No. 13-6440
CAPITAL CASE

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 IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

Whether Hinton's Sixth Amendment right to the effective assistance of counsel was violated when his trial attorney hired as an expert witness in firearm and toolmark examination an independent consultant who was a member of the American Academy of Forensic Sciences, had decades of experience with firearms and bullets through the United States Air Force, and had significant experience examining fired bullets and matching fired ammunition to particular weapons.

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INTRODUCTION

Anthony Hinton was convicted of two counts of capital murder for shooting night managers at Birmingham restaurants and robbing the store safes. His trial counsel, after diligently searching for a firearm and toolmark expert who would work on the limited budget counsel believed he had, hired Andrew Payne, Jr., a consulting engineer who had studied firearms and projectiles and had previously been qualified as an expert ballistics witness in Alabama.[1] Payne testified that the projectiles recovered from the murder scenes did not match the revolver found in Hinton's home, but the jury believed the State's two expert witnesses and convicted Hinton. More than fifteen years later, Hinton proffered the testimony of three additional firearm and toolmark experts on post-conviction review and alleged that his trial counsel was ineffective for hiring Payne.

The issue Hinton presents is factbound and meritless. Every court to consider his claim has found that Payne was a qualified expert witness. Aside from the fact that Hinton failed to present this issue to the circuit court or the Alabama Court of Criminal Appeals in accordance with the strictures of Alabama Rule of Criminal Procedure 32, both courts found that there had been no violation of *Strickland v. Washington* in Payne's hiring. Hinton is

1. Pet. App. A at 39.

simply attempting to use this Court to substitute new experts for the qualified expert he had at trial, and in so doing circumvent the jury's finding of guilt. As there is no issue here worthy of certiorari, this Court should deny review in this matter.

STATEMENT OF THE CASE

A. The murders

If not for his third victim's quick thinking, Hinton's string of robbery-murders might have gone unsolved.

Two strikingly similar robbery-murders occurred at Birmingham restaurants in February and July 1985. In each case, the night manager was discovered inside the restaurant's cooler, shot twice in the head with a .38 caliber weapon. There were no signs of forced entry, and the victims' belongings were untouched, but the restaurants' safes had been emptied.[2] The projectiles recovered from the first victim, John Davidson, were delivered to David Higgins, a firearm and toolmark examiner with the Alabama Department of Forensic Sciences (DFS).[3] Those recovered from the second

2. *Hinton v. State*, 548 So. 2d 547, 550–51 (Ala. Crim. App. 1988).
3. *See* R. 1201, 1203, 1205–06. Citations to the record on appeal are as follows:
Transcript on direct appeal: R.
Transcript on Rule 32 appeal: R32.

victim, Thomas Wayne Vason, were given to Higgins's colleague at DFS, Lawden Yates.[4]

Shortly after midnight on July 25, night manager Sidney Smotherman was closing up at a Quincy's Family Steak House in Bessemer, a city just southwest of Birmingham. Two other employees went with him to a nearby grocery store, where one noticed a "strange looking guy" who was not shopping, kept attempting to hide his face, and followed Smotherman out.[5]

As Smotherman began to drive home, a car bumped his from the rear. When Smotherman and the other driver got out to survey the damage, the man pointed a gun at him, forced Smotherman into the other car, and drove them back to Quincy's. At the restaurant, the gunman ordered Smotherman to give him everything out of the safe except the pennies. Once Smotherman complied, the gunman asked him where the cooler was located, then told him to go inside. Remembering the two murders, Smotherman asked if he could be put into a storage room instead of the cooler, as it was warmer. Once inside, Smotherman ducked as the gunman fired twice, then kicked the door shut, locking the gunman out of the storage room. Ten minutes later,

4. *See* R. 1263, 1266.
5. *Hinton*, 548 So. 2d at 551–52.

