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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In a splintered 5-4 decision, the Texas Court of Criminal Appeals held that there is no due process right to a new trial when expert testimony essential to a conviction is later found to be invalid or unreliable. The slim majority thus deprived Mr. Robbins of the new trial ordered by the Texas trial court even though the testimony of the assistant medical examiner, Dr. Moore—undisputedly the only evidence of actual criminal activity in this case—has been reevaluated and retracted. The holding below exacerbates a deepening 8-5 split among federal and state courts and violates fundamental notions of due process.[1]

In opposition, the State does not dispute that Dr. Moore's now-retracted testimony was the only evidence at trial that a crime had been committed, that a split of authority exists on the question presented, and that the question is important and recurring. Rather, the State offers three arguments in an attempt to change the subject away from the question presented here—but none of those arguments supports, much less warrants, a denial of certiorari.

First, the State overreaches in its search for a procedural bar and asserts that Mr. Robbins did not

[1] The Petition describes a 7-5 split, but the Third Circuit's opinion in *Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), issued after the Petition's submission and discussed below, further deepens the split to 8-5.

preserve the core due process question litigated at every level of this case. Opp. 16–19. This erroneous argument simply repackages the State's myopic merits argument that "unreliable" evidence is not necessarily "false" within the meaning of the Due Process Clause. *See id.* Indeed, the State plainly misrepresents the record: not only did Mr. Robbins assert at every possible opportunity that he was denied due process and that Dr. Moore's testimony was false because it was unreliable, but the Texas Court of Criminal Appeals never invoked any purported prior waiver as a basis for its decision.

Second, the State goes to great lengths in its attempt to explain away the mature—and burgeoning—circuit split on this issue. Yet even while critiquing Mr. Robbins's cases, the State concedes that a recent Third Circuit opinion directly contradicts the Texas court's holding here. And the State hardly mentions, much less rebuts, Mr. Robbins's showing that this issue will continue to divide lower courts as scientific evidence becomes increasingly important to criminal convictions and technological advances draw attention to errors in past testimony.

Finally, the State contends that Texas courts already go "too far" in invoking the Due Process Clause to grant new trials. This claim is both baseless and irrelevant to whether certiorari is warranted. Regardless of how Texas courts address *other* due process claims, those courts have adopted the more restrictive—and erroneous—rule regarding the question presented here, creating arbitrary and

unconstitutional limits on relief that this Court should now correct.

I. MR. ROBBINS PROPERLY RAISED HIS DUE PROCESS CLAIM BELOW

The State's primary argument in opposition to certiorari—that Mr. Robbins failed to raise his claim below—was not invoked by any court below and plainly mischaracterizes the record. Throughout the state-court proceedings, Mr. Robbins premised his due process claim for a new trial on the assertion that Dr. Moore's testimony was false because it was unreliable. Reply App. 2a-3a. Specifically, Mr. Robbins explained that "false" testimony encompasses all testimony that is "discredited, inaccurate, incorrect, invalid, unfounded, unsound, erroneous, misleading, faulty, or untrue." Reply App. 3a n.24.

The trial court agreed that Mr. Robbins is entitled to a new trial on the basis that Dr. Moore's testimony was "not true" because it was "based on false pretenses of competence, objectivity, and underlying pathological reasoning." Pet. App. 102a. Although the majority below limited its discussion to evidence affirmatively proven to be "false," the court never indicated that Mr. Robbins had waived the argument that "false" evidence encompasses "unreliable" evidence. To the contrary, the dissenters addressed the ramifications of "unreliable" evidence precisely because Mr. Robbins described such evidence as "false." Pet. App. 44a-71a.

The State's waiver argument thus ignores the record and rests on the lower court's artificial distinction between "false" and "unreliable" evidence. But as the Petition explains, this issue is the linchpin of Mr. Robbins's due process claim—and the deepening split calling for this Court's review—because several courts have held that "false" evidence encompasses "unreliable" or "unfounded" evidence. *See infra* Part II. There is no question that Mr. Robbins preserved his present arguments below, and the State's obfuscation of this issue only underscores the need for this Court's intervention.

