No. 22-7546

In the Supreme Court of the United States

ROBERT LESLIE ROBERSON, III,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF FOR RETIRED FEDERAL JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

MELISSA ARBUS SHERRY
Counsel of Record
MEAGHAN J. HALEY
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3386
melissa.sherry@lw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF AMICI CURIAE*

Amici curiae are retired federal judges:

- Judge Robert Cindrich, U.S. District Judge for the Western District of Pennsylvania (1994-2004);
- Judge Andre Davis, U.S. Court of Appeals for the Fourth Circuit (2009-17); U.S. District Judge for the District of Maryland (1995-2009). Judge Davis also served as a senior advisor to the President's Council of Advisors on Science and Technology (PCAST), on its 2016 report to the President entitled *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*;
- Judge Nancy Gertner, U.S. District Judge for the District of Massachusetts (1994-2011);
- Judge Stephen Orlofsky, U.S. District Judge for the District of New Jersey (1996-2003); and
- Judge T. John Ward, U.S. District Judge for the Eastern District of Texas (1999-2011).

Together, amici have over sixty-five years of judicial service. Amici each retain a vested interest in the fair and efficient administration of justice.

---

* The parties have received timely notice of the intent to file this brief. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

From their collective experience, amici developed an acute understanding of the role courts should play when faced with scientific advancements that call into question the foundation on which prior convictions are based. Amici recognize that decisions to convict may have been premised on outdated understandings of scientific and forensic evidence that subsequent evolution demonstrates are wrong or deeply flawed. Thankfully, many courts have properly exercised their authority with respect to advancements in areas of scientific inquiry and have ordered new trials when the scientific methodology has proven unreliable. But others have not.

Amici have a deep interest in ensuring that all courts fully and fairly consider scientific developments and that convictions premised on flawed "science"—particularly capital convictions—do not stand. Roberson's case and the decisions below directly implicate that interest.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A critical foundation of our criminal justice system is that defendants are convicted based on accurate and reliable evidence, as judged by a jury of their peers. Courts play a pivotal role in ensuring that this is more than an empty promise. At trial, courts ensure that unreliable evidence based on unproven science is not admissible. And when the scientific evidence is debatable, juries see that debate. Evidence comes in on both sides and juries decide whether the scientific (or other) evidence is sufficient to find guilt beyond a reasonable doubt.

That system has the potential to break down when scientific theories once thought inviolate prove flawed

over time. But here too, courts play an essential role in protecting the judicial process. When the scientific consensus changes and the reliability of a theory that underpins a conviction is called into question, courts are the failsafe. Judges must be willing to fully and fairly consider new evidence and to order a new trial when a conviction could not fairly be sustained based solely on such evidence if introduced today.

That did not happen in Roberson's case. So-called "Shaken Baby Syndrome" (SBS) is a prime example of a previously accepted theory that has proven fundamentally flawed over time. At the time of Roberson's conviction, everyone accepted SBS as the undisputed cause of his daughter's death. Mountains of new evidence—evidence the jury never considered—now proves otherwise.

The Texas court system failed Roberson. It failed to fully and fairly consider that new evidence. It rubber-stamped a capital conviction based on unreliable medical evidence. It denied Roberson the constitutional process he is due. And his life hangs in the balance as a result. This Court's review is needed to prevent that miscarriage of justice.

ARGUMENT

A. Capital Convictions Must Be Based On Accurate And Reliable Evidence Fairly Considered By An Impartial Adjudicator

Accurate and reliable scientific evidence plays an indispensable role in the American justice system. In no area is the need for such evidence more critical than when a defendant's life is at stake. But what qualifies as reliable evidence may change over time. Theories previously thought credible can later be disproven as "junk science." And when that happens,

courts cannot turn a blind eye. Judges must fully and fairly consider new evidence when scientific theories can no longer credibly support a conviction.

