WR-73,484-02

IN THE

COURT OF CRIMINAL APPEALS

EX PARTE NEAL HAMPTON ROBBINS, Applicant

Successive Application for a Writ of Habeas Corpus
in Cause No. 98-06-0075-CR from the
410th Judicial District Court of Montgomery County

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

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IDENTITY OF PARTIES AND COUNSEL

The following are the parties and their counsel, listed pursuant to **T**ex.**R**.**A**pp.**P**. 38.1(a) in order that the members of this Court may determine whether any basis for disqualification or recusal exists:

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Trial and Habeas Judge: Honorable K. Michael Mayes
410th Judicial District Court
Montgomery County, Texas

IDENTITY OF *AMICUS CURIAE* AND COUNSEL

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process to those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The ever-increasing use of scientific evidence in criminal cases poses challenges to the criminal justice system which NACDL members and its affiliates confront on a regular basis. With the enactment of Article 11.073 of the Texas Code of Criminal Procedure, the State of Texas has taken a significant and commendable step to address and remedy the serious consequences which sometimes result from the failures and limitations of forensic science, or from deficiencies which are later exposed. The construction and application of Article 11.073 in a manner which upholds its remedial legislative purpose and assures the integrity of the fact-finding process required by core due process principles, is important to NACDL members' interests in protecting the rights of their current and future clients and in assuring the reliability of evidence used in efforts to secure criminal convictions.

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TRAP RULE 11 DISCLOSURE

This brief is tendered on behalf of NACDL. No fee was (or will be) paid for preparation of this brief, and all costs were borne by NACDL.

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TO THE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

The Court has granted oral argument.

STATEMENT OF THE CASE

Following a jury trial in the 410th Judicial District, Montgomery County, Texas, Applicant was convicted of capital murder and sentenced to life imprisonment. The Ninth Court of Appeals affirmed his conviction. *Robbins v. State,* 27 S.W.3d 245 (Tex. App. - Beaumont 2000). This Court granted discretionary review and affirmed.

Robbins v. State, 88 S.W.3d 256 (Tex. Crim. App. 2000).

Applicant filed for a writ of habeas corpus pursuant to Art. 11.07, C. Crim. P. on the ground that after having re-examined the applicable data,[1] the State's expert witness, the assistant medical examiner, disavowed as unreliable her expert trial testimony as to the manner (homicide) and cause of death (asphyxia by compression). The expert concluded that neither the cause nor manner of death could be determined. The trial judge recommended a new trial. In a 5 to 4 decision, this Court denied relief. *Ex parte Robbins,* 360 S.W.3d 446 (Tex. Crim. App. 2011). The Supreme Court denied *certiorari.* 132 S.Ct. 2374 (2011).

After this Court's decision, the Texas legislature revised habeas procedures in order to provide a specific remedy where flawed science played a critical role in securing a criminal conviction, or where advances in science afforded critical favorable evidence to a convicted individual. Art. 11.073, C.Crim.P. This revision to Article 11 of the Code of Criminal Procedure went into effect September 1, 2013. It authorizes a trial court to do what the trial court did here, that is, grant relief on a habeas corpus application containing "relevant scientific evidence" which "was not available to be offered" at the convicted person's trial, or which "contradicts scientific

[1] As the record demonstrates, and as is discussed more fully in Applicant's brief, Dr. Moore conducted a thorough examination of the available data in concluding that her previous opinions - which she offered to the jury in her official capacity - were unreliable, that is, not justified by the objective facts.

evidence relied upon by the state at trial". Art.11.073(a).

Applicant filed a subsequent writ application pursuant to the new provision. The Article [Art. 11.073(b)] authorizes the grant of relief where the application "contain[s] specific facts indicating that

[Art. 11.073(b)(1)]

> (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
>
> (B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application;"

and the trial court so finds, and also finds "that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted." Art.11.073(1) and (2).[2]

On October 21, 2013, the trial court entered its findings of fact and conclusions of law with respect to Applicant's subsequent application for a writ of habeas corpus. The court adopted its previous findings and conclusions and recommended that applicant receive a new trial, stating as follows with respect to the requirements of Art. 11.073:

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[2] Art. 11.073 (c) and (d) speak to due diligence in relation to prior writ applications.

