IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

EDWARD THOMAS KENDRICK, III,	)	
	)	
Appellee,	)	
	)	No. E2011-02367-SC-R11-PC
	)	Hamilton County Criminal Court
v.	)	No. 220622
	)	CCA. No. E2011-2367-CCA-R3-PC
	)	(Post-Conviction)
STATE OF TENNESSEE	)	
	)	
Appellant,	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT OF THE TENNESSEE COURT OF CRIMINAL APPEALS

BRIEF OF *AMICI CURIAE*

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS & TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

IN SUPPORT OF THE APPELLEE

STEPHEN ROSS JOHNSON (BPR No. 022140)
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37902
www.rddjlaw.com
(865) 637-0661
(865) 542-4632 (FAX)
Member of Board of Directors, NACDL
Past-President of Board of Directors, TACDL

W. THOMAS DILLARD (BPR No. 002020)
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37902
www.rddjlaw.com
(865) 637-0661
(865) 542-4632 (FAX)

Counsel for Amici Curiae
National Association of Criminal Defense Lawyers &
Tennessee Association of Criminal Defense Lawyers

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

EDWARD THOMAS KENDRICK, III,	)	
	)	
Appellee,	)	
	)	**No. E2011-02367-SC-R11-PC**
	)	**Hamilton County Criminal Court**
v.	)	**No. 220622**
	)	**CCA. No. E2011-2367-CCA-R3-PC**
	)	**(Post-Conviction)**
STATE OF TENNESSEE	)	
	)	
Appellant,	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT OF THE TENNESSEE COURT OF CRIMINAL APPEALS

BRIEF OF *AMICI CURIAE*

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS & TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

IN SUPPORT OF THE APPELLEE

STEPHEN ROSS JOHNSON (BPR No. 022140)
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37902
www.rddjlaw.com
(865) 637-0661
(865) 542-4632 (FAX)
Member of Board of Directors, NACDL
Past-President of Board of Directors, TACDL

W. THOMAS DILLARD (BPR No. 002020)
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37902
www.rddjlaw.com
(865) 637-0661
(865) 542-4632 (FAX)

Counsel for Amici Curiae
National Association of Criminal Defense Lawyers &
Tennessee Association of Criminal Defense Lawyers

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

STATE CASES

OTHER AUTHORITES

STATEMENT OF AMICI CURIAE

The Tennessee Association of Criminal Defense Lawyers (TACDL) is a non-profit corporation chartered in Tennessee in 1973. It has over 1000 members statewide, mostly lawyers actively representing citizens accused of criminal offenses. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before courts and the legislature regarding reforms calculated to improve the administration of criminal justice in Tennessee.

****

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus curiae briefs each year with the United States Supreme Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION

This year marks the 51st anniversary of the United States Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the 30th anniversary of its decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Gideon*, the Court held that the Sixth and Fourteenth Amendments require providing counsel to those persons accused who cannot afford representation. In *Strickland*, the court recognized the necessity of creating an objective standard that could be applied to all cases raising Sixth Amendment claims of ineffective counsel.

The United States Supreme Court's recent analysis of defense counsel's responsibilities to investigate and obtain expert assistance in *Hinton v. Alabama*, 571 U.S. ___, 134 S.Ct. 1081 (2014), directly applies to this case. Investigation of the prosecution's proposed scientific or technical evidence on critical facts essential to the defense is a necessary part of rendering constitutionally adequate counsel. This case allows the Court to clarify that it is deficient performance for defense counsel in a criminal case to not investigate proposed scientific or technical evidence on critical facts essential to the defense.

In *Baxter v. Rose*, 523 S.W.2d 931, 936 (Tenn. 1975), this Court set a reasonableness standard for ineffective counsel which compares counsel's actions to a range of competence demanded of attorneys in a criminal case. The Court now has the opportunity to respond to a growing national realization that in order for counsel to fall within the range of competence demanded, counsel necessarily must investigate any scientific or technical data that is essential to a defense. Failure to investigate scientific or technical data essential to a defense can have a powerful negative impact on the accused, and as a result does not meet the constitutional mandate that every person accused of a crime be provided with competent criminal defense counsel.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S RECENT ANALYSIS IN *HINTON V. ALABAMA* OF DEFENSE COUNSEL'S RESPONSIBILITIES TO INVESTIGATE AND OBTAIN EXPERT ASSISTANCE DIRECTLY APPLIES TO THIS CASE.

