

**IN THE 435TH DISTRICT COURT
OF MONTGOMERY COUNTY, TEXAS**

EX PARTE

NICOLE NADRA BAUKUS

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CAUSE NO. 12-06-07085-A

**BRIEF IN SUPPORT OF
APPLICATION FOR A WRIT OF HABEAS CORPUS**

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SUBJECT INDEX

	<u>Page</u>
CUSTODY	1
CHRONOLOGY OF THE PROCEEDINGS	1
ISSUES PRESENTED.....	2
THE TRIAL	2
GROUND FOR RELIEF	7
APPLICANT’S GUILTY PLEAS WERE INVOLUNTARY AS A RESULT OF OUTRAGEOUS GOVERNMENTAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL.	
A. The Standard of Review	7
B. The Circumstances Surrounding The Guilty Pleas	8
C. Applicant’s Guilty Pleas Were Involuntary Because The Police Planted Evidence In Her Truck To Make It Appear That She Was Driving At The Time Of The Collision, The State Failed To Disclose To The Defense That The Police Planted The Evidence, And The State Presented False Testimony Regarding The Planted Evidence.....	10
D. Applicant’s Guilty Pleas Were Involuntary Because Trial Counsel Failed To Conduct An Adequate Investigation And Inform Her That The Police Planted Evidence In Her Truck And That Other Evidence Indicated That She Was Not Driving At The Time Of The Collision	19
E. Prejudice.....	30
CONCLUSION	31
CERTIFICATE OF COMPLIANCE.....	32

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Boykin v. Alabama, 395 U.S. 238 (1969)	8
Brady v. Maryland, 373 U.S. 83 (1963)	19
Brady v. United States, 397 U.S. 742 (1970)	8
Ex parte Harrington, 310 S.W.3d 452 (Tex. Crim. App. 2010).....	30
Ex parte Imoudu, 284 S.W.3d 866 (Tex. Crim. App. 2009).....	30
Hill v. Lockhart, 474 U.S. 52 (1985).....	8, 31
McMann v. Richardson, 397 U.S. 759 (1970)	8
Melton v. State, 987 S.W.2d 72 (Tex. App.—Dallas 1998, no pet.)	30
Powell v. Alabama, 287 U.S. 45 (1932).....	7
Rios v. State, 377 S.W.3d 131 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd)	8, 19

Constitutional Provisions

U.S. CONST. amend. V	8
U.S. CONST. amend. VI.....	7
U.S. CONST. amend. XIV	7, 8

CUSTODY

Nicole Baukus is illegally restrained of her liberty in the Mountain View Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, pursuant to a judgment of the 435th District Court of Montgomery County.

CHRONOLOGY OF THE PROCEEDINGS

Baukus pled not guilty to two counts of intoxication manslaughter and one count of intoxication assault in cause number 12-06-07085-CR in the 435th District Court of Montgomery County before Judge Michael Seiler. She changed her pleas to guilty during the trial. The jury assessed punishment at 15 years for each count of intoxication manslaughter and eight years for intoxication assault on August 2, 2013. The court cumulated the sentences for a total of 38 years. Mike McDougal represented her in the trial court.

The Ninth Court of Appeals affirmed Baukus' convictions in an unpublished opinion issued on March 9, 2016. The Court of Criminal Appeals refused discretionary review on August 24, 2016. Baukus v. State, 2016 WL 908281, Nos. 09-13-00397-CR, 09-13-00398-CR, 09-13-00399-CR (Tex. App.—Beaumont 2016, pet. ref'd) (AX 1).¹ Frank Blazek and William Carter represented her on appeal.

¹ Baukus' habeas exhibits are denominated "AX ____."

ISSUES PRESENTED

1. Applicant's guilty pleas were involuntary as a result of outrageous governmental misconduct.
 - a. The police planted evidence in applicant's truck to make it appear that she was driving at the time of the collision.
 - b. The State failed to disclose to the defense that the police planted the evidence.
 - c. The State presented false testimony regarding the planted evidence.
2. Applicant's guilty pleas were involuntary because trial counsel failed to conduct an adequate investigation and inform her that the police planted evidence in her truck and that other evidence indicated that she was not driving at the time of the collision.

THE TRIAL

A. The Indictment

The indictment alleged that Baukus, by intoxication while operating a motor vehicle, a deadly weapon, caused the deaths of Nicole Adams (count one) and Travis Saunders (count two) and serious bodily injury to David Porras (count three) (C.R. 29).

B. The Voir Dire Examination

McDougal questioned the prospective jurors on the defense of involuntary conduct and obtained their agreement that Baukus would be not guilty if she were "slipped a drug" (3 R.R. 123-125).

C. The Opening Statements

Prosecutor Andrew James told the jurors that, when the police arrived at the scene, Baukus said that her friend was driving but she did not know his name (4 R.R. 12-13). Her left shoe and sock were missing, and her left foot was bleeding (4 R.R. 13). That shoe and sock were found on the driver's floorboard of her truck. She told the paramedics that she was driving and made inconsistent statements to an officer at the hospital about whether she was driving (4 R.R. 13-14). She had a blood alcohol content of 0.265 and a small amount of Valium in her system (4 R.R. 14). Her DNA was found on the driver's airbag and the bloody sock (4 R.R. 15). There was no evidence that anyone else had been in her truck and no question that she was driving at the time of the collision (4 R.R. 13, 15).

