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 FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of lawyers who practice criminal law before virtually every state and federal court in the country.[1] NACDL was founded in 1958 to promote criminal law research, to develop and disseminate knowledge in the area of criminal practice, and to encourage integrity and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and fair administration of justice.

To that end, as courts increasingly rely on scientific evidence for criminal convictions, the reliability of that evidence becomes critically important to the administration of justice. NACDL's 12,800 member attorneys and the 35,000 members of its state, local, and international affiliates represent defendants in a wide variety of criminal cases; many of these cases may involve convictions based upon unreliable scientific evidence. NACDL's members are interested in the resolution of the due process question in this case because it will affect the due process rights of their current and future clients, and because NACDL has a

[1] Counsel of record received timely notice under Rule 37.2(a) of NACDL's intent to file this brief, and all parties consented to its filing, as reflected in the accompanying written consent letters. No party's counsel authored any part of this brief, and no person other than NACDL and its counsel made any monetary contribution intended to fund its preparation or submission.

significant interest in ensuring that their clients are not incarcerated for crimes as to which the prosecution has not established guilt beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Mr. Robbins's criminal trial may have appeared to be fair at the time it was conducted. Nevertheless, due process requires that Mr. Robbins be granted a new trial because his conviction was based on demonstrably unreliable scientific evidence – specifically, on scientific testimony that was *recanted in toto* by the scientist. As the Petition explains, a number of federal and state courts would grant Mr. Robbins a new trial under these circumstances. However, the Texas Court of Criminal Appeals and certain other courts require a more onerous showing, akin to the exculpatory evidence used in actual innocence claims. As a theoretical matter, this standard contravenes scientific norms, which do not call for affirmative disproof of scientific theories. And, as a practical matter, the standard is nearly impossible for criminal defendants to meet given that scientific soundness and accuracy is not the forte of adjudicating courts and resources are limited, as this case amply demonstrates. Criminal defendants should not have to meet such a standard in order to obtain a fair trial.

This Court should grant the Petition for three reasons. First, the problem addressed here is worthy

of this Court's attention because scientific evidence plays an increasingly prominent role in criminal trials. As scientific advances reinforce or call into question the "certainties" of the past, courts need guidance on how best to account for evidence that, post-conviction, is shown to be unreliable. This issue has arisen on several occasions, with disparate results in the lower courts; it will continue to arise again and again in the future. Second, this Court's review is warranted not only because of the divided court authority, but further because the holding of the Texas Court of Criminal Appeals, and of the courts that share its view of the law, is inconsistent with this Court's due process jurisprudence and effectively alters the burden of proof in criminal proceedings. Review is required to correct the approach of the court below and the courts that join its side of the divide on this issue. Third, this case is the right vehicle for review of this important and recurring issue because it presents a situation where the scientific evidence was the only direct evidence in the case, was plainly central to Mr. Robbins's conviction, and was recanted in full after the conviction.

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REASONS THE WRIT SHOULD BE GRANTED

I. THE QUESTION PRESENTED IS IMPORTANT BECAUSE SCIENTIFIC EVIDENCE PLAYS AN IMPORTANT ROLE IN CRIMINAL TRIALS, AND LOWER COURTS ARE DIVIDED ON WHAT TO DO WHEN SCIENTIFIC EVIDENCE THAT FORMED THE BASIS FOR A CONVICTION IS LATER DEEMED UNRELIABLE

Several courts are willing to grant relief when scientific evidence in the original trial is shown to be sufficiently unreliable as to undermine confidence in the accuracy and integrity of the jury verdict. *See, e.g., United States v. Freeman*, 650 F.3d 673, 678-80 (7th Cir. 2011); *Drake v. Portuondo*, 553 F.3d 230, 233 (2d Cir. 2009); *State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008); *State v. Krone*, 897 P.2d 621, 621 (Ariz. 1995); *State v. Gookins*, 637 A.2d 1255, 1259 (N.J. 1994); *In re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 504 (W.Va. 1993); *State v. Caldwell,* 322 N.W.2d 574, 587 (Minn. 1982). These courts sometimes phrase their holdings in terms of "false" scientific evidence, but they use a common-sense definition of the term that essentially equates "false" evidence with unreliable or discredited evidence. *See, e.g., In re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d at 503 (granting relief where the scientific evidence submitted at trial could not be considered factually correct because it overstated the strength of the results, and stating that "once the use of false

evidence is established, as here, such use constitutes a violation of due process.").