1. In a wide variety of settings, this Court has recognized the indispensable role that accurate and reliable evidence plays in the American legal system. Even in the civil context, expert evidence is admissible only if it is reliable, which requires courts to assess whether the "reasoning or methodology underlying the testimony is scientifically valid." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 592-93 (1993). And it is well-established that the government's failure to correct the admission of false evidence violates a criminal defendant's due process rights. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

2. In no area is the need for accurate and reliable evidence more critical than when a criminal defendant's life hangs in the balance. *See Lockett v. Ohio*, 438 U.S. 586, 604, 612-13 (1978) (recognizing that "the penalty of death is qualitatively different" (citation omitted)).

In *Moore v. Texas*, this Court recognized that "[t]he medical community's current standards" constrain a State's ability to execute an intellectually disabled capital defendant. 581 U.S. 1, 20 (2017); *see also Hall v. Florida*, 572 U.S. 701, 721-22 (2014) (noting the importance of considering "views of medical experts" in determining intellectual disability in a capital context). And just this Term, in *Escobar v. Texas*, 143 S. Ct. 557 (2023), the State of Texas admitted that a new trial was warranted when "the State had offered flawed and misleading forensic evidence" at a capital trial—and this Court granted, vacated, and remanded in light of that concession. *See* Respondent Br. 2,

Escobar v. Texas, 143 S. Ct. 557 (2023) (No. 21-1601), 2022 WL 4781414.

3. The natural consequence of scientific and medical progress is that evidence once thought to be credible may be proven inaccurate and unreliable over time.

Examples abound of popular scientific theories that are now recognized as "junk science." And the forensic fields are no different. A number of methods once widely used and accepted—from bitemarks, to arson diagnostics, to comparative bullet lead analysis—have now been called into serious question. *See* Michael J. Saks et al., *Forensic Bitemark Identification: Weak Foundations, Exaggerated Claims*, 3 J.L. & Biosciences 538 (2016) (bitemark analysis); Valena E. Beety & Jennifer D. Oliva, *Evidence on Fire*, 97 N.C. L. Rev. 483 (2019) (arson science); Paul C. Giannelli, *Comparative Bullet Lead Analysis: A Retrospective*, 47 Crim. L.J. 306 (2010) (comparative bullet lead analysis).

This Court has already acknowledged the danger of convictions secured in reliance on junk science. In *Melendez-Diaz v. Massachusetts*, the Court recognized that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." 557 U.S. 305, 319 (2009). As support, the Court cited to "[o]ne commentator" who "assert[ed] that '[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.'" *Id.* (alteration in original) (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491 (2006)). And the Court noted a "study of cases in which exonerating evidence resulted in the overturning of criminal convictions" which "concluded

that invalid forensic testimony contributed to the convictions in 60% of the cases." *Id.* (citing Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009)); *see also Hinton v. Alabama*, 571 U.S. 263, 276 (2014) (relying on same study and summarily reversing in capital case for *Strickland* prejudice analysis).

More than a decade after that landmark study, the problems identified still persist. A 2016 report by the President's Council of Advisors on Science and Technology, building on the study's findings and conclusions, analyzed a number of forensic methods the 2009 report had identified as problematic. President's Council of Advisors on Sci. & Tech, *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Composition Methods* (2016), https://obamawhitehouse.archives.gov/sites/default/fifil/microsites/ostp/PCAST/pcast_forensic_science_rerepo_final.pdf. It concluded that many of the methods lacked validation studies, and either had no foundational validity and should be disregarded entirely, or required more rigorous standards and guidelines if they were to be relied on in the future. *Id.* And according to the National Registry of Exonerations, updated as of June 13, 2023, "false or misleading forensic evidence" has contributed to 24% of all wrongful convictions in the United States. Nat'l Registry of Exonerations, *% Exonerations by Contributing Factor* (current as of June 13, 2023), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.

4. Allowing a conviction to stand based on discredited (or, perhaps more accurately, false)

evidence violates due process and undermines our criminal judicial system. Allowing a *capital* conviction to stand based on such evidence is simply untenable. Put another way, a state should not be allowed to execute a defendant whose conviction was secured based on a scientific theory that would be either inadmissible, or insufficient to sustain a conviction, today.

