

No. 19-6226

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EDWARD THOMAS KENDRICK,
Petitioner-Appellant,

v.

MIKE PARRIS,
Respondent-Appellee.

On appeal from the
United States District Court for the Eastern District of Tennessee
Greeneville Division
No. 1:16-cv-00350

**BRIEF OF *AMICI CURIAE* THE TENNESSEE INNOCENCE
PROJECT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, AND TENNESSEE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS IN SUPPORT OF PETITIONER**

Thomas Anthony Swafford
Joshua Counts Cumby
Adams and Reese LLP
424 Church Street, Suite 2700
Nashville, Tennessee 37219
Tel: (615) 259-1540
Fax: (615) 259-1470
Tony.Swafford@arlaw.com
Joshua.Cumby@arlaw.com

Jessica Van Dyke
Executive Director & Lead
Counsel
Tennessee Innocence Project
2126 21st Ave. S.
Nashville, TN 37212
Tel: (615) 581-7230
jessica@tninnocence.org

Attorneys for Amici Curiae

Stephen Ross Johnson
President, Tennessee Innocence Project
NACDL Amicus Committee, Sixth
Circuit Vice Chair
Past-President, TACDL
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37902
Tel: (865) 637-0661
Fax: (865) 524-4623
johnson@rddjlaw.com

Jonathan Harwell,
Chairperson,
TACDL Amicus Committee
1101 Liberty Street
Knoxville, Tennessee 37919
Tel: (865) 594-6120
jharwell@pdknox.org

Attorneys for Amici Curiae

**CORPORATE AFFILIATE/FINANCIAL INTEREST
DISCLOSURE STATEMENT**

Amici Curiae The Tennessee Innocence Project, Tennessee Association of Criminal Defense Lawyers, and National Association of Criminal Defense Lawyers are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

STATEMENT OF IDENTITY, INTEREST, AND CONSENT

The Tennessee Innocence Project (TIP) is a nonprofit corporation designed to prevent and correct wrongful convictions in Tennessee. TIP has three primary areas of focus: (1) litigating wrongful conviction cases for those in Tennessee prisons to obtain exonerations; (2) training law students and attorneys about how to litigate these cases and how to prevent future wrongful convictions; and (3) effectuating changes that facilitate the discovery of wrongful convictions and remedies to the wrongfully convicted.

The 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 many thousands of direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in the U.S. Supreme Court, this Court, and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Tennessee Association of Criminal Defense Lawyers (TACDL) is a nonprofit voluntary professional bar association founded 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.

All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting the brief.

TABLE OF CONTENTS

CORPORATE AFFILIATE/FINANCIAL INTEREST DISCLOSURE STATEMENT	i
STATEMENT OF IDENTITY, INTEREST, AND CONSENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. Investigation of the prosecution’s scientific or technical evidence on critical facts essential to the defense is a necessary part of rendering constitutionally adequate counsel.....	3
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.....	3
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.	4
C. Extensive research has shown a positive correlation between faulty forensic science testimony and the wrongful conviction of those accused of a crime.	6
D. The United States Supreme Court’s analysis of defense counsel’s responsibilities to investigate and obtain expert assistance in <i>Hinton v. Alabama</i> directly applies to this case.	7
II. Trial counsel’s failure to introduce Inspector Miller’s statements through the excited-utterance exception is the kind of unforced error that the Supreme Court recognizes as constitutionally inadequate.	10
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE.....	13
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

Cases

<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	1
<i>Hinton v. Alabama</i> , 571 U.S. 273 (2014)	1, 6, 7, 8, 9, 10, 11
<i>Kendrick v. State</i> , No. E2011-02367-CCA-R3-PC, 2013 WL 3306655 1, (Tenn. Crim. App. 2013)	7
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009)	6

Secondary Sources

<i>DNA Exonerations in the United States</i> , Innocence Project.....	3
<i>Forensic Science: Problems and Solutions</i> , Innocence Project	4
Garrett, Brandon L. & Peter Neufeld, <i>Invalid Forensic Science Testimony and Wrongful Conviction</i> , Va. L. Rev. 1, 14 (2009)	6
National Research Council of the National Academies, <i>Strengthening Forensic Science in the United States: A Path Forward</i> (2009)	4, 5

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“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. 273 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). In *Hinton*, the Supreme Court recognized the shortcomings of forensic-sciences expert testimony and the corresponding “threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts”—a threat that is “minimized when the defense retains a competent expert to counter the testimony of the prosecution’s expert witnesses.” *Id.* at 276.

The shortcomings of experts and expert testimony and their threat to the fairness of criminal trials is very real. As the empirical research summarized below demonstrates, faulty expert testimony has a powerful impact at trial, and it often leads to wrongful convictions. That is why it is so critically important for defense counsel to investigate and prepare for the prosecution’s scientific or technical evidence and—in cases like this one—engage an expert to rebut the prosecution’s expert testimony.

