

No. 11-777

---

IN THE  
**Supreme Court of the United States**

---

NEIL HAMPTON ROBBINS,

*Petitioner,*

*v.*

THE STATE OF TEXAS,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
TEXAS COURT OF CRIMINAL APPEALS

---

**BRIEF OF THE INNOCENCE NETWORK AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

---

KEITH A. FINDLEY  
*President*  
INNOCENCE NETWORK  
University of Wisconsin  
Law School  
975 Bascom Mall  
Madison, WI 53706  
(608) 262-4763

JAMES C. DUGAN  
THOMAS H. GOLDEN\*  
ALEXANDER L. CHENEY  
GRETCHEN D. ADELSON  
RACHEL A. MILLS  
WILLKIE FARR  
& GALLAGHER LLP  
787 Seventh Ave.  
New York, NY 10019  
(212) 728-8000  
tgolden@willkie.com

*Counsel for Amicus Curiae The Innocence Network*

January 20, 2012

*\*Counsel of Record*

---

## TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	3
I. THE COURT SHOULD PROVIDE CLARITY REGARDING THE LEGAL STANDARD TO BE USED WHEN EVALUATING DUE PROCESS CLAIMS WHERE A CRIMINAL CONVICTION IS BASED UPON FALSE SCIENTIFIC EVIDENCE.....	8
A. The Nature of Scientific Evidence and Its Uniquely Persuasive Impact on a Jury.....	8
B. Appellate Courts Use Inconsistent Tests to Determine Whether a New Trial is Required When False Scientific Evidence is Used By the State at Trial.....	13
C. The Use of Inconsistent Tests Leads to Inconsistent Outcomes that Undermine the Goals of Fairness and Accuracy and Weaken the Public's Faith in the Criminal Justice System. ....	20

II.	THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS DOES NOT COMPORT WITH DUE PROCESS BECAUSE IT LETS STAND A CONVICTION BASED ON FALSE SCIENTIFIC EVIDENCE.....	21
	CONCLUSION .....	25

## TABLE OF AUTHORITIES

### CASES

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985).....	11
<i>Alcorta v. Texas</i> , 355 U.S. 28 (1957).....	4
<i>Brown v. Dodd</i> , 484 U.S. 874 (1987).....	11
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	11
<i>Drake v. Portuondo</i> , 553 F.3d 230 (2d Cir. 2009) .....	17
<i>Fuller v. Johnson</i> , 114 F.3d 491 (5th Cir. 1997).....	15, 16
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	4
<i>Giles v. Maryland</i> , 386 U.S. 66 (1967).....	4
<i>In re Investigation of W. Va. State Police Crime Lab., Serology Div.</i> , 438 S.E.2d 501 (W.Va. 1993) .....	18
<i>Miller v. Pate</i> , 386 U.S. 1 (1967).....	4
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935).....	4
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959).....	4, 7

<i>People v. Waters</i> , 764 N.E.2d 1194 (Ill. App. 2002) .....	20
<i>Pyle v. Kansas</i> , 317 U.S. 213 (1942) .....	4
<i>Ragland v. Commonwealth</i> , 191 S.W.3d 569 (Ky. 2006) .....	19
<i>State v. Avery</i> , No. 2010AP1952, 2011 WL 4550337 (Wis. App. Oct. 4, 2011) .....	20
<i>State v. Gookins</i> , 637 A.2d 1255 (N.J. 1994) .....	18, 19
<i>Trotter v. State</i> , 736 S.W.2d 536 (Mo. Ct. App. 1997) .....	15, 16
<i>United States v. Agurs</i> , 427 U.S. 97 (1976) .....	4
<i>United States v. Berry</i> , 624 F.3d 1031 (9th Cir. 2010) .....	15
<i>White v. Ragen</i> , 324 U.S. 760 (1945) .....	4

## RULES

Tex. R. Evid. 702 .....	11
Tex. R. Evid. 703 .....	11
Tex. R. Evid. 704 .....	11

## LEGISLATIVE MATERIALS

<i>Funding Forensic Sciences – DNA and Beyond: Hearing Before the Senate Judiciary Comm., Subcomm. On Administrative Oversight and the Courts</i> , 108th Cong. (2003) (statement of Randall Hillman, Executive Director, Alabama District Attorneys Association) .....	9
---	---

