No. 13-6440

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. The Constitutional Duty of a Criminal Defense Attorney to Engage Credible and Effective Expert Assistance When a Conviction Turns on Forensic Evidence Is a Critically Important Issue This Court Should Address.

The Sixth Amendment analysis enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984), requires reviewing courts to evaluate the reasonableness of counsel's performance in light of prevailing professional standards and the totality of the evidence adduced at trial and in postconviction proceedings. The Alabama Court of Criminal Appeals did not apply this standard. Instead, it concluded that because Andrew Payne's testimony met the bare standards of evidentiary admissibility, counsel's reliance on Payne was per se reasonable. Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *31 n.12 (Ala. Crim. App. Apr. 28, 2006) (finding evidence relating to Payne's competence irrelevant because circuit court admitted Payne's testimony as an expert); Hinton v. State, No. CR-04-0940, 2011 WL 3780644, at *8 (Ala. Crim. App. Aug. 26, 2011) ("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."). Accordingly, review by this Court is fully justified. Nothing in the State's Brief in Opposition undermines this conclusion.

Notably, the State does not argue that counsel's decision to hire 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. Instead, the State argues that the lower court properly reduced the Sixth Amendment question to one that looks exclusively to minimum standards of evidentiary admissibility, and that the court properly found that because Payne's testimony was admissible, counsel's reliance on Payne was per se reasonable under Strickland:

> Payne met the criteria for an expert witness in Alabama at the time of Hinton's trial: "by study, practice, experience or observation as to the particular subject, [he had] acquired a knowledge beyond that of an ordinary witness."

State's Br. in Opp'n 22. The State's argument supports the need for the Court to grant certiorari review. This argument begs the question of whether the admissibility of a witness's testimony under state evidentiary rules is dispositive when assessing whether counsel's failure to obtain a credible and effective expert on the single most important issue in a death-penalty trial is deficient and prejudicial.

The State's argument that the Sixth Amendment question presented in this case is "meritless" because "[e]very court to consider his claim has found that Payne was a qualified expert witness," State's Br. in Opp'n 1, is not persuasive. First, far from patently meritless, this is a question that has divided every appellate court to consider it. 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;[1] and certiorari review was denied in a

[1]Hinton, 2006 WL 1125605, at *66 (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

narrowly divided 4-3 order, Ex parte Hinton, No. 1110129 (Ala. Apr. 19, 2013).

The State's argument that Payne met the minimum standards of evidentiary admissibility rests entirely on the State's characterization of Payne's own testimony at trial. According to Payne's testimony, he underwent no training in firearms identification or toolmark examination; took no courses on the subject; and did not belong to or participate in the trainings offered by the gatekeeper professional organization for firearms and toolmark examiners, the Association of Firearms and Toolmark Examiners. (R. 1572-77, 1642-43.)[2] Payne acknowledged that his only experience matching bullets to a barrel was during an eight- or nine-month period when he compared pieces of heavy ordnance fired from known .50-caliber artillery guns. (R. 1641-42.)[3] He had no experience comparing a bullet of unknown origin to a weapon for firearms identification purposes.[4] The State argues, first and foremost, that Payne was competent because he had a military career, State's Br. in Opp'n 5, but identifies no relevant experience in firearms identification during his military experience. Indeed, Payne testified that he spent his time in the military researching

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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.").

[2]References are to the appellate record below in this case. "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.

[3]The weapon the State contended was used to commit the Vason and Davidson offenses was a .38-caliber Smith & Wesson revolver. Hinton v. State, 548 So. 2d 547, 553 (Ala. Crim. App. 1988).