The heightened standard that other courts have adopted requires a defendant who challenges scientific evidence as unreliable to proffer additional, exculpatory evidence to affirmatively demonstrate how the crime actually did occur, or to demonstrate his or her actual innocence of the crime. *See United States v. Berry*, 624 F.3d 1031, 1035-41 (9th Cir. 2010) (acknowledging that the expert testimony about compositional analysis of bullet lead suffered from "significant criticisms" but denying relief because the petitioner had not shown that the evidence was "almost entirely unreliable"); *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000) (denying relief because the petitioner failed to show that witness testimony was "'indisputably false' rather than merely misleading."); *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997) (denying relief because, although the petitioner had shown that the expert witness did not follow standard scientific procedures in forming his opinion at trial and therefore could not have testified accurately, the petitioner had not shown that the expert testimony was "actually false"); *see also Robbins v. State of Texas,* No. AP-76464, 2011 Tex. Crim. App. LEXIS 910 at *35-*45 (Tex. Crim. App. June 29, 2011), Pet. App. at 25a-34a.

The deepening split between these two schools of judicial thought creates an intolerable uncertainty in the law. Criminal defendants and their attorneys struggle to reconcile the evolving nature of scientific

truth with the law's affinity and preference for certainty, and to determine whether the exculpatory evidence often needed for actual innocence claims is now necessary to safeguard a defendant's constitutional right to a fair trial.

As Judge Cochran recognized in his dissenting opinion in the Texas Court of Criminal Appeals, "[t]his case raises a novel and difficult issue" for which the appropriate analytic framework is not clear. *See Robbins*, 2011 Tex. Crim. App. LEXIS 910 at *61, Pet. App. at 44a (Cochran, J., dissenting). Indeed, courts on both sides of the judicial divide struggle with the applicable law, recognizing that this case does not clearly fall under the legal doctrine involving "actual innocence" or the doctrine involving "false testimony." *Compare* Cochran Dissent, 2011 Tex. Crim. App. LEXIS 910 at *68-*69, Pet. App. at 49a, *with* Price Concurrence, 2011 Tex. Crim. App. LEXIS 910 at *46-*57, Pet. App. at 34a-41a. Judge Cochran ascribed the source of the confusion, in part, to the "fundamental disconnect between the worlds of science and law" and opined that:

> [this] disconnect between changing science and reliable verdicts that can stand the test of time has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased. The potential problem of relying on today's science in a criminal trial (especially to determine an essential element such as criminal causation or the

> identity of the perpetrator) is that tomorrow's science sometimes changes and, based upon that changed science, the former verdict may look inaccurate, if not downright ludicrous. But the convicted person is still imprisoned . . . [f]inality of judgment is essential in criminal cases, but so is accuracy of the result – an accurate result that will stand the test of time and changes in scientific knowledge.

Cochran Dissent, 2011 Tex. Crim. App. LEXIS 910 at *66, Pet. App. at 47a-49a (internal quotations omitted).

In a similar vein, a congressionally-mandated report from the National Research Council also underscores the need for accuracy in the scientific evidence on which criminal convictions are based. *See generally* National Research Council of the National Academies, Committee on Identifying the Needs of the Forensic Science Community, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD ("NRC Report") (2009). The NRC Report examined the historical uses and limitations of scientific evidence and made strong recommendations for its improvement. *See generally id.*

The NRC Report analyzed the state of forensic science generally, and also looked at the courtroom roles of specific types of evidence such as toolmark and bitemark evidence, fingerprint analysis, bloodstain pattern analysis, hair sample analysis, serology, fire and explosive evidence, and coroner and medical examiner systems, among others. *See generally id.*

While the report recognized the myriad benefits that science has brought to the legal community, it also pointed out the problems caused by fallible scientific evidence:

> Many crimes that may have gone unsolved are now being solved because forensic science is helping to identify the perpetrators. Those [scientific] advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

Id. at 4.

The Report specifically notes that "faulty," "erroneous," and "misleading" science is admitted all over the country, with devastating consequences for the wrongfully convicted.[2] Further, it recognizes that

[2] Notably, a showing that scientific evidence is "faulty," "erroneous," and "misleading" would not be enough to obtain relief under the unreasonably heightened standard for "falsity" used by the lower court. Under the lower court's standard, there is *no* relief for criminal defendants whose convictions are based on faulty, erroneous, and misleading scientific evidence. The courts' interests in finality, while important, cannot be so strong as to

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reliability is key for the efficient and sound administration of justice:

> [B]ecause accused parties in criminal cases are convicted on the basis of testimony from forensic science experts, much depends upon whether the evidence offered is reliable. Furthermore, in addition to protecting innocent persons from being convicted of crimes that they did not commit, we are also seeking to protect society from persons who have committed criminal acts. Law enforcement officials and the members of society they serve need to be assured that forensic techniques are *reliable*.