> Applicant has demonstrated that relevant scientific evidence that contradicts scientific evidence relied on by the state at trial is currently available and was not available at the time of Applicant's trial because the evidence was not ascertainable through the exercise of reasonable diligence by Applicant before the date of or during Applicant's trial; and the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the Application; and had the scientific evidence been presented at trial, on the preponderance of the evidence Applicant would not have been convicted.

On November 27, 2013, the application was filed and set for submission pursuant to this Court's order which also directed the parties to brief several issues, including "whether Applicant is entitled to relief under Article 11.073(b)." *Ex parte Robbins,* 2013 WL 62112218*1 (Tex. Crim. App. November 27, 2013).

ISSUE PRESENTED

WHETHER ARTICLE 11.073 OF THE CODE OF CRIMINAL PROCEDURE REQUIRES A NEW TRIAL WHERE THE CONVICTION ITSELF AND THE DETERMINATION THAT A CRIME OCCURRED AT ALL ARE "PRIMARILY DEPENDENT" UPON EXPERT TESTIMONY LATER REEVALUATED BY THE WITNESS AND FOUND TO BE SCIENTIFICALLY INSUPPORTABLE, A CONCLUSION CONFIRMED BY OTHER RELIABLE EXPERT EVIDENCE

This Court specified several questions which the parties were directed to address. *Ex parte Robbins,* 2013 WL 62112218*1 (Tex. Crim. App., November 27, 2013). NACDL addresses the question "whether Applicant is entitled to relief under Article 11.073(b)". The State has urged this Court to reject the trial court's thoroughly

considered recommendation to grant Applicant a new trial pursuant to Article 11.073 of the Code of Criminal Procedure. NACDL submits that the State's notion of how Article 11.073 should be construed is at odds with its plain language, unjustifiably restricts the legislature's goal to provide a meaningful remedy for convictions secured by flawed science, and - in contravention of well-established principles of statutory interpretation - unnecessarily invites constitutional doubt.

STATEMENT OF FACTS

The facts of this case are set forth in the majority, concurring, and dissenting opinions of this Court in *Robbins,* 360 S.W.3d 446, and in Applicant's Merits Brief (at pages 4-24), upon which we rely. However, as a framework for discussion of the application of Article 11.073(b) to the circumstances presented here, we highlight certain of the undisputed facts:

- "The State's case **largely depended on the expert opinion of Dr. Patricia Moore, the medical examiner** who performed the autopsy and who testified that Tristen died from asphyxia due to the compression of her chest and abdomen." *Ex parte Robbins v. State,* 360 S.W.3d 446, 448 (Tex. Crim. App. 2011) (emphasis added). "At trial, Moore, as the State's expert witness, testified that the cause of Tristen's death was asphyxia due to compression of the chest and abdomen and that the manner of death was homicide." *Id.* at 450.

- The child's death occurred in 1998. Applicant was tried and convicted in 1999. In March 2007, the Harris County Medical Examiner's Office was contacted by an acquaintance of Applicant and asked "to review Dr. Moore's findings regarding the cause of Tristen's death." 360 S.W.3d at 453. "The deputy chief medical examiner for Harris County, Dr. Dwayne Wolf, undertook a re-evaluation of the autopsy findings. After **reviewing the testimony adduced during Applicant's trial, the autopsy report, the EMS and medical records, and the police offense report, Dr. Wolf concluded that Moore's observations during the autopsy did not support a finding that the death resulted from asphyxiation by compression or from any other specific cause**" (emphasis added). *Id.* Accordingly, on May 2, 2007, Dr. Wolf *amended the autopsy report* "to reflect that both the cause and the manner of death were 'undetermined'." *Id.* In other words, how the child died could not be determined and whether a homicide occurred could not be determined.

