No. 13-6440

IN THE

Supreme Court of the United States

ANTHONY RAY HINTON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of petitioner.

The Constitution Project advances its goals through constructive dialogue across ideological and partisan lines, and through scholarship, advocacy, and public education efforts. It often undertakes original research, publishes reports and statements, testifies before Congress, and holds regular briefings with legislative staff and other policymakers. Its work has been cited by numerous government agencies and by leading law and policy organizations. The Constitution Project also frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the highest state courts in support of the protection of citizens' constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of the American justice system. The Committee was established in 2004 to examine whether criminal defendants and juveniles charged with delinquency receive adequate legal representation. In 2009, the Commit-

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certify that counsel of record for both parties received timely notice of *amicus curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

tee issued a report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel,* that included findings on the ineffective assistance of counsel in the criminal justice system. *Available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf. The Committee's report concluded that courts' application of the standards "for judging effective assistance of counsel has been unsuccessful in protecting the innocent, let alone ensuring that counsel has performed competently." *Id.* at 43.

The Constitution Project supports review in this case because the Alabama Court of Criminal Appeals has departed from this Court's controlling precedents and rewritten the test set forth in *Strickland* v. *Washington,* 466 U.S. 668 (1984). The only evidence of guilt in this capital case was the testimony of two state experts that a gun linked to the defendant matched bullets found at the scenes of two murders. That testimony has now been definitively debunked, but that did not happen at Mr. Hinton's trial because of defense counsel's constitutionally deficient performance. Defense counsel recognized that challenging the State's expert testimony was critical. Yet defense counsel retained an incompetent expert who he knew would be ineffective at trial, under the mistaken belief that he could not obtain funding to hire a more qualified expert.

Rather than applying *Strickland*'s two-part test and evaluating whether these actions constituted deficient performance that prejudiced the defendant, the Alabama Court of Criminal Appeals held that Mr. Hinton's ineffective assistance claim was "meritless" because the expert's testimony met the minimal standards of admissibility under Alabama evidentiary rules, which require merely that the "expert"

have more knowledge than "the average man in the street." *Hinton* v. *State*, No. CR-04-0940, 2008 WL 5517591, at *6, *8 (Ala. Crim. App. Aug. 26, 2011) (quoting *Charles* v. *State*, 350 So. 2d 730, 733 (Ala. Crim, App. 1977)), *rev'd and remanded by Ex parte Hinton*, No. 1110129, 2012 WL 5458542 (Ala. Nov. 9, 2012).

The lower court's decision is part of a broader trend of flawed forensic expert testimony and ineffective defense counsel failing to properly challenge such testimony. Given the risk that faulty forensic evidence can lead to wrongful convictions, the question of the duty of defense counsel to engage competent forensic experts when the sole evidence against the defendant is based upon the testimony of state forensic experts is a critically important issue of federal law that this Court should review.

SUMMARY OF THE ARGUMENT

The testimony of state expert forensic witnesses has a powerful impact on jurors. Yet, many forensic disciplines, including firearms and toolmark analysis, lack rigorous scientific standards, and cannot reliably link a piece of evidence to a particular defendant with a high degree of certainty. Faulty expert testimony that overstates, or even completely misstates, the strength of such forensic evidence has resulted in the convictions of hundreds of innocent people. The danger that flawed expert testimony will lead to wrongful convictions is especially grave where—as here—such forensic testimony is the *only* evidence against the defendant in a capital murder trial.

When expert forensic testimony is critical to the prosecution's case, defense counsel's failure to challenge such testimony in an effective manner violates the Sixth Amendment's guarantee of effective assis-

tance of counsel. In this case, defense counsel recognized prior to trial that the expert he had retained to challenge the State's critical forensic evidence was not competent. He failed to retain a more qualified expert not as a result of a tactical decision as to the most promising trial strategy, but because he mistakenly believed that he could not obtain the necessary funds. The Alabama Court of Criminal Appeals, rather than evaluating whether defense counsel's actions constituted deficient performance and prejudiced the defendant under *Strickland*, wrongly held that Mr. Hinton's ineffective assistance claim was "meritless" because the expert's testimony met the minimal standards for admissibility under Alabama evidentiary rules, which require merely that the "expert" have more knowledge than "the average man in the street." *Hinton*, 2008 WL 5517591, at *6, *8. Under a proper *Strickland* analysis, counsel's failure to retain a competent firearms and toolmark expert constituted deficient performance that prejudiced Mr. Hinton; indeed, the evidence strongly suggests that it led to a miscarriage of justice, and caused an innocent man to be sentenced to death.