Smotherman escaped and called the police. As before, the two spent projectiles were sent to Yates at DFS.[6]

Smotherman gave police a detailed description of the robber, helped construct a composite drawing of the suspect, and quickly picked Hinton out of a photographic array. One of Smotherman's coworkers also identified Hinton as the man who had been following Smotherman at the grocery store.[7]

On July 31, police arrested Hinton at his home, where he lived with his mother. A sergeant asked Hinton's mother if she had a gun in the house. When she opened a kitchen drawer to retrieve it, she found the gun missing. She then went into a bedroom and returned with a .38 caliber Smith & Wesson revolver, which she gave to the officers along with two cartridges taken from the gun. The revolver was given to DFS.[8]

B. The trial and direct appeal

The State called David Higgins and Lawden Yates as expert witnesses. Both men were veteran firearm and toolmark examiners,[9] and they agreed

6. *Id.* at 552.
7. *Id.* at 552–53.
8. *Id.* at 553.
9. R. 1195–99, 1259–61.

that all six crime scene projectiles matched those test-fired from the Hinton revolver.[10]

The defense, in turn, called Andrew Payne, Jr.[11] After being educated as a civil engineer, Payne joined the Air Corps in 1942, then went into the gunnery program, where he eventually served as an instructor and as the chief engineer of the flexible gunnery engineering division.[12] During his tenure with the Air Force, Payne was involved with the design of gun barrels and the testing of firearms and bullets, and he acted as the project officer for the .60 caliber machine gun.[13] Payne testified that he worked for the Air Force at the Pentagon, where he was the technical assistant to the deputy chief of staff for research and technology, overseeing all non-nuclear weapons.[14] He had also become a member of the American Academy of Forensic Science in the course of his career.[15] Prior to Hinton's trial, Payne had been qualified as an expert in firearm identification twice and had given an opinion regarding toolmarks and toolmark identification.[16]

10. R. 1233–34, 1272–73, 1282.
11. R. 1571.
12. R. 1572–73.
13. R. 1574–75.
14. R. 1577.
15. R. 1578.
16. R. 1577–78, 1654.

In conducting his analysis, Payne acquired six bullets that he believed had been fired through the Hinton revolver.[17] He also relied upon *Firearms Identification* by J. Howard Matthews, which he stated was a widely used reference book for people in his field.[18] Payne testified that he had used comparison microscopes to examine bullets thousands of times.[19]

Payne explained that the Hinton revolver was forty to fifty years old.[20] At the time that the gun was manufactured, the common primers used in bullets were chlorate primers, which deposited corrosive salts in gun barrels. Over time, barrels could rust and toolmarks could be obliterated.[21] Upon examining the revolver, Payne concluded that corrosive ammunition had been used in that gun, as the toolmarks were "substantially dulled" and holes had been eaten into the barrel.[22]

Payne made two examinations of the revolver and examined the projectiles using DFS's equipment.[23] He found no match between any of the crime scene projectiles and the test bullets, nor did he conclude that any of the crime scene projectiles had been fired from the revolver.[24]

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17. R. 1585.
18. R. 1697–98.
19. R. 1601.
20. R. 1612.
21. R. 1613–14, 1617.
22. R. 1616, 1618.
23. R. 1622, 1633–34.
24. R. 1637.

On cross-examination, Payne testified that he had matched spent ordnance to a particular barrel "perhaps for a period there of six to eight or nine months a hundred percent."[25] He also admitted that he was unfamiliar with DFS's comparison microscope and had to ask Yates how to operate it.[26] He did not know whether he would be compensated for his work in Hinton's case, explaining that the defense attorney, Sheldon Perhacs, had told him that he did not know whether the funds would be available.[27] The prosecutor concluded by pointing out that Payne only had one eye.[28]

The jury convicted Hinton of two counts of capital murder after less than three hours of deliberation.[29] During the sentencing phase, the jury voted 10–2 for the death penalty on both counts.[30] Judge James Garrett sentenced Hinton in accordance with the jury's advisory recommendation.[31]

On direct appeal, the Alabama Court of Criminal Appeals affirmed the judgment and sentence of the trial court.[32] The Supreme Court of Alabama also affirmed.[33] This Court denied certiorari in 1989.[34]

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25. R. 1641.
26. R. 1650–51.
27. R. 1656.
28. R. 1667.
29. R. 1858–61.
30. R. 1897–1901.
31. R. 1962.
32. *Hinton v. State*, 548 So. 2d 547 (Ala. Crim. App. 1988).
33. *Ex parte Hinton*, 548 So. 2d 562 (Ala. 1989).
34. *Hinton v. Alabama*, 493 U.S. 969 (1989).