- Shortly thereafter, at the request of the Montgomery County District Attorney's Office, former Harris County Medical Examiner Joye Carter again reviewed Moore's autopsy report. Carter had been Dr. Moore's supervisor and had agreed with Moore's original opinion. Upon review, Carter wrote to the District Attorney on May 10, 2007, stating: " 'Upon my review of this case **I would <u>not</u>**

<u>concur</u> with the opinion on the manner of death as a homicide but would reconsider this case as an undetermined manner,' and 'If the Harris County Medical Examiner intends to re-rule this case as an undetermined manner of death I would agree with that change.' " 360 S.W.3d at 453-454 (emphasis added).

- Dr. Moore also reviewed her autopsy report at the request of the District Attorney's Office and concluded as follows in a May 13, 2007 letter to the district attorney:

> I believe that there are unanswered questions as to why the child died, and I still feel that this is a suspicious death of a young child. Given my **review of all the material from the case file** and having had more experience in the field of forensic pathology, I now feel that an opinion for a cause and manner of death of undetermined, undetermined is best for this case (emphasis added).

360 S.W.3d at 454. "Moore explained that since her original opinion, she has had **more experience**, and she has reviewed **additional information** that suggested that the bruises could have resulted from aggressive CPR and other efforts to assist the child. She emphasized that it was significant that aggressive adult-type CPR by untrained persons was performed on Tristen, a 17-month-old child." *Id.* (footnote omitted; emphasis added).

- On August 22, 2007 "the trial court appointed Dr. Thomas Wheeler, the

Chairman of the Department of Pathology at Baylor College of Medicine," to conduct "an independent pathological examination to address the following issues: (1) What is the manner of Tristen Rivet's death? (2) What is the means of Tristen Rivet's death? (3) Are the manner and means of Tristen Rivet's death able to be determined? (4) Does a change in the medical examiner's opinion about the manner and means of Tristen Rivet's death entitle Applicant to a new trial?" 360 S.W.3d at 454-455. "After reviewing the autopsy file of the victim, trial testimony, and exhibits," Dr. Wheeler "concluded in a September 18, 2007 letter to the trial court that the cause and manner of Tristen's death was undetermined." He stated that " '[a]lthough the autopsy performed by Dr. Moore was thorough and well documented, **her conclusion that the death of Tristen Rivet was caused by asphyxia secondary to chest compressions was not justified by the objective facts and pathological findings in this case.**'" *Id.* at 455 (emphasis added). "He could not rule out suffocation or asphyxiation as the cause of death, but he did not see any physical findings that would support any particular conclusion as to the cause of death." *Id.*

- Thereafter, Justice of the Peace Connelly (in October 2007) "ordered that pathologist Linda Norton conduct an independent forensic examination of the evidence and submit a written report of her findings and opinion on the cause

and the manner of Tristen's death." 360 S.W.3d at 455. On **March 28, 2008**, Norton reported her opinion to court and counsel (by telephone) - that "Tristen's death was a homicide and that the manner of death was asphyxia by suffocation." *Id.* On May 13, 2008, "Judge Connelly amended Tristen's death certificate to correspond with Norton's opinion that Tristen's death was caused by asphyxia due to suffocation, rather than asphyxia by compression; the homicide finding was not changed." *Id.* at 455-456. On May 14, 2008, Norton incorporated her telephone report into an affidavit. *Id.* at 456. Dr. Wheeler submitted an affidavit restating his previous evaluation and adding his disagreement with Norton's conclusions. *Id*.