II. FEDERAL AND STATE COURTS ARE DIVIDED OVER WHETHER DUE PROCESS REQUIRES A NEW TRIAL WHEN A CONVICTION IS BASED ON UNRELIABLE SCIENTIFIC EVIDENCE

There is now an 8-5 split among federal and state courts regarding whether a criminal defendant is entitled to a new trial if the underlying conviction is based on unreliable scientific evidence. *See supra* n.1. While courts have uniformly held that due process requires a new trial if a criminal defendant was convicted with evidence affirmatively demonstrated to be "false" by other evidence,[2] the

[2] The State correctly identifies another split among federal and state courts over whether due process relief also depends on whether the prosecution knew or should have known the evidence was "false." Opp. 30. But because the Texas court below explicitly rejected such a requirement for due process relief, Pet. App. 26a, that issue is not presented here.

courts are divided on whether the Due Process Clause affords relief to defendants convicted through use of evidence that is false because it later is shown to be "unreliable." *See* Pet. 13–21.

The State concedes the existence of a split in the lower courts, admitting that the Third Circuit in *Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), has presented a "competing approach" to the approach adopted by the Texas Court of Criminal Appeals. Opp. 24. Yet the State attempts to downplay this live controversy by claiming that *Lee* is not a "final decision." Opp. 26. The State must mean that *Lee* did not grant final relief to a petitioner whose conviction was obtained through evidence later shown to be unreliable—but the procedural posture of *Lee* does not diminish the Third Circuit's holding that if the scientific evidence at issue there is shown to be "fundamentally unreliable, then Lee will be entitled to federal habeas relief on his due process claim." *Lee*, 667 F.3d at 407-08.

The State pivots to an effort to minimize the split in authority by recharacterizing the remaining eleven cases that form it. *See* Opp. 19–24. But the reality is that some courts, like the Second and Seventh Circuits, grant due process relief on a showing that essential evidence was unreliable even if not demonstrably false, while other courts, like the Texas Court of Criminal Appeals, require a showing of actual falsity through the presentation of other evidence. *See* Pet. 13–21.

The Seventh Circuit has held that the term "false testimony" is not limited to only those statements

whose truth or falsity can be "conclusively established." *United States v. Freeman*, 650 F.3d 673, 679-80 (7th Cir. 2011). The State's response attempts to downplay *Freeman* by arguing that "[n]othing in *Freeman* suggests that the Seventh Circuit would reverse a conviction absent a finding that material evidence was actually false." Opp. 22. But that argument flies in the face of the court's unequivocal holding that "[t]o uphold the granting of a new trial, *there does not need to be conclusive proof that the testimony was false*." 650 F.3d at 680 (emphasis added). This holding is in direct contrast with the requirement of the Texas Court of Criminal Appeals that Mr. Robbins could only be entitled to a new trial if Dr. "Moore's trial testimony ha[d] been proven to be false." Pet. App. 28a.

In *Drake v. Portuondo*, 553 F.3d 230, 237-39 (2d Cir. 2009), the Second Circuit similarly adopted a broad definition of the term "false" to include unreliable or invalid testimony. The State attempts to distinguish *Drake* by arguing that case turned not only on the fact that the testimony was unreliable—and therefore, "false"—but also on the fact that "the prosecutor knew it was false." Opp. 20. However, the prosecutor's knowledge was not dispositive, but was merely one factor considered by the court in ultimately vacating the conviction. 553 F.3d at 247-48. Notably, the Second Circuit's definition of falsity—which included unreliable and not just plainly false evidence—is the relevant factor here. On that issue, the Second Circuit has aligned itself with the Third and Seventh Circuits.