## OTHER AUTHORITIES

Deborah Tuerkheimer, <i>Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome</i> , 62 Ala. L. Rev. 513 (2011) .....	24
John William Strong, <i>Language and Logic in Expert Testimony: Limiting Expert Testimony By Restrictions of Function, Reliability, and Form</i> , 71 Or. L. Rev. 349 (1992) .....	3
Kimberlianne Podlas, “ <i>The CSI Effect</i> ”: <i>Exposing the Media Myth</i> , 16 Fordham Intell. Prop. Media & Ent. L.J. 429 (2006) .....	13
Kit R. Roane, <i>The CSI Effect</i> , U.S. News & World Rep., Apr. 25, 2005, at 50 .....	13
Mark A. Godsey & Mari Alou, <i>She Blinded Me With Science: Wrongful Convictions and the “Reverse CSI-Effect,”</i> 17 Tex. Wesleyan L. Rev. 481 (2011) .....	13
National Research Council of the National Academies, <i>Strengthening Forensic Science in the United States: A Path Forward</i> (2009) .....	9, 10, 11, 12, 13

Paul C. Giannelli, <i>Scientific Evidence in Criminal Prosecutions</i> , 137 Mil. L. Rev. 167 (1992) .....	9, 10
Tara Marie La Morte, Comments, <i>Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Under Daubert</i> , 14 Alb. L.J. Sci. & Tech. 171 (2003) .....	3

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Innocence Network (the “Network”) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The sixty-five current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, and Australia. The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. The Network pioneered the post-conviction DNA model that has to date exonerated 289 innocent and wrongfully-convicted

---

<sup>1</sup> Pursuant to this Court’s Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Pursuant to Rule 37.3, *amicus curiae* states that petitioner and respondent have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk’s Office.



persons, and has served as counsel in the majority of these cases. As perhaps the Nation's leading authority on wrongful convictions, the Network and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science) are regularly consulted by officials at the state, local and federal levels.

In over half of the 289 exonerations secured by the Network, the misapplication of forensic disciplines – such as blood type testing, hair analysis, fingerprint analysis, bite mark analysis, and more – has played a role in convicting the innocent. In these cases, forensic criminalists presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury which led to the wrongful conviction. Because of this background, the Network has a particularly strong interest in ensuring that forensic evidence used to obtain criminal convictions is both accurate and reliable. This interest is directly implicated by Petitioner's claim that the Due Process Clause of the Fourteenth Amendment requires a new trial when the key forensic evidence supporting a conviction – in this case, the primary evidence that the victim's death was the result of a criminal act – is shown to be false.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Scientific evidence has a uniquely persuasive impact on juries,<sup>2</sup> which are predisposed to credit the testimony of scientific experts and to believe that conclusions reached through the application of scientific methods are trustworthy.<sup>3</sup> A scientific expert is permitted to testify as to his or her opinion regarding the conclusions that should be drawn from a particular set of facts, conclusions that the scientific expert attests to within a reasonable degree of scientific certainty. The State can offer scientific expert testimony for a variety of purposes, such as to establish that a defendant was at the scene of a crime or had the proper mental state for a particular

---

<sup>2</sup> “[J]urors place substantial weight on forensic evidence. A 1987 survey of jurors conducted immediately after their discharge from serving on criminal cases revealed forensic science experts are the most persuasive of all witnesses testifying at trial.” Tara Marie La Morte, Comments, *Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Under Daubert*, 14 Alb. L.J. Sci. & Tech. 171, 208 (2003) (citing reference omitted).

<sup>3</sup> “There is virtual unanimity among courts and commentators that evidence perceived by jurors to be ‘scientific’ in nature will have particularly persuasive effect.” John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony By Restrictions of Function, Reliability, and Form*, 71 Or. L. Rev. 349, 367 n.81 (1992) (citing references omitted).

charge, or that a crime occurred at all. Because of the weight scientific testimony carries with a jury, when scientific expert testimony used to obtain a conviction turns out to be false – when it is discredited and shown to have lacked adequate support – the reliability of a conviction based primarily on such testimony is called into serious question.

This Court has long held that a conviction based on the use of false evidence by the State violates the Due Process Clause of the Fourteenth Amendment and, if the false evidence is likely to have affected the outcome of the trial, compels a new trial.<sup>4</sup> In such cases, the Court has held that the State's knowing use of false evidence violates constitutional due process principles.<sup>5</sup> The result should be no different where the State obtains a conviction based upon false scientific testimony. By proffering scientific evidence, the State makes a special claim on a jury's trust because the scientific evidence offers a truth that lay jurors can not themselves draw from a set of facts. Where that claim turns out to be without foundation – for example, where, as here, a defendant is convicted of

---

<sup>4</sup> See *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957); *White v. Ragen*, 324 U.S. 760, 764 (1945); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

<sup>5</sup> *Giles v. Maryland*, 386 U.S. 66, 74 (1967); *Napue*, 360 U.S. at 269-70.

a crime based almost entirely on scientific testimony that is later retracted – the conviction is fundamentally tainted and should not stand.

