No. 11-777

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Texas Court of Criminal Appeals is one of the very few appellate courts to have held that the Due Process Clause of the Fourteenth Amendment is violated by the admission of material testimony, believed to be true by both witness and prosecutor, upon a subsequent determination that the testimony is "false." The petitioner argues that the Court of Criminal Appeals still has not gone far enough, and that it should recognize a violation of the Due Process Clause in the good-faith admission of scientific opinion testimony upon a subsequent finding that the testimony is merely "unreliable," *i.e.,* that the testimony *might* be false. He poses the following question for this Court's review:

> 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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STATEMENT OF THE CASE

I. The Death of Tristen Rivet and the Trial of Neil Robbins.

A. The circumstances of Tristen's death.

Tristen Rivet's death at the age of seventeen months did not occur in an evidentiary vacuum. There was a substantial amount of lay witness testimony suggesting that the death was a homicide.

Neil Robbins's relationship with Tristen's mother, Barbara Hope, was volatile and unstable. 8 RR[1] 263-71. Robbins became increasingly "moody" and "secretive" after he was seriously injured in an automobile accident and prescribed pain medication. 8 RR 247. The couple argued frequently about a variety of problems, including Hope's employment as a topless dancer, her pregnancy and abortion, and the couple's dire economic situation. 8 RR 248, 255, 288. Hope became severely depressed and sought assistance from the Tri-County public mental health agency. 8 RR 269-70. Hope described Robbins as "stressed out," and Tri-County records reflected that he told a psychologist that he did not know what he would do if the situation worsened. Robbins said he feared he would "hurt [his] girlfriend" if they stayed together. 8 RR 271; 10 RR 168.

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[1] Citations to "RR" refer to the reporter's record of Robbins's trial, preceded by the volume number and followed by the page number. Citations to "CR" refer to the clerk's record prepared for the appeal for Robbins's conviction.

Tristen Rivet sustained suspicious injuries on three occasions when she was left alone with Robbins. Robbins claimed that the first injury, a facial bruise that resembled a "black eye," occurred when Tristen fell in the bathtub. 9 RR 104-06. He said that an injury to Tristen's leg, which prevented her from standing or walking for approximately four days, occurred when he accidently stepped upon the child's heel. 9 RR 107-08. And he claimed that the third injury, which consisted of a series of purple bruises across Tristen's face, neck and back, occurred when he grabbed the child to prevent her from falling while he was taking a shower with her. 9 RR 109-16.

During the period in which Tristen sustained these injuries, she began to manifest fear of Robbins, "cowered" in his presence, and avoided being held by him. 8 RR 249-50; 9 RR 125. Tristen's regular babysitter testified that she reported the suspicious injuries to the Child Protective Services agency, before leaving the area because of her fear of Robbins. 9 RR 151-53.

In May of 1998, Hope and Robbins moved in with Robbins's mother, Bonni Morris, so that she could assist Hope in obtaining psychiatric care for her severe depression. On May 9, 1998, Hope threatened to commit suicide, cut her wrist with a key, and was transported by ambulance to a hospital. 8 RR 290-91. That evening Robbins drove Hope to Morris's house, departed, and did not return until the following morning. 8 RR 294. He was similarly absent during each of the following two nights. 8 RR 297.

On the morning of May 12, 1998, Hope left Tristen in Robbins's care while Morris took Hope to visit a counselor and shop for a mobile home. 8 RR 298. Robbins's parole officer visited Robbins and observed Tristen "walking around eating animal crackers." 8 RR 201. Robbins's brother also visited until approximately 2:20 p.m. 10 RR 109.

Robbins paged Hope between 3:30 p.m. and 4:00 p.m., and Hope testified that he sounded "shaky" and "excited." 8 RR 306. He told Hope to hurry back because he had to go and he had things to do. *Id*. Hope and Morris returned home between 4:00 and 4:30 p.m., and Robbins told Hope he had laid Tristen down for a nap a few minutes after they spoke on the telephone. 8 RR 308. Robbins stated that he had to leave, and he and Hope argued again about his frequent absences. *Id.* Robbins told Hope he was going to Willis, Texas, but he actually went to an adult book store where he had previously worked. 10 RR 136-37.

Hope checked on Tristen at approximately 5:40 p.m., and thought the child was sleeping. She went to get Tristen up at approximately 6:00 p.m., and saw that she was lying in her bed with a pillow case covering one eye, part of her nose and her mouth. When Hope moved the pillow case, she saw that Tristen's lips were blue. When she picked up the child, she found that Tristen's body was "ice cold," and she realized the child was not breathing. 8 RR 309-12.

Hope asked Morris to call 911 for assistance, and carried Tristen outside, placing her on a patch of well-groomed lawn near the front door. 8 RR 313-16. Morris and Pamela Garrison attempted to perform

CPR on Tristen; Morris blew into Tristen's mouth while Garrison "gently" pushed upon the child's abdomen with the palm of her hand three or four times. 10 RR 203, 209-11. Jackie Sullivan, a neighbor who previously worked as an emergency medical technician, approached and told them that they were performing CPR too forcefully. Sullivan observed that Tristen's body was "ice cold" and her lips were blue, and she believed that Tristen was already dead. 7 RR 18-21, 27.