McDougal told the jurors that Baukus was not guilty because she had been drugged and did not voluntarily consume alcohol or engage in the conduct that caused the collision (4 R.R. 17).

D. The State's Case

Arnes Buchanan testified that, as he was driving on I-45 on June 29, 2012, at 3:00 a.m., a F-150 truck parked on the side of the road facing the oncoming traffic drove across the highway at a 45-degree angle in front of him and hit a car (5 R.R. 25-28, 30, 33). He saw a passenger wearing a seatbelt in the front seat of the truck (5 R.R. 29, 34-35).

Shenandoah Police Department (SPD) officer Jacob Reuvers,² the first officer at the scene, saw Baukus and a man near the passenger side of the truck (5 R.R. 48, 51-52).³ Reuvers told her to sit on the ground and asked whether she was hurt (5 R.R. 53). She said that her foot hurt.⁴ She wore a shoe and sock on her right foot (5 R.R. 57). He asked whether she was driving (5 R.R. 53). She said, “My friend.” He assumed that the driver had been ejected and looked around the area but did not see anyone (5 R.R. 54). As a result, he decided that she was driving (5 R.R. 57).

SPD officer Cody Harmon, the second officer to arrive, told SPD officer Todd Schmaltz, the third officer to arrive, that Baukus was the driver, “but she says she’s not” (4 R.R. 35; 5 R.R. 67). Schmaltz saw Baukus sitting on the ground on the passenger side of her truck (4 R.R. 33-34). Her left shoe and sock were missing, and her left foot was bleeding (4 R.R. 34, 52-53). He asked whether she was driving (4 R.R. 39). She said “No.” He asked who was. She said, “My dad.” The next time he asked, she said that “a guy” was driving (4 R.R. 39-40).

² Reuvers worked for the Montgomery County Sheriff’s Office (MCSO) on the night of the collision but for the SPD at the time of the trial (5 R.R. 48).

³ Reuvers did not obtain the man’s name (5 R.R. 69-70)

⁴ A doctor subsequently determined that Baukus’ left foot was fractured (6 R.R. 65, 74).

Baukus told Patrick Langan, a paramedic, that she was driving (5 R.R. 153).⁵ Langan testified that she could have made conflicting statements about whether she was driving because she was disoriented (5 R.R. 158).

Reuvers saw Baukus' left shoe and sock on the driver's floorboard of the truck (5 R.R. 58).⁶ The driver's airbag was deployed, but the passenger's airbag was not (4 R.R. 35-36).⁷ The driver's seat was close to the steering wheel, where it would be if a person Baukus' height were driving (5 R.R. 59-60). The driver's side window was out (5 R.R. 68). There was conflicting testimony about whether the driver's door was open. Reuvers testified that it did not appear that the door could be opened for the driver to exit (5 R.R. 56). Langan testified that the door was open, although extensively damaged (5 R.R. 152-53).⁸ Department of Public Safety (DPS) trooper Andre Brack testified that he concluded that Baukus was driving because her sock was under the driver's seat (5 R.R. 94-95).

Schmaltz, Brack, and Langan testified that Baukus appeared to be intoxicated (4 R.R. 71; 5 R.R. 119-20, 149). Oscar Williams, a Texas Alcoholic

⁵ Langan did not ask Baukus whether she was referring to the time of the collision or earlier that night.

⁶ Schmaltz testified that he saw the left shoe and sock near the brake pedal (4 R.R. 51).

⁷ Schmaltz testified that an airbag will not deploy unless someone is sitting in the seat at the time of the collision (4 R.R. 36). He inferred that the passenger's airbag did not deploy because no one was in the passenger seat.

⁸ In fact, the driver's door was partially open and the window was out (AX 100).

Beverage Commission agent, narrated a videotape that depicted Baukus drinking 21 alcoholic beverages between 9:19 p.m. and 1:46 a.m. at On The Rox, a bar (5 R.R. 233-73, SX83A). She left the bar at 1:58 a.m. (5 R.R. 274).⁹ Her blood was drawn at a hospital at 4:05 a.m. (6 R.R. 24, 27). She had a blood alcohol content of 0.268 (6 R.R. 231).¹⁰ She also had a small amount of Valium in her system (6 R.R. 254, 264). A toxicologist testified that this low therapeutic dose would have had a negligible effect on her (7 R.R. 58-59, 64).

A DPS analyst found what appeared to be blood on the driver's airbag and the sock (6 R.R. 172-74, 179-80). Baukus was the source of the DNA found on this evidence (6 R.R. 187-89). However, the analyst found no "obvious signs of blood staining" on her shoes (6 R.R. 181).

E. The Guilty Pleas

After the toxicologist testified, McDougal informed the court that Baukus would change her pleas to guilty (7 R.R. 64). She confirmed that she would plead guilty and abandon the defense that she had been drugged (7 R.R. 66-68). She pled guilty to each count and true to the deadly weapon allegation (7 R.R. 69-71).

⁹ Baukus' time is unaccounted for from 2:02 a.m., when she drove out of the parking lot, until 3:00 a.m., when the collision occurred.

