No. __________

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. In this death penalty case, the State's evidence of guilt rested entirely on a single piece of scientific evidence presented by state forensic experts. In such a case, is the Sixth Amendment guarantee of effective assistance of counsel violated when appointed defense counsel fails to obtain a skilled, competent forensic expert without which no reliable conviction or adversarial testing of the State's charges against an accused could be accomplished?

2. When a state's criminal case against an indigent accused turns entirely on scientific evidence, should this Court provide guidance to lower courts on what the Sixth Amendment right to counsel requires of an appointed lawyer where the defendant cannot be effectively defended or reliably convicted without the aid of a skilled forensic defense expert and post-conviction evidence from skilled experts establishes a reasonable probability that the outcome of the trial would have been different had such evidence been presented?

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I. WITH INCREASING FREQUENCY, CRIMINAL PROSECUTIONS IN THIS COUNTRY ARE DEPENDENT ON SCIENTIFIC EVIDENCE WHICH OFTEN PROVIDES THE SOLE BASIS FOR A CRIMINAL CONVICTION. THIS COURT SHOULD REVIEW WHAT THE SIXTH AMENDMENT REQUIRES FROM DEFENSE COUNSEL TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN SUCH A CASE AND WHETHER THE FAILURE TO OBTAIN A SKILLED, COMPETENT SCIENTIFIC EXPERT VIOLATES THE SIXTH AMENDMENT. 16

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APPENDIX F Alabama Supreme Court, Order denying a petition for a writ of certiorari, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013).

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PETITION FOR WRIT OF CERTIORARI

Anthony Hinton respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006), is unreported and is attached as Appendix A, along with that court's denial of rehearing. The order of the Alabama Supreme Court remanding for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008), is attached as Appendix B. The Order of the Alabama Court of Criminal Appeals remanding to the circuit court, Hinton v. State, No. CR-04-0940, 2008 WL 5517591 (Ala. Crim. App. Dec. 19, 2008), along with its Order on return to remand on August 26, 2011, and rehearing denial on October 21, 2011, is attached as Appendix C. The Order of the Alabama Supreme Court remanding for further compliance with its remand order, Ex parte Hinton, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012), is attached as Appendix D. The order of the Alabama Court of Criminal Appeals complying with the remand, Hinton v. State, No. CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013), is attached as Appendix D. The order of the Alabama Supreme Court denying a petition for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013), is unreported and is attached as Appendix F.

JURISDICTION

The initial judgment of the Alabama Court of Criminal Appeals was issued on April 28, 2006. Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006). On October 17, 2008, the Alabama Supreme Court reversed and remanded for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008). On February 15, 2013, the Alabama Court of Criminal Appeals on return to second remand affirmed the trial court's denial of postconviction relief, Hinton v. State, CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013), and the Alabama Supreme Court denied Mr. Hinton's timely Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on April 19, 2013. Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013). On July 15, 2013, Justice Thomas extended to and including September 16, 2013, the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Anthony Ray Hinton has been on Alabama's death row for 27 years for two murders he adamantly maintains he did not commit. There is compelling evidence supporting his claim of innocence which has divided lower courts. A three-member majority of the Court of Criminal Appeals affirmed his conviction over strong dissents criticizing the majority for failing to respond to the vast evidence that a miscarriage of justice has occurred. Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *66 (Ala. Crim. App. Apr. 28, 2006) (Cobb, J., dissenting) ("There exists ample evidence that the adversarial system suffered a severe breakdown here because of trial counsel's ignorance of the law and his resulting decision to retain an unqualified witness. As a result, the confidence in the outcome of Hinton's trial has been seriously undermined."); id. at *70 (Shaw, J., dissenting) ("I am concerned that confidence in the outcome of Hinton's trial was seriously compromised by the failure of trial counsel to seek the additional funding to which he was entitled."). In a narrowly divided 4-3 order, the Alabama Supreme Court also denied further review of this case. Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013). This petition follows.

In this case, the State conceded at trial that without scientific testimony linking gun evidence from three separate crimes, Alabama could not convict Anthony Ray Hinton of capital murder and a judgment of acquittal would be required. Because the charges against Mr. Hinton involved two separate robbery-murders that occurred

months apart with no evidence linking Mr. Hinton to either crime other than the State's gun evidence, the trial court took the unprecedented step of sua sponte consolidating the separate crimes into a single trial. The State's ability to link these two murders required evidence from a third attempted robbery-murder where the victim survived. The trial judge appointed counsel to Mr. Hinton who was thus required to defend against three distinct crimes – capital murder charges in two separate cases occurring nearly five months and eleven miles apart, as well as evidence from a third attempted murder case. Although Alabama law authorized the appointment of two lawyers for a capital murder case, the judge appointed just one lawyer whose out-of-court compensation was limited by statute to $1000.

Because the State's case against Mr. Hinton rested entirely on testimony from two experts that a gun seized from Mr. Hinton's mother fired the bullets recovered from all three crime scenes, Mr. Hinton's defense required expert assistance from a firearms identification examiner. Mr. Hinton's appointed counsel believed he had only $500 for expert assistance and could not find an expert examiner to assist him for that little money. Instead, he presented testimony from a civil engineer who was inadequately trained and skilled in firearms identification. This engineer, who was partially blind, admitted at trial that he did not know how to operate the standard comparison microscope used in firearms identification and was thoroughly discredited and mocked by state prosecutors. The jury deliberated less than two hours before finding Mr. Hinton guilty of both capital murders.

In collateral proceedings, Mr. Hinton presented compelling evidence from

experienced firearm identification experts who testified that there was no evidence to support the State's claim that the bullets recovered from the three crimes came from a single weapon. Experts also testified that there was no evidence that could support the State's claim that bullets could be matched to the Hinton weapon. Two experts testified that there was evidence that mechanically excluded the Hinton weapon from the bullets recovered from at least one of the crimes. Finally, the experts pointed out defects and deficiencies in the State's prior testing that were evident in the testing notes and documents prepared by the State's examiners in support of their findings. Additional evidence supporting Mr. Hinton's claim of innocence was presented below, including details about Mr. Hinton's compelling alibi which contradicted a finding of guilt. State prosecutors nonetheless wrote a 144-page order which made detailed findings against Mr. Hinton and denied relief. Two years later, following repeated motions from Mr. Hinton seeking a ruling, the trial judge adopted the State's order verbatim.