[4]As then-Judge Cobb recognized, Payne's time in the military was spent "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." Hinton, 2006 WL 1125605, at *62 (Cobb, J., dissenting) (internal quotation marks omitted); see also id. at *70 (Shaw, J., dissenting) (Payne "was a civil engineer with a military background primarily in heavy weapons and ordnance").

heavy ordnance and, in the vast majority of cases he was not required to compare a spent projectile to test projectiles in order to identify which specific weapon fired the spent projectile; rather, he looked at fired artillery shells to "see the effect of the impact with the target." (R. 1640; see also R. 1601 ["[W]e had to examine the bullets to see whether or not the bullets were performing the tasks which we wanted them to perform and if not what we had to do to correct the problem."].)

The State's reliance on Payne's experience testifying as an expert witness also is misplaced. At Mr. Hinton's trial, Payne admitted on cross-examination that he had testified in court as a consulting engineer more than a thousand times but only twice in a case involving firearm and tool marks identification, and one of those was a civil case. (R. 1654-56.) Payne typically provided courtroom testimony in civil cases about questions involving radio antennae, electrical lines, Black & Decker power tools, and car accidents. See, e.g., Rye v. Black & Decker Mfg. Co., 889 F.2d 100 (6th Cir. 1989) (negligence case involving Black & Decker saws); Thomas v. Black & Decker, Inc., 502 So. 2d 157 (La. Ct. App. 1987) (failure analysis involving power tools); Alabama Power Co. v. Robinson, 447 So. 2d 148 (Ala. 1983) (radio antenna and overhead power lines); Erwin v. Sanders, 320 So. 2d 662 (Ala. 1975) (car accident). In at least one other Alabama case, Payne demonstrated his willingness to offer expert opinion testimony when he was not in a position to do so credibly.[5]

[5]The Alabama Supreme Court found in Alabama Power Co. v. Robinson, 447 So. 2d 148 (Ala. 1983), that the trial court erred in allowing Payne to testify that a radio antenna "apparently" struck power service lines because his testimony was "not a reasonable inference deduced from a premise of fact; rather it was a conclusion based on speculation and conjecture." Id. at 150, 153. The court further found that Mr. Payne "incorrectly recalled" the facts he asserted in support of his opinion testimony. Id.

The State complains that Mr. Hinton and amici offer "unwarrantedly harsh" criticism of Payne and "incorrectly make[] him out to be" "an incompetent buffoon." State's Br. in Opp'n 20. The difficulty for Respondent is that it was the State's own lawyers who characterized Mr. Payne as a charlatan and convinced the jury that Payne was "no expert at all" to obtain a conviction in this case. (R. 1727.) On cross-examination and armed with knowledge from his own expert who was present when Payne examined the evidence, the prosecutor at trial elicited Payne's many difficulties in executing even the most basic functions with the comparison microscope necessary to examine the bullets in question. Payne admitted that he had to ask the State's expert for help turning on the light source for the comparison microscope even though it was equipped with the same kind of switch commonly used on microscopes; that he had mistakenly turned on an electric inscribing tool when trying to turn on this light source; and that he did not know how to manipulate the dual stages of the comparison microscope, operate the slow motion controls to raise and lower these stages, or even operate the turret lenses of the microscope. (R. 1650-53.) Payne also admitted that he struggled for over ten minutes to locate a bullet under the microscope before proclaiming, "Hell, I can't even find it . . . I don't know how to operate the machine . . . , will someone please help me?" (R. 1653.) Payne also admitted that he finally located the bullets under the microscope after twenty minutes of looking and only with assistance from the State's expert. (R. 1653-54.) The prosecutor had Payne show his tools to the jury, then pointed out to the jury that Mr. Payne's tools – the calipers, an ordinary hand magnifying glass, and a steel gauge – were described on page six of an

authoritative text on firearms investigation as the tools of "charlatans." (R. 1648, 1666-67.) The cross-examination ended with the State exposing that Payne had only one eye. (R. 1667.)

