No._____

In the
Supreme Court of the United States

IN RE DANIEL CLATE ACKER,
Petitioner.

ON ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

MOTION FOR STAY OF EXECUTION

DANIEL ACKER IS SCHEDULED TO BE EXECUTED ON THURSDAY, SEPTEMBER 27, 2018

TO THE HONORABLE JUDGES OF THIS COURT:

Daniel Clate Acker was convicted of capital murder and is facing an execution date of September 27, 2018. As detailed in his accompanying original petition for writ of habeas corpus, there are now serious doubts as to whether this case was a homicide at all. Mr. Acker was tried and convicted on the theory that he had abducted the victim Marquetta George and then strangled her while driving, a theory that the State disavowed in federal court. Unlike the State's three different and conflicting versions of his guilt, for the past eighteen years Mr. Acker has steadfastly and consistently maintained that Ms. George jumped from his truck. The Texas Court of Criminal Appeals upheld Mr. Acker's conviction on the theory that, while driving his truck at high speeds, "it is likely that the decedent was strangled and

probably dead or near death prior to being dumped from the vehicle." *Acker v. State,* No. 74,109 (Tex. Crim. App. Nov. 26, 2003) at *5.[1] Death by strangulation figured in all parts of Mr. Acker's trial, from the indictment, to the testimony of the medical examiner,[2] the arguments, the jury deliberations, through to the appeal and the state post-conviction proceedings.[3]

However, the State's own expert in federal court, nationally-recognized coroner Dr. Vincent Di Maio, opined at the federal evidentiary hearing in 2011 that Ms. George was never strangled, essentially agreeing with defense expert Dr. Glenn Larkin. At that hearing, the State changed their theory and contended that Mr. Acker pushed Ms. George from the truck, a theory that was never presented to Acker's jury. The State has made no effort to defend the trial theory of guilt of "death by strangulation" heard by Mr. Acker's jury. Instead, they have disavowed it, not once but twice.

In yet another change of the State's theory, a third version, initially devised by the federal district court in its opinion and then affirmed by the Fifth Circuit Court of Appeals, was that the victim was immobilized in Acker's truck, placed on the ground and then

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

[2] The medical examiner who testified at Mr. Acker's trial was Dr. Morna Gonsoulin, who, at the time she signed the autopsy report, *was still an intern and hadn't completed all of the requirements to be a medical examiner.* (20 RR 273.) ("RR" refers to the Reporter's Transcript, with the volume number preceding the page number.)

[3] A detailed discussion of the dominance of the strangulation theory at Mr. Acker's trial is in his petition for writ of certiorari.

deliberately run over by Acker. *No witness ever testified to this at Acker's trial.* In fact, the witness upon whom the federal courts apparently relied to arrive at this conjectural hypothesis admitted he gave three different stories to the police and, even in his final version, he told the jury that Acker placed the victim on the ground and drove away *and did not run her over.*

At trial, the State's case was based on the now-discredited strangling-while-driving hypothesis, a virtually impossible feat. Due to erroneous evidentiary rulings by the trial court, Acker's jury was not allowed to hear that, just two weeks prior to her death, Ms. George had attempted to jump from Acker's truck, precisely his explanation of what caused her death on March 12, 2000 when he turned himself in to the authorities. Just a few minutes prior to the discovery of the victim's body, eye-witnesses saw George attempting to escape from the truck while Acker was trying to keep her in. Not only did Acker have no motive to push George to her death, his intent was the exact opposite. He wanted to forcibly bring her with him to meet the person with whom she had spent the night, to see if they had been intimate—a meeting George, understandably, did not want to attend. Hence, she attempted to jump, which went awry, and ended tragically with her death. Mr. Acker has taken full responsibility for the victim's abduction and has expressed remorse for that act from the day he turned himself in shortly after the accident.