The Court should grant the petition for certiorari and review this matter now because, if the petition is denied, any further federal court review of this case will be constrained by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This Court has repeatedly stressed that AEDPA imposes stringent limits on federal habeas corpus proceedings. Granting this certiorari petition would therefore allow the Court to address the critical Sixth Amendment issue presented here in a superior posture.

ARGUMENT

I. WHERE EXPERT TESTIMONY IS CRITICAL TO THE PROSECUTION'S CASE, DEFENSE COUNSEL'S FAILURE TO CHALLENGE SUCH TESTIMONY IN AN EFFECTIVE MANNER MAY CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Flawed Forensic Testimony Has Led To Numerous Wrongful Convictions.

Criminal prosecutions increasingly depend on forensic expert testimony. Indeed, "[f]orensic science experts and evidence are routinely used in the service of the criminal justice system." Comm. on Identifying the Needs of the Forensic Scis. Cmty. et al., Nat'l Research Council, *Strengthening Forensic Science In The United States: A Path Forward*, 86 (2009). For instance:

> DNA testing may be used to determine whether sperm found on a rape victim came from an accused party; a latent fingerprint found on a gun may be used to determine whether a defendant handled the weapon; drug analysis may be used to determine whether pills found in a person's possession were illicit; and an autopsy may be used to determine the cause of death of a murder victim.

Id.; see also Janine Robben, *The 'CSI' Effect: Popular Culture and the Justice System*, 66-OCT Or. St. B. Bull. 9, 10 (Oct. 2005).

In many instances, this increasing reliance on expert forensic testimony has improved the reliability of prosecutions. See Nat'l Research Council, *Strengthening Forensic Science, supra*, at 4 ("[T]he forensic science disciplines have produced valuable evidence

that has contributed to the successful prosecution and conviction of criminals as well as to the exoneration of innocent people."). Such testimony, however, also presents serious pitfalls. Jurors typically lack the capacity to evaluate the accuracy of scientific assertions independently, and accordingly tend to place great weight on the testimony of witnesses presented as scientific experts. Therefore, as this Court has recognized, "[e]xpert evidence can be both powerful and quite misleading . . . ." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). "[T]he esoteric nature of an expert's opinions, together with the jargon and the expert's scholarly credentials, may cast an aura of infallibility over his or her testimony." Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 Sci. Am. 46, 48 (May 1990); see Jessica D. Gabel, *Forensiphilia: Is Public Fascination with Forensic Science a Love Affair or Fatal Attraction?*, 36 New Eng. J. on Crim. & Civ. Confinement 233 (2010).

Further, "forensic sciences are precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008). When witnesses presented as scientific experts testify that "fingerprints, or bite marks, or hairs, or other such evidence from the crime scene can be matched in the laboratory to the defendant, even—as such experts sometimes claim—to the exclusion of all other persons in the world, that testimony is likely to be accepted as conclusive." *Id.*; see Mark A. Godsey & Marie Alao, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481, 483-84 (2011); see generally, Allan Raitz et al., *Determining Damag-*

es: The Influence of Expert Testimony on Juror Decision Making, 14 Law & Hum. Behav. 385 (1990).

And because the jurors themselves lack scientific expertise, when parties present competing experts, juries' "scientific decisions . . . tend to be made based on assessments of the personality, credentials, and perceived credibility of the experts, more than on the validity of scientific research . . . ." Findley, *Innocents At Risk*, *supra*, 38 Seton Hall L. Rev. at 949. Therefore, "[a]n advantage lies with the party whose expert has the most persuasive forensic skills rather than the most authoritative and meritorious testimony." Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 133 (1996).