A. In *Baxter v. Rose* this court outlined a reasonableness standard for ineffective counsel comparing counsel's actions to a range of competence demanded of attorneys in a criminal case.

This Court, in *Baxter v. Rose*, 523 S.W.2d 931, 936 (Tenn. 1975), departed from its long standing "farce and mockery" standard to apply a standard of reasonableness to ineffective counsel claims. This reasonableness standard compares counsel's actions to those "within the range of competence demanded of attorneys in criminal cases." *Id.* To fall within the range of competency defense counsel must among other things:

> [C]onduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Id. at 933 (citing *United States v. DeCoster*, 487 F.2d 1197, 1203-4 (D.C. Cir. 1973)).

Moreover, this Court adopted the language of *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974), to further evaluate the competency of counsel which states:

> [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. Defense

> counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

Baxter, 523 S.W.2d at 934-35 (quoting *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)).

"Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 571 U.S. ___, 134 S.Ct. 1081, 1088 (2014) (quoting *Harrington v. Richter*, 562 U.S. ___, ___, 131 S.Ct. 770, 778 (2011)). In *Harrington*, defense counsel was unaware that the prosecution at trial would change tactic and employ two blood experts to counter his theory of the case. *Harrington*, 562 U.S. __, 131 S.Ct. at 782 (finding that federal habeas standard was not met when defense counsel failed to hire counter blood spatter expert since defense counsel effectively discredited prosecution experts at trial and blood spatter evidence was not critical to defense theory). Unlike *Harrington*, *Hinton* did require the introduction of counter-expert evidence in order for counsel to be constitutionally adequate. To emphasize the point, the per curiam opinion in *Hinton* provided:

> 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, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009)). This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Hinton, 571 U.S. __, 134 S.Ct. at 1088.

B. *Hinton v. Alabama* applies a reasonableness standard which requires trial counsel to research scientific and technical evidence essential to the defense in order to be within the range of competence demanded of criminal defense attorneys.

Hinton was charged and convicted of two counts of capital murder in the commission of two robberies. *Hinton*, 571 U.S. __, 134 S.Ct. at 1083. During the trial the state's only physical evidence was six bullets and Mr. Hinton's mother's .38 caliber revolver, which the state alleged Hinton used in the shootings. *Id.* at 1084. In addition, 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. 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. "The State's case," the court summed up, "turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." *Id*. at 1084.

Notably, despite that Hinton's attorney pursued an alibi defense and offered supporting witnesses, the United States Supreme Court concluded that the case was one of those whereby the only reasonable and available defense strategy required consultation with experts or introduction of expert evidence. The court provided, "as Hinton's trial attorney recognized, the core of the prosecution's case was the state experts' conclusion that the six bullets had been fired from the Hinton revolver, and effectively rebutting that case required a competent expert on the defense side." *Id*. at 1088.

To underscore the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, the court summarized the findings of the defense experts presented at Hinton's post-conviction hearing.

> All three [defense] experts examined the physical evidence and testified that they could not conclude that any of the six bullets had been fired from the Hinton revolver. The State did not submit rebuttal evidence during the postconviction hearing, and one of Hinton's experts testified that, pursuant to the ethics code of his trade organization, the Association of Firearm and Tool Mark Examiners, he had asked the State's expert, Yates, to show him how he had determined that the recovered bullets had been fired from the Hinton revolver. Yates refused to cooperate.

Id. at 1086.

II. INVESTIGATION OF THE PROSECUTION'S PROPOSED SCIENTIFIC OR TECHNICAL EVIDENCE ON CRITICAL FACTS ESSENTIAL TO THE DEFENSE IS A NECESSARY PART OF RENDERING CONSTITUTIONALLY ADEQUATE COUNSEL.

