No. 11-

IN THE
Supreme Court of the United States

NEIL HAMPTON ROBBINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 20, 2011

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QUESTION PRESENTED

Petitioner, Neil Hampton Robbins, was convicted of capital murder based on expert medical testimony that has since been fully discredited, and he thus seeks a new trial. The State's only direct evidence at trial that a homicide had been committed came from Dr. Patricia Moore. But Dr. Moore has since retracted her testimony based on her own later experience and subsequent scientific advances. Dr. Moore now believes, in agreement with four other medical experts, that the cause of death is—and always should have been—undetermined. As a result, a Texas trial court recommended that Mr. Robbins be granted a new trial. In a deeply divided 5-4 opinion, the Texas Court of Criminal Appeals rejected that recommendation, holding that Mr. Robbins could receive relief only if he could prove that Dr. Moore's testimony satisfied a highly technical definition of the term "false." This misplaced focus ignores the due process implications of the permanent imprisonment of an individual convicted on the basis of discredited and disavowed scientific evidence. In so holding, the Texas Court of Criminal Appeals joined an increasing 7-5 split in federal and state authority regarding the application of due process relief in the face of scientific evidence later shown to be inaccurate.

The question presented is:

> Whether federal due process requires that a criminal defendant be afforded a new trial upon the revelation that scientific evidence necessary to his conviction was or has become unreliable as a matter of law or scientific fact.

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PETITION FOR A WRIT OF CERTIORARI

Neil Hampton Robbins respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The state trial court's order recommending Mr. Robbins be granted a new trial was issued on January 22, 2010. Pet. App. 114a. The opinion of the Texas Court of Criminal Appeals rejecting that recommendation issued on June 29, 2011 (Pet. App. 1a), and is reported as *Robbins v. State of Texas*, --- S.W.3d ----, 2011 WL 2555665 (Tex. Crim. App. June 29, 2011). The Texas Court of Criminal Appeals denied Mr. Robbins's request for rehearing on September 21, 2011. Pet. App. 1a.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals became final on September 21, 2011. The Court has jurisdiction to review that judgment under 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution states, in relevant part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Criminal convictions increasingly turn on the availability and strength of scientific evidence offered by the prosecution to establish that a crime

has been committed and that the charged defendant is the only possible perpetrator. Juries raised on television programs like *CSI* expect scientific evidence and, once that expectation is satisfied, give disproportionate—even dispositive—weight to that evidence. The criminal justice system's increasing dependence on this evidence has produced a long and troubling line of cases struggling with the problem of how to rectify convictions premised upon expert testimony and scientific evidence subsequently proven to be legally and scientifically inaccurate or unreliable.

There is now a 7-5 split among state and federal courts on this crucial—and recurring—due-process question. The Second and Seventh Circuits, as well as state courts in Wisconsin, New Jersey, West Virginia, Arizona, and Minnesota, recognize that due process requires a new trial when scientific evidence necessary to the conviction becomes so unreliable as to call the validity of the jury's verdict into question. Meanwhile, the Fifth, Sixth, and Ninth Circuits, the Texas Criminal Court of Appeals, and the Supreme Court of Missouri have held that, even where necessary scientific evidence has been invalidated, a criminal defendant may receive a new trial only if he also proffers fully exonerating evidence. This conflict among federal and state courts is particularly worrisome given the critical importance of scientific evidence in the criminal justice system and because the continued evolution of more exacting scientific methods will continue to expose infirmities in convictions resting on scientific evidence.

Mr. Robbins's petition presents an ideal case for resolving this split. Mr. Robbins was convicted of a murder that may have never occurred based on evidence that has been discredited in its entirety. But, aligning itself with the minority view, the Texas Court of Criminal Appeals determined that the inaccuracy of this essential evidence was not sufficient to warrant a new trial absent an affirmative showing from Mr. Robbins that Tristen Rivet died of natural causes—even though five medical experts, including the State's own expert from Mr. Robbins's original trial, agree that Tristen's cause of death cannot be (and could not have been) conclusively determined. Thus, the Texas Court of Criminal Appeals' holding traps Mr. Robbins in the legal paradox of either making an impossible showing or serving a lifetime in prison for a crime that the State's star witness now agrees may not have been committed. Mr. Robbins's predicament underscores the need for this Court to resolve the increasing split among both federal and state courts regarding the legal standard for obtaining a new trial in a clear case of discredited scientific evidence undermining the fundamental fairness and reliability of a criminal conviction.

A. Background

The actual circumstances of seventeen-month old Tristen Rivet's tragic death on May 12, 1997 remain largely unknown. Tristen and her mother, Barbara Ann Hope, lived with Mr. Robbins at the home of his mother. Pet. App. 73a. On the day of Tristen's death, Ms. Hope left Tristen in Mr. Robbins's care. *Id.* At 2:00 p.m., an independent

witness observed Tristen happily playing and eating a snack while in Mr. Robbins's care. Pet. App. 74a. Ms. Hope returned and relieved Mr. Robbins around 4:00 p.m. and discovered Tristen's body in her crib two hours later at 6:00 p.m. *Id.* The record is largely devoid of evidence as to what happened to Tristen between the critical hours of 2:00 p.m., when Tristen was last seen playing, and 6:00 p.m. *Id.*

But what happened next is well documented. Ms. Hope went to wake Tristen around 6:00 p.m. Pet. App. 74a She found Tristen unconscious in her crib with her face—including her nose and mouth—partially covered by her bedding. *Id.* In a panic, Ms. Hope rushed Tristen to the living room and began breathing into Tristen's mouth. Pet. App. 75a. She then took Tristen outside where Mr. Robbins's mother and a neighbor began performing vigorous, adult CPR on Tristen on the ground. *Id.* Another neighbor, Jackie Sullivan, came outside to investigate and, drawing on her experience as a medical technician, told the others to stop performing adult CPR because they were compressing Tristen's chest too forcefully. *Id.* Ms. Sullivan warned that these efforts could actually kill Tristen. *Id.*

Moments later, the paramedics arrived. Pet. App. 75a. Tristen was pronounced dead at 6:53 p.m. shortly after arriving at the hospital. Pet. App. 76a.