¹⁰ A toxicologist testified that, based on retrograde extrapolation, Baukus' blood alcohol content would have been about 0.30 when she was driving (7 R.R. 14, 50).

F. The Rest Of The Trial

The trial continued with the punishment stage. The State presented testimony regarding Baukus' bad acts, Porras' injuries, and the impact of the incident on Porras and the families of the deceased. McDougal presented testimony from Baukus' relatives and friends. The State presented rebuttal testimony regarding additional bad acts. Baukus personally informed the court that she would not testify (8 R.R. 168). McDougal said that he disagreed with her decision and called her anyway (8 R.R. 169). Of note, she testified that she remembered talking to a man in the club who gave her a hat (which, according to the videotape, occurred at 12:30 a.m.) and next remembered awakening at 6:00 a.m. (8 R.R. 172). She did not remember telling the police that she was not driving (8 R.R. 183). Prosecutor Warren Diepraam argued during summation that she had "enough snap" to immediately start building her defense by telling the first officer at the scene that she was not driving (8 R.R. 218-19).

GROUND FOR RELIEF

APPLICANT'S GUILTY PLEAS WERE INVOLUNTARY AS A RESULT OF OUTRAGEOUS GOVERNMENTAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL.

A. The Standard Of Review

Baukus had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; Powell v. Alabama, 287 U.S. 45, 59 (1932).

Counsel must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759, 771 (1970).

An involuntary guilty plea must be set aside as a denial of due process of law. U.S. CONST. amends. V and XIV; Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). Voluntariness is determined by considering all relevant circumstances surrounding the plea. Brady v. United States, 397 U.S. 742, 755 (1970). Where the defendant contends that she pled guilty based on inadequate advice of counsel, she must show that counsel's advice fell below an objective standard of reasonableness and, but for that advice, there is a reasonable probability that she would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985).

The State's use of false evidence can render a guilty plea involuntary. See Rios v. State, 377 S.W.3d 131, 136-37 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (guilty plea to DWI involuntary where State discovered after plea that technician who maintained breath test machine falsified calibration records, and defendant relied on that false evidence in deciding to plead guilty).

B. The Circumstances Surrounding The Guilty Pleas

Baukus' Unsworn Declaration explains the circumstances surrounding her guilty pleas (AX 2):

I became highly intoxicated at On The Rox during the night of June 28 and the early morning hours of June 29, 2012. My last memory of that night is talking to a man in the club who gave

me his hat. A videotape reflects that this conversation occurred on June 29 at 12:30 a.m. I next remember waking up in the hospital about 6:00 a.m. I do not remember the collision, whether I was driving, or what I told the police. My information about the collision came from Mr. McDougal.

I did not want to believe that, while intoxicated, I drove on the freeway in the wrong direction, struck a car, and killed two people and seriously injured a third. I wanted Mr. McDougal to present the defense that I was not driving. He convinced me that I was driving, regardless of my statements to the contrary to police officers, paramedics, and hospital personnel. I suggested that, if I was driving, someone put drugs in my drink without my knowledge. I based this on the fact that I had Valium in my system but had not taken any that day. When the trial started, it was my understanding that he would present the defense that someone at the club put Valium in my drink; that, as a result of being drugged, I unknowingly drank so much alcohol that I became intoxicated; and that I involuntarily drove my truck and had a collision. Although I wanted to present the defense that I was not driving, I deferred to his judgment.

A toxicologist testified that, based on the amount of alcohol I drank, I would have had a blood alcohol content of about 0.30 at the time of the collision and that the low therapeutic dose of Valium in my system had little effect on me. Mr. McDougal told me at the next recess that there was no credible evidence that I had been drugged; that, even if I had been, the drug did not contribute to my intoxication; and that we could not successfully present the defense that I drove involuntarily after someone put drugs in my drink. He recommended that I change my pleas to guilty because the jury might be more lenient on punishment. I followed his advice and pled guilty.

McDougal provided an affidavit that he and Baukus discussed presenting the defense that she was not driving at the time of the collision, but he did not believe that it would be successful “because both of her tennis shoes and her

bloody sock were found on the driver's floorboard and her DNA was found on the driver's airbag" (AX 3). Instead, he decided to present the defense of involuntary intoxication based on the theory that she had been drugged while drinking at the bar. When it became clear during the trial "that there was no credible evidence that she was drugged," he had her change her pleas to guilty to "create some sympathy for her from the jury."

Pamela K. Sanders, McDougal's court-appointed investigator, provided an affidavit that Baukus wanted to present the defense that she was not driving at the time of the collision, but McDougal refused to do so because of the incriminating evidence found in her truck (AX 4). McDougal told Sanders to investigate the defense of involuntary intoxication. As a result, she did not watch the police COBAN videos, listen to the audio recordings, review the scene photos, or interview any of the civilians.

C. Applicant's Guilty Pleas Were Involuntary Because The Police Planted Evidence In Her Truck To Make It Appear That She Was Driving At The Time Of The Collision, The State Failed To Disclose To The Defense That The Police Planted The Evidence, And The State Presented False Testimony Regarding The Planted Evidence.