Here, Tristen Rivet, a seventeen-month old toddler, was found by her mother unconscious and not breathing in her crib at approximately 6:00 p.m. on May 12, 1998.<sup>6</sup> Tristen had been in the sole care of Petitioner between the hours of 11:30 a.m. and approximately 4:30 p.m.<sup>7</sup> Petitioner was ultimately indicted for capital murder in connection with Tristen’s death.<sup>8</sup> At trial, the State’s case hinged on the testimony of Dr. Patricia Moore, a pathologist employed by the Harris County Medical Examiner’s Office, who had performed Tristen’s autopsy.<sup>9</sup> Dr. Moore testified that the cause of Tristen’s death was “asphyxia due to compression of the chest and abdomen” – that she had essentially been crushed to death – and that Tristen had been the victim of a homicide.<sup>10</sup> Dr. Moore’s testimony was the central piece of evidence establishing that Tristen’s death was the result of a criminal act.<sup>11</sup> The jury found Petitioner guilty of capital murder, and the trial court sentenced him to life in prison.<sup>12</sup>

More than eight years later, after Dr. Moore had acquired “more experience in the field of forensic

---

<sup>6</sup> (Pet. App. 4a, 73a.)

<sup>7</sup> (Pet. App. 3a-4a.)

<sup>8</sup> (Pet. App. 73a.)

<sup>9</sup> (Pet. App. 6a-7a.)

<sup>10</sup> (Pet. App. 7a, 100a.)

<sup>11</sup> (Pet. App. 7a.)

<sup>12</sup> (Pet. App. 11a.)

pathology,”<sup>13</sup> she re-evaluated the evidence on which she had based her trial opinion and concluded that she had been wrong about the cause and manner of Tristen’s death.<sup>14</sup> Based on her post-trial review of the evidence, Dr. Moore concluded that the cause and manner of death could not be determined, and that the facts did not warrant her original conclusions that Tristen had died as a result of asphyxiation by compression and that her death was a homicide.<sup>15</sup> Four other forensic pathologists have also opined that, based on the trial evidence, Tristen’s death can not be affirmatively attributed to homicide.<sup>16</sup>

Petitioner filed an application for a writ of habeas corpus in June 2007 arguing, among other things, that he was denied a right to a fair trial because his conviction was based on false testimony.<sup>17</sup> The trial court found that, when Dr. Moore had formed her forensic conclusions, she had been inexperienced and that her testimony had been biased in favor of the prosecution.<sup>18</sup> The trial court granted Petitioner a new trial because the conviction “was not obtained by fair and competent evidence, but by admittedly false testimony that was unsupported by objective facts and pathological

---

<sup>13</sup> (Pet. App. 85a.)

<sup>14</sup> (Pet. App. 14a.)

<sup>15</sup> (Pet. App. 14a.)

<sup>16</sup> (Pet. App. 8a, 13a-14a, 16a.)

<sup>17</sup> (Pet. App. 15a.)

<sup>18</sup> (Pet. App. 101a.)

findings and not based on sufficient expertise or scientific validity.”<sup>19</sup>

The Texas Court of Criminal Appeals reversed the trial court’s decision, holding that due process did not require a new trial because Petitioner could not “exclude [Dr. Moore’s] original opinion as the *possible* cause and manner of death.”<sup>20</sup> In other words, in the court’s view, because Petitioner could not affirmatively disprove that Tristen’s death was a homicide, he was not entitled to a new trial.

This Court has recognized that its “duty . . . to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.”<sup>21</sup> Here, the Court should grant Petitioner’s writ of certiorari for two principal reasons. First, given the uniqueness of scientific evidence and its growing importance in criminal trials, federal and state courts need guidance in assessing due process claims that challenge convictions based on false scientific evidence. Second, the Texas Criminal Court of Appeals’ decision creates an impossibly high standard for obtaining a new trial where – as here – forensic science has eviscerated the scientific conclusion presented to the jury but can not definitively rule out any *possibility* of guilt because it can not support a conclusion either way.

---

<sup>19</sup> (Pet. App. 112a.)

<sup>20</sup> (Pet. App. 29a (emphasis added).)

<sup>21</sup> *Napue*, 360 U.S. at 271 (citation omitted).