Like *Hinton*, Mr. Kendrick's trial counsel was deficient when he failed to perform his duty to make a reasonable investigation of the facts and the law.

> Hinton's attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for "any expenses reasonably incurred." An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.

Hinton v. Alabama, 571 U.S. __, __, 134 S.Ct. 1081, 1088-9 (2014).

Similar to *Hinton*, Mr. Kendrick's case was one of those wherein the only reasonable defense strategy required consultation with an expert, or the introduction of credible expert

evidence.[1] To conclude otherwise ignores that in *Hinton* trial counsel did offer witnesses in support of an alibi defense, but, even so, the court recognized the need to counter the state's expert testimony with a competent expert on the defense side. Just as the alibi witnesses in *Hinton* failed to carry the day for the defense, Sergeant Miller's testimony did nothing in Mr. Kendrick's case to counter the opinions of the state's expert, Kelly Fite.

Mr. Kendrick's trial counsel's omissions fell below an objective standard of reasonableness, a standard of reasonableness recognized in *Hinton*.

A. Counsel's investigation of forensic sciences and techniques related to a fact essential to a defense is critical because of the powerful impact expert testimony has at trial.

Since 1989 there have been at least 316 documented post-conviction DNA exonerations in the United States. Many of these individuals served prison sentences upwards of ten years, and many were on death row. *DNA Exoneree Case Profiles,* Innocence Project (last updated May 19, 2014), http://www.innocenceproject.org/know/. Since the first DNA exoneration there has been an upward trend in the number of defendants who have been falsely accused. *Id.* With a trend toward more defendants convicted of crimes they did not commit it is important that the root of this injustice be uncovered and eliminated.[2] Some of these erroneous convictions are the result of eyewitness misidentification, false confessions, or government misconduct; but a significant

[1] The shooting in *Hinton* occurred in 1985. The shooting in Mr. Kendrick's case happened in 1994. If the only reasonable defense strategy required consultation with an expert for a 1985 shooting involving expert ballistics issues, surely the same can be said of a 1994 shooting involving a state firearms expert prepared to testify that the rifle could not have accidently discharged without the trigger being pulled.

[2] In the panel opinion below, the Court of Criminal Appeals thought it significant and pointed out in footnote 6: We note that according to a "Chattanooga Police Supplement Report" prepared by Sgt. Rawlston, Sgt. Rawlston "contacted Special Agent Jack Scott of the U.S. Treasury Bureau of Alcohol Tobacco and Firearms" on March 8, 1994, and that Sp. Agent Scott would "conduct research into the history of the Remington Model 7400 which was utilized in this incident." The state did not call Sp. Agent Scott to testify at the Petitioner's trial.

number are the result of non-validated or improper forensic science and ineffective performance of the defense function. *Id.*

According to the national Innocence Project, in forty-nine percent of DNA exonerations, invalid or improper forensic science was a key factor that led to the erroneous conviction. *Unreliable or Improper Forensic Science*, Innocence Project (last updated May 19, 2014), http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php. Many forensic disciplines currently used by analysts regularly testifying at trial do not meet scientific method standards. *Id.* Furthermore, there has been a documented history of forensic misconduct by testifying experts who have falsified results, or made illogical leaps that have led the jury astray. *Id.*; *see also Hinton*, 571 U.S. __, 134 S.Ct. at 1091.

B. The National Research Council of the National Academy of Science's report on the forensic science community highlights the shortcomings of the field as well as the powerful impact that faulty forensic science can have on those accused of a crime.

In 2009, the National Research Council of the National Academy of Sciences released a report detailing the shortcomings of forensic sciences community and their impact on judicial proceedings. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. & NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (hereinafter National Academy of Sciences Report). The National Academy of Sciences Report states: "in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. . . . demonstrat[ing] the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. *Id.* at 4. Furthermore, regarding the correlation between forensic testing and wrongful convictions the National Academy of Sciences Report found that "[t]he majority of forensic science laboratories are administered by law enforcement agencies,

such as police departments, where the laboratory administrator reports to the head of the agency." *Id.* at 183. This lack of independence can lead to uncertainties and biases that can ultimately affect the neutrality of the data provided by these laboratories in reports and courtroom testimony. *Id.* at 183-6. These findings illustrate why it is necessary for counsel to make an investigation into technical and scientific data presented by the prosecution that is essential to a defense in order for the minimum standards to be met under the Sixth and Fourteenth Amendments, as well as Tennessee Constitution Article 1 § 9.