This case raises fundamental questions about the right to counsel in this country when the government's criminal case rests exclusively on scientific evidence, a phenomenon which has dramatically increased in frequency since this Court last addressed the parameters of the right to counsel in Gideon v. Wainwright, 372 U.S. 335 (1963) fifty years ago. Because most claims of ineffective assistance of counsel are not typically presented until state collateral proceedings, many petitioners are unable to seek certiorari review in this Court following state court litigation, due to the federal

statute of limitations for federal habeas review.[1] This case presents the Court with an uncommon opportunity to address the requirements of the Sixth Amendment in a posture outside of federal habeas corpus proceedings where review is constrained by the standards created by this Court's habeas corpus jurisprudence and those imposed by the Anti-Terrorism and Effective Death Penalty Act. See Harrington v. Richter, 131 S. Ct. 770 (2011).

A. Facts

Anthony Ray Hinton was arrested in his mother's front yard on July 31, 1985, after Sidney Smotherman, manager of Quincy's restaurant in Bessemer, Alabama, picked Mr. Hinton out of a photo line-up as a suspect in a robbery at Quincy's on July 26, 1985. (R. 1168-69, 1986-87.)[2] Police searched Mrs. Beulah Hinton's home and took her old .38-caliber revolver. (R. 1161, 1173, 1179.) Firearms identification examiners employed by the Alabama Department of Forensic Sciences tested the gun and said it fired not only the two bullets recovered from the Quincy's crime, but also bullets from two earlier robbery-murders: the fatal shooting of Mrs. Winner's restaurant manager John Davidson in Birmingham on February 23, 1985, and that of Captain D's restaurant manager Thomas Wayne Vason in Woodlawn on July 1, 1985. (R. 1233-34,

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[1]Lawrence v. Florida, 549 U.S 327, 329 (2007) (filing petition for certiorari in the United States Supreme Court after state court enters final judgment on collateral review does not toll 1-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment under 28 U.S.C. § 2244(d)).

[2]References are to the appellate record below in this case. "PH." refers to the preliminary hearing transcript. "R." refers to the trial transcript. "PC." refers to the clerk's record in the state postconviction proceedings. "PR." refers to the transcript of the postconviction hearing.

1282.) The assertion that all six recovered bullets were fired from the same weapon was the sole evidentiary basis for the State's theory that the same person who attempted to kill Mr. Smotherman killed Mr. Davidson and Mr. Vason.

Anthony Hinton was charged with two counts of capital murder and was too poor to afford a lawyer. The trial court appointed one lawyer, Sheldon Perhacs (R. 74), whose compensation for out-of-court work was capped at $1000. Ala. Code § 15-12-21.[3] The trial court took the unprecedented step of sua sponte consolidating two separate capital murder cases into a single trial. Ex parte Hinton, 548 So. 2d 562, 566 (Ala. 1989). To prove the two capital murder charges, the State relied on evidence of the uncharged Quincy's robbery, which meant a single lawyer had to defend against three separate cases. Appointed counsel tried to obtain compensation for each of the capital murder cases but his fee declaration was rejected. He was paid a total of $1600 for his work at trial.[4]

Anthony Hinton, twenty-nine years old with no history of violent crime, steadfastly maintained his innocence. There were no eyewitnesses to either murder and fingerprints from each crime scene did not match Mr. Hinton. (R. 1984-86.) A

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[3]The cap on compensation in death penalty cases for out-of-court time was eliminated in 1999. Ala. Code § 15-12-21(d).

[4]Mr. Perhacs was paid a total of $1600 for representing Mr. Hinton. (PR. 179.) He testified in postconviction proceedings that Mr. Hinton's defense "require[d] a lot of time and effort" because "[t]wo capital cases were combined for trial, but they were all contingent upon the occurrence of a third event which was a robbery at Quincy's." (PR. 180); see also Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *26-27 (Ala. Crim. App. Apr. 28, 2006) (Perhacs testified "that was not adequate compensation because he spent much more time than that trying the case; that the case required a lot of effort because he was, in effect, defending three cases at one time; and that he tried to get compensated for the two capital cases, but his fee declaration was rejected").

polygraph test given by police exonerated him of any involvement in these crimes but the trial court refused to admit it into evidence. (R. 1868-70, 1953-54, 2025-28, 2150-53.) Mr. Hinton was working in a secure warehouse facility fifteen miles away at the time of the Quincy's robbery. (R. 1023, 1345, 1350, 1393-98.) Witnesses at trial and in postconviction proceedings testified that he received his work assignment for that night at about 12:10 a.m. (R. 1396, 1398) and that it was physically impossible for him to travel fifteen miles to Quincy's in time to wait for the manager as he left the restaurant at 12:14 a.m. (R. 1812, 1809-10, 1146.)

In fact, "the only evidence linking Hinton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver." Ex parte Hinton, No. 1051390, 2008 WL 4603723, at *2 (Ala. Oct. 17, 2008). The State conceded at trial that, without a weapon match, there is no basis to believe that Anthony Hinton is guilty of these offenses. At the suppression hearing, the prosecutor told the judge "if the evidence of the firearms experts of the State of Alabama is not sufficient then, of course, a judgment of acquittal would lie." (R. 836.) The trial court likewise recognized that a judgment for acquittal would be appropriate if the State could not prove a toolmark match first between the three crimes and secondly with the Hinton weapon. (R. 827-28) ("[K]nowing what the evidence is alleged to be by the State, it's going to be relevant only at the time that it's linked by the State's [firearm] expert testimony, so up until that time relevancy wouldn't really be a problem because a motion for a judgment of acquittal would lie.").

