NO:

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL DANTZLER,

***Petitioner*,**

v.

RANDEE REWERTS,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is clearly established federal law that a criminal defendant is entitled to a scientific expert that is essential to confront scientific expert analysis used by the prosecution in its case-in-chief.

2. Whether a defense attorney provides constitutionally ineffective assistance of counsel by failing to retain a defense expert when scientific analysis forms the primary basis of a criminal prosecution?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Samuel Dantzler respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's unpublished opinion affirming the denial of Dantzler's 28 U.S.C. § 2254 petition is included in the Appendix at A-2, and its denial of a petition for rehearing is at A-1. The District Court's opinion denying Dantzler's § 2254 petition is included at A-5. The state trial court order denying Dantzler's postconviction

motion for relief is at A-6. The state appellate court decision affirming Dantzler's conviction on direct appeal is included at A-7.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of this Court's rules. The decision of the court of appeals denying Dantzler's petition for en banc rehearing was entered on October 25, 2021. On petitioner's request, Justice Kavanaugh extended the time to file the petition for a writ of certiorari until March 24, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Section 2254(d) of Title 28 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) states, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

Samuel Dantzler was convicted of murder and sentenced to die in prison on the basis of a novel—and questionable—type of DNA analysis. There was no blood or other single source of DNA to test. Instead, prosecutors paid analysts to complete a multi-source statistical analysis of "touch DNA" left on a knit cap at the murder scene. That type of analysis was controversial at the time of Dantzler's trial. It is now recognized as unreliable.

But the state court failed to provide enough funding for Dantzler's defense attorney to obtain an independent DNA expert to help evaluate and confront the prosecution's evidence. In fact, the state court refused to pay the $1,500 retainer for the defense's expert even though the prosecution paid one of its three experts nearly $4,000 for just one portion of her analysis. The full cost for the prosecution's experts was undoubtedly greater, likely far greater: The prosecution only pursued the case against Dantzler after receiving extra grant money to test DNA on cold cases, at a cost significantly higher rates than would be allotted to the defense.

Even as the jury was being called in, Dantzler's attorney objected that he did not have sufficient funding for an expert, and Dantzler himself addressed the court mid-trial to object to the lack of a DNA expert. Without a DNA expert, the prosecution's questionable DNA evidence went largely uncontested. Dantzler's case

presents a complete breakdown of the state judicial process, and habeas relief is necessary to correct the injustice.

STATEMENT OF THE CASE

1. In 2006, Bernard Hill assaulted his ex-girlfriend Quiana Turner. Turner was Dantzler's niece. After the attack, Hill retreated to the apartment of his then-girlfriend, Nikitta McKenzie. Around 12:45 a.m., six black men dressed all in black broke down the door wielding golf clubs. McKenzie ran to the bathroom and could not identify the attackers. Someone shot Hill in the head, killing him.

2. The state prosecutor theorized that a "posse" from Turner's family, including Dantzler, went to Hill's house to attack him in retaliation for hurting Turner. No witnesses present at Hill's murder could identify the attackers. But Hill's mother, Janet Burt, testified that two people—Turner's brother, Rodney Turner, and Dantzler's son (also named Samuel Dantzler)—banged on her door early in the morning on the day of Hill's murder.[1] Burt also claimed to have seen Dantzler's car outside her home, though not Dantzler himself.

3. State prosecutors did not bring charges against Dantzler until 2010, four years after Hill's murder. He was arrested only after the Detroit Police Department

[1] Since the Sixth Circuit's decision in 2021, Dantzler's son has confessed to being involved in Hill's murder and attested that his father was not involved. He passed a polygraph affirming that his father was not involved. Dantzler also passed a polygraph attesting to his innocence.

received "cold case" grant funds and used them to test the hat at the scene for residual DNA left behind from the people who may have worn or touched the hat. The DNA on the hat purportedly matched Dantzler's DNA profile. After these results came back, Dantzler and his son were charged on the theory that they either killed Hill or aided and abetted the murder.

4. Dantzler's son, who Ms. Burt claimed to have seen on the day of the murder, ultimately admitted to having pointed other people to where Hill was hiding. The son admitted that he knew the unnamed "other people" were taking golf clubs to Hill's apartment and were going to "beat up Bernard Hill."

5. The primary evidence against Dantzler was a black knit hat left at McKenzie's apartment. A DNA analyst from the Michigan State Police attested that the hat's inner rim had DNA consistent with Dantzler's. The analyst also asserted that Hill's DNA was on the hat, as well as DNA from several additional contributors. No other evidence put Dantzler at Hill's apartment.

