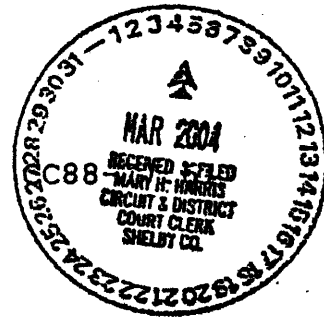


ADDENDUM A

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

RONALD PATRICK SWINEY,)
)
 Petitioner,)
)
 v.)
)
 STATE OF ALABAMA,)
)
 Respondent.)

Case No.



ORDER GRANTING STATE OF ALABAMA'S
 MOTION TO DISMISS SWINEY'S SUCCESSIVE
 RULE 32 PETITION

This is an action for relief under Rule 32 of the Alabama Rules of Criminal Procedure by a prisoner under a sentence of life without parole. With the assistance of counsel, Ronald Patrick Swiney ("Swiney") filed his Rule 32 petition on August 13, 2003, wherein he challenges his conviction for capital murder based on claims of newly discovered evidence of factual innocence.

Before recounting the allegations in Swiney's Rule 32 petition, the Court sets out the procedural history that demonstrates Swiney has appealed his capital murder conviction through the state and federal courts. Swiney was indicted, tried and convicted in the Shelby County Circuit Court of the crime of capital murder for

intentionally causing the deaths of Betty Snow Swiney and Ronnie Lynn Pate by one act or pursuant to one scheme or course of conduct, a violation of Ala. Code § 13A-5-40(a)(10). The verdict was returned and Swiney was adjudged guilty on June 12, 1989. Swiney's capital murder conviction was affirmed on appeal. Swiney v. State, 555 So. 2d 1207 (Table) (Ala. Crim. App. 1989).

Swiney concedes that he previously challenged his conviction by filing a Rule 32 petition in 1993. See Swiney's Rule 32 petition at p. ii. Swiney's initial Rule 32 petition was denied after he received an evidentiary hearing. *Id.* The denial of Swiney's Rule 32 petition was affirmed by the state appellate courts. Swiney v. State, 662 So. 2d 305 (Table) (Ala. Crim. App. 1994), cert. denied, Ex parte Swiney, 668 So. 2d 579 (Table) (Ala. 1995).

Swiney also attacked his conviction by filing a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. Swiney's Rule 32 petition at p. 4. That court denied Swiney's habeas petition on June 23, 1998. *Id.* The Eleventh Circuit Court of Appeals denied Swiney's

certificate of appealability on August 13, 1999. *Id.* at p. 5.

In his recently filed Rule 32 petition, Swiney contends that newly discovered evidence establishes that he is factually innocent. Swiney's contentions of newly discovered evidence are based upon experiments conducted by Jon Nordby,¹ who has issued his findings in a lengthy report that accompanied Swiney's Rule 32 petition. Nordby fired a Charter Arms AR-7 .22 caliber semi-automatic rifle using Remington .22 caliber ammunition, the same caliber and manufacture of gun and ammunition that was used in this crime. Although Nordby used the same manufacture of ammunition used in the crime, he does not assert that the ammunition he used contains the same chemical primer mix contained in the ammunition used by Swiney in 1987. Nordby's report indicates that he used two methods, scanning electron microscopy (SEM) and infrared spectrophotometry (IR), to detect gunshot residue in the experiment that he conducted. In his experiment, Nordby, or whoever was

¹ Nordby attached a curriculum vitae to his report that makes the claim he is an expert in nine different areas of forensic science, one of which is "ballistics and GSR testing." Swiney's Rule 32 petition, Exhibit 1 at p. 194.

test firing the gun, employed optimal conditions to obtain gunshot residue. These conditions were: the shooter fired eight times in an enclosed environment, wore a Tyvek suit that is designed to attract gunshot residue, and immediately tested the Tyvek suit for the presence of gunshot residue.