- On **August 13, 2008**, the parties filed **proposed joint findings** of fact and conclusions of law "which recommended that Applicant be granted a new trial based on due process grounds and the fact that he was denied a 'fundamentally fair trial and an accurate result.' " *Id.* On **August 26, 2008,** after the filing of Dr. Moore's sworn affidavit incorporating much of what she had previously written to the district attorney, the parties again submitted proposed joint findings of fact and conclusions of law. *Id.* However, the trial court instead ordered discovery and each of the experts (except Norton) was deposed by an attorney experienced in depositions of medical experts [in December 2008

(Moore and Wheeler) and February 2009 (Wolf)]. Norton initially could not be located and subsequently advised (and submitted affidavits) that she was not able to participate in a deposition due to medical problems. 360 S.W. 3d at 456.[3]

- Norton's December 17, 2008 affidavit "confirmed that she was incapable of preparing for or participating in a deposition" and "adopted and ratified under oath the statements and opinions she expressed during the previous telephone conference, including that she believed Tristen died from suffocation and that her death was a homicide." *Id.*
- "Based largely on Norton's opinion, on December 22, the State . . . recommended that relief be denied. Shortly thereafter, Applicant filed an objection to Norton's affidavit, arguing that, given her unwillingness to be deposed, the trial court should not consider her affidavit." *Id.* "On January 15, 2010, the State filed its proposed findings of fact and conclusions of law, which recommended that relief be denied." *Id.* at 457.
- The trial court entered findings of fact and conclusions of law and recommended a new trial. The court's findings included the following: "Dr. Moore's testimony at trial was 'critical' to the State's case and 'her opinions were the sole bases of the State's case as to cause and manner of death, without

[3] She has since surrendered her license to practice medicine. State's Brief on the Merits at page 9 and note 3.

which the State would not have obtained a conviction.' " 360 S.W.3d at 474 (dissenting opinion of Cochran, J., joined by Womack and Johnson, JJ.).

- The trial court's recommendation that Applicant receive a new trial was based on its findings that Applicant had satisfied the standards of Art. 11.073:

> Applicant has demonstrated that relevant scientific evidence that contradicts scientific evidence relied on by the state at trial is currently available and was not available at the time of Applicant's trial because the evidence was not ascertainable through the exercise of reasonable diligence by Applicant before the date of or during Applicant's trial; and the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the Application; and had the scientific evidence been presented at trial, on the preponderance of the evidence Applicant would not have been convicted.

SUMMARY OF ARGUMENT

As the trial court concluded after exhaustive fact-finding, the application of Art. 11.073 to the facts of this case requires habeas relief. This conclusion accords with the provision's legislative purpose and its plain language. Moreover, the application of Art. 11.073 to afford relief in the circumstances presented here comports with the requirements of due process of law and thereby averts the unnecessary constitutional doubt which would attend a more restrictive interpretation of Art. 11.073, that is, an interpretation less mindful of the integrity of the fact-finding process.

The Court's previous majority opinion denied habeas relief because Applicant

failed to establish that Dr. Moore's trial testimony was "false". With the subsequent enactment of Art. 11.073, habeas relief for persons convicted on the basis of scientific evidence is not dependent upon the existence of "false evidence", since that is not the standard under Art. 11.073. Nor does Art. 11.073 impose upon an Applicant the burden to prove that a crime did not occur or, if it did, to show how it occurred, in order to challenge the scientific evidence used to secure his conviction.

It is undisputed that the State's case was "largely dependent" upon the testimony of Dr. Moore, the responsible science official. At Applicant's trial, that official maintained that the evidence proved one thing (death attributable to compression asphyxiation, a homicide) but upon re-examination of the facts in accordance with the scientific method concluded otherwise, that is, that **the evidence** did not in fact support the previous opinion. Instead, the scientific evidence, properly analyzed, could not determine either the cause of death or whether a crime occurred at all. The validity of Dr. Moore's reevaluation of her expert trial opinion, on which the State "primarily depended" at trial and upon which the jury undoubtedly relied, was confirmed by several expert analyses which were thoroughly vetted. There can be no question that Dr. Moore's reevaluation "contradicts scientific evidence relied upon by the state at trial". Art.11.073(a).