Several courts of appeals have recognized as much. *See, e.g.*, *Gimenez v. Ochoa*, 821 F.3d 1136, 1143-44 (9th Cir.), *cert. denied*, 580 U.S. 1004 (2016); *Han Tak Lee v. Glunt*, 667 F.3d 397, 404-05 (3d Cir. 2012); *cf. Feather v. United States*, 18 F.4th 982, 986 (8th Cir. 2021) (assuming without deciding that "the government's use of false or discredited scientific evidence could violate a criminal defendant's right to due process"). As Judge Kozinski explained, "courts have long considered arguments that the introduction of faulty evidence violates a petitioner's due process right to a fundamentally fair trial." *Gimenez*, 821 F.3d at 1143 (citing cases). That rule applies with full force when challenging a conviction secured based on "expert testimony about discredited forensic principles or other junk science." *Id.*

Due process requires more than a rubber stamp. Judges must fairly and fully consider the evidence in the cases that come before them. And judges flout that responsibility when they disregard valid evidence submitted by one side. Without engaging in a genuine and fair inquiry into the presentation of evidence, judges render the promises of due process essentially meaningless. Due process guarantees are more than mere formalities. Allowing a capital defendant to introduce new evidence that calls into doubt the scientific or medical understandings that

undergird his capital conviction is the beginning, not the end, of the analysis. That evidence must be fully and fairly considered. Only then can our legal system fulfill the Fourteenth Amendment's promise.

In short, scientific progress is a socially beneficial tool, but our legal system must adapt to wield it properly. Judges exacerbate the "junk science" problem when they fail to adequately consider scientific progress, and allow convictions to stand based on theories that experts within the relevant scientific field no longer accept as sound. A just legal system cannot turn a blind eye to such advances. It cannot allow convictions to stand simply because the defendant was tried at a time and in a place where the "science" was different. And it certainly cannot allow the most severe and irreversible sanction of death to be carried out without an assurance that it rests on accurate and reliable evidence—judged by the scientific support and consensus *today*, not some discredited, historical relic of what the medical community once believed.

B. Allowing Roberson's Conviction To Stand Would Violate Due Process And Undermine The Criminal Justice System

So-called "Shaken Baby Syndrome" (SBS) is a prime example of "science" that has proven flawed over time. Upholding Roberson's conviction—which was secured based on flawed SBS evidence, undisputed at trial—would undermine fundamental due process protections and our criminal justice system. This Court's review is warranted.

1. SBS is a prime example of what some would call "junk science." Widely accepted by the medical community at one time, SBS is now considered to be

devoid of scientific merit or, at least, subject to serious doubt—even by the doctor who pioneered the diagnosis. *See, e.g.*, Joseph Shapiro, *Rethinking Shaken Baby Syndrome*, NPR (June 29, 2011), https://www.npr.org/2011/06/29/137471992/rethinking-shaken-baby-syndrome. As recognized by multiple courts and commentators, the original understandings of SBS—which have been used to justify trial testimony regarding both the cause and timing of a victim's injuries—has eroded.

With respect to causation, "[n]ew research into the biomechanics of head injury" including "a significant change in medical science relating to head injuries in children, generally, and the [SBS] hypothesis, in particular," have "reveal[ed] that the doctors who testified" for certain prosecutions "misinterpreted the medical evidence to conclude that shaking, or shaking with impact, was the only mechanism capable of causing [certain victims'] injuries." *People v. Bailey*, 999 N.Y.S.2d 713, 724 (N.Y. County Ct. 2014), *aff'd,* 144 A.D.3d 1562, 1564 (App. Div. 2016); *see also State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008) ("newly discovered evidence . . . shows that there has been a shift in mainstream medical opinion since the time of [defendant']s trial as to the causes of the types of trauma [the victim] exhibited"); Pet. 16-22 (summarizing new evidence on causation).

Likewise, as to timing, "[a]lthough the medical profession once thought that there is no interim between trauma and collapse in shaken-baby syndrome, the medical profession now believes . . . that there can be an interim in which the child would be conscious, but probably lethargic or fussy or feverish or have difficulty sleeping or eating." *Aleman v. Vill. of Hanover Park*, 662 F.3d 897, 902-03 (7th Cir.

2011), *cert. denied*, 567 U.S. 935 (2012); *see also Edmunds*, 746 N.W.2d at 596 (recognizing evolution in science as to "whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death"); Pet. 17-18 (summarizing new evidence on timing).

