ANTHONY RAY HINTON

Anthony Ray Hinton has been on death row for over 28 years for a crime EJI firmly believes he did not commit. Mr. Hinton's innocence claim is unusually clear, compelling and uncontradicted. After a reversal of his case by the United States Supreme Court in February 2014, Mr. Hinton's case is now pending in Jefferson County Circuit Court where EJI has asked that the charges against him be dismissed. His case raises serious issues about race and official misconduct that should be addressed by those responsible for the administration of justice in this community.

THE CRIME

Late on February 23 or early on February 24, 1985, a Mrs. Winner's restaurant in Birmingham was robbed. John Davidson, the night manager, was shot twice in the head and died the next day. There were no eyewitnesses to the robbery-murder and technicians found no traceable fingerprints at the scene. Department of Forensic Sciences (DFS) toolmark examiner David Higgins examined two projectiles recovered from the crime and concluded it was impossible for him to say that these bullets were fired from the same weapon. Accordingly, police did not know if more than one shooter or more than one gun was involved.

Police had no suspects and the pressure to solve these murders grew as similar crimes continued. During the early morning hours of July 2, 1985, a Captain D's restaurant in Woodlawn was robbed and the assistant manager, Thomas Wayne Vason, was fatally shot twice in the head. There were no eyewitnesses to the murder and fingerprints lifted from the scene have never been matched to a suspect. Later that day, a different DFS examiner, Lawden Yates, was asked to examine the two projectiles recovered from the crime and he concluded that they had been fired from a single weapon. Yates, who was Higgins's supervisor, then re-examined the Davidson bullets with Higgins and compared them to the Vason bullets. On July 3, 1985, Higgins changed his opinion and together with Yates informed investigators that all four bullets had been fired from the same weapon.

On July 25, 1985, a Quincy's restaurant in Bessemer was robbed and the night manager, Sidney Smotherman, was shot and suffered superficial wounds. During the investigation into the Smotherman robbery, Anthony Hinton was identified as a suspect after Mr. Smotherman picked him from a photo lineup. Mr. Hinton had a petty theft conviction from years earlier, which is why he was in the police photo book.

Mr. Smotherman misidentified other people as perpetrators of the crime against him

including Leon Perry, a professional football player who gave aid to Mr. Smotherman shortly after the crime. There is evidence that police tried to pressure several people into identifying Mr. Hinton as the man they saw near the Quincy's on the night of the offense.

Police searched the home of Mr. Hinton's mother, Beulah Hinton, and seized her gun. Higgins and Yates then asserted that the Hinton weapon was the gun that fired the bullets in the two murder cases and the attempted murder of Mr. Smotherman. Their undisclosed records did not support this finding.

THE TRIAL

Mr. Hinton, who was twenty-nine years old at the time of the crime and had no history of violent crime at the time of his arrest, steadfastly maintained his innocence. Prior to trial, he passed a polygraph test given by police that exonerated him of any involvement in these crimes. The trial judge refused to admit it into evidence.

Most importantly, Mr. Hinton had a powerful alibi for the night Smotherman was robbed. He was working in a secure facility (a Bruno's warehouse) fifteen miles from the crime scene at the time of the Smotherman offense. His supervisor and other employees confirmed that Mr. Hinton arrived at work at 11:57 p.m. on the night of the Smotherman offense, clocked in at 12:00 a.m., was given his work assignment at about 12:10 a.m., was checked on by his supervisor around 12:40 a.m., and was closely supervised during his six-hour shift. The Smotherman crime took place between 12:15 a.m. and 12:45 a.m. and the person who committed that crime had to be waiting outside the restaurant from before midnight in order to follow the restaurant manager from the building at closing and attempt the robbery. After Mr. Hinton's arrest, similar armed robberies of fast-food restaurants continued in the Birmingham area.

Despite these facts, Mr. Hinton was charged in two separate indictments with the Davidson and Vason robbery-murders based on a theory that the person who committed the Smotherman crime had to have committed the two murders. Over defense objection, the two murder cases were consolidated. As the State conceded at trial, the only evidence linking Mr. Hinton to the deaths of John Davidson and Thomas Wayne Vason was the toolmark link between the Hinton weapon and the bullets from all three crimes. 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."