## ARGUMENT

### **I. THE COURT SHOULD PROVIDE CLARITY REGARDING THE LEGAL STANDARD TO BE USED WHEN EVALUATING DUE PROCESS CLAIMS WHERE A CRIMINAL CONVICTION IS BASED UPON FALSE SCIENTIFIC EVIDENCE.**

#### **A. The Nature of Scientific Evidence and Its Uniquely Persuasive Impact on a Jury.**

Scientific evidence is grounded in the application of scientific method. The goal of scientific method is to

[c]onstruct explanations (“theories”) of phenomena that are consistent with broad scientific principles . . . [t]hese theories, and investigations of them through experiments and observed data, are shared through conferences, publications, and collegial interactions, which push the scientist to explain his or her work clearly and which raise questions that might not have been considered . . . [a]cceptance of the work comes as results and theories continue to hold, even under the scrutiny of

peers, in an environment that encourages healthy skepticism.<sup>22</sup>

Indeed, “[a]s credibility accrues to data and theories, they become accepted as established fact and become the ‘scaffolding’ upon which other investigations are constructed.”<sup>23</sup> In other words, scientific conclusions are theories about what likely happened that can be drawn from a set of facts based on the application of scientific method. However, if the method used to arrive at a scientific conclusion is flawed, either because it lacks support among peers, or because it is affected by bias or inexperience on the part of the scientist, or for some other reason, the conclusion can not be trusted and the theory about what likely happened should not be credited.

The use of forensic evidence is increasingly common in the criminal justice system.<sup>24</sup> Such

---

<sup>22</sup> National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 112 (2009).

<sup>23</sup> *Id.*

<sup>24</sup> “[A]pproximately 75 percent of all cases in the criminal justice system are touched by forensic science evidence analysis. Without this service, our criminal justice system would effectively come to a halt.” *Funding Forensic Sciences – DNA and Beyond: Hearing Before the Senate Judiciary Comm., Subcomm. On Administrative Oversight and the Courts*, 108th Cong. 1-2 (2003) (statement of Randall Hillman, Executive Director, Alabama District Attorneys Association). “Scientific and expert evidence is playing an ever-increasing and far more



evidence can be admitted to satisfy the State's burden as to a particular element of a charge, to establish that it is the defendant – and not some other individual – who committed an alleged crime, or, like here, to prove that a crime has occurred at all. For example,

DNA testing may be used to determine whether sperm found on a rape victim came from an accused party; a latent fingerprint found on a gun may be used to determine whether a defendant handled the weapon; drug analysis may be used to determine whether pills found in a person's possession were illicit; and an autopsy may be used to determine the cause of death of a murder victim.<sup>25</sup>

Unlike a lay witness, a forensic expert can weigh the facts of a case and offer his or her opinion, even on ultimate issues of fact that are disputed at trial,

---

important role in criminal prosecutions . . . . [R]eliance on scientific proof has become so common that its *absence* in a particular case becomes noteworthy.” Paul C. Giannelli, *Scientific Evidence in Criminal Prosecutions*, 137 Mil. L. Rev. 167, 167-69 (1992).

<sup>25</sup> National Research Council of the National Academies, *supra* note 22, at 86.

based upon his or her expertise in a particular discipline.<sup>26</sup>

This Court has recognized that juries grant special deference to scientific evidence, in part because the average juror lacks knowledge of the science forming the basis of the testimony.<sup>27</sup> As such, an expert's conclusion "is cloaked in the special authority that we have recognized an expert witness conveys to the jury."<sup>28</sup> "[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect."<sup>29</sup> These findings were echoed by the Forensic Science Committee of the National Research Council of the National Academies, which was tasked by Congress with assessing the current state of forensic science and making recommendations for best practices, in its report entitled *Strengthening Forensic Science in the United States: A Path Forward* (2009). See Report at 9 and 12 (noting that "[f]orensic science experts and evidence are routinely used in the service of the criminal justice system" and that "because accused parties in criminal cases are

---

<sup>26</sup> See, e.g., Tex. R. Evid. 702; Tex. R. Evid. 703; Tex. R. Evid. 704.

<sup>27</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.").

<sup>28</sup> *Brown v. Dodd*, 484 U.S. 874, 877 (1987) (citation omitted).