ARGUMENT

ARTICLE 11.073 REQUIRES A NEW TRIAL WHERE THE CONVICTION ITSELF AND THE DETERMINATION THAT A CRIME OCCURRED AT ALL ARE "PRIMARILY DEPENDENT" UPON EXPERT TESTIMONY LATER REEVALUATED BY THE WITNESS AND FOUND TO BE SCIENTIFICALLY INSUPPORTABLE, A CONCLUSION CONFIRMED BY OTHER RELIABLE EXPERT EVIDENCE

Scientific Expert Evidence

The courts recognize that jurors defer to scientific evidence. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 595 (1993). "[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The testimony from another source can have less effect." *Ake v. Oklahoma,* 470 68, 82 n. 7 (1985) (citations omitted). *See, also*, *Brown v. Dodd,* 484 U.S. 874, 877 (1987) (acknowledging "the special authority" an expert opinion conveys to jurors).

Moreover, as the Supreme Court pointedly observed only recently:

> Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensics evidence used in criminal trials . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez-Diaz v. Mass-achusetts,* 557 U.S. 305, 310 (2009) (citing Garrett & Neufield, Invalid Forensic Science Testimony and Wrongful Convictions,

95 Va. L.Rev. 1, 14 (2009).

Hinton v. Alabama, 571 U.S.___(2014) (per curiam).

And of course there is the so-called "CSI" Effect[4] which suggests forensic evidence is infallible or far more advanced than often it is. *See* National Research Council of the National Academies, Committee on Identifying the Needs of the Forensic Science Community [the Congressionally-mandated NRC Report], *Strengthening Forensic Science in the United States: A Path Forward* 48-49 (2009); *see also id.* at 9, 12, 31 (2009).

As the NRC Report makes clear, flawed, mistaken or inadequate science is a fact of life in the contemporary criminal justice system. Article 11.073 is designed to provide - where warranted by the probable impact of such scientific evidence - a remedy. The trial court has applied the standards of Art. 11.073 and concluded, following a thorough review, that habeas relief is appropriate. The trial court's recommendation is a well-founded application of Art. 11.073's standards as a matter of legislative purpose, plain language, and the jurisprudence which upholds the integrity of the fact-finding process.

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[4] *E.g.,* Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth,* 16 Fordham Intell. Prop. Media & Ent. LJ 429, 437 (2006); Mark A. Godsey and Mari Alou, *She Blinded Me With Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481, 483 (2011).

The State Relies on an Untebable Construction of Article 11.073

The State's position necessarily rests upon a construction of Art. 11.073 which is more narrow than its plain language and, in at least one respect, simply erroneous. The State relies in particular on the defense testimony at trial offered by Dr. Robert Bux, the deputy chief medical examiner for Bexar County, Texas. The argument is that since at trial Dr. Bux made the points now raised, habeas relief under Art. 11.073 is not warranted. This argument is misplaced. Art. 11.073 concerns new evidence which "contradicts scientific evidence **relied upon by the state** at trial" (emphasis added). Art.11.073(a). The State did not rely on Dr. Bux's testimony at trial.

The State's contrary position also requires a result at odds with Article 11.073's legislative purpose, because it necessarily rests on the untenable conclusion that a trial was fair even though the evidence on which its case "primarily depended"[5] has been reevaluated and **found to be scientifically insupportable by the very official principally responsible for determining whether a homicide occurred at all and, if so, the cause of death.** ***And*****,** according to well-qualified and thoroughly vetted experts, the official expert's previous opinions were in fact insupportable as a matter of science. The State's position also requires a conclusion that this fully-confirmed

[5] In another context, *compare and contrast Ex parte Weinstein,* WR-78,989-01 (Tex. Crim. App., January 29, 2014) (unpublished) and the Court's observation that the disputed evidence there was not critical: it was "very unlikely Adams' testimony was the tipping point."

reevaluation casts little if any pall on the integrity of the fact-finding process.

