Nos.18-6075; 18A310

In the
Supreme Court of the United States

DANIEL CLATE ACKER,
Petitioner,
vs.
STATE OF TEXAS,
Respondent.

REPLY BRIEF OF PETITIONER

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
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
* Counsel of Record for Applicant
Member, Supreme Court Bar

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On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

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Respondent's Brief In Opposition ("BIO") is based on assertions regarding the record, Mr. Acker's arguments, and the law that do not withstand scrutiny. Respondent argues that this matter involves "the same actual innocence claims [that] were previously rejected by the jury" (Question Presented, BIO at i); only "factual errors" unworthy of this Court's attention (*Id.* at 13); that certiorari review and a stay of execution are foreclosed by a state procedural bar (*Id.* at 15-17); and that Acker cannot show innocence and his claim is defaulted. (*Id.* at 17-36). These arguments are all unavailing.

I. Introduction.

The State seeks to execute Daniel Acker on the basis of trial testimony that the State's own expert, and the State itself, have repudiated. This evidence, that the victim was strangled, permeated Mr. Acker's indictment, trial opening statements and testimony, the cross-

examination of Mr. Acker, the prosecution's final arguments, the jury's inquiry at deliberations, the appeal and the state post-conviction proceedings. Notably, the State in both federal district court, the Fifth Circuit Court of Appeals, the Supreme Court of the United States, in the Texas Court of Criminal Appeals, and now once again in this Court in has made absolutely no effort to defend the erroneous trial testimony upon which Mr. Acker was tried, convicted and sentenced to death. Respondent's question presented, that "the same actual innocence claims were previously rejected by the jury," (BIO at i) blatantly misrepresents the fact that only well after Acker's trial, in federal habeas proceedings, did the State reject its trial theory, which put Acker's innocence claim—that the victim jumped—in an entirely new light. In addition, Mr. Acker submitted to the Texas Court of Criminal Appeals ("TCCA") a declaration from a juror who states that had he known that the victim was not strangled, it would have made a difference in his vote.[1] This declaration, along with much of Acker's evidence, is not even discussed by Respondent, let alone controverted.

Instead, Respondent resorts to misrepresentations of the factual record, presents a distortion of this Court's well-settled law, bases their BIO on a federal district court decision which made significant factual errors and was decided under a different and more restrictive legal standard than the Texas state standard, and seeks to prevent a jury hearing the facts establishing that this case was a tragic accident, not a homicide.

The apparent current operative theory of Acker's guilt, the State's third such version, is the federal district court's holding that, "Mr. Young saw Acker pull her from the truck and lay

[1] *See* Exhibit 19 to Acker's subsequent application to the TCCA, Declaration of Juror Stephen Watson. This refutes the State's repeated contentions (BIO at 1, 17-20, 25) that Acker cannot meet his burden under *Schlup v. Delo,* 513 U.S. 298 at 327 (1995) or Art. 11.071 sec. 5(a)(2) to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

her along the road in front of the truck, that Acker subsequently ran over Mr. George with his truck, and that was the cause of her death." (BIO at 25, citing *Acker v. Director*, No. 4:06-cv-469, 2016 WL 3268328 at *24 (E.D. Tex. June 14, 2016)). *Yet neither Mr. Young nor any other witness ever testified that Acker deliberately ran over the victim. In fact, Mr. Young explicitly denied it*.[2]

Respondent's procedural arguments would bar Mr. Acker from having the "one bite" at the habeas apple to which this Court has held he is entitled, on the basis that the facts were presented or could have been presented in his initial state habeas application—a writ that has accurately been termed "gibberish."[3]

The Texas Legislature and courts created new avenues specifically designed to prevent the tragedy that is imminent here—the execution of an innocent man on the basis of facts not known or capable of being known at the time of his initial application and on the basis of false or misleading forensic evidence. *See* TEX. CODE CRIM. PROC. art 11.071 sec. 5(a); art. 11.073. Yet, the TCCA summarily dismissed Acker's application despite compelling proof of his innocence

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[2] Mr. Young told differing versions of his story, including one that claimed he saw Acker and the victim arguing in the truck, testified that Acker pulled her out of the truck and took a few steps backward and then laid her on the side of the road and got back in his truck and took off. (19 RR 208.) Young testified that he saw Acker's truck headed south (19 RR 210) *and it did not run over the woman* as it left his sight. (19 RR 231.) ("RR" refers to the Reporter's Record, with the volume number preceding the page number).