Mr. Robbins was subsequently indicted for capital murder for allegedly causing Tristen's death. Pet. App. 73a. The State's entire case turned on the testimony of Dr. Patricia Moore—testimony that has

since been retracted in its entirety. Dr. Moore testified that Tristen died from asphyxia due to compression of the chest and abdomen and ruled Tristen's death a homicide. Pet. App. 7a. Dr. Moore's disclaimed testimony was the only direct evidence at trial suggesting that a crime had occurred. Pet. App. 100a. Aside from that testimony, the State did not offer any direct evidence—eyewitness, physical, or otherwise—that Tristen's death was the result of a homicide.

Dr. Moore was the State's star witness. But Dr. Moore was not a board-certified forensic pathologist at the time she conducted the autopsy. Pet. App. 77a. Her employer, the Harris County Medical Examiner's Office ("HCMEO"), was not accredited because it performed too many autopsies to satisfy the standards of the National Association of Medical Examiners. *Id.* The HCMEO staff was generally overworked and faced excessive case loads. *Id.* Further, Dr. Moore later conceded that she was unaware at the time of trial that Ms. Hope had performed adult CPR on Tristen and had taken numerous other steps that could have caused Tristen's injuries. Pet. App. 85a-86a.

Notwithstanding these problems and contrary testimony from Dr. Robert Bux, the deputy chief medical examiner of Bexar County, Texas, the State repeatedly emphasized Dr. Moore's conclusions as the primary evidence justifying a conviction. Most importantly, in its closing argument and subsequent rebuttal, the State stressed Dr. Moore's testimony as the key evidence indicating that a crime—rather than an accidental or natural death—had occurred.

Pet. App. 81a. Thereafter, the jury found Mr. Robbins guilty of capital murder, and the trial court sentenced him to life in prison. *Id.*

B. Mr. Robbins's Habeas Proceedings

Following Mr. Robbins's conviction, four additional experts were contacted to re-evaluate Dr. Moore's autopsy findings and trial testimony. Pet. App. 82a-92a. Each expert, as well as Dr. Moore herself, concluded that Dr. Moore's original findings and testimony had been incorrect. Pet. App. 82a-97a.

Dr. Dwayne Wolf, the deputy chief medical examiner for Harris County, re-evaluated the autopsy findings in March 2007 and concluded that the evidence did not support a finding that the death resulted from asphyxiation by compression or from any other specific cause. Pet. App. 82a-84a. Dr. Joye Carter, the former Harris County Medical Examiner and Dr. Moore's supervisor at the time of Mr. Robbins's trial, agreed that the autopsy findings and facts of the case did not show that a homicide occurred, much less indicate Tristen's particular cause of death. Pet. App. 13a-14a, 84a. In fact, Dr. Carter noted that a prior employee review for Dr. Moore had indicated that Dr. Moore "seemed biased in favor of the prosecution." Pet. App. 93a.

Even Dr. Moore admitted that her own original findings and testimony were erroneous. Pet. App. 85a-86a, 92a-94a. In a May 2007 letter sent to the Montgomery County District Attorney, Dr. Moore stated that given her "review of all the material from the case file and having had more experience in the

field of forensic pathology," she felt that "an opinion for a cause and manner of death of . . . undetermined is best for this case." Pet. App. 85a.

In light of these findings, Mr. Robbins filed an application for a writ of habeas corpus in June 2007 with the 410th Judicial District Court in Montgomery County, Texas, asserting that in light of this newly discovered evidence, "no rational juror would find [Mr. Robbins] guilty beyond a reasonable doubt of the offense." Pet. App. 15a. Mr. Robbins also explained that his "right to a fair trial by a fair and impartial jury . . . was violated because his conviction was based on testimony material to the State's case that has now been determined to be false." *Id.*

In its initial response, the State recommended that Mr. Robbins be granted a new trial because "the jury was led to believe and credit facts that were not true." Pet. App. 15a. Rather than accept the State's recommendations, the trial court appointed Dr. Thomas Wheeler, the Chairman of the Department of Pathology at Baylor College of Medicine in Houston, to determine, if possible, the means and manner of Tristen's death. Pet. App. 15a-16a. After conducting an independent examination, Dr. Wheeler also concluded that Dr. Moore's trial testimony was "not justified by the objective facts and pathological findings" and that there were no physical findings to support the conclusion that a homicide had occurred. Pet. App. 16a.

In August 2008, Mr. Robbins and the State, again, recommended to the trial court that Mr.

Robbins be granted a new trial. Pet. App. 18a. Yet again, rather than agree to the joint recommendations from the parties, the trial court ordered that the parties engage in discovery. *Id*. Dr. Wheeler and Dr. Wolf were subsequently deposed and each reaffirmed their findings that the evidence did not support a finding that a homicide had occurred. Pet. App. 94a-95a. In Dr. Moore's deposition, she confirmed that her trial testimony was not justified by the objective facts and pathological findings. Pet. App. 92a-94a.

