No._____

In the Supreme Court of the United States

IN RE DANIEL CLATE ACKER,
Petitioner.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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

A. Richard Ellis*
75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251
a.r.ellis@att.net

Maureen Scott Franco
Federal Public Defender
Western District of Texas

Timothy P. Gumkowski
Assistant Federal Defender
504 Lavaca St., Suite 960
Austin, TX 78701
(512) 916-5025
tim_gumkowski@fd.org

* Counsel of Record for Applicant
Member, Supreme Court Bar

CAPITAL CASE

QUESTION PRESENTED

This original petition presents two compelling reasons for this Court to grant the petition. First, Mr. Acker is due to be executed on Thursday, September 27, 2018 based on a theory of liability that the State itself has repudiated in federal court. All facets of Mr. Acker's trial were based on the State's allegations and false evidence that he strangled the victim which has now been shown to be false. His appellate and state post-conviction proceedings were completely inadequate, amounting to a disgraceful farce. The State has adopted three differing and contradictory versions of his guilt, and the current version is not supported by witness testimony and was never presented to his jury.

Second, since this Court decided *Herrera v.Collins*, 506 U.S. 390 (1993), there has been confusion regarding the standards for actual innocence, new technology has added greater significance to these claims, and there are compelling reasons under the Eighth Amendment to recognize a free-standing actual innocence claim since *Herrera* was handed down.

This petition thus presents the following question:

Whether an original writ of habeas corpus is appropriate in the case of a death-sentenced individual who was convicted and sentenced to death on a theory of liability that has been proven false, is repudiated by the State, and was never presented to the jury?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Daniel Clate Acker, was the Applicant before the Texas Court of Criminal Appeals in a subsequent application for a writ of habeas corpus. In previous matters, Mr. 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 and this Court. 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 prosecuting attorney of the 8th Judicial District Court of Hopkins County, Texas and the Director and her predecessors were the Respondents before the Texas Court of Criminal Appeals, 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 and this Court.

Mr. Acker asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Applicant is not a corporate entity.

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No._____

In the
Supreme Court of the United States

IN RE DANIEL CLATE ACKER,
Petitioner.

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

Daniel Clate Acker respectfully petitions for an original petition for writ of habeas corpus to review the judgment and decision of the Texas Court of Criminal Appeals.

OPINIONS BELOW

On September 18, 2018, the Texas Court of Criminal Appeals ("TCCA") dismissed Mr. Acker's subsequent application for a writ of habeas corpus and denied his motion for a stay of execution. *Ex parte Acker*, No. WR-56,841-06 (Tex. Crim. App. Sept. 18, 2018 (*per curiam*) (Appendix A). In previous state proceedings, the TCCA denied Mr. Acker's direct appeal on November 26, 2003. *Acker v. State,* No. AP-74,109, 2003 WL 22855434 (Tex. Crim. App. November 26, 2003)(not designated for publication). (Appendix B). His initial state post-conviction application was denied on November 15, 2006. *Ex Parte Daniel Clate Acker,* No. WR-56,841-01 and WR-56,841-03, 2006 WL 3308712 (Tex. Crim. App. November 15, 2006)(*per curiam*)(not designated for publication). (Appendix C). A subsequent writ application was dismissed by the TCCA on Sept. 10, 2008, without reaching the merits, that Court

determining that Mr. Acker's claims did not meet the requirements of Tex. Code Crim. Proc. Article 11.071 Sec. 5. *Ex parte Acker*, No. WR-56,841-04, 2008 WL 4151807 (Tex. Crim. App. Sept. 10, 2008) (not designated for publication). (Appendix D). A pro se application was dismissed without prejudice by the TCCA on May 14, 2014, because federal proceedings were pending. *Ex parte Acker*, No. WR-56,841-05, 2014 WL 2002200 (Tex. Crim. App. May 14, 2014). (Appendix E).

In the previous federal proceedings, the unpublished decision of the federal district court that Mr. Acker sought to appeal, *Acker v. Director, TDCJ*, No. 4:06-cv-469 (E.D. Tex.), 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 F. On August 14, 2017, the United States Court of Appeals for the Fifth Circuit issued an Opinion denying a certificate of appealability on four issues. This Opinion, reported as *Acker v. Davis*, 693 F. App'x 384 (5th Cir. 2017), is attached as Appendix G. The docket entry of the denial of *en banc* rehearing on September 13, 2017 is attached at the end of Appendix G. This Court then denied Mr. Acker's petition for certiorari on April 16, 2018. *Acker v. Davis*, No. 17-7045. (Appendix H).

A petition for a writ of certiorari, *Ex parte Daniel Clate Acker*, No. 18-6075, and a motion for a stay of execution (No. 18A-310) were submitted to this Court on September 21, 2018. They are currently pending.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 2241.

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented implicates 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.

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.

SUPREME COURT RULE 20 STATEMENT

Rule 20.1 of this Court requires a petitioner seeking an original writ of habeas corpus to establish that (1) "the writ will be in aid of the Court's appellate jurisdiction"; (2) "exceptional circumstances warrant the exercise of the Court's discretionary powers"; and (3) "adequate relief cannot be obtained in any other form or in any other court." This writ is in aid of this Court's appellate jurisdiction, as the claim has already been presented to the Texas Court of Criminal Appeals, and because Mr. Acker is restrained in his liberty by the Director. In addition, Mr. Acker meets the requirements of (2) and (3) as outlined below in Section III and Section IV, respectively.

Moreover, Rule 20.4 of this Court places additional responsibilities on the petitioner, requiring "a statement of the 'reasons for not making application to the district court of the

district in which the applicant is held'" and "how and where the petition has exhausted available remedies in the state courts." Mr. Acker is not filing this petition in the district court for the reasons set out below. He has exhausted his state court remedies by pleading his current claims in his most recent subsequent application for writ of habeas corpus to the Texas Court of Criminal Appeals, which was dismissed on procedural grounds on September 19, 2018. *See Ex parte Acker*, No.WR-56,841-06 (Tex. Crim. App. 2018).

STATEMENT OF THE CASE

A. Procedural Summary.

Mr. Acker is scheduled for execution on September 27, 2018. He is incarcerated on death row at the Polunsky Unit of the Texas Department of Criminal Justice at Livingston, Texas, in the custody of Respondent. In March 2001, Mr. Acker was convicted in the 8th District Court of Hopkins County, Texas of the capital murder of his girlfriend Marquetta George.[1] The jury answered the special issues pursuant to Texas Code of Criminal Procedure article 37.071, and the trial court set punishment at death.[2]

On November 26, 2003, the TCCA affirmed Acker's conviction and sentence of death. *Acker v. State,* No. AP-74,109 (Tex. Crim. App. November 26, 2003)(not designated for publication).[3]

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[1] USCA5.353-355 (indictment); USCA5.365 (verdict). The federal Record on Appeal is referred to as "USCA5.[page]." The trial Reporter's Record is referred to as "[volume number] RR [page]."

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

[3] USCA5.420-440. (Appendix B).

Mr. Acker sought state post-conviction relief and filed an application through court-appointed counsel Mr. Toby Wilkinson.[4] 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).[5]

Mr. Acker filed his federal petition in the federal district court on November 14, 2007.[6] On December 12, 2007, the district court held proceedings in abeyance.[7] Mr. Acker filed a subsequent writ application in the trial court on February 7, 2008, which was dismissed by the TCCA on September 10, 2008, without reaching the merits, that Court determining that Mr. Acker's claims did not meet the requirements of Tex. Code Crim. Proc. Article 11.071 Sec. 5. *Ex parte Acker*, No. WR-56,841-04 (Tex. Crim. App. Sept. 10, 2008) (not designated for publication).[8] Mr. Acker then filed his "Post-Exhaustion Petition for Writ of Habeas Corpus" in the federal district court. That Court ordered an evidentiary hearing on Claim One, relating to actual innocence. The hearing was held on June 16, 2011.[9] Post-hearing briefs were submitted.[10] While awaiting an opinion, a *pro se* application was dismissed *without prejudice* by

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

[5] USCA5.556-557. (Appendix C).

[6] USCA5.94-350.

[7] USCA5.1040-1042.

[8] USCA5.25-26. (Appendix D). This was prior to the State's expert's disavowal of the trial theory that Mr. Acker strangled the victim; and prior to the State's disavowal of that theory and adoption of two new and incompatible theories that were never presented to Mr. Acker's jury.

[9] USCA5.2058-2219 (transcript of hearing).

[10] USCA5.1827-1846 (Respondent's brief); USCA5.1847-1909 (Acker's brief).

the TCCA on May 14, 2014, because federal proceedings were pending. *Ex parte Acker*, No. WR-56,841-05, 2014 WL 2002200 (Tex. Crim. App. May 14, 2014).[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 ("COA") on all issues.[12]

In the Fifth Circuit Court of Appeals, Mr. Acker applied for a COA on November 16, 2016. The Fifth Circuit denied a COA on these claims on August 14, 2017. *Acker v. Davis*, 693 F. App'x 384 (5th Cir. 2017).[13] Rehearing was denied on September 13, 2017. *Acker v. Davis*, No. 16-70017 (5th Cir.)[14]

A petition for *certiorari* was filed in this Court on December 11, 2017, and *certiorari* was denied on April 16, 2018. *Acker v. Davis*, No. 17-7045.[15] On May 7, 2018, Judge Eddie Northcutt of the 8th Judicial District Court of Hopkins County, Texas, set an execution date of September 27, 2018.[16]

On August 31, 2018, Mr. Acker filed a subsequent application for a writ of habeas corpus and a motion for a stay of execution in the trial court. *Ex parte Acker*, No. WR-56-841-06

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[11] Appendix E.

[12] USCA5.1946-2054; *Acker v. Director, TDCJ*, 2016 WL 3268328 (E.D. Tex. June 14, 2016). (Appendix F).

[13] Appendix G.

[14] Docket entry of September 13, 2017, denying petition for rehearing (at end of Appendix G).

[15] Appendix H.

[16] That Court's Order for Execution and the Warrant of Execution are included as an appendix to Mr. Acker's motion for a stay of execution.

(TCCA), No. 0016026 (trial court, 8th Judicial District Court, Hopkins County, Texas). On September 18, 2018, the TCCA denied the application and the stay.[17]

A petition for a writ of certiorari, *Ex parte Daniel Clate Acker*, No. 18-6075, and a motion for a stay of execution (No. 18A-310) were submitted to this Court on September 21, 2018. They are currently pending.