The State extensively relied on this exposure of Payne in closing arguments. See Pet. Cert. at 13 (citing to State's closing argument, R. 1727-33). The prosecutor unfavorably compared Payne's credentials to the credentials of the State's expert, and argued that "Mr. Payne says he has testified at least a thousand times as an expert witness, as a consulting engineer. Well, a consulting engineer, ladies and gentlemen, is not a firearms and tool marks experts, and he's no expert. No expert at all." (R. 1727.) The prosecutor noted that "Andrew Payne, Jr. did not know what in the world he was doing, but he is ready to come down here and tell you I'm an expert, I've got all this experience, . . . I'll give you my opinion." (R. 1730.) After arguing at length that Payne was a "civil engineer" with no qualifications in firearms identification, the prosecutor closed by saying:

> My Lord in heaven, the height of irresponsibility for somebody to come in here and do something like that. That is incredible. It's irresponsible and I ask you to reject his testimony and you have that option because you are the judges of the facts and whose testimony, Mr. Yates' or Mr Payne's you will give credence to, and I submit to you that as between these two men there is no match between them. There is no comparison. One man just doesn't have it and the other does it day in and day out, month in and month out, year in and year out and is recognized across this state as an expert.

(R. 1733-34.)

The State now contends that "[t]he fact that Payne did not instantly know how

to use a particular brand of microscope has no bearing on his qualification" and that Payne was missing one eye is unimportant because "binocular vision is not necessary to examine projectiles under a comparison microscope, which produces a flattened image." State's Br. in Opp'n 20. But the State relied at length on these factors at trial to discredit Payne. In closing arguments at trial, the State argued that:

> This is a one-eyed man, what kind of depth perception does a one-eyed man have? What kind of superior scopic vision to have to be able to even make any judgment about [tool marks]. You're educated people. I submit to you he doesn't even have depth perception and yet he's looking at a surface, not a flat object but a round object which requires depth perception.

(R. 1731.) In finding Payne's willingness to testify "startling and disturbing," the prosecutor further noted, "I said [to Payne on cross-examination] are you familiar with comparison microscope. Of course, I've used it at least a thousand times and yet when he goes to a lab to use a comparison microscope . . . [t]his man has no idea, he didn't have a clue about what he was doing." (R. 1728.)

The State first characterized Payne as an unqualified charlatan and demonstrated why his unfamiliarity with the equipment and visual impairment matters. While the State made a strong case for Payne's incompetence at trial, most critically, when Mr. Hinton claimed during postconviction that his attorney was ineffective for going to trial with an incompetent expert, the State presented no evidence to refute Payne's incompetence. Instead, the State's own experts provided further testimony condemning Payne. Both of the State's DFS examiners, David Higgins and Lawden Yates, testified during Rule 32 proceedings that Andrew Payne

lacked experience and qualifications in forensic firearms identification. (PC. 2208-09, 2220, 2304-08.) Higgins stated "I don't believe that [Payne] had had [firearm and toolmark identification] experience inasmuch as that we had to assist him in simple tasks like turning on the microscope." (PC. 2208-09.) Higgins testified that, based on his observations of Payne's conduct in the lab, Payne "didn't have the basic knowledge of the microscope." (PC. 2220.) Yates likewise testified that "[Payne] was unfamiliar with the use of the microscope . . . . I specifically recall him asking questions which I thought were inappropriate such as how do you turn the lights on on this machine, and where is the slow motion button." (PC. 2305-06.) Yates testified that Payne "demonstrated an obvious limited ability to do the kind of work that we were conducting at that time" (PC. 2304-05) and "the fact that he showed up employing the use of a magnifying glass, a pair of outside calipers and a steel ruler indicated to me that he probably had limited knowledge of firearms identification" (PC. 2306). Yates observed that these tools "would have limited value in firearms identification" and "have been mentioned in a textbook which describes the appearance of charlatans as employing those tools." (PC. 2307.) Yates testified that Payne's failure to independently test-fire the Hinton firearm was not what he would expect from an independent examiner. (PC. 2308 ["[I] would expect an independent examiner to request his own test bullets."].)[6]

[6]Higgins said post-trial that the inability to turn on the microscope "could happen to anyone" but made clear that his observations of Payne's examination led him to believe that Payne lacked the qualifications and experience necessary to conduct the toolmark examination, that Payne's examination was defective, and that Payne did not have basic knowledge of the comparison microscope. (PC. 2208-09, 2220.)