6. Because of the critical nature of the DNA evidence, in July 2010, Dantzler's trial attorney sought funds to hire an expert to evaluate the prosecution's evidence. At a pretrial conference in September 2010, defense counsel stated that he had contacted a local laboratory, but the lab wanted to see the prosecution's DNA report before committing to the assignment. When the court expressed a concern over delay of the trial, defense counsel emphasized the importance of the defense

conducting its own independent DNA analysis: "We need our expert." He insisted that he needed the state expert's report sufficiently before trial so that the defense's own expert could examine it.

7. Despite defense counsel's recognition that a defense DNA expert was critically important, when trial began three months later, he had not secured an expert. The state court had approved funds for a defense expert at the standard rate—$200 per hour for evaluations and $150 per hour for court testimony. But when defense counsel attempted to hire an expert willing to work for those rates, he failed twice. During the exchange on the first day of trial, defense counsel did not mention the local laboratory. Instead, he explained that he sent the DNA information to expert Cathy Carr first, but she had a conflict because she had done work on Dantzler's case.

8. At Carr's suggestion, defense counsel contacted a second expert, Ann Chamberlain. The trial judge issued an order appointing Chamberlain on November 24, 2010, less than a month before the start of trial. Chamberlain's fee schedule quoted a $1,500 retainer free, a $250 hourly rate, and $2,500 per day for depositions or court testimony.

9. In a hurried conversation before the jury was empaneled, defense counsel explained that, although he sent materials to Chamberlain, things went wrong with the funding approved by the court. Defense counsel essentially begged

the trial court for more funding, but mid-conversation, the trial court called in the jury. This whole conversation lasted less than 10 minutes.

10. The DNA evidence was the centerpiece of the prosecutor's case against Dantzler. The prosecutor admitted in closing arguments: "I can't tell you that he was the gunman. I can't tell you he was one of the persons that had a golf club." But, the prosecutor continued, "I do submit to you, ladies and gentlemen, based on this hat with his DNA in it and with Bernard Hill's DNA on it, along with the motive and testimony, Dantzler was part of the group" that assaulted and killed Hill. Apart from the DNA, the only other evidence the prosecutor emphasized was the vague testimony by Ms. Burt that she saw Dantzler's car, but not him, outside her home when Dantzler's son and Turner's brother banged on her door in the morning of the murder.

11. Both voir dire and opening statements struck a similar tone. During voir dire, the prosecutor alerted the jurors that they would likely hear from a DNA expert. He made sure the jurors did not harbor doubts about DNA science, asking, "Is there anybody here who says, ah, DNA, CNA, it's all nothing but, you know, scientific mish-mash. Is there anybody here that feels that way?" No juror answered in the affirmative. And during his opening argument, the prosecutor remarked that the knit hat at the murder scene "[h]ad this man's DNA on it, in terms of one to 2.3 quadrillion, that's how strong the DNA is on that hat ultimately." He emphasized the point again and again, stating that the DNA analysis "came back to Dantzler, all right, and it

came back one in 2.3 quadrillion," and the original cut of fabric from the hat "comes back to this man, one in 2.3 quadrillion." (*Id.* at 438, 442.)

12. The prosecutor called three experts to testify about DNA analysis, and defense counsel appeared unprepared to question any of them on any technical aspects of the DNA testing.

13. Christopher Steary, a forensic biologist for the City of Detroit crime laboratory, was the first to testify for the prosecution. Steary testified that he did "a cursory examination" of the evidence—the hat, a buccal swab from another suspect (Patrick Grunewald), and a blood sample from Hill—before sending evidence to an outside vendor laboratory, Bode Technology, for testing.

14. Disturbingly, during trial, the prosecutor opened the bag containing the knit cap and handled it in front of the jury. Steary explained that, before the bag was open, further testing could have been done, but afterward, it could not be tested. By opening the bag and fondling the hat, the prosecutor destroyed the most important piece of evidence. And defense counsel did not object.

15. On cross-examination, defense counsel's questions showed a lack of understanding about the process. For example, defense counsel stated, "The sample that you took was so small that you had to have tweezers or scissors?" Steary corrected him: it was "a half-an-inch by a half-an-inch." He also questioned Steary, open-ended, about why testing the cap would determine who wore the hat last, which

allowed Steary to expound on the importance of DNA to creating leads in criminal investigations. Defense counsel repeatedly asked why the entire hat was not cut into small pieces and each piece tested, to which Steary explained that it would be prohibitively expensive.

