No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

THOMAS LANE, Petitioner,

v.

STATE OF ALABAMA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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April 19, 2021

CAPITAL CASE

QUESTION PRESENTED

The State's case at trial was lacking in direct evidence and built instead on circumstantial evidence. The State bolstered its otherwise circumstantial case through the expert opinion of Scott Milroy, who testified that a chisel found in Mr. Lane's truck was the only chisel "in the world" that could have made the marks on front door of the home where Mrs. Lane was staying. This was the only piece of physical evidence used to tie Mr. Lane to the scene of the crime. The trial court qualified Mr. Milroy as an expert and allowed him to give his opinion despite the fact that he had never previously analyzed chisel marks on wood. The Alabama Court of Criminal Appeals affirmed and the Alabama Supreme Court denied certiorari. The question presented is:

> In a capital case, does the admission of expert testimony from a witness regarding a subject outside his area of expertise violate a defendant's Fifth, Eighth, and Fourteenth Amendment rights to due process, a fair trial, and a reliable conviction and sentence?

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PETITION FOR WRIT OF CERTIORARI

Thomas Lane respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Lane's conviction and sentence, *Lane v. State*, No. CR-15-1087, 2020 WL 2830015 (Ala. Crim. App. May 29, 2020), is attached as Appendix A, and that court's order denying Mr. Lane's application for rehearing on September 4, 2020, is unreported and attached as Appendix B. The order of the Alabama Supreme Court denying Mr. Lane's petition for writ of certiorari, *Ex parte Lane*, No. 1191036 (Ala. Nov. 20, 2020), is also unreported and attached as Appendix C.

JURISDICTION

On May 29, 2020, the Alabama Court of Criminal Appeals affirmed Mr. Lane's conviction and sentence, *Lane v. State*, No. CR-15-1087, 2020 WL 2830015 (Ala. Crim. App. May 29, 2020), and on September 4, 2020, the same court denied Mr. Lane's application for rehearing. On November 20, 2020, the Alabama Supreme Court denied Mr. Lane's petition for writ of certiorari. *Ex parte Lane*, No. 1191036 (Ala. Nov. 20, 2020). On March 19, 2020, this Court

entered a general order expanding the time to file this petition for a writ of certiorari to 150 days, until April 19, 2021. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The State's theory at trial was that on October 12, 2003, between 8:45 a.m. and 9:15 a.m., Mr. Lane broke into the home of Pelagia "Indy" Wilson and killed his estranged wife, Theresa Lane, by drowning her in the bathtub. (R. 1249, 1262-65, 2130-31.)[1] At trial, the defense argued that there was reasonable doubt regarding the State's theory because there was no evidence of breaking found by investigators on the day of the crime. (R. 2161-64.)

The evidence that no one documented a breaking that occurred on the day of the crime was significant because it created the possibility that someone could have used a chisel to break open the door after the crime and then placed the chisel in Mr. Lane's truck. Officers repeatedly testified that on October 12, they treated the scene like a homicide, and conducted a homicide investigation. (R. 1454, 1477, 1494, 1521, 1581.) They documented the scene, searched for evidence of a crime, took pictures, and collected evidence. (R. 1488, 1522-23.) None of the physical evidence that was collected tied Mr. Lane to the scene.

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[1]"C." refers to the clerk's record, "R." to the reporter's transcript, "S1." to the first supplemental clerk's record, "S2." to the second supplemental clerk's record, "S3." to the third supplemental clerk's record, and "S4." to the fourth supplemental clerk's record. "2006 R." refers to the reporter's transcript from Mr. Lane's 2006 appeal. "2006 S1." refers to the first supplemental clerk's record from Mr. Lane's 2006 appeal. "2006 S2." refers to the second supplemental clerk's record from Mr. Lane's 2006 appeal.

As part of this investigation, at least 15 members of law enforcement came to the house on October 12, many walking through the front door multiple times to conduct an investigation for a crime that they knew could be a burglary-murder. (R. 1534.) However, not a single person investigating the homicide noticed evidence of forced entry on October 12. (R. 1475, 1482, 1521, 1533-35, 1539-40, 1579, 1581, 1938.) Indeed, Iris Raley, the daughter of Ms. Wilson, testified that after police were finished with the scene on October 12, she went to the front door and locked it herself. (R. 1367-68.) She emphasized that when she left on October 12, the front door "was locked. I checked it several times." (R. 1367-68.)