B. Factual Summary of Evidence Presented at Mr. Acker's Trial.

Mr. Acker has consistently and unwaveringly stated that the victim Markie George jumped out of his truck. He has admitted abducting her but her death was a tragic accident, and never a homicide. At trial, his efforts to show his innocence were stymied by the trial court.

At the liability phase of the trial, two witnesses said that the night prior to Ms. George's death, Mr. Acker had been drinking, he got into an argument with her, and made some threats against her. (19 RR 22-34) However, one of these witnesses, Mary Peugh, testified she did not take Mr. Acker's threat as a serious statement and hence did not warn Ms. George (19 RR 26) and another, Timothy Mason, admitted that he had a past disagreement with Mr. Acker. (19 RR 45.) Dorcas Dodd Vititow, Mr. Acker's older sister, testified that he was acting as if he was getting jealous and she asked him to stay out of trouble (19 RR 63), but she did not see him get into any altercation with Ms. George. (19 RR 80.) The next morning, Mr. Acker came by Ms. Vititow's house again, crying and angry and still looking for Ms. George. (19 RR 73.) Acker said he was going to beat George and the person she was with when he found them. (19 RR

[17] Appendix A.

74.)[18] At this time, Mr. Acker was driving a utility truck belonging to his employer, Bentley Electric. (19 RR 74.)

Lila Seawright**,** the victim's mother, testified that on the morning of Sunday, March 12, 2000, at about 9:15 a.m., Mr. Acker was still looking for Ms. George. Mr. Acker made an alleged threat against Ms. George and whoever she had spent the night with. At this time, Mr. Acker was in control and not upset. (19 RR 103.) Mr. Acker was possessive of Ms. George, but Ms. Seawright never saw him hurt, beat or threaten George, and never saw them fight. (19 RR 108, 114, 117.)

Thomas Smiddy testified at trial that he was the caretaker of the trailer rented by Markie George which was next door to Mr. Smiddy's. (19 RR 136-137.) On the morning of March 12, 2000, Mr. Acker, driving a white utility truck, returned to his trailer. (19 RR 138, 152.) Markie George arrived a little before 11 a.m., accompanied by a man. (19 RR 144.) She went into the trailer and the man left. (19 RR 145.)[19] Ms. George and Mr. Acker were not arguing. (19 RR 145.) After about half an hour, Ms. George ran to Mr. Smiddy's house and hollered at him to call the sheriff. (19 RR 146, 162.) She appeared to be afraid of Mr. Acker, and hid behind Mr. Smiddy's wife. (19 RR 146.) Ms. George also said "He's not going to whup me this time." (19 RR 163.) Mr. Acker then came and picked her up and walked off with her. (19 RR 147.) George was hitting him as she was carried away. (19 RR 165.) He placed her in the driver's side of the truck. (19 RR 147, 151.) It appeared that she was resisting. (19 RR 175.) Mr.

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[18] However, this statement was only made in her second statement but not the first. (19 RR 82-83.)

[19] Shortly after she entered the trailer, she came back out and was talking to the man that had brought her home before he left. 19 RR 161.

Smiddy testified that when Ms. George was being pushed into the truck, it was like watching someone try to push a cat into a bathtub. At this point, Mr. Smiddy heard something that sounded like someone being hit. (19 RR 165, 175.)[20] The witness looked away for an instant and then Ms. George was not visible in the truck. (19 RR 148.)

Mr. Smiddy then saw Mr. Acker's truck pulling out of the driveway and swerving from side to side in the road. (19 RR 149.) He was going slowly. (19 RR 176.) At one point, the truck veered into the ditch and came back onto the road. (19 RR 169.) Mr. Smiddy then called the police when he saw which way the truck was going. (19 RR 149, 170.) This was at about 11:45 a.m. (19 RR 171.)

Alicia Smiddy, Thomas Smiddy's wife, recalled Markie George running out of her trailer, yelling that someone should call the sheriff, and hiding behind her. (19 RR 179.) Mr. Acker came over, picked George up, and carried her to a truck where he tried to put her in it. (19 RR 179.) Ms. Smiddy heard a slap sound and then Ms. George went in the truck. (19 RR 181.) They drove off swerving from side to side on the road. (19 RR 179-180.) As Acker drove away, it seemed as if he was leaning over towards the middle of the seat (19 RR 182) and he could have been trying to keep George from jumping out. (19 RR 187.) Although at trial Ms. Smiddy stated that George did not attempt to exit the truck after they drove away, on the day of the incident this witness gave a statement to the deputies that said "she [George] was trying to get out of the car as it spun out through the ditch." (19 RR 186, 191.)

Brodie Young, a crucial State's witness, admitted to giving false statements to law enforcement. On March 12, 2000, at around noon, he was heading toward Sulphur Springs and

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[20] This statement was not made by Mr. Smiddy in his initial statements to law enforcement.

saw a white utility truck parked part of the way in the road (19 RR 201) with one person on the driver's side. (19 RR 204.) Mr. Young slowed down and went into the ditch as the truck was partly blocking the road, and as he passed it he saw a person who looked like he was talking to himself. (19 RR 205, 220.) The man got out of the truck and opened the passenger door and pulled a lady out. (19 RR 206-207.) He took a few steps backward and then laid her on the side of the road and got back in his truck and took off. (19 RR 208.) The truck headed south until it turned on Road 3504. (19 RR 210.) *It did not run over the woman*. (19 RR 231.) Mr. Young went directly to the sheriff's office. (19 RR 208.)

Mr. Young admitted that on the day of the incident, he talked to Officer Wright and told him a story that was false, that he saw a man and a lady fighting in the truck. (19 RR 225-226.) "I retracted that later on because I realized that was a false statement...after I thought about it." (19 RR 226.) Young admitted that he didn't see a man and a woman fighting in the truck, but he initially told the officer that he did. (19 RR 226.) In all, Mr. Young gave three statements about the incident. (19 RR 227.) In the initial statement he said he saw a parked truck and inside it, a man and a woman who appeared to be fighting. (19 RR 228.) Young admitted "exaggerating some." (19 RR 228.) In a second statement given at Officer Wright's office, Young said the person in the truck was about thirty years old and he appeared to be talking to himself. (19 RR 229-230.) In the statement Young said that the man had her underneath her arms and pulled her *out of the truck*, holding her like someone who has gone to sleep. (19 RR 230.) Mr. Young also gave a statement to defense counsel. (19 RR 234.) The witness claimed the only thing he "retracted out of the statement is the first time I said I saw a man arguing with a lady or fighting with a lady. Later on, I retracted that and said I just saw a man sitting in the truck." (19 RR 237.) On the first statement, "I was exaggerating on that and I changed it later." (19 RR 238.)

Mr. Young claimed that the only time he saw the lady is when she was pulled out of the truck. (19 RR 238.)

Dr. Morna Gonsoulin**,** the assistant medical examiner with the Harris County Medical Examiner's Office, performed the autopsy on Ms. George. (20 RR 200.) The State's case for Mr. Acker's guilt rested to a great degree on her erroneous testimony, although, even at the time of the trial, she was still an intern and had not completed all of the requirements to be a medical examiner. (20 RR 273.) Dr. Gonsoulin testified that there were several blunt force injuries to the body, particularly the head and the neck. (20 RR 201.) There were contusions to the chest and a hip abrasion, and a large laceration on the leg. (20 RR 201.) Several of the injuries appeared to be postmortem. (20 RR 201.) There were several internal injuries, lung and liver lacerations, rib fractures, and internal injuries to the trunk. (20 RR 202.) Many of these injuries were postmortem, including an abrasion of the skin, and a laceration of the leg. (20 RR 204.) There was also a skull fracture and the head was crushed, consistent with being struck with a blunt instrument. (20 RR 208.) The victim had a .07 blood alcohol content at the time of her death. (20 RR 266.)

The neck and internal injuries were not likely postmortem, and they included hemorrhage to the neck muscles, and contusions or bruises to the thyroid. (20 RR 209.) These injuries indicate that there was a lot of pressure around the neck while the decedent was still alive. (20 RR 209.) There was some hemorrhage associated with the carotid and jugular arteries. (20 RR 212.) There would not be such hemorrhage if the injury occurred after death. (20 RR 213.) There was bruising from pressure being placed on the neck, thyroid and windpipe areas. (20 RR 214.)

The external injuries were consistent with motor vehicle injuries. (20 RR 215.) The neck injuries indicate that there was a lot of force applied when she was alive. (20 RR 215.) It was more from being constricted than from a fall. (20 RR 216.) There were also small hemorrhages in the blood vessels of the eye that were consistent with strangulation injuries. (20 RR 217.) The injuries Gonsoulin observed were allegedly consistent with strangulation. (20 RR 218.) There was not enough evidence to tell whether it was manual or ligature strangulation. (20 RR 218-219.) The exterior blunt force injuries were, in the witness's opinion, caused either at or near death or postmortem and occurred after the strangulation injuries. (20 RR 219.) Either of these categories of injuries could have caused death. (20 RR 220.)[21] Dr. Gonsoulin's opinion was that Ms. George died as a result of homicidal violence, including strangulation and hence the manner of death was homicide. (20 RR 221.) The exterior injuries were consistent with being hit by great force. (20 RR 226.)

The witness could not tell how long prior to George's death the strangulation marks may have been made. (20 RR 230.) Thus, it was impossible to say that the victim died from strangulation alone. (20 RR 233.) Death by strangulation can take several minutes. (20 RR 232.) The blunt force injuries were sufficient to cause her death. (20 RR 233.)

The victim also had road rash. (20 RR 235.) This is consistent with jumping out of a vehicle. (20 RR 235.) There would have been no more extensive bleeding after the observed heart damage (20 RR 257) or after the brain stem was broken. (20 RR 264.)

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[21] The witness stated that the injuries compatible with strangulation did not necessarily cause death, as these injuries could have been inflicted well before the victim's death. (20 RR 230-231.)

There was a brush burn to the victim's hip which was the same injury called "road rash." (20 RR 263-264.) There were no petechiae in the brain or larynx which would normally be caused by an increase in pressure through strangulation. (20 RR 266-267.) After the strangulation injuries the victim had suffered, Dr. Gonsoulin testified, it is likely she would have been incapacitated. (20 RR 269.) At the time of the autopsy, Gonsoulin was still an intern and had not yet qualified to be a medical examiner. (20 RR 273.)