Around this same time, Justice of the Peace Edith Connelly reopened the inquest into Tristen's death and appointed Dr. Linda Norton to examine the evidence. Pet. App. 13a-16a. Dr. Norton also disagreed with Dr. Moore's trial testimony. Pet. App. 88a-90a. Dr. Norton estimated that the cause of death was asphyxia by suffocation and placed the estimated time of death between 2:30 p.m. and 5:00 p.m. Pet. App. 16a-17a. Dr. Norton ultimately concluded that she believed Tristen had been killed, but determined that she could not conclude beyond a reasonable doubt that Mr. Robbins was in any way responsible. Pet. App. 90a.

Dr. Norton was the only expert of the six pathologists consulted by the habeas court to conclude that Tristen did not die of natural causes. But Dr. Norton was also the only expert witness who refused to make herself available for deposition. Shortly before her scheduled deposition, Dr. Norton vanished. Pet. App. 97a-98a. Dr. Norton's daughter informed the court that Dr. Norton's roommate and long-time assistant had committed suicide in their

shared home and that Dr. Norton was seeking inpatient treatment. *Id.* After four months of searching, Dr. Norton was finally located. Pet. App. 98a. At that time, she informed the trial court that she was under a doctor's care, she was "physically incapable of preparing for or participating in a deposition," and she would not appear for deposition. *Id.* In response, the trial court accepted an affidavit from Dr. Norton that simply confirmed her earlier findings. Pet. App. 98a-99a. Dr. Norton was never deposed and her findings were never subjected to any meaningful examination by counsel or the trial court. *Id.*

On January 15, 2010, the State, for the first time, urged that relief be denied to Mr. Robbins. Pet. App. 20a. The trial court, however, found that Mr. Robbins was entitled to a new trial because the verdict against him was "not obtained by fair and competent evidence, but by admittedly false testimony that was unsupported by objective facts and pathological findings and not based on sufficient expertise or scientific validity." Pet. App. 112a.

C. The Decision Below

The Texas Court of Criminal Appeals, in a 5-4 decision, rejected the trial court's recommendations and denied relief. Pet. App. 34a. The five-judge majority concluded that because Mr. Robbins "failed to prove that the new evidence unquestionably establishes his innocence," he was not entitled to relief on his claim of actual innocence of the crime for which he was convicted. Pet. App. 23a.

The majority then departed from the trial court's findings and held that false testimony had not been used to convict Mr. Robbins. Pet. App. 27a. Notwithstanding the agreement among the consulted experts that Dr. Moore's findings and testimony were incorrect, the majority refused relief because none of the experts affirmatively proved the negative proposition that "Tristen could not have been intentionally asphyxiated." Pet. App. 29a-30a. Thus, the majority concluded Mr. Robbins did not "have a due process right to have a jury hear Moore's re-evaluation." Pet. App. 33a-34a.

In a dissent joined by two other judges, Judge Cochran identified her "extremely serious concern" about the increased "disconnect between the worlds of science and of law" that allows a conviction to remain in force when the scientific basis for that conviction has since been rejected by the scientific community. Pet. App. 46a-47a. Adding to this concern was the dissent's observation that this disconnect "has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased." Pet. App. 48a. As a result, the dissent argued that "[f]inality of judgment is essential in criminal cases, but so is accuracy of the result—an accurate result that will stand the test of time and changes in scientific knowledge." Pet. App. 49a.

Looking at the facts of Mr. Robbins's conviction, the dissent believed this case created an appropriate opportunity to address this growing concern. Pet. App. 49a-54a. Because Dr. Moore's findings and

trial testimony have been uniformly rejected, including by Dr. Moore herself, the dissent urged that Mr. Robbins "did not receive a fundamentally fair trial based upon reliable scientific evidence." Pet. App. 62a.

Indeed, Judge Cochran explained that she "suspect[ed] that the [United States] Supreme Court will one day hold that a conviction later found to be based upon unreliable scientific evidence deprives the defendant of a fundamentally fair trial and violates the Due Process Clause of the Fourteenth Amendment because it raises an intolerable risk of an inaccurate verdict and undermines the integrity of our criminal justice system." Pet. App. 50a-51a.

Judge Alcala dissented separately, concluding that Mr. Robbins "is entitled to relief on his application for a writ of habeas corpus on the ground that he was denied due process of law by the State's use of false testimony to obtain his conviction." Pet. App. 63a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons.

First, there is now a mature split between, on one side, the Second and Seventh Circuits, as well as five state courts, and, on the other side, the Fifth, Sixth, and Ninth Circuits, as well as two state courts, as to whether due process entitles a defendant to a new trial where a conviction is premised upon expert scientific testimony later found to be fundamentally unreliable. The Court's resolution of this split will facilitate the beneficial use of scientific evidence in criminal prosecutions while also protecting the criminal justice system and the due process rights of criminal defendants against shoddy science and discredited theories.

Second, the due process problem presented by scientific evidence later found to be demonstrably unreliable presents an important and recurring constitutional issue given the prominent and frequent use of scientific evidence in criminal prosecutions in both state and federal courts. Scientific evidence plays an increasingly influential and often critical role in criminal prosecutions. But the reliability of such evidence will continue to face challenges and impugn existing—even long-standing—convictions as new scientific discoveries and revised methodologies improve the accuracy of forensic testimony. This problem shows no sign of subsiding as today's juries increasingly demand some element of scientific certainty in the criminal justice process.

Third, the Texas Court of Criminal Appeals incorrectly held that the use of unreliable expert testimony to secure a criminal conviction comports with the requirements of the Due Process Clause. That conclusion cannot be reconciled with the fundamental truth-seeking function of the criminal justice system and improperly elevates the desire for finality over foundational principles that justice be done and only the guilty face punishment. Instead, in keeping with similar conclusions by the Second and Seventh Circuits and several state courts, Mr. Robbins should have been granted a new trial because Dr. Moore's unequivocal repudiation of her earlier testimony rendered the jury's verdict irreparably suspect and fundamentally unfair.