An ambulance arrived at 6:08 p.m., and paramedic Elizabeth Fredregill observed that Tristen was pale and cold to the touch. She also believed that Tristen was dead (7 RR 35-39, 43). The first base-line EKG, taken in the ambulance at 6:16 p.m., revealed a complete absence of electrical activity of the heart. 10 RR 243, 250-51.

Tristen arrived at the hospital at 6:36 p.m. Emergency room physician John Conner detected no heart activity or respiration, and he observed "dependent lividity" indicating she "had been dead for some time." A nurse attempted to determine Tristen's temperature with a rectal thermometer, which continued to display its lowest possible reading of 94 degrees Fahrenheit, indicating that the child's temperature was actually lower than the minimum displayed by the digital thermometer. Conner pronounced Tristen dead at 6:53 p.m. 8 RR 27-30.

Hope was extremely distraught while Tristen was being examined at the hospital; Robbins arrived later and appeared to be quiet and subdued. Conner met with the couple, and he testified that Robbins

acted strangely during the conversation, fondling Hope's legs and breasts in an inappropriate manner. 8 RR 35-41.

In the latter part of May or early June, Rhonda Bethune found that Robbins had removed the batteries from all of Tristen's toys. Asked for an explanation, Robbins stated that "it hurt too much" to hear the sounds made by the toys, and he "couldn't handle the guilt." 9 RR 133-34.

B. Trial testimony – medical experts.

Tristen's autopsy was performed at the Harris County medical examiner's office pursuant to a contract with Montgomery County authorities. Assistant medical examiner Patricia Moore's examination of Tristen's body revealed six or seven contusions on Tristen's legs; five irregularly-shaped, purple bruises on Tristen's back, ranging from one-eighth to one-quarter inch in width; bruises on the right side of her neck; and areas of discoloration on her face and left arm. Moore incised the bruises on Tristen's back and found hemorrhages down to the level of deep subcutaneous tissue. Moore found small areas of hemorrhage known as "petechiae" on the thymus, the lungs and the kidney; recent hemorrhage between the intracostal muscles of the eleventh and twelfth ribs on each side; and hemorrhage of the tonsils. Pet. App. 77a-78a.

On the following day Moore found two additional bruises behind Tristen's right ear and another bruise

on the right side of her neck. She testified that the injuries to Tristen's back were inconsistent with the administration of CPR to the child, and that the internal petechiae she observed were consistent with an asphyxia-related death. Moore testified that she believed the cause of Tristen's death was asphyxia due to compression of the chest and abdomen. Asked about Tristen's general health, she said the child was doing "fairly well" at the time of her death, and stated that the death could not be described as an incidence of sudden infant death syndrome, which is diagnosed in infants less than one year of age. Pet. App. 78a-79a.

Moore testified that Tristen was dead for about three hours before her temperature was taken at the hospital, based upon an approximate post-mortem cooling rate of 1.5 degrees per hour; and she testified that Tristen's body would not have sustained bruises as the result of CPR administered that long after her death. Pet. App. 79a.

Dr. Robert Bux, the deputy chief medical examiner for Bexar County, Texas, testified for the defense that the bruises on Tristen's back were consistent with the administration of CPR, and that a death from asphyxia by compression would have resulted in "abundant" petechiae above the level of compression, which Moore did not observe during the autopsy. Bux testified that observation of occasional petechiae on internal organs was a "non-specific finding" and could have resulted from various causes. Pet. App. 79a-80a. He agreed that the autopsy findings would arouse

suspicion that something was "done to that child," but would not support a determination that the death was a homicide or that it resulted from asphyxia. 10 RR 54, 72.

C. The outcome of the initial prosecution.

On February 22, 1999, a jury found Robbins guilty of capital murder, and because the State had not sought the death penalty, the trial court sentenced him to imprisonment for life. Robbins filed a motion for new trial, arguing that the evidence was insufficient to establish that Tristen's death was a homicide, but the trial court denied that motion. Pet. App. 81a.

Robbins argued again on appeal that the evidence was insufficient to prove that he intentionally caused Tristen's death, but the Court of Appeals for the Ninth District affirmed the conviction. *See Robbins v. State*, 27 S.W.3d 245 (Tex. App. – Beaumont 2000). The Texas Court of Criminal Appeals affirmed that decision, holding that evidence of Tristen's previous injuries was properly admitted as proof of Robbins's culpable mental state and to rebut Robbins's defensive theory that the child's death was an accident. *See Robbins v. State*, 88 S.W.3d 256 (Tex. Crim. App. 2002).