16. Defense counsel did not ask Steary any technical questions about DNA analysis. Rather, he questioned Steary on what type of hat it was and how Steary himself personally wore his hat. He did not ask about how likely it would be to confuse Dantzler's DNA with that of his son, who had admitted to having some role in the murder. The defense's questions played no role in closing arguments. Defense counsel neither disputed what type of hat was involved nor suggested the manner of wearing the hat made a difference to the analysis.

17. Rebecca Preston, a second DNA analyst from Bode Technology, also testified. She explained that she examined three cuttings from the hat and discovered a mixture of at least two people's DNA on two of those cuttings. The other cutting contained a mixture of three people's DNA. All three DNA mixtures had "at least one male contributor." Preston explained the technical process for examining DNA analysis and how she "performed statistics on the evidence item." She testified as to the "probability of randomly selecting an *unrelated* individual with this DNA profile" (emphasis added). And she placed it at "one in two quadrillion in the U.S. African American population." This statement about "one in two quadrillion in the U.S.

African American population" appears to be where the prosecutor obtained his repeated assertion that it was "one in 2.3 quadrillion" that Dantzler was the source of DNA on the hat. She did not explain the likelihood that a related person—Dantzler's son—contributed the DNA instead.

18. At a side bar before defense counsel's cross-examination, the prosecutor revealed that Preston had been paid $3,972.75 to test the three extra cuts from the hat. As to how much the other work costed—including testing the initial cut of the hat, testing of buccal swabs from Dantzler and others samples, and blood samples from Hill—the prosecutor claimed that he did not know how much it cost because it was "under a grant" and thus "Wayne County prosecutors {sic} office doesn't pay that fee." The prosecutor also insisted, "I'm not under a duty to turn that over." The judge disagreed, ordering the prosecutor "to do everything in your power with your associates upstairs to ascertain what the contract value was and to break that down in terms of what they received in terms of compensation; okay?" The court expressed that "the defense is entitled to that." There is no indication that further costs were revealed to the defense attorney after this conversation, even though the defense attempted to follow up the next day by presenting the court with the contract between the county and the state testing laboratory.

19. Defense counsel's cross-examination of Preston again demonstrated a lack of understanding of DNA evidence. He emphasized that Bode was paid for the

work. But without understanding of the technical aspects of DNA technology, defense counsel's questioning focused on less important details, such as the areas of the hat that were tested and showed no results, and the fact that the DNA scraped from the hat was compared only to Dantzler and not to other suspects. He also asked about whether DNA can "dissipate" over time—a question easily answered in the negative. Defense counsel presented Preston with a chart he made himself from snippets of her report, but it appeared to confuse the jury, so he withdrew it. Defense counsel emphasized that Preston could not say definitely who wore the hat the night of the murder.

20. The prosecution's re-direct of Preston consisted of just two questions: "Q. Can you ever tell who had the hat on at such and such a date? You can't tell that period; can you? A. No, we cannot. Q. You can only tell us what your testing shows from the hat, is that correct, or the items that you had? A. Correct."

21. Nicole Kaye, a DNA analyst for Bode, was the prosecution's third DNA expert. She testified that about a report she wrote after extracting DNA from the hat and a chart she made to compare Hill's DNA to that extracted from the hat. She further explained that "the alleles from [Hill's] known sample are also in the DNA profile in the hat," and it hit for 9 of 13 "loci." Defense counsel's cross-examination again focused on the fact that Bode was paid to work on the case. He did not ask

technical questions about her DNA analysis, or the highly subjective nature of multi-source touch DNA testing.

22. In the middle of trial, Dantzler asked to address the court. He told the judge that, since being arrested, he had requested that the hat be independently tested for DNA and was concerned that it had not been. The judge stated, "Well, I've appointed an expert." But ultimately, the judge told Dantzler he was deferring to defense counsel.

23. The defense offered no expert testimony.

24. Dantzler himself took the stand and denied any involvement in the murder. On cross-examination, the prosecutor pressed Dantzler on the DNA evidence, asking, "Do you have any explanation, sir, as to how your DNA, one in 2.3 quadrillion, got inside that hat, Exhibit 22?" Dantzler responded, "Only explanation I can have is either it was put there or I had worn that hat before." When asked who could have put it there, he replied, "I know -- I don't know. I don't know who put it there. That's the same question I been asking. I don't know how my DNA got there, but it shouldn't be there." The defense asked no redirect questions.