C. Post-conviction proceedings

Aided by new counsel, Hinton filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on August 15, 1990.[35] Among other claims, Hinton contended that the bullets recovered from the three crime scenes could not be linked to a single gun or to the revolver his mother produced.[36] As evidence, Hinton's counsel took the depositions of Higgins and Yates, who stated that they had poor opinions of Payne and that they compared evidence in their cases.[37] Counsel also presented testimony from Lannie Emanuel and Raymond Cooper, firearm and toolmark examiners from the Southwestern Institute of Forensic Science, and from John H. Dillon, Jr., a self-employed forensic consultant.[38] Emanuel concluded that the Davidson bullets were fired from the same gun, but stated that he could not determine whether the Vason or Smotherman bullets had been fired from that gun. He also noted dissimilarities between the recovered projectiles and the test bullets.[39] Cooper reached similar conclusions, admitting that he could not determine whether any of the bullets had been

35. Pet. App. A at 16.
36. *Id.* at 23.
37. *Id.* at 25–26.
38. *Id.* at 26–29.
39. *Id.* at 26–27.

fired from the Hinton revolver.[40] Finally, Dillon, like Emanuel and Cooper, concluded that the Davidson bullets were fired from the same gun, but stated that there were insufficient marks on the Vason and Smotherman bullets to make that determination. He also stated that he could not determine whether any of the bullets had come from the Hinton revolver.[41]

After an evidentiary hearing, Judge Garrett denied the petition in 2005.[42] He noted in particular the vague responses Hinton's three new experts offered:

> At the evidentiary hearing, Hinton presented the testimony of three ballistics experts: Lannie G. Emanuel, Raymond E. Cooper, and John Dillon. All three experts testified that the projectiles recovered from John Davidson's body were fired from the same weapon. All three experts testified that they were unable to determine whether or not all six projectiles recovered from the three crime scenes were fired from the same weapon; rather, their testing was inconclusive. Also, all three experts testified that they were unable to determine whether or not all six projectiles were fired from the weapon recovered from Hinton's mother's home; rather, that their results were inconclusive. In

40. *Id.* at 28.
41. *Id.* at 29.
42. *Id.* at 16. The fifteen-year delay was due to a number of factors. Hinton's first Rule 32 attorney withdrew one week before the hearing on April 15, 1991, necessitating a continuance. Hinton's second Rule 32 attorney filed an amended petition on March 14, 1994, and a second amended petition on November 6, 1998. Two additional attorneys from the Equal Justice Initiative filed notices of appearance on June 2, 1999. The circuit court set the case for hearing on March 22, 2002, but Hinton's new counsel filed a third amended petition four weeks before, and the hearing was reset for June. The circuit court dismissed the third amended petition on January 18, 2005. (*See, e.g.*, Br. Appellee at 4–8, Hinton v. State, No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006).)

> other words, these expert witnesses could not exclude the possibility that Hinton's gun fired those six projectiles.
>
> Hinton did not present evidence proving that the recovered projectiles were not fired from the gun recovered at his mother's house. Rather, Hinton's experts testified that while they could not make a conclusive match between the six projectiles and his weapon, they could not exclude the possibility that those projectiles were fired from that weapon. Therefore, this is not new evidence exonerating Hinton. At trial, Hinton presented expert testimony that excluded the possibility that the six projectiles were fired from the weapon recovered from his mother's house. As a result, this latest expert testimony is less persuasive of innocence than the expert testimony presented at trial.
>
> Because this expert testimony presented at the evidentiary hearing was offered for the same purpose as the expert testimony at Hinton's trial, this expert testimony is cumulative to the evidence that was presented at trial. Also, because this expert testimony was less compelling of innocence than the expert testimony presented at trial, this evidence would not have changed the outcome of the verdict and it amounts merely to impeachment evidence. Accordingly, this claim is dismissed because it does not meet the requirements of newly discovered material facts under Rule 32.1(e) and because this evidence does not prove that Hinton is innocent of the crimes for which he was convicted.[43]

The Alabama Court of Criminal Appeals concurred with the circuit court in 2006.[44] That court noted that Hinton's new experts' testimony "was not as favorable to the defense" as the expert testimony he presented at trial, as his new experts "carefully phrased their answers" and "discussed the limitations on their testing." Moreover, the Court of Criminal Appeals wrote