II. The State Mischaracterizes the Record to Understate the Importance of the Issue in this Case.

The State makes several key mischaracterizations of the trial record which require a response. First, the State's assertion that Smotherman "quickly picked Hinton out of a photographic array," State's Br. in Opp'n 4, is misleading[7] at best because it omits that Smotherman picked out Mr. Anthony Hinton's photo – with "AH" printed on it – immediately after he was told the suspect's name was Anthony Hinton. (R. 804, 807-08.) The detective who conducted the photo array acknowledged that Smotherman may have known that someone named Anthony Ray Hinton was a suspect. (R. 804.) He also testified that the photo Smotherman chose contained the initials "A.H." for Anthony Hinton. (R. 804.)[8] Moreover, while the State asserts that Mr. Smotherman "gave a detailed description of the robber," the record shows that Mr. Smotherman's description of a 5'11", 190-pound assailant did not even come close to Mr. Hinton, who is 6'2" and over 230 pounds. (R. 910, 2149.)[9]

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[7]The other evidence the State asserts to link Mr. Hinton to the Smotherman crime is meaningless to the capital murder convictions if there is no gun match. If the Smotherman bullets were not fired from the same gun that fired the Vason and Davidson bullets, it does not matter who committed the Smotherman offense because the gun match was the only basis for admitting any evidence about the Smotherman offense at this trial. The Smotherman incident was not charged in the indictment, Hinton v. State, 548 So. 2d 547, 556 (Ala. Crim. App. 1988), and Mr. Hinton was never tried or convicted for the Smotherman offense.

[8]Law enforcement also talked to one of Mr. Smotherman's co-workers, Robert Stephenson, who testified at Mr. Hinton's post-conviction hearing in June 2002 that the police pressured him to identify Mr. Hinton as the perpetrator, but he did not do so. (PR. 153.) Mr. Stephenson testified that a detective visited his home, showed him three pictures and asked him to pick out one. When Mr. Stephenson told the detective he had never seen any of the people in the photos, the detective specifically directed him to a photo of Mr. Hinton, but Mr. Stephenson still could not identify him. (PR. 153-55.) The State never called Mr. Stephenson as a witness. (PR. 156.)

[9]Evidence presented during the post-conviction hearing further showed that Smotherman confused his assailant with a professional football player who stopped to assist him (PR. 160-61); that Mr. Hinton did

Second, the State incorrectly argues that the state court properly found that trial counsel's reliance on Payne was reasonable because "Payne's testimony was more favorable to the defense than Hinton's 'better' experts' testimony had been, and that Payne, unlike the later experts, actually examined the State's experts' test bullets." State's Br. in Opp'n 24 (quoting Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *43 (Ala. Crim. App. Apr. 28, 2006)); see also State's Br. in Opp'n 17 (quoting Hinton, 2006 WL 1125605, at *29)). This assertion is false. All three Rule 32 experts compared the evidence bullets to the pre-cleaning test bullets fired and examined by the State's experts. (PR. 77, 78, 109.) Based on their examination of the State's test bullets as well as their own, Emanuel and Cooper determined that the six bullets could not all be linked to a single weapon and none of the six bullets can be matched to the Hinton revolver. (PR. 105-06, 73-74, 116-17.) Emanuel, Cooper, and Dillon each testified that independent microscopic examinations of the six recovered bullets established that the bullets could not be linked to a single weapon. (PR. 73-74, 116-17, 141-43.) They also concluded that the revolver cannot be matched with the recovered bullets. (PR. 73-74, 116-17, 141-43.)