<sup>29</sup> *Ake v. Oklahoma*, 470 U.S. 68, 82 n.7 (1985) (quotation omitted).

convicted on the basis of testimony from forensic science experts, much depends on whether the evidence offered is reliable”).<sup>30</sup>

The use of forensic science has been amplified by what legal scholars have referred to as the “CSI Effect,” or the real-world consequences of the portrayal of scientific evidence in popular television shows like the *CSI: Crime Scene Investigation* franchise.<sup>31</sup> These and other fictional television shows often present forensic work in criminal investigations as straightforward and infallible, and they “suggest that convictions are quick and no mistakes are made.”<sup>32</sup> Indeed, “jurors have come to expect the presentation of forensic evidence in every case, and they expect it to be conclusive.”<sup>33</sup> Forensic evidence has been elevated “to an unsupported level of certainty,” and legal scholars have expressed concern that jurors will “blindly believe forensic evidence,” even if there are good reasons to doubt its

---

<sup>30</sup> The Forensic Science Committee also noted that, notwithstanding its foundation in scientific method, forensic evidence is fallible and its use should be tempered with a healthy dose of skepticism. National Research Council of the National Academies, *supra* note 22, at 9, 12 (“The law’s greatest dilemma in its heavy reliance on forensic evidence, however, concerns the question of whether – and to what extent – there is *science* in any given forensic science discipline.”).

<sup>31</sup> *See id.* at 48.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

reliability.<sup>34</sup> Given the significant weight placed by juries on scientific evidence, when a trial conviction is based on scientific evidence that is later shown to be false, the credibility of the trial's outcome is critically undermined.

**B. Appellate Courts Use Inconsistent Tests to Determine Whether a New Trial is Required When False Scientific Evidence Is Used By the State at Trial.**

Notwithstanding the growing use of scientific evidence in criminal cases and the influence that such evidence has on the outcome of a trial, there is a lack of uniformity among appellate courts in how to approach wrongful conviction claims based on the use of false or unreliable scientific evidence. In particular, appellate courts are divided as to whether, in order to obtain a new trial, it suffices that the tainted expert testimony likely affected the trial's outcome or whether a convicted defendant must affirmatively disprove the expert's conclusion.

---

<sup>34</sup> Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 Fordham Intell. Prop. Media & Ent. L.J. 429, 437 (2006); *see also* National Research Council of the National Academies, *supra* note 22, at 48-49; Mark A. Godsey & Mari Alou, *She Blinded Me With Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481, 483 (2011); Kit R. Roane, *The CSI Effect*, U.S. News & World Rep., Apr. 25, 2005, at 50 ("At trial, many juries tend to believe forensic experts and the evidence they provide—even when they shouldn't.").

Here, a five-judge majority of the Texas Court of Criminal Appeals held that “to constitute a due process violation, the testimony used by the State must have been false, and it must have been material to the defendant’s conviction, meaning ‘there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.’”<sup>35</sup> However, despite Dr. Moore’s disavowal of her original forensic opinion, the court found that due process did not require a new trial because her prior testimony had not “been proven to be false.”<sup>36</sup> The court explained that the expert’s “trial testimony is not false just because her re-evaluation of the evidence has resulted in a different, ‘undetermined’ opinion, especially when neither she nor any other medical expert can exclude her original opinion as the possible cause and manner of death.”<sup>37</sup> In other words, there was no due process violation because Petitioner could not definitively *prove* that no crime had occurred.

The Texas court’s decision fundamentally misapprehended the nature of scientific evidence insofar as the court failed to recognize that, by disavowing the ability of forensic science to reach any definitive conclusion as to the cause of Tristen’s death, Dr. Moore in fact disproved her prior forensic conclusions and rendered false, as a matter of science, her prior testimony that, within a

---

<sup>35</sup> (Pet. App. 26a (quoting *Agurs*, 427 U.S. at 103-04; *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011)).)

<sup>36</sup> (Pet. App. 28a.)

<sup>37</sup> (Pet. App. 29a.)

reasonable degree of scientific certainty, the cause of Tristen's death was a homicide. Yet the Texas Criminal Court of Appeals' approach in this case echoes other federal and state appellate courts that have imposed a very high threshold on a convicted defendant's right to obtain a new trial based on false scientific evidence.<sup>38</sup>

In *Fuller*, for example, a defendant was sentenced to death for robbery, murder, and sexual assault. The defendant initially confessed that he committed the crimes alone, but at trial, he recanted his confession and posited that an accomplice actually killed the victim with a pipe.<sup>39</sup> To challenge the defendant's allegations, the prosecution presented autopsy evidence from a medical professional showing that the victim's injuries indicated she was killed with blows from a fist, not a pipe.<sup>40</sup> Following his conviction, the defendant filed a petition for writ of habeas corpus arguing that his conviction was based on false testimony. In support, he submitted an affidavit from another medical professional who stated that the trial expert did not perform the scientific procedures necessary to make the conclusions he presented to the jury.<sup>41</sup> The district court denied the petition. The Fifth Circuit

---

<sup>38</sup> See *United States v. Berry*, 624 F.3d 1031, 1039-43 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 431 (2011); *Fuller v. Johnson*, 114 F.3d 491, 496-97 (5th Cir. 1997); *Trotter v. State*, 736 S.W.2d 536, 538-39 (Mo. Ct. App. 1997).