The tendency of juries to accord great weight to the testimony of highly credentialed forensic experts becomes problematic when that testimony is flawed. While much forensic expert testimony is no doubt valid, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 319 (2009). Indeed, a recent study conducted at the request of Congress by the National Research Council of the National Academy of Sciences concluded that there is a significant danger that juries will give "undue weight to evidence and testimony derived from imperfect testing and analysis." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 4. Such circumstances, the study found, can allow "true offenders [to] continue to commit crimes while innocent persons inappropriately serve time." *Id.* at 5.

The study further found that the reliability of expert testimony varies widely across different fields of forensics. *Id.* at 6. DNA analysis, for instance, has a strong and rigorously verified scientific basis, and "is now universally recognized as the standard against

which many other forensic individualization techniques are judged." *Id.* at 130. "[A]bsent fraud or an error in labeling or handling, the probabilities of a false positive [in DNA analysis] are quantifiable and often miniscule." *Id.* Other forensic techniques, however, "are based on observation, experience, and reasoning without an underlying scientific theory, experiments designed to test the uncertainties and reliability of the method, or sufficient data that are collected and analyzed scientifically." *Id.* at 128. These techniques are far less reliable than DNA analysis, and far more likely to lead to wrongful convictions. "Indeed, DNA testing has been used to exonerate persons who were convicted as a result of the misapplication of other forensic science evidence." *Id.* at 100.

Some fields of forensics have been found to be so flawed as to call into question their legitimacy. For instance, experts testified in many criminal trials that bite marks on a particular victim could be matched to the defendant's teeth, but the National Research Council found "no evidence of an existing scientific basis for identifying an individual to the exclusion of all others" through bite mark analysis. *Id.* at 176. "[I]n case after case where inmates convicted on bite mark evidence were able to obtain DNA testing of the saliva found on the skin or clothing where the bite mark occurred, the DNA testing proved that they had not in fact been the biter/perpetrator." Godsey & Alao, *She Blinded Me with Science*, *supra*, 17 Tex. Wesleyan L. Rev at 485.

Similarly, FBI crime lab analysts testified in criminal trials for 40 years that "lead in bullets had unique chemical signatures" and that "it was possible to match bullets, not only to a single batch of ammunition coming out of a factory, but to a single box of bul-

lets." *60 Minutes: Evidence of Injustice* (CBS News Broadcast Sept. 12, 2008), *available at* http://www.cbsnews.com/8301-18560_162-3512453.html. Yet when the National Research Council subjected these claims to scientific testing, the tests revealed that "the available data do not support any statement that a crime bullet came from, or is likely to have come from, a particular box of ammunition, and references to 'boxes' of ammunition in any form are seriously misleading . . . ." Comm. on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Nat'l Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence* 113 (2004).

Expert testimony regarding "Shaken Baby Syndrome" also has been discredited recently. For years, experts testified in criminal trials that certain types of brain injuries to infants could only have been caused by a person violently shaking the infant. Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1 (2009). But "[t]here is now general agreement among the medical community that the previous incarnation of [shaken baby syndrome] is invalid," *id.* at 6, and that there is "inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to [shaken baby syndrome]," Mark Donohoe, *Evidence–Based Medicine and Shaken Baby Syndrome, Part I: Literature Review*, *1966–1998*, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003). Indeed, it is now recognized that injuries which experts testified could *only* have been caused by violent shaking can in fact be caused by infections, strokes, blood clotting problems, accidental falls, and other conditions. 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 Oct. 21, 2013) (listing eleven exonerations of defendants wrongfully convicted because of expert testimony regarding Shaken Baby Syndrome).

