

Split ruling focuses on expert's credibility

Hinton stays on Death Row, raising concerns

By CARLA CROWDER
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An Alabama Death Row prisoner recently lost an appeal when the state attorney general's office successfully argued that his expert witness was competent and qualified.

Twenty years ago, the prosecutor called civil engineer Andrew Payne a "one-eyed charlatan" and told jurors the witness was "no expert at all" in firearm analysis.

The sharply clashing characterizations from the side that wants Anthony Ray Hinton executed for the 1985 robbery-slayings of two Birmingham restaurant managers raised serious concerns among two criminal appeals court judges.

Yet Hinton remains on Death Row after the court refused to grant him a new trial in a 3-2 vote released April 28.

"Neither the parties, nor the members of this court, can agree to whether Payne was qualified to testify," Judge Greg Shaw wrote in his dissent. "The irony of the State's first argument is that it is exactly the opposite of the argument the prosecutor made at trial — that Payne was a charlatan and not an expert with regard to firearms and tool-mark examination."

Discussion in the 187-page opinion raises questions about the state's nebulous standards for expert witnesses in capital murder trials. Many Death Row prisoners were convicted at a time when Alabama limited expert compensation to \$500.

Hinton's conviction was based on two state forensics investigators linking a weapon found in his home with bullets from the crimes. His appeal hinges on testimony from three nationally known firearms examiners — the retired chief of the FBI firearms and tool-mark unit and two examiners from the Institute of Forensic Sciences in Dallas — whose test results conflict with the state's. They've said they could not match the .38-caliber revolver with the crime-scene bullets.

The Court of Criminal Appeals ruled out their findings, saying it was not new evidence as is required at this stage in an appeal. Further, "Payne's testimony was much more favorable," Judge Pamela Baschab wrote, because he unequivocally said the bullets didn't match, while the recent experts were more guarded in their phrasing.

In her dissent, Judge Sue Bell Cobb points out that even Hinton's trial attorney told the judge he didn't believe

Payne was a qualified expert, but he couldn't afford a better one. "Payne was mocked and represented to be no better than a buffoon and a paid liar," she wrote. "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 was not qualified or competent to render the opinions."

Years later, in defending Hinton's conviction, the attorney general's office repeatedly referred to Payne's work as expert testimony and wrote in an argument later adopted by the Jefferson County Circuit Court, "Mr. Payne has been qualified as an expert witness in firearms and projectiles in several courts across Alabama."

A law professor who studies capital cases called the state's conflicting versions of Payne's competency "pretty outrageous."

"They shouldn't be able to take different positions on his qualifications now than they took at the time," said Rob Warden, director of the Center on Wrongful Convictions at Northwestern University School of Law. "We're talking about issues of life and death here. Shouldn't we put justice and truth ahead of procedure and jockeying for advantages?"

These kinds of arguments surface, in part, because there are no legal stan-

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dards for expert witnesses; it's up to the discretion of judges, Warden said.

Clay Crenshaw, chief of the attorney general's capital litigation unit, stood by the state's tactics. "As it should, the state would attack any expert hired by a murderer to distort the truth before a jury."

Both law enforcement and death penalty opponents agree the science of ballistics examination has improved since Hinton was convicted.

"It's basically been shown in the past to be fundamentally junk that the law enforcement agencies were using," Warden said. "It was highly unreliable."

An official at the Alabama Department of Forensic Sciences said that only within the last few years has the state's lab gotten accredited by the

American Society of Crime Laboratory Directors.

"The public, the criminal justice system has kind of demanded it," said Ed Moran, the department's firearms and toolmarks chief. "Just like with any other industry that's out there you want to make sure you have safeguards against making any consequential error."

But those safeguards were not there when Hinton was convicted, said his current attorney, Bryan Stevenson. "The experts who testified for Mr. Hinton at his (appeal) hearing used state-of-the-art equipment. The greatest advances have come in digital photography which allow for amplification of microscopic comparisons that are more reliable and verifiable," said Stevenson, director of the Equal Justice Initiative in Montgomery, a nonprofit law firm that represents poor people on Death Row.

Though Judge Kelli Wise voted to deny Hinton's request for a new trial, she cautioned: "In cases such as this, where advances in forensic testing or scientific knowledge call into question earlier test results and/or prior expert testimony, the State would be well-advised to present additional evidence to rebut the petitioner's evidence, rather than to 'rest on its laurels.'"

Hinton is appealing the decision to the Alabama Supreme Court.