Trial counsel recognized that his ability to confront the State's case and

establish Mr. Hinton's innocence depended on obtaining the assistance of a skilled, competent firearms identification examiner[5] who would be "a pivotal witness" for the defense. (R. 55.) Counsel told the court prior to trial:

> The problems are worse trying to go to trial without an expert, because no matter what anybody says about anything, this case would not get off the ground if there wasn't a ballistics comparison.

(R. 63.) Counsel later testified that he knew expert evidence was "[c]ritical to the case" because "[w]ithout a ballistics comparison that was positive, there could have been no matching of the evidence." (PR. 181); see also Hinton, 2006 WL 1125605, at *27 ("Perhacs testified that firearm and toolmark examination was critical to the case because the three crimes could not be connected without it.")

The trial court pre-approved only $500 per case for expert assistance. (R. 2118.) While trial counsel complained that it was not possible to find an expert for $500, trial counsel believed that he could not get more than $500 from the court and did nothing to obtain additional funds. (R. 62, 65, 71; PR. 181, 207.) Trial counsel's belief that he could not get more than $500 to hire an expert under Alabama law was incorrect. With minimal research, counsel would have learned that at the time of Mr. Hinton's trial,

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[5] Toolmark examination or firearms identification is sometimes referred to as "ballistics identification," but that term is improper because ballistics deals with the motion of projectiles. See Paul C. Giannelli, Ballistics Evidence: Firearms Identification, 27 Crim. L. Bull. 195, 197 (1991).

> Firearms identification is a subspecies of toolmark identification dealing with the toolmarks that bullets, cartridge cases, and shotshell components acquire by being fired and that unfired cartridge cases and shotshells acquire by being worked through the action of a firearm.

Adina Schwartz, A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification, 6 Colum. Sci. & Tech. L. Rev. 2 (2004-2005).

Alabama law provided reimbursement to appointed counsel for any expenses reasonably incurred in the defense of his client, "to be approved in advance by the trial court." Ala. Code § 15-12-21(d). Mr. Hinton was also entitled to sufficient funds to hire a competent expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). Moreover, the trial court explicitly invited counsel to seek additional funds if necessary:

> I don't know as to what my limitations are as for how much I can grant, but I can grant up to $500.00 in each case as far as I know right now and I'm granting up to $500.00 in each of these two cases for this. So if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts, but I am granting up to $500.00, which is the statutory maximum as far as I know on this and if it's necessary that we go beyond that then I may check to see if we can, but this one's granted.

(R. 10-11.)[6]

At trial, the State presented testimony from two Alabama Department of Forensic Sciences firearms examiners that the bullets recovered from all three crimes were (1) fired from the same weapon, and (2) that Mr. Hinton's mother's revolver was the weapon that fired all of the bullets. (R. 1233-34; 1272-73; 1281-89.) To dispute the State's expert evidence of a match, defense counsel presented Andrew Payne, who admitted on cross-examination that he was an engineer – not a firearms identification examiner – and that his experience with weapons was limited to a six- or nine-month stint developing .50-caliber artillery guns for the Air Force twenty years earlier when

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[6]"Although Ala. Code § 15–12–21(d) previously limited expert fees to $500, Act No. 84–793, 1984 Ala. Acts 1st Ex.Sess., p. 198, effective June 13, 1984, amended that section to provide reimbursement to appointed counsel for any expenses reasonably incurred in the defense of his/her client, 'to be approved in advance by the trial court.'" Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *30 n.29 (Ala. Crim. App. Apr. 28, 2006).

he was in the military. (R. 1641-42.) Payne testified he was not a member of any professional firearms identification organization; he belonged only to the engineering – not toolmarks – section of the American Academy of Forensic Sciences. (R. 1642.)

Payne admitted that he never test-fired the Hinton firearm (R. 1657) – a step which toolmark examiners consider necessary. (PR. 74.) Worse, due to his lack of skill and poor vision, he told the jury that he was unable even to see the bullets through the microscope without help from the State's experts:

> Q. As a matter of fact when you were looking at the Smotherman projectile there at the laboratory of the Department of Forensic Sciences you had to ask Mr. Yates how to cut on the light source for the comparison microscope, did you not?
>
> A. Very possible, in fact, probably did, yes.
>
> Q. And as a matter of fact after he told you how to do it you reached over to your immediate right and threw the switch on an electric inscribing tool that was on a shelf next to the microscope, did you not?
>
> A. Very possible; yes, sir.
>
> . . .
>
> Q. That's a little device that's – a hand-held device about six or seven inches long that has a simply switch on it with a hard carbide tip that vibrates and a cord that comes off the back.
>
> . . .
>
> Q. And as a matter of fact, you did not know how to manipulate the dual stages on the comparison microscope, did you?
>
> A. I had to learn for the first time on American Optical while I was there, that's true.
>
> . . .

Q. All right. And then you were unaware of whether or not there was any type of slow motion controls to raise the stage up and down?

A. I didn't know where they was. I asked Mr. Yates to tell me which he – well, I won't go into that.

(R. 1650-52.) The jury heard from Payne himself that, because he did not know how to use the microscope, for most of his examination he could not even see the bullets under the microscope. After spending twenty minutes looking for the bullets he eventually got so exasperated that he said "Hell, I can't even find it" and had to ask the State's examiner, Lawden Yates for help:

Q. Then over a process of ten minutes as you attempted to do that, you finished that period of time by saying, Hell, I can't even find it?

A. That's probably true, that's right.

Q. Followed up next by saying, I don't know how to operate the machine on immediate power, will someone please help me?

A. That's right. I asked Mr. Yates to, please, tell me how to operate that particular aspect of the microscope. I might add that he refused to do so.

. . .

Q. . . . Did you say, I don't seem to be able to see the bullet. I can see the mirror and I can see my finger fine?

A. It's very possible that I said that. That would be one of the problems you would have when you were trying to locate the higher power glass and that's why I asked for the instructions.