Even where the forensic techniques themselves are generally reliable, expert testimony based on flawed analysis or overstatement of the evidence has led to hundreds of wrongful convictions. Many fields of forensics—including analysis of fingerprints, hair, shoe and tire marks, firearm and toolmarks, DNA, and blood—are geared towards "individualization," or, in other words, determining whether evidence obtained from a defendant can be "match[ed]" to evidence found at the crime scene. Nat'l Research Council, *Strengthening Forensic Science, supra*, at 7. But "[w]ith the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *Id.* In hundreds of wrongful convictions, forensic experts testified that evidence could be conclusively matched to a defendant, even though there was no empirical support for such a statement, or the experts gave inaccurate statistics that greatly overstated the probability that the evidence could be matched to the defendant. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (Mar. 2009); see *Nat'l Registry of Exonerations*, *supra* (listing 272 exonerations of defendants wrongfully convicted wholly or partially on the basis of false or misleading forensic evidence).

Firearms and toolmark analysis—the type of forensic testimony at issue in this case—is not free from

these problems. "The task of the firearms and toolmark examiner is to identify the individual characteristics of microscopic toolmarks . . . and then to assess the extent of agreement . . . to permit the identification of an individual tool or firearm." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153. The technique essentially consists of examining under a microscope bullets fired from a particular gun and bullets found at a crime scene, and coming to a judgment as to whether the bullets match. *Id.* at 152.

The technique is not inherently unreliable, and can reliably *exclude* the possibility that a particular gun fired a particular bullet. *Id.* at 154. Expert testimony that purports to determine definitively that a particular gun *must have* fired a particular bullet, however, is not currently supported by science. Indeed, the National Research Council found that there are no existing standards for "the number of correlations needed to achieve a given degree of confidence" that two bullets were fired from same gun. *Id.* at 155; see *United States* v. *Green*, 405 F. Supp. 2d 104, 114 (D. Mass 2005) (finding that "there are no national standards to be applied to evaluate how many marks must match" for a toolmark expert to match a bullet to a gun). In other words, there is no empirical basis for determining the probability that a particular gun fired a particular bullet. Rather, an expert's determination whether a bullet matches a gun "remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153-54; see Richard Grzybowski et al., *Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards*, 35 AFTE J. 209, 213 (2003) (finding that

it "is not possible to calculate an absolute error rate for routine casework" in firearms and toolmark analysis).

As one court noted, there is an "almost complete lack of factual and statistical data pertaining to the problem of establishing identity in the field of firearm identification." *United States* v. *Monteiro*, 407 F. Supp. 2d 351, 367 (D. Mass. 2006) (quoting Alfred A. Biasotti, *A Statistical Study of the Individual Characteristics of Fired Bullets*, 4 J. Forensic Sci. 34 (1959)). Testimony "claiming to be able to single out a particular firearm or other tool as the source of an evidence toolmark, to the exclusion of all other tools in the world," is therefore not backed by empirical data and may "fundamentally mislead judges and juries." Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification*, 6 Colum. Sci. & Tech. L. Rev. 2, 32 (2004-05); see *Green*, 405 F. Supp. 2d at 109 (excluding an expert's opinion that a bullet could be definitively matched to a particular gun under *Daubert* because "[t]hat conclusion—that there is a definitive match—stretches well beyond [the expert's] data and methodology."); *United States* v. *Glynn*, 578 F. Supp. 2d 567, 570 (S.D.N.Y. 2008) (Rakoff, J.) ("[W]hatever else ballistics identification analysis could be called, it could not fairly be called 'science.'").

There is also a significant risk of false positives, because many of the microscopic markings on bullets may be common to a particular model of gun, rather than unique to one individual weapon. Schwartz, *A Systemic Challenge*, *supra*, 6 Colum. Sci. & Tech. L. Rev. at 14. Controlled studies have found that "[t]he similarities between known non-matching toolmarks were sometimes so great that even under a comparison microscope, it was difficult to tell the toolmarks

apart and not erroneously attribute them to the same gun." *Id.* at 15. As there are no widely accepted rules for distinguishing which marks are unique to a single gun, "examiners can only rely on their personal familiarity" with the manufacturing processes and toolmarks left by similar weapons. *Id.* at 21; see *Green*, 405 F. Supp. 2d at 107 ("The examiner has to exercise his judgment as to which marks are unique to the weapon in question, and which are not."). And because the technique "involve[s] subjective qualitative judgments by examiners," "the accuracy of examiners' assessments is highly dependent on their skill and training." Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153; see *Monteiro*, 407 F. Supp. 2d at 366 (finding that the process "of identifying a match between a particular cartridge case and gun . . . is admittedly 'subjective' and based on experience and training of the individual examiner.").

