

## CHOOSING LIFE IN A DEATH PENALTY STATE

A Birmingham News editorial series

# A question of innocence

**THE ISSUE** *Anthony Ray Hinton's compelling evidence questions his capital murder conviction.*

**Y**ou can hold Anthony Ray Hinton's life in the palm of your hand.

Six mangled lead slugs, supposedly fired from a rusty, Smith & Wesson .38 special found in his mother's home near Dora, sent Hinton to Death Row in 1986. Police recovered the spent slugs from victims of a string of robbery/murders at fast-food restaurants in the Birmingham area in 1985. Jefferson County prosecutors used that evidence to help convince a jury Hinton committed the crimes and should be put to death.

Hinton's lawyers believe those slugs and others tested by firearms experts they hired provide ammunition that ultimately could prove Hinton innocent and free him after 19 years on Alabama's Death Row. Hinton would become the sixth Death Row inmate exonerated in the past dozen years.

"I absolutely think the evidence surrounding his case is some of the most disturbing and troubling in a death penalty case here in Alabama," said Bryan Stevenson, Hinton's lead lawyer and the executive director of the Equal Justice Initiative of Alabama, which represents poor people on Death Row. "I don't think there's any question he's innocent."

Bob McGregor, who led Hinton's prosecution for the Jefferson County district attorney's office, doesn't think there's any question either — that Hinton is guilty.



Anthony Ray Hinton

"I've never had a case in my life that I've been so absolutely convinced by the evidence," he said. "I had referred to Anthony Ray Hinton (during trial) as one of the coldest killers who ever walked a sidewalk in Jefferson County. I haven't changed my opinion in the slightest."

Twenty years later, McGregor describes Hinton as "one of the most evil people" and a "sociopathic jerk." He said Stevenson is "selectively extracting information" to build a case for Hinton's innocence, while ignoring damning testimony and evidence.

### Fatally flawed

Good people can argue the cases of the five, men already emancipated from Death Row and reach different conclusions about their guilt or innocence. But good people should be outraged Alabama's capital punishment system is so fatally flawed that five men convicted of capital murder have walked free since 1993 and, if Hinton's lawyers are right, he will, too. Those who value life must demand at minimum a fair, impartial system designed to prevent the abhorrent possibility of the state killing an innocent person.

Since 1973, 121 inmates in 25 states have been released from Death Row, according to the Death Penalty Information Center in Washington, D.C. In addition, thanks to DNA testing, dozens of others have been cleared in nondeath-penalty cases — exonerations that have called into question the reliability of eyewitness accounts, co-defendant testimony and even confessions in all kinds of criminal cases.

To put it simply, our system of justice isn't as foolproof as many of us once thought. That's why more than a dozen states have launched reviews of the death penalty, as more and more people come to understand that bias, poor legal representation, questionable tactics by authorities and charged emotions can send innocent people to jail and potentially to their deaths, while leaving guilty people walking the streets.

Based on trial court transcripts and filings and interviews with both sides in the Hinton case, there is no way to know beyond a reasonable doubt whether he is innocent. But Hinton's lawyers raise several troubling issues that question whether he is guilty beyond a reasonable doubt — the standard the law requires.

Hinton, by his own admission, didn't stand a chance at his September 1986 trial. Police had arrested him the year before on charges of robbing and murdering assistant managers at a Mrs. Winner's on Southside and a Captain D's in Woodlawn. Sidney Smotherman, a night manager at Quincy's in Bessemer, survived a similar attempt. Smotherman's description of his assailant resulted in a police sketch that a Quincy's employee who knew Hinton immediately identified as Hinton, leading to his arrest.

No fingerprints or other physical evidence from any of the scenes linked Hinton to the crimes, and he passed a polygraph test, which wasn't allowed into evidence. But prosecutors, armed with testimony from state forensics experts, argued the six bullets used in the three crimes all came from the same gun — the .38 pistol with a rusty barrel taken from the home of Hinton's mother.