Nordby's report is offered in an apparent attempt to confirm the findings obtained by David Higgins, the laboratory analyst employed with the Department of Forensic Sciences (DFS) who performed various tests in 1987, soon after Swiney was taken into custody. Higgins, among other things, tested for the presence of primer residue or gunshot residue from swabs that were taken of Swiney's hands several hours after the shooting. Higgins' report, a copy of which can be found in Nordby's report at page 9, states that "[l]aboratory analyses failed to reveal conclusive evidence that the above-named person fired a weapon, handled a fired weapon, or whether the hands were in close proximity to a firearm when it was discharged." In this same report, Higgins stated that "certain brands of .22 caliber rim fire ammunition do not

contain the elements necessary" to establish the presence of primer residue. Swiney's Rule 32 petition makes no allegations that Higgins report was not disclosed to Swiney's trial counsel, Richard Bell. In fact, Richard Bell testified at the evidentiary hearing on the initial Rule 32 petition that the prosecution had an "open file" policy and that there were no surprises at the trial. R32R at 225, 273.²

Swiney's claim of innocence, as the Court understands it, is as follows. Nordby has shown, "according to the IR [infra-red] Spectroscopy application to GSR [gunshot residue], that the AR-7 rifle and .22 caliber rim fire ammunition used in this crime would have left detectible GSR on [Swiney] if he had fired this weapon 8 times in an enclosed space." Swiney's Rule 32 petition at p. 26. The fact that Higgins did not find gunshot residue on the swabs taken of Swiney's hands, so Swiney contends, is evidence that Swiney did not shoot a gun. This is so, according to Swiney, because Nordby's findings conclude that "GSR

² "R32R" is a reference to the transcript of the Rule 32 evidentiary hearing held in 1992.

420

would have been detectible by any means," apparently even by the test used by David Higgins.

The State's motion to dismiss is supported by an affidavit executed by Ed Moran, the Discipline Chief of the Firearms and Tool Marks Identification. See State's Motion to Dismiss, Exhibit B. Moran was requested by the State to read the file retained by DFS relating to the Swiney case and discuss the testing that Higgins performed. Moran's affidavit states that Higgins "tested for the presence of gunshot residue or primer residue by using the flameless atomic absorption spectrophotometry (FAAS)." State's Motion to Dismiss, Exhibit B at paragraph 3. Moran defines primer residue as the "portion of the residue resulting from the discharge of a firearm." *Id.* Regarding the testing performed by Higgins, Moran states in pertinent part as follows:

The FAAS test, which is still used in many labs today, is designed to detect antimony and/or barium, chemicals that were contained in the primer composition of some rim fire and center fire primers. The documents that I reviewed in the DFS file indicate that Higgins conducted a test that was screening for antimony. Higin tested the swabs

had no reason to take hand swabs three hours after the shooting. An article that is published by the FBI and attached to this affidavit and labeled 'Appendix A', states that primer residue is much like chalk, it is easily removed by such mechanical actions as rubbing the hands together, handling objects, or putting them in pockets. Water can also remove primer residue. Even the act of cuffing a suspect's hands, see Exhibit A at page 2, can remove primer residue. Some firearms also do not deposit sufficient quantities of residues for detection. Of course, this is variable from gun to gun. Therefore, a negative finding for primer residue does not mean that an individual did not fire a gun.

Exhibit B at paragraph 4. Swiney's assertions that Higgins' report is an indication that Swiney is factually innocent is easily rejected because a negative result for primer residue does not necessarily indicate that a person did not fire a gun.

Swiney's response to the State's motion to dismiss takes strong exception to the above-quoted portion of Moran's affidavit, stating that Nordby never alleged that a negative gunshot residue test is an indication that someone did not fire a weapon. Accordingly,

Nordby submitted a supplemental affidavit that stated as follows:

Obviously no one who knows basis logic, let alone gunshot residue analysis, would advance such an absurd claim - of course negative results for GSR [gunshot residue] are not ... proof of anything at all! I certainly know both logic and gunshot residue analysis; further, I made no such simple assertion in my report.

Swiney's response to State's Motion to Dismiss, Exhibit B at p. 2. Nordby's initial report, filed with Swiney's Rule 32 petition, however, did clearly assert that a negative gunshot residue finding means that the person tested did not fire a gun. Nordby, in his original report, stated "[t]here is no scientific justification available to twist a NEGATIVE GSR result into anything other than proof that the person tested DID NOT FIRE A WEAPON other than a cross bow." *Swiney's Rule 32 petition, Exhibit 1 at p. 9* (emphasis in original). Swiney's Rule 32 petition at page 28, quoting from this portion of Nordby's report, stated that "Dr. Nordby is saying that the Primer Residue Analysis testing that 'failed to reveal conclusive evidence that the above-named person fired a weapon'