C. Extensive research has shown a positive correlation between faulty forensic science testimony and the wrongful conviction of those accused of a crime.

Over the past decade significant research has gone into understanding the correlation between forensic science testimony and wrongful convictions. In Brandon Garrett and Peter Neufeld's 2009 article the authors explain that in a study set of 137 trial transcripts of exonerated defendants, 82 (or 60%), of them involved invalid forensic science testimony. Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction*, VA. L. REV. 1, 14 (2009); *see also Hinton*, 571 U.S. __, 134 S.Ct. at 1090. Furthermore, evidencing the correlation and serious problems with forensic sciences offered in criminal proceedings, the Supreme Court in *Melendez-Diaz v. Massachusetts* stated "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." 557 U.S. 305, 319 (2009); *see also* Garret & Neufeld, *supra,* at 14. The findings of this article and the National Academy of Sciences Report, as well as those continuously made by groups such as the Innocence Project, are prime examples of why investigation into technical and scientific research should be encompassed in trial counsel's

duties to their clients as understood by this Court. *Baxter v. Rose*, 523 S.W.2d 931, 933 (Tenn. 1975).

Mr. Kendrick's situation is plagued by both questionable forensic testing and analysis, as well as his counsel's failure to meet its duty to investigate the facts of his case. *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2013 WL 3306655 1, 3-6 (Tenn. Crim. App. 2013). Here, this Court can simultaneously right the wrong done to Mr. Kendrick; and provide a clarification regarding defense counsel's duty to investigate proposed expert or technical evidence. Although it may be true that counsel "does not enjoy the benefit of unlimited time and resources," it is nevertheless paramount that counsel conducts both the factual and legal investigations to determine potential matters of defense. *Chandler v. United* States, 218 F.3d 1305, 1314 n.14 (11th Cir. 2000) (citing *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994)). *See also Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006); *Baxter*, 523 S.W.2d at 923-33).

CONCLUSION

It is fundamental to the judicial process that a person accused of a crime be provided with competent counsel at trial. Foundational to providing competent counsel is the basic knowledge of duties that counsel is expected to meet. This Court has the opportunity to state that duty such that it encompasses the investigation of scientific and technical facts that are essential to the defense of the case. For these reasons, as well as those stated above, the National Association of Criminal Defense Lawyers and the Tennessee Association of Criminal Defense Lawyers respectfully submit that this Court uphold the decision below of the Court of Criminal Appeals.

Respectfully submitted this 22nd day of May, 2014.

RITCHIE, DILLARD, DAVIES & JOHNSON, P.C.

W. THOMAS DILLARD, [BPR #002020]

STEPHEN ROSS JOHNSON. [BPR #022140]
606 W. Main Street, Suite 300
Knoxville, TN 37902
(865) 637-0661
(865) 524-4623
www.rddjlaw.com
Member of Board of Directors, NACDL
Past President of Board of Directors, TACDL

Counsel for Amici NACDL and TACDL

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was forwarded via electronic copy, hand delivery and/or first-class postage with proper postage affixed thereon this 22nd day of May 2014 to:

Ann C. Short, Esq.
The Bosch Law Firm, P.C.
712 S. Gay Street
Knoxville, Tennessee 37902-1708
Counsel for Appellee, Edward Thomas Kendrick III

John H. Bledsoe
Senior Counsel
Criminal Justice Division
Office of the Tennessee Attorney General
Cordell Hull Building
425 Fifth Avenue North
P. O. Box 20207
Nashville, Tennessee 37202-0207
Counsel for Appellant, State of Tennessee

STEPHEN ROSS JOHNSON