The following day, Ms. Raley called the police to note that it now appeared that the front door had been kicked in. (R. 1369.) The police returned to the same crime scene after dark in the late evening on October 13, and for the first time found obvious signs of forced entry, including the chain from the lock hanging down and a 10-inch piece of wood from the door in the front yard. (C. 683-84; R. 1533-34, 1539.) The officers found the 10-inch piece of wood, which had nails protruding from it, in the front yard in the exact location where investigators were photographed standing the day before (Compare C. 1362 with C. 1363), though it had not been seen by them if it had been there and was not visible in the pictures taken (R. 1533-35).

Despite the lack of any evidence establishing that a forced entry occurred on the day of the crime, the State grounded its case at trial on a forced entry, noting that it was their only piece of direct evidence against Mr. Lane. (R. 2212.) Consequently, the State relied heavily on the testimony from a toolmarks expert, who had never previously matched a chisel to a mark on a piece of wood, but who nevertheless asserted to the jury that the chisel found in Mr. Lane's truck was the only chisel in the world capable of making the mark found on the door. (R. 1617, 1624.) The State emphasized to the jury that this evidence tied Mr. Lane to the crime (R. 2135, 2138, 2143, 2204, 2205, 2207, 2210-12), despite the fact that they had no evidence that this mark occurred on the day of the crime.

After the initial investigation of the scene, suspicion had fallen on Mr. Lane, given his status as the estranged spouse. On the day of the crime, police pulled over and arrested Mr. Lane with no probable cause, holding him for at least 20-30 minutes, and as many as 90 minutes, until the lead detective could come, Mirandize him, and obtain a statement from him. (R. 98, 1846-53.) In his statement, Mr. Lane denied any involvement in the offense and the police released him following his statement. (R. 1852-53.) The following day, the police arrested Mr. Lane, seized his truck, and subsequently searched his trailer. (R. 1555, 1858-59.) In the search of Mr. Lane's trailer, the police found no bloodstained or damp clothes, no cash or jewelry, and no other direct evidence

linking Mr. Lane to the crime. (R. 1945-48.)

B. PROCEEDINGS BELOW

Mr. Lane was initially charged with non-capital murder and the State sought to plead the case out and offered Mr. Lane a plea to 23 years. (2006 S2. 219.) Mr. Lane maintained his innocence and rejected the plea offer. (2006 S2. 221.) After other capital murder defendants in Mobile County complained about arbitrary charging decisions by the district attorney's office, pointing to Mr. Lane's case, the office reconsidered its initial charge and on April 8, 2005, nearly eighteen months after Mr. Lane was charged with non-capital murder, the State indicted Mr. Lane on three counts of capital murder. (2006 S2. 219-20; S3. 58-59.)[2]

At trial, the court admitted Scott Milroy "as an expert in the field of firearm and toolmark analysis" based on his involvement in "somewhere between 6[00], 700 cases" in which he performed toolmarks analysis on bullets and cartridges. (R. 1593-94.) Mr. Milroy then testified that a chisel recovered from Mr. Lane's truck made the indentations discovered on the front door of the house in which Theresa Lane died, claiming that "not another chisel in the world" could have made the marks. (R. 1617.) However, Mr. Milroy testified that

[2]Mr. Lane was acquitted of one count of capital murder at his first trial. (S3. 69-72.)

chisel-mark analysis was a "crossover" field, and that he had ***no experience*** analyzing chisel marks prior to the test he performed for Mr. Lane's case; he had never previously matched a metal instrument to impressed wood. (R. 1609, 1623-25.) Moreover, Mr. Milroy admitted to having conducted only one other chisel-mark test in the years between his initial analysis of the door for Mr. Lane's case and his testimony at Mr. Lane's trial. (R. 1625.)

After the close of evidence, the jury convicted Mr. Lane of capital murder under Counts I and II of the indictment. (C. 105-06.) Following the penalty phase – during which defense counsel presented the jury with mitigating evidence of Mr. Lanes lack of criminal record, mental illness, and experience with childhood trauma (C. 96-100) – the jury returned an 11-1 advisory verdict for death. (C. 107.)[3] The trial court held a subsequent sentencing hearing and imposed a sentence of death. (R. 2572; C. 83-103.)

