Per Curiam

SUPREME COURT OF THE UNITED STATES

ANTHONY RAY HINTON *v.* ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

No. 13–6440 Decided February 24, 2014

PER CURIAM.

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), we held that a criminal defendant's Sixth Amendment right to counsel is violated if his trial attorney's performance falls below an objective standard of reasonableness and if there is a reasonable probability that the result of the trial would have been different absent the deficient act or omission. *Id.,* at 687–688, 694. Anthony Ray Hinton, an inmate on Alabama's death row, asks us to decide whether the Alabama courts correctly applied *Strickland* to his case. We conclude that they did not and hold that Hinton's trial attorney rendered constitutionally deficient performance. We vacate the lower court's judgment and remand the case for reconsideration of whether the attorney's deficient performance was prejudicial.

I

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In February 1985, a restaurant manager in Birmingham was shot to death in the course of an after-hours robbery of his restaurant. A second manager was murdered during a very similar robbery of another restaurant in July. Then, later in July, a restaurant manager named Smotherman survived another similar robbery-shooting. During each crime, the robber fired two .38 caliber bullets; all six bullets were recovered by police investigators. Smotherman described his assailant to the police, and when the police showed him a photographic array, he picked out Hinton's picture.

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The police arrested Hinton and recovered from his house a .38 caliber revolver belonging to his mother, who shared the house with him. After analyzing the six bullets fired during the three crimes and test-firing the revolver, examiners at the State's Department of Forensic Sciences concluded that the six bullets had all been fired from the same gun: the revolver found at Hinton's house. Hinton was charged with two counts of capital murder for the killings during the first two robberies. He was not charged in connection with the third robbery (that is, the Smotherman robbery).

At trial, the State's strategy was to link Hinton to the Smotherman robbery through eyewitness testimony and forensic evidence about the bullets fired at Smotherman and then to persuade the jury that, in light of the similarity of the three crimes and forensic analysis of the bullets and the Hinton revolver, Hinton must also have committed the two murders. Smotherman identified Hinton as the man who robbed his restaurant and tried to kill him, and two other witnesses provided testimony that tended to link Hinton to the Smotherman robbery. Hinton maintained that he was innocent and that Smotherman had misidentified him. In support of that defense, Hinton presented witnesses who testified in support of his alibi that he was at work at a warehouse at the time of the Smotherman robbery. See 548 So. 2d 562, 568–569 (Ala. 1989) (summarizing the evidence on each side of the case).

The six bullets and the revolver were the only physical evidence. Besides those items, the police found no evidence at the crime scenes that could be used to identify the perpetrator (such as fingerprints) and no incriminating evidence at Hinton's home or in his car. The State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver. According to the Alabama Supreme Court, "the only evidence linking Hin-

ton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver." 2008 WL 4603723, *2 (Oct. 17, 2008).

The category of forensic evidence at issue in this case is "firearms and toolmark" evidence. Toolmark examiners attempt to determine whether a bullet recovered from a crime scene was fired from a particular gun by comparing microscopic markings (toolmarks) on the recovered bullet to the markings on a bullet known to have been fired from that gun. The theory is that minor differences even between guns of the same model will leave discernible traces on bullets that are unique enough for an examiner to conclude that the recovered bullet was or was not fired from a given weapon. See generally National Research Council, Strengthening Forensic Science in the United States: A Path Forward 150–155 (2009).

Recognizing that Hinton's defense called for an effective rebuttal of the State's expert witnesses, Hinton's attorney filed a motion for funding to hire an expert witness of his own. In response, the trial judge granted $1,000 with this statement:

> "'I don't know as to what my limitations are as for how much I can grant, but I can grant up to $500.00 in each case [that is, for each of the two murder charges, which were tried together] as far as I know right now and I'm granting up to $500.00 in each of these two cases for this. So if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts, but I am granting up to $500.00, which is the statutory maximum as far as I know on this and if it's necessary that we go beyond that then I may check to see if we can, but this one's granted.'" 2006 WL 1125605, *59 (Ala. Crim. App., Apr. 28, 2006) (Cobb, J., dissenting) (quoting Tr. 10).

Hinton's attorney did not take the judge up on his invitation to file a request for more funding.

In fact, $500 per case ($1,000 total) was *not* the statutory maximum at the time of Hinton's trial. An earlier version of the statute had limited state reimbursement of expenses to one half of the $1,000 statutory cap on attorney's fees, which explains why the judge believed that Hinton was entitled to up to $500 for each of the two murder charges. See *Smelley* v. *State*, 564 So. 2d 74, 88 (Ala. Crim. App. 1990). But the relevant statute had been amended to provide: "'Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court.'" See *Dubose* v. *State*, 662 So. 2d 1156, 1177, n. 5 (Ala. Crim. App. 1993) (quoting Ala. Code §15–12–21(d) (1984)), aff'd 662 So. 2d 1189 (Ala. 1995). That amendment went into effect on June 13, 1984, *Dubose*, *supra,* at 1177, n. 5, which was over a year before Hinton was arrested, so Hinton's trial attorney could have corrected the trial judge's mistaken belief that a $1,000 limit applied and accepted his invitation to file a motion for additional funds.

The attorney failed to do so because he was himself unaware that Alabama law no longer imposed a specific limit and instead allowed reimbursement for "any expenses reasonably incurred." At an evidentiary hearing held on Hinton's postconviction petition, the following conversation occurred between a state attorney and Hinton's trial attorney:

> "Q. You did an awful lot of work to try and find what you believed to be a qualified expert in this case, didn't you?
> "A. Yes, sir, I did.
> "Q. Would you characterize it that you did everything that you knew to do?

> "A. Yes, sir, I think so.
> "Q. And this case, did it come down to an unwillingness of experts to work for the price that you were able to pay?
> "A. Yes, sir, I think it did.
> "Q. So your failure to get an expert that you would have been let's say a hundred percent satisfied with was not a failure on your part to go out and do some act, it was a failure of the court to approve what you believed would have been sufficient funds?
> "A. Well, putting it a little differently, yes, sir, it was a failure—*it was my failure, my inability under the statute to obtain any more funding for the purpose of hiring qualified experts*." Reporter's Official Tr. 206–207 (emphasis added).

Operating under the mistaken belief that he could pay no more than $1,000, Hinton's attorney went looking for an expert witness. According to his postconviction testimony, he made an extensive search for a well-regarded expert, but found only one person who was willing to take the case for the pay he could offer: Andrew Payne. Hinton's attorney "testified that Payne did not have the expertise he thought he needed and that he did not consider Payne's testimony to be effective." 2006 WL 1125605, *27. As he told the trial judge during a pretrial hearing:

> "I made an effort to get somebody that I thought would be useable. And I'll have to tell you what I did [about] Payne. I called a couple of other lawyers in town . . . to ask if they knew of anybody. One of them knew him; one of them knew him. The reason I didn't contact him was because he wasn't recommended by the lawyer. So now I'm stuck that he's the only guy I could possibly produce." *Id.,* at *30 (internal quotation marks omitted).

At trial, Payne testified that the toolmarks in the barrel

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