The State similarly ignores language from several state courts that have contradicted the Texas Court of Criminal Appeals and held that a new trial is warranted if a defendant is convicted with unreliable scientific evidence. *See, e.g.*, *State v. Krone*, 897 P.2d 621, 622-23 (Ariz. 1995) (remanding for new trial when expert testimony regarding bite pattern was shown to be erroneous); *State v. Caldwell*, 322 N.W.2d 574, 584-87 (Minn. 1982) (looking to federal due process precedent and holding "it is the duty of a trial court to grant a new trial, where a witness at the original trial subsequently admits . . . *that he was mistaken in his* testimony").

For example, although the State concedes that the Wisconsin Court of Appeals granted a new trial in the face of unreliable evidence in *State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008), it argues the holding was based on "state common law rules," Opp. 22. While the petitioner's claim in that case was based on a Wisconsin statute authorizing post-conviction collateral review based on newly-discovered evidence, *see* WIS. STAT. § 974.06(1); *Edmunds*, 746 N.W.2d at 595, Wisconsin courts have made clear that such claims are based on the federal right to due process, *see State v. Avery*, 807 N.W.2d 638, 643 (Wis. Ct. App. 2011); *State v. Ware*, No. 94-1323, 1995 WL 302888, at *2 (Wis. Ct. App. May 17, 1995) (per curiam) (unpublished).

The State also recognizes that cases from New Jersey and West Virginia differ from the ruling below "in the manner in which the finding of falsity was reached." Opp. 24. Yet it argues that this

distinction is irrelevant because the holdings still labeled the challenged evidence as "false." *State v. Gookins*, 637 A.2d 1255 (N.J. 1994); *In Matter of Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993). However, semantics aside, each court found the relevant evidence was "false" not because it was actually proven to be incorrect by other evidence, but because it had become unreliable in light of police misconduct from other cases. Therefore, these decisions align with the Second, Third, and Seventh Circuit holdings that interpret "false evidence" to include unreliable evidence.[3]

These holdings from multiple federal and state courts simply cannot be reconciled with the holding from the Texas Court of Criminal Appeals below. Notwithstanding the State's unavailing efforts to downplay the extent of the current conflict, federal and state courts will continue to apply divergent standards of due process in the face of convictions based on unreliable scientific evidence. The present

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[3] The decision below also arguably conflicts with a recent decision of the Ninth Circuit, which granted a new trial where a conviction was based largely on the testimony of a jailhouse informant found to be unreliable because he had lied on several other occasions. *See Maxwell v. Roe,* 628 F.3d 486, 493 (9th Cir. 2010)*, cert. denied sub nom. Cash v. Maxwell,* 132 S. Ct. 611 (2012). *Maxwell* also appears to be in tension with prior Ninth Circuit authority, *see, e.g., United States v. Berry,* 624 F.3d 1031, 1039-40 (9th Cir. 2010), holding that a new trial was unwarranted even where expert testimony was found to be inaccurate. This apparent inconsistency within recent Ninth Circuit decisions underscores the need for this Court's review.

split in authority will only continue to deepen as expert testimony plays an increasingly prevalent role in criminal convictions due to phenomena such as the "CSI Effect" and the "Reverse-CSI Effect." Pet. 21-24. Accordingly, this Court's intervention is necessary to provide guidance to the lower courts.

III. THE STATE'S INTERPRETATION OF DUE PROCESS IS CONSTITUTIONALLY UNSOUND

Casting its vote with the minority in the existing split in authority, the Texas Court of Criminal Appeals erroneously relied upon a hyper-technical interpretation of the term "false" and ignored the due process implications in upholding a conviction based on faulty scientific evidence. The State's response that Texas courts already extend due process "too far"—in effect, that Texas courts are overly defendant-friendly—is both far-fetched and not a reason to deny certiorari.