25. Apart from the DNA evidence, there was little additional evidence that Dantzler was involved in the shooting. The only other piece of evidence was the testimony from Hill's mother that two of Turner's brothers and Dantzler's son came

to her house shortly after the murder, and that she saw what she thought was Dantzler's car outside her home at that time.

26. The jury convicted Dantzler of first-degree murder.

27. Dantzler appealed his conviction all the way to the Michigan Supreme Court, arguing that prosecutors lacked sufficient evidence to convict him and that the trial court violated his right to due process by denying sufficient funding for an independent DNA expert. His appellate attorney did not raise a concern about ineffective assistance of trial counsel or raise specific arguments about the unreliability of touch multi-source DNA. The state courts affirmed Dantzler's conviction.

28. The Michigan Court of Appeals rejected Dantzler's sufficiency claim on the grounds that a jury could rationally find him guilty of first-degree murder based on the DNA evidence. App. 7, at 72–73. The court also stated that other "strong circumstantial evidence" supported the first-degree murder conviction, but it cited only one additional fact: Hill's mother testified that Dantzler's relatives came to her house looking for Hill. *Id.* at 73.

29. The state court recognized that equal protection requires parity between state and defense resources. *Id.* at 74. But the court reasoned that this requirement did not allow Dantzler to hire an expert of his choosing. *Id.* The court faulted Dantzler for not seeking another expert or producing evidence to establish that other experts

were unavailable. *Id.* The court concluded that "the state satisfied its obligation to provide defendant with the means to prepare his defense" by "agree[ing] to pay for an expert on defendant's behalf." *Id.* The Supreme Court denied leave to appeal.

30. After filing for federal habeas release, and being granted a stay to exhaust further state claims, Dantzler moved for postconviction relief through Mich. Comp. Laws Ann. § 6.500, often called a "6.500 motion." In the 6.500 motion, he argued that he received ineffective assistance of counsel when his attorney failed to hire an independent DNA expert.

31. The state court offered almost no issue-specific explanation for denying the 6.500 motion. Without any meaningful discussion of the specific rights at issue, the court explained that "[t]he record clearly reflects that the constitutional rights afford to defendant under the United States and Michigan Constitutions have been protected." App. 6, at 69. Ultimately, it concluded: "The record does not demonstrate that defense counsel's performance was unreasonable and his trial strategy and determinations will not be substituted with the judgment of this Court. This Court finds that defense counsel performed competently in his representation of defendant at his trial." *Id.* at 70. The court did not address prejudice.

32. Dantzler petitioned to the Michigan Court of Appeals and the Michigan Supreme Court, and both courts concluded that he did not meet his burden of establishing entitlement to relief.

33. In petitioning for federal habeas relief, Dantzler re-asserted his claims related to sufficiency of the evidence, the DNA expert, and ineffective assistance of counsel in relation to the DNA expert. The district court denied each claim for relief.

34. As to the due-process claim, the district court reasoned that a habeas petitioner is not entitled to habeas relief "for the failure of the state court to appoint non-psychiatric expert witnesses for the defense because such a claim cannot be supported by clearly established Supreme Court law." App. 5, at 52–53. The court also concluded that the trial court did not actually deny Dantzler expert assistance because he was provided funds but failed to secure an expert willing to perform the work for the cost approved. *Id.* at 53.

35. The district court also held that trial counsel's failure to secure an expert did not qualify as ineffective assistance. The court recognized that "DNA evidence was at the heart of the case against Dantzler." *Id.* at 57. And the court acknowledged that "Dantzler's trial counsel seemed to recognize the importance of DNA evidence, yet never explained why he gave up on trying to obtain an expert." *Id.* at 58. Yet the court held that "given that the results of additional DNA testing may not have been helpful to Dantzler, this could have been a reasonable strategic decision." *Id.* Further, the court decided Dantzler could not show prejudice, because "[t]he benefits an independent DNA expert could have provided are speculative." *Id.* at 59. The court did, however, express "misgivings about trial counsel's failure to obtain independent

DNA testing and the state court's cursory analysis of the ineffective-assistance-of-counsel claim." *Id.* at 60.

36. The district court granted a certificate of appealability on trial counsel's failure to obtain an independent DNA expert, and appellate counsel's failure to raise the issue on appeal. *Id.* at 63. Dantzler moved pro se to expand the certificate of appealability, and the district court denied the motion but appointed counsel for this appeal. App. 4, at 36–38. The Sixth Circuit then expanded the certificate of appealability to include Dantzler's claim that "the trial court violated his due process rights by failing to provide adequate funding for a DNA expert." App. 3, at 30.