Moreover, the State's position that the integrity of the proceeding is intact because the defense presented contrary expert testimony at trial ascribes insufficient import to (1) the fact that the State's case depended primarily on the medical examiner's testimony, and (2) the fact that Dr. Moore was not merely an expert with a different opinion - she was the official charged with the responsibility to make the determinations on which the State's case rested.

It would be difficult to fathom a more appropriate situation for application of Art. 11.073's remedy: responsible medical official offers expert opinions in her official capacity that **the pertinent evidence demonstrates x and y, facts essential to the determination of the cause of death and a determination that a crime occurred at all;** subsequently, the same medical official reevaluates the evidence and offers expert opinions **that the pertinent evidence does not in fact support those conclusions**, determinations with which several well-qualified experts concur after having reviewed and analyzed the pertinent evidence**.** Respectfully, the State's position is not sustained by legislative purpose or Art. 11.073's plain language. Moreover, its position invites constitutional doubt in a jurisprudence which strives to uphold the integrity of the fact-finding process. NACDL submits this *amicus* brief to support a reading of this important legislation which accords with its purpose,

language, and the due process of law secured by the Fourteenth Amendment.

Article 11.073 Should Be Construed to Avoid Doubt About Its Constitutionality

To give Article 11.073 the cramped interpretation for which the State now advocates not only conflicts with the remedial intent of the Texas Legislature in enacting the provision (as explained in other briefing to this Court), but also unnecessarily invites serious constitutional questions. The Court should reject the strained interpretation of Article 11.073 urged by the State and acknowledge the remedy provided in order to avoid serious constitutional questions. *See, e.g., Skilling v. United States,* 561 U.S.____, 130 S.Ct. 2896, 2929-2930 (2010) (statutes should be accorded a reasonable construction which avoids constitutional doubt and infirmity; numerous citations omitted); *Stockton v. Offenbach,* 336 S.W.3d 610, 618 (2011) ("We presume that when enacting legislation, the Legislature intends to comply with the state and federal constitutions, and we are obligated to avoid constitutional problems if possible.") (citation and internal quotation marks omitted).

Due Process of Law Jurisprudence

The Due Process Clause of the Fourteenth Amendment secures to an accused individual the **fundamental right to a fair trial**, *Brady v. Maryland,* 373 U.S. 83 (1963), *Pena v. State,* 353 S.W.3d 797 (Tex. Crim. App. 2011); *Holmes v. South Carolina,* 547 U.S. 319 (2006) (upholding the right to defend and rejecting on due

process grounds a judicially-created rule which foreclosed evidence that another committed the offense where the evidence of guilt was strong, particularly the forensic evidence), *Chambers v. Mississippi,* 410 U.S. 284 (1973) (denial of due process where petitioner could not challenge another's renunciation of his confession to the crime for which petitioner was convicted), *Crane v. Kentucky,* 476 U.S. 683, 690 (1986). **Perhaps most important to a consideration of Article 11.073 is its commendable goal to assure the integrity and accuracy of the fact-finding process**, *Dutton v. Evans,* 400 U.S. 74, 89 (1970)*, Berger v. California,* 393 U.S. 314, 315 (1969), *Bruton v. United States,* 391 U.S. 123, 135-137 (1968). *See, also International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) **(**applying **"the traditional notions of fair play and substantial justice implicit in due process**") (internal citations omitted) (emphasis added).

The "False Testimony" Conundrum and Article 11.073

While "false" evidence is not a necessary predicate for relief under Art.11.073 standards, that concept informs due process jurisprudence and warrants discussion even though this Court is not constrained by a need to determine whether testimony is false or not. As the parties agree (State's Brief on the Merits at 13), Art. 11.073 provides a new basis for habeas relief where neither an actual innocence nor a false testimony claim obtains under due-process jurisprudence. State's Brief at 11 and 13.