II. Revision of the Autopsy Report and Initiation of Habeas Corpus Proceedings.

A. Pathologists' reconsideration of the case.

An acquaintance of Robbins later contacted the medical examiner's office and requested a review of Moore's findings regarding the cause of Tristen's death. After completing that review, Dr. Dwayne Wolf concluded that Moore's observations during the autopsy did not support a finding that the death resulted from asphyxiation by compression or any other specific means. On May 2, 2007, Wolf amended Tristen Rivet's autopsy report to reflect that both the cause and manner of death were "undetermined." Pet. App. 82a-83a.

In May of 2007, former Harris County Medical Examiner Joye M. Carter was contacted by counsel for the State and asked to review Moore's autopsy report. Carter reviewed the file and concluded in a written report that she "would not concur with the opinion on the manner of death as a homicide but would reconsider this case as an undetermined manner." Pet. App. 84a.

Moore, who had since left the Harris County medical examiner's office, was asked by a prosecutor to review her autopsy report pertaining to Tristen's death. On May 13, 2007, Moore wrote that she had reviewed the file, including some materials she had not previously seen, and while she still believed this was a "suspicious death," she concurred with Wolf's amendment of the report, and felt that "an opinion for

a cause and manner of death of undetermined, undetermined is best for this case." Pet. App. 85a.

On June 4, 2007, Robbins filed an application for a writ of habeas corpus under Tex. Code Crim. Proc. Ann. art. 11.07 (West Supp. 2011), asserting a single claim that newly discovered evidence – the revised opinions of the three pathologists – established his actual innocence. CR 6. One month later, he filed a supplemental writ application arguing that his constitutional "right to a fair trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 10, of the Texas Constitution was violated when his conviction was based on evidence material to the prosecution's case that was later found to be false." CR 48.

B. Retention of Dr. Norton and amendment of death certificate.

Justice of the peace Edie Connelly formally reopened the inquest into Tristen's death, and she ordered that Dallas pathologist Linda Norton conduct an independent forensic examination of the evidence. After a comprehensive review of the case, Norton reported her findings during a recorded telephone conference call – in which defense counsel participated – on March 28, 2008. Norton stated it was her opinion that, based upon the existence of internal petechial hemorrhages on Tristen's lungs and thymus and the other circumstances of the case, Tristen's death

was a homicide and resulted from suffocation. She calculated that death occurred between 2:30 p.m. and 5:00 p.m., hence the external bruises observed during the autopsy could not have been inflicted during CPR, but were instead evidence of trauma intentionally inflicted on the child at or before the time of death. Pet. App. 86a-89a.

On May 14, 2008, Norton executed an affidavit stating her opinion that Tristen's death was a homicide resulting from asphyxia by suffocation. Judge Connelly amended Tristen Rivet's death certificate on May 13, 2008, to correspond with Norton's opinion that Tristen's death was a homicide resulting from suffocation rather than compression. Pet. App. 90a.

C. Deposition of medical experts.

Because of the conflicting opinions offered by the medical experts, the trial court ordered in the latter part of 2008 that the parties depose Wolfe, Moore, Norton, and Dr. Thomas Wheeler of the Baylor College of Medicine.

Moore's deposition testimony was consistent with her August 19, 2008 affidavit: she stated that it was no longer her opinion that Tristen's death resulted from compression asphyxia, and she concurred in the decision to list the cause of death as "undetermined." She concurred with Wolf's opinion that the observations made during the autopsy were not sufficient to

determine a cause or manner of death. Pet. App. 92a-93a.

Wheeler testified there was an absence of evidence that could cause him to conclude, as a matter of reasonable medical probability, that Tristen's death was the result of suffocation or asphyxia. Wheeler testified that he could not rule out suffocation or asphyxiation as the cause of death, but did not see any physical findings that would support a particular conclusion as to the cause of death. Pet. App. 94a-95a.

Wolf testified that intrathoric petechiae can result from various causes and are not indicators of a specific cause of death. Wolf stated that he could not rule out suffocation as the cause of death, but that it was generally impossible to determine that a child's death resulted from suffocation in the absence of a confession by the perpetrator, because of the absence of autopsy findings specific to a death by suffocation. Wolf testified that a death of a 17-month-old infant without any ascertainable cause was a rare occurrence and the death could therefore be viewed as suspicious and warranting investigation, but he could not say that it was more likely than not that foul play was involved. Pet. App. 96a-97a.

Shortly before Norton's scheduled deposition, her daughter informed counsel that Norton's office administrator and close friend had suddenly passed away and Norton could not participate in a deposition. It was later determined that Norton's office administrator died of a self-inflicted gunshot wound

at the residence she shared with Norton. Pet. App. 97a.

After several unsuccessful attempts to obtain Norton's deposition, Norton informed counsel by telephone that she was under a doctor's care; that she was physically incapable of preparing for or participating in a deposition; and that she did not expect to be medically cleared to participate in a deposition until at least the end of January, 2010. On December 17, 2009, Norton executed an affidavit in which she confirmed that she was incapable of preparing for or participating in a deposition, and she adopted and ratified under oath the statements and opinions she expressed during the telephone conference call which occurred on March 28, 2008. She stated in her affidavit that her "opinions regarding the cause and the manner and means of the death of Tristin Rivet have not changed," and that she continued "to believe that the death of Tristin Rivet was a homicide and that it resulted from asphyxiation by suffocation."[2] Pet. App. 98a-99a.