The defense case at the guilt phase was hindered by various trial court rulings that prevented the jury from hearing evidence of Mr. Acker's innocence. Sabrina Ball, who lived near Mr. Acker's mother Nancy Acker, testified that on the night of February 26, 2000, two weeks prior to her death, she met the victim. (21 RR 8.) Outside the presence of the jury, the witness stated that Ms. George came to Ms. Ball's door that night at about 10:30 p.m. (21 RR 10.) Ms. George was down on her hands and knees crying and saying "Help me, help me." (21 RR 11.) She was brought inside and said that Daniel was going to kill her, that he was crazy. (21 RR 11.) Then the Sheriff's Department was called. (21 RR 12.) Ms. George said that she had been at "Bustin Loose" with Mr. Acker and a fight had started and they had left. (21 RR 13.) In the same truck from which she met her death two weeks later, she tried to jump out but Mr. Acker grabbed her by the hair and dragged her back in. (21 RR 13.)

Ms. Ball's testimony about Ms. George's statement was offered under the excited utterance exception to the hearsay rule. (21 RR 14.) When Ms. 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.) But George was more concerned about the fight in the truck than the fight in the house and that's what she mentioned first to Ms. Ball. (21 RR 25.)

The trial court ruled that only the first part of the victim's statement, about Mr. Acker being crazy, would be admissible, and the latter part about jumping out of the truck was not because it was not an excited utterance, and because she was being questioned about the events. (21 RR 30.)[22] The trial court later ruled that no testimony from this witness was to be considered by the jury. (21 RR 65.) Thus, the jury never heard evidence about Ms. George's prior attempt to jump from Acker's truck and her unusual propensity or willingness to jump from moving vehicles.

William Brandon Anderson, of the Hopkins County Sheriff's Office, testified *in camera* that he was working on February 26, 2000, and responded to a call at Mrs. Ball's home. (21 RR 37.) He testified as to Markie George's attempt to jump from the truck two weeks prior to her death. (21 RR 37-40.) The defense offered this evidence but the trial court sustained an objection to it. (21 RR 41.) Here again, Mr. Acker's jury was prevented from hearing important evidence that pointed to his innocence.

Walter Allen Story**,** a 9-1-1 communications supervisor in Hopkins County, testified that a 9-1-1 radio log recorded a call from Mr. Smiddy at 11:45 a.m. on March 12, 2000, and a call from Mr. Ferrell at 11:47 a.m. (21 RR 69, 72.) Officer Hill arrived at the location at 11:51 a.m. (21 RR 69.) At 11:53 a.m. the officer called in to say there was no pulse. (21 RR 75.)

Nancy Acker, Mr. Acker's mother, testified *in camera* that on March 12 Mr. Acker said that Ms. George had jumped out of the truck and was dead. (21 RR 83.) Once again, the court ruled that this was not an excited utterance and was inadmissable hearsay. (21 RR 104.)

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[22] *Id.* The witness's statement indicates that there was no logical reason to term part of it an "excited utterance" and the part helpful to Mr. Acker not such an utterance.

The defense also had available another witness, Kenny Baxter, who was also told by Mr. Acker that Ms. George had jumped from the truck. (21 RR 105.) Here again, the jury was not allowed to hear this evidence.

John Riley Sands**,** the defense investigator, testified *in camera* that he was asked to see if he could open the door from the driver's seat of the truck. (21 RR 134.) Defense counsel pointed to testimony of "road rash" which indicated the victim hit the ground when the vehicle was moving. (21 RR 134.) Sands obtained a similar truck, a Ford 350 one-ton truck, and he testified *in camera* that he was not able to open the door from the driver's seat without extending himself quite a bit so that he could still see above the dashboard. (21 RR 142.) Sands could not have opened the door and pushed someone out of the vehicle while driving on the road. (21 RR 142.) An objection to this evidence was sustained and the jury was not allowed to hear this testimony. (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 because he was not an expert. (21 RR 137, 139-143.)

Daniel Clate Acker testified that he lived with Ms. George and her two children for about one month. (21 RR 146.) They had a good relationship as long as neither of them were drinking, but they argued when they drank, usually on the weekends. (21 RR 152-153.) Mr. Acker was an electrician's helper, working on his journeyman's license. (21 RR 154.) The defense asked him about an incident on February 26, 2000, when Ms. George attempted to jump out of the truck. (21 RR 155.) The Court sustained an objection to this evidence. (21 RR 159.)

On March 11, 2000, Mr. Acker and Ms. George arrived at "Bustin Loose" around 10 p.m. (21 RR 176.) They had a disagreement, Ms. George disappeared, and Mr. Acker began looking for her. (21 RR 177-184.) At the club, he did not make any threats against Ms. George, and he

did not remember talking to Tim Mason. (21 RR 192.) That night, Acker went to various motels in Sulphur Springs thinking that she may have rented a room. (21 RR 195; 22 RR 45.) Then he returned to his house and laid down, but did not sleep. (21 RR 196.)

The next morning, Ms. George and Robert McGee, whose nickname was "Calico," a bouncer at the club, pulled into the driveway. (21 RR 211.) Mr. Acker was glad to see her and kissed and hugged her. (21 RR 216.) Mr. McGee said that he had taken Ms. George to her father's house last night. (21 RR 212.) Mr. Acker said that he had been to her father's house but she wasn't there. (21 RR 212.) She then went into the house. (21 RR 212.) Mr. Acker asked Mr. McGee why he was bringing her home when her father had a car. (21 RR 213.) Ms. George then came out of the house and made a comment. (21 RR 216.)

Mr. Acker pulled his truck from a mud patch where it had been stuck. (21 RR 219.) Mr. Acker then went back inside the house and found out that Ms. George had spent the night with Calico. (21 RR 221.) She admitted to sleeping with Calico. (21 RR 222.) Mr. Acker pushed her down on the couch and shook her and told her "just because you're not my wife doesn't mean I don't love you." (21 RR 223.) He did not strangle her but shook her fairly hard. (21 RR 225.) He then slapped her and asked her where Calico lived. (21 RR 225.) Ms. George told him and Mr. Acker got dressed so that he could go to Calico's house. (21 RR 226.)

Then Ms. George ran out the door to the Smiddys' house. (21 RR 227.) Mr. Acker ran out behind her, went to the Smiddys' and picked her up. (21 RR 228.) Acker carried her to the truck and tried to put her in. (21 RR 230.) Mr. Acker then got in and started the truck. (21 RR 231; 22 RR 66.) As they were pulling out of the driveway, Ms. George opened the door and tried to jump out of the truck and Mr. Acker caught her and pulled her back. (21 RR 233; 22 RR 66.) As he leaned way over to grab her, the truck went into the ditch. (21 RR 234.) He

corrected and then went into the ditch on the other side. (21 RR 234.) On the road, he was driving between fifty and sixty-five miles an hour. (21 RR 237.) Ms. George attempted to jump again, and Mr. Acker slapped her. (21 RR 238; 22 RR 77.) Mr. Acker tried to talk to her but she wouldn't respond. (21 RR 240.)

On a one-lane road, a car approached and he pulled to the side and then she jumped from the pickup. (21 RR 241.) Mr. Acker tried to stop her but could not catch her, and she jumped. (21 RR 242.) Acker stopped the truck and backed up. (21 RR 242.)[23] Another car came down the road and passed him, and then he jumped out and went to Ms. George. (21 RR 242.) Acker dragged her to the truck, opened the door to put her back in the truck but had to put her back down when he realized that there were fluorescent light bulbs on the seat. (21 RR 244.) When he picked her up again, her head fell back and, realizing that she was dead, Acker laid her back down, ran around to the front of the truck and left. (21 RR 244.) He panicked and went into shock. (21 RR 244.) Mr. Acker went to his mother's house. (21 RR 249.) When he was there, a highway patrol car passed by, and he waved it down and was then placed under arrest. (21 RR 250.)

At trial, Mr. Acker was extensively questioned about his knowledge of a defense expert's findings as to strangulation. (22 RR 7-11.) He denied ever seeing Tim Mason at the club and stated he had never met Mary Singleton or Mary Peugh. (22 RR 25.) Mr. Acker denied that he had strangled Ms. George and disputed Dr. Gonsoulin's opinion. (22 RR 7, 91.) Acker was in prison from October 1992 to October 1995 on a burglary charge. (22 RR 106.) After

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[23] He did not run over her as he backed up, and denied ever running over her. (21 RR 253.)

deliberations, the jury found Mr. Acker guilty of capital murder as charged in the indictment. (23 RR 39.)

C. The Totality of the Evidence Points to an Accidental Death by Jumping.

1. The trial evidence.

This Court has held that, when considering due process claims, all exculpatory evidence must be considered collectively and not item-by-item. *See Kyles v. Whitley,* 514 U.S. 419 (1995); *See also Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). Acker presented highly credible new evidence in his federal petition and at the federal evidentiary hearing that not only heightens the case for an accidental death, but also throws substantial doubt on all of the State's three theories of his guilt.

(1) State's expert Dr. Di Maio[24] and defense expert Dr. Larkin have completely demolished Dr. Gonsoulin's "strangulation" theory, which the State has now conceded.[25] With "strangulation" now off the table, it is clear that "jumping" is a much more likely scenario than the victim either being pushed out or deliberately run over by Acker, as the State now contends. Dr. Larkin and Dr. Di Maio differed only in that Dr. Di Maio cannot support Dr. Larkin's "plausible alternative scenario" as to the sequence of events that occurred leading up to the victim jumping from the truck.[26]

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[24] *See* Exhibit 1 herein, letter of State's expert Dr. Vincent Di Maio to State's Attorney.

[25] The Fifth Circuit Court of Appeals has acknowledged that the State's case was "largely based on strangulation." *Acker v. Davis*, 693 F. App'x 384 at 394 (5th Cir. 2017).

[26] One stipulation at the federal hearing was that it was a possibility that George was run over by the truck. This is not inconsistent with her jumping nor with Acker's trial testimony. Another stipulation was 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."

(2) Officer Lewis Tatum's hearing testimony and report (Exhibit 2)and Officer Anderson's report (Exhibit 3) show that George attempted to jump from the truck on February 26, 2000, two weeks prior to her death on March 12, 2000. This shows that she had a propensity to jump out of a moving vehicle, a very dangerous feat that few people would ever attempt, and, in remarkably similar circumstances two weeks prior, she made this attempt from the same truck when she got into a fight with Acker. This evidence was not heard by Acker's jury.