In this case, the State presented testimony from two forensic experts, both of whom were professional firearms and toolmark examiners with the Alabama Department of Forensic Sciences, and both of whom had testified for the state in hundreds of cases. *Hinton* v. *State*, No. CR-04-0940, 2006 WL 1125605, at *9-10 (Ala. Crim. App. Apr. 28, 2006), *rev'd and remanded by Ex parte Hinton*, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008). Both of the State's experts testified without caveat that the bullets found at all three crime scenes had been fired from the same gun, and that the gun was "the revolver that was recovered from [Mr. Hinton's] mother." *Id.* at *10.

This expert testimony was not only critical to the murder prosecution—it was the prosecution's entire case. "[T]he only evidence linking Hinton to the two murders were forensic comparisons of the bullets re-

covered from those crime scenes to the Hinton revolver." *Ex parte Hinton*, 2008 WL 4603723, at *2. Indeed, other evidence—including a strong alibi, that Mr. Hinton was at work in a secured warehouse facility during one of the crimes—supported Mr. Hinton's claim of innocence. *Hinton*, 2006 WL 1125605, at *19. The prosecution conceded at a suppression hearing that its case rested on the forensic testimony alone, stating "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[2]; see Pet. at 8-9, 14. This lack of any other evidence led the dissent below to remark: "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 . . . ." *Hinton*, 2006 WL 1125605, at *69 (Cobb, J., dissenting).

This "amazing prosecutorial feat" was made possible by defense counsel's failure to retain a competent forensic expert to challenge the State's evidence. Instead, defense counsel presented testimony from a partially blind civil engineer, Andrew Payne, who had little training or experience with toolmark analysis. R.1641-42; R.1667. Mr. Payne did not know how to use a comparison microscope to determine whether bullets from the crime scenes matched bullets from Mr. Hinton's mother's gun; indeed, for most of his examination, he could not even find the bullets under the microscope. R.1653-54.

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[2] References are to the appellate record below. "R." refers to the trial transcript, and "PR." refers to the transcript of the postconviction hearing.

Unsurprisingly, the prosecution conducted a devastating cross-examination of Mr. Payne, and thoroughly discredited him in front of the jury, successfully characterizing him as a "charlatan" who was "not a firearms and tool marks expert . . . . [n]o expert at all." R.1732-33, 1727; see R.1728 (prosecutor's statement that Mr. Payne "knows very, very little about what he came up here to testify about, very little."). As the prosecution told the jury, there was simply "no comparison" between Mr. Payne's qualifications and experience and those of the State's two experts.

With Mr. Payne thoroughly discredited, Mr. Hinton was unable to challenge the State's expert testimony, leaving its "aura of infallibility" undisturbed. Neufeld & Colman, *When Science Takes the Witness Stand*, *supra*, 262 Sci. Am. at 48. The jury was thus led to believe that it had been conclusively and scientifically determined that the bullets from each murder scene could only have been fired from Mr. Hinton's gun, even though more recent studies, including by the National Research Council, have concluded that there is no established scientific basis to determine with a high degree of certainty that a particular bullet was fired from a particular gun. Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153-55; Schwartz, *A Systemic Challenge*, *supra*, 6 Colum. Sci. & Tech. L. Rev. at 32. Given the lack of any other evidence of Mr. Hinton's guilt—and the strong evidence of his innocence—"[c]onfidence in the outcome of Hinton's trial has been seriously undermined . . . ." *Hinton*, 2006 WL 1125605, at *69 (Cobb, J., dissenting).

B. Defense Counsel's Failure To Challenge Critical Forensic Testimony In An Effective Manner Violated The Sixth Amendment.