James told the jury in his opening statement that there was no question that Baukus was driving at the time of the collision because her left shoe and bloody sock were found on the driver's floorboard and her DNA was found on the driver's airbag and the sock (4 R.R. 13, 15). Reuvers testified that Baukus

was wearing a right shoe and sock when he arrived; both her left shoe and sock were on the driver's floorboard (5 R.R. 57-58). Reuvers asserted that he never entered the cab of the truck or touched the shoe and sock but does not know whether anyone else did (5 R.R. 61, 68). Harmon did not testify.¹¹ Schmaltz testified that the left shoe and sock were near the brake pedal (4 R.R. 51). Brack testified that he concluded that Baukus was driving because her sock was under the driver's seat (5 R.R. 94-95).

McDougal advised Baukus that he could not present the defense that she was not driving at the time of the collision because of the incriminating evidence found in the truck (AX 2, 3, 4). Instead, despite the absence of any supporting evidence, he presented the defense of involuntary conduct based on the theory that she had been drugged while drinking at the bar. When it became obvious during the trial that there was no evidence to support this defense, he advised her to change her pleas to guilty. The trial was a disaster from start to finish.

Baukus' guilty pleas were involuntary as a result of outrageous governmental misconduct. Reuvers and Harmon planted evidence in the truck before the other officers and the paramedics arrived to make it appear that

¹¹ James told the court outside the presence of the jury that Harmon would no longer be available to testify but did not explain why (5 R.R. 47).

Baukus was driving at the time of the collision after she repeatedly denied it and civilians told them that the male driver had fled. Reuvers turned off his COBAN six minutes after he arrived so it would not record the officers planting her left shoe and sock on the driver's floorboard and contaminating the airbag with blood from the sock. After the other officers and the paramedics arrived, Reuvers or Harmon planted her right shoe, which by then had been removed, on the driver's floorboard. Although they tried to make it appear that the shoes and the sock came off during the collision or were removed before she exited the truck, they left a trail of evidence demonstrating otherwise. It is yet to be determined whether the prosecutors were aware that the officers planted the evidence. However, had prosecutors as experienced as James and Diepraam closely examined all the evidence, they should have been. Regrettably, McDougal was not aware that the officers planted the evidence, as he failed to watch the COBAN videos, listen to the audio recordings, carefully examine the scene photos, and interview the civilians.¹²

¹² James notified the court and McDougal after the voir dire examination that he had just received Reuvers' COBAN video, did not know what was on it, and would provide a copy to McDougal "shortly" (3 R.R. 169). Sanders sent an email to McDougal at 1:51 a.m. asserting, "We need to look at those CD's [sic] I have not had time" (AX 5). When James offered the video (State's Exhibit 71) the next morning, McDougal said that he had seen it (5 R.R. 47-48). If he had, he did not appreciate what he saw. He acknowledges in his affidavit that he did not watch it (AX 3). Sanders explains in her affidavit that they did not watch the videos and listen to the audio recordings because McDougal decided not to contest that Baukus was driving at the time of the collision (AX 4).

Baukus was wearing white tennis shoes in a surveillance video taken as she left On The Rox at 1:58 a.m. (AX 101). As Reuvers approached the scene, his COBAN recorded her standing in the road on the passenger side of the truck wearing a white object on each foot (AX 102, 200A1). She is standing level rather than leaning to the left, as she would have been if she were wearing only a right shoe. Thus, she is either wearing two shoes and two socks or no shoes and two socks (AX 103). In view of the fact that the other officers and the paramedics saw her wearing a right shoe and sock, she was wearing both shoes and socks when Reuvers arrived.

Reuvers turned off his COBAN six minutes after he arrived (AX 200A2). Harmon parked his vehicle facing away from the collision (AX104, 200B1). Neither recorded Baukus' truck.¹³ Ninety seconds after Reuvers turned off his video, Harmon's body microphone recorded him quietly asking, "Are they in there?" (AX 200B2, 300). Reuvers responded, "They're in there." In context, it appears that Reuvers planted Baukus' left shoe and sock on the driver's floorboard and contaminated the airbag with blood from her sock while Harmon questioned her. Twenty-five seconds later, Harmon loudly proclaimed that she was driving.

¹³ Neither Reuvers nor Harmon prepared a supplemental offense report regarding their activities at the scene.

Schmaltz arrived at 3:11 a.m. and noticed the injury to Baukus' left foot (AX 301). Thus, her left shoe and sock were removed from her foot after she exited the truck and were planted on the driver's floorboard before he arrived. MCSO deputy Jason Prince arrived at 3:22 a.m. and noticed the injury and that she "was missing both her shoe and sock from that foot" (AX 302).

The hospital and EMS records reflect that Baukus had no wound above her lower extremities that bled (AX 400). There was a small spot of what appeared to be blood on the driver's airbag (6 R.R. 172-74; AX 105). A laceration that caused her foot to bleed while she was wearing a shoe and a sock could not possibly account for the blood on the airbag. More importantly, had her left shoe and sock come off during the collision (assuming that is even possible) or been removed while she was seated behind the wheel, there would be blood on the driver's floorboard and a blood trail along the route of her exit from the truck. Photos depict that the only blood in the truck was on the sock on the driver's floorboard; there was no blood on the passenger seat or floorboard and no blood trail leading from the driver's floorboard out either side of the truck (AX 100, 106, 107, 108). Thus, her left shoe and sock did not come off in the truck.