Q. And then at the end of 20 minutes from the time you switched the turret lens at approximately 11:40, you said, there you are, I was too far to the right?

A. . . . I wouldn't dispute that.

(R. 1653-54.)

The prosecutor concluded his cross-examination by exposing the fact that Payne was physically incapable of performing the requisite testing in this case:

Q. Mr. Payne, do you have some problem with your vision?

A. Why, yes.

Q. How many eyes do you have?

A. One.

(R. 1667.)

The State successfully characterized Payne as a fraud with no relevant training, skill, or experience necessary to evaluate the evidence. With much support, the State characterized Payne to the jury as a "one-eyed" "charlatan," who employed "totally, totally inappropriate" techniques in his examination, who "didn't have a clue" about how to use a comparison microscope, and whose claims to be an expert were so "incredible and irresponsible" that the prosecutor found his testimony "startling and disturbing, alarming and almost sickening." (R. 1728-33.) As the State repeatedly emphasized, "a consulting engineer, ladies and gentlemen, is not a firearms and tool marks expert, and he's no expert. No expert at all." (R. 1727.) After deliberations lasting less than two hours, Mr. Hinton was convicted of two counts of capital murder and sentenced to death. (R. 1857-61, 1993.)

At his state postconviction hearing, Mr. Hinton presented testimony from three experienced firearms examiners whose qualifications the State conceded. (PR. 64, 114, 135.) Each testified that independent microscopic examinations of the six recovered

bullets established that they could not all be linked to a single weapon (PR. 68, 73-74, 116-17, 140-43). This unrebutted testimony alone discredited the state's theory of guilt. The experts additionally testified that the revolver recovered from Mr. Hinton's mother could not be matched with the recovered bullets. (PR. 77, 119, 143-44.) The examiners' testimony that the recovered bullets could not be linked to a single weapon discredited the State's theory, destroyed the State's only link between the Smotherman shooting and the Vason and Davidson murders, and was powerful evidence of Mr. Hinton's innocence. Two of the experts additionally performed tests which showed that the bullets from the Smotherman crime could not have been fired from the Hinton weapon. (PR. 120-21; see also PR. 86, 123.)[7]

Additional evidence demonstrating Mr. Hinton's innocence was also presented at the Rule 32 hearing, including evidence that Mr. Hinton could not have committed the kidnapping and robbery of Mr. Smotherman at the Quincy's restaurant because it was undisputed that he was fifteen miles away from Quincy's at 12:10 a.m. (R. 1023, 1396). Witnesses testified that whoever committed the Smotherman crime had to have planned to arrive at the Quincy's restaurant before 11:00 p.m. because Mr. Smotherman frequently closed and left the restaurant as early as 11:00 p.m. (PR. 152, 167-68.) Additional evidence was presented discrediting witness identification of Mr. Hinton as the man who committed the Smotherman crime.

Trial counsel testified that he believed Andrew Payne was not an expert in the

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[7]In light of this new evidence, the State has been asked repeatedly to re-examine its evidence against Mr. Hinton and, in violation of toolmark examiners' ethical requirements, its experts refused. (PR. 106-07.) The State never has offered any evidence to rebut the new evidence.

area of firearm and toolmark examination (PR. 188-89) and admitted his deficient performance by acknowledging that his inability to present a competent firearms identification examiner "was my failure, my inability under the statute to obtain any more funding for the purpose of hiring qualified experts." (PR. 207); see also Hinton, 2006 WL 1125605, at *27 (trial counsel testified that Payne "did not have the expertise he thought he needed and that he did not consider Payne's testimony to be effective").

The prosecutor wrote a 144-page proposed order concluding on this issue that "Hinton fails to meet his burden of pleading or proving that his counsel was deficient or how he was prejudiced when the expert chosen by trial counsel testified to what he claims any other 'qualified' ballistics expert would have testified," which the trial judge adopted verbatim on January 18, 2005, and the Alabama Court of Criminal Appeals adopted verbatim in significant part in its divided 3-2 decision denying postconviction relief. (PC. 1050-1194, 1510-1651); Hinton, 2006 WL 1125605, at *27-28.

B. Procedural History and the State Court Ruling on Review

Anthony Hinton filed a timely application for rehearing, which was denied, and then timely petitioned the Alabama Supreme Court for a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals. On October 17, 2008, the Alabama Supreme Court reversed and remanded for additional findings, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008).

After its first decision on return to remand was reversed by the Alabama Supreme Court, Ex parte Hinton, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012), the Alabama Court of Criminal Appeals on February 15, 2013, affirmed the trial

court's denial of postconviction relief on return to second remand, Hinton v. State, No. CR-04-0940, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013).

A divided Alabama Supreme Court denied Mr. Hinton's timely Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on April 19, 2013. Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013) (four justices voted to deny review; three dissented; and two recused themselves due to their prior service on the lower appellate court). This petition follows.

REASONS FOR GRANTING THE WRIT

I. WITH INCREASING FREQUENCY, CRIMINAL PROSECUTIONS IN THIS COUNTRY ARE DEPENDENT ON SCIENTIFIC EVIDENCE WHICH OFTEN PROVIDES THE SOLE BASIS FOR A CRIMINAL CONVICTION. THIS COURT SHOULD REVIEW WHAT THE SIXTH AMENDMENT REQUIRES FROM DEFENSE COUNSEL TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN SUCH A CASE AND WHETHER THE FAILURE TO OBTAIN A SKILLED, COMPETENT SCIENTIFIC EXPERT VIOLATES THE SIXTH AMENDMENT.