I. BOTH FEDERAL AND STATE COURTS DISAGREE AS TO WHETHER THE DUE PROCESS CLAUSE REQUIRES A NEW TRIAL WHEN A CONVICTION IS BASED ON ADMITTEDLY UNRELIABLE EVIDENCE

Federal and state courts are deeply divided as to whether a defendant is entitled to relief upon the revelation that misleading or discredited evidence played a significant role in the underlying conviction. In stark contrast to the Texas Court of Criminal Appeals, the Seventh and Second Circuits hold that due process can be violated by the use of testimony or evidence whose validity has been seriously called into question, even where it has not necessarily been recanted or wholly discredited. *See, e.g.*, *United States v. Freeman*, 650 F.3d 673, 678-80 (7th Cir. 2011); *Drake v. Portuondo*, 553 F.3d 230, 233 (2d Cir. 2009). Holdings from state courts in

Wisconsin, New Jersey, West Virginia, Arizona, and Minnesota are in accord.[1] The Fifth, Ninth, and Sixth Circuits, however, hold that a new trial is not warranted unless the expert testimony can be shown to be "actually false." *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997); *see also United States v. Berry*, 624 F.3d 1031, 1039-42 (9th Cir. 2010); *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000). The Texas Court of Criminal Appeals and the Supreme Court of Missouri also adhere to this approach.[2]

A. In the Second and Seventh Circuits and other jurisdictions taking a similar approach, defendants are granted relief where the evidence in the original trial has been called into question in such a way as to undermine the apparent accuracy and integrity of the jury verdict. *See, e.g.*, *Freeman*, 650 F.3d at 678-80; *State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008). These jurisdictions remedy the apparent due process violations that arise from the continued imprisonment of an individual that was convicted on the basis of evidence that has subsequently been shown to be incorrect without requiring defendants to satisfy an unnecessarily

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[1] *See State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008); *State v. Krone*, 897 P.2d 621, 621 (Ariz. 1995); *State v. Gookins*, 637 A.2d 1255, 1259 (N.J. 1994); *Matter of Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 504 (W.Va. 1993); *State v. Caldwell*, 322 N.W.2d 574, 587 (Minn. 1982).

[2] *See Ex Parte Robbins*, 2011 WL 2555665, at *12-15; *Trotter v. State*, 736 S.W.2d 536, 539 (Mo. Ct. App. 1987).

rigorous standard of "falsity" that neglects the proper focus of due process analysis.

The Seventh Circuit holds that, before granting a new trial on due process grounds, it need not "be conclusively established that the . . . witness was lying." *Freeman*, 650 F.3d at 678-80. In fact, in *Freeman*, the Seventh Circuit squarely *rejected* the suggestion that a defendant must prove that the challenged evidence was verifiably false in order to trigger due process relief. *Id.* at 679. The Seventh Circuit explained that there "does not need to be conclusive proof that the testimony was false" for it to constitute a due process violation. *Id.* at 679-80.

The Second Circuit agrees with the Seventh Circuit. In *Drake*, a federal habeas petitioner sought relief on the grounds that a prosecution expert testified falsely at trial. 553 F.3d at 233. Among the expert's "false" statements were statements of fact that were affirmatively proven to be incorrect, statements of exaggerated credentials, and testimony concerning a dubious medical condition known as "picquerism." *Id.* at 237-39. After noting the "improbability of [the expert's] testimony as to the scientific validity of 'picquerism,'" the court found that the prosecution erred by not at least contacting "any other health professional to inquire about the concept." *Id.* at 238, 243. It subsequently reversed and remanded for a new trial. *Id.* at 247-48.

Similarly, in *Edmunds*, 746 N.W.2d. at 592-93, the defendant was convicted of reckless homicide of an infant after expert medical testimony at trial

suggested the infant's injuries could only be explained by shaken baby syndrome (SBS). During post-conviction proceedings, Edmunds presented expert testimony from multiple doctors revealing a newly developed debate in the medical community that undermined the state's expert trial witness. *Id.* at 593. Although "the new evidence d[id] not completely dispel the old evidence," the court found that a new trial was warranted because the new evidence undermined Edmunds original conviction. *Id.* at 599.

And *In Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501, 502-03 (W. Va. 1993), a state investigation uncovered numerous allegations of misconduct by a former state serologist who had testified in multiple criminal trials. Because the allegations of misconduct included acts such as "overstating the strength of results," it could not be proven that the trial testimony from the serologist was always factually incorrect. *Id.* at 503. Nevertheless, the court held that any prior testimony offered by the serologist "should be deemed invalid, unreliable, and inadmissible in determining whether to award a new trial in any subsequent habeas corpus proceeding." *Id.* at 506. The court made the basis for its holding clear by stating that, "once the use of false evidence is established, as here, such use constitutes a violation of due process." *Id.*

B. Conversely, courts aligning with the Texas Court of Criminal Appeals hold that due process is not violated "merely" because an individual is

convicted using evidence or testimony that was later deemed unreliable and thus misled the jury into reaching a guilty verdict. Rather than focusing on the integrity of the jury verdict, these jurisdictions assign dispositive weight to a highly stylized meaning of the phrase "actually false." In so doing, these jurisdictions improperly place the burden on a convicted defendant to affirmatively prove that testimony given at trial is technically "false" rather than simply factually wrong or unreliable.