(3) A very short time after the tragic occurrence, Acker told his mother that George jumped, at a time when he was still upset and "looked frantic."[27] It strains credulity to think that Acker made this story up on the spur of the moment and lied to his mother. When he turned himself in to the police, and while in custody he also told the police that George had jumped. (Exhibit 4.) And when confronted with information that the medical examiner Dr. Gonsoulin opined that the victim was strangled and "was dead at the time she was run over," Acker waived his *Miranda* rights and "got very angry and stated, '[t]he medical examiner is lying' and "continually stated that Markie jumped out of the truck." (*Id*.) Acker has always asserted, even before he turned himself in, that the victim jumped.

(4) Sabrina Ball's testimony, summarized above, and her police report regarding what she knew about the February 26, 2000 incident also lend additional evidential support to an accidental death of George as a result of jumping. Ms. Ball's report to the police stated that George told her

> We got in a fight, we were at Bustin' Loose..We were in the truck and he was beating my head against the dash. I tried to jump out, but he pulled me back in. My face was just a few inches from the pavement.

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[27] Transcript of Federal Evidentiary Hearing, *Acker v. Director of TDCJ*, No. 4:06-cv-469), Plano, Texas, June 16, 2011 at page 30.

(Exhibit 5.)

Significantly, Acker's jury was not allowed to hear anything about this prior attempt by the victim to jump from the same truck only two weeks prior to her death.

(5) Deputy Chris Hill's statement regarding Mr. Smiddy's original statement to the police. (Exhibit 6.) This report is especially important because it is contrary to Mr. Smiddy's trial testimony where he said nothing about the victim attempting to jump from the truck just minutes before her death. Mr. Smiddy said only that it appeared that she was resisting (19 RR 175) but nothing was said about the attempt to exit and Acker "jerking" her back in. At trial, Mr. Smiddy also said he heard something that sounded like someone being hit (19 RR 165, 175); and he testified that he looked away for an instant and then George was not visible in the truck. (19 RR 148.) Significantly, nothing about this was in Deputy Hill's report. (Exhibit 6.) Mr. Smiddy's testimony was used by the prosecution to bolster their theory that the victim was first knocked unconscious.

Just minutes before her death, the victim was attempting to jump. It is reasonable to believe that, as the truck went out of sight, that George continued in her attempts to jump and, as Acker has said all along, tragically, she eventually attempted the jump, it went awry, and she flipped under the truck.[28]

(6) Alicia's Smiddy's statement to the Hopkins County Sheriff's Office on May 12, 2000 discussed *supra*. (Exhibit 7.) This report was never seen by Acker's jury. It would have been powerful impeachment of Alicia Smiddy's trial testimony. Mrs. Smiddy said nothing at trial about her "trying to get out" as they drove away, only that Acker could have been trying to keep

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[28] The truck had a protruding utility bed which the victim would have likely hit when she attempted to jump while the truck was moving. (Exhibit 8.)

her from jumping out. (19 RR 187.) It corroborates her husband and is powerful evidence that, just minutes prior to her death, she was trying to jump from the truck and that the truck was swerving on and off the road as it left the trailer park.

(7) Acker's jury was not allowed to hear the testimony of defense investigator John Riley Sands about the difficulty of opening the driver's side door while driving. (21 RR 129-143.) Officer Hurley's testimony was that he was able to do that, but only while the car was stationary and there was no one resisting him in the passenger seat.

However, one must add the fact that 1) Acker would have had to reach around Ms. George to open the door; 2) even if he was able to open the door while driving, there is no indication that he would have then been able to shove Ms. George out while holding the door open while driving at a fairly high speed. That would have required an even longer reach than merely opening the door, in addition to a sustained force required to keep the door open; 3) that George presumably would not be sitting idly by while this was happening and would have resisted or grabbed the door or seat or fought back to prevent her ejection; and 4) that Mr. Acker would have been attempting this one-handed, while George had both hands free to thwart it. The trial testimony was that George was so resistant that Acker had difficulty in placing her in the car while he had both hands free.

It is unreasonable, approaching the realm of the near-impossible, to seriously credit the possibility that Acker pushed her out one-handed while driving.[29] Any reasonable juror with a driver's license (almost all jurors) would well know how difficult it would be to even open a car

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[29] Officer Storey's testimony regarding the time of the 9-1-1 calls (Federal Evidentiary Hearing at page 78) and Sands' testimony of the driving time show that Acker could not have stopped along the way.

door from the driver's seat while driving, let alone keep the door open against wind resistance while at the same time, with one hand, attempting to eject a presumably resisting passenger from a truck cab wider than an ordinary sedan.

Nor is there any credible evidence that George was dead or unconscious before she exited the truck. The undisputed testimony from the Smiddys was that the truck was swerving as it drove away, indicating that George was alive, and the State has abandoned the theory that she was strangled prior to the blunt force injuries. The State's current version of guilt, that George was placed on the ground and then deliberately run over by Acker is contradicted by undisputed evidence that George had "road rash." (20 RR 235.) This is consistent with jumping out of a moving vehicle (20 RR 235) but inconsistent with being placed on the ground and then run over. The State's theory is also contradicted by the trial testimony of the witness relied upon by the Fifth Circuit for its version of Acker's guilt. Broadie Young testified that the truck headed south until it turned on Road 3504 19 RR 210) *and it did not run over the woman*. (19 RR 231.)

(8) Acker turned himself in to the Sheriff, not the typical action of someone who has just committed murder. A stipulation was received at the hearing that Acker surrendered to Officer Reece after waving him down. (Federal Evidentiary Hearing transcript at 81.)

The Fifth Circuit based its holding on the federal district court's new theory of Mr. Acker's guilt:

> 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. Director*, No. 4:06-cv-469, 2016 WL 3268328 at *24 (E.D. Tex. June 14, 2016) (ROA.1988-1989.)

The district court based this erroneous conclusion on witness Broadie Young's trial testimony, holding that it "contradicts and virtually destroys Petitioner's story of picking Ms. George up off of the road," and Acker's testimony "is not credible in the light of Mr. Young's testimony." [ROA.1987-1988.] *Acker v. Director*, No. 4:06-cv-469, 2016 WL 3268328 at *24 (E.D. Tex. June 14, 2016). This was despite the fact that Young was discredited as a liar and despite the fact that, as the only witness to the scene of the accident, he never testified to that.

2. Motive and Mr. Acker's actions also point to the victim's jumping.

A coherent theory of motivation has never been presented by the State, either prior to the change in the theory of the cause of death or since. Mr. Acker allegedly made statements that he would kill George if he found her, but he did not follow through on his threats when George returned home. The statements were made in a night of heavy drinking at "Bustin Loose;" Acker was likely intoxicated; and he behaved differently when drinking. Additionally, Acker and George had a tempestuous relationship.

If it was Acker's intent to kill George because of his rage that she had spent the night with another man ("Calico"), he would have killed her when she first told him about it in the trailer. It is undisputed that when George returned and Acker found out, there was a physical confrontation. (21 RR 225.) However, he did *not* kill George when she told him where she spent the night. Instead, he asked her where Calico lived and then got dressed with the intention of driving to Calico's house. (21 RR 225-226.) When Ms. George ran out of their trailer, Acker caught her and placed her in the truck, carrying through with his intention of taking her to Calico's house. Acker's intent was not to kill her, which he could have done earlier in the privacy of the trailer, had he been so inclined. His intent was to forcibly transport her with him in order to find and confront Calico about whether they had been intimate.

Why would Mr. Acker, in the space of a few minutes, suddenly change from trying to keep her in the truck to meet with Calico to killing her en route? The totality of the evidence is much more suggestive of Acker wanting to transport George to a face-to-face meeting with Calico, to find out what they did that night, than him murdering her right after driving off in full sight of the Smiddys. Mr. Acker's overwhelming need was to try to find out whether George and Calico had been intimate, not to kill her. That was the purpose of putting her in the truck.

Acker's actions after George's death are not indicative of the actions of a person who had just committed murder. Rather, they suggest a man who had just abducted his girlfriend, who then jumps from his truck and is killed, and, as a result, Acker goes into shock and acts irrationally. Most importantly, he did not attempt to flee or conceal himself from the authorities, an almost universal reaction on the part of murderers. Had Acker intended to murder Ms. George, he could and would have done it in their residence, when she first told him where and with whom she had spent the night, when his rage was at its height. Instead, by his own admission, he shook and slapped her and then got dressed. (21 RR 225-226.) This is simply not a prelude to murder by any reasonable interpretation.

3. This was never a homicide case.

As homicide in Texas requires the intent to kill, this case was never a homicide, but rather a kidnaping or manslaughter. Texas law has repeatedly and unequivocally held that capital murder requires a specific intent to kill: "Capital murder is a result-of-conduct oriented offense; the crime is defined in terms of one's objective . . . ." *Roberts v. State*, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008); *see Black v. State*, 26 S.W.3d 895, 898 (Tex. Crim. App. 2000); *Medina v. State*, 7 S.W.3d 633, 639 (Tex. Crim. App. 1999);

Cook v. State, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994); *Alvarado v. State*, 704 S.W.2d 35, 36 (1985); *see also Schroeder v. State,* 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (reiterating that intentional murder under sec. 19.02(b)(1) is a "result of conduct" offense); *Cook*, 884 S.W.2d at 490 ("We have long held that intentional murder is a 'result of conduct' offense."); *Martinez v. State,* 763 S.W.2d 413, 419 (Tex. Crim. App. 1988) (same); *Lugo-Lugo v. State*, 650 S.W.2d 72, 80, 88 (Tex. Crim. App. 1982) (same). As the Texas Court of Criminal Appeals has explained, a "result of conduct" offense is defined by specific intent to bring about a prohibited result: "what matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified." *Cook*, 884 S.W.2d at 490 (citing *Alvarado*, 704 S.W.2d at 39)(emphasis in original). The "required culpability" for capital murder is to intentionally or knowingly bring about the death of another person. Tex. Penal Code sec. 19.03(a). The Texas Penal Code states that an offender acts intentionally "with respect to . . . a result of his conduct when it is his conscious objective or desire to . . . cause the result." Tex. Penal Code sec. 6.03(a); *see also Martinez*, 763 S.W.2d at 419. Thus, capital murder "is defined in terms of one's objective to produce a specified result. . . . [The offender] must have specifically intended that death result from his conduct." *Kinnamon v. State*, 791 S.W.2d 84, 88 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook*, 884 S.W.2d at

491; *see Morrow v. State*, 753 S.W.2d 372 (Tex. Crim. App. 1988).[30] This case was a tragic accident, not a homicide.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER AN ORIGINAL WRIT OF HABEAS CORPUS IS APPROPRIATE IN THE CASE OF A DEATH-SENTENCED INDIVIDUAL WHO WAS CONVICTED AND SENTENCED TO DEATH ON A THEORY OF LIABILITY THAT HAS BEEN PROVEN FALSE, IS REPUDIATED BY THE STATE, AND WAS NEVER PRESENTED TO THE JURY.