Since this Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963), criminal prosecutions have become more dependent on scientific evidence presented through expert testimony from a range of state forensic and scientific specialists.[8] While scientific evidence has clearly increased the reliability of criminal prosecutions in many instances, without skilled confrontation by defense experts, the introduction of unchallenged scientific evidence in a criminal case has also been a significant factor

[8] See Williams v. Illinois, 132 S. Ct. 2221, 2275 (2012) (Thomas, J., concurring) (recognizing that "scientific evidence plays a larger and larger role in criminal prosecutions"); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319, 320 (2009) (noting "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," even though "forensic evidence [is] commonly used in criminal prosecutions").

in many wrongful convictions.[9] This Court has always made clear that the right to counsel "is the right to the effective assistance of counsel," Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)), and that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Id. at 685 (quoting Adams v United States ex rel. McCann, 317 U.S. 269, 275 (1942)). As such, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id, 466 U.S. at 686.

The Court of Criminal Appeals below found that trial counsel's reliance on a "qualified" expert automatically shielded trial counsel's performance from this Sixth Amendment review. Petitioner contends that this judgment conflicts with this Court's long-established precedents and provides this Court with an opportunity to address this critically important issue.

What the Sixth Amendment requires when the state seeks a conviction and death sentence against an indigent accused based entirely on scientific evidence or

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[9]See Nat'l Registry of Exonerations: A Joint Project of Michigan Law and Northwestern Law, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Sept. 16, 2013) (citing false or misleading forensic evidence as a contributing factor in wrongful convictions for 266 of 1,209 known exonerations since 1989); Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1 (2009) (reviewing trial transcripts of exonerees and finding that sixty percent (80 of 137) of cases involved state forensic experts who provided testimony misstating or wholly unsupported by empirical data, with defense counsel rarely challenging this testimony through cross-examination or defense experts of their own).

forensic testimony is a question of growing importance. There is no dispute that the mechanical engineer who defense counsel relied on in this case had no experience in the field of forensic firearms identification, despite the centrality of the issue. See Hinton, 2006 WL 1125605, at *62 (Cobb, J., dissenting) ("Payne was a civil engineer, not a firearms and toolmark investigator, and [ ] he received his engineering degree in 1933, more than 50 years before Hinton's trial. (TR. 1571-72.) He spent many years in the military and worked with weapons, but he testified that his duties included 'working on various bombs and fuses and then designing delivery schemes with bombs for certain specialized targets' and being the 'project officer for the .60 caliber machine gun.'" (TR. 1573, 1575.)).

A divided lower court concluded that the Sixth Amendment question of counsel's effectiveness turned only on whether the defense expert's testimony met some minimal standard for admissibility under state evidentiary rules. The dissent strongly disagreed:

> In all my tenure on the bench, I have never seen the State successfully prosecute a capital-murder case when the only evidence of guilt consisted of testimony by a firearms and toolmark expert. This was an amazing prosecutorial feat, which could have been tested if Hinton had received effective representation and had been provided full and complete discovery. Hinton received neither.

Hinton, 2006 WL 1125605, at *69 (Cobb, J., dissenting).

Petitioner contends that under Strickland and its progeny, defense counsel's failure to obtain and present a competent firearms identification expert in a case where forensic evidence is dispositive is objectively unreasonable and violates the Sixth

Amendment.

A. Trial Counsel's Performance with Respect to the Only "Reasonable and Available Defense Strategy" Was Unreasonably Deficient.

While there are typically many ways reasonably effective counsel might decide to defend a case, this case belongs to a separate category of criminal cases where the state's evidence of guilt relies entirely on scientific evidence. Harrington v. Richter, 131 S. Ct. 770, 788 (2011) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both."). There is no dispute in this case that the only "reasonable and available defense strategy" required the assistance of a competent firearms identification examiner.

At trial, there was no dispute that Mr. Hinton could not have been convicted for capital murder but for testimony from the State's firearms identification experts that bullets recovered from three crime scenes were fired from a single weapon and that weapon was the gun recovered from Mr. Hinton's mother. The State conceded before and during trial that there is no connection between Mr. Hinton and the murders of John Davidson and Thomas Wayne Vason unless there is a toolmark match between the bullets recovered from those crime scenes and the gun recovered from the home of Mr. Hinton's mother. (R. 836; see also R. 33-34, 423-26, 827-28.)

At the preliminary hearing, the State's witness, Sergeant Howard Miller, testified:

Q. Let me make sure I understand, the only thing insofar as your

> investigation is concerned that connects my client to this case is the report that you have the bullets obtained from these two separate locations and they appear to match the gun that was obtained by Lieutenant Acker?

A. Yes, sir.

Q. That's it?

A. From the three locations, yes, sir.

(PH. 54.)

The prosecutor told the trial court, "if the evidence of the firearms experts of the State of Alabama is not sufficient then, of course, a judgment of acquittal would lie." (R. 836.) The prosecutor acknowledged that "the gun is key to the identification of this defendant, there being no eye witnesses in either the case involving the killing of John Davidson at Mrs. Winner's or in the case involving Wayne Vason at Captain D's." (R. 33-34.) He reiterated that the only thing that ties Anthony Ray Hinton to the capital crimes "is the fact that the gun was used in all three instances." (R. 34.)

In opening argument, the State told the jury that without a toolmarks match, there would be no conviction – indeed, no prosecution. (R. 423-24.) The State repeatedly emphasized to the jury that when suspects were arrested in connection with these offenses, but test results did not match the suspect's weapon with the crime, the police "ordered them released on the murder charge." (R. 1792-94; see also R. 1724: "The same day, later, a pistol was turned in to be checked against here. They looked at it, no comparison, no match, wrong gun.")

The trial court likewise recognized that a judgment for acquittal would be

appropriate if the toolmarks evidence did not match. (R. 827-28: "knowing what the evidence is alleged to be by the State, it's going to be relevant only at the time that it's linked by the State's [toolmarks] expert testimony, so up until that time relevancy wouldn't really be a problem because a motion for a judgment of acquittal would lie.")

Trial counsel also recognized that "this case would not get off the ground if there wasn't a ballistics comparison." (R. 63.) At the Rule 32 hearing, counsel testified that "[w]ithout a ballistics comparison that was positive, there could have been no matching of the evidence." (PR. 181; see also PR. 189: "without the corroboration of the ballistics, the balance of the case collapsed.")