[3] *See* USCA5.872-891 (newspaper articles relating to Acker's state petition and others by state habeas counsel). Some of the media comments were that "the writ echoes Acker's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper" [USCA5.874]; that it was "filled with gibberish" [USCA5.878]; and that it "reads as if it was written by someone with an 8th Grade education. In fact, most of it was." [USCA5.879.] However, the only comment this petition elicited from the district court was to point out that "there were 39 actual claims" filed and to characterize criticism of it as "harsh." [USCA5.1993-1994.] "USCA5___" refers to the page number of the Record on Appeal in the Fifth Circuit.

and a showing that he clearly met the statutory criteria for subsequent habeas applications. These are compelling reasons for this Court to grant certiorari.

II. Respondent's erroneous procedural arguments. (BIO at 15-17).

Respondent misleadingly asserts that "Acker's claims of due process error, ineffective assistance of state habeas counsel, and improperly excluded evidence were procedurally defaulted because of the previous application of Section 5." (BIO at 14-15). Unmentioned is the fact that the "previous application of Section 5," Acker's 2008 writ application, was submitted prior to the State's disavowal of strangulation in 2011 through their own expert; prior to the State changing its theory of Acker's guilt twice;[4] prior to the new line of cases from the TCCA holding that false testimony can violate an applicant's due process rights, even if the State was unaware at the time of the testimony that it was false;[5] and prior to the 2013 enactment of TEX. CODE CRIM. PROC. art. 11.073.

The State's contention that Mr. Acker's petition and stay application are foreclosed by an independent and adequate state-procedural bar (BIO Section I) reflects a misunderstanding of Mr. Acker's argument, and demonstrates the State's struggle to address the question Mr. Acker presents to the Court.[6]

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[4] At the federal evidentiary hearing the State contended Acker pushed George from the truck. Then that theory was changed in their Fifth Circuit and Supreme Court pleadings to coincide with the federal district court's new theory in the 2016 opinion that the victim was immobilized in the truck, pulled from it and then deliberately run over by Acker.

[5] *Ex parte Chabot,* 300 S.W.3d 768, 772 (Tex. Crim. App. 2009); *Ex parte Chavez,* 371 S.W.3d 200 (Tex. Crim. App. 2012); *Ex parte Robbins,* 360 S.W.3d 446 (Tex. Crim. App. 2011); *Ex parte Gharremani,* 332 S.W.3d 470, 477-478 (Tex. Crim. App. 2011); *Ex parte Henderson,* No. AP-76,925 (Tex. Crim. App. Dec. 5, 2012)

[6] The State unabashedly declares, "[t]he question that Acker presents for review is *unworthy of the Court's attention*." BIO 13 (emphasis added). Attention and relief are two very different things. This is a capital case. The State of Texas intends to execute Mr. Acker in two days. In

Mr. Acker's petition does not "assert only factual errors or that a properly stated rule of law was misapplied," as the State contends.[7] (BIO 13.) Nor is the sole issue in his case "only the lower court's proper application of state procedural rules for collateral review of death sentences." *Id*. Rather, Mr. Acker inquires whether, in this "rare instance," due process requires a state post-conviction process beyond the TCCA's rote application of Article 11.071 Section 5(a) of the Texas Code of Criminal Procedure. While the TCCA's reliance on 11.071§ 5(a) may provide federal courts with a ground upon which such courts may find a claim procedurally barred, Mr. Acker's argument is of a different sort. Here, Mr. Acker is *not* challenging a federal court's ruling that a claim is procedurally barred based on TCCA's reliance on 11.071 § 5(a). Mr. Acker is asking this Court to recognize, consistent with the Court's understanding of the nature and premises of habeas corpus proceedings in general, that in this particular situation, the TCCA's dismissal and non-adjudication of Mr. Acker's subsequent application, without providing a process to review his judgment, was fundamentally inadequate to vindicate his rights.

Mr. Acker's case is unique. And the question he proposes to the Court addresses the unique circumstances of his case. Mr. Acker finds himself in a scenario that is not commonplace in capital proceedings. A unique scenario brought about because of the State's compelled repudiation of its theory of liability in post-conviction proceedings, and the federal courts' adoption of a liability theory that was never presented to Mr. Acker's jury, unsupported by the

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this petition, Mr. Acker raises questions involving due process and the fairness and appearance of fairness in the imposition of his death sentence. The State's position that these questions do not even deserve the Court's *attention* is disturbing and troubling.

[7] Mr. Acker maintains that the TCCA refused to acknowledge that he met the requirements of Article 11.071 § 5(a), as he demonstrated both a change in the law and new evidence such that he presented a prima facie case sufficient to meet the standard.

evidence at trial, and not tested in an adversarial manner. In such a unique situation, due process requires an adequate state post-conviction process to address the circumstances of his case. Here, the TCCA's September 18, 2018, order dismissing Mr. Acker's subsequent habeas application failed to provide such process.