Id. at 109 (emphasis in original). To that end, judicial guidance from this Court is needed to ensure that reliability remains a requirement for the scientific evidence used to convict criminal defendants – and that when scientific evidence is demonstrably *unreliable*, a criminal defendant can vindicate his or her due process rights and obtain a new trial.

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obliterate the interests of accuracy and fairness in criminal proceedings. Given that there are acknowledged weaknesses in the criminal justice system, particularly in the fast-paced world of scientific advances, due process concerns are at their peak. A specific showing that the scientific evidence used to convict was unreliable – here, through fully recanted testimony – should be enough to warrant a new trial under due process.

II. THE DECISION WARRANTS REVIEW BECAUSE IT IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE

The touchstone of the Due Process Clause is the right to a fair trial: "The failure to accord an accused a fair hearing violates even the minimal standards of due process. A fair trial in a fair tribunal is a basic requirement of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations and internal quotation omitted). Regardless of the specific due process claims at issue, the focus remains on fundamental fairness in criminal trials. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984) (noting that the right to counsel is necessary "to protect the fundamental right to a fair trial"). Consistent with this view of due process, in false evidence cases this Court has eschewed an overly technical definition of "false evidence," and has instead favored a practical definition that includes evidence that, "taken as a whole," has been shown to "give the jury [a] false impression" such that the facts were not "truthfully portrayed." *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

Here, Mr. Robbins was convicted on the basis of unreliable scientific evidence that should never have been admitted at trial, and therefore due process requires that he be granted a new trial. Nevertheless, the lower court determined that Mr. Robbins could receive a new trial only if he proffered evidence that actually exonerated him of the crime. Mr. Robbins was able to show that the scientific evidence attributing the victim's death to homicide by compression

asphyxiation was unsupported and should never have been admitted. However, the Texas Court of Criminal Appeals required much more: it required that Mr. Robbins provide *additional, affirmative* evidence that actually *ruled out* the possibility that he committed homicide. The court required this showing even though five medical experts, including the State's own expert from Mr. Robbins's original trial, agreed that the victim's cause and manner of death cannot be (and could not have been) determined. Essentially, the Court of Appeals conflated the doctrines for actual innocence claims and false testimony claims, and required Mr. Robbins to proffer affirmative, exculpatory, impossible-to-obtain evidence of his own "actual innocence" and of the actual manner of death, in order to show that the scientific evidence used for his conviction was "false." Such evidence is nearly impossible to find in most cases, and should not be required for criminal defendants who are wrongly convicted based on unreliable scientific evidence. Review is required to correct the approach of the court below and the courts that join its side of the divide on this issue.

III. THIS CASE IS THE RIGHT VEHICLE FOR REVIEW OF THIS IMPORTANT AND RECURRING ISSUE

This case is a proper vehicle for deciding the question presented for the reasons explained in the Petition. It presents a situation where the scientific evidence was the *only* direct evidence at trial, and

there was very little circumstantial evidence. In this context, there was no question that Dr. Moore's testimony played an integral role in the jury's decision to convict Mr. Robbins; the impact of the scientific evidence was monumental and determinative, and the subsequent revelation of its unreliability undermined confidence in the jury verdict.

Further, the indeterminable nature of the cause of death was supported by several additional expert witnesses, so that not only was it *legally* difficult for Mr. Robbins to produce the exculpatory evidence required by the lower court, as a general matter, but it was actually *factually* impossible. It is not, and may never be, possible to determine exactly how and why the victim died. But that does not mean that Mr. Robbins – or anyone else – should be incarcerated. Mr. Robbins showed that scientific evidence necessary to his conviction was completely unreliable. Under the proper analysis of this issue, this would be sufficient to grant a new trial, and this Court should so hold.

Reliable scientific evidence can assist judges and juries in determining "truth" and advancing the proper, efficient, and fair administration of justice. Unreliable scientific evidence, however, creates a great potential that the government will imprison the wrongfully accused. The unreliability of the evidence may be due to forensic fraud, examiner bias or error, invalid procedures, or well-established methodologies the soundness of which is later disproven. Whatever the cause, the result is the same: a criminal defendant may be

convicted based on unreliable evidence that should never have been admitted at trial, but whose unreliability was not known until after the defendant was convicted. That is exactly what happened here, and that is why this case presents the appropriate vehicle for deciding this important issue.

This Court's guidance is needed to protect the due process rights of defendants like Mr. Robbins, by setting forth an appropriate analytical framework that keeps the burden of proof on the prosecution, and affords a defendant an appropriate avenue to obtain a new trial when his or her conviction was obtained with scientific evidence that is subsequently proven to be inaccurate and unreliable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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