

S.C. No. _____

IN THE SUPREME COURT OF ALABAMA

RONALD PATRICK SWINEY

Appellant

VS.

LISA K. WESTMORELAND

Appellee

ON APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY,

ALABAMA

(CC-88-77.61)

PETITION FOR WRIT OF CERTIORARI

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RONALD PATRICK SWINEY

Appellant

vs.

STATE OF ALABAMA

APPELLEE

CIRCUIT COURT OF SHELBY COUNTY , ALABAMA

S. C. No. _____

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA:

Comes your Petitioner Ronald Patrick Swiney, and petitions this Court for a Writ of Certiorari to issue to the Court Of Criminal Appeals in the above styled cause under Rule 39,A. R. App. P, and shows the following;

1. Petitioner suffered a judgment denying relief on a Rule 32, Ala. R. Crim. P. Petition without a hearing in the Circuit Court of Shelby County, Alabama, on March 5, 2004. The Court Of Criminal Appeals affirmed the judgment on January 7, 2005. An Application For Rehearing was filed on January 20, 2005, and denied on February 11,2005.

2. A copy of the opinion of the appellate court is attached to this petition which shows the Court of Criminal

Appeals case to be CR-03-1163.

3. Petitioner alleges as grounds for issuance of the writ the following:

I. The basis of this petition for the writ is that the decision of the appellate court is in conflict with a prior decision of the Supreme Court on the same point of law. In its present decision the appellate court held;

In other words, because tests did not reveal the presence of GSR on Swiney's person or clothing, the results were held to be inconclusive. According to Swiney, new techniques established in 2003 concerning detection of gunshot residue (hereinafter GSR) proved that an absence of GPR (sic) from Swiney's person cannot be merely inconclusive as to whether he fired the lethal gunshots, but is definitive in showing that he did not.

In the case of Courtaulds Fibers, Inc. v. Long, [Ms. 1971996, September 15, 2000] ___ So.2d ___ (Ala. 2000) the Supreme Court held;

However, this Court has not abandoned the "general acceptance" test stated in Frye v United States, 203 F. 1013, 1014 (D.C. Cir. 1923), and it has not adopted the Daubert standard in civil cases. (citations omitted).

Courtaulds objects to Dr. Oehme's testimony because he has no scientific literature to support his opinions. Because he has no scientific literature to support his opinions, Courtaulds claims there was "no valid scientific basis" for his opinions and the testimony is therefore inadmissible under Daubert. However neither the Frye test nor the Daubert standard applies to Dr. Oehme's

testimony . Instead this issue is controlled by Rule 702, Ala. R. Evid., which provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skills, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Rule 702 does not require an expert to have scientific literature to support his or her opinion... The narrow interpretation of Rule 702 advocated by Courtaulds would bar physicians from testifying about a differential diagnosis - a diagnosis based upon ruling out all other causes. (Citations omitted).

Dr. Oehme's opinions derived from knowledge, skill, and training he has received through his years of experience. This is all that is required under Rule 702.

These statements of the law are in conflict and the issue is which holding should be followed on this principle of law.

II. The basis of this petition for the writ is that the decision of the appellate court is in conflict with a prior decision of the appellate court on the same point of law. In its present decision the appellate court held;

In other words, because tests did not reveal the presence of GSR on Swiney's person or clothing, the results were held to be inconclusive. According to Swiney, new techniques established in 2003 concerning detection of gunshot residue (hereinafter GSR) proved that an absence of GPR (sic) from Swiney's person cannot be merely inconclusive as to whether he fired the lethal gunshots, but is

definitive in showing that he did not.

In the case of State v. Freeman, 605 So.2d 1258,
1259 (Ala. Crim. App., 1992) the appellate court held;

Freeman's allegations concerning the juror (that the foreman of the jury gave admittedly false information on voir dire) constitutes newly discovered evidence, *State v. Gilbert*, 568 So.2d 876 (Ala. Crim. App. 1990), and therefore it was not procedurally barred by Rule 32.2 (a) (4) and (5). *id.*

These statements of the law are in conflict and the issue is which holding should be followed on this principle of law.