I. Statement of Reasons for not Filing in the District Court.

Mr. Acker has not filed this petition in the United States District Court for the Eastern District because the claim would be considered successive, as it was presented in a prior application. Thus, that court does not have the authority to reach the merits of the claim absent authorization from the circuit court. *See* U.S.C. § 2244(b)(3)(A). Moreover, Mr. Acker has not sought authorization to file a successive petition from the United States Court of Appeals for the Fifth Circuit because he has no non-frivolous argument that this claim meets the statutory requirements for a successive petition. *See id*. § 2244(b)(1). Indeed, Mr. Acker has no available avenue to present this claim other than an original petition for a writ of habeas corpus to this Court, and he cannot obtain adequate relief in any other form or from any other court.[31]

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

[31] This presumes the Court's denial of Mr. Acker's petition for writ of certiorari, No. 18-6075.

II. Exceptional Circumstances Warrant the Exercise of the Court's Discretionary Power.

This Court retains the power to entertain original petitions for writ of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 660 (1996). The exceptional circumstances presented in this case warrant the exercise of this Court's discretionary powers, which are reserved for those cases, such as Mr. Acker's, where "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Mr. Acker's last opportunity to avoid being executed for a crime he did not commit lies with this Court.

Mr. Acker is fully aware that original writs are rarely granted.[32] However, the State of Texas is on the verge of executing a man who was convicted and sentenced to death on a theory that has been shown to be false and that has been repudiated by the State. Moreover, the current theory on which the State and the courts are relying on was never presented to Mr. Acker's jury.

In the course of Mr. Acker's federal post-conviction proceedings, the theory upon which the State sought and ultimately obtained Mr. Acker's capital conviction and death sentence was proven false. The evidence presented in federal court compelled the State to repudiate its theory. Notwithstanding this new evidence and profound revelation and dissolution of the State's case, the federal district court denied relief. Beyond that, the federal district court fashioned a new theory in support of Mr. Acker's conviction. The Fifth Circuit adopted the district court's new theory of liability. This theory, however, was never presented to Mr. Acker's jury.

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[32] S. Ct. R. 20(4)(a) ("To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.").

Mr. Acker's recourse was to return to State court to present the new evidence and have that forum review Mr. Acker's judgment in an adversarial setting. The TCCA dismissed Mr. Acker's subsequent application, without providing an opportunity for Mr. Acker to present his evidence.

III. The Circumstances of Mr. Acker's Case Demonstrate That, as Contemplated in *Felker v. Turpin* and Evidenced By *In re Davis*, this Court's Authority to Entertain Original Habeas Petitions Should Not Be Strictly Bound By 28 U.S.C. § 2244(b).

This Court's jurisdiction to review original writs of habeas corpus is reserved to adjudicate "exceptional circumstances warranting the exercise of the Court's discretionary powers," and "when adequate relief cannot be obtained in any other form or from any other court." S. Ct. R. 20(4)(a). In *Felker v. Turpin*, 518 U.S. 651, 663 (1996), the Court observed the unique nature of original writs, concluding only that §§ 106(b)(1) and (2) of the Antiterrorism and Effective Death Penalty Act of 1996—codified as §§ 2244(b)(1) and (2)—"inform our consideration of original habeas petitions," leaving unanswered "[w]eather or not we are bound by these restrictions." This Court has since indicated that it may not, in fact, be bound by such "restrictions" when truly extraordinary circumstances exists. *In re Davis*, 557 U.S. 952 (2009) (transferring habeas petition to district court for hearing on claim of actual innocence); *id.* (Stevens, J., concurring) ("The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this."). Adjudication of Mr. Acker's claim is "necessary [and] appropriate in aid of [this Court's] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C § 1651(a).

IV. Mr. Acker's Case is Extraordinary

As discussed above, the State's theory and presentation of Mr. Acker's liability for capital murder was grounded in the assertion that Mr. Acker strangled Ms. George. Strangulation was paramount. This theory of liability appeared in the indictment, and proved to be the cornerstone of the State's case. The State was compelled to repudiate this theory during the presentation of evidence in Mr. Acker's federal habeas proceedings. Not only was the State's bedrock strangulation theory proven false, and the State forced to abandon its commitment to such a theory, but the federal district court fashioned a completely new theory of liability. A theory unsupported by the evidence at trial, and a theory that was never presented to the jury. Not withstanding these drastic revelations, and the State court's unwillingness to provide a remedy, the State of Texas intends to execute Mr. Acker in a matter of days.

Mr. Acker's conviction could not be constitutionally affirmed based on the current theory of liability. *See Dunn v. United States*, 442 U.S. 100 (1979); *Chiarella v. United States*, 435 U.S. 222 (1980) . Due to the timing of the new theory and the TCCA's refusal to provide any meaningful review of the judgment in light of these revelations, Mr. Acker presents the extraordinary case for which this Court's jurisdiction is reserved.

The idea that an individual could be put to death when the precise theory that the State relied on to secure a capital conviction and death sentence has been proven false, without being provided a vehicle to consider the evidence, presents an extraordinary situation and demands a remedy.

V. The Court Should Take This Opportunity To Re-visit the Standards for Actual Innocence As Set Forth in *Herrera v. Collins*.[33]

Mr. Acker's case presents an ideal opportunity for this Court to re-visit the standards for claims of actual innocence. As described *supra*, his trial and sentence of death were largely based on a theory that has now been disavowed by the State in federal court. His state appeal brief was nine pages long and his state post-conviction writ was largely illiterate "gibberish" copied by his attorney from Acker's own letters. The federal district court adopted a new theory of Mr. Acker's guilt, a third version, that was never presented to Acker's jury, and that theory was then adopted by the Fifth Circuit Court of Appeals. The Texas Court of Criminal Appeals refused to even consider Mr. Acker's claims, his new evidence, or his showing that he met the standards for a subsequent writ in that Court. In this case, any reliance on the state justice system to protect and preserve Mr. Acker's constitutional rights was misplaced.

In *Herrera v. Collins*, 506 U.S. 390 (1993), this Court held that an inmate's claim of actual innocence in the face of execution does not entitle him to habeas corpus relief unless that actual innocence claim is accompanied by another claim asserting an independent constitutional violation.[34] In his petition, Herrera alleged that his execution would violate the Eighth and Fourteenth Amendments in light of new evidence showing his innocence. However, this Court

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[33] This argument adopts the reasoning of several academic commentators and law review articles, including the following: Mourer, Sarah A., *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. Miami L. R. 1279 (2010); Aglialoro, Matthew, *A Case for Actual Innocence*, 23 Cornell Journal of Law and Public Policy 635 (2014); Muskat, Michael J., *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 Tex. L. Rev. 131 (1996); Garrett, Brandon L., *Claiming Innocence*, 92 Minn. L. Rev. 1629 (2008).

[34] *See also* 28 U.S.C. § 2254(a), d(1).

held that such violations, if they existed, occurred only after his state criminal proceedings. Because the constitutional violations did not affect the fairness of his state court trial, these violations could only serve as the "basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits." *Herrera* at 416.

However, this Court's rejection of Herrera's freestanding claim of actual innocence did not completely dismiss the possibility that claims of actual innocence could serve as the basis of federal habeas corpus relief. On the contrary, in dismissing Herrera's claim this Court "assume[d] for the sake of argument...that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial *would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim*." Herrera at 417-419 (emphasis added). However, Herrera's claim fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist." *Id.* Although this assumption was dicta, widespread debate has ensued over the viability of actual innocence claims.[35]

Herrera's holding was supported by five justices but a different majority of justices signaled support for the assumption in the Court's opinion and a larger majority of the Court suggested that the execution of an inmate with a truly persuasive case of actual innocence would be unconstitutional. Justice White in his concurrence explicitly assumed that a state prisoner

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[35] *See, e.g.*, William D. Darden, Herrera v. Collins: *The Right of Innocence: An Unrecognized Constitutional Privilege*, 20 J. Contemp. L. 258 (1994); Kathleen Cava Boyd, *The Paradox of "Actual Innocence" in Federal Habeas Corpus After* Herrera v. Collins, 72 N.C. L. Rev. 479 (1994).

with such a claim would be entitled to federal habeas corpus relief.[36] *Herrera* has left open for this Court to give consideration to a compelling case of actual innocence such as Mr. Acker's as discussed *supra*.

One reason to revisit *Herrera* is that case's reliance on the availability of state clemency procedures as a last resort for innocent prisoners *Herrera* at 415-417, where the majority stated that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system." Since Herrera, courts have relied on clemency to deny freestanding claims of actual innocence. *See, e.g., Coleman v. Thaler,* 716 F.3d 895, 908 (5th Cir. 2013) ("And we have implied that...the availability of clemency in Texas would defeat a freestanding innocence claim."); *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999) (actual innocence claim dismissed because "state clemency proceedings provide the proper forum to pursue claims of actual innocence based on new facts."). This is improper for two reasons. First, the chances of a clemency grant are very slim. In Mr. Acker's state, Texas has executed 553 capital defendants since 1976 and granted clemency to only two defendants.[37] In the same period, there have been 13 innocents who were exonerated from death row.[38] Second, the clemency process is based largely on politics rather

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[36] *See Herrera*, 506 U.S. at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial...would render unconstitutional the execution of petitioner.") Justice O'Connor made the same assumption although she was in the majority (Id. At 427 (O'Connor, J, concurring ("Nowhere does the Court state that the Constitution permits the execution of an actually innocent person.")

[37] *See State by State Database,* Death Penalty Information Center, http://www.deathpenaltyinfo.org/state/state_by_state/Texas (last visited September 21, 2018).