Given this background, the Supreme Court’s reasoning in *Hinton* applies with even greater force here. Whereas *Hinton*’s counsel failed to hire a *competent* expert because he was mistaken about the amount of funding

available, Petitioner Edward Thomas Kendrick’s counsel failed to hire *an* expert, even though counsel knew that the prosecution would present expert testimony on critical facts essential to Kendrick’s only defense that required rebuttal. Because investigation of the prosecution’s proposed scientific or technical evidence on critical facts was a necessary part of rendering constitutionally adequate counsel in this case, Kendrick’s counsel was deficient.

Similarly, Kendrick’s counsel was ineffective because he failed to prepare for—much less investigate—what he himself considered “the most important piece of evidence in the entire trial”: testimony from Inspector Miller, the officer who shot himself in the foot with the murder weapon *without pulling the trigger*. Rather than interviewing Miller or subpoenaing the reports that documented the accidental shooting before trial, Kendrick’s counsel “presumed” that he would be able to elicit the testimony that, again, was crucial to Kendrick’s only defense. Had counsel recognized that he could use the excited-utterance exception to the hearsay rule—which even the greenest defense attorney knows well enough—Miller’s out-of-court statement would have been admitted as substantial evidence. Here, too, counsel was constitutionally deficient, and for these reasons the district court should be reversed and the petition should be granted.

ARGUMENT

I. Investigation of the prosecution’s scientific or technical evidence on critical facts essential to the defense is a necessary part of rendering constitutionally adequate counsel.

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 367 documented post-conviction DNA exonerations in the United States. *DNA Exonerations in the United States*, Innocence Project, available at <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited July 4, 2020). Since the first DNA exoneration, there has been an upward trend in the number of defendants who have been falsely accused. *Id.* Some of these erroneous convictions are the result of eyewitness misidentification, false confessions, or government misconduct. *Id.* But a significant number—44%—are the result of non-validated or improper forensic science. *Id.*

According to the national Innocence Project, the misapplication of forensic science contributed to 45% of wrongful convictions in the United States proven through DNA evidence, and false or misleading forensic evidence was a contributing factor in 24% of all wrongful convictions nationally. *Forensic Science: Problems and Solutions*, Innocence Project, available at

<https://www.innocenceproject.org/forensic-science-problems-and-solutions/>

(last visited July 4, 2020). Many forensic disciplines currently used by analysts who regularly testify 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. at 276 (“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.”) (quoting *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)).

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 the forensic sciences community and their impact on judicial proceedings. National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (last visited July 4, 2020) (National Academy Report).

The National Academy Report states that, “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 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 183–86.

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.

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

Recently, 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%) involved invalid forensic science testimony. Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction*, Va. L. Rev. 1, 14 (2009) (Garrett & Neufeld); *see also Hinton*, 571 U.S. at 276 (citing Garrett & Neufeld). Furthermore, evidencing the correlation and serious problems with forensic sciences offered in criminal proceedings, the Supreme Court in *Melendez-Diaz v. Massachusetts* recognized that “[t]he 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) (quoting National Academy Report at xx); *see also* Garret & Neufeld at 14.

The findings of this article and the National Academy 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 is included in trial counsel's duties to their clients.

D. The United States Supreme Court's analysis of defense counsel's responsibilities to investigate and obtain expert assistance in *Hinton v. Alabama* directly applies to this case.

Kendrick's situation is plagued by questionable forensic testing and analysis, as well as his counsel's failure to meet his duty to investigate the facts of the case. *See Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2013 WL 3306655 1, 3–6 (Tenn. Crim. App. 2013). And like the petitioner in *Hinton*, Kendrick was deprived of constitutionally mandated effective assistance of counsel because his counsel did not retain an expert to rebut the prosecution's expert and advance his only defense.

Hinton was charged and convicted of two counts of capital murder in the commission of two robberies. *Hinton*, 571 U.S. at 265. During the trial the state's only physical evidence was six bullets and Hinton's mother's .38 caliber revolver, which the state alleged Hinton used in the shootings. *Id.* In addition, the police found no evidence at the crime scenes that could have been used to identify the perpetrator (such as fingerprints), and no incriminating evidence at Hinton's home or in his car. *Id.* 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. *Id.* Hinton maintained that he was innocent and that Smotherman had misidentified him. *Id.* 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. *Id.* “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.” *Hinton*, 571 U.S. at 265.

Notably, even though 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. “[A]s 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 273.

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 270.

Similarly, Kendrick's post-conviction expert testified that the drop test the prosecution's expert performed on Kendrick's rifle "does nothing whatsoever to analyze the [trigger] mechanism and how it can fail," Page ID # 3134—that is, the prosecution's expert did nothing to determine if Kendrick's gun could fire without pulling the trigger, the central issue in the case.