D. Hearing on motion to reopen death inquest.

On December 29, 2009, Judge Connelly conducted a hearing on Robbins's motion to reopen the inquest into Tristen Rivet's death. On January 6, 2009, Judge

[2] Tristen's name has frequently been misspelled in the records of this case.

Connelly denied the motion to reopen the inquest, concluding in a written order that "on the basis of examination and investigation," the cause of Tristen's death was "asphyxia due to suffocation" and the manner of her death was "homicide." Pet. App. 100a.

III. The Trial Court's Findings.

On January 22, 2010, the district court executed findings of fact and recommended that habeas corpus relief be granted on grounds that "Dr. Moore's trial opinions as to cause and manner of death were not true," and the admission of Moore's "false testimony" constituted a violation of the Due Process Clause. The district court found that Robbins's conviction was obtained through the use of "false testimony that was unsupported by objective facts and pathological findings and not based on sufficient expertise or scientific validity," and that this "constitutional error . . . probably caused a verdict in which there can be little confidence and which is fundamentally unfair." Pet. App. 112a. While the "prosecution did not knowingly offer any false testimony" or "knowingly fail to correct testimony it knew to be false," the district court nevertheless concluded that Moore's testimony constituted a due process violation because she was employed by an official medical examiner's office at the time of trial. Pet. App. 102a, 113a.

The district court found that "[n]o expert rules out asphyxia as the cause" of Tristen's death, and that "no expert has excluded homicide as the manner

of death." Pet. App. 104a. Because there is "expert testimony and non-medical evidence . . . from which a rational trier of fact could find beyond a reasonable doubt that the death of Tristen Skye Rivet was either a homicide or was not a homicide," the court found that Robbins had failed to establish his "actual innocence" claim. Pet. App. 104a-05a, 111a-12a.

IV. The Decision of the Court of Criminal Appeals.

The Court of Criminal Appeals concurred with the district court's holding that Robbins failed to carry his "extraordinarily high" burden of proving his actual innocence, in the absence of new evidence that would preclude any rational juror from finding him guilty beyond a reasonable doubt. Pet. App. 25a. It disagreed, however, with the proposition that Robbins had established that Moore's trial testimony was actually "false" and that a new trial was therefore required by the Due Process Clause.

The court's analysis of the latter issue began with the dubious assertion that the "Due Process Clause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly." Pet. App. 26a. But the court then noted that while various pathologists testified that they would categorize the cause of Tristen's death as "undetermined," their opinions did not logically prove that Moore's trial testimony – in which she opined

that the death was a homicide – was actually "false." Pet. App. 29a. The court noted that "none of the experts have stated that Tristen could not have been intentionally asphyxiated." Pet. App. 30a. On the other hand, "at least one well-qualified pathologist, Dr. Norton, has concluded that the child was a victim of homicide by asphyxiation." *Id.* Because "Moore's trial testimony has not been proven false," the court concluded that the "State did not use false evidence to obtain [Robbins's] conviction, and [Robbins] does not have a due process right to have a jury hear Moore's re-evaluation." Pet. App. 33a-34a.

The dissenting opinion of Judge Cochran (joined by two other judges) suggested that focus on the absolute truth or falsity of scientific opinion testimony was inappropriate, and that the case should instead have been decided on an issue which was never addressed by the parties or the trial court: whether 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. After predicting that this Court will "one day" recognize a new constitutional right to be tried upon reliable scientific evidence, Judge Cochran dissented to the denial of relief because Robbins "did not receive a fundamentally fair trial based upon reliable scientific evidence (or the honest admission that science cannot resolve that critical issue [of the cause of Tristen's death])." Pet. App. 51a, 62a.

Judge Alcala authored a separate dissent because, in her opinion, this case did not involve the development of the sort of "new scientific principles" that would trigger the application of Judge Cochran's proposed rule. Pet. App. 63a, n. 1. She would instead have granted a new trial on the basis of the court's previous holdings that the admission of objectively "false" testimony on a material issue constitutes a violation of the Due Process Clause. Pet. App. 63a.

REASONS TO DENY THE PETITION

I. Robbins Seeks Review of an Issue Which Was Not Raised and Litigated in the Courts Below.

Robbins is critical of the Court of Criminal Appeals for applying a "highly technical definition" of the term "false" and "dissecting an array of technical distinctions to assess" whether Dr. Moore's testimony "was 'false' as a matter of law," instead of focusing on the "reliability" of the scientific evidence upon which his conviction may have been based. Pet. i, 29. But the majority opinion can hardly be faulted for addressing and resolving only the precise issue raised by Robbins himself.