In *United States v. Berry*, the petitioner claimed that his due process rights were violated because his conviction was based largely on expert testimony that had been subsequently deemed unreliable. 624 F.3d at 1039-40. The petitioner had originally been convicted, in part, on the basis of "compositional analysis of bullet lead" ("CABL") evidence. *Id.* at 1035. Following the petitioner's conviction, the FBI discontinued the use of CABL evidence because it was found to be inaccurate. *Id.* at 1037. Although the Ninth Circuit acknowledged that the expert testimony suffered from "significant criticisms," the Court denied relief because the petitioner failed to show that the evidence was "almost entirely unreliable." *Id.* at 1041.

The Fifth Circuit reached a similar conclusion in *Fuller*. In *Fuller*, the defendant was convicted of murder and sexual assault. *Id.* at 494. At trial, the defendant asserted his innocence and claimed that another man killed the victim with a metal pipe. *Id.* at 495. This defense was refuted by the prosecution's expert, a coroner, who testified that the injuries were likely caused by fists rather than a

pipe. *Id.* In his federal application for a writ of habeas, Fuller claimed that his due process rights were violated because the testifying coroner failed to adhere to standard scientific procedures in forming his opinion as expressed at trial. *Id.* at 496. In support, Fuller provided expert testimony to show that the coroner could not have testified accurately at trial without first following the correct procedures. *Id.* Nevertheless, the Fifth Circuit denied relief because Fuller could not prove that the coroner's testimony at trial was "actually false." *Id.* at 496-97.

Similarly, in *Byrd*, the petitioner also claimed his due process rights were violated when he was convicted with the use of false testimony. 209 F.3d at 500-01. The petitioner presented evidence to show that witnesses from his original trial were "involved in a scheme to testify falsely against [him] in order to further their own causes with the [prosecutor's office]." *Id.* But the Sixth Circuit denied relief because the petitioner failed to show the statements were "'indisputably false,' rather than merely misleading." *Id.* at 517-18.

C. This fundamental split is becoming more fractured because federal district courts and state courts have no clear guidance as they grapple with the use of unreliable evidence in criminal trials. In accord with the Seventh and Second Circuits, several courts find that due process can be violated through the use of unreliable expert evidence, even if that evidence cannot be affirmatively proven to be false. *See, e.g.*, *Stitt v. United States*, 369 F. Supp. 2d 679, 699-700 (E.D. Va. 2005) (concluding that a sufficient

basis for collateral attack of a conviction exists when an expert's original testimony has been retracted and shown to be erroneous); *Edmunds*, 746 N.W.2d at 598-99 (explaining that significant developments in the medical field concerning shaken baby syndrome cast sufficient doubt on the conviction, requiring a new trial); *State v. Gookins*, 637 A.2d 1255, 1259 (N.J. 1994) (finding that due process prevents the use of unreliable evidence in obtaining criminal convictions or guilty pleas); *Matter of Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d at 504 (finding violation when it was shown a state serologist made misleading statements at trial); *State v. Caldwell*, 322 N.W.2d 574, 587 (Minn. 1982) (holding that a defendant is entitled to a new trial where it can be shown that the testifying expert "was mistaken in his testimony" (quoting *Martin v. United States*, 17 F.2d 973, 976 (5th Cir. 1927))).

These holdings are directly at odds with holdings from the Texas Court of Criminal Appeals and other courts. *See, e.g.*, *Couch v. Booker*, 650 F. Supp. 2d 683, 699 (E.D. Mich. 2009) (explaining that a habeas petitioner bears the burden of showing testimony given at trial was false for purposes of a due process violation); *Trotter v. State*, 736 S.W.2d 536, 539 (Mo. Ct. App. 1987) (rejecting due process claim because, although expert later recanted trial testimony, the "testimony of [the expert] was true and correct as to the best of [the expert's] knowledge at the time of the trial").

Further, these conflicting applications of the Due Process Clause have become more troublesome in

recent years. Without this Court's guidance, this already fractured split among federal and state courts threatens to grow even more complicated and lead to further inconsistent results between and within individual jurisdictions. Courts adjudicating due process claims arising from the use of unreliable expert testimony are doing so in an increasingly wide range of circumstances. Specifically, the cases that have addressed this issue are split into three categories. First, various courts have been called upon to determine whether a new trial is required when an expert witness withdraws earlier opinions offered at trial because of mistake or inaccuracy. *See, e.g.*, *Souter v. Jones*, 395 F.3d 577, 593 (6th Cir. 2005); *Ege v. Yukins*, 380 F. Supp. 2d 852, 871 (E.D. Mich. 2005); *Stitt*, 369 F. Supp. 2d at 699-700; *People v. Moldowan*, 643 N.W.2d 570, 571 (Mich. 2002).

Second, courts have addressed situations where newly available evidence undermines expert testimony from trial. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 536-54 (2006); *State v. Krone*, 897 P.2d 621, 621 (Ariz. 1995); *Murphy v. State*, 24 So.3d 1220, 1222-23 (Fla. Dist. Ct. App. 2009); *Caldwell*, 322 N.W.2d at 587; *Edmunds*, 746 N.W.2d at 590.

Third, courts have had to decide whether a defendant should be afforded a new trial when an expert willfully testifies falsely. *See, e.g.*, *Mitchell v. Gibson*, 262 F.3d 1036, 1064 (10th Cir. 2001); *United States v. Stewart*, 323 F. Supp. 2d 606, 614-16 (S.D.N.Y. 2004); *United States v. Jones*, 84 F. Supp. 2d 124, 126-27 (D.D.C. 1999); *United States v. Williams*, 77 F. Supp. 2d 109, 111-13 (D.D.C. 1999).