37. The Sixth Circuit affirmed the denial of habeas relief. As to the due-process argument, the court held that the state court did not actually deprive Dantzler of expert assistance, only his "preferred expert." App. 2, at 16.

38. As to ineffective assistance, the court correctly recognized that Dantzler did not default his claim of ineffective assistance, and the panel majority "assume[d] for purposes of argument, without deciding, that trial counsel performed inadequately in not obtaining an independent DNA expert." *Id.* at 19. The dissent stated, without assuming: "Doubtless, Dantzler's trial lawyer's failure to consult with, hire, or call a DNA expert was constitutionally deficient." *Id.* at 27.

39. But the panel majority concluded that, even under de novo review, Dantzler could not show prejudice under *Strickland v. Washington*, 466 U.S. 668

(1984)—that is, a reasonable probability that if not for counsel's deficient performance the proceedings would have been different. App. 2, at 20. The panel concluded that many of Dantzler's specific arguments about how the lack of an expert prejudiced his defense were forfeited because he did not make them in detail in his *pro se filings* in the district court. *Id.* at 20–22. It also concluded that the prosecutor's repeated mistake in explaining the DNA statistics did not prejudice Dantzler because he did not present evidence as to what an expert should have shown. *Id.* at 23–24. In effect, the Sixth Circuit demanded that Dantzler present expert analysis to back up his argument that he needed an expert to effectively fight his case—the exact type of expert assistance that had been repeatedly denied to him.

40. The Sixth Circuit denied a timely filed petition for rehearing en banc. App. 1, at 1.

REASONS FOR GRANTING THE WRIT

I. This Court should recognize that the deprivation of critical expert assistance violates a criminal defendant's due process rights.

"[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). This rule is not new. In *Griffin v. Illinois*, 351 U.S. 12, 17 (1956), and then *Britt*, 404 U.S. at 227, the Supreme Court adopted this standard, which both involved requests for free transcripts of trial proceedings. The Court furthered this rule in *Little v. Streater*,

452 U.S. 1, 16 (1981), which held that the State cannot deny funding for blood testing to an indigent defendant in a *civil* paternity lawsuit. The Court reasoned that the refusal to fund an indigent defendant—who faces the State as an adversary when the child received public assistance—violates "the requirement of fundamental fairness expressed by the Due Process Clause." *Id.* (quotation omitted).

In 1986, this Court, in *Ake v. Oklahoma*, 470 U.S. 68 (1986), relying on *Griffin*, *Britt*, and *Little,* held: "We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77. "Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Id.* (cleaned up).

More recently, in *Medina v. California*, 505 U.S. 437 (1992), this Court concluded that "[t]he holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" *Id.* at 444–45 (quoting *Ake*,

470 at 76). Thus, clearly established law is that an indigent defendant must be given adequate resources for an expert if failure to provide those resources would deprive him of a fair opportunity to present a defense. And, *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), "clarified *Ak*e slightly by holding that a defendant must offer more than undeveloped assertions to be entitled to expert assistance under the Constitution." Theodore J. Greeley, *The Plight of Indigent Defendants in A Computer-Based Age: Maintaining the Adversarial System by Granting Indigent Defendants Access to Computer Experts*, 16 Va. J.L. Tech. 400, 416–17 (2011).

Respondent contended below that this Court has never held that due process requires the appointment of nonpsychiatric defense experts at state expense. But this argument misconstrues the right at issue by calling it a right to have the state "fund any expert a defendant might find useful." Dantzler does not advocate that Supreme Court law requires the appointment of any "useful" expert. The rule is that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1986).

Appellate courts have treated this right as "clearly established" even after enactment of AEDPA. In a post-AEDPA habeas case, the Sixth Circuit recognized that "*Ake* requires the provision of an independent pathologist to determine a victim's cause of death." *Clinkscale v. Warden, Lebanon Corr. Inst.*, 645 F. App'x 347, 348 (6th

Cir. 2016). Similarly, citing *Medina*, 505 at 444–45, the Tenth Circuit held that *Ake* covers nonpsychiatric experts by establishing that "the Constitution requires that indigent defendants be provided with '[m]eaningful access to justice' such that they receive the 'basic tools of an adequate defense or appeal.'" *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1128 (10th Cir. 2006). The Ninth Circuit also holds that "[t]here is no doubt that in appropriate circumstances a court must provide investigative help to ensure that an accused has received the effective assistance of counsel." *Williams v. Stewart*, 441 F.3d 1030, 1053 (9th Cir. 2006).