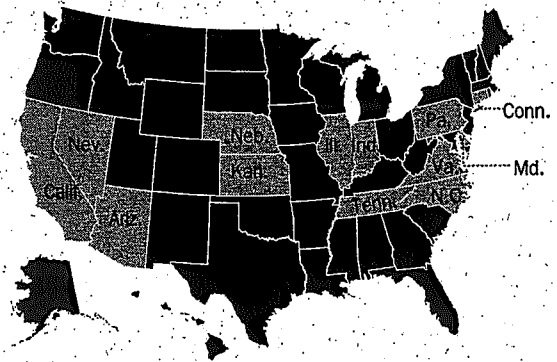
As damaging as that was, Hinton, who was on parole after serving time for theft, believes the death blow to his case came from his own ballistics "expert," hired in desperation by Sheldon Perhacs, Hinton's court-appointed lawyer. Perhacs had contacted several out-of-state experts about testifying, but he said they turned him down because the amount of money the court provided wouldn't cover their fees.

Hinton's expert, Andrew Payne, who has since died, was a civil engineer with a military background. Payne testified he didn't think the bullets came from the gun found in Beulah Hinton's home.

But the prosecutor shredded Payne on cross-examination like a corporate wrongdoer destroys damning documents.

Payne admitted he never test-fired the Hinton firearm to compare test bullets to recovered slugs; he didn't know how to turn on the state Department of Forensic Sciences microscope and repeatedly had to ask for help operating it; he couldn't even see the bullets under the microscope

#### States with death penalty study commissions



Source: Equal Justice USA/Quixote Center

A BIRMINGHAM NEWSGRAPHIC/JODY POTTER

for most of his analysis.

The cross-examination ended like this:  
"Mr. Payne, do you have some problem with your vision?"

"Why, yes."

"How many eyes do you have?"

"One."

During closing arguments, the prosecutor reminded jurors of the one-eyed "charlatan" whose testimony was "startling and disturbing, alarming and almost sickening."

Hinton knew he was doomed.

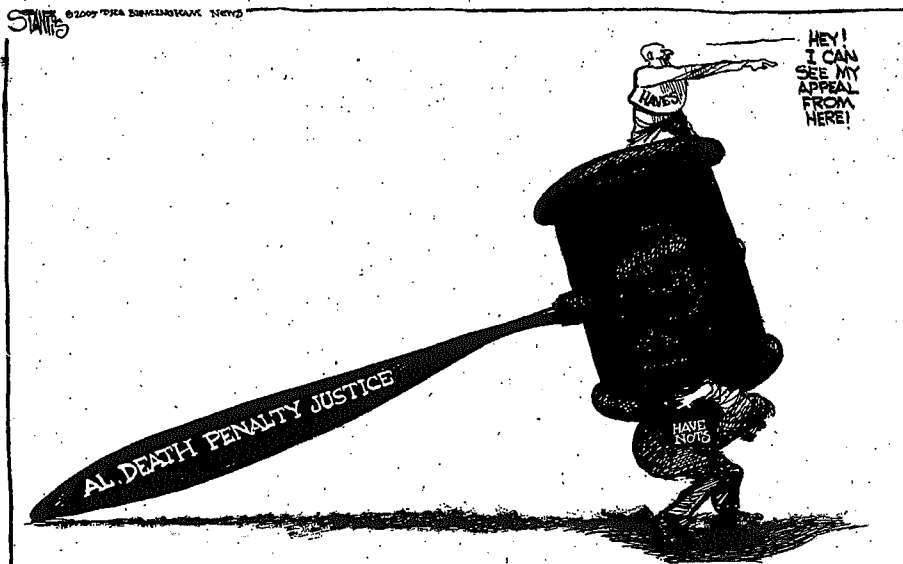
"The way the prosecutor chewed him up ... not a jury in hell would have found me not guilty," Hinton said recently to Daniel Farbman, a law student working with Stevenson. (The Department of Corrections turned down a request from The News to interview Hinton.)