Combined with the existing disagreement among the courts, this proliferation of diverse circumstances illustrates how quickly this issue will become unworkable in the lower courts. The application of due process will become progressively varied, and many courts will look to factors that have no bearing on the ultimate due process concern: the actual guilt of a criminal defendant.

The Court's intervention is necessary to bring uniformity among state and federal courts tasked with enforcing the Due Process Clause. Thus, this deep split among federal and state courts is ripe for the Court to resolve.

II. THIS ISSUE IS IMPORTANT AND RECURRING, PARTICULARLY GIVEN JURORS' INCREASING DEFERENCE TO FORENSIC EVIDENCE

A. The Problem Of Scientific Evidence Deemed Subsequently Unreliable Threatens The Integrity Of A Wide-Range Of Criminal Prosecutions Throughout The United States

Expert witness testimony frequently plays a dispositive role in criminal trials. "[L]ay jurors tend to give considerable weight to scientific evidence when presented by experts with impressive credentials." *Clemons v. State*, 896 A.2d 1059, 1078 (Md. 2006). The rise of the "Reverse-CSI Effect," whereby jurors give undue deference to the testimony of expert witnesses resulting in convictions where a defendant would otherwise be acquitted, further exacerbates this problem. *See* Mark A. Godsey & Marie Alou, *She Blinded Me With*

Science: Wrongful Convictions and the "Reverse CSI-Effect", 17 TEX. WESLEYAN L. REV. 481, 483 (2011).

The serious threat to due process created by the Reverse-CSI Effect is exemplified by several cases. In *State v. Krone*, 897 P.2d 621 (Ariz. 1995), a criminal defendant was convicted of murder almost exclusively on the basis of evidence offered by a forensic odentologist. *Id.* at 622. The expert conclusively testified that bite marks on the victim's body matched the defendant's bite pattern. *Id.* In fact, the expert's testimony was so convincing that Krone was nicknamed "the snaggle-toothed killer" in the press, and the jury found the defendant guilty. *Id.* But Krone was completely exonerated in 2002 after subsequent DNA testing revealed that the expert testimony was simply wrong.

Similarly, as noted above, in *State v. Edmunds*, 746 N.W.2d. at 592-93, a defendant was convicted of first-degree reckless homicide based on expert testimony attributing the victim's death to shaken baby syndrome (SBS). When the state's expert witness later testified that new research cast doubt on the expert's prior testimony, Edmunds was granted a retrial. *Id.* at 599. The court explained that, as a result of the passage of time, developments in the area of forensic pathology made the conclusions at trial altogether uncertain. *Id.* Thus, the court held that, while "the new evidence d[id] not completely dispel the old evidence," it was persuaded that "the emergence of a legitimate and significant dispute within the medical community as to the cause of those injuries" sufficiently undermined the

original conviction. *Id.*[3] Without expert testimony to suggest a crime had even been committed, the State dismissed all criminal charges. Ed Trevelen, *Citing Wishes of Baby's Parents, Prosecutors Won't Retry Edmunds*, WIS. STATE J., July 11, 2008.

The problem of the Reverse CSI Effect synergizes with the long-recognized "CSI Effect" to create an array of perverse incentives. Heightened juror expectations make it increasingly likely that prosecutors will feel pressured to offer scientific testimony in every criminal prosecution, perhaps even in cases where the scientific evidence rests on a less than adequate foundation. In one of the first empirical studies of juror expectations regarding scientific evidence presented by the prosecution in a criminal trial, researchers found that jurors naturally expect scientific evidence in certain criminal trials and in trials where circumstantial evidence forms a part of the prosecution's case. Donald E. Shelton, Young S. Kim, & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?* 9 VAND. J. ENT. & TECH. L. 331, 357-62 (2006). Jurors now freely admit that they expect forensic evidence to be presented at trial and that

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[3] The issues presented by Mr. Robbins's conviction are virtually indistinguishable from those presented in the emerging literature addressing the increasingly questionable SBS convictions of the late-1990s. *See generally* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1 (2009).

they are reluctant to convict a criminal defendant absent such evidence. *See Reyes v. Gonzales*, No. 08-1928, 2010 WL 316806, at *6 (C.D. Cal. Jan. 22, 2010) (potential trial juror struck by the prosecution after expressing an unwillingness to convict a defendant without DNA evidence). And this problem is not simply academic—one empirical study found forensic science errors in 63% of all cases resulting in wrongful convictions. Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 423–24 (2001) (conclusions drawn by analyzing data from The Innocence Project, Inc.). Such a high rate of error suggests that prosecutors already overreach in their effort to satisfy juror's appetites for scientific certainty.

These dangers are exacerbated by the increasingly fragmented split in both federal and state jurisprudence discussed above. As forensic evidence continues to play an ever more vital role in criminal prosecutions, the disagreements among federal and state courts will inevitably lead to wildly disparate due process protections being afforded to similarly situated criminal defendants. Criminal defendants will increasingly face different results not only based on jurisdiction but also based on the specific grounds discrediting the original expert testimony, be it disavowal, new evidence, or willful dishonesty. But none of these grounds speak to the ultimate issue—whether the defendant committed the crime. Instead, as the split continues to deepen, scientific evidence will continue to grow in prominence while evaluations of its function and effect will remain mired in legalistic distinctions

having no connection to the fundamental truth-seeking function of the criminal justice system.

Adding to this danger is the reality that science continues to repudiate previously held theories and methods at an ever-faster pace. More and more, tomorrow's science will validate or discredit evidence presented in today's trials. This increased accuracy in forensic science will both condemn the guilty and redeem the innocent. Thus, as the accuracy of forensic science continues to improve, due process requires the judicial system to provide an effective safety-valve to ensure that innocent defendants do not fall victim to the inherent shortcomings of the scientific evidence juries so readily embrace. Despite the holdings of some federal and state courts, including the Texas Court of Criminal Appeals, the continued incarceration of individuals convicted on admittedly unreliable evidence cannot comport with due process.