Further, the Sixth Circuit wrongly decided that the state trial judge's "limits" on funding did not equate to a denial of the necessary funding for an expert. Dantzler's attorney began the trial by essentially begging for more money for an expert, and in response, the trial judge interrupted him and called in the jury, leaving Dantzler without an expert on a highly technical scientific matter that formed the crux of the prosecution against him. Exasperated at this clear disparity in access to experts, Dantzler himself stood up, mid-trial, and explained how desperately he needed a DNA expert. In response, the trial judge said he "doesn't get involved in the trial strategy of either side," and thus he would "defer to [defense counsel] and his trial strategy on your behalf, Dantzler." These remarks were unreasonable because it ignored that trial counsel had tried repeatedly to get adequate funding for an expert and had been denied.

Further, the Sixth Circuit failed to meaningfully grapple with the vast disparity in funding for the prosecution's expert as opposed to the money authorized for Dantzler. The Michigan Court of Appeals wrongly described Dantzler's expert as requiring a $2,500 retainer, when it was in fact $1,500. One of the prosecution's three experts, on the other hand, was paid close to $4,000 ($3,972.75) for *extra* testing of three cuts of the hat at issue. The prosecutor avoided disclosing the cost of the original testing—and the cost of multiple expert's testifying at trial—by claiming he did not know the cost because it was covered by grant funding. Thus, the disparity is likely far greater than the nearly three-to-one ($3,972 to $1,500) disparity acknowledged on the record. Moreover, the state trial judge had no problem with the hourly rate, only with the "initial retainer into the thousands of dollars," which he found "exorbitant, unrealistic." Yet on this point, too, the state court was factually wrong: The retainer was not "into the thousands of dollars"—it was $1,500, far less than the cost paid by the prosecution for its testing.

Given this disparity, the state trial judge acted unreasonably in denying fair funding to Dantzler. And the state appellate court then compounded the error by failing to even address the true nature of the disparity when it miscomprehended the facts underlying the funding problem. But in any event, no matter the fee, Dantzler's attorney placed on the record how he had attempted to hire two experts, but the state had not authorized enough money.

This Court should grant review to determine the scope of the right to expert assistance in criminal trials, and the evidentiary burden needed to show the necessity of an expert. The meager budget afforded to Dantzler's defense presented only the illusion of access to the materials needed to build a defense. When no expert is available to do the work for the budgeted amount, it is a threat to the bedrock aspect of our criminal justice system that money is not a prerequisite for a defense. Ultimately, it should vacate the Sixth Circuit's finding that Dantzler failed to meet his burden and remand with instructions to grant Dantzler a new trial with the assistance of an expert in DNA analysis.

II. This Court should grant review, vacate, and remand on the question of prejudice from the ineffective assistance of Dantzler's counsel.

The Sixth Circuit also erred in analyzing prejudice for purposes of Dantzler's claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, "a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Strickland*, 466 U.S. at 694).

Because the state court addressed only the performance of counsel, de novo review applied to the question of prejudice. Yet, despite reviewing this question de novo, the Sixth Circuit entirely ignored this Court's precedent on point in *Hinton v. Alabama*, 571 U.S. 263 (2014).

In *Hinton,* this Court held that a defense attorney's failure to consult with a ballistics expert was unreasonable. Prosecutors had introduced bullets from the scene of a shooting murder, and they were the only physical evidence. *Id.* at 265. State experts concluded the bullets were fired from a gun found at Hinton's house. *Id.*

Hinton's attorney moved for funding to hire a ballistics expert and received approval for $1,000. *Hinton*, 571 U.S. at 266. Counsel attempted to find a qualified expert but had trouble finding one willing to work for the funds offered. *Id.* at 267. The attorney did not understand that he could petition for additional funding under a state statute. *Id.* at 268. The attorney, unlike Dantzler's attorney, eventually found an expert, but he performed poorly on cross-examination. *Id.* at 268–69.

This Court held that the case called for "a straightforward application" of *Strickland* and that Hinton's lawyer's failure to seek additional funds to hire an expert was objectively unreasonable. *Hinton*, 571 U.S. at 273. While remanding for further analysis on the prejudice prong, the Court made important points about the prejudice that derives from this type of attorney error:

> That the State presented testimony from two experienced expert witnesses that tended to inculpate Hinton does not, taken alone, demonstrate that Hinton is guilty. 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)). 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. at 276.