43. Pet. App. A at 29 (internal citations omitted).
44. *Id.* at 31.

that Judge Garrett, who "observed the witnesses and, on several occasions, asked them very specific questions about their testing and conclusions," was best suited to determining their credibility.[45]

The Supreme Court of Alabama granted certiorari solely on the issue of whether Hinton's trial counsel "was ineffective in failing to procure a competent firearms-identification expert."[46] That court then reversed and remanded the matter in 2008 for the circuit to court to make specific findings as to whether Andrew Payne was qualified and competent to testify as an expert.[47]

On remand in 2009, the circuit court, now presided over by Judge Laura Petro,[48] concluded that Judge Garrett considered Payne to be an expert.[49] The Court of Criminal Appeals determined that a second remand was necessary, however, and directed the circuit court to produce specific findings of fact as to Payne's qualifications.[50] In 2010, Judge Petro did as instructed, listed eleven items regarding Payne's experience, and concluded

45. *Id.* at 30.
46. Pet. App. B. at 2.
47. *Id.* at 5.
48. By 2009, Judge Garrett had moved out of state. (Order on Remand, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Mar. 10, 2009).)
49. *Id.* at 2 ("While Judge Garrett never [waved] a legal wand and specifically said at any point during the trial that Mr. Payne was an expert, all of the evidence points to the fact that he allowed him to testify as such.").
50. Order of Aug. 13, 2010, Hinton v. State, No. CR-04-0940 (Ala. Crim. App. Apr. 28, 2006).

that Payne was an expert witness "due to the fact that he clearly had more experience and knowledge in the area of firearms and toolmarks comparisons than that of the average lay witness or juror."[51] In so doing, she relied on the standard for expert testimony at the time of Hinton's trial: "'that the witness, by study, practice, experience or observation as to the particular subject, [had] acquired knowledge beyond that of an ordinary witness.'"[52]

After supplemental briefing, the Court of Criminal Appeals affirmed on return to second remand in 2011.[53] That court explained why it disagreed with Hinton's contention that Payne was unqualified:

> [A]lthough Hinton alleges that Payne's examination of the bullets in this case was incompetent, we do not find that Payne's actions during his examination rendered him unqualified as an expert. Hinton is correct that when Payne came to the DFS laboratory, he brought with him calipers, a magnifying glass, and a scale, all traditionally old-school instruments. However, Payne testified that he used those instruments to measure and weigh the bullets. He used the comparison microscope provided by DFS to perform the microscopic examination of the bullets, from which he came to his conclusion that the bullets from the crimes were not fired from the gun recovered from Hinton's mother. Additionally, Hinton is also correct that Payne did not test-fire the gun at issue during his examination. Rather, Payne used something much more damning to the State's case to reach his conclusion—the State's own test-fired bullets. Furthermore, although it is clear from the record that Payne required assistance in using the

51. Order on Remand at 2, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Sept. 1, 2010).
52. Pet. App. C at 8 (quoting *Meade v. State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980)). As the Court of Criminal Appeals noted, the Alabama Rules of Evidence did not go into effect until January 1, 1996. (*Id.* at 9 n.3.)
53. *Id.* at 9.

> comparison microscope at the DFS laboratory, Payne specifically testified that he had never used that particular brand—American Optical—of comparison microscopes. As this Court noted in its original opinion affirming the circuit court's denial of Hinton's Rule 32 petition, even one of the State's own firearms-identification experts testified during his deposition for the Rule 32 proceedings that such assistance would be necessary, stating that "on the scope we had at that time, unless you were familiar with *that model*, you would need someone familiar with it to show you." Finally, the fact that Payne dropped a bullet while at the DFS laboratory in no way affects his qualifications as an expert.[54]

For a second time, however, the Supreme Court of Alabama reversed and remanded in 2012, holding that the Court of Criminal Appeals should have reviewed the evidence de novo rather than reviewing the circuit court's findings for abuse of discretion.[55] The Court of Criminal Appeals again affirmed in 2013,[56] and the Supreme Court of Alabama denied certiorari.[57]

The present petition to this Court followed.[58]

54. *Id.* at 8–9 (internal citation omitted, emphasis in original).
55. Pet. App. D at 5.
56. Pet. App. E at 2.
57. Pet. App. F.
58. On October 21, 2013, the Constitution Project filed an amicus brief in support of Hinton.