"The causes of wrongful conviction, . . . [including] faulty scientific evidence . . . are all matters that competent defense lawyers can address," but "defendants who are innocent . . . stand virtually no chance of avoiding conviction absent dedicated representation . . . ." The Constitution Project, *Justice Denied*, *supra*, at 47. While in many cases defense counsel will have a wide range of reasonable strategies, "[c]riminal 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." *Harrington* v. *Richter*, 131 S. Ct. 770, 788-89 (2011). Therefore, "[i]t can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts . . . ." *Id.*

This is just such a case. The State repeatedly conceded before and during trial that the only evidence tying Mr. Hinton to the two murders was the testimony of its forensic experts. See Pet. 19-22. Therefore, "it was essential . . . that trial counsel retain a qualified firearms and toolmarks expert to testify with respect to what the parties agree was the crucial issue at trial—whether the bullets found at the crime scenes could be connected to the gun found at the residence of Hinton's mother." *Hinton*, 2006 WL 1125605, at *70 (Shaw, J., dissenting).

Yet instead of hiring a competent firearms and toolmark expert, defense counsel hired Mr. Payne. Defense counsel's choice of Mr. Payne was not based on any strategic judgment that Payne would be effective with the jury, but rather was based on counsel's

failure to investigate Alabama law. See *Wiggins* v. *Smith*, 539 U.S. 510, 522 (2003) (explaining that "counsel's failure . . . could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] [his] obligation to conduct a thorough investigation . . . .'" (quoting *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000))). At a pretrial hearing, defense counsel told the trial judge that he believed Mr. Payne might not be qualified to testify, and that another attorney who knew Mr. Payne did not recommend him. R.62-71. Defense counsel likewise testified at the postconviction hearing that he did not believe that Mr. Payne had the expertise needed and that Mr. Payne's trial testimony had not been effective. PR.188-89; see *Hinton*, 2006 WL 1125605, at *59-60 (Cobb, J., dissenting).

Defense counsel hired Mr. Payne because, out of ignorance of State law, he mistakenly believed that the State would not reimburse more than $500 per case in expert fees for indigent criminal defendants. Therefore, as defense counsel told the court before trial, he believed he was "stuck" with Mr. Payne as "the only guy I could possibly produce," as he had not been able to find any other experts willing to testify for so little money. R.71. However, the law governing state funds for experts had been amended; the version in effect at the time of Mr. Hinton's trial provided that the state would reimburse any expenses reasonably incurred in the defense of an indigent criminal defendant. Ala. Code § 15-12-21(d). "Counsel failed to conduct a reasonable investigation—or any investigation—into the current law; he failed to discover that the former statutory limitation had been eliminated 18 months before the pretrial hearings were held in this case, and more than 2 years be-

fore the trial." *Hinton*, 2006 WL 1125605, at *61 (Cobb, J., dissenting).

The predictable result of defense counsel's decision to present Mr. Payne as an expert witness was that the State devastated Mr. Payne's credibility on cross-examination, and successfully characterized Mr. Payne to the jury as a "charlatan," R.1727, 1732-33, who "didn't have a clue about what he was doing," R.1728. The prosecutor even aptly stated during closing argument that presenting Mr. Payne as an expert in firearms and toolmark analysis was "the height of irresponsibility," R.1733, and that it was "startling and disturbing, alarming and almost sickening to see someone come up here and give an opinion like that," R.1728. The prosecution's attack on Mr. Payne's qualifications and skills was especially damaging because the value of toolmark testimony, and jury evaluation of expert testimony in general, is "highly dependent on the[] skill and training" of the expert. Nat'l Research Council, *Strengthening Forensic Science, supra*, at 153; *Monteiro*, 407 F. Supp. 2d at 366; Strier, *Making Jury Trials More Truthful*, *supra*, 30 U.C. Davis L. Rev. at 133. Thus, "[t]he 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." *Hinton*, 2006 WL 1125605, at *64 (Cobb, J., dissenting).