Robbins's original application for a writ of habeas corpus advanced an actual innocence claim that has not been carried forward to this Court. His supplemental application for relief asserted that his constitutional "right to a fair trial by a fair and impartial

jury" was violated because his "conviction was based on evidence material to the prosecution's case that was later found to be *false*." Pet. App. 25a (emphasis supplied). In his objections to the State's proposed findings of fact, Robbins argued that the Due Process Clause is violated when a conviction is "based on evidence material to the State's case ultimately unmasked as false," or when "the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly." He made no mention of a constitutional right to be tried only upon "reliable" scientific evidence.

Accordingly, the trial court's findings focused upon whether Moore's testimony was actually "false" and whether the State bore any responsibility for its falsity. Pet. App. 102a-03a; 112a. And the Court of Criminal Appeals understood the applicant's claim to be that, "Moore's trial testimony was false"; and it denied relief because "it has not been proven that the State used false testimony" to obtain his conviction. Pet. App. 27a, 34a.

This Court ordinarily will not address constitutional issues which were not raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). It will not consider constitutional arguments that were not "adequately presented in the state system." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

In this case, the first suggestion of a proposed constitutional right to relief when the "reliability" of scientific evidence is called into question occurred in Judge Cochran's dissenting opinion, in which she bemoaned the lack of any existing "jurisprudential mechanism to deal with cases in which a prior conviction was based upon scientific evidence that has subsequently been found to be unreliable. . . ." Pet. App. 50a. Judge Cochran then predicted that this Court might "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"; and she dissented from the failure of the court to grant relief on this newly-proposed constitutional right that was not even mentioned in the majority opinion. Pet. App. 51a, 62a.

The petitioner now argues for recognition of a rule that due process requires a new trial when scientific evidence "has become unreliable as a matter of law or scientific fact," but that argument was not properly presented for the consideration of the state courts. "False" is not synonymous with "unreliable." The rule previously recognized by the Court of Criminal Appeals, regarding the introduction of "false" testimony, is entirely different from the newly proposed rule, regarding the use of "unreliable" scientific evidence. There is no indication that the judges who joined in the majority opinion even considered the merits of a "reliability" requirement for scientific evidence. Because Robbins seeks review of a constitutional claim that was neither properly presented

by Robbins nor resolved by the Court of Criminal Appeals, the petition for writ of certiorari should be denied.

II. There Is No Well-Defined Split Among Federal and State Courts That Requires Resolution by This Court.

There is no "mature split" between federal circuits and aligned state appellate courts on the constitutional issue raised by Robbins, as suggested in his petition. Pet. 12. The asserted conflict in decisions is a product of the diligent comparison of apples to oranges. He relies upon cases involving disparate issues and dissimilar judicial remedies. In fact, the precise question raised by Robbins – namely, whether the Due Process Clause requires a grant of a new trial when it is shown that a conviction was based in some measure on "unreliable" scientific evidence – seems to have been squarely addressed only by a single appellate court.

Robbins posits a split between the Second, Seventh and Fourth Circuits, on the one hand, and the Fifth, Sixth and Ninth Circuits, on the other. The first group of courts is said to have held 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," whereas the second group is said to require a showing that expert

testimony is "actually false." Pet. 13-14; Supp. Brief for Pet. 1-2.

Robbins suggests that the Second Circuit's position is represented by *Drake v. Portuondo*, 553 F.3d 230 (2d Cir. 2009), and implies that the defendant's conviction in that case was reversed because an expert witness provided "testimony about a dubious medical condition known as 'picquerism,'" and the "prosecution erred by not at least contacting 'any other professionals to inquire about the concept.'" Pet. 15. Actually, the case was reversed upon a showing that the prosecutor knew the witness was lying about his qualifications and the amount of time he had to prepare for his testimony. *See Drake*, 553 F.3d at 242-43. In fact, the case previously had been remanded to the district court for a determination of whether the prosecution knew that the purported expert's testimony was false. *Id.* at 238. *Drake* merely applied the well-established rule that "a conviction obtained through the use of false evidence, *known* to be such by representatives of the State, must fall under the Fourteenth Amendment." *Id.* at 240-41 (emphasis in original) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The reversal of the conviction was predicated upon findings that the testimony was actually false and that the prosecutor knew it was false, and there is no suggestion in the opinion that reversal of a conviction might be required because of the admission of scientific testimony that was merely "unreliable."

Robbins relies upon *United States v. Freeman*, 650 F.3d 673 (7th Cir. 2011), in arguing that the Seventh Circuit similarly holds that a due process violation can be found in the absence of "conclusive" proof that evidence was false. But the quoted language appears in an explanation that a district court is authorized to grant a new trial upon a finding "that the government has knowingly used false testimony" and its decision will not be reversed on appeal because of quibbling about whether the false testimony would support a conviction for perjury:

> . . . In *Boyd*, we noted that *Napue* does not require that the witness could be successfully prosecuted for perjury. *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995). In this area of the law, the governing principle is simply that the prosecutor may not knowingly use false testimony. This includes "half-truths" and vague statements that could be true in a limited, literal sense but give a false impression to the jury. *Id*. ("It is enough that the jury was likely to understand the witness to have said something that was, as the prosecution knew, false."). To uphold the granting of a new trial, there does not need to be conclusive proof that the testimony was false or that the witness could have been prosecuted for perjury; *all that matters is that the district court finds that the government has knowingly used false testimony*. Thus, we reject the government's argument that a claim under *Napue* can only be made

> when it can be established that the witness is lying.

