

## Petitioning the Court for a Competent Expert

By Adam J. Sheppard – April 16, 2014

In February 2014, the U.S. Supreme Court held that an attorney in a capital-murder case was ineffective in failing to petition the trial court for sufficient funds to hire a competent expert to rebut the state's forensic evidence. The case is *Hinton v. Alabama* (No. 13-6440, Feb. 24, 2014) (per curiam). The defendant was charged with shooting two restaurant managers to death in the course of two separate robberies. Later that month, a third restaurant manager was shot at, but survived, during another similar robbery. That restaurant manager later identified the defendant as the shooter. Officers recovered a .38 caliber from the defendant's residence. 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 the defendant's residence. The state's strategy in the murder cases was to persuade the jury that the similarity between all three crimes, the eyewitness testimony of the restaurant manager who survived, and the forensic analysis of the bullets meant that only the defendant could have committed the murders.

In a pretrial motion, the defense attorney petitioned the trial court under an Alabama state statute for funding to hire an expert to rebut the state's forensic analysis regarding the bullets. The statute in effect at the time of the trial authorized the court to grant up to \$500 for an expert on each case (\$1,000 total) but also authorized additional funding upon a showing that such funds were necessary. The trial judge had actually invited counsel to apply for additional funds if he could show that the statute authorized them. Counsel, however, never applied for additional funds; he mistakenly believed that the statute definitively capped funds for experts at \$1,000 in this case.

The only expert that defense counsel was able to obtain for \$1,000 did not nearly have the same credentials and experience as the state's experts. The defense expert did opine that the bullets recovered from the murder scenes were not shot from the defendant's gun. However, the prosecution was able to substantially discredit the expert, particularly when comparing his credentials to those of the state's experts. The Supreme Court held that counsel was deficient in failing to request more funds for a more competent expert. The Court remanded the case for reconsideration of whether the defendant's attorney's deficient performance was sufficiently prejudicial to warrant reversal of his conviction.

*Hinton* is instructive for a variety of reasons. First, it reaffirms that counsel—particularly appointed counsel—must stay abreast of the relevant statutes that govern appointment of expert witnesses. In federal court, the relevant statute is [18 U.S.C.A. § 3006A\(e\)](#) (“Services other than counsel”). The statute sets certain caps for compensation of experts; however, it authorizes the approval of funds in excess of those caps if the attorney can show that such services are necessary for adequate representation. See 18 U.S.C.A. § 3006A(e)(2) and (e)(3). Courts evaluate a petition for the appointment of an expert under the “private attorney” standard. See *United States v. Allen*, 767 F.2d 314, 318 (7th Cir. 1984). That is, a court should grant the

request to appoint an expert if a reasonable attorney would engage such services for “a client having the independent financial means to pay for them,” and counsel has made a timely request for such services. *See id.*; *see also United States v. Bass*, [477 F.2d 723, 725 \(9th Cir. 1973\)](#); *United States v. Parker*, 4 F. App’x 111 (2d Cir. 2001). Accordingly, *Hinton* reminds us that counsel on behalf of an indigent party should not shy away from petitioning the court to appoint a necessary expert.

Secondly, *Hinton* shows that defense counsel should not blindly accept the forensic analysis of the prosecution’s experts. In *Hinton*, the state’s experts had opined that the six bullets at issue had all been fired from the same gun. Yet, in post-conviction proceedings, three highly credentialed experts, including a former FBI analyst, opined that they could not conclude that the bullets had been fired from the same gun. The Supreme Court stated the following:

Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials. . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.” *Melendez-Diaz v. Massachusetts*, 557 U. S. 305, 319 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009)).

*Hinton*, slip op. at 13.

Lastly, *Hinton* instructs that counsel must thoroughly vet an expert’s credentials and personal characteristics prior to putting the expert on the witness stand. It is not enough that the court will accept the witness as an “expert.” The witness must be able to survive cross-examination. In *Hinton*, after the prosecution thoroughly attacked the defense expert’s experience in the area of toolmark identification, the prosecutor ended the cross-examination with this:

Q: Mr. Payne, do you have some problem with your vision?

A: Why, yes.

Q: How many eyes do you have?

A: One.

The Supreme Court characterized the defense expert as having been “badly discredited.” Accordingly, the lesson of *Hinton* is that any old expert won’t do; it must be an expert who is truly competent to challenge the conclusions of the prosecution’s witnesses.

**Keywords:** litigation, young lawyer, *Hinton v. Alabama*, expert witness

[Adam J. Sheppard](#) is a partner with Sheppard Law Firm PC in Chicago, Illinois, and sits on the editorial board of the Young Advocates Committee.

---

© 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.