REASONS THE PETITION SHOULD BE DENIED

Hinton's petition is not worthy of certiorari. His meritless claim is entirely factbound, and his Sixth Amendment right to counsel was in no way violated by his trial counsel's decision to retain Andrew Payne, Jr., as an expert witness. The Alabama courts properly reviewed and dismissed his claims, and there is no reason for this Court to grant the writ.

I. Hinton's claim is factbound and meritless.

Hinton's claim is not certworthy because it is factbound and, in the end analysis, meritless. On the particular facts of this case, no Sixth Amendment violation occurred.

A. Alabama courts deemed Andrew Payne, Jr., a qualified expert witness.

No matter what Hinton's counsel's reasons were for hiring Payne, every court to consider the matter has found that Payne was qualified to serve as an expert witness in firearm and toolmark examination under the evidentiary rules in place at the time of Hinton's trial.

Alabama's current evidentiary rule concerning expert testimony, Alabama Rule of Evidence 702,[59] largely follows Rule 702 of the Federal Rules of Evidence. Prior to 1996, however, "[t]he criterion for admission of expert testimony [was] that the witness, by study, practice, experience or observation as to the particular subject, has acquired a knowledge beyond that of an ordinary witness."[60] Then as now, "[w]hether a witness is shown to possess the requisite qualifications to be called as an expert is a preliminary question largely within the discretion of the trial courts."[61]

In Hinton's case, the trial court clearly considered Payne to be qualified. Although he never specifically declared Payne an expert on the record, Judge Garrett never made that declaration regarding *any* expert witness, including the two DFS examiners presented by the State.[62] In fact, Judge Petro wrote that the State's expert witnesses "were qualified and

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59. Adopted effective January 1, 1996, Rule 702 was amended effective January 1, 2012, in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
60. *Meade v. State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980).
61. *Id.*; *see, e.g.*, *Boyles v. Dougherty*, 2013 WL 5394326, No. 1120395, at *5 (Ala. Sept. 27, 2013) ("As a general rule, decisions as to a witness's competency to testify as an expert on a particular subject are within the discretion of the trial court."); *Revis v. State*, 101 So. 3d 247, 292 (Ala. Crim. App. 2011) ("[T]he Committee's Notes to this rule affirm that under Rule 702, as under preexisting law, the determination of whether a witness qualifies as an expert and should be allowed to testify as such rests largely within the discretion of the trial court.").
62. Order on Remand at 2, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Mar. 10, 2009).

treated in the same manner as Mr. Payne. . . . At no time, with no witness[,] did either party specifically offer the witness as an expert, nor did either party specifically object to any of the witness'[s] qualifications as an expert."[63]

Judge Petro also pointed to several pretrial conversations between Perhacs and Judge Garrett, noting, "It seems more than obvious to this Court that these conversations centered on Perhacs'[s] use of Andrew Payne as an expert witness at trial. At no time during these conversations did Judge Garrett ever say anything to discourage Mr. Payne's hiring as a defense expert."[64] In fact, the record suggests that Judge Garrett proposed using Payne as an expert witness, as the prosecutor stated, "I would say that the Court is familiar with Mr. Payne's reputation. Otherwise, I assume that the court would not have recommended that name to Mr. Perhacs."[65]

Hinton never raised the issue of Payne's qualification on direct appeal. In his Rule 32 petition, however, Hinton alleged that his trial counsel had provided ineffective assistance of counsel because Payne was unqualified as an expert witness in firearms and projectiles.[66] Denying the petition, Judge Garrett wrote, "Since this trial, Mr. Payne has been qualified as an expert

63. *Id.*
64. *Id.* at 3.
65. *Id.* at 3–4.
66. Pet. App. A at 68 (Cobb, J., dissenting).

witness in firearms and projectiles in several courts across Alabama."[67] He also found that Payne's "expert testimony" was more "compelling of innocence" than the testimony of the three experts Hinton presented at the evidentiary hearing.[68]

The Alabama Court of Criminal Appeals adopted the circuit court's findings.[69] Regarding the issue of ineffective assistance of counsel, the court found Hinton's argument meritless:

> We have reviewed Payne's trial testimony, and we note that he testified in detail about his extensive experience with firearms and toolmarks; the identification of striations and lands and grooves; how rifling is created; how bullets travel when shot; his extensive use of comparison microscopes; various ways toolmarks can be obscured or obliterated, including by corrosive primers; his examination of the bullets and revolver in this case; and his conclusion that the bullets had not been fired from the revolver that was recovered from the appellant's mother. We also note that defense counsel thoroughly and extensively cross-examined the State's firearm and toolmark experts and that Payne apparently prepared him for that cross-examination. We further note that, even though Payne did not test-fire the revolver, he examined the bullets the State's experts test-fired. Therefore, unlike the appellant's Rule 32 experts, Payne examined the same test bullets the State's experts examined. Finally, we note that Payne's testimony was more favorable to the defense than that of the appellant's Rule 32 experts because he testified *unequivocally* that the Davidson, Vason, and Smotherman bullets had not been fired from the revolver that was recovered from the appellant's mother. Thus, even assuming that counsel's apparent ignorance that the cap on expert expenses had been lifted constituted

67. *Id.* at 29.
68. *Id.* at 29.
69. *Id.* at 30.

> deficient performance, for the reasons set forth herein, the appellant has not shown that he was prejudiced by that deficient performance.[70]

The Supreme Court of Alabama remanded the matter to allow the circuit court to make specific findings regarding Payne's qualifications as a firearm and toolmark expert.[71] On second remand, Judge Petro listed eleven findings of fact from the record regarding Payne and ruled that he was an expert witness when he testified in Hinton's trial, based on the pre-1996 criteria. Specifically, the order noted the following:

> 1) During his service in the Air Force[,] Mr. Payne was an instructor in the gunnery program and worked on "development research of guns";
> 2) Throughout his 30 year career with the Air Force, Mr. Payne was involved with the design of gun barrels;
> 3) During his Air Force [c]areer[,] Mr. Payne was involved with the testing of firearms and bullets on a daily basis;
> 4) During his Air Force career[,] he examined bullets fired from machine guns and examined bullets fired from handguns on a regular basis;
> 5) During the 1950s[,] he served on the weapons evaluation board of the Air Force and examined fired bullets approximately 6000 times;
> 6) He worked at the Pentagon as the "technical assistant to the deputy chief of staff for research and technology[,]" which include research and design of all weapon, non-nuclear;
> 7) He was a member of the American Academy of Forensic Sciences[,] through which he received all publications of the criminalistics branch[,] which included firearms identification;
> 8) Throughout his career[,] he learned how "barrels and bullets put toolmarks on one another";

70. *Id.* at 43 (emphasis in the original).
71. Pet. App. B at 5.

> 9) Prior to his examination of Hinton's gun[,] he had viewed bullets under a comparison microscope "thousands" of times;
> 10) Throughout his career[,] he spent much of his time matching ammunition back to a particular gun barrel. Even more specifically[,] Payne had spent six to nine months of his career involved 100 [percent] of the time "specifically matching a projectile to a barrel";
> 11) Payne had previously been qualified as an expert witness in both civil and criminal courts in Jefferson County[, Alabama].[72]

On second return to remand, the Court of Criminal Appeals found Hinton's arguments "unpersuasive" and stated that Judge Petro's findings were "supported by the record."[73] After revisiting Payne's credentials, the court concluded that Payne "clearly possessed knowledge of gun barrels, rifling characteristics, and toolmarks beyond that of an average layperson" and that the circuit court did not abuse its discretion in finding him qualified as an expert.[74] On third remand, the Court of Criminal Appeals reviewed Payne's qualifications de novo and again affirmed the judgment of the circuit court.[75]

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72. Order on Remand at 2, Hinton v. State, Nos. CC-1985-3363.60, -3364.60 (Cir. Ct. Jefferson County Sept. 1, 2010).
73. Pet. App. C at 7.
74. *Id.* at 8–9. The amici's position that the Court of Criminal Appeals violated *Strickland* in finding that Hinton's counsel was not deficient for presenting the testimony of a qualified firearms expert is unfounded. *See* Br. Constitution Project at 19–20. Furthermore, the court noted that in *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998), the Fourth Circuit Court of Appeals wrote, "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." The Court of Criminal Appeals explained that although *Wilson* pertained to the mental health experts, the Alabama Supreme Court had, "at least implicitly, extended the *Wilson* rationale to other experts" by its 2008 opinion in *Ex parte Hinton* (Pet. App. B). Pet. App C at 10–11 n.7.
75. Pet. App. E at 2.