The doctrines of Texas jurisprudence relied upon by the State are the same requirements to either affirmatively prove "actual innocence" or to disprove evidence at trial that are wholly inadequate and are challenged here.[4] The State's approach requires a

[4] The State's assertion that Mr. Robbins could also seek executive clemency is irrelevant. Opp. 33. Due process, which is a fundamental right guaranteed by the Constitution cannot be limited by the possibility of executive clemency which is—by definition—"a matter of grace" committed solely to the discretion of the executive. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998).

defendant to affirmatively disprove evidence used at trial in order to obtain due process relief, resulting in arbitrary and unconstitutional limits on due process. Obviously, "as a practical matter it is never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960). But to the extent disproving scientific evidence is ever possible, the ability to do so will often depend solely on the type of evidence at issue. For example, an erroneous conclusion of blood type would be significantly easier to prove false than the testimony used here. And the ability to disprove scientific evidence will be affected by other circumstances outside of a defendant's control, including the passage of time, tainting of a sample, or police misconduct. Because Mr. Robbins's conviction rests on scientific evidence that is essentially impossible to disprove, Texas will imprison him for the rest of his life, even though no reliable evidence remains to show that a crime occurred, much less to support his conviction.[5]

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[5] In its zeal to dissuade this court from granting certiorari, the State misstates the record with respect to the testimony of Dr. Norton, who rejected Dr. Moore's original findings both as to cause of death and as to Mr. Robbins's guilt. Pet. App. 88a-90a. Although Dr. Norton opined that death could have resulted from suffocation, she could not conclude beyond a reasonable doubt that Mr. Robbins was in any way responsible. Pet. App. 90a. Moreover, Dr. Norton refused to make herself available for deposition, and her findings were never subjected to any meaningful examination by counsel or the trial court. Pet. App. 98a-99a. As such, the trial court found that Dr. Norton's testimony "must be kept at arm's length when being reviewed . . . in habeas proceedings." Pet. App. 104a.

Such arbitrary distinctions to define basic constitutional rights should be rejected. *See Thompson v. City of Louisville*, 362 U.S. 199, 199 (1960) (explaining that convictions "totally devoid of evidentiary support" are unconstitutional and violate due process). Indeed, in her dissent, Judge Cochran predicted "that the 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." Pet. App. 50a-51a.

The State relies on *Perry v. New Hampshire*, 132 S. Ct. 716 (2012), to suggest that allowing a conviction based on unreliable evidence to stand never violates due process because that issue is essentially an evidentiary concern. But there are critical distinctions between *Perry* and this case. In *Perry*, the petitioner claimed his due process rights were violated by the introduction of unreliable eyewitness testimony at trial. *Id.* at 722-23. But the testimony was known to be unreliable at the time it was introduced, thereby permitting the defendant to present the faults and inaccuracies of the testimony to the jury. *Id.*

In contrast to the lay eyewitness in *Perry*, whose testimony was just one piece of a larger evidentiary puzzle showing Perry's guilt, here, Dr. Moore was a designated expert medical examiner whose expertise was proffered by the State as the only piece of evidence indicating that a crime had been committed. The prosecutor's reliance on Dr. Moore's testimony during closing argument to discredit the

defense's theory of the case underscores that this evidence was the foundation of Mr. Robbins's conviction. Pet. App. 10a.

Further, Dr. Moore's supposedly expert testimony contained latent inaccuracies that could not have been discovered until after Mr. Robbins's conviction. Unlike the defendant in *Perry*, Mr. Robbins could not expose the unreliability of Dr. Moore's testimony before either the trial court or the jury. Indeed, the relief Mr. Robbins seeks is the opportunity to present this evidence before a jury in a new trial. In light of Mr. Robbins's continued imprisonment without any reliable evidence that a crime took place, due process demands no less.