This raises the question of whether Reuvers and Harmon would plant evidence and Reuvers would lie under oath. No responsible police department

would have hired either of them based on their history of dishonesty. The Houston Police Department refused to hire Reuvers in 2008 because of his history of employee theft (AX 303). The Tomball Police Department refused to hire him in 2010 because he failed the written exam. The MCSO hired him in November of 2010 even though a background check revealed that he stole from his employers between the ages of 17 and 23 and he failed to disclose on his application that he had been charged with a crime in Wisconsin.¹⁴ The SPD hired him in 2012 despite his history of theft. The SPD hired Harmon despite his admission that he stole from a previous employer (AX 304). During his tenure at the SPD, he received several reprimands, was castigated by his sergeant for his “extreme lack of professionalism,” and resigned.¹⁵ Thus, Reuvers and Harmon absolutely would plant evidence, and Reuvers would lie under oath.

A comprehensive analysis of the COBAN videos, audio recordings, scene photos, and statements of the civilians demonstrates that Baukus was not driving at the time of the collision and that the police planted evidence to make

¹⁴ Reuvers was born on March 12, 1985 (AX 303). He was 27 years old on June 29, 2012.

¹⁵ Harmon’s email correspondence at the SPD in the days preceding June 29, 2012, reveals that an officer asked him to say that he had no recording for a particular incident and that he agreed to ask Schmaltz to change a report to make it consistent with another officer’s report (AX 304). These emails suggest that corruption is commonplace at the SPD.

it appear that she was.

Buchanan testified that he saw a passenger wearing a seatbelt in the front passenger seat of the truck as it crossed the road in front of him (5 R.R. 29, 34-35). He provided an affidavit in 2015 in which he elaborated that the passenger was a female wearing white shorts (AX 6).¹⁶ Photos depict Baukus wearing white shorts as she left the bar and as she stood in the road after the collision (AX 101, 102). Thus, Buchanan saw Baukus in the passenger seat of the truck, wearing a seatbelt, seconds before the collision.

Reuvers saw Baukus and a man near the passenger door of her truck as he arrived (5 R.R. 52). His COBAN recorded her wearing a white object on each foot (AX 200A1). There is no doubt that she was wearing both shoes and socks when he arrived.¹⁷

Reuvers made Baukus sit on the ground on the passenger side of her truck (5 R.R. 53). Her left foot was fractured, and she told him that it hurt (5 R.R. 53; 6 R.R. 74). It is a reasonable deduction that, once seated on the ground, she removed her left shoe and sock to alleviate the pain. Her foot bled profusely once the shoe was removed and the pressure on the wound was

¹⁶ Buchanan asserts that he provided this information to an officer at the scene (AX 6). He also told James, who said that it was “impossible,” and that he could not testify to it. Nonetheless, he testified that he saw a passenger in the truck.

¹⁷ Reuvers told Karen Hewitt, a private investigator, in 2016 that Baukus was wearing one shoe and both socks when he arrived (AX 200E1, 305).

released. Photos depict a puddle of blood on the ground where she was sitting (AX 108). Her sock was soaked with blood, but there was no obvious blood staining on her shoe (6 R.R. 179-81). This is consistent with her foot starting to bleed after she removed the shoe while seated on the ground next to the passenger side of the truck.

Reuvers and Harmon decided to plant the left shoe and sock on the driver's floorboard before the other officers and the paramedics arrived to make it appear that Baukus was driving at the time of the collision. Reuvers turned off his COBAN (AX 200A2).¹⁸ Reuvers planted the left shoe and sock on the driver's floorboard and intentionally or inadvertently contaminated the driver's airbag with blood from the sock. Harmon quietly asked, "Are they in there?" Reuvers responded, "They're in there." When the other officers and the paramedics arrived, Baukus was wearing a right shoe and sock; her left shoe and sock were on the driver's floorboard.

Reuvers and Harmon then made a critical error. Baukus' right shoe was removed before she was placed on the backboard to go to the hospital (AX 109). Reuvers or Harmon planted the right shoe on the driver's floorboard. Photos depict both shoes and the bloody sock in that location (AX 106). No

¹⁸ Reuvers was not disciplined for turning off his COBAN in Baukus' case. However, he received verbal counseling for failing to activate his COBAN during a use of force incident a month later (AX 303).

offense report mentions the right shoe or describes when and how it came to be on the driver's floorboard after the officers saw Baukus wearing it as she sat in the road. The prosecutors did not elicit testimony or otherwise mention that the right shoe was on the driver's floorboard because there is no innocent explanation and they must have realized that it was planted there after the collision.

McDougal remained oblivious to all of this because he received Reuvers' COBAN video after the voir dire examination and never watched it or carefully reviewed the photos depicting both shoes on the driver's floorboard (3 R.R. 169; AX 3). The prosecutors did not tell him that the police planted the evidence in the truck. They presented false testimony that the officers found the left shoe and bloody sock on the driver's floorboard and blood on the driver's airbag and argued that this evidence established that Baukus was driving.