III. The basis of this petition for the writ is that the decision of the appellate court is in conflict with a prior decision of the appellate court on the same point of law. In its present decision the appellate court held;

For a myriad of reasons, Swiney has not demonstrated good cause for his requested discovery. First, Swiney's claims are barred by the statute of limitations which must be applied as a matter of "jurisdiction." (Citation omitted). Second, the requested items were available for testing when he litigated his first Rule 32 petition. Third, the technologies that's one he states he is going to use in testing the requested items were available when he litigated his first Rule 32 petition. fourth, Swiney has not demonstrated how testing any of these items will prove his innocence.

In the case of King v. State, 689 So.2d 929, 930
(Ala. Crim. App.1997) the appellate court held;

In the event that the circuit judge has personal knowledge of the actual facts underlying King's claim, he may deny the allegation without further proceedings as long as he states the reason for the denial in a written order.

These statements of the law are in conflict and the issue is which holding should be followed on this principle of law.

IV. The basis of this petition for the writ is that the decision of the appellate court is in conflict with a prior decision of the appellate court on the same point of law. In its present decision the appellate court held;

For a myriad of reasons, Swiney has not demonstrated good cause for his requested discovery. First, Swiney's claims are barred by the statute of limitations which must be applied as a matter of "jurisdiction." (Citation omitted). Second, the requested items were available for testing when he litigated his first Rule 32 petition. Third, the technologies that's one he states he is going to use in testing the requested items were available when he litigated his first Rule 32 petition. fourth, Swiney has not demonstrated how testing any of these items will prove his innocence.

In the case of Martin v. State, 839 So.2d 665,
(Ala.Crim.App.,2001) the appellate court held;

"Brady requires the disclosure of exculpatory and impeachment evidence to a defendant even if

the evidence is known only to police investigators and not to the prosecutor.".

These statements of the law are in conflict and the issue is which holding should be followed on this principle of law.

V. The basis of this petition for the writ is that the decision of the appellate court is in conflict with a prior decision of the United States Supreme Court on the same point of law. In its present decision the appellate court held;

Swiney's petition does not make any contentions of "newly discovered evidence" that are relevant to the test performed by the Department of forensic sciences in 1987 or to the conclusions that were reached.

In the case of *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) the United States Supreme Court held;

Thus, where relevant evidence does not reach the jury either as a result of the State's failure to disclose or as a result of the defense's failure to discover, relief is warranted where cumulative consideration of all of the evidence which did not reach the jury undermines confidence in the result of the trial. The issue is whether the undisclosed evidence could have mattered to the jury's evaluation of whether a reasonable doubt existed.

These statements of the law are in conflict and the

issue is which holding should be followed on this principle of law.

VI. The basis of this petition for the writ is that the decision of the appellate court is in conflict with a prior decision of the Supreme Court on the same point of law. In its present decision the appellate court held;

Swiney's Rule 32 petition was considered upon submission of affidavits and exhibits. The Circuit Court denied Swiney's petition on the procedural grounds that the petition was successive (Rule 32.2 (b), Ala. R. Crim. P.), filed outside the limitations period (Rule 32.2 (c), Ala. R. Crim. P.), did not constitute newly discovered evidence (Rule 32.2 (e), Ala. R. Crim. P.), and could have been raised at trial and on direct appeal (Rules 32.2 (3) and (5) , Ala. R. Crim. P.)

In the case of *Ex parte Gardener*, [Ms. 1030309, January 27, 2004] ___ So.2d ___ (Ala. 2004) the Supreme Court held;

...[W]e hereby suspend the provisions of Rule 39 (g) and (h), Ala. R. App. P., allowing the defendant to file a brief and we summarily grant the writ. .. The time within which Gardener was required to file his Rule 32 petition began to run on the date the Court of Criminal Appeals issued its certificate of judgment, March 23, 2001, which was the triggering date.

These statements of the law are in conflict and the issue is which holding should be followed on this principle

of law.

Petitioner respectfully requests that after a preliminary examination, the writ of certiorari be granted and that this Court proceed under its rules to review the matters complained of, and to reverse the judgment of the Court Of Criminal Appeals, and for such other relief as petitioner may be entitled.

I certify that I have this day served copies of this petition and the brief on all other parties to the appeal the Court of Appeals and the Court of Criminal Appeals.



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