The Texas Court of Criminal Appeals has denied Mr. Robbins that right based on a strained construction of the term "false." In so doing, it has sacrificed the due process rights of individuals who have been or will be convicted for the apparent ease of a bright-line, albeit arbitrary, rule. This rule conflicts with multiple holdings from other courts, and it is an affront to fundamental constitutional protections. Because no rational observer could have any confidence in Mr. Robbins's conviction, given Dr. Moore's reevaluation and retraction as well as the conclusion of no fewer than five experts who have unanimously rejected her trial testimony, the 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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APPENDIX

APPENDIX A

No. 98-06-00750-CR-A
EX PARTE NEAL HAMPTON ROBBINS, Applicant
IN THE 410th DISTRICT COURT
OF MONTGOMERY COUNTY, TEXAS
Application for Writ of Habeas Corpus
from the 410th District Court
of Montgomery County, Texas
APPLICANT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDATION

Pending before the Court is Applicant's writ of habeas corpus, in which he contends that as a result of newly available evidence, no rational juror would find him guilty beyond a reasonable doubt of the offense for which he has been convicted, and his supplemental writ, in which he contends that his Due Process rights under the United States and Texas Constitutions were violated because his conviction was based on evidence material to the State's case that has now been found to be false.

Having reviewed the original and supplemental application for a writ of habeas corpus, the State's original and supplemental answers; the depositions of Drs. Patricia Moore, Thomas Wheeler, and Dwayne Wolf; the exhibits introduced by the parties, including the affidavit of Dr. Linda Norton; official court documents; the reporter's record from Applicant's trial; and arguments of counsel, the Court makes the following Findings of Fact, Conclusions of Law, and Recommendation pursuant to Article 11.07,

Section (d), of the Texas Code of Criminal Procedure. For the reasons set forth below, the Court recommends that relief be granted and that Applicant be given a new trial.

* * *

B. APPLICANT'S DUE PROCESS CLAIM

The Due Process Clause of the Fourteenth Amendment is violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. **Ex parte Castellano**, 863 S.W.2d 476, ___ (Tex.Crim.App. 1993)(knowing use); **Ex parte Chabot**, ___ S.W.3d ___, No. AP-75940, *slip op.* at 7 (Tex.Crim.App. December 9, 2009)(*unknowing use*); **Ex parte Carmona**, 185 S.W.3d 492, 497 (Tex.Crim.App. 2006)(*unknowing use*). The State's use of false testimony to secure a conviction, whether knowing or unknowing, is subject to a harmless error analysis. **Ex parte Fierro**, 934 S.W.2d 370, 374 (Tex.Crim.App. 1996). Under this standard, the "applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." **Id.** at 374-275 [sic]. Where false testimony is critical to the State's case or where it has predicated its trial theory on the perjured testimony, due process mandates a new trial. **Ex parte Chabot**. ___ S.W.3d at ___; *slip op.* at 7 (new trial warranted where "it is more likely than not that" perjured testimony "contributed to the applicant's conviction"). While this case does not involve the State's use of perjured testimony, the Court concludes that when viewed through the lens of the state and federal constitutions' Due Process Clauses, there is no meaningful distinction between the State's use of *perjured* testimony and its use of

testimony subsequently shown to be *false*.[24] This Court holds that Applicant's state and federal Due Process rights to a fair trial are too important to turn on *when* in the appellate process he is able to show that testimony sponsored by the State that was critical to securing his conviction is ultimately unmasked as false.[25]

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[24] While Applicant contends that Moore's trial testimony has been shown to be "false" in light of her subsequent re-evaluation, this Court concludes Due Process is offended where the State sponsors testimony critical to the defendant's conviction later shown to be "discredited," "inaccurate," "incorrect," "invalid," "unfounded," "unsound" "erroneous," "misleading," "faulty," or "untrue,"all of which are interchangeable for "false." www.thesaurus.reference.com (*last visited January 12, 2009*). **See Yates v. State**, 171 S.W.3d 215, 221 (Tex.App.– Houston [1st Dist.] 2005).

[25] While the State claims that a habeas applicant should be held to a more onerous standard when the falsity of State-sponsored testimony is not detected until the post-conviction writ stage, it has not directed the Court to any cases that support this submission.