Reuvers and Harmon tampered with physical evidence at the scene and Reuvers committed aggravated perjury at trial. Baukus did not know that the police planted the evidence in her truck to make it appear that she was driving at the time of the collision (AX 2). Had she known, she would have pled not guilty and presented the defense that she was not driving at the time of the collision. Accordingly, her guilty pleas were involuntary as a result of

outrageous governmental misconduct. See Rios, 377 S.W.3d at 136-37.

D. Applicant's Guilty Pleas Were Involuntary Because Trial Counsel Failed To Conduct An Adequate Investigation And Inform Her That The Police Planted Evidence In Her Truck And That Other Evidence Indicated That She Was Not Driving At The Time Of The Collision.

The State's sole Brady¹⁹ disclosure was that Fisher Hampshire²⁰ made the statement, "I have no idea where the driver of the truck is at or the direction he fled" (C.R. 107). James observed in his opening statement that Baukus told the officers that a friend was driving but she did not know his name; told the paramedics that she was driving; and made inconsistent statements to an officer at the hospital about whether she was driving (4 R.R. 12-14). He asserted that there was no evidence that anyone else had been in her truck and no question that she was driving at the time of the collision (4 R.R. 13, 15). Buchanan testified that he saw a passenger wearing a seatbelt in the front seat of the truck immediately before the collision (5 R.R. 29, 34-35). Reuvers testified that he saw Baukus and a man near the passenger side of the truck, and Baukus told him that her friend was driving (5 R.R. 52-53). Schmaltz testified that Harmon told him that Baukus was the driver, "but she says she's not" (4 R.R. 35). When Schmaltz asked Baukus who was driving, she said,

¹⁹ Brady v. Maryland, 373 U.S. 83 (1963).

²⁰ Hampshire is a civilian who stopped to help.

“My dad,” and, when he asked again, “a guy” (4 R.R. 39-40). Diepraam argued during summation that Baukus had “enough snap” to immediately start building her defense by telling the first officer at the scene that she was not driving (8 R.R. 218-19).

A comprehensive analysis of the COBAN videos, audio recordings, scene photos, and statements of the civilians demonstrates that Baukus was not driving at the time of the collision. McDougal performed deficiently in failing to conduct an adequate investigation, presenting the defense of involuntary conduct based on the theory that she had been drugged while drinking at the bar instead of the defense that she was not driving, and advising her to plead guilty during the trial.

Reuvers’ COBAN recorded an unidentified person (probably Steven Ramirez)²¹ saying that Baukus was in the passenger seat and he did not see the driver (AX 200A3, 306). When Harmon asked Baukus if she was driving, she responded that she was the passenger (AX 200B3, 300). He asked who was driving. She said, “Kambiz.” He asked where the man was. She said, “I don’t know.” He told Reuvers, “She said she wasn’t driving” (AX 200A4, 306). Reuvers turned off his COBAN (AX 200A2). Harmon again asked whether

²¹ Ramirez is a civilian who stopped to help.

Baukus was driving (AX 200B3). She said, “No. I was up front but I was the passenger.” He again asked who was driving. She again said, “Kambiz.”²² He then quietly asked Reuvers, “Are they in there?” (AX 200B2). Reuvers responded, “They’re in there.” Thus, Reuvers and Harmon planted the left shoe and sock on the driver’s floorboard shortly after Reuvers turned off his COBAN.

Schmaltz’s COBAN recorded him asking Baukus, “So you were driving?” (AX 200C1, 308). She said, “No.” He asked her to explain how she was not driving where she was the only person in the truck. She responded, “I was the only one in there beside [sic] the guy driving.” Schmaltz asked where he was. She said, “I don’t know.” Schmaltz spoke on the phone to Diepraam and said that Baukus “is claiming that she was not driving” and that a male was driving, but “things here indicate otherwise,” as her bloody sock was under the gas pedal (AX 200C2, 308).

Schmaltz’s COBAN later recorded the conversation while Langan was treating Baukus (AX 200C3, 308). She said that she was not driving. An unidentified officer said, “She was driving a long time ago.” While en route to

²² Kambiz Duran was drinking with Baukus and her companions at On The Rox (AX 307). Her cell phone records reflect that her phone called his phone at 2:44 a.m. (AX 402, 403). The State was aware of his involvement, as it charged him with illegally providing alcohol to her on that occasion (AX 404). James notified the court during her trial that Diepraam was in Harris County to obtain a court order for defense witness “Canvass [sic] Duran,” but the State did not need him (6 R.R. 11).

the hospital in the ambulance, she told the paramedics that she was driving earlier but stopped because she was drunk (AX 200C4, 308). When asked whether she stopped driving before or after the accident, she said, “Before.”

Prince’s COBAN recorded unidentified officers discussing among themselves whether they could prove that Baukus was driving (AX 200D1, 200D2, 309):

- “She’s saying over and over that she didn’t drive, tried making up a name of somebody that was driving and then her shoe is and her sock that’s missing are sitting in the driver’s seat, like on the floor, right below the pedals.”
- “We just don’t know who was driving right now.”
- “Can we wheel her at all?”

They also discussed among themselves whether the impact could have caused the sock to come off in the driver’s seat.

Prince’s COBAN also recorded an unidentified officer asking an unidentified man (probably Ramirez) whether anyone was in the driver’s seat (AX 200D3, 309). The man said no, that the female was in the passenger seat, and that he did not know how the driver exited the truck.