At bottom, it is irrefutable that "[d]oubt has increased in the medical community 'over whether infants can be fatally injured through shaking alone.'" *Cavazos v. Smith*, 565 U.S. 1, 13 (2011) (Ginsburg, J., dissenting) (quoting *Edmunds*, 746 N.W.2d at 596).

2. The jury that convicted Roberson of capital murder took the SBS diagnosis as an established and undisputed fact. *See* Pet. 9-10. In light of intervening advances undermining the scientific foundation of SBS, allowing his conviction to stand—and his execution to go forward—would be a gross miscarriage of justice.

Other courts have recognized as much. In *Commonwealth v. Epps*, for example, the Supreme Court of Massachusetts considered the substantial new evidence questioning "the diagnostic significance of the symptoms previously thought indicative" of SBS. 53 N.E.3d 1247, 1264 (Mass. 2016). The court explained that while defense counsel may not have been ineffective in failing to counter the evidence of SBS back in 2007, "if the trial" had been conducted "today [*i.e.*, in 2016], it would be manifestly unreasonable for counsel to fail to find and retain a credible expert given the evolution of the scientific and medical research." *Id.* at 1266. And because the court's "touchstone must be to do justice," it remanded for a new trial. *Id.*

Similarly, in *Edmunds*, the Court of Appeals of Wisconsin ordered a new trial based on newly

discovered evidence about SBS, even though the evidence in that case revealed "competing medical opinions" and "fierce disagreement between forensic pathologists." 746 N.W.2d at 599. The very "emergence of a legitimate and significant dispute within the medical community," the court explained, is what "constitutes newly discovered evidence." *Id.* That is because, at trial, "there was no such fierce debate." *Id.* Whereas today, "a jury would be faced with competing credible medical opinions." *Id.* Because "a jury, looking at both the new medical testimony and the old medical testimony, would have a reasonable doubt as to Edmunds's guilt," the court reversed and remanded for a new trial. *Id.*; *see also Bailey*, 144 A.D. at 1564 (affirming grant of new trial because the "cumulative effect of the research and findings . . . as presented in SBS/SBIS cases and short-distance fall cases supports the court's ultimate decision that, had this evidence been presented at trial, the verdict would probably have been different"); Order of the Court, *State v. Nieves*, No. 17-06-00785, at 69-70 (N.J. Super. Ct. Law Div. Jan. 7, 2022) (banning testimony about SBS (referred to as "AHT"), calling the diagnosis "akin to 'junk science'").

With justice as the touchstone, Roberson's capital conviction cannot be sustained based on undisputed evidence at trial that SBS caused his daughter's death when intervening advancements in medical science have proven that evidence is, at best, hotly disputed or, at worst, inaccurate and unreliable.

All of that evidence was before the Texas courts. Roberson presented extensive new evidence showing both that a shift in mainstream scientific and medical thinking has seriously undermined the SBS hypothesis, and that scientific developments show

viable alternative causes for the death of Roberson's daughter. By contrast, the State offered little to no additional evidence of its own, refused to engage with Roberson's evidence, and failed to show that SBS remains a reliable theory. Notwithstanding the one-sided presentation, the Texas court adopted—essentially in full and verbatim—the State's proposed findings of fact and conclusions of law. Pet. 24; *see also* Pet. App. 6-17 (Texas court decision); Pet. App. 328-45 (State's proposed findings of fact). The Texas Court of Criminal Appeals rubber-stamped that result. Pet. App. 1-4.

Without this Court's intervention, Roberson faces execution even though his conviction rests on a medical theory that was presented to the jury as established and undisputed scientific fact, but that has been substantially eroded by changes in scientific understanding in the intervening years. Allowing the decision below to stand contravenes the basic tenants of our legal system, weakens the public's confidence in the judiciary, and undermines the constitutional promise of due process.

CONCLUSION

This Court should either grant plenary review or, alternatively, summarily reverse the decision below.

Respectfully submitted,

MELISSA ARBUS SHERRY
Counsel of Record
MEAGHAN J. HALEY
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3386
melissa.sherry@lw.com

Counsel for Amici Curiae

June 14, 2023