Freeman, 650 F.3d at 678 (emphasis supplied). The Court of Appeals upheld the new trial order against a government challenge because: (1) "the evidence fully supports the district court's finding that Williams's testimony was false," *id.* at 679, and (2) the "district court did not err in finding that the government knowingly used false testimony." *Id.* at 680. Nothing in *Freeman* suggests that the Seventh Circuit would reverse a conviction absent a finding that material evidence was actually false.

Robbins lists five state court decisions that supposedly demonstrate that those courts are "in accord" with the federal courts holding 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." Pet. at 13-14, 14 n. 1. Three of those cases apply state law and do not rely upon constitutional due process guarantees at all. *State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008), and *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982), apply state common law rules authorizing a new trial upon a showing of newly discovered evidence,[3] and *State v.*

[3] *Edmunds* makes no mention of due process at all, and the only mention of due process in *Caldwell* is the observation that the appellate court did not "feel the need to reach the constitutional issue of whether this may amount to a denial of due process," since the decision was based upon the court's role of

(Continued on following page)

Krone, 897 P.2d 621 (Ariz. 1995), awarded a new trial because of a violation of a state discovery rule requiring pretrial notice of the anticipated use of an exhibit.

The other two state court decisions deal with the problem of pervasive misconduct by a police officer. In *State v. Gookins*, 637 A.2d 1255 (N.J. 1994), three defendants moved for new trials on the basis of newly discovered evidence that the officer who arrested them had falsified breath alcohol testing results in other cases. Relief was granted partly on grounds that the new evidence would be admissible for impeachment purposes in a retrial, and partly upon the due process considerations discussed in *In re an Investigation of the W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993), which implemented a report of an investigation of pervasive misconduct by a serologist in a police laboratory. The opinion in *In re an Investigation* (in an excerpt quoted in *Gookins*) relied upon this Court's holdings that "it is a violation of due process for the State to convict a defendant based on false evidence." *In re Investigation* at 504; *Gookins* at 1259.

In both of those cases, the systematic misconduct on the part of a rogue officer was deemed so pervasive as to raise a presumption that any conviction based upon the officer's testimony was tainted with "false evidence." Thus the remedies devised in those cases

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supervising the "correct administration of criminal justice." 322 N.W. at 586, n. 9.

were predicated upon a finding that the officer's testimony was actually false. As stated in *In re Investigation* at 506, "once the use of false evidence is established, as here, such use constitutes a violation of due process." These cases are unusual only in the manner in which the finding of falsity was reached, and do not relax the *Napue* requirement of a showing that material evidence was actually false.

So to the extent that the cases cited by Robbins even rely upon constitutional due process guarantees, their holdings are consistent with the generally understood rule, derived principally from this Court's decisions in *Napue* and *Giglio v. United States*, 405 U.S. 150 (1972), that the Due Process Clause requires the granting of a new trial only upon a showing that evidence material to a conviction was actually and demonstrably false, and the prosecution knew it. *See, e.g., Abrante v. St. Amand*, 595 F.3d 11, 18 (1st Cir. 2010) (finding that a defendant failed to establish a right to relief under the Due Process Clause in the absence of a showing that the testimony of a witness was "indisputably false"); *Fuller v. Johnson*, 114 F.3d 491, 496-97 (5th Cir. 1997) (holding that a habeas petitioner failed to meet his burden under the Due Process Clause of showing that trial testimony by a pathologist and a psychologist was actually – rather than potentially – "false").

To be fair, Robbins does point to one case (in the supplement to his petition) that represents a competing approach to the firmly established jurisprudence regarding the admission of false testimony. The Court

of Appeals for the Third Circuit appears to have ventured far out on a constitutional limb in *Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012), in holding that a habeas petitioner was entitled to engage in discovery in an effort to support a cognizable claim that "his continued incarceration is unconstitutional because his convictions are predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony, in violation of due process." The court of appeals appears to have accepted the validity of Lee's constitutional argument on the basis of a slender line of cases holding that it was a due process violation to offer and admit evidence that is so unfair and prejudicial as to have "undermined the fundamental fairness of the entire trial." *Id*. (quoting *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001), in which a habeas petitioner unsuccessfully argued that admission of evidence of his association with a motorcycle club and his wife's role as an FBI informant deprived him of due process).

It is premature, however, to recognize – on the basis of the opinion in *Lee v. Glunt* – a conflict between jurisdictions that necessitates this Court's intervention under Rule 10 of this Court's rules. First, as previously noted, the Court of Criminal Appeals did not dispose of this case on a "fundamental fairness" theory of due process. The case came to that court on an assertion that "false evidence" was admitted in violation of the *Napue* line of cases, and its only substantive holding is that Robbins failed to satisfy that test by proving the evidence was actually

false. Nothing in the majority opinion addresses, much less conflicts with, another court's discussion of a different sort of due process violation.