<sup>39</sup> 114 F.3d at 495.

<sup>40</sup> *Id.* at 495.

<sup>41</sup> *Id.* at 496.

Court of Appeals affirmed the lower court's decision because the defendant did not show that the expert's opinion was "actually false."<sup>42</sup>

And in *Trotter*, a defendant was convicted of killing a police officer based on expert testimony that a .357 magnum revolver was used to kill the officer.<sup>43</sup> After the defendant was convicted, the same expert examined the deceased officer's own .38 caliber Smith & Wesson and determined that his expert trial testimony was wrong.<sup>44</sup> It was the officer's own gun that was used to kill the officer.<sup>45</sup> The circuit court and the Missouri Court of Appeals denied the defendant's request for a new trial because the expert's testimony at trial, though later recanted, was true to the best of the expert's knowledge at the time of the trial.<sup>46</sup>

Other appellate courts that have analyzed similar claims have taken a far less restrictive approach. Indeed, a number of appellate courts have granted new trials where scientific evidence is later

---

<sup>42</sup> *Id.*

<sup>43</sup> 736 S.W.2d at 537-38.

<sup>44</sup> *Id.* at 538.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 539. Even under the analyses of the *Fuller* and *Trotter* courts, Petitioner would be entitled to a new trial. In those cases, the scientific evidence went not to whether a homicide had occurred, but to which weapons had been used to murder the victims. In those cases, unlike here, the new forensic evidence did not refute the conclusion that the victims had been murdered.

shown to be so unreliable as to call the legitimacy of the trial's outcome into question, but have not required that the convicted defendant affirmatively disprove the expert's conclusions in order to obtain a new trial.

For example, in *Drake v. Portuondo*, the prosecution offered the testimony of a prison psychologist to establish that the defendant had the requisite intent to commit murder.<sup>47</sup> The expert testified that the facts of the case led him to conclude that the defendant suffered from picquerism, “a purported syndrome . . . in which the perpetrator realizes sexual satisfaction from penetrating a victim by sniper activity or by stab or bite wounds,” and the jury convicted the defendant on two counts of second degree murder.<sup>48</sup> In a habeas petition, the convicted defendant established that the expert had lied on the stand regarding his credentials, when he learned about the facts of the case, and how and when he concluded that the defendant suffered from picquerism.<sup>49</sup> The court determined that the expert's conclusions were not based on reliable science, the prosecutor knew that at least some of the expert's testimony was false, and that the defendant was entitled to a new trial.<sup>50</sup> The court did not, however, require the defendant to disprove the expert's conclusions regarding picquerism, or to prove that he lacked the requisite intent for the crime.

---

<sup>47</sup> 553 F.3d 230, 234-35 (2d Cir. 2009).

<sup>48</sup> *Id.* at 235-37.

<sup>49</sup> *Id.* at 237-39.

<sup>50</sup> *Id.* at 243-44, 247-48.



In *In the Matter of Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, the West Virginia court appointed a circuit judge to conduct an investigation into whether habeas relief should be granted to prisoners whose convictions were obtained through the testimony of a former serologist who was alleged to have engaged in systematic misconduct, including the falsification of evidence in criminal prosecutions.<sup>51</sup> The investigation concluded that the serologist's "pattern and practice of misconduct completely undermined the validity and reliability of any forensic work he performed or reported."<sup>52</sup> Although the report did not disprove the serologist's conclusions in every trial in which his testimony was offered, the court held that all of his testimony should be deemed false, and thus "in any habeas corpus hearing involving [the serologist's] evidence, the only issue is whether the evidence presented at trial, independent of the forensic science presented by [the serologist], would have been sufficient to support the verdict."<sup>53</sup> Therefore, the court held that a new trial was required for defendants who were convicted based on the serologist's evidence if such evidence "could . . . in any reasonable likelihood have affected the judgment of the jury."<sup>54</sup>

And finally, in *State v. Gookins*, three defendants arrested for drunk driving protested their innocence but pleaded guilty when they were

---

<sup>51</sup> 438 S.E.2d 501, 502-03 (W.Va. 1993).