B. Courts Will Continue To Inconsistently Apply The Due Process Clause In This Area Absent Further Guidance

This case is not an isolated incident, and there is widespread confusion and discord among both federal circuit courts and state supreme courts about the proper disposition of cases subsequently found to rely upon inaccurate scientific testimony. As the cases discussed above and in the previous section indicate, courts continue to struggle with satisfying juror expectations while providing some avenue to remedy unsupportable jury verdicts. In fact, a larger

survey reveals that this issue has already arisen in dozens of additional cases nationwide.[4]

As Judge Cochran explained in her dissent in the Court of Criminal Appeals, "[t]he potential problem of relying on today's science in a criminal trial . . . is that tomorrow's science sometimes changes and, based upon that changed science, the former verdict may look inaccurate, if not downright ludicrous." [CCA at *19]. Neither the importance of

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[4] All of the following cases have tried to address the troubling implications of the use of unreliable and/or factually incorrect evidence at trial: *Souter v. Jones*, 395 F.3d 577, 593 (6th Cir. 2005); *Mitchell v. Gibson*, 262 F.3d 1036, 1064 (10th Cir. 2001); *Blocker v. United States*, 274 F.2d 572, 573-74 (D.C. Cir. 1959); *Ege v. Yukins*, 380 F. Supp. 2d 852, 871 (E.D. Mich. 2005); *Stitt v. United States*, 369 F. Supp. 2d 679, 699–700 (E.D. Va. 2005); *United States v. Stewart*, 323 F. Supp. 2d 606, 615-16 (S.D.N.Y. 2004); *United States v. Jones*, 84 F. Supp. 2d 124, 126-27 (D.D.C. 1999); *United States v. Williams*, 77 F. Supp. 2d 109, 111-12 (D.D.C. 1999); *People v. Moldowan*, 643 N.W.2d 570, 570-71 (Mich. 2002); *State v. Avery*, No. 2010AP1952, 2011 WL 4550337, *34 (Wis. Ct. App. Oct. 4, 2011); *Murphy v. State*, 24 So.3d 1220, 1222–23 (Fla. Ct. App. 2009); *Arrington v. State*, 983 A.2d 1071 (Md. 2009); *State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008); *Brewer v. State*, 725 So.2d 106, 125-26 (Miss. 1998); *State v. Krone*, 897 P.2d 621, 621 (Ariz. 1995); *State v. Gookins*, 637 A.2d 1255, 1259 (N.J. 1994); *In re Investigation of the W. Va. State Police Criminal Lab., Serology Div.*, 438 S.E.2d 501, 506 (W. Va. 1993); *McCarty v. State*, 765 P.2d 1215, 1218-19 (Okla. Crim. App. 1988); *Trotter v. State*, 736 S.W.2d 536, 539 (Mo. 1987); *People v. Cornille*, 448 N.E.2d 857, 862 (Ill. 1983); *State v. Caldwell*, 322 N.W. 2d 574, 587 (Minn. 1982); *State v. DeFronzo*, 394 N.E.2d 1027, 1031–32 (Ohio Com. Pl. 1978); *Barton v. Plaisted*, 256 A.2d 642, 646 (N.H. 1969).

science in criminal prosecution nor the inherent malleability and constant evolution of scientific standards show any signs of abating. In fact, as science becomes a more reliable tool, it will increasingly develop means of verifying and discrediting long-standing convictions. Given the established and expanding split on this pervasive issue, courts will continue to struggle with these problems and continue to reach markedly inconsistent results in a way that threatens the broader integrity of all criminal convictions.

III. MR. ROBBINS'S CONVICTION DOES NOT SATISFY THE MINIMUM STANDARDS REQUIRED BY THE DUE PROCESS CLAUSE

A. The Texas Court of Criminal Appeals and the other jurisdictions subscribing to a similar view of due process all make the same single mistake: their jurisprudence has developed such fine distinctions in pursuit of a definition of "falsity" that they neglect the fundamental truth-seeking function of the criminal justice system.

As this Court explained in *Thompson v. City of Louisville*, an arbitrary conviction will not withstand constitutional scrutiny under the Due Process Clause. 362 U.S. 199, 199 (1960). The State fails to meet its burden to convict—and, arguably, retain custody—where the charges asserted "were so totally devoid of evidentiary support as to render [the] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Id.* In short, a total lack of evidentiary support compels due process relief.

Thus, the question addressed by the trial court and the Texas Court of Criminal Appeals below should not have been whether Dr. Moore's testimony met some highly technical definition of the word "false." Instead, the question addressed should have been whether a reasonable observer could have any confidence in the jury's conclusion that Mr. Robbins committed a murder once the medical evidence suggesting that a homicide occurred was disavowed and discredited.

B. No reasonable observer could have any confidence in Mr. Robbins's conviction given Dr. Moore's retraction of the only direct evidence that a crime had been committed. Dr. Moore presented critical testimony to the jury in her capacity as a State-sponsored expert witness. She testified that she was reasonably medically certain that Tristen's cause of death had been asphyxia by compression attributable to homicidal conduct. This evidence was indisputably the only direct evidence that Tristen had died at the hands of a third party rather than from some other, natural cause. Thus, the State was dependent on Dr. Moore to establish that Tristen had been murdered. Only after establishing that foundation could the State seek to assign the blame that was later laid upon Mr. Robbins. Such expert testimony undeniably carries extraordinary weight with juries because experts—by definition—provide testimony and analysis that the average witness cannot supply. See FED. R. EVID. 702. This problem is further exacerbated by the Reverse CSI-Effect discussed above.