"Man, I cried for my expert. ... You have a man's life on the line, and this is what you give him for an expert?" Hinton said.

On Sept. 19, 1986, jurors deliberated for about two hours and convicted Hinton on two counts of capital murder. They voted 10-2 that Hinton be sentenced to death, and Circuit Judge James Garrett obliged.

But Hinton's lawyers over the years, most recently Stevenson and EJI, believe they have raised issues that damage the prosecution's case. Among the most compelling:

► Three nationally known forensics experts, including the former chief of the FBI's firearm and toolmark identification unit, dispute the crucial trial testimony of two former state forensics employees. While the two state firearms experts testified at trial they matched the six recovered bullets to Hinton's gun, Lannie Emanuel, Raymond Cooper and John Dillon Jr. say they cannot match the bullets to a single gun, nor can they match the Hinton weapon to any of the six bullets. Emanuel and Cooper work at the Southwestern Institute of Forensic Sciences in Dallas. Dillon, formerly with the FBI, is a recent president of the Association of Firearm and Toolmark Examiners. The three, who almost always testify for prosecutors, testified in a 2002 hearing before Garrett that Hinton's weapon was mechanically incapable of firing the bullets recovered in the Smotherman crime.



The firearm and toolmark association's ethical rules require that when examiners reach different conclusions, they work to resolve them. Emanuel in the hearing said he asked the former state forensics department director who testified at Hinton's trial "if he would show us what he had seen, what he had . . . used to make his determination . . . they were all fired from the same gun."

"He declined," Emanuel said.

► Prosecutors didn't give Hinton's trial lawyer evidence that could have helped his defense, as they are required to do, Stevenson said. For example, prosecutors didn't tell Hinton's lawyer about a detective's interview with a Quincy's employee who went with Smotherman to a nearby Food World after they closed the restaurant. The employee said the detective attempted to coerce him into identifying Hinton from a lineup and placing him at Food World. Also, Stevenson said, state forensics employees didn't turn over ballistics worksheets that show they had questions about what are known as "class characteristics" of the six slugs recovered from the crime scenes that calls their testimony into question.

"That's not necessarily true, because the experts at trial said they made their match on striations," said Corey Maze, an assistant attorney general handling the prosecution's case on appeal. "The experts always testified they were not sure on class characteristics. So the worksheets are completely consistent (with their testimony)."

Striations are microscopic markings on bullets that ballistics experts use to match bullets to each other and to a weapon. At trial, state forensics experts said they matched those striations from the recovered bullets to test bullets fired from Hinton's gun, Maze said. But none of Hinton's experts could find striations on the recovered bullets, and the state's original test bullets have been lost.

► Hinton, a temporary employee at the Bruno's warehouse in Ensley, arrived at work on the night of the Smotherman shooting at 11:57 p.m. and was clocked in at 12 a.m., his time card and trial testimony from his supervisor showed. Hinton received his work assignment at 12:10 a.m., and his supervisor checked on him a half hour later and "at least three times" in Hinton's first two hours of work. Smotherman and several Quincy's employees left the restaurant at about 12:14 a.m. He and two employees stopped at Food World, in which one employee testified he saw Hinton, and left at 12:26 a.m., according to Smotherman's cash register receipt. Smotherman's assailant then bumped his car from the rear, forced him out of his car and made Smotherman go with him back to the restaurant, where he was robbed and shot.

## The state's theory

For the state's theory to work, Hinton would have had to sneak out of the Bruno's warehouse, drive to Quincy's and follow Smotherman to Food World, commit the crime and be back at the warehouse by 12:40. The warehouse in Ensley is 15 miles from the Bessemer Quincy's.

"Being locked into a secure facility 15 miles away is about as good as it gets," Stevenson said.