The State's suggestion that Payne's use of the State's test bullets, rather than his own test bullets, made him a "better" expert is factually incorrect in a second way. It was the testimony of every firearms examiner in this case, including the State's own examiners, that Payne's failure to obtain his own test bullets was a significant

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not own a car that fit any of Smotherman's descriptions and that Smotherman gave varying descriptions of the assailant's car (PH. 139-40; R. 904-05); and Smotherman could not tell the difference between a boxy Mercedes sedan and a sporty Porsche (PC. 2493; PR. 164, 198).

departure from standard procedure; no qualified toolmark examiner would proceed the way Andrew Payne did in this case. (PC. 2220, 2308.)[10]

Similarly, the State's assertion that Payne's testimony was more compelling is not persuasive. Payne did not aid Mr. Hinton's defense by giving a "favorable" opinion to the jury. None of Payne's testimony was favorable because it was not believable. By suggesting it mattered not whether Payne was qualified or credible, but only that he uttered a favorable opinion in court, the State asks this Court to find that trial counsel acts reasonably if he presumes jurors will leave their common sense at the courthouse door and credit testimony without noticing anything about the witness's lack of expertise or his inability to perform the requisite examination.[11] Under the State's analysis, defense counsel would not be ineffective if he had picked a person at random and put her on the stand to say that, contrary to the opinions of the State's career toolmark examiners, the bullets in this case do not match.

Third, the State's characterization of the expert testimony during postconviction proceedings is misleading. The State, citing the findings it authored, asserts that Mr. Hinton's experts at the post-conviction hearing were "vague" and "inconclusive" because they were unable to determine whether any of the bullets were fired by the

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[10]David Higgins testified that Payne's failure to obtain his own independent test bullets was "a defect in his examination." (PC. 2220.) Lawden Yates testified that he "would expect an independent examiner to request his own test bullets." (PC. 2308.) No qualified examiner would rely on bullets he has not fired or seen fired from the evidence weapon because a proper scientific method is premised on the examination of materials that are valid and reliable. (RTR2 C. 58.)

[11]To the contrary, Mr. Hinton's jury was charged that it should rely on its common sense in finding facts at trial (R. 1829) and that it must consider all the evidence, including a witness's appearance and demeanor, before determining whether to believe expert testimony. (R. 1830-31.)

Hinton weapon. State's Br. in Opp'n 8-10.[12] In fact, there is nothing inconclusive about the experts' findings. Cooper's testimony that none of the bullets, except of the two bullets recovered from the Davidson offense, could be linked to any single weapon, which completely undermines the State's consolidated crimes theory of guilt. There was no evidence connecting Mr. Hinton to the capital murders of Mr. Davidson and Mr. Vason. The State insisted a single weapon fired all of the bullets, which was repudiated during the Rule 32 hearing. (PR. 117 ["Q. Did you conclude that they could not be fired from a single weapon as well? A. Yes."].) Dillon and Emanuel reached the same conclusion. (PR. 73-74, 141-43.)

Additionally, the Rule 32 experts excluded the Hinton weapon as mechanically incapable of firing the Smotherman bullets. Cooper concluded that the Smotherman bullets could not have been fired from the Hinton weapon. (PR. 123.) His testimony was anything but vague:

> [T]he question was[,] was it my opinion that State's Exhibit 54 and 55 could have been fired from State's Exhibit 79. And it's my opinion it could not have been because the mechanical ability of this weapon to produce a bullet of that nature.

(PR. 123.)

