated" in the truck and then run over. *Id*. at 394.

mentions that Young was discredited at trial as someone who initially told a story that buttressed the State's theory—before that theory changed.[11]

Young's initial statement was that he 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.) Young testified 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); and 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.) Young admitted "exaggerating some." (19 RR 228.) He claimed that the only time he saw the lady is when she was pulled out of the truck. (19 RR 238.) In all, Young 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.) Young actually testified that Acker *did not* run over George. (19 RR 231.) It is significant that on the day of the victim's death, Young gave a story he later repudiated when it became inconsistent with the State's theory that Acker had strangled George while driving.

While Respondent, following the district court, cites alleged threats against George by Acker (BIO at 12,citing 19 RR 71; 19 RR 73-74;19 RR 89-115), nowhere is it acknowledged that Acker did not kill George upon her return and these alleged threats were directed at *both* George and "her suspected paramour," "the man he suspected she had been sleeping with." (BIO at 12.) Acker's jealousy was directed at finding out whether George had been unfaithful, his

[11] The opinion asserts that "Acker attacks the credibility of Young's testimony on the basis of Young's giving inconsistent statements to the authorities, yet he relies on Young's testimony that the truck did not run over the woman." *Acker*, 693 F. App'x at 396 n.1. However, the district court and the panel opinion rely on Young, not Acker, who has argued and shown that Young should be afforded no credibility whatsoever. *See* Acker's COA application at 45-48, where Acker argues Young was "discredited as a liar."

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.[12]

The Director's attempt to show that the district court's analysis was not one-sided (BIO at 11-16) actually shows the opposite. The court is credited for "discounting" the strangulation evidence, even though the State itself had already discounted it and admitted there was no strangulation. (Opposition at 14-16.) 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 Maio's testimony. (BIO at 14.) 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 14, citing USCA5.1983.) 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 14 citing USCA5.1983.)[13] Respondent credits the district court because it "took account of the testimony

[12] Respondent misrepresents the record in claiming that "petitioner finally caught up with George the morning of her death" and "when petitioner arrived back at the trailer house he shared with George, George ran out..." (BIO at 13.) This inaccurately portrays Acker as pursuing George and immediately killing her. The record is clear that Acker was at the trailer when George returned; they talked amicably when she arrived; that she went in 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.)

[13] Unless "actual evidence" means "eyewitness evidence," this is misleading, 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, *Acker*, 693 F. App'x at 394-395, and his accounts have always been consistent, from turning himself in, to his post-arrest police interviews, to his trial and evidentiary hearing testimony.

of Broadie Young" (BIO at 13), while ignoring the fact that Young gave inconsistent versions, lied about seeing two people arguing in the truck, retracted that story when it became incompatible with the State's strangulation theory, and did not even testify as the district court held he did. Any evidence favorable to Acker was ignored or distorted.

B. Respondent's attempt to reduce false evidence to a mere disagreement is contrary to this Court's precedents.

Respondent argues that the mere disagreement of experts does not render the testimony false. (BIO at 31-37.) However, even though it has been shown the testimony was false, courts also permit petitioners to seek relief from convictions based on flawed forensic evidence. Scientific evidence introduced at trial violates due process rights if the evidence "infect[ed] his entire trial with error of constitutional dimensions." *Murray v. Carrier,* 477 U.S. 478, 494 (1986). This is not only a "freestanding innocence claim," but also a due process claim, as argued herein. *Lee v. Houtzdale SCI,* 798 F.3d 159, 162 (3d Cir.2015). A constitutional violation from the introduction of flawed expert testimony at trial occurs if this evidence "undermined the fundamental fairness of the entire trial." *Id.* at 162. Such is the case here.

In order to constitute a due process violation, the testimony used by the State must have been false and it must have been material to the defendant's conviction, meaning that 'there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103-104 (1976); *Ex parte Ghahremani,* 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). It is impossible to subtract the false testimony of strangulation and add the improperly-excluded evidence of Acker's innocence and come to the conclusion that the fundamental fairness of Acker's trial was not undermined.

C. Acker's state habeas petition was "gibberish."

Respondent makes much of Acker's failure to raise this claim in his first state habeas petition [USCA5.443-519] (*e.g.*, BIO at 26, ("petitioner fails to address why any due-process violation that occurred as a result of the trial court's evidentiary ruling could not have been addressed in petitioner's first state habeas petition.") Unmentioned is the fact that the first state habeas petition was submitted by a trial-court-appointed attorney so incompetent he copied Acker's own ramblings into the petition and, as a result, it was literally gibberish. *See* USCA5.872-891 (newspaper articles relating to Acker's state petition and others by this 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.][14] Likewise, Respondent merely states, incorrectly, that it "present[ed] forty-six claims of error." (BIO at 4.) Acker is not at fault for state habeas counsel's incompetence.

[14] A review of this disgraceful pleading will easily dispel any doubts about the criticism being overly "harsh." [USCA5.443-519].

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 [USCA5.380-392] and his state writ was incoherent gibberish. This Court should decline this invitation.

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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