Second, *Lee v. Glunt* is not a final decision on the issue of whether a conviction based upon unreliable scientific evidence violates due process, regardless of the fairness of the trial itself. It is only a preliminary determination that the inmate has made an arguable claim that warrants investigation and discovery. The legal basis of the claim was not thoroughly discussed, and the decision to recognize the asserted claim is not a logical extension of the few cases cited by the court of appeals. Recognition of an actual conflict in decisions should await the factual development of Lee's claim and an explanation of the grounds for relief, if any exist.

In summary, Robbins's assertion of a "mature" conflict in decisions is greatly exaggerated. He has cited one case recognizing a potential due process violation in the existence of a conviction based to some degree upon unreliable scientific evidence, and that case has only been remanded to a district court for development of the evidentiary basis of the inmate's argument. There is not yet an adequate explanation of the constitutional basis of the claim or a determination of the appropriate standard for review of that claim. On the other side of the asserted conflict is a fact-intensive case that was litigated on a different due-process theory, in which the asserted right to be convicted upon reliable scientific evidence was first proposed in a dissenting opinion joined by

just two members of the court. This conflict in decisions has not been sufficiently developed by litigants and appellate courts to provide an adequate basis for this Court's resolution of the claimed split.[4]

III. There Is No Need for an Additional Constitutional Remedy for the Admission of Inaccurate Scientific Evidence.

The Court of Criminal Appeals has gone far beyond other courts in providing post-conviction remedies under the Due Process Clause to inmates who assert a claim to relief based upon newly discovered evidence. The Court of Criminal Appeals has long

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[4] Robbins also contends that the state appellate courts are struggling in "confusion and discord" with problems arising from recanted and unreliable trial testimony, Pet. at 25, 27, but a review of the cases he cites reveals only the appropriate use of a variety of state-law remedies to address differing situations.

One case might involve the application of statutory post-conviction remedies, *see Arrington v. State*, 983 A.2d 1071 (Md. 2009); and another might be a review of a ruling on a motion for new trial based upon newly discovered evidence. *See State v. Edmunds*, 746 N.W.2d 590 (Wis. App. 2008). One case might rely in part upon a state constitutional right to due process, *see State v. DeFronzo*, 394 N.E.2d 1027 (Ohio Com. Pl. 1978); another might apply federal due process authorities such as *Giglio. See People v. Cornille*, 448 N.E.2d 857 (Ill. 1983). This is as it should be. None of the state courts displayed any real difficulty in identifying an appropriate vehicle for the claim or appropriate legal grounds for relief. Relief was granted when it was warranted and denied when it was not. There is no confusion, except for that which might result from lumping these various disparate cases into a single lengthy footnote.

held that actual innocence is a cognizable claim in habeas corpus proceedings under the Due Process Clause. *See Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). And it has recently stated that the Due Process Clause is violated by the introduction of false evidence that is material to the determination of the defendant's guilt or appropriate punishment, even if the prosecution was entirely unaware that the evidence was false. *See Ex parte Robbins* at Pet. App. 36a (Price, J., concurring); *Ex parte Napper*, 322 S.W.3d 202, 242-44 (Tex. Crim. App. 2010) (acknowledging validity of due process claim regarding the prosecution's unknowing use of false – rather than perjured – scientific evidence); *Estrada v. State*, 313 S.W.3d 274, 287-88 (Tex. Crim. App. 2010) (death sentence vacated because of admission of false testimony regarding prison inmate classification system, despite the lack of knowledge of falsity on the part of either the witness or the trial prosecutor); *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009) (granting relief because of the prosecution's unknowing use of the perjured testimony of an accomplice witness).

This Court has never formally confirmed that the Due Process Clause supports a free-standing claim of actual innocence like that entertained by the Court of Criminal Appeals. *See House v. Bell*, 547 U.S. 518, 555 (2006); *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Most of the federal circuits have declined to recognize or address a free-standing claim of actual innocence based upon newly discovered evidence. *See,*

e.g., Leyja v. Parker, 404 Fed.Appx. 291, 297 (10th Cir. 2010); *Muntaser v. Bradshaw*, 429 Fed.Appx. 515, 521 (6th Cir. 2011); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003). Thus Texas is "one of the few jurisdictions to recognize freestanding claims of actual innocence" in habeas corpus proceedings. *Williams v. Thaler*, 602 F.3d 291, 311 (5th Cir. 2010).