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

¹ The shooting in *Hinton* occurred in 1985. The shooting in 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 accidentally discharged without the trigger being pulled.

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, Inspector Miller's testimony did nothing in Kendrick's case to counter the opinions of the state's expert (largely because the favorable testimony Kendrick's counsel "presumed" Miller would give was not admitted; see Part II below).

Kendrick's trial counsel's omissions fell below an objective standard of reasonableness, a standard of reasonableness recognized in *Hinton*. For that reason, the district court should be reversed and Kendrick's petition should be granted.

II. Trial counsel's failure to introduce Inspector Miller's statements through the excited-utterance exception is the kind of unforced error that the Supreme Court recognizes as constitutionally inadequate.

Trial counsel thought that Inspector Miller's shooting himself in the foot with Kendrick's gun "was the most important piece of evidence in the entire trial." Page ID # 3276. Yet counsel never interviewed Miller; rather, he "presumed [he] would be able to get Mr. Miller's testimony that he was no[t] holding the trigger and the gun discharged and shot him in the foot." Page ID # 3365, 3293. And when that presumption turned out to be mistaken, counsel simply failed to recognize that Miller's post-incident statements could still

have been admitted under the excited-utterance exception to the hearsay rule.

As counsel later recalled, “I think it could have well have been used as an excited utterance. I’ll tell you that. In the heat of trial, I didn’t see that.”

Page ID # 3320.

Trial counsel’s failure to adduce the evidence necessary to Kendrick’s only defense is akin to Hinton’s attorney’s ignorance of the law on expert-witness reimbursement. Like Hinton’s counsel, Kendrick’s counsel knew that Inspector Miller’s testimony was fundamental to Kendrick’s defense—indeed, that it “was the most important piece of evidence in the entire trial.”

Page ID # 3276; *Hinton*, 571 U.S. at 274. Like Hinton’s counsel, Kendrick’s counsel also “failed to make even the cursory investigation” necessary to ensure that Miller’s testimony was admitted as substantive evidence. *Hinton*, 571 U.S. at 274. Trial counsel did not interview Miller or subpoena the reports where he stated that he shot himself in the foot without touching the trigger on Kendrick’s gun. Moreover, he failed to even recognize that he could use the law of hearsay and its exceptions—the same doctrine that has been drilled into every law student since time immemorial—to admit Miller’s statements. Kendrick’s counsel’s failure to recognize that he had such recourse, like Hinton’s counsel’s mistake of law, “is a quintessential example of unreasonable performance under *Strickland*.” *Id.*

CONCLUSION

For these reasons, The Tennessee Innocence Project, TACDL, and NACDL respectfully request that the district court's decision be reversed and the petition for a writ of habeas corpus be granted.

Respectfully submitted this 20th day of July, 2020, by:

/s/ Joshua Counts Cumby

Thomas Anthony Swafford
Joshua Counts Cumby
Adams and Reese LLP
424 Church Street, Suite 2700
Nashville, Tennessee 37219
Tel: (615) 259-1450
Fax: (615) 259-1470
Tony.Swafford@arlaw.com
Joshua.Cumby@arlaw.com

Jessica Van Dyke
Executive Director & Lead
Counsel
Tennessee Innocence Project
2126 21st Ave. S.
Nashville, TN 37212
Tel: (615) 581-7230
jessica@tninnocence.org

Stephen Ross Johnson
President, Tennessee Innocence Project
NACDL Amicus Committee, Sixth Circuit
Vice Chair
Past-President, TACDL
Ritchie, Dillard, Davies & Johnson, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37902
Tel: (865) 637-0661
Fax: (865) 524-4623
johnson@rddjlaw.com

Jonathan Harwell,
Chairperson, TACDL Amicus Committee
1101 Liberty Street
Knoxville, Tennessee 37919
Tel: (865) 594-6120
jharwell@pdknox.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the Court's type-volume, typeface, and type style limitations and requirements.

Respectfully submitted this 20th day of July, 2020, by:

/s/ Joshua Counts Cumby
Joshua Counts Cumby
Adams and Reese LLP
424 Church Street, Suite 2700
Nashville, Tennessee 37219
Tel: (615) 259-1450
Fax: (615) 259-1470
Joshua.Cumby@arlaw.com

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on all counsel of record by CM/ECF.

Respectfully submitted this 20th day of July, 2020, by:

/s/ Joshua Counts Cumby
Joshua Counts Cumby
Adams and Reese LLP
424 Church Street, Suite 2700
Nashville, Tennessee 37219
Tel: (615) 259-1450
Fax: (615) 259-1470
Joshua.Cumby@arlaw.com

Attorney for Amici Curiae