At Mr. Hinton's postconviction hearing, by contrast, the defense introduced testimony from three highly qualified experts. All three were professional firearms and toolmark examiners with decades of experience in the field; one was the former Chief of the Firearms and Toolmark Unit at FBI Headquarters, and the former President of the Association of Firearms and Toolmark Examiners. PR.61-65, 113-14,

135; see *Hinton*, 2006 WL 1125605, at *64 (Cobb, J., dissenting). All three testified that they could not match the bullets from the three crime scenes to a single gun, and could not match any of the crime scene bullets to Mr. Hinton's mother's gun. PR.73-74, 77, 116-19, 141-44. Further, two of the experts testified that Mr. Hinton's mother's gun was mechanically *incapable* of firing the bullets from one of the crime scenes. PR.86, 120-23. The State presented no new evidence at the postconviction hearing to rebut the testimony of these three experts. PR.106-07. "If such testimony had been presented at Hinton's trial by qualified, competent experts in the field of firearms and toolmark examinations, there is a reasonable probability that the result of the proceeding would have been different," because the State could not have discredited the testimony by attacking the skills and qualifications of the experts. *Hinton*, 2006 WL 1125605, at *66 (Cobb, J., dissenting).

The Alabama Court of Criminal Appeals rejected this argument. It looked to the "criterion for admission of expert testimony" under Alabama law at the time of Mr. Hinton's trial, *Hinton*, 2008 WL 5517591, at *6 (quoting *Meade* v. *State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980)), and held that Mr. Payne's testimony was admissible because his knowledge of firearms and toolmark analysis was "to some degree better than that found in the average juror or witness," and Mr. Payne could "enlighten a jury more than the average man in the street." *Hinton*, 2008 WL 5517591, at *6 (quoting *Charles*, 350 So. 2d at 733). Therefore, the state court concluded, defense counsel's presentation of Mr. Payne's testimony *could not* constitute ineffective assistance: "Because Payne was a qualified expert in firearms identification, even if his qualifications did not match those of the State's

experts, Hinton's claim that his trial counsel was ineffective for not procuring a qualified firearms-identification expert is meritless . . . ." *Id.* at *8.

The Alabama Court of Criminal Appeals' decision directly conflicts with *Strickland*. The question under *Strickland* is not whether Mr. Payne's testimony was admissible, but whether, under the circumstances, defense counsel's decision to present that testimony was deficient performance that prejudiced Mr. Hinton. *Rompilla* v. *Beard*, 545 U.S. 374, 380-81 (2005). This Court should grant certiorari to address that conflict on a critically important issue of federal law, in a case where there is a serious danger that the state court's erroneous legal standard could result in the execution of an innocent man.

II. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT WILL CONSTRAIN ANY FURTHER FEDERAL COURT REVIEW.

This Court should grant the petition for the additional reason that, if the petition is denied, any further federal court review of this case would be constrained by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Section 2254(d)(1) of AEDPA provides that federal courts cannot grant relief on habeas review of state court convictions unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

AEDPA significantly limits the ability of federal courts to review *Strickland* claims. "The more general the rule, the more leeway courts have in reach-

ing outcomes in case-by-case determinations" under AEDPA, *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004), and "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial," *Richter*, 131 S. Ct. at 788. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*[]." *Id*. Therefore, on federal habeas review, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id*. at 785.

While AEDPA "stops short of imposing a complete bar on federal court relitigation," it tightly limits federal courts' review in habeas cases. *Id.* at 786. Whether the state court's decision was unreasonable is "the only question that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003); see also *Cavazos* v. *Smith*, 132 S. Ct. 2, 7 (2011) (in a Shaken Baby Syndrome case where AEDPA applied, "[d]oubts about whether Smith is in fact guilty are understandable," but cannot support federal habeas relief); Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211 (Oct. 2008). Because AEDPA does not apply in the current posture of this case, this petition for certiorari presents a superior vehicle for this Court to address the critical Sixth Amendment issues presented here, and to consider the serious miscarriage of justice that occurred in this death penalty action.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

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