[38] *Id.*

than the defendant's innocence. In Texas, the governor can override the recommendation of the Texas Board of Pardons and Paroles, as has happened in the past.[39]

A. There are differing approaches to claims of actual innocence since *Herrera*.

Another reason for this Court to grant certiorari is that since *Herrera*, the courts have adopted varying divergent approaches to actual innocence claims. Some circuits hold that there can be no habeas relief based solely on a claim of actual innocence. *See, e.g., Royal v. Taylor,* 188 F.3d 238, 243 (4th Cir. 1999) ("[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." (Quoting *Herrera*, 506 U.S. at 400); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) ("The Fifth Circuit has...held that claims of actual innocence are not cognizable on federal habeas review"); *United States v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000) ("We know from *Herrera v. Collins* that a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent.").

Other circuits, however, have supported, at least in theory, a freestanding claim of actual innocence despite the availability of state court remedies. *See, e.g., In re Davis*, 565 F.3d 810, 817 (11th Cir. 2009) ("We likewise have recognized the possibility of freestanding actual innocence claims..."); *Tomlinson v. Burt*, 509 F. Supp. 2d 771, 776 (N.D. Iowa 2007) ("While the Supreme Court did not clearly articulate the quantum of proof necessary for a claim based solely on actual innocence...it is evident that such claims require that the court be 'convinced

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[39] *Texas Man Executed After Clemency Denied*, NBCNews.com (Nov. 20, 2009) (noting Governor Rick Perry's denial of clemency over Parole Board's recommendation to commute Robert Thompson's sentence to life in prison).

that those new facts unquestionably establish [the defendant's] innocence.'" (citing *Schlup v. Delo*, 513 U.S. 298, 317 (1995)).

In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court held that a provision of Antiterrorism and Effective Death Penalty Act ("AEDPA") preventing this Court from reviewing a Court of Appeals order denying leave to file second habeas petition by appeal or by writ of certiorari did not repeal this Court's authority to entertain original habeas petitions; and that the provisions of AEDPA creating "gatekeeping" mechanism in Court of Appeals do not apply to this Court's consideration of original habeas petitions, but the petitioner's claims did not justify the issuance of a writ. Quoting Sup. Court Rule 20.4(a) this Court held that "[t]o justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court." *Felker* at 665. However, those "exceptional circumstances" were not defined, leaving the state of actual innocence claims still unsettled.

B. New technology since *Herrera* indicates a need to re-visit claims of actual innocence.

Since *Herrera* was handed down twenty-five years ago, the advance in DNA technology presents a compelling reason to re-examine that case. The emergence of this technology is of great importance to claims of actual innocence since it can provide near-certain proof of innocence after a defendant has been found guilty and sentenced to death in a trial that may have been otherwise error-free.[40] When this Court decided *Herrera* in 1993, DNA testing was still in

[40] *See* Duncan, Melissa, *Finding a Constitutional Right to Access DNA Evidence: Post-conviction*, 51 Tex. L. Rev. 519, 522 (2009).

its infancy.[41] Not until the mid-to-late 1990's did DNA testing emerge as a viable tool for exoneration.[42] Thus, it is not surprising that Herrera did not foresee the rise in DNA technology as serving to present overwhelming evidence of actual innocence that could not have been presented or was unavailable at the time of trial. In fact, Herrera held that reliance on habeas corpus as a venue for retrials was unreliabel due to the passage of time and fading of memories. *Herrera,* 506 U.S. at 403-404.

While a truly persuasive case for actual innocence perhaps could not have been imagined at the time of *Herrera* or *Felker*, it is now abundantly clear that such is not the case now. Data since *Herrera* shows that DNA evidence has played a significant role in exonerations since that case was handed down.[43] Although Mr. Acker's case does not involve DNA, the significant advances in this technology present a compelling need for this Court to re-visit the standards for actual innocence claims.

C. Execution of a person with a persuasive claim of innocence violates the Eighth Amendment.

The Eighth Amendment prohibits cruel and unusual punishments. The amendment was originally drafted to prohibit torture and other barbaric methods of punishment. *Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) (plurality opinion). However, the Eighth Amendment has been "interpreted in a flexible and dynamic manner" to reflect evolving standards of decency. *Id.* at 171. The penalty "must accord with 'the dignity of man,' which is the basic

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[41] *See* Aglialoro, *supra* at 645; Garrett, *supra*, at 1658-1659.

[42] Garrett at 1669.

[43] *See* Innocence Project, http://www.innocenceproject.org (last visited Sept. 23, 2018) (claiming that there have been 362 DNA exonerations since 1989).

concept underlying the Eighth Amendment." *Id.* at 173, quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). There can hardly be a punishment more violative of the dignity of man than the execution of an innocent person.

This Court has made it clear that the death penalty must not be imposed in an arbitrary or capricious manner. *Gregg* at 188-189 (discussing *Furman v. Georgia*, 408 U.S. 238 (1972)). The courts have looked to whether imposition of the death penalty will further the societal goals of capital punishment. *Enmund v. Florida,* 458 U.S. 782, 798 (1982). When this Court in *Gregg* held that the death penalty was not *per se* unconstitutional, it required that the death penalty meet certain societal goals if it was to be implemented. *Gregg,* 428 U.S. at 183, 186-187 (plurality opinion). These goals are deterrence and retribution. *Id.* at 183.

In *Coker v. Georgia*, 433 U.S. 584, 592 (1977) a plurality of this Court found that the death penalty for the rape of an adult woman violated the Eighth Amendment. It held that, under *Gregg,* the death penalty is excessive punishment when it makes no measurable contribution to acceptable societal goals of the death penalty or is grossly disproportionate to the severity of the crime. *Id.* A punishment could fail the test on either prong. *Id.*

In *Edmund v. Florida*, 458 U.S. 782, 797 (1982) this Court held that the death penalty for a prisoner found guilty of vicarious felony murder violated the Eighth Amendment. The Court focused on the defendant's moral culpability: "As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' is an excessive penalty for the [vicarious felony murderer] who, as such, does not take human life." *Edmind* quoting *Gregg*, 428 U.S. at 187. The majority focused on individual culpability and the petitioner in *Edmund* was clearly less culpable than those who actually killed the victims.

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) this Court found that the execution of individuals with intellectual disabilities violates the Eighth Amendment. The Court asked whether the execution of such persons would further the purposes of the death penalty, namely deterrence and retribution. *Id.* at 319-320. The majority held that because such persons have a diminished mental capacity, their execution would measurably deter them from committing such offenses. *Id.* As for retribution, as such handicapped people have a diminished moral culpability, the justification for execution as retribution is greatly reduced. *Id*. at 319. So their execution would be "nothing more than the purposeless and needless imposition of pain and suffering." *Id*. at 319, quoting *Edmund*, 458 U.S. at 798. *Coker, Edmund* and *Atkins* clearly show that the Eighth Amendment prohibits the needless imposition of pain and suffering. So too, the execution of an innocent person would be purposeless and needless.

Other cases have prohibited the death penalty for crimes that the Court has found to be "needless," "arbitrary," or "excessive." *Roper v. Simmons*, 543 U.S. 551, 570-571, 578 (2005), prohibits the execution of juveniles under the age of eighteen, citing a lack of moral culpability. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (1972) (per curiam) held that the death penalty is prohibited for the rape of a child because the punishment is excessive and disproportionate. *Graham v. Florida*, 560 U.S. 48 (2010) held that mandatory life sentences for juveniles who commit the offense at thirteen violates the Eighth Amendment. The common denominator with these Eighth Amendment cases is individual moral culpability. The conclusion is that it is a flagrant violation of the Eighth Amendment to execute an innocent person.

The Eighth Amendment has traditionally stood for the value of protecting the innocent from punishment. The Courts have proceeded under the assumption that by guarding a defendant from constitutional errors at trial, a just and fair verdict will result. But with

advancing technology in such areas as DNA analysis, the increasing ability to detect trial errors, and evolving standards of fairness and justice, courts should now recognize freestanding claims of actual innocence where the traditional safeguards have obviously failed, as they have with Mr. Acker.

The execution of an innocent person does not serve either goal of capital punishment, deterrence or retribution. *See, e.g. Gregg,* 428 U.S. at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.") Mr. Acker's case presents the opportunity for this Court to explicitly recognize a freestanding claim of actual innocence for capital defendants.

CONCLUSION

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

Respectfully Submitted,

s/s A. Richard Ellis

* A. Richard Ellis
75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251
a.r.ellis@att.net
Texas Bar No. 06560400

Maureen Scott Franco
Federal Public Defender
Western District of Texas

Timothy P. Gumkowski
Assistant Federal Defender
504 Lavaca St., Suite 960
Austin, TX 78701
(512) 916-5025
tim_gumkowski@fd.org

Attorneys for Daniel Clate Acker
* Counsel of Record

EXHIBIT 1

VINCENT J.M. DI MAIO, M.D.
CONSULTANT IN FORENSIC PATHOLOGY
10 CARRIAGE HILLS
SAN ANTONIO, TEXAS 78257
(210) 698-1400
FAX (210) 698- 3809
Email: vincent dimaio@yahoo.com

May 27, 2011

Tina J. Miranda
Assistant Attorney General
Post conviction Litigation Division
P.O. Box 12548
Austin, Texas 78711

Re: Texas v. Acker

Dear Ms. Miranda:

As requested, I have reviewed the following materials in regard to the above case:

1. The autopsy report
2. Photos of the body and scene
3. The report of G.M. Larkin, M.D.
4. Trial Transcripts Volumes 19-22

Based on the aforementioned materials, it is my opinion that the diagnosis of strangulation of Marquette George is not supportable by the evidence. The neck injuries and petechiae are non-specific and better explainable by the massive blunt force injuries incurred when Ms. George went out the moving truck and was run over. In addition, to strangle an individual one has to maintain continuous pressure on the neck, occluding both the carotid arteries, for 2-3 minutes. I do not think this would be possible under the circumstances of this incident i.e. using one hand while driving a truck and the victim a healthy adult female.

As to whether, Ms. George jumped or was pushed from the truck, it is impossible to say from the injuries. While Dr. Larkin gives a detailed explanation as to how each injury occurred and why she had to have jumped out the truck, in my opinion this is not possible, due to too the many variables. These include: the speed of the truck; whether it was going straight or swerving when she left the truck; if swerving to the right or left. In addition, was Mr. Acker holding on to her or her clothing? Was he pushing her out or trying to pull her back? Did she go out face first as if diving, or backward as if falling or being pushed, or sideways as if she was falling or being pushed to her right? Was she attempting to stop her exiting the vehicle by holding onto Mr.

Acker or the door or a seat belt? With all these variables and possibilities, all that one can say from the autopsy findings is that she incurred her injuries from going out a moving vehicle and being run over by the vehicle. In regard to absence of tire marks, these may be absent on both the clothing and the body in some cases.