The panel never addressed this analysis, while at the same time concluding that, "[e]ven if" the prosecutor misused the DNA evidence here, and "trial counsel was unable to rebut the flawed presentation of evidence," still Dantzler "cannot show how he was prejudiced because he offers no evidence as to the true actual-match probability." App. 2, at 23. But as emphasized in *Hinton*, the point is that Dantzler was deprived at trial of any chance to truly test the prosecution expert evidence against him. His attorney's failure to provide that opportunity prejudiced him. "DNA evidence was at the heart of the case against Dantzler," and his attorney "never explained why he gave up on trying to obtain an expert." App. 5, at 57–58. There is no objective strategic justification for his attorney's actions, especially when he himself recognized, "We need our expert."

The Sixth Circuit dissent did not miss this point. It cited *Hinton* and explained that "expert rebuttal testimony could have seriously undermined the reliability of touch DNA—the core of the prosecution's case." App. 2, at 27. Indeed, reliable scientific studies show that calculating the statistical "probability" of a person's DNA being in a mixed-source sample is "problematic because subjective choices made by

examiners, such as about which alleles to include in the calculation, can dramatically alter the result and lead to inaccurate answers." EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT'S COUNCIL OF ADVISORS ON, SCIENCE AND TECHNOLOGY. FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS, 76 (2016), *available at* https://perma.cc/CP88-JRCQ [hereinafter "PCAST Report"]. Dantzler's attorney, if provided an expert, could have pointed out the subjectivity of the analytical method and potential flaws in the state expert's analysis.

The ineffective cross-examination by Dantzler's trial attorney also revealed this lack of understanding about DNA evidence and the ensuing prejudice to Dantzler's defense. His questioning did nothing to undermine the prosecution's assertion that Dantzler's DNA was on the cap. Rather, he attempted to suggest bias on the part of the analysts because they were being paid to do their jobs. He also asked basic, easily answered questions about the size of the cut, the type of cap, why investigators did not test the whole cap, and why certain areas of the cap showed no DNA results. He also confused the jury with a chart he created himself to try to cross-examine Preston, the lead DNA expert. The ineffectiveness of the cross-examination of Preston is seen in the fact that the prosecutor only asked two questions on re-direct.

The prejudice from trial counsel's failure to hire a necessary defense expert is explained well in the Third Circuit's decision in *Showers v. Beard*, 635 F.3d 625, 633

(3d Cir. 2011). There, the state court found no prejudice because defense counsel's closing arguments "sufficiently exploited gaps in the [state's] evidence." *Id.* But the Third Circuit noted, "closing arguments are not to be considered evidence," and an attorney simply pointing out flaws in the analysis of a state expert is not the same as "rebuttal testimony from a credible, objective expert witness" casting doubt on the prosecution's case. *Id.* at 634.

The Sixth Circuit wanted Dantzler to produce more evidence of what an expert could have shown. But that overlooked the unique procedural posture of this case. Counsel was only appointed for appeal, and Dantzler never had a chance to develop a factual record regarding the DNA analysis. His state trial attorney failed him. His state appellate attorney also failed him—the Sixth Circuit dissent found him ineffective, and the majority's decision regarding his effectiveness rested not on his performance but on the prejudice inquiry regarding the trial-counsel claim. In pro se postconviction briefing in the state, Dantzler asked for an evidentiary hearing on this issue, and he received a pro forma denial order in response. Dantzler could not, on his own, pro se, from a prison cell, find an expert, and to require him to do so would run afoul of the precept that pro se litigants should be treated with leniency, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and that "[p]leadings must be construed so as to do justice." Fed. R. Civ. P. 8(e).

In any event, it is clear that an expert on DNA could have greatly assisted the defense's cross-examination. DNA evidence is far from an absolute science, particularly when it involves the type of statistical analysis of multi-source "touch" DNA samples touted by the prosecution and expert Preston. Analysis of multi-source mixtures of touch DNA is a fundamentally flawed science. PCAST Report, *supra*, at 75–82. Calculating statistical "probability" of a person's DNA being in a mixed-source sample—as Preston did—is particularly "problematic because subjective choices made by examiners, such as about which alleles to include in the calculation, can dramatically alter the result and lead to inaccurate answers." *Id.* at 76. Explaining the pitfalls about multi-source touch DNA analysis was all the more important given the traditional reliability of single-source DNA testing.