Despite the fact that the entire case against Mr. Hinton turned on crucial firearm and toolmark evidence, and trial counsel knew it was absolutely critical to obtain a competent

firearm and toolmark expert to assist in Mr. Hinton's defense, he unreasonably relied on his mistaken belief that Alabama law limited funds to $1000. Believing he had only $1000, trial counsel retained Andrew Payne, a visually-impaired civil engineer with no firearms identification expertise who admitted that he could not operate the machinery necessary to examine the evidence. With no credible expert to counter the state's claims about the gun, Mr. Hinton was quickly convicted and sentenced to death. Based on this ineffective assistance of counsel, the United States Supreme Court, in a unanimous decision, overturned his conviction. The Court found that Mr. Hinton's attorney at trial was "constitutionally deficient." The Court wrote:

> Hinton's attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for "any expenses reasonably incurred."

Hinton v. Alabama, 134 S. Ct. 1081, 1088-1089 (2014); see also id. at 1089 (holding "inexcusable mistake of law" – not strategic decision – "caused counsel to employ an expert that he himself deemed inadequate").

RACIAL BIAS AND MISCONDUCT

Racial bias, stereotypes, and bigotry played a significant role in the investigation, arrest and prosecution of Mr. Hinton. Police investigators revealed racial bias in developing their theory of the case. The lead investigator, Sergeant Howard Miller, asserted that his observation of the murder scenes – two robbery-murders of restaurant managers where no fingerprints were found and where there were no eyewitnesses – allowed him to conclude that the same person committed both crimes and that the shooter was a black man.[1] Even before the Smotherman offense, Mr. Miller claimed that he could tell, without any evidence and before the state had any suspects, that the person who committed these crimes was a black man who "lived with his mom or auntie." This racially biased pre-judgment about the crime and offender was never addressed by officials. This bigoted thinking clearly created an unjustified presumption of guilt against Mr. Hinton who lived with his mother.

The other principal investigator, Lt. Doug Acker, was indicted on criminal charges and

[1]Prosecutor Bob McGregor later reported in detail his conversation with Sgt. Miller at the crime scene. Bob McGregor, Whiskey Bent and Hell Bound: No Holiday for Justice, 192 (2009).

tried in federal court in 1982 after federal authorities concluded that he was beating and torturing criminal suspects to obtain confessions with the use of electric cattle prods and hypodermic needles. Mr. Acker, the head of a notorious Bessemer vice squad, was accused by another officer and federal prosecutors of routinely beating and torturing black prisoners and suspects, by firing blank pistols into their heads, applying electric cattle prods to their privates and injecting them with hypodermic needles in an effort to coerce them into making statements or confessing to crimes. The FBI recovered discarded cattle prods that had been thrown into a creek after Mr. Acker was indicted. After a mistrial, an all-white jury refused to convict Acker and he was promoted by the Police Department and assigned to work on the Hinton case.

The original prosecuting attorney similarly exhibited reckless and racially biased behavior that cannot be defended, excused or supported. Bob McGregor had a documented history of racial bias. He was twice found guilty of illegally discriminating against African Americans in jury selection in Mobile and Jefferson County. McGregor is the only prosecutor ever found to have "a systemic and intentional practice of excluding blacks" from jury service so pronounced that it violated a civil rights era ban on racial discrimination. The Eleventh Circuit Court of Appeals reached the unprecedented conclusion that his actions violated the 1965 Supreme Court holding that to prove illegal racial discrimination in jury selection a criminal defendant must show that a prosecutor has made a studied effort to exclude black jurors in every case over a long period of time. That standard has since been replaced because it was deemed to be impossible to meet.[2]

Mr. McGregor defended his prosecution of Mr. Hinton despite the absence of evidence by asserting repeatedly that he could tell Mr. Hinton was not only guilty but "evil" based solely on looking at him. These bigoted statements were accompanied by inappropriate threats and unethical assertions, including a promise to "meet him at the prison gates if he were ever to be released, and that it wouldn't be with either love in my heart or air in my hands." He later explained that he knew that Mr. Hinton was guilty because he "just radiated guilt and pure evil."

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[2]In Jones v. Davis, 835 F.2d 835 (11th Cir. 1988), a criminal case in Mobile County in which McGregor removed 100 percent of the eligible black jurors, the Eleventh Circuit reviewed the testimony of over a half-dozen attorneys who testified that it was McGregor's practice to exclude all (or all but one) black potential jurors from the jury venire in almost every case. Noting that McGregor's own testimony gave the "strong impression that he struck most blacks in the other cases," the court concluded that the petition had met his initial burden under Swain v. Alabama of proving that the prosecutor "had a systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges..." Jones, id. at 838, 839 n.6. In a subsequent opinion, the court granted relief. See Jones v. Davis, 906 F.2d 552 (11th Cir. 1990).