On appeal, Mr. Lane argued that Mr. Milroy's experience in ballistic toolmark analysis did not qualify him as an expert in impression-type chisel-mark analysis, which he had never previously conducted. The trial court's admission of his testimony in that field was erroneous under Alabama law and infected Mr. Lane's trial with unfairness. Ala. R. Evid. 702; *Kyser v. Harrison*,

[3]At Mr. Lane's first capital trial, his jury returned an 8-4 verdict for life without parole, which the trial judge overrode and imposed a death sentence. Lane v. State, 80 So. 3d 280. 283 (Ala. Crim. App. 2010).

908 So. 2d 914, 920 (Ala. 2005) ("[a] person who offers an opinion as a scientific expert must prove that he relied on scientific principles, methods, or procedures that have gained general acceptance in the field in which the expert is testifying" (internal citations and quotation marks omitted)); *Revis v. State*, 101 So. 3d 247, 292 (Ala. Crim. App. 2011) ("[i]t is error for a court to allow an expert witness to testify outside his area of expertise" (internal citations and quotation marks omitted)); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The Alabama Court of Criminal Appeals held that "Milroy was qualified to testify as a firearms-and-toolmarks expert," that "[t]he marks on Wilson's front door fell within that field of expertise," and that there was "no error, much less plain error, in allowing Milroy to testify." *Lane*, 2020 WL 2830015, at *33 (internal citations omitted). The Alabama Supreme Court denied certiorari in this case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE INTRODUCTION OF HIGHLY PREJUDICIAL EXPERT TESTIMONY ON A TOPIC OUTSIDE THE WITNESS'S AREA OF EXPERTISE AS THE ONLY PIECE OF DIRECT EVIDENCE CONNECTING THE DEFENDANT TO THE CRIME VIOLATES DUE PROCESS AND THE EIGHTH AMENDMENT.

A. The Admission of This Testimony Infected the Trial with Unfairness, Resulted in the Denial of Due Process, and an Unfair Conviction and Sentence.

This Court should grant certiorari to establish that the introduction at a capital trial of expert testimony on a topic outside the witness's area of expertise can be so prejudicial that it violates a defendant's right to due process, as well as his right to receive a sentence that is neither arbitrary nor capricious. To allow a capital conviction and sentence of death to stand when a witness with no experience analyzing chisel marks is permitted to testify as an expert in that field, and provide the State with its only piece of direct evidence, would violate Mr. Lane's right to due process, as well as his rights under the Eighth Amendment.

Mr. Lane has maintained his innocence since he was first charged with non-capital murder. At trial, the defense argued that there was reasonable doubt regarding the State's theory, focusing in part on the fact that investigators found no evidence of breaking and entering at Ms. Wilson's house where Mrs. Lane

was staying on the day of the crime. (R. 2161-64.) The defense instead argued that the evidence surrounding the initial investigation at Ms. Wilson's house indicated that even if a chisel was used on the front door, someone could have used the chisel to break open the door after the crime and placed the chisel in Mr. Lane's truck. This chisel, and Mr. Milroy's expert opinion that "not another chisel in the world" could have made the marks on the front door of the house in which Mrs. Lane died (R. 1617), was the only physical evidence linking Mr. Lane to the crime scene in an otherwise circumstantial case.

The Alabama Court of Criminal Appeals affirmed the introduction of Mr. Milroy's expert opinion regarding the chisel marks on Ms. Wilson's door and the chisel found in Mr. Lane's truck by noting that "[a]ny lack of experience Milroy might have had specifically with chisels or 'impressed toolmark[s]' went to the weight of Milroy's testimony, not its admissibility." *Lane v. State*, CR-15-1087, 2020 WL 2830015, at *33 (Ala. Crim. App. May 29, 2020). Despite evidence and testimony illustrating Mr. Milroy's complete lack of experience analyzing chisel marks, the lower court determined that "before [Milroy] worked as a firearms-and-toolmarks examiner, he worked for seven years as a 'trace-evidence examiner,' which, according to Milroy, required him to 'work on' other types of impression evidence." *Lane*, 2020 WL 2830015, at *32. In so concluding, the lower court ignored the fact that none of this "expertise" – not a single one of the

600 to 700 cases Mr. Milroy had worked on – involved matching marks made by a metal tool, like a chisel, to a wooden door frame. (R. 1624.)