As homicide 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 that Court 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).[4]

The State's wildly speculative and flawed strangulation theory was never effectively challenged by Mr. Acker's attorneys, mainly because the trial court obstructed their efforts to do so. Defense counsel's requests for forensic experts were denied on the basis that they had been provided with an investigator. But when the investigator attempted to show that Acker could not have strangled her while driving and pushed her out of the truck, the court ruled this evidence was inadmissable because his tests were not performed by the very experts for which the court had denied funding. The trial court also did not allow the jury to hear important evidence that the victim attempted to jump from the very same truck just two weeks prior to her death, something very few people would attempt, and was prevented from doing so by Mr. Acker.

The miscarriages of justice continued on appeal when appellate counsel filed a 9-page brief, possibly one of the shortest ever filed in a capital case this State. Even worse, if possible, were Acker's state post-conviction proceedings, where the vast majority of the application consisted of Acker's own memos and letters, submitted verbatim without even basic editing, mostly without even changing them from the first person vernacular. To characterize Acker's state habeas petition as incoherent would be an understatement. This woefully incompetent pleading was the subject of widespread media attention and

[4] 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.)

incredulity.[5]

Mr. Acker was prejudiced by the State's change of theory, as juror Stephen Watson has attested in his declaration submitted to the Texas Court of Criminal Appeals in Mr. Acker's subsequent application. Mr. Watson states that had he known that "the prosecution's strangulation theory was later discredited by other experienced experts who concluded that Ms. George was not strangled...It is possible it would have changed my mind about Daniel's guilt."

As provided in the federal habeas corpus statute, 28 U.S.C. §2251,

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.
> *See also McFarland v. Scott,* 512 U.S. 849, 857-858, 114 S. Ct. 2568, 2573 (1994).

Barefoot v. Estelle, 463 U.S. 849, 888, 889, 893 n.4 (1983), the leading authority on post-petition habeas corpus stays recognizes that a stay of execution is required whenever at least one claim is "not frivolous" or "colorable," the claim is "debatable among jurists of reason and a court *could* resolve the claim favorably to the petitioner." *See also McFarland ,supra,* at 860 (1994)(O'Connor, J., concurring in the judgment in part and dissenting in

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[5] USCA5.872-891 (this refers to the federal record on appeal in the Fifth Circuit Court of Appeals); (newspaper articles relating to Mr. Acker's state petition and other petitions by state habeas counsel Toby Wilkinson). Some of the media comments were that "the writ echoes Acker's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper" [at 874]; that it was "filled with gibberish" [at 878]; and that it "reads as if it was written by someone with an 8th Grade education. In fact, most of it was." [at 879.]

part). This standard does not require the petitioner to show that he would prevail on the merits, but it does require him to show that the issues he presents are debatable among jurists of reason. *Barefoot,* 463 U.S. at 893 n.4. *See also Delo v. Stokes,* 485 U.S. 320, 321 ("A stay of execution pending disposition of a second or successive federal habeas petition should be granted only where there are substantial grounds upon which relief might be granted").

When the resolution of a claim turns on "procedural grounds," a stay of execution should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). For the reasons discussed herein, Mr. Acker is entitled to a stay of execution.

Daniel Acker is innocent of the murder of Markie George and respectfully requests a stay of his execution so that a close and careful review of the strong evidence of Mr. Acker's innocence may be conducted. As the Supreme Court has stated, "execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright,* 477 U.S. 399, 411 (1986).

PRAYER FOR RELIEF

For the reasons above and for those stated in his accompanying Original Petition for Writ of Habeas Corpus, Mr. Acker respectfully requests that this Court:

1. Grant a stay of execution , currently scheduled for September 27, 2018;

2. Grant his petition for writ of certiorari and/or his original petition for writ of habeas corpus and remand the matter for a hearing on his compelling claims of innocence.

3. Mr. Acker further requests any other relief that law or justice may require.

Dated: September 24, 2018.

Respectfully submitted,

s/s A. Richard Ellis

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