Following this decision, the Supreme Court of Alabama denied Hinton's petition for writ of certiorari.[76]

Thus, the trial judge, a circuit judge, and the Alabama Court of Criminal Appeals all found Payne to be a qualified expert witness in the field of firearm and toolmark identification. Although Payne may not have been a perfect expert witness for the defense, he was far from the incompetent buffoon Hinton incorrectly makes him out to be.[77]

B. Trial counsel was not deficient for hiring a qualified expert witness.

Sheldon Perhacs, Hinton's trial counsel, did not render ineffective assistance by hiring Payne as an expert witness. Regardless of Perhacs's reasons for hiring Payne, the fact remains that every court to consider the

76. Pet. App. F.

77. The amici also offer unwarrantedly harsh criticism of Payne's performance. For example, the amici reference Payne's difficulty in using the comparison microscope provided by DFS as proof of his incompetence. *See* Br. Constitution Project at 14. Payne testified that he had used comparison microscopes "thousands" of times, however. *See* Order on Remand at 2. The fact that Payne did not instantly know how to use a particular brand of microscope has no bearing on his qualification. As one of the State's experts later testified, "[U]nless you were familiar with that model [of microscope], you would need someone familiar with it to show you." *See* Pet. App. C at 9.

The amici further count against Payne the fact that he was "partially blind." Br. Constitution Project at 8. It is undisputed that Payne had only one eye, but binocular vision is not necessary to examine projectiles under a comparison microscope, which produces a flattened image.

issue has deemed Payne qualified. Perhacs cannot be ineffective simply because the jury believed the State's experts.

Hinton is trying to use this Court to do what Judge Garrett and the Alabama Court of Criminal Appeals feared: present "better" experts to an appellate court to work around the jury's decisions. As the Court of Criminal Appeals explained, quoting Judge Garrett's order denying the petition:

> "What if we come up with some different experts later on that are even more recognized as the ultimate experts? That's what we're getting into is a swearing contest between experts. . . . It concerns me that we're going to get into a situation where somebody—one party feels that they have a better expert than was presented the last time, therefore the evidence is more believable. And that issue has already been addressed by a jury. This is a question of fact, not a question of law, and the question of facts are decided by the jury. I would be in essence second-guessing the jury and [its] determination based on the evidence that was presented to [it] on the same issues."
>
> We share the circuit court's concerns, and we note that a party cannot go back after the trial to secure what he considers to be a more qualified expert. Allowing a party to do so would be contrary to the requirement of Rule 32.1(e)(2), Ala. R. Crim. P., that evidence not be merely cumulative to other facts that were known. Also, in such circumstances, proceedings might never end because, theoretically, better experts might always be found. The appellant had a chance to present expert testimony to the jury, and he did so. In fact, as we explain throughout this opinion, Payne's testimony was much more favorable than that of the Rule 32 experts.[78]

78. Pet. App. A at 31 (internal citation omitted).

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."[79] Perhacs was not ineffective for hiring him.

C. The Alabama Court of Criminal Appeals properly applied *Strickland* when it found that Hinton's claim of ineffective assistance of counsel was meritless.

Hinton concludes his petition by alleging that the Alabama Court of Criminal Appeals' analysis regarding his ineffective assistance claim conflicts with the Sixth Amendment and *Strickland v. Washington*.[80] Specifically, Hinton alleges that the court erred in finding that because Payne was a qualified expert witness, Perhacs was not ineffective for relying on him.[81] This claim is meritless.

In a single paragraph of claim I.B.2 of the third amended Rule 32 petition, Hinton posited that he was denied effective assistance of trial counsel because Perhacs failed to "obtain and present qualified ballistics experts."[82] Judge Garrett determined that Hinton had failed to meet either