The State reluctantly concedes, as it must, that this Court is not entirely precluded from providing the relief Mr. Acker seeks. *See* BIO 35 (acknowledging that there are situations where federal courts may weigh-in on, and indeed "upset" a state's post-conviction procedures). However, the State fails to address Mr. Acker's argument that, in this unique situation, the Court should do just that.

III. The State's arguments regarding actual innocence (BIO at 17-25).

As the State concedes, the federal district court and Fifth Circuit opinions were made in the context of Acker's gateway innocence claim (BIO at 17-18), which was a different standard than the one before the TCCA. Unlike federal law, Texas state law in 2006 first held that admission of false testimony can violate an applicant's due process rights even if the State was unaware at the time of the testimony that it was false.[8] In fact, much of the State's argument regarding the federal proceedings is based on (1) their failure to acknowledge that the federal standard is different and more restrictive than the state standard and (2) faulty representations of what transpired in the federal district court.

The State's entire argument, based on what transpired in federal court, is unavailing.

[8] *See* cases cited in footnote 5 *supra*. The federal standard for false testimony is dramatically different from Texas' standard. In *Napue v. Illinois,* 360 U.S. 264, 269 (1959) and *United States v. Agurs,* 427 U.S. 97, 103 (1976) this Court has held that a conviction obtained through use of false evidence is a violation of due process if it was known to be false by representatives of the State, unlike the Texas standard.

a. Respondent misstates the federal court proceedings.

The State also misleads in presenting a skewed view of the federal proceedings. The federal district court is repeatedly praised for "exhaustively review[ing]" and "considering the totality of the evidence" (BIO at 18); a "wide-ranging analysis" (*Id.* at 20); for "scour[ing] the record" (*Id*. at 20); for taking "account of the testimony of Broadie Young" (*Id*. at 22); for "extensively analy[ing]" the medical testimony (*Id.* at 23); for "considering and analyzing all the evidence from the trial and evidentiary hearing," (*Id*. at 25), all this in the five weeks it had the case. However, the hasty review and errors of the district court are encapsulated in the following holding:

> ...although Petitioner now argues that Ms. George would have resisted his efforts to open the passenger door to push her out, he simultaneously contends that she herself attempted to jump more than once and ultimately succeeded. That undercuts Petitioner's credibility even more because if Ms. George wanted out of the truck, why would she have resisted Petitioner while he was trying to open the passenger side door from which she purportedly wanted to jump?
> (*Acker v. Director*, 2016 WL 3268328 at *21.)

The error here is readily apparent: Acker argued that George would have resisted if Acker had tried to push her out to show the implausibility of the"pushed out" theory, i.e., that it never happened, not that she actually resisted. There is no "simultaneous contention," but a showing that she jumped and that pushing her out would have been difficult to the point of impossibility. This error undoubtedly fatally skewed the district court's "probabilistic determination." It also shows that Acker was not granted a careful review of his claim. The failure of the district court to grasp even this basic point should, in itself, be sufficient to discount the State's holding of the federal district court as an exemplar of careful analysis and a basis to show that "Acker cannot show actual innocence" (BIO at 17-25), even if the holding was not based on a different and more restrictive standard, which it was.

The State makes numerous factual errors throughout the BIO most of them adopted from the federal pleadings and the federal district court holding. The State repeatedly attempts to characterize and minimize this application as merely based on new expert medical testimony or a disagreement among experts. (BIO at 24, 30, 32, 33). The record shows otherwise. The Fifth Circuit Court of Appeals has acknowledged that "[i]t is true that the State's theory at trial was largely based on strangulation as the cause of George's death." *Acker v. Davis*, 693 F. App'x 384, 394 (5th Cir. 2017).

Strangulation was not merely an alternative theory of the manner of the victim's death, or one expert's opinion, it *was* the State's case, presented as such in the autopsy, the indictment, the grand jury proceedings, the prosecution's opening statements, the testimony of the medical examiner, the prosecutor's cross-examination of Acker, the jury charge, the prosecution's final arguments, the jury's sole inquiry at deliberations, the case on appeal,[9] and the holding on state habeas.[10] The State's argument that strangulation was merely one of the State's theories and that Acker's petition is based merely on "differing expert testimony" (BIO at 1) or a "disagreement with one part of the medical expert opinion testimony" (BIO at 32) blithely disregards the fact that strangulation underpinned the State's case for Acker's guilt and its absence now vastly alters Acker's showing of innocence.

