

Statement Of The Case

Patrick Swiney was convicted in the Shelby County Circuit Court of Capital Murder in violation of Ala. Code §13A-5-40(a) (10), murder of two or more people, on June 12, 1989. (C.1) The conviction was affirmed on appeal. *Swiney v. State*, 555 So. 2d 1207 (Ala. Crim. App. 1989). (C. 4) In 1993, Swiney filed a Rule 32 petition which was denied following an evidentiary hearing. (C. 4) The denial was affirmed. (*Swiney v. State*, 662 So. 2d 305 (Ala. Crim. App. 1994), *cert. denied, Ex Parte Swiney*, 668 So. 2d 579 (Ala. 1995)). A petition for writ of habeas corpus was denied in the United States District Court for the Northern District of Alabama on June 23, 1998. (C.4) Certificate of Appealability was denied by the 11th Circuit Court of Appeals on August 13, 1999. (C.5) On August 13, 2003, Swiney filed a subsequent Rule 32 Petition in the Shelby County Circuit Court challenging his conviction under Rule 32.1(e), Ala. R. Crim. P. claiming newly discovered evidence of factual innocence. (C. 159) On January 10, 2004, Request For Production Of Evidence was filed by Patrick Swiney. (C. 90) This Rule 32 Petition and the Request For Production Of Evidence were then denied without a

hearing and with prejudice on March 5, 2004. (215-250)
Notice Of Appeal was filed on April 14, 2004. (C. 251)
This appeal followed.

Statement Of The Issues

1. Evidence of Actual Innocence Exists and Is Timely Filed under Rule 32.1(e) A.R. Crim.P..
2. It Was Error to Dismiss the Rule 32 Petition Considering Clearly Established Federal and State Law.
3. Dismissal Of The Petition With Prejudice Without Hearing Was A Denial Of Due Process.
4. Exculpatory Brady Material Was Wrongfully Withheld from Patrick Swiney.
5. It Was Error to Dismiss the Rule 32 Petition Containing Newly Discovered Evidence of Actual Innocence.
6. It Was Error Not To Rule On all The Issues Pled in the Petition..

Statement Of The Standard Of Review

The standard of review in this case is whether the trial Court abused its discretion when it dismissed the Rule 32 Petition of Patrick Swiney without a hearing.

The standard of appellate review is *de novo*, since there was no oral testimony taken by the trial Court, and no *ore tenus* presumption attaches to the judgment of the trial Court.

Summary Of The Argument

This appeal has a single major issue upon which all the other issues have been decided. That single issue is whether the newly discovered evidence in this case is in fact newly discovered evidence. The trial Court held that the newly discovered evidence is not in fact, newly discovered evidence. This finding is, Patrick Swiney respectfully suggests, contrary to the facts and to the law. A standard argument was used in this case. If the "new" science is presented soon after discovery, it is not "accepted" in the scientific community. If the "new"

science is presented one day after acceptance in the scientific community is recognized, it is no longer "newly discovered evidence" as the science has been in existence while being "accepted" by testing, replication, statistical verification, and experience.

The newly discovered evidence in this case is a way of testing gun shot residue, the deposits of primer material, burned and unburned gunpowder, and wadding materials, which method was first reported in May, 2003, and used by Dr Nordby in July, 2003. This newly discovered evidence is the result of a combination of new uses of existing technology, new technology, and new and unique testing materials.

This newly discovered evidence determines the innocence of Patrick Swiney in that the newly discovered evidence can prove actual innocence in this particular case.

The trial Court would not allow this newly discovered evidence to be considered, as the trial Court would not allow testing using the new test. The items to be tested have been preserved and exist in an evidence locker. Patrick Swiney contends that it was an abuse of discretion to refuse access to the materials for testing. The materials requested for nondestructive testing include the

rifle, ammunition in the magazine of the rifle, and clothing. All are in the possession of the State.

The trial Court gave great weight to the fact that some scientific testing had already been done, and the testing done by the State Department of Forensic Sciences was regarded as the best and final result. That conclusion is not supported by the evidence, and the test conducted by the State was admittedly a sham.

The Alabama Department of Forensic Sciences did conduct a gun shot residue test. It is acknowledged by the State that the test performed by the Department of Forensic Sciences was a test for a single element known not to be used in the manufacture of bullets at that time. The test for the chemical admittedly not used was, as would be expected, negative. No further testing of gun shot residue was done.

Testing was also conducted on the bullets found inside the bodies. The objective of the testing was to determine if the bullets that caused the deaths of Betty Swiney and Ronald Pate were fired from the rifle owned by Patrick Swiney. Those tests did not identify the bullets as having been fired by the rifle that belonged to Patrick Swiney.

One additional test was conducted by the Department of Forensic Sciences. This test was on cotton swabs used to detect the presence of gun shot residue. As expected, the test was negative for gun shot residue, and now the cotton swabs have been lost, misplaced, or destroyed by law enforcement officials. The loss of these swabs is not a legitimate issue as this kind of test using the swabs was negative, and there are several other items in existence that can be tested at this time using the new test.

If testing were allowed using the new test, testing would be conducted for gunshot residue on the clothing of Patrick Swiney, and on the clothing worn by Betty Swiney and Ronald Pate when their bodies were discovered. Testing would be conducted on the rifle and on one or two of the seven unfired bullets in the magazine of the rifle. The only destructive testing would be the test firing of the one or two on extended cartridges in the magazine of the rifle.

The expected test results, in summary, could show that it was impossible for Patrick Swiney to have fired the rifle in the enclosed space, then for his clothing to be free of gunshot residue or blood spatters. The new test has a high probability of providing an identification of the rifle that

fired the bullets. The rifle may or not be the rifle owned by Patrick Swiney.

There was no testimony or evidence to put the rifle in the hands of Patrick Swiney, no fingerprints, or any evidence of any kind to allow a juror to think that Patrick Swiney was the shooter with the rifle owned by Patrick Swiney.

At the trial of this case, the jury had no conclusive evidence and no theory that anyone except Patrick Swiney could have committed the crime. The evidence does offer clear and convincing proof beyond any reasonable doubt that Patrick Swiney, scientifically, physically, and actually, could not, and did not kill Betty Swiney and Ronald Pate. It is reasonable to expect that a jury, after considering the newly discovered evidence, would return a verdict of not guilty.

Patrick Swiney contends that his newly discovered evidence is admissible using either of the four standards for admission of scientific evidence currently recognized in Alabama law, Frye, Daubert, the criminal DNA exception, and Rule 702, Ala. R. Evid.