Nonetheless, the "false evidence" conundrum warrants some discussion as an issue which appears to have concerned the Court in *Robbins,* 360 S.W.3d 446.

Pre-Article 11.073, a majority of this Court disagreed with the trial court's finding that Dr. Moore's testimony was "false" and that a new trial was therefore required by the Due Process Clause. Regarding "actual innocence" or "false" testimony as a basis for habeas relief, one dissenting opinion (3 judges dissenting) determined that this case did not fall within either category. The other dissenter concluded that a due process violation was clear from the Applicant's demonstration of false evidence.

The majority's previous habeas opinion distinguished Moore's "re-evaluation of her [trial] testimony" from cases involving due process violations as a consequence of false testimony, concluding: "we do not believe Moore's testimony was false, it did not create a false impression of the facts" [360 S.W.3d at 462-63]. Because the post-trial evidence did not "rule out" Moore's prior and now-renounced conclusions, the majority reasoned that Applicant failed to prove the Moore testimony was false. *Robbins,* at 461-462. Four members of the Court concluded (as did the trial court) that due process required a new trial. One of the dissenting opinions (3 of the dissenters) did not attribute the denial of due process to "false testimony" as such. *See Robbins,* 360 S.W.3d at 470 (Cochran, J., dissenting) ("I agree with Judge Price's concurrence that neither of our two recognized categories of 'actual innocence' or

'false testimony' is exactly appropriate").

Another dissenter found the due process violation to be the product of "false" evidence and in doing so expounded on the conundrum created by use of the term "false" to describe that which is not a lie, perjury, or fraud. Judge Alcala wrote: "The Supreme Court has disallowed this technical splicing of the truth to avoid due process violations. In evaluating whether evidence is false, it has focused on whether the testimony, taken as a whole, gives the jury a false impression." *Id.* at 477. As a consequence of Moore's testimony, this dissent reasoned, the jury received **a false impression of the controlling evidence** about the cause and manner of death (citing *Alcorta v. Texas,* 355 U.S. 28, 31 (1957) (due process required a new trial where the jury was given a false impression as a consequence of a witness' misstatement of his relationship with the victim), and *Napue v. Illinois,* 360 U.S. 264, 270 (1959) (same result where witness understated the reward received from the State for his testimony). *Id.* at 477-480.

The majority opinion also acknowledged this conundrum. *See Robbins,* at 459-460 [" '[t]estimony that is untrue' is one of many ways jurists define false testimony [and the] Supreme Court has indicated that 'improper suggestions, insinuations and, especially, assertions of personal knowledge' constitute false testimony" (citations omitted); and at 461: "It is true that we have held that testimony may be false because it creates a false impression of the facts."].

"False or not false" is, to some degree, a question of semantics. Dr. Moore testified that a homicide occurred. The majority, believing Applicant failed to establish the cause of death or that no homicide had occurred,[6] concluded that the testimony therefore could not be deemed "false". Viewed another way, however, the testimony is "false" (albeit not intentionally so, necessarily). Dr. Moore testified that **the forensic evidence established** that a homicide had occurred. But **the evidence did not establish** that a homicide occurred, according to Dr. Moore's subsequent scientific analysis of the facts, the validity of which was confirmed by several other well-qualified experts. This illustrates the conundrum the "false testimony" requirement can create, as the Court as a whole has recognized and with which it has grappled.

At trial, Dr. Moore represented to the jury that it was ***true*** - indeed, certainly true - that the child's death was caused by compression asphyxia which was the result of homicide. At that time, she admittedly was very inexperienced, and was to some extent predisposed towards the prosecution's position. Years later Dr. Moore reevaluated those opinions, concluding that neither the cause nor manner of death could be determined reliably from the available data and that her opinion that death

[6] In *Montcrieffe v. Holder,* __U.S.__, 133 S.Ct. 1678 (2013), an immigration deportation case, the Supreme Court construed the applicable statute without resort to the circumstances of the underlying offense and held that the marijuana distribution offense at issue was not an "aggravated felony". The Court rejected the dissent's suggestion that the problem would be solved by requiring the petitioner to prove the offense was not an "aggravated felony". It is worth noting that the Texas legislature did not adopt such an approach. Applicant is not required to prove how the death occurred in order to obtain relief under Art. 11.073.

was caused by compression asphyxia was in fact inaccurate. These conclusions were confirmed by several other experts who also analyzed the available data.