But not good enough. Assistant AG Maze suggests Hinton could have been signed in without

actually being at work, plus there was trial testimony that people could slip out undetected.

"There's really no proof it was actually Hinton that signed in," Maze said.

There's no proof, if you ignore the testimony of Tom Doll, who supervised Hinton and other temporary employees. Doll, now a math teacher at Collinsville High School in DeKalb County, said there is no way Hinton is guilty.

"I really don't see how he could have done this. It's amazing," Doll said. "I think about him often. I hope the best for him."

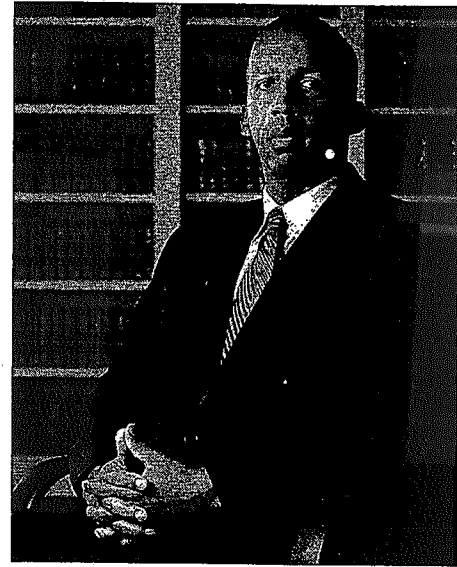
This past January, 2½ years after the hearing, Garrett signed the proposed order the attorney general's office wrote, refusing to overturn Hinton's conviction or death sentence.

June 10, Stevenson appealed the ruling to the Alabama Criminal Court of Appeals with a 120-page brief that begins: "Anthony Ray Hinton is innocent. Mr. Hinton seeks expedited review because he has been on Death Row for 19 years for two capital murders he did not commit."

The state countered in its Aug. 26 response that "Hinton was guilty in 1986, and he is still guilty today. Simply wrapping an old defense in a new cover does not prove innocence. Beneath the new wrapping still lies the same defense and evidence previously rejected by the jury."

Stevenson sought oral arguments, which the court granted, setting a hearing for Nov. 15. That's a small victory, he said. The ultimate victory for Hinton, of course, would be for the court to order his immediate release, Stevenson said.

The criminal appeals court — Presiding Judge H.W. "Bucky" McMillan, and Judges Sue Bell Cobb, Pam Baschab, Greg Shaw and Kelli Wise — must weigh seriously Hinton's claims of innocence, even as they make sure the state's case is as ironclad as McGregor and the attorney gener-



**Bryan Stevenson**

*Lawyer for Anthony Ray Hinton also represented Walter McMillian, freed from Death Row on an innocence claim in 1993.*

## THE SERIES | WHAT'S NEXT

**Thursday:** The reasons death penalty supporters use to make the case for the ultimate punishment, such as deterring other crimes, don't hold up.

**Friday:** Embracing a culture of life begins with acknowledging the state's system of capital punishment doesn't work.

al's office say it is.

Among questions the judges must consider: How were state forensics experts able to match the six slugs to each other and to test bullets fired from the same gun when national experts were unable to replicate their findings? Why won't the state's experts work with the national experts to resolve their differences? How could Hinton have clocked in to work at midnight and been assigned his tasks at 12:10 a.m. on the night of the Smotherman shooting, yet driven to Quincy's 15 miles away in just four minutes?

For the court to take on these types of questions may well be, as the state argues, a request by Hinton for "a five-juror retrial." But when a man who could be innocent faces execution, how could the court possibly do otherwise?

Attorney General Troy King said if there is any evidence of innocence in a Death Row case, "I would go to the court myself" — much like he did to argue for death sentences in the recent high-profile cases of Kerry Spencer, who killed three Birmingham policemen, and Westley Devon Harris, convicted of gunning down six members of his girlfriend's family.

Anthony Ray Hinton's next day in court is Tuesday. King should make it a point to attend.

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