And the Court of Criminal Appeals stands almost alone in holding that the Due Process Clause requires a new trial when it is shown that false evidence was admitted during trial, regardless of whether the government was aware of its falsity. Few, if any, state appellate courts have held that a constitutional due process violation results from the admission of false testimony in the absence of any showing that the government knew or should have known of its falsity. *See State v. Lotter*, 771 N.W.2d 551, 562-63 (Neb. 2009). Almost all of the federal courts of appeals have found no due process violation under *Giglio* and *Napue* in the absence of any governmental awareness of the occurrence of perjury during a criminal trial.[5]

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[5] *See, e.g., Abrante v. St. Amand*, 595 F.3d 11, 18 (1st Cir. 2010); *Lambert v. Blackwell*, 387 F.3d 210, 243 (3d Cir. 2004); *Hoke v. Netherland*, 92 F.3d 1350, 1360 (4th Cir. 1996); *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977); *Woods v. Booker*, 450 Fed.Appx. 480, 486 (6th Cir. 2011); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir. 1980); *United States v. Bass*, 478 F.3d 948, 951 (8th Cir. 2007); *United States v. Frazier*, 429 Fed.Appx. 730, 734 (10th Cir. 2011); *Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984); *United States v. Burch*, 156 F.3d 1315, 1328-29 (C.A.D.C. 1998).

In addition to the Texas Court of Criminal Appeals, it appears that only the Second and Ninth Circuits have found a due process violation in the admission of perjured or otherwise false testimony in the absence of proof of government awareness of the falsity of the testimony. *See Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003); *Maxwell v. Roe*, 628 F.3d 486, 508 (9th Cir. 2010). The extent to which the Ninth Circuit diverged from settled due-process jurisprudence in *Maxwell* was recently noted in Justice Scalia's opinion dissenting from the denial of the State's petition for writ of certiorari:

> To make matters worse, having stretched the facts, the Ninth Circuit also stretched the Constitution, holding that the use of Storch's false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity. *See* 628 F.3d, at 506-507. We have never held that, and are unlikely ever to do so. All we have held is that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (emphasis added). This extension of due process by the Ninth Circuit should not be left standing.

Cash v. Maxwell, 132 S.Ct. 611, 615 (2012) (Scalia, J., dissenting).

The Court of Criminal Appeals has already gone too far in invoking the Due Process Clause as a basis

for its correction of the results of fairly conducted criminal trials, yet Robbins argues that is still not far enough. His suggestion that this Court find a due process violation when scientific opinion testimony has been shown to be merely "unreliable" – but not necessarily "false" – has almost no support in existing due process jurisprudence, and it would convert routine state-court evidentiary rulings into constitutional questions to be ultimately resolved by the federal courts. It would create a constitutional issue to be litigated through the federal court system every time a scientific expert took issue, after the fact, with a colleague's opinion testimony; and the State's interest in the finality of its courts' judgments, *see McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991), would be entirely frustrated in cases involving expert testimony of any kind.

If a conviction based upon unreliable scientific evidence violates the Due Process Clause, the violation must occur at the time the evidence is admitted. But this Court has been reluctant to hold that an evidentiary issue cannot be resolved "through nonconstitutional sources like the Federal Rules of Evidence" because the evidence in question is "so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Dowling v. United States*, 493 U.S. 342, 352-53 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). Hence the "reliability" of scientific opinion testimony is determined at the time of trial under Federal Rule of Evidence 702 (or the corresponding state evidentiary rule), rather

than under some vague common-law standard derived from the Due Process Clause. *See Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579, 589-93 (1993).

The petitioner's goal of attaining recognition of a constitutional right to be tried upon only reliable scientific evidence seems foreclosed by this Court's recent decision in *Perry v. New Hampshire*, 132 S.Ct. 716, 723 (2012), in which it noted that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." A defendant is protected by constitutional safeguards such as the right to counsel, compulsory process, and confrontation and cross-examination of witnesses; but "apart from these guarantees . . . state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial." *Id.* The "potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair" and therefore a due process concern. *Id*. at 728.

The Court's rationale for declining to subject "unreliable" eyewitness identification testimony to heightened scrutiny under the Due Process Clause in *Perry* applies equally to the scientific opinion testimony in issue in this case. Robbins argues that jurors are likely to give great weight to the testimony of a

scientific expert, but jurors give equally great weight to eyewitness identification testimony, and that fact was not found to require additional due process protection in *Perry*.

Neil Robbins has already been accorded a great deal of due process in the Texas court system. Well-represented by counsel, he had a full and fair opportunity to cross-examine Dr. Moore regarding her opinion as to the cause of Tristen's death, and then he presented opposing testimony from his own well-qualified expert witness. He litigated the cause-of-death issue in his motion for new trial and in his direct appeal from the judgment of conviction. In the lengthy habeas corpus proceeding which ensued, the Texas appellate courts provided him with two avenues for relief: he could win a new trial either by establishing his actual innocence under the *Herrera* standard, or by proving that Moore's opinions regarding the cause of Tristen's death were actually false and therefore deprived him of due process. Having failed to establish his right to relief under either line of cases, he may still resort to the "fail safe" remedy of executive clemency. *See Herrera v. Collins*, 506 U.S. 390, 415 (1993). There has been no lack of due process that would suggest a need to create – from almost non-existent precedent – a new and uncontainable constitutional right to be tried only upon reliable scientific evidence.

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CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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