<sup>52</sup> *Id.* at 504.

<sup>53</sup> *Id.* at 506.

<sup>54</sup> *Id.* at 505 (quotation omitted).

presented with breathalyzer readings in excess of .10.<sup>55</sup> After their pleas, an undercover operation resulted in the conviction of the arresting officer on charges of falsifying the results of a breathalyzer test on an undercover agent.<sup>56</sup> The three defendants moved for new trials based on the officer's conviction, but the Municipal Court denied the motions.<sup>57</sup> The Law Division and the Appellate Division upheld the Municipal Court's decision because the charges against the arresting officer did not relate to the tests performed on the three defendants who pleaded guilty, and thus did not establish the falsification of evidence in any of their cases.<sup>58</sup> In other words, the three defendants did not prove that the officer falsified the results in their own cases and that they were actually innocent. The Supreme Court of New Jersey reversed that decision and remanded the cases to the municipal court where the State would be required "to prove defendants' guilt with evidence that is free of the taint of [the officer's] pattern of misconduct."<sup>59</sup>

---

<sup>55</sup> 637 A.2d 1255, 1256-57 (N.J. 1994)

<sup>56</sup> *Id.* at 1256-57.

<sup>57</sup> *Id.* at 1257.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1260. Other courts have also permitted new trials when scientific trial evidence is shown to be unreliable, even though the conclusions drawn from that evidence are not affirmatively disproven. See *Ragland v. Commonwealth*, 191 S.W.3d 569, 578-80 (Ky. 2006) (ordering new trial when National Research Council determined that expert conclusions drawn from comparative bullet lead analysis, such as

**C. The Use of Inconsistent Tests Leads to Inconsistent Outcomes that Undermine the Goals of Fairness and Accuracy and Weaken the Public's Faith in the Criminal Justice System.**

This Court's guidance is needed to establish a uniform standard governing when the Due Process Clause of the Fourteenth Amendment requires a new trial where a conviction is based upon unreliable or false scientific evidence. The disparate standards used by federal and state appellate courts to determine whether a new trial is required has led to

---

those introduced in defendant's trial, did not meet *Daubert's* reliability determinations without requiring defendant to prove that expert testimony at trial was false); *People v. Waters*, 764 N.E.2d 1194, 1203-04 (Ill. App. 2002) (granting new trial motion in aggravated criminal sexual assault case when post-trial DNA testing revealed that urine on victim's jacket could not have originated with defendant, which undermined victim's identification of defendant as one of her attackers); *see also State v. Avery*, No. 2010AP1952, 2011 WL 4550337, at \*9-10 (Wis. App. Oct. 4, 2011) (granting a new trial for a defendant who was originally convicted based on a video that purported to show him committing a crime when, post-trial, an expert's use of video enhancement—technology developed after the trial—suggested the defendant was not actually the person in the video, even though the new evidence did not “totally destroy the prosecution's case”), *petition for rev. filed* (Wis. Oct. 18, 2011) (No. 2010AP001952).

inconsistent and unpredictable outcomes that undermine the goals of fairness and accuracy and weaken the public's faith in the criminal justice system. For example, under the test used by the Texas Criminal Court of Appeals in this case, Petitioner could not obtain a new trial unless he could affirmatively exclude even the possibility that Tristen's death had been a homicide – an impossible task, given that five out of six forensic pathologists who examined the trial evidence could not reach any determination on the cause of Tristen's death. Because he was prosecuted in Texas, Petitioner must remain incarcerated for the remainder of his life. This result would be very different if Petitioner's case had been heard by the appellate courts of Wisconsin or New Jersey, which do not require defendants convicted by unreliable scientific evidence to affirmatively prove that the conclusions reached using such evidence could not possibly be true. Such divergent outcomes based solely on where a defendant happens to be convicted can not be squared with due process notions of fairness and accuracy in the criminal justice system.