79. *Meade v. State*, 390 So. 2d 685, 693 (Ala. Crim. App. 1980).
80. 466 U.S. 668 (1984).
81. Pet. at 29.
82. R32. 418–19. Paragraph 44 cross-references claims I.G and I.K of the petition, which, respectively, state that Hinton's right to present a defense was unconstitutionally restricted by the court's failure to grant Perhacs's request for additional funds to hire an expert, and that prosecutorial misconduct

the high *Strickland* standard or the requirements of Alabama Rule of Criminal Procedure 32, and he deemed the ineffective assistance claim deficient for two reasons.[83] First, the claim was initially raised in Hinton's 1998 amended petition, and therefore fell afoul of the two-year statute of limitations required by Rule 32.2(c). As the claim was new and did not relate back to Hinton's original petition, it was dismissed as untimely.[84] Secondly, as Payne was a qualified expert witness, Hinton had failed to state a claim upon which relief might be granted, and the claim was therefore dismissed pursuant to Rule 32.7(d).[85]

On appeal, Hinton raised his ineffective assistance claim again as claim III.B.[86] The Alabama Court of Criminal Appeals, writing in 2006, laid out the requirements of *Strickland*—deficient performance and resultant prejudice—then quoted *Strickland*'s direction that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[87] Turning to the claim at issue, the court first found that it was not

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(assumedly, the prosecutor's comments about Payne) violated Hinton's constitutional rights.

83. R32. 1538–39, 1545–48.
84. R32. 1545–46.
85. R32. 1547–48.
86. Br. Appellant at 66–77, Hinton v. State, No. CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006).
87. Pet. App. A at 16 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

properly before them because, as the circuit court noted, Hinton did not first present it to the circuit court. The Court of Criminal Appeals then stated that even if the argument had been properly presented, it was meritless.[88] The court found that Payne was a qualified expert, that Perhacs "thoroughly and extensively cross-examined the State's firearm and toolmark experts," and that Payne, the expert Hinton now maligns, "apparently prepared [Perhacs] for that cross-examination."[89] The court also noted that 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. In conclusion, the court wrote, "Thus, even assuming that counsel's apparent ignorance that the cap on expert expenses had been lifted constituted deficient performance, for the reasons set forth herein, the appellant has not shown that he was prejudiced by that deficient performance. *See Strickland*, *supra*."[90]

Clearly, the Court of Criminal Appeals conducted a *Strickland* analysis of Hinton's ineffective assistance claim in 2006 and determined that the claim was meritless. Hinton now makes much of the Court of Criminal Appeals' 2011 opinion, arguing that the court did not conduct a *Strickland*

88. *Id.* at 43
89. *Id.*
90. *Id.*

analysis at that time. But the only issue on which Hinton's case was remanded after 2008 was whether Payne was qualified to testify as a firearm and toolmark expert.[91] Judge Petro and the Alabama Court of Criminal Appeals agreed that he was,[92] and the Supreme Court of Alabama implicitly found that Hinton's ineffective assistance of counsel claim lacked sufficient merit to warrant further review when it denied certiorari.[93]

Hinton's claim of ineffective assistance of counsel in regards to the hiring of Payne is meritless. It raises no constitutional concerns and no cause to disturb the judgment rendered below.

II. There is no need for error correction because Hinton can raise his ineffective assistance claim in federal habeas proceedings.

Even if the Alabama courts were mistaken about Hinton's ineffective assistance claim — and they were not, as explained above — this Court should not review the state courts' judgment here because the federal habeas court can resolve these issues.[94] Given the availability of federal habeas relief, there is no compelling reason for this Court to expend its limited resources on the case-specific question at issue here.

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91. Pet. App. B at 5.
92. Pet. App. E at 2.
93. *See* Pet. App. F.
94. *See, e.g.*, *Hopkinson v. Shillinger*, 866 F.2d 1185, 1219–20 (10th Cir. 1989) ("Even if the state postconviction petition was dismissed arbitrarily, the petitioner can present anew to the federal courts any claim of violation of his federal constitutional rights.").

On federal habeas, Hinton will be able to present his arguments about the Alabama courts' decisions. If Hinton is right when he argues that the Alabama Court of Criminal Appeals substantively misapplied this Court's Sixth Amendment precedents to his ineffective-assistance claim, then the federal habeas court could find the Alabama court's decision to be "contrary to, or . . . an unreasonable application of, clearly established Federal law" and grant him relief.[95] There is no need for this Court to grant certiorari.

95. 28 U.S.C. § 2254(d). Although the amici correctly note that AEDPA applies on federal habeas review, *see* Br. Constitution Project at 20–21, AEDPA does not foreclose federal relief on state-court *Strickland* determinations.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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