Mr. McGregor's bigoted and indefensible comments and behavior, and that of the police investigators, were tolerated by the previous District Attorney but should not be tolerated or relied upon any longer.

EVIDENCE OF INNOCENCE

In postconviction proceedings that began in 1994, three of the nation's top firearms experts[3] examined the firearms evidence by Mr. Hinton. Each of the three experts concluded that there is no evidence to establish that bullets recovered from the three crimes were fired from the same weapon. This testimony completely discredits the state's case against Mr. Hinton and according to the state's position at trial justifies a dismissal of the charges against Mr. Hinton.

At his postconviction hearing in 2002, these experts, whose qualifications the State conceded, testified that none of the recovered bullets, with the exception of the Davidson bullets, could be linked to a single weapon. Emanuel, Cooper, and Dillon also compared the six recovered bullets to the Hinton weapon. They concluded that the bullets recovered from the crimes could not be matched to the Hinton weapon.

Emanuel reported these findings to the State's expert, Lawden Yates. Emanuel asked Yates to work with him to resolve their differences, as required by professional ethical rules under AFTE.[4] He asked Yates to show him what he had seen and what he had used to make his

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[3]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 98 to 99 percent of the time for the prosecution. 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. John Dillon is the former chief of the firearm and toolmarks unit of the Federal Bureau of Investigation (FBI) and past president of(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.

[4]AFTE is the leading association of firearm experts in the country and establishes an internationally recognized code of professional ethics for firearm and toolmark examiners. The

determination that there was a match, but Yates refused to do so.

Having determined that the Smotherman bullets were fired from a weapon that was severely out of time, Emanuel and Cooper test-fired the 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. They concluded that the Smotherman bullets, could not have been fired from the Hinton weapon. 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."

These findings alone completely exonerate Mr. Hinton. Without a weapon match, there is no basis to believe that Anthony Hinton is guilty of these offenses. The state conceded at trial that the firearm match was the only evidence linking Mr. Hinton to the Davidson and Vason crimes. At Mr. Hinton's original trial, 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." 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." 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." The State emphasized the same point to the jury, arguing in opening statements that without a toolmarks match, there would be no conviction – indeed, no prosecution. The trial judge likewise recognized that a judgment for acquittal would be appropriate if the toolmarks evidence did not match.

Indeed, the trial court, the Alabama Court of Criminal Appeals, and the Alabama Supreme Court all considered the factual assertion of a weapons match to be the crucial linchpin of the State's case. As the United States Supreme Court observed:

> The State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver. According to the Alabama Supreme Court, "the only evidence linking Hinton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver."

Hinton v. Alabama, 134 S. Ct. 1081, 1084 (2014). The trial court on remand from the United States Supreme Court's decision also recognized that, "throughout the trial both sides and Judge Garrett acknowledged that the firearms and toolmark evidence was the glue that held the three

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State's examiners are members of this association, as are Mr. Hinton's experts.

cases together." Order on Remand 4-5 (Sept. 25, 2014).

In addition to the firearms evidence, more unrebutted evidence was also presented about Mr. Hinton's alibi at the 2002 hearing, and one witness testified that he was pressured by police investigators to falsely identify Mr. Hinton as being near the crime scene (which he refused to do). Despite this evidence state officials refused to take action and Mr. Hinton spent another twelve years on death row. EJI repeatedly asked state officials to re-investigate the case and re-examine the evidence but they refused.

Reviewing the evidence of innocence, misconduct, and unfairness, former Chief Justice of the Alabama Supreme Court Sue Bell Cobb cited this case as a clear example of unconstitutional misconduct and opined that Mr. Hinton was entitled to relief:

> Anthony Ray Hinton did not receive a fair trial. His capital-murder convictions and death sentence were obtained after the had State suppressed favorable, material evidence and after trial counsel had rendered ineffective assistance by failing to seek additional funds for an expert and by presenting an unqualified witness to testify as an expert. 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.