The State's argument that the experts' testimony is "inconclusive" is an about-

[12]The State's reliance on the "findings" contained in Judge Garrett's order denying postconviction relief and the Court of Criminal Appeals's adoption of those factual findings is problematic. Judge Garrett did not author these findings. Instead, the circuit judge adopted verbatim the 144-page order written by the State's lawyers, and the Court of Criminal Appeals in turn relied on and quoted extensively from that order without conducting an independent review or identifying any convincing evidence that the findings and conclusions are those of the trial court. See Anderson v. Bessemer City, 470 U.S. 564, 572 (1985) (criticizing "courts for their verbatim adoption of findings of fact prepared by prevailing parties").

face from its position in the lower court. The State acknowledged that the experts' testing excluded the Hinton weapon as the murder weapon. In its proposed order, which the trial court signed, the State admitted that the expert testimony conclusively excluded the possibility that the Hinton weapon fired the Smotherman bullets. (PC. 1065 ["Raymond Cooper testified that he was able to exclude the bullet in Exhibit #54 as having been fired from the gun recovered at Hinton's mother's house because he could not get the gun to fire a bullet with as much skidding as there was on #54."].)

Moreover, the State's characterization of this evidence suggests that Mr. Hinton is not entitled to relief unless he presents evidence that excludes the Hinton weapon. State's Br. in Opp'n 10. An exclusion, however, is not required to demonstrate prejudice. This is a case where an unmistakable match between recovered bullets and the Hinton weapon was necessary to accuse Mr. Hinton of these crimes. Rule 32 experts testified unequivocally that no such match exists. The absence of a definitive match is powerful exculpatory evidence that strongly supports Mr. Hinton's claim of ineffectiveness. This is a case, where as the State conceded at trial, without a dispositive match between bullets and weapon there was no basis for prosecution.

III. This Petition for Certiorari Presents a Superior Vehicle for this Court to Address the Critical Sixth Amendment Issues Presented Here.

The State's final argument is that there is no need for certiorari review because if Mr. Hinton's claim of ineffective assistance of counsel is meritorious he will get relief on federal habeas corpus review. State's Br. in Opp'n 25-26. In fact, if denied review by this Court, any further federal review will be constrained by the "doubly deferential"

standard of review under Section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011). As this Court recently reiterated in Burt v. Titlow, the question presented to a federal court on habeas corpus review is entirely different from the question presented to this Court on direct review. No. 12-414, 2013 WL 5904117, at *1 (U.S. Nov. 5, 2013); see also Harrington v. Richter, 131 S. Ct. 770, 785 (2011) ("The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard.").

As amici urge, criminal trials are increasingly won or lost based on expert forensic testimony, making this an important issue for the Court and the unique posture of this case makes it a superior vehicle for addressing this issue. Br. of The Constitution Project et al. as Amici Curiae 20-21. Most claims of ineffective assistance of counsel are not raised until state postconviction and a petition for certiorari does not toll the filing deadline under the AEDPA,[13] so most petitioners are unable to seek certiorari review in this Court following state court litigation. Because AEDPA does not apply in the current posture of this case, this petition for certiorari presents an uncommon opportunity and superior vehicle for this Court to address the critical Sixth

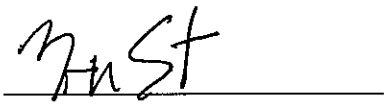
[13] Lawrence v. Florida, 549 U.S. 327, 331 (2007) (filing petition for certiorari in United States Supreme Court after state court enters final judgment on collateral review does not toll one-year statute of limitations under 28 U.S.C. § 2244(d)).

Amendment issues presented here.[14]

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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[14]The State suggests both that Mr. Hinton's ineffectiveness claim was raised in the trial court too late and that it was not raised in the trial court at all. No procedural default bars or even complicates this Court's review of the state court's merits determination notwithstanding these contradictory and unsupported points. The decision on which the State's first point depends, Charest v. State, 854 So. 2d 1102 (Ala. Crim. App. 2002) (requiring that claims raised in amended petition "relate back" to original petition in order to avoid time bar), was overruled by the Alabama Supreme Court prior to the state court decision in this case. Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) (relation-back doctrine does not apply to Rule 32 proceedings). As to the second point, the State concedes that Mr. Hinton properly presented his claim to the trial court prior to the evidentiary hearing and that Mr. Hinton's ineffectiveness claim was addressed on the merits by the state court. State's Br. in Opp'n 22-23.