But the Texas Court of Criminal Appeals would deny Mr. Robbins relief where the State's necessary evidence has since been discredited. Dr. Moore now rejects her own expert opinion. No reasonable juror—even construing all the remaining evidence in favor of the State—could still conclude that Tristen was murdered absent any evidence regarding cause of death. This reality is further underscored by the fact that no less than five experts have examined this case and have concluded that they cannot testify as to Tristen's cause of death with a reasonable degree of medical certainty—hardly a foundation upon which to base any conviction, much less one carrying a life sentence.

Rather than address these problems, the majority in the Texas Court of Criminal Appeals allocated nearly half of its opinion to dissecting an array of technical distinctions to assess whether Dr. Moore's admittedly inaccurate trial testimony was "false" as a matter of law. *Robbins*, 2011 WL 25556655 at *12–15. But the technical nuances that engrossed the majority simply have nothing to do with the ultimate due process question presented by Mr. Robbins's petition. The Court's emphasis on stylized definitions elevates form over substance. Notwithstanding its implicit acknowledgement that Dr. Moore's retraction eliminated the only evidence from the trial that indicated a crime had even been committed, the majority chose to disregard the complete lack of evidentiary support for the jury's verdict in the remaining record on the grounds that Dr. Moore's retraction did not conclusively prove that Tristen died of natural causes.

This analysis turns the proper order of criminal proceedings on their head. By so holding, the majority rewarded the State for convicting Mr. Robbins on expert conclusions that all parties agree were factually and scientifically incorrect. The majority's position allowed the State to retain a patently defective conviction unless Mr. Robbins could shoulder an often impossible burden to prove a negative where the burden of proof is properly attributable to the State. In short, Mr. Robbins should not have to prove his innocence beyond a reasonable doubt where the State no longer has the evidence to convict by that same standard.

C. Erroneous forensic investigations like the one at issue here, even when done in good faith, will produce erroneous, or at least inherently suspect, verdicts based on the resulting expert testimony. These problems implicate, at their base, the core interests of justice that the Court is charged with defending. In *State v. Caldwell*, the Minnesota Supreme Court held that it "is the duty of a trial court to grant a new trial, where a witness at the original trial subsequently admits on oath that he committed perjury, or even that he was mistaken in his testimony, provided such testimony related to a material issue, and was not [merely] cumulative." 322 N.W.2d at 587. (quoting *Martin v. United States*, 17 F.2d 973, 976 (5th Cir. 1927)). In *Caldwell*, the fingerprint expert's testimony was mistaken and inaccurate. Although the expert "never 'recanted' his own testimony," there was "no doubt that [a] fingerprint was misidentified" as belonging to the defendant. *Id.* Therefore, the court granted a new

trial for the criminal defendant because, without the fingerprint expert's testimony, the court was unable to find that the same verdict would have been reached. *Id.* The same concerns that required a new trial in *Caldwell* apply with equal force to Dr. Moore's admittedly inaccurate testimony that established critical elements of the charges brought against Mr. Robbins.

It is imperative for "[t]he judicial system, with its search for the closest approximation to the 'truth,' [to] accommodate this ever-changing scientific landscape." *State v. Behn*, 868 A.2d 329, 343 (N.J. Super. Ct. App. 2005). Therefore, when a trial expert's testimony is recanted or mistaken and later revealed to be inaccurate by subsequent scientific developments, a court should grant a new trial in the interests of justice. And though finality is an important principle in any justice system, the American court system has long recognized that crucial evidence can sometimes emerge well after the verdict is handed down. As a consequence, "[e]very jurisdiction provides some mechanism for awarding a convicted defendant a new trial on the basis of newly discovered evidence," *Burr v. Florida*, 474 U.S. 879, 881 (1985) (Marshall, J., dissenting). "If a convicted defendant can produce sufficient indication that the jury's finding of guilt beyond a reasonable doubt was wrong, the institutional need for finality yields to the more compelling concerns of truth and fairness." *Id.* Or, as this Court more recently explained, "comity and finality . . . must yield to the imperative of correcting a fundamentally unjust

incarceration." *House v. Bell*, 547 U.S. 518, 536 (2006).

And this compromise in no way threatens the criminal justice system's responsibility to punish the guilty. As one court aptly put it more than a century ago, "whatever the truth may be, whether the defendant be guilty or innocent, it can be established by another trial." *Bussey v. State*, 64 S.W. 268, 269 (Ark. 1901). If the State can prove that Mr. Robbins committed a crime without Dr. Moore's testimony, it should be required to do so. If it cannot carry its burden, Mr. Robbins should not be required to spend the rest of his life in prison based on a conviction finding no support in science, law, or the basic tenets of the United States Constitution.

D. Mr. Robbins's conviction is now "so totally devoid of evidentiary support" that it triggers the due process protections articulated in *Thompson*. 362 U.S. at 199. If Mr. Robbins were put on trial today, none of the available experts who participated in the original trial or subsequent habeas proceedings would testify that Tristen's death was a homicide. Though they could not testify affirmatively that Tristen died of some other specific cause, it was not and is not Mr. Robbins's obligation to so prove. Instead, the jury would be left to assume a cause of death based on the mere fact that Tristen may have died during the time she was alone with Mr. Robbins. Such a conviction would not withstand even the permissive standards of sufficiency review, and such a conviction should not authorize the State to imprison Mr. Robbins for the rest of his life.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 20, 2011

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