Sincerely,

VINCENT J.M. DI MAIO, M.D.

EXHIBIT 2

HOPKINS COUNTY SHERIFFS OFFICE
SUPPLEMENTAL REPORT

OFFENSE ___ INCIDENT ✓

CASE NUMBER	OFFENSE / INCIDENT	REFERENCE:
SO 200698	Incident	Marquetta George / Acker

NARRATIVE

On 2-26-00 at 10:44pm I deputy L Tatum and deputy B Anderson were dispatched to a residence on cr 2450 reference assault in progress. When we arrived we met with a white female a Marquetta George and another white female who was later learned to be Daniel Acker's mother. Both at that time were at a neighbor's home where they had came to call 911. Mrs George advised that her and Mr Acker had been at bustin hoose where they had gotten into a arguement. When they started to the residence on cr 2450 which was Mr Acker's mother's residence. Mrs George had tried to jump out of the pickup Mr Ackers he caught her by the arm and pulled her back into the vehicle. When they arrived at Daniel Acker's mother's residence they were arguing Mr Acker's mother tryed to break them up Mr Acker grabed his mother and threw her on the couch. At that point Mrs George told Mr Acker she was going to call the cop's at that point he ran through the sliding glass door's in the back of the residence. At that time Mr Acker's mother and Mrs George went to a neighbor's house to call 911. When we arrived Mr Acker had already theft the scene.

Both myself and Deputy Anderson tried to get Mrs George and Mr Acker's mother to file a report they would not. They stated they would not give us a statement. Mrs George stated she was afraid he would go back to jail and not see his children she declined any type of a report.

REPORTING OFFICER	DATE	APPROVING SUPERVISOR	DATE
L Tatum 618			
FOLLOW UP INVESTIGATION YES NO		ASSIGNED TO	DATE

EXHIBIT 3

HOPKINS COUNTY SHERIFFS OFFICE
SUPPLEMENTAL REPORT

OFFENSE____ INCIDENT V

CASE NUMBER	OFFENSE / INCIDENT	REFERENCE:
50200698	Incident	Marqueta George + Daniel Acker

NARRATIVE

On 2-26-00 Deputy Lewis Tatum and myself responded to an assault in progress on County Road 2450 5th residence on the left off of County Road 38W. When we arrived we were met by a white female by the name of Marqueta George, Mrs George was at a neighbors residence with another white female who was later found out to be her boyfriend's (Daniel Acker) mother. They both advised that mr Acker had left the residence prior to our arrival.

Mrs. George then advised officers that mr Acker and herself had been at Austin Loose and had gotten into an argument and left the club and came back to his mother's house. While in the residence mr Acker became very violent and started arguing. Mrs George stated that his mother had stepped in between them and mr Acker picked his mother up and threw her on the couch. Mrs George then stated that they were going to call the the Cop's and mr Acker ran through the back sliding glass window. Mrs George then stated that her and his mother ran to a neighbors house to call the Police. Mrs George also advised later in her Conversation that while mr Acker and her were on the way back to the residence from the club, she had attempted to jump from the truck and mr Acker caught her by the arm and pulled her back into the truck.

After speaking with Daniel Acker's mother she advised that they had both came in from the Club and both were screaming at each other. She felt that the altercation was progressing and stepped in between them and mr Acker picked her up and threw her on the couch. At this time mrs George had threatened to call the police and mr Acker ran through the back sliding glass door, and her and mrs George ran to a neighbor's house. & Neither party wished to file any charges or give any statements against mr Acker. &

REPORTING OFFICER	DATE	APPROVING SUPERVISOR	DATE
Brandon Anderson 612			
FOLLOW UP INVESTIGATION YES NO		ASSIGNED TO	DATE

EXHIBIT 4

HOPKINS COUNTY SHERIFF'S OFFICE
RIMINAL INVESTIGATION DIVISI
INVESTIGATIVE REPORT

ORIGINAL

OFFENSE NUMBER: 00-03-031 OFFENSE: MURDER
VICTIM: MARQUETTA GEORGE DEFENDANT: DANIEL CLATE ACKER
REPORTING INVESTIGATOR: TONEY HURLEY #504

SUNDAY (3-12-2000)

SHORTLY AFTER 12:00pm, INVESTIGATOR HURLEY RECEIVED A CALL FROM THE HOPKINS COUNTY SHERIFF'S OFFICE. THE DISPATCHER ADVISED THAT A DEAD BODY HAD BEEN FOUND ON COUNTY ROAD 3519. HURLEY RESPONDED TO THE CALL AND APPROACHED THE CRIME SCENE FROM THE SOUTH. UPON ARRIVAL, HURLEY NOTICED THAT THE SCENE WAS SECURED BY DEPUTY JACE ANGLIN, DEPUTY CHRIS HILL AND SHERIFF ADAMS. HURLEY STARTED TAKING PHOTOGRAPHS OF THE SCENE WHILE SHERIFF ADAMS LOGGED THE PICTURES THAT WERE BEING TAKEN. ADAMS BRIEFED HURLEY ON THE SITUATION AND ADVISED THAT DANIEL ACKER WAS THE SUSPECT IN THIS CASE. ADAMS TOLD HURLEY THAT MARQUETTA GEORGE WAS THE DECEASED FEMALE. UPON WALKING UP TO THE BODY, HURLEY NOTICED A SMALL POOL OF BLOOD NORTH EAST OF GEORGE'S RIGHT FOOT. (APPROXIMATELY 6'3" FROM THE HEAD) HURLEY AND SHERIFF ADAMS DECIDED TO CALL DPS SARGENT WILLINGHAM TO THE SCENE. WILLINGHAM HAS THE CAPABILITY OF MAKING A COMPUTERIZED DIAGRAM OF THE CRIME SCENE. AFTER INVESTIGATOR WRIGHT ARRIVED, HURLEY SENT HIM (WRIGHT) TO DEPUTY COSME'S LOCATION. COSME WAS AT A HOUSE ON COUNTY ROAD 3511. THIS LOCATION IS THE HOME OF GEORGE AND ACKER. HURLEY WAS TOLD THAT THE INCIDENT STARTED AT THIS LOCATION.

HURLEY WAS TOLD THAT DPS TROOPER BILL REESE HAD LOCATED DANIEL ACKER AND WAS TAKING ACKER TO THE SHERIFF'S OFFICE.

INVESTIGATOR SHACKELFORD ARRIVED AND PHOTOGRAPHED THE SCENE AND ASSISTED SGT. WILLINGHAM WITH THE CRIME SCENE. JUDGE RONNY GLOSSUP WAS THE JP THAT WAS CALLED TO THE SCENE.

TEXAS RANGER DANNY RHEA MET HURLEY AT THE HOPKINS COUNTY SHERIFF'S OFFICE. HURLEY AND RHEA CONDUCTED A VIDEO TAPED INTERVIEW WITH DANIEL ACKER. ACKER HAD HIS RIGHTS READ TO HIM (ACKER) BY HURLEY. ACKER WAIVED HIS RIGHTS AND WANTED TO TALK ABOUT THE OFFENSE. THE INTERVIEW WAS VIDEO TAPPED. ACKER TOLD HURLEY AND RHEA THAT HE (ACKER) AND GEORGE WERE ARGUING ABOUT WHO SHE (GEORGE) HAD SPENT THE PREVIOUS NIGHT WITH. ACKER STATED THAT GEORGE RAN OUT OF THE HOUSE AND OVER TO THE NEIGHBORS AND WAS YELLING FOR THEM TO CALL THE POLICE. ACKER STATED THAT HE THEN GRABBED HER AND PLACED HER IN HIS WORK TRUCK. ACKER TOLD INVESTIGATORS THAT GEORGE JUMPED OUT OF THE TRUCK AND WAS RAN OVER. ACKER SAID THAT HE THEN BACKED UP AND TRIED TO LIFT HER (GEORGE) AND HE COULD TELL THAT SHE WAS DEAD. ACKER SAID THAT HE THEN DROVE AWAY LEAVING GEORGE LYING IN THE ROAD. ACKER STATED THAT HE TOLD HIS MOTHER, KENNY BAXTER AND GENE BOOTH THAT MARKIE HAD JUMPED OUT OF HIS TRUCK AND THAT SHE WAS DEAD. (REFER TO THE FIRST TAPPED INTERVIEW FOR DETAILS)

AT APPROXIMATELY 6:15pm (3-12-00), DORCAS DODD AND NANCY ACKER CAME TO THE SHERIFF'S OFFICE. DODD IS DANIEL'S SISTER AND NANCY IS DANIEL'S MOTHER. BOTH, NANCY AND DORCAS GAVE WRITTEN STATEMENTS CONCERNING THERE INVOLVEMENT IN THIS CASE. (INV.CHESTER RETAINS THE STATEMENTS)

MONDAY (3-14-00)

AT APPROXIMATELY 9:35am THE D.P.S. CRIME LAB ARRIVED AND PROCESSED THE WHITE FORD UTILITY TRUCK THAT ACKER WAS DRIVING DURING THE OFFENSE. D.P.S. TOOK CUSTODY OF ALL EVIDENCE THAT WAS COLLECTED.

AT APPROXIMATELY 2:10pm, JUDGE RONNY GLOSSUP TOLD HURLEY THAT THE MEDICAL EXAMINER'S OFFICE HAD CALLED HIM AND STATED THAT THEY BELIEVE THAT GEORGE WAS DEAD AT THE TIME SHE WAS RUN OVER. CHESTER CALLED THE M.E. AND SPOKE TO DR. MORNA GOUSLIN AND CONFIRMED THE INFORMATION.