Brack’s report reflects that Baukus told him at the hospital both that she was and was not driving (AX 310). He did not ask her to specify whether she was referring to the time of the collision or earlier that night.

Daryl Brooks, a Needham fireman, told Hewitt in 2015 that Baukus told him that someone else was driving (AX 200E2, 311). However, the location of her shoe on the driver’s floorboard was “proof that she . . . was definitely driving.”

The civilians told the police, in essence, that the driver was a man who ran away after the collision and left Baukus in the passenger seat.²³ Buchanan saw a female passenger wearing white shorts and a seatbelt in the front passenger seat of the truck immediately before the collision and heard someone say after the collision that a man ran away (AX 6). Ramirez signed a statement at the scene that he approached the truck and saw a female passenger and no driver (AX 7). Hampshire provided an affidavit in 2015 that he heard someone say that “the driver of the truck had run off” (AX 8). Reuvers’ COBAN recorded two people crossing the road in the distance as he arrived (AX 200A5). They are not seen again. The driver of the truck could have called a friend to pick him up, left with someone who stopped to help, or fled on foot. McDougal did not interview any of these witnesses before trial (AX 3).

The physical evidence is more consistent with Baukus being the passenger than the driver. McDougal did not examine the evidence carefully

²³ Knowing this did not prevent James from asserting in his opening statement — presumably with a straight face—that there was no evidence that anyone but Baukus had been in her truck (4 R.R. 13).

or consult with experts to help him interpret it.

Reuvers testified that the driver's seat was close to the steering wheel, where it would be if a person Baukus' height were driving (5 R.R. 59-60). Baukus is 5'2" and weighed 104 to 106 pounds (AX 302, 400 at page 3). Kambiz Duran is 5'2" and weighed 130 pounds (AX 405). The driver's seat would have been in the same position for either of them or any person of similar size. Thus, the position of the driver's seat does not establish that Baukus was driving at the time of the collision.

Reuvers testified that the driver's airbag was deployed, but the passenger's airbag was not (4 R.R. 35-36). Schmaltz testified that an airbag will not deploy unless someone is sitting in the seat at the time of the collision (4 R.R. 36). He inferred that the passenger's airbag did not deploy because no one was in the passenger seat. McDougal did not obtain the Owners Guide for the 2006 Ford F-150 (AX 406), the United States General Accounting Office Report regarding airbags (AX 407), the Ford safety card regarding airbag deployment (AX 408), or consult with an expert. These documents, and the affidavits of David Pearson, a traffic accident reconstructionist for the Harris County Sheriff's Office, and Robin Wright, a former DPS traffic accident reconstructionist, confirm that the passenger's airbag will not deploy if the passenger is small or the collision occurred at an oblique angle (AX 409,

410).²⁴ A photo of Baukus at On The Rox depicts her wearing makeup (AX 110). Photos taken after the collision depict no makeup on the airbag (AX 111). The hospital and EMS records do not indicate that she had any airbag injuries or resin on her (AX 400, 401). Reuvers told Hewitt in 2016 that he would have expected to see airbag injuries on Baukus had she been driving, but she had none (AX 200E1, 305). Thus, that the passenger's airbag did not deploy does not establish that Baukus was not in the passenger seat at the time of the collision.

Reuvers testified that it did not appear that the driver's door could be opened (5 R.R. 56). The State elicited this testimony to suggest why Baukus had to exit the passenger door. However, Langan testified that the driver's door was open, although extensively damaged (5 R.R. 152-53). Photos depict the driver's door being partially open (AX 100). Duran, who weighed 130 pounds, or any driver of similar size, could have exited the truck through that door or the open window.

Baukus' cell phone records reflect that she received a call from Yates Poitinger at 2:46 a.m. (AX 402, 411). Poitinger testified that, although he could not understand her well, she told him that she threw up on herself and

²⁴ Buchanan testified that the truck crossed the road at a 45-degree angle and hit the car (5 R.R. 27-28, 30).

did not know where she was; her phone then “went dead” (8 R.R. 65-66). DPS trooper Orlando Ortega wrote in his report that the truck stopped on the shoulder of the road for someone to vomit (AX 312). Photos depict what appears to be vomit on the passenger door weather strip and sill and on a Walgreens’ receipt found on the ground just outside the passenger door (AX 107, 112). This evidence suggests that Baukus was sitting in the passenger seat, opened the door to vomit, and started vomiting before she could lean all the way out of the door.

David DeLonga, a medical doctor and forensic engineer, reviewed the hospital records (including the radiological imaging), photos, witness statements, and police testimony. He provided an affidavit that, in his opinion, the fractures to Baukus’ foot and a previously undiagnosed left internal oblique muscle hematoma on her CT scan, that is consistent with blunt force trauma from the passenger seatbelt attachment, suggest that she was in the front passenger seat at the time of the collision (AX 412, 413).

McDougal made an unsound decision to present the implausible defense that Baukus was drugged instead of the plausible defense that she was not driving and that the police planted the evidence. Substantial evidence supports this defense.