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

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

[10] Discussed in Mr. Acker's petition at 17-24.

Acker's jury was never presented a stand-alone theory of "blunt-force injuries," as the State now contends (BIO at 29-30), but was told that *these injuries followed the now-discredited strangulation*. *See, e.g.*, Exhibit 5 to Acker's TCCA application (autopsy); 19 RR 19 (opening argument); 20 RR 207, 219-221, 273-274 (coroner's testimony); 23 RR 5-6, 26-30 (final argument); *State v. Acker*, 2003 WL 22855434 (Tex. Crim. App. Nov. 26, 2003) at *12 (holding on appeal). Essentially, the State seeks to uphold Acker's death sentence on either of two new and incompatible theories never presented to his jury—that Acker either pushed the victim out of the truck, or laid her on the roadside and ran over her.[11] Strangulation was the basis of the State's case for Acker's guilt and blunt-force injuries were presented as *following the strangulation*. (19 RR 19; 20 RR 207, 219-221, 273-274; 23 RR 5-6, 26-30; *State v. Acker*, 2003 WL 22855434 (Tex. Crim. App. Nov. 26, 2003) at *12 (citing autopsy). In fact, in all of the State's pleadings in both federal and state court, it is not even clear what the "blunt-force injuries," their current version of Mr. Acker's guilt, are: incapacitation of the victim in the truck by a blow or being run over by the truck?

The State's repeated contentions of the non-materiality of the strangulation testimony (BIO at 18-25, 29-32) is clearly at variance with the massive evidence adduced in Mr. Acker's petition (at 18-24) (discussing eleven phases of the proceedings where it was central, plus the State's own pleadings in federal court). The Fifth Circuit Court of Appeals also acknowledged

[11] The State's theory has gone from strangulation, the trial theory, to pushing the victim out of the truck, their theory at the federal evidentiary hearing, to adopting the district court's new theory that Acker ran her over while she was unconscious, as discussed herein, in their Fifth Circuit and Supreme Court pleadings.

that "[i]t is true that the State's theory at trial was largely based on strangulation as the cause of George's death." *Acker v. Davis*, 693 F. App'x 384, 394 (5th Cir. 2017).[12]

b. Acker has never argued that the victim was not run over.

Additionally, the State's argument assumes that when George exited the truck she was not then immediately run over, or that Acker is arguing that George was not run over. *See, e.g.,* BIO at 8 (citing Fifth Circuit's opinion that "George's injuries were too extensive and particular to have been caused by merely falling out of a car;" and "Dr. Larkin would...concede that it's possible that Ms. George was run over"); BIO at 24-25 (discussion of Dr. Di Maio's testimony, concluding that "[i]n Dr. Di Maio's opinion, George could not have gotten those injuries merely by jumping or being pushed out of the truck," citing the federal district court, *Acker*, 2016 WL 3268328 at *20); BIO at 25, (referring to 'the State's theory of the case' as including the proposition that he 'ran over her with the truck.'")

Dr. Di Maio *did not* testify as the district court held and the State argues. Dr. Di Maio repeatedly said in his report and his testimony that George either jumped or was pushed out of the truck and that she was then run over by the truck, which could have been a result of her attempt to jump. *E.g.,* Exhibit 11 to TCCA application, Dr. Di Maio's letter to the State's attorney ("As to whether Ms. George jumped or was pushed from the truck, it is impossible to say...all that one can say from the autopsy findings is that she incurred her injuries from going out a moving vehicle and being run over by the vehicle"); Exhibit 3 to TCCA application,

[12] Although the Fifth Circuit's factual review was circumscribed by the standards for a certificate of appeability ("COA"), under which that Court conducts only a "threshold" inquiry required by 28 U.S.C. § 2253(c) which "does not require full consideration of the factual or legal bases adduced in support of the claims," *Miller-El Cockrell,* 537 U.S. 322, 337 (2003), Respondent relies on it for a factual summary and devotes nine pages of the BIO (at 2-11) to that circumscribed review.

transcript of federal evidentiary hearing, at 61 ("if you assume that the individual went out [of] the truck while the truck was moving, you can't tell from the injuries whether the person was pushed or jumped"); (*Id*. at 65) ("they're the type of injuries that you get whether you jumped or you were pushed. You can't tell from the injuries themselves"); (*Id*. at 67) (Dr. Di Maio's bottom line was that George was either pushed or jumped from the truck "and was run over"); *Id*. at 119 (stipulation that George was possibly run over by the truck and that "from the medical evidence alone it is impossible to say whether there was a pushing or a jumping of the victim from the vehicle.")