These problems were particularly prevalent around the time of Dantzler's trial when multi-source touch DNA less widely used. "Initial approaches to the interpretation of complex mixtures relied on subjective judgment by examiners and simplified calculations." *Id.* at 8. "This approach is problematic because subjective choices made by examiners can dramatically affect the answer and the estimated probative value—introducing significant risk of both analytical error and confirmation bias." *Id.* A presidential council tasked with examining the use of scientific evidence in criminal trials thus concluded that "subjective analysis of

complex DNA mixtures has not been established to be foundationally valid and is not a reliable methodology." *Id.*

Even if Dantzler could not show that the method used to identify him was "foundationally invalid," his attorney, if provided an expert, would have been able to point out the subjectivity of the analytical method and potential flaws in the state expert's analysis. He also could have presented the statistical likelihood that his DNA profile look similar to his son's, who admitted his involvement. A scientifically informed cross-examination would have been a far stronger challenge to this critical evidence than to suggest the prosecution's experts were biased, or pointing out the few inconclusive portions of the hat testing.

Moreover, the prosecutor repeatedly misrepresented the DNA evidence, stating no less than seven times that there was "one in 2.3 quadrillion" probability that Dantzler's DNA was not on the hat. Without a defense expert, the prosecutor was able to assert this erroneous statistic no less than seven times without pushback. This argument has been coined the "prosecutor's fallacy" by legal scholars, because it wrongfully equates the likelihood of a random match with the probability that the person was the source of the DNA. Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1478 (2007). Because of this fallacy, scholars warned, even back in at the time of Dantzler's trial, that "[g]iven society's trust in the reliability of

DNA typing as a tool for forensic identification, it is imperative that the prosecutor not misrepresent the evidentiary value of the DNA evidence." *Id.* at 1479. Without a defense expert, trial counsel did not have the tools he needed to object to these misrepresentations.

Failures in this type of DNA analysis would have been known to any expert in the field at the time of Dantzler's trial. For example, a 2009 study of a high-profile murder case found that a prosecution expert had dramatically overestimated the accuracy of DNA expert—it was closer to a 1 in 2 chance of a match than the "1 in 1.1 billion" claimed by the prosecution. *See* William C. Thompson, *Painting the target around the matching profile: the Texas sharpshooter fallacy in forensic DNA interpretation*, 8:3 LAW, PROBABILITY AND RISK 257, 271 (2009), https://perma.cc/D4XM-XQZC. At the time of Dantzler's trial, experts knew that "[i]f there is more than one person's DNA in the sample, it can be impossible to tell how many people make up that sample." Bess Stiffelman, *No Longer the Gold Standard: Probabilistic Genotyping Is Changing the Nature of DNA Evidence in Criminal Trials*, 24 BERKELEY J. CRIM. L. 110, 117 (2019) (collecting sources from 2005 and later).

The prejudice argument is further bolstered by the weakness of any purported circumstantial evidence of Dantzler's guilt. The circumstantial evidence consisted of testimony that Dantzler's car (but not him) was allegedly seen outside the home of the victim's mother, and that Dantzler had a motive because the victim had assaulted

his niece. But nobody testified that Dantzler was at the victim's mother's home, and it is clear from the trial that Dantzler had a large extended family that also knew about the assault and thus would have had the same motive as Dantzler. Even under the State's theory of the case, six men burst into the victim's apartment to assault him. Multiple members of Dantzler's family, including his son, were also indicted for the murder. No one could testify directly about who was in the apartment or who shot Hill. In these circumstances, it is impossible to be certain that there is not a reasonable probability the jury would have reached a different decision if an expert had assisted the defense and to counter the prosecution's repeated (erroneous) assertion of a "one in 2.3 quadrillion" certainty of Dantzler's DNA being on a hat in the apartment.

The importance of the DNA evidence also is underscored by the fact that state prosecutors did not bring charges against Dantzler until 2010, four years after the murder, only after Detroit police received "cold case" grant money to test the hat for residual DNA. The prosecutor then made clear in his closing arguments that, to acquit Dantzler, the jury would have to find that he "let somebody else borrow his hat." In his final remarks, the prosecutor conceded, "I can't tell you that he was the gunman," but "based on this hat with his DNA in it, and with Bernard Hill's DNA on it, along with the motive and testimony, Dantzler was part of the group that kicked in that door." There is more than a reasonable probability the outcome of this case—

and of Dantzler spending the rest of his life in prison—would change if Dantzler had a competent DNA expert able to challenge this critical evidence against him.

This Court should grant review, vacate the Sixth Circuit's prejudice analysis, and remand for further proceedings.

CONCLUSION

Petitioner Samuel Dantzler requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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