Indeed, the trial court, the Alabama Court of Criminal Appeals, and the Alabama Supreme Court all initially affirmed Mr. Hinton's guilt based on the factual assertion of a weapons match, which each court accepted on direct appeal as entirely reliable.[10]

As the State, trial court, trial counsel, and appellate courts all have recognized, without a weapon match, Mr. Hinton would not have been prosecuted for the capital murders of Davidson and Vason, much less convicted. Accordingly, if trial counsel had

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[10]See R. 1985-87 (trial court finding that the "38 caliber bullets which were recovered from both victims were later compared to determine if they had been fired from the same weapon and determination was made, in fact, that they were fired from the same weapon" and that "a determination was made from the Department of Forensic Sciences that the pistol recovered from the defendant's home was the weapon that had fired the fatal bullets into the bodies of Thomas Wayne Vason and John Davidson, and also the weapon that had been used in the robbery and the attempted murder of Sidney Smotherman."); Hinton v. State, 548 So. 2d 547, 553 (Ala. Crim. App. 1988) ("The gun recovered at the defendant's home was . . . the weapon through which all of the bullets recovered from these three robbery investigations were fired.") and at 558 ("The same weapon was used in each incident."); Ex parte Hinton, 548 So. 2d 562, 569 (Ala. 1989) ("[T]he bullets from all three crimes came from the gun taken from the defendant's house.") and at 565 ("[T]he .38 caliber gun given to the police was the same gun that had fired the bullets that had killed Davidson and Vason and that had injured Smotherman.").

presented competent evidence establishing that the bullets from the three separate crime scenes cannot be linked to a single weapon or cannot be matched to Beulah Hinton's gun, there unquestionably is a reasonable probability that Mr. Hinton would have been acquitted.

Under these circumstances, it would have been obvious to any reasonably effective lawyer that the assistance of a skilled, experienced, and competent toolmark expert was crucial. Yet, despite knowing that a competent expert was indispensable to Mr. Hinton's defense, counsel did not obtain one. At a pretrial hearing, trial counsel told the court that he doubted Payne was a qualified expert but that he nonetheless felt "stuck" with him. (R. 71.) Similarly, at the postconviction hearing, trial counsel testified that he knew that a competent toolmark expert was "[c]ritical to the case" and that he believed that Andrew Payne was not an expert in the area of firearm and toolmark examination. (PR. 181, 188-89.)

The record is clear that counsel's decision was not due to strategic considerations but due to the unprecedented financial constraints he faced and his failure to obtain additional necessary funding. Counsel admitted in his Rule 32 testimony that his failure to present a competent toolmark examiner was not the result of strategy but instead was "my failure, my inability under the statute to obtain any more funding for the purpose of hiring qualified experts." (PR. 207.) Trial counsel's belief that the statute limited him to $500 to hire an expert was incorrect. With minimal research, counsel would have learned that at the time of Mr. Hinton's trial, Alabama law provided reimbursement to appointed counsel for any expenses reasonably incurred in

the defense of his client. Ala. Code § 15-12-21(d).

Counsel's failure to research the relevant law is inexplicable in light of the trial court's invitation to seek additional funding and to research the relevant law. While the court pre-approved only $500 per case for expert assistance, the court informed counsel that Mr. Hinton might be entitled to more money, and explicitly invited counsel to seek additional funds should they be necessary:

> I don't know as to what my limitations are as for how much I can grant, but I can grant up to $500.00 in each case as far as I know right now and I'm granting up to $500.00 in each of these two cases for this. So if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts, but I am granting up to $500.00, which is the statutory maximum as far as I know on this and if it's necessary that we go beyond that then I may check to see if we can, but this one's granted.

(R. 10-11) (emphasis added).

While competent counsel would have asserted that he was entitled to sufficient funds to hire a competent expert pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), or corrected the court's erroneous belief that the statute limited funds for experts to $500, trial counsel did not do so. Instead of researching the law to learn what assistance Mr. Hinton was entitled to, trial counsel believed he would have to get an expert for $500. In fact, trial counsel believed that he might not have any money to pay an expert, as he had already used the $500 in his attempts to locate one. (R. 62: "And I've also spent enough time that I exceeded the allowance limit just in the time I've been looking for a doggone expert.") As a result, counsel believed that he would have to find "somebody hanging around" – a retired expert who would work for free. (R. 65: "I was looking for

somebody retired, you know, somebody hanging around.")[11]

Believing that his options were limited to someone willing to volunteer their services, counsel decided that Payne was his "only shot." (R. 62.) Counsel's decision to rely on "somebody hanging around" who was willing to testify for free instead of conducting the legal research indicated by the court cannot be considered a reasonable strategic decision entitled to deference. Trial counsel made the mistaken and uninformed assumption that he could not seek more than $500 for expert assistance. Based on that mistaken belief, counsel abandoned his efforts to obtain a competent expert and resigned himself to the false conclusion that he was "stuck [with Payne because] he's the only guy I could possibly produce" for $500. (R. 71.) Counsel's conduct was unreasonable. Strickland, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see also Wiggins v. Smith, 539 U.S. 510, 533 (2003) ("'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'") (quoting Strickland, 466 U.S. at 690-91); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (defense counsel's failure to conduct pre-trial discovery not a strategic decision because it was based on defense counsel's "mistaken belief" that

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[11]Trial counsel's testimony on this point is corroborated by Payne's testimony at trial. At trial, Payne testified that he was not certain that he would be paid for his services in this case because trial counsel "asked me to assist him as a court appointed attorney and he said I don't know whether you'll receive a fee for your work or not" and that "he just said he didn't know whether he could pay me or not and I said that's all right with me." (R. 1656.)

prosecution was obliged to turn over inculpatory evidence).[12]

As then-Judge Cobb noted in her dissent, "[i]t is axiomatic that effective assistance of counsel requires knowledge of current state law. An attorney's 'lack of knowledge or misunderstanding' of the relevant law 'is not only unacceptable under Supreme Court and circuit law,' but it is 'reprehensible representation in a death-penalty case.'" Hinton, 2006 WL 1125605, at *61 (Cobb, J., dissenting) (quoting Hardwick v. Crosby, 320 F.3d 1127, 1185 n. 207 (11th Cir. 2003)); see also Williams v. Taylor, 529 U.S. 362, 373, 395 (2000) (counsel's failure to investigate and present mitigating evidence based on erroneous belief that "state law didn't permit" access to records held to be ineffective).