Contrary to the lower court's holding, this Court has recognized that "[e]xpert advice can be both powerful and quite misleading[.]" *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (internal quotation marks omitted). The Due Process Clause guarantees a criminal defendant the right to a fair trial and an impartial jury. *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process."). Accordingly, unreliable testimony from a highly persuasive expert witness on a subject outside of his field of expertise is prejudicial to an extent that it denies a defendant his right to a fair trial. That Mr. Milroy may have been qualified to testify regarding typical toolmarks – like those left by a gun on a bullet – could not be used to transform his unqualified and inexperienced opinion about chisel marks into an expert opinion, and the trial court's erroneous admission of Mr. Milroy's "expert" testimony was highly prejudicial.

To bolster its otherwise circumstantial case against Mr. Lane, the State referenced Mr. Milroy's testimony throughout its closing argument (R. 2135, 2138, 2143, 2204, 2205, 2207, 2210-12), repeatedly reminding the jury of the

claim that the chisel recovered from Mr. Lane's truck was the only chisel "in the world" that could have made the marks on Ms. Wilson's front door (R. 1617, 2205, 2207). The prosecution rebutted the notion that their case lacked direct evidence by emphasizing "we have the chisel. We have the chisel." (R. 2212.) Such reliance by the State demonstrates a "reasonable possibility" that the improper introduction of this testimony "contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The testimony's probable effect on the jury was confirmed by the trial court's sentencing order, which refers to the chisel testimony as "[t]he critical piece of evidence." (R. 2560.) The introduction of this prejudicial and unreliable testimony from an expert witness on a subject outside his area of expertise directly violated Mr. Lane's rights to due process and requires reversal of his conviction. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)

This Court "has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983). "[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *see also Woodson v. North Carolina*, 428

U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). This Court has explained that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The introduction Mr. Milroy's testimony, in the form of an expert opinion that he was not qualified to give, undermined the reliability of Mr. Lane's conviction and death sentence and unconstitutionally permitted "the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 427–428 (1980); *see also Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (holding capital statute must be narrowly tailored by legislature to "suitably direct[] and limit[] [the sentencer's discretion] so as to minimize the risk of wholly arbitrary and capricious" imposition of death penalty as required by Eighth and Fourteenth Amendments); *Furman v. Georgia*, 408 U.S. 238 (1972).

B. The Decision by the Alabama Court of Criminal Appeals That This Testimony Was Not Erroneous Is Out of Step with Multiple Other Jurisdictions.

Unlike Alabama, multiple other jurisdictions have excluded expert testimony from witnesses on subjects outside their areas of expertise. The highest courts in Florida, Idaho, and Mississippi have all attested to the essential gatekeeping function of trial courts, which must ensure expert testimony is reliable and that expert witnesses do not testify with regard to subjects outside of their areas of expertise.

In *Jordan v. State*, 694 So. 2d 708 (Fla. 1997), the Florida Supreme Court analyzed a trial court's determination that a state expert was sufficiently qualified to give an expert opinion. The State's witness, a private practice therapist with a bachelor's degree in psychology and a master's degree in counseling, testified that the defendant was a "'sociopath without conscience.'" *Id.* at 716-17. On appeal, the Florida Supreme Court reversed, holding that the witness "testified to matters that were demonstrably outside of her areas of expertise" because she did not testify to a sufficient study of the scientific literature, nor did she have experience analyzing or drawing conclusions about the mental state of people accused of violent crimes. *Id.*

In *State v. Pearce*, 192 P.3d 1065 (Idaho 2008), the Supreme Court of Idaho affirmed the trial court's conclusion that the defendant's expert lacked the

necessary education, experience, and factual background to testify regarding police lineup procedures and the effect of various procedures on identifications. *Id.* at 1069. There, the expert witness had extensive experience in the field of polygraph testing, but "had dealt only peripherally with lineup procedures and issues, having talk[ed] about eyewitnesses, how to do lineups, [and] how to conduct interviews in his Psychology and the Law class." *Id.* at 1071 (internal quotation marks omitted). While the expert had learned about lineup procedures at psychology conferences, he had never specifically done research in that area so the trial court found him unqualified and the supreme court affirmed. *Id.* Additionally, in *Turner v. State*, 726 So. 2d 117 (Miss. 1998), the Supreme Court of Mississippi found the trial court did not abuse its discretion by excluding the defendant's expert accident reconstruction witness to testify as to the position of the occupants in the truck. *Id.* at 130. In *Turner*, after reviewing the expert's curriculum vitae, the trial court found that while he was an accident reconstruction expert, he lacked sufficient expertise to opine regarding the position of the vehicle occupants, because "he was not a physicist." *Id.*