**II. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS DOES NOT COMPORT WITH DUE PROCESS BECAUSE IT LETS STAND A CONVICTION BASED ON FALSE SCIENTIFIC EVIDENCE.**

In this case, Dr. Moore's testimony "was critical to the State's obtaining a conviction and her opinions were the sole bases of the State's case as to cause and manner of death, without which the State

would not have obtained a conviction.”<sup>60</sup> However, Dr. Moore later disavowed her trial testimony, concluding that the cause and manner of death could not be determined.<sup>61</sup> Dr. Moore’s conclusion was corroborated by the trial testimony of Petitioner’s expert, as well as three other forensic experts who reviewed the case after Petitioner’s trial.<sup>62</sup> In addition, the trial court found that Dr. Moore, at the time she performed the autopsy, was inexperienced and biased towards the prosecution.<sup>63</sup> As a result, the trial court ultimately found that the conclusions she offered at trial as to cause and manner of death were “not justified by the objective facts and pathological findings” in the case, and set aside Petitioner’s conviction.<sup>64</sup>

The Texas Court of Criminal Appeals conceded that the State’s expert “played an important role in the State’s case as the only trial witness to point to a specific cause of . . . death.”<sup>65</sup> However, the Court of Criminal Appeals did not evaluate whether there was a “reasonable likelihood” that the testimony “could have affected the judgment of the jury” because it determined that the testimony was not actually “false.”<sup>66</sup> The court’s decision does not comport with due process for three reasons.

---

<sup>60</sup> (Pet. App. 100a.)

<sup>61</sup> (Pet. App. 14a.)

<sup>62</sup> (Pet. App. 8a, 13a-14a, 16a.)

<sup>63</sup> (Pet. App. 41a n.14, 58a, 59a, 93a, 101a, 102a.)

<sup>64</sup> (Pet. App. 58a, 92a, 93a, 102a, 114a.)

<sup>65</sup> (Pet. App. 28a-29a.)

<sup>66</sup> (Pet. App. 26a, 29a.)

First, the Texas appellate court's decision turns the burden of proof on its head by requiring Petitioner to disprove an element of a crime – that the child's death was the result of a homicide – in order to receive a new trial. Under this standard, Petitioner can not obtain a new trial because he can not prove that there was no crime, even though the central evidence at Petitioner's trial that a crime occurred has been refuted by the very expert who originally offered the evidence. The Texas court of appeals has created a standard that is impossible to satisfy where – as here – forensic science can neither support nor disprove the conclusion presented to the jury.

Second, the Texas appellate court failed to recognize that the conclusion presented to the jury at Petitioner's trial – that, within a reasonable degree of scientific certainty, the victim had been murdered – was in fact false. Dr. Moore's retraction of her trial testimony did not signify simply that she was less certain about whether Tristen's death was a homicide. Instead, it completely refuted the central evidence at trial that a crime occurred by confirming that the results of the autopsy did not support *any* conclusion as to the cause and manner of Tristen's death. Therefore, the scientific conclusion that was presented to the jury was, as a matter of science, actually false. The Texas appellate court's decision requiring Petitioner to prove that homicide was not a *possibility* in order to show that the conclusion was false fails to account for the nature and role of scientific evidence.

Third, the Texas appellate court's decision fails to account for the uniquely persuasive impact of scientific evidence in criminal trials. Given jurors' inclination to assign significant weight to scientific expert testimony, once Dr. Moore testified that Tristen's death was caused by a criminal act, the jury likely focused on whether it was Petitioner who committed the crime, instead of whether a crime was committed at all.<sup>67</sup> And just as Dr. Moore's testimony likely carried significant weight with the jury, so would testimony that the cause and manner of death was "undetermined." Therefore, if the forensic evidence had been presented to the jury accurately – which would have established that forensic science could not determine how Tristen died – such evidence certainly would have affected how the jury evaluated all of the evidence against Petitioner.

If the decision of the Texas Court of Criminal Appeals is allowed to stand, Petitioner will be denied a new trial even though the central scientific evidence supporting his conviction has been shown to be so unreliable that the accuracy of the jury's guilty

---

<sup>67</sup> See Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 Ala. L. Rev. 513, 555 (2011) (explaining that given jurors' assumptions regarding criminal investigations, "juries focus their deliberations on testing the connection between the crime and the defendant, as opposed to questioning whether a crime occurred at all").

verdict has been critically undermined. Such a result does not comport with due process.

### CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

Keith A. Findley  
*President*  
 INNOCENCE  
 NETWORK  
 University of Wisconsin  
 Law School  
 975 Bascom Mall  
 Madison, WI 53706  
 (608) 262-4763

James C. Dugan  
 Thomas H. Golden  
*Counsel of Record*  
 Alexander L. Cheney  
 Gretchen D. Adelson  
 Rachel A. Mills  
 WILLKIE FARR &  
 GALLAGHER LLP  
 787 Seventh Avenue  
 New York, NY 10019  
 (212) 728-8000

*Counsel for Amicus Curiae The Innocence Network*

January 20, 2012