Dr. Di Maio's testimony is clear that he thought that George's injuries could not have been sustained from jumping or being pushed *alone,* without also being run over, which Acker has never denied. The State misleads by arguing that Acker is arguing that the victim was not run over, whereas the victim's "blunt-force" injuries were a result of her jump going awry, hitting the protruding utility bed while the truck was moving, and then flipping under the truck. Acker has always insisted that he did not *deliberately* run over the victim, he has never denied that she was accidentally run over when she jumped and flipped under the truck when she hit the protruding utility bed.

IV. The State's due process arguments are unavailing. (BIO at 26-35).

Respondent misconstrues and misrepresents Acker's due process arguments. Respondent argues the cases Acker cited, *Chiarella v. United States*, 445 U.S. 222 (1980) and *Dunn v. United States*, 442 U.S. 100 (1979) (Petition at 27-29), as applying only to direct appeal, asserting that Petitioner "ignores the distinction between a direct appeal and habeas review" (BIO at 27), and the issue is whether petitioner has met his burden on his gateway actual-

innocence claim. (BIO at 27; *see also* BIO at 17-19, discussing *Schlup v. Delo*, 513 U.S. 298 (1995) gateway innocence standard.)

First, Respondent ignores the argument made in Acker's petition (at 32-38), that this new evidence *could not* have been presented on direct appeal---or in state habeas---because 1) it was only in federal habeas proceedings that the State disavowed its trial theory of strangulation; 2) new Texas law beginning in 2006 allowed a subsequent application alleging false evidence that the State did not know of at trial, and a new section of Texas law, TEX. CODE CRIM. PROC sec. 11.073 allowed for the introduction of new forensic evidence in a subsequent application; and 3) Mr. Acker's state appeals and state habeas proceedings were disgraceful shams. In this situation, it makes no sense to limit these cases to appellate review.

Respondent attempts to differentiate this habeas case from appellate review, citing the district court's habeas role as making a probabilistic determination on a totality of the evidence, including newly adduced evidence. (BIO at 20, 23, 31 citing *Acker*, 2016 WL 3268328.) But this ignores Acker's showing that the district court never made a reasonable probabilistic determination and ignored virtually all of Acker's evidence of innocence. Far from "scour[ing] the trial record" for evidence of Acker's innocence (BIO at 20), as Respondent contends, the district court ignored most of Acker's argument regarding the centrality of "strangulation" to the State's case. The district court's review was so cursory and hurried[13] that it mistakenly construed Acker's showing of the difficulty, to near impossibility, of his pushing George out of the truck, because she presumably would have resisted, as inconsistent with his argument that she jumped.

[13] The opinion was issued only a few weeks after the case had been reassigned to the signing judge.

The main case Respondent cites for distinguishing between habeas review and direct appeal, *Gattis v. Snyder,* 278 F.3d 222 (3d Cir. 2002) (BIO at 27-28), is easily distinguishable, as in the very same footnote quoted (BIO at 27), the court stated it denied relief in *Gattis* because

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

Additionally, the *Gattis* court held that "the state's theory played a small role, if any, in the courts' reasoning." *Gattis,* 278 F.3d at 238. None of these factors are present here. Respondent misleads in arguing that *Gattis* was decided on the basis that the claim was brought not on direct appeal, but on state habeas. Respondent quotes *Gattis* as holding, "'[t]he fundamental flaw' in that argument to be that '[t]he allegedly different theory of guilt was not presented on direct appeal in support of his conviction but in the course of a post-conviction hearing" (BIO at 28), but misleadingly omits the rest of the sentence: "held in connection with his claim that counsel was ineffective for failing to present expert testimony concerning the implausibility of the state's account of the murder." *Gattis,* 278 F.3d at 238. Thus, unmentioned by Respondent, the court in *Gattis* denied relief on an entirely different claim.

Respondent also argues that "this is not a false evidence case." (BIO at 31-34). Yet this argument has a basic flaw in asserting that it is just one expert arguing against another. The *State itself* has acknowledged that the trial evidence was false in disavowing it at the federal hearing.

This is not a case of "dueling experts," as in the cases cited by Respondent (BIO at 32-33), but a case of the State's own expert being disavowed by the State post-trial.

V. Conclusion.

For the foregoing reasons, and for those discussed in the petition, the Court should grant Mr. Acker's petition for writ of certiorari to consider the important questions presented, which merit review and grant his motion for stay of execution.

Respectfully submitted,

s/ A. Richard Ellis

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* A. Richard Ellis
75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251

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,
Member, Supreme Court Bar

September 25, 2018.