MONDAY (3-13-00)

AT APPROXIMATELY 3:50pm, HURLEY AND CHESTER CONDUCTED A VIDEO TAPED INTERVIEW WITH DANIEL ACKER. ACKER HAD HIS MIRANDA WARNING READ BEFORE ANY QUESTIONING. ACKER WAVED HIS RIGHTS AND WISHED TO TALK ABOUT THE OFFENSE. HURLEY TOLD ACKER ABOUT THE INFORMATION THAT WAS PROVIDED BY THE MEDICAL EXAMINER. ACKER GOT VERY ANGRY AND STATED; "THE MEDICAL EXAMINER IS LYING". ACKER CONTINUALLY STATED THAT MARKIE JUMPED OUT OF THE TRUCK. (SEE VIDEO TAPED INTERVIEW NUMBER TWO)

AFTER THE INTERVIEW, HURLEY WAS TAKING ACKER BACK TO THE JAIL, WHEN ACKER TOLD HURLEY THAT HE (ACKER) NEEDED TO TELL THE TRUTH ABOUT EVERYTHING. HURLEY AND CHESTER BEGAN THE THIRD TAPED INTERVIEW WITH ACKER. ACKER WAS REMINDED OF HIS RIGHTS AND HE STATED THAT HE UNDERSTOOD. ACKER TOLD INVESTIGATORS THAT HE WAS ASSAULTING GEORGE AT THE TRAILER HOUSE. ACKER STATED THAT MARKIE RAN OUT OF THE HOUSE AND WAS YELLING TO THE NEIGHBORS, "CALL THE POLICE". ACKER TOLD INVESTIGATORS THAT HE (ACKER) THEN GRABBED GEORGE AND PUT IN THE TRUCK AND DROVE OFF. ACKER STATED THAT GEORGE WAS TRYING TO GET OUT OF THE TRUCK WHILE HE WAS DRIVING. ACKER STATED THAT HE WAS PULLING GEORGE'S HAIR TO HOLD HER IN THE TRUCK. ACKER STATED THAT HE ALSO HIT GEORGE IN THE NOSE AND MOUTH. ACKER TOLD HURLEY AND CHESTER THAT HE KNEW THAT HE WAS THE CAUSE OF MARKIE'S DEATH BECAUSE HE PLACED HER IN THE TRUCK. ACKER CONTINUED TO STATE THAT GEORGE JUMPED OUT OF THE TRUCK.
(SEE VIDEO TAPED INTERVIEW NUMBER THREE)

TUESDAY (3-14-00)

HURLEY AND CHESTER MET WITH FRANK LONG AND BRIEFED LONG ON THE CASE. LONG TOLD INVESTIGATORS TO WORK THE CASE AS MURDER AND WAIT FOR THE MEDICAL EXAMINER'S REPORT.

HURLEY WAS OUT OF TOWN WHEN INVESTIGATOR CHESTER OBTAIN THE MURDER WARRANT AND SERVED IT ON DANIEL ACKER.

TONEY HURLEY, C.I.D.
INVESTIGATOR
4-3-2000

EXHIBIT 5

Hopkins County Sheriffs Office

THE STATE OF TEXAS, THE COUNTY OF HOPKINS

Voluntary Statement (Not Under Arrest)

PAGE 1 OF 3 PAGES

I, Sabrina Ball, AM 36 YEARS OF AGE,

DATE OF BIRTH IS 7-30-64, I AM NOT UNDER ARREST FOR, NOR AM I BEING DETAINED FOR ANY CRIMINAL OFFENSES CONCERNINGTHE EVENTS I AM ABOUT TO MAKE KNOWN TO Depury S R Scott

MY ADDRESS IS RT 8 Box 128 Sulphur Spgs TX AND HOME PHONE # IS 885-7734 342-3973

On February 26, 2000 at approx 10:30 pm a woman came to our house. She was beating on the door and ringing the doorbell repeatedly. We answered the door and found her on her hands and knees at the front door. My husband recognized her as Makie Henry. I asked, "Are you O.K.?" She replied No! She's crazy! She's going to kill me! Can I use your phone?" We told her to come inside. I asked, "who is trying to kill you?" She replied, "Daniel Acker, he lives a few houses down, we got in a fight, we were at BUSTIN LOOSE. We were in the truck and he was beating my head against the dash. I tried to jump out, but he pulled me back in. My face was just a few inches from the pavement" She was very upset, shaking and crying. I asked if he was chasing her. She said he had driven off in his truck. We gave her the cordless phone and she made the call.

R. Scott
WITNESS

WITNESS

Sabrina Ball For Record Only
SIGNATURE OF PERSON GIVING STATEMENT

1-26-01

CX-2

Hopkins County Sheriffs Office

THE STATE OF TEXAS, THE COUNTY OF HOPKINS

STATEMENT CONTINUED: PAGE 2 OF 3 PAGES

STATEMENT OF (PRINT NAME) Sabrina Ball

She continued to talk about the fight and how she had run a way. She stated they were at his moms house when the fight had continued. She said, "He's crazy. He ripped the phone out of the wall, busted a window, and even picked up his mother and threw her on the couch." She said that she ran to get away and saw the light on at our house.

The sheriff's deputies arrived and questioned L.S. Creasy. She refused to file charges. but was concerned about her purse & left in the pickup truck. Mrs. Acker (Daniels mother) also came to our house during this time. Mrs Acker said "Y'all are always fighting, you need to just stay away from each other and this kind of thing would not happen." Mrs. Creasy said "Do not to call someone to pick up my son at the skating rink." She then made several calls but was unable to find anyone. While making these calls C/ spoke to her and urged her to file charges and stressed to her the need to

T.R. Scott
WITNESS

Sabrina Ball
SIGNATURE OF PERSON MAKING STATEMENT

WITNESS

1-16-01
DATE

Hopkins County Sheriffs Office

THE STATE OF TEXAS, THE COUNTY OF HOPKINS

STATEMENT CONTINUED: PAGE 3 OF 3 PAGES

STATEMENT OF (PRINT NAME) Sabrina Ball

do something in order to assure her safety. However, she said she just couldn't do it. Mrs Elder offered to take her to pick up her son and they left together at that time.

SB

J.R. Scott
WITNESS

Sabrina Ball
SIGNATURE OF PERSON MAKING STATEMENT

1-6-01

EXHIBIT 6

HOPKINS COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

Date: 3-12-00
Ref: Death of Marquetta Deanne Follis George

On Sunday, 3-12-2000, I, Deputy Chris Hill, was dispatched to a call of a Disturbance/Trespassing on CR 3511, 2nd trailer house on the left. Dispatch advised that a Mr. Smiddy called 9-1-1 and advised that his neighbors were involved in a disturbance in his yard. Comp. advised that he wanted to press charges for trespassing on them. Dispatch also advised that the subjects left in a white utility truck headed toward Mahon Dispatch stated that the comp. saw the male subject force the female subject into the white truck and then driv off, and while driving off female subject tried to exit the vehicle and the male subject "jerked" her back in. Jus before arriving at CR 3511, dispatch called back and advised that a Mr. Ferrell had called 9-1-1 and advised th he just found a white female lying in the road at the end if his driveway on CR 3519 south of 1537. I then proceeded to that location being the closest officer. As I turned onto CR 3519, I noticed several ruts in the ditches on both sides of the road where it looked like a vehicle had ran completely off of the road several times recently. I pulled into the first residence on the right and briefly spoke with two subjects who quickly told me that they had not called the Sheriff's Office. I then looked further down the road and seen a subject waving me down. I proceeded further south and then saw a white female laying on the west side of the county road. I approached the subject in the road and saw that she was laying lifeless and bleeding profusely. I advised dispat of what I saw and then got out and ran up to the woman and began trying to talk to her to get her to respond. noticed that she had blood coming from her nose and mouth area. I also noticed that she had what looked to b part of the skull protruding through the skin above her left eyebrow and her right eye was partially open as wel as her mouth. I then checked for a pulse on both sides of her neck and listened for any sign of breathing. Afte attempting approx. 3 times, I felt no pulse and heard no breathing. I advised dispatch of this and about that same time Cpl. Jace Anglin arrived at the scene. He came up to the female where I was and I advised him that checked for a pulse and listened for breathing and got no response. Cpl. Anglin and I then began to tape off th scene and had dispatch notify 500,501, and the on-call investigator and advise them of what we had. I went up to speak with the complainant, Mr. Sedell Ferrell. Mr. Ferrell stated that he had been out feeding hay on his tractor and when he got back to his dairy, he saw the subject in the road and called 9-1-1. Cpl. Anglin got a statement from Mr. Ferrell while I spoke with the E.M.S. and F.D. personnel who had just arrived on the scene E.M.S. advised that they applied monitors to four different places on the subject and got no heartbeat or pulse. They advised me that they did leave the monitor hook-ups on the body. E.M.S. then covered the body with a white sheet. During the time that E.M.S. was attending the body, Deputy Victor Cosme (who was on the scen on CR 3511) advised that he was speaking with the original complainants as well and a family member of the deceased's boyfriends mother and sister. Dep. Cosme advised on radio that the subject that left in the white utility truck with the deceased was a subject by the name of Daniel Acker, and gave a description of him as wel as 2 to 3 locations where he may be found. Dep. Cosme further advised that the subject worked for Bentley Electric and the white truck would probably come back to that company and that there were 2 small children th were unaccounted for. About this time Sheriff Adams arrived at the scene. I walked over to him and advised him of all that I knew. Sheriff then advised me that the deceased was Marquetta (Markie) Follis George. I was familiar with that subject and was aquainted with her from previous law-enforcement related calls, however, sh was unrecognizable by this officer due to the trauma to the face and head. Shortly after, Eddy Moon from the Birthright F.D. came to me and advised that there was a subject at the road block that stated that he was a witness to a white utility truck being at the location where the body was found a few minutes before my arrival. advised Mr. Moon to let the subject through and have him come and talk to me. I spoke with the subject by th

EXHIBIT 7

Hopkins County Sheriff's Office

STATE OF TEXAS, THE COUNTY OF HOPKINS

Voluntary Statement (Not Under Arrest)

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I, ALICIA SMIDDY, AM 25 YEARS OF AGE, MY DATE OF BIRTH IS 5-18-74, I AM NOT UNDER ARREST FOR, NOR AM I BEING DETAINED FOR ANY CRIMINAL OFFENSES CONCERNINGTHE EVENTS I AM ABOUT TO MAKE KNOWN TO Victor M. Cosme MY ADDRESS IS Rt 1 Box 32f Sulphur Springs AND HOME PHONE # IS (903) 438-0805

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 1yr 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 1yr old picked marquetta up over his shoulder. She was screaming, kicking, yelling NO Daniel, NO Daniel, traying her best to get loose. She started crying, he shoved her into a white utility truck on the Drivers Door side. she was trying to get out the hit her, shoved her on in, holding her down, spun off through the ditch she was trying to get out he was swearing all over the road turned and went towards Mahoney. That was the last we saw

Victor M. Cosme
WITNESS

Alicia Smiddy
SIGNATURE OF PERSON GIVING STATEMENT

WITNESS

3-12-00
DATE

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EXHIBIT 8

Notice how far the utility bed sticks out past the cab.