Here, Mr. Milroy's experience with toolmarks analysis on bullets and cartridges, and "peripheral" knowledge of impression marks generally, did not qualify him as an expert in analyzing chisel marks against wood, just as the expert in *Jordan* could not supply an expert opinion on the mental state of a

defendant convicted of murder because she was a therapist, and just as the expert in *Turner* could not transform his experience with accident reconstruction into expertise in the area of physics.

Decisions from lower courts of appeal in additional states further illustrate that Alabama is out of step with other jurisdictions. For example, in *Com. v. Guinan*, 17 N.E. 3d 439 (Mass. Ct. App. 2014), the Appeals Court of Massachusetts held that error occurred where the trial court permitted the State's witness, who had experience with automobile mechanics, to testify as an expert as to whether the computer-assisted, motor-driven power steering mechanism in the defendant's car malfunctioned at the time of a crash that resulted in the victim's death. *Id.* at 442. There, the witness conducted the mechanical inspection of the petitioner's vehicle and opined there was no mechanical failure in the steering mechanism, and that the system was properly installed. *Id.* However, the witness further testified regarding the computer system that was connected to the power steering mechanism and the related software update and opined that the computer-assisted power steering did not contribute to the crash. *Id.* Noting that "a judge's discretion can be abused when an expert witness is permitted to testify to matters beyond an area of expertise or competence," *id.* at 444 (internal citations and quotation marks omitted), the court found that the witness's testimony related to the computer software was

erroneously admitted:

> Trooper George had no training or experience in electronic power steering, or in the computer software and sensors that control it. He had no background in computer science or software engineering. While George was qualified to opine as to the mechanical integrity of the car, and to evaluate the forces interacting in a collision as an accident reconstruction expert, he was not qualified to opine regarding the electronic software update and the operation of the computer-assisted, motor-driven power steering system. The witness exceeded the scope of his expertise.

Id. Here, as in *Guinan*, the fact that Mr. Milroy's skill set is closely related to the subject matter about which he testified is not enough to ensure the reliability of his expert opinion regarding an area for which he had no experience.

Furthermore, in *Robertson v. State*, 484 S.E. 2d 18 (Ga. Ct. App. 1997), the defendant testified that he shot the victim at close range in self defense, while the victim testified that he was shot at a range of between 15 and 30 feet after the altercation had concluded. *Id.* at 19. To support his case, the defendant attempted to introduce expert testimony from the doctor who treated the victim in the emergency room that the victim must have been shot from close range. *Id.* The physician proffered that while he had assisted law enforcement agencies on occasion in assessing what angle a bullet entered a person's body and the victim's position when shot, he had "never been asked to determine where an assailant might have been standing when a shot was fired." *Id*. The Court of Appeals of Georgia held that "the trial court did not abuse its discretion in

refusing to allow the physician to express an opinion regarding the distance from which the gun was fired or the trajectory of the bullet, as such matters were outside the physician's area of expertise," even though he could testify "as to the point of entry of the bullet and the angle of the wound in the body." *Id.* (internal citations omitted).

C. Conclusion.

The trial court here failed in its gatekeeping duty and allowed unreliable testimony from an expert witness on a critical piece of physical evidence to infect Mr. Lane's trial with unfairness. Despite evidence and testimony illustrating Mr. Milroy's complete lack of experience analyzing chisel marks, the State was able to bolster its otherwise circumstantial case with Mr. Milroy's expert opinion that "no other chisel in the world" could have made the marks on Ms. Wilson's door. The introduction of this testimony rendered Mr. Lane's trial fundamentally unfair, greatly prejudiced the outcome of Mr. Lane's trial at both the guilt/innocence and penalty phases, and violated his constitutional rights to due process, a fair trial, and a reliable sentence under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. This Court should grant certiorari to address this important federal issue.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

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