Hinton v. State, No. 04-0940, 2006 WL 1125605, at *66 (Ala. Crim. App. Apr. 28, 2006) (Cobb, J., dissenting). Justice Greg Shaw, then Judge Shaw, also wrote that:

> This is an extremely important case, not only for Hinton and the families of the victims of these horrendous crimes, but also for the people of Alabama, who must have confidence that the criminal justice system is capable of achieving its ultimate purpose-the fair conviction and punishment of the guilty and the protection of the innocent.

Id., at *70 (Shaw, J., dissenting). Chief Justice Roy Moore and Associate Justices Glenn Murdock and Greg Shaw dissented from the Alabama Supreme Court's refusal to review this case on April 19, 2013. Certificate of Judgment, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013).

DELIBERATE INDIFFERENCE TO CLAIMS OF INNOCENCE

Over the course of fifteen years, the Equal Justice Initiative has repeatedly asked state officials to re-examine evidence in his case, re-open the case or otherwise investigate the possibility that Mr. Hinton is innocent. This dates back to requests made to the Jefferson County District Attorney's office under David Barber.

In 1999, Mr. Hinton's experts – three of the most highly respected firearms examiners in the nation – asked state forensic experts to meet with them to discuss their findings that there was no support for Mr. Hinton's conviction. Although thecode of professional conduct for firearms examiners requires that firearms examiners meet to resolve differences of opinion, the State's examiners refused.

In 2002, EJI asked the Jefferson County District Attorney's office to join a motion asking for reconsideration of the case and Mr. Hinton's release based on the new gun evidence. The District Attorney refused.

The Attorney General's office also has refused to re-examine the case despite repeated requests dating back to 2002. Attorney General Troy King refused to re-examine the case despite repeatedly being asked by EJI and the Birmingham News to address the new evidence of innocence.

In 2011, EJI met twice with representatives for Luther Strange seeking a re-examination of the evidence against Mr. Hinton. In a 2011 letter, Attorney General Strange promised an investigation but none was conducted. Strange's office refused to respond to renewed requests for testing in 2012.

Dating back to 2002, the Birmingham News in a series of editorials criticized the State's unwillingness to confront this evidence of innocence:

> Also unsettling is Attorney General Bill Pryor's reluctance to consider the possibility that a mistake was made. While Hinton's current lawyers are asking that his conviction be reconsidered, Pryor's office calls it a "waste of time." . . . That's unfortunate. Pryor's staff is entrusted with death penalty cases throughout the appeals process. But the prosecutors have no greater duty than ensuring that the wrong person does not die for a crime.

Editorial, Vindicating a Verdict, Hinton Case Merits a Closer Look by Prosecutors, Birmingham News, June 30, 2002. Four years later, the editorial board wrote: "If Anthony Ray Hinton's death sentence doesn't concern the Alabama Court of Criminal Appeals its hard to imagine what death sentence would." Editorial, A Mockery of Justice: a State Appeals Court Rejected the

Appeal of Death Row Inmate Anthony Ray Hinton, Birmingham News, May 3, 2006.

Mr. Hinton's new trial was obtained only when the United States Supreme Court reversed the lower court decisions upholding his conviction and an order was entered by Judge Petro granting a new trial.

THE PLIGHT OF ANTHONY RAY HINTON

Against all odds, throughout this ordeal Anthony Ray Hinton has demonstrated himself to be a man of unusual character and integrity. His mother and closest family members have died while he has waited and waited for justice. During his time on death row he has succeeded in achieving a remarkable reputation with correction officers at Holman Prison. In our nearly 30 years of representing people on death row, EJI has never been contacted by more correctional staff who work on death row to express their support for someone on death row than the calls and comments we've received from prison employees about Mr. Hinton. Not only have they expressed their confidence in Mr. Hinton's innocence based on their years of working with him, many have expressed unusual admiration and support for his honesty, integrity and character in the face of a terrible injustice. They have universally identified him as one of the most thoughtful and considerate people they have dealt with and many have offered to testify on his behalf about his outstanding character. In his 28 years on death row, Mr. Hinton has collected only a single disciplinary. (He is alleged to have used someone's cell phone to call a relative.)

There is urgency to resolve this case because if Mr. Hinton is innocent, each day that passes compounds a terrible injustice. Anthony Ray Hinton is currently the second longest-serving death sentenced person in Alabama. Months have passed since he was ordered to receive a new trial and state officials have not disclosed their plans or intentions. EJI believes that charges against Mr. Hinton should be dismissed immediately.