B. Counsel's Deficient Performance Was Prejudicial.

Trial counsel performed deficiently with respect to the only reasonable and available defense strategy in this case. "Payne was mocked and represented to be no better than a buffoon and a paid liar. The testimony on the only physical evidence that connected Hinton to any of the crimes was useless to him because it was delivered by a witness who not qualified or competent to render the opinions." Hinton, 2006 WL 1125605, at *64 (Cobb, J., dissenting). Had trial counsel obtained the assistance of a qualified, competent toolmark examiner, there exists a reasonable probability of a different outcome at trial. See Williams v. Taylor, 529 U.S. 362, 391 (2000) (prejudice

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[12] See also Hinton, 2006 WL 1125605, at *60 (Cobb, J., dissenting) ("Trial counsel's beliefs that he was unable to hire a qualified expert because the statute limited the amount of compensation and that he was 'stuck [with Payne because] he's the only guy I could possibly produce' (TR. 71) were incorrect. Trial counsel was limited only by his lack of knowledge of the relevant law.").

demonstrated where there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" (quoting Strickland, 466 U.S. at 694 (1984).).

In contrast with Payne's incredible and incompetent performance at trial, Mr. Hinton presented unrebutted evidence from qualified, competent toolmark examiners at the Rule 32 hearing showing that the State's assertion of a weapons match is wrong.

Lannie Emanuel is a nationally recognized toolmark examiner with the Southwestern Institute of Forensic Sciences in Dallas (Dallas County Crime Laboratory) and prominent member of the Association of Firearms and Toolmark Examiners (AFTE). From 1979 through 1990, he served as a toolmark examiner in the United States Army Criminal Investigation Laboratory System. He testifies ninety-eight to ninety-nine percent of the time for the prosecution. (PC. 1322-23; PR. 64, 105.)

Raymond Cooper has been a toolmark examiner with the Southwestern Institute of Forensic Sciences in Dallas since 1987 and is a former Supervisor of the Firearms Identification, Chemistry, and Latent Print sections of the State of Utah Crime Laboratory. He has been qualified to testify as an expert on firearms and toolmark examination over 250 times. (PC. 1336-37; PR. 114.)

John Dillon is the former chief of the firearm and toolmarks unit of the Federal Bureau of Investigation (FBI) and past president of AFTE (2000-2001). He has had extensive training in toolmark examination, has been doing toolmark examinations since 1976, has trained many other firearm and toolmark examiners, and has testified as an expert in more than seventy cases. (PR. 136-38, 146.)

Mr. Emanuel, Mr. Cooper, and Mr. Dillon each conducted independent microscopic examinations of the six recovered bullets (PR. 68, 73, 119, 140; PC. 2200) and established that the bullets could not be linked to a single weapon. All three testified that none of the recovered bullets, with the exception of the Davidson bullets,[13] could be linked to a single weapon. (PR. 73-74, 116-17, 141-43.)

Mr. Emanuel, Mr. Cooper, and Mr. Dillon also compared the six recovered bullets to the Beulah Hinton weapon using their own test bullets as well as the State's test bullets. (PR. 74, 76, 115-16, 117.) They concluded that the bullets recovered from the crimes could not be matched to the Hinton weapon. (PR. 77, 119, 143-44.)

Mr. Emanuel reported these findings to the State's expert at trial, DFS employee Lawden Yates. (PR. 106.) Mr. Emanuel asked Yates to work with him to resolve their differences, as required by AFTE's ethical rules. (PR. 107.) He asked Mr. Yates to show him what he had seen and what he had used to make his determination that there was a match, but Mr. Yates refused to do so. (PR. 107.)

Having determined that the Smotherman bullets were fired from a weapon that was severely out of time,[14] Mr. Emanuel and Mr. Cooper test-fired the Beulah Hinton weapon in a manner that might allow it to produce a bullet like the Smotherman bullet by manually manipulating the weapon to put it in an extreme out-of-time position.

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[13]The Davidson bullets were introduced at trial as State's Exs. 2 and 8. (R. 461, 505-06, 1232-33.)

[14]See Pet'r Ex. 9. Mr. Emanuel testified that Petitioner's Exhibit 9 depicts one of the Smotherman bullets alongside the tests fired with the Hinton weapon in its normal firing position. (PR. 78.) The comparison shows that the Smotherman bullet does not have a land and groove signature and the tests do. (PR. 79.) Further, the Smotherman bullet is extruded, indicating that it was produced from a severely out-of-time revolver. (PR. 79, 81.)

(PR. 83, 120.) They concluded that the Smotherman bullets, State's Exhibits 54 and 55, could not have been fired from the Hinton weapon. (PR. 86, 120-21.) Mr. Cooper testified that the Hinton weapon was unable to fire these bullets "because [of] the mechanical ability of this weapon to produce a bullet of that nature." (PR. 123.)

The findings of these qualified and competent experts demonstrate that the recovered bullets can neither be linked to a single weapon nor matched to the Hinton weapon and that the Hinton weapon could not have fired the Smotherman bullets. These findings wholly undermine the State's assertion of a match, and this evidence from any qualified, competent, and experienced expert – in contrast with testimony from an incompetent, inexperienced, one-eyed civil engineer – unquestionably would have resulted in a different outcome at Mr. Hinton's trial.

Indeed, in contrast with its devastating demonstration that Payne lacked any relevant experience, qualifications, and credibility as a toolmarks examiner, the State stipulated to the qualifications and experience of the Rule 32 experts, could not impeach their testimony, and presented no evidence in rebuttal to their findings – even though a state toolmarks examiner was present at the hearing. (PR. 59, 64, 114, 135.)