It bears repeated emphasis that Applicant's conviction was based primarily on scientific evidence, Dr. Moore's expert testimony. As the majority opinion states: "**The State's case largely depended on the expert opinion of Dr. Patricia Moore, the medical examiner** * * * " (emphasis added). The question before the Court now is whether the application of Article 11.073 warrants a new trial where the conviction is "largely dependent" upon opinions Dr. Moore has now reevaluated and found to be **insupportable as a matter of science**, a conclusion also reached by other qualified experts who were vetted regarding their conclusions (as the one contrary opinion was not). As the plain language of Article 11.073 reveals, it is not necessary to determine the issue here in the "sticky wicket" of the "false evidence" conundrum.

In Summary

As noted, courts have long recognized the special influence of science in the courtroom, particularly its impact upon jurors who both expect and rely upon scientific evidence. Here, where the State's case was "largely dependent" on Dr. Moore's now-reevaluated expert testimony, there can be no serious dispute regarding the impact of testimony which unquestionably served as the primary building block upon which this conviction rests. This science-based testimony was reevaluated by **the very official** whose **official duty** it was to examine the pertinent evidence and determine cause and

manner of death, if possible. As the trial court has recommended, a new trial is warranted by an application of Art. 11.073's standards in a manner consistent with its legislative purpose and plain language, and in a manner which avoids constitutional doubts.

CONCLUSION

The trial court correctly applied the standards of Art. 11.073 to the evidence and determined "that **relevant scientific evidence** [Dr. Moore's reevaluation and findings that her prior expert opinions were scientifically insupportable, as validated by other qualified experts] that **contradicts scientific evidence relied on by the state at trial** [Dr. Moore's testimony] **is currently available and was not available at the time of Applicant's trial because the evidence was not ascertainable through the exercise of reasonable diligence by Applicant before the date of or during Applicant's trial** [because the reevaluation and findings had not yet occurred]; and **the scientific evidence would be admissible** under the Texas Rules of Evidence at a trial held on the date of the Application [there is no dispute concerning the admissibility of the new evidence]; and **had the scientific evidence been presented at trial, on the preponderance of the evidence Applicant would not have been convicted** [a sound, if not inevitable conclusion given that the State's case depended primarily on Moore's now-reevaluated testimony]" (emphasis added). The trial court correctly enunciated

and applied Art. 11.073's standards in accordance with the evidence and its recommendation comports with the requirements of our jurisprudence to protect the integrity and accuracy of the fact-finding process.

PRAYER

For the reasons stated herein, in the Applicant's briefs, and briefs offered in support of Applicant, *Amicus* NACDL respectfully prays that this Court grant habeas corpus relief, vacate the judgment of conviction, and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This document was served on counsel for the parties, Bill Delmore, Montgomery County District Attorney's Office, 301 North Thompson, Conroe, Texas 77301, and Brian Wice, 440 Louisiana, Suite 900, Houston, Texas 77002-1635, by placing copies in the U.S. mail on March 7, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex.R.App.P. 9.4(1)(i)(1), I certify that this document complies with the type-volume limitations of Tex.R.App.P. 9.4(i)(2)(D):

1. Exclusive of the exempted portions set out in Tex.R.App.P. 9.4(i)(1), this document contains 5,405 words.

2. This document was prepared in proportionally spaced typeface using WordPerfect Times New Roman 14 for text and Times New Roman 12 for footnotes.

/s/Shirley Baccus-Lobel
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