Baukus left the bar at 1:58 a.m. and drove out of the parking lot at 2:02

a.m. The collision occurred about an hour later. She called Duran at 2:44 a.m. She then vomited on the passenger side of the truck. She told Poitinger on the phone at 2:46 a.m. that she had just vomited.

Duran met Baukus and was driving her truck at the time of the collision because she was so intoxicated. The passenger's airbag did not deploy because she is small and the truck hit the car at an oblique angle. He exited the truck through the partially open driver's door or the window, ran away, and left her to take the blame.

Civilians stopped to help. Buchanan and Ramirez saw Baukus in the passenger seat. Someone saw a man run away.

Reuvers arrived and saw Baukus and a man near the passenger door. Civilians told him that the male driver ran away. He made Baukus, who was wearing two white tennis shoes and socks, sit in the road. She removed her left shoe and sock because her foot hurt, and she bled on the ground. She twice told Harmon that "Kambiz" was driving and she was the passenger.

Reuvers and Harmon, the only officers at the scene at that time, did not see the male driver in the immediate area. They decided that Baukus was driving because it was her truck and she was the only person there who clearly had been in the truck. They chose not to investigate her statement that "Kambiz" was driving and the civilians' statements that the male driver ran

away. They were concerned that they would not be able to prove that she was driving because they did not see her behind the wheel. Corruption and laziness then met opportunity. They planted her left shoe and sock on the driver's floorboard and contaminated the airbag with blood from the sock. The other officers and the paramedics arrived, saw the shoe and sock on the driver's floorboard and, as expected, immediately concluded that she was driving, notwithstanding her drunken protestations to the contrary.

Baukus told various officers and paramedics both that she was driving and was not driving. She was telling the truth each time. She drove from the bar but, at the time of the collision an hour later, she was not driving. A small female with an extrapolated blood alcohol content of 0.30 was far too intoxicated to have “enough snap”—as Diepraam argued—to fabricate this defense on the spot.

The prosecutors either ignored all the evidence of innocence or malevolently sought to overcome it by presenting false and misleading testimony regarding the physical evidence. They suggested through questioning that the position of the driver's seat established that Baukus was driving, that she had to exit the passenger door because she could not open the driver's door, and that the passenger's airbag did not deploy because no one was in that seat. All concerned should be ashamed of their roles in convicting

her of crimes she did not commit.

McDougal did not watch the COBAN videos, listen to the audio recordings, carefully examine the scene photos, interview the civilians, or consult with experts. He did not realize that the officers planted the shoes and sock on the driver's floorboard and contaminated the airbag with blood from the sock. He did not recognize the significance of the evidence regarding Duran. He now acknowledges that he should have presented the defense that Baukus was not driving at the time of the collision and that the police planted the evidence instead of advising her to plead guilty (AX 3).

Baukus asserts in her Unsworn Declaration that she would not have pled guilty had McDougal informed her of these matters (AX 2):

Had Mr. McDougal informed me before the trial that I made numerous statements at the scene and the hospital that I was not driving and that I told officer Harmon that Kambiz was; that my cell phone bill showed a call to Kambiz about 20 minutes before the collision; that civilians saw a female passenger in the truck and someone said that a man ran away; that deputy Reuvers' video depicts two men crossing the road; that I was wearing both shoes and socks when I left the club and as I stood in the road after the collision; and that both shoes and my bloody left sock subsequently were found on the drivers' floorboard (before all the officers, except Reuvers and Harmon, arrived at the scene), I would have insisted that he present the defense that I was not driving at the time of the collision. My extreme intoxication explains why I could not remember what happened after 12:30 a.m. I would not have pled guilty during the trial had Mr. McDougal provided me with this information.

Baukus' guilty pleas were involuntary because McDougal failed to conduct an adequate investigation and inform her that the police planted evidence in her truck and that other evidence indicated that she was not driving at the time of the collision. See Melton v. State, 987 S.W.2d 72, 77 (Tex. App.—Dallas 1998, no pet.) (guilty plea involuntary where counsel erroneously told defendant that videotapes showed him committing crime); Ex parte Imoudu, 284 S.W.3d 866, 870-71 (Tex. Crim. App. 2009) (guilty plea involuntary where counsel failed to investigate and inform defendant of availability of insanity defense); Ex parte Harrington, 310 S.W.3d 452, 459-60 (Tex. Crim. App. 2010) (guilty plea involuntary where counsel failed to determine that prior conviction alleged to enhance misdemeanor DWI to felony did not belong to defendant). No sound strategy could justify these omissions.

E. Prejudice

McDougal refused to present the defense that Baukus was not driving and, instead, presented the implausible defense that she was not legally responsible for her conduct because she had been drugged. When it became clear during the trial that there was no evidence to support this defense, he had her change her pleas to guilty. As a result, she was convicted of three felonies that she did not commit and was sentenced to a total of 38 years in prison. She must serve 19 years before becoming eligible for parole because of the deadly weapon finding. Had he

adequately investigated the case and given her complete information and accurate advice, she would have pled not guilty and presented the defense that she was not driving at the time of the collision and that the police planted the evidence. Accordingly, his erroneous and inadequate advice resulted in prejudice. See Hill, 474 U.S. at 57-59.

CONCLUSION

Applicant requests that the Court conduct an evidentiary hearing, make findings of fact and conclusions of law, and recommend a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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