"There exists ample evidence that the adversarial system suffered a severe breakdown here because of trial counsel's ignorance of the law and his resulting decision to retain an unqualified witness. As a result, the confidence in the outcome of Hinton's trial has been seriously undermined." Hinton, 2006 WL 1125605, at *66 (Cobb, J., dissenting); see also id. at *70 (Shaw, J., dissenting) ("I am concerned that confidence in the outcome of Hinton's trial was seriously compromised by the failure

of trial counsel to seek the additional funding to which he was entitled.”).

C. The Alabama Court of Criminal Appeals's Analysis Conflicts with the Requirements of the Sixth Amendment and Strickland v. Washington.

In addressing trial counsel's performance in proceeding to trial with a mechanical engineer, the Court of Criminal Appeals did not address the standard set out in Strickland. Instead, it conducted a truncated assessment of the “criterion for admission of expert testimony,” Hinton v. State, CR-04-0940, 2011 WL 3780644, at *6 (Ala. Crim. App. Aug. 26, 2011), and, looking exclusively to minimum standards of evidentiary admissibility, found that because Payne's testimony was admissible, counsel's reliance on Payne was per se reasonable: “Because Payne was a qualified expert in firearms identification. . ., Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless.” Hinton, 2011 WL 3780644, at *8. The court did not evaluate whether trial counsel's decision to use Andrew Payne was reasonable in light of prevailing professional standards in a death penalty case or in light of the totality of the evidence adduced at trial and in postconviction proceedings as required by Strickland.

The Court of Criminal Appeals reasoned that the Constitution requires nothing more than admissible testimony from someone “who can enlighten a jury more than the average man in the street” – even in a death penalty case. Hinton, 2011 WL 3780644, at *6 (quoting Charles v. State, 350 So. 2d 730 (Ala. Crim. App. 1977)). The court further reasoned that because counsel's decision to hire Payne was informed by the funding restrictions imposed by the court, Mr. Hinton's claim is “completely

without merit . . . because ineffective assistance of counsel is viewed from the actions of counsel and not the actions of the trial court," 2006 WL 1125605, at *55.

The standard for reviewing a claim of ineffective assistance of counsel is of course well-established:

> Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice with performance being measured against an "objective standard of reasonableness," "under prevailing professional norms."

Rompilla v. Beard, 545 U.S. 374, 380-81 (2005) (internal citations omitted). In addressing trial counsel's performance in proceeding to trial with Andrew Payne, however, the Court of Criminal Appeals did not address the standard set out in Strickland.

Petitioner contends that the admissibility of a witness's testimony is relevant, but it is by no means dispositive when assessing whether counsel's failure to obtain a qualified and credible expert on the single most important issue in a death-penalty trial is deficient and prejudicial.

The Court of Criminal Appeals cited Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998), for the proposition that mere admissibility of expert testimony satisfies the constitutional requirement, articulated in Ake v. Oklahoma, 470 U.S. 68 (1985), that necessary expert assistance be provided to indigent defendants. The Court of Criminal Appeals relied on dicta in Wilson suggesting that the Due Process Clause's standard is not as high as a "malpractice standard" for a court-appointed expert, id. at 402.

Other circuits directly addressing the constitutional standard for expert

assistance, including the Eleventh Circuit, have held that Ake requires more than mere access to any 'expert.' Ford v. Gaither, 953 F.2d 1296, 1299 (11th Cir. 1992) (finding violation of Ake where expert failed to engage in an evaluation that was "appropriate under the circumstances"); Wilson v. Gaetz, 608 F.3d 347, 351 (7th Cir. 2010) (finding that expert "neither conducted an appropriate examination nor assisted meaningfully in evaluation, preparation, and presentation of [the defendant's] insanity defense"); Starr v. Lockhart, 23 F.3d 1280, 1289 (8th Cir. 1994) (overruled on other grounds) ("As Ake explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination.").

More fundamentally, the Court of Criminal Appeals confused the Sixth Amendment right to counsel issue presented in this case with the questions presented by Ake about what the Fourteenth Amendment's due process guarantee of fundamental fairness requires. The Court of Criminal Appeals failed to engage in the legal analysis required by Strickland and instead adopted a rule that defense counsel in a death-penalty case cannot be found ineffective so long as the expert witness he presents "can enlighten a jury more than the average man in the street." Hinton, 2011 WL 3780644, at *6. This analysis conflicts with Strickland and established precedent acknowledging not only that Ake requires "a competent [expert] who will conduct an appropriate examination," 470 U.S. at 83, but also the "special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Missisisppi, 486 U.S. 578, 584 (1988) (quotations omitted); see also Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989) ("death penalty is special circumstance" that

justifies expansion of constitutional rights).

By reducing the performance prong of the Strickland analysis to a question of the bare admissibility of expert testimony, the Court of Criminal Appeals insulates counsel's performance from Sixth Amendment review. The court's decision directly conflicts with the standard established by Strickland and effectively eliminated meaningful Sixth Amendment review of Mr. Hinton's capital murder convictions. The question of what is required from appointed counsel in a criminal case where scientific evidence will be dispositive is a critically important issue and how lower courts review claims of ineffective assistance of counsel is a topic of growing importance. This Court should grant certiorari review.[15]

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[15]According to the Department of Justice, "[o]ur national difficulty to meet the obligations recognized in Gideon is well documented." Statement of Interest of the United States, at 4, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wa. Aug. 14, 2013) ("America's indigent defense systems continue to exist in a state of crisis." (quoting Attorney General Eric Holder, Address at the American Film Institute's Screening of Gideon's Army (June 21, 2013), available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html)). This Court also has recognized the need to continually reexamine the protections necessary to ensure the right to counsel for indigent defendants. See, e.g., Martinez v. Ryan, 132 S. Ct. 1309, 1317-18 (2012).

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

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