

## Argument

### 1. Evidence of Actual Innocence Exists And Is Timely Filed Under Rule 32.1(e) A.R. Crim.P..

A major factor cited as a reason for denial of a hearing on the issue of newly discovered evidence in this case is not a legitimate issue at all. The ruling was that there can be no newly discovered evidence in this case. The basis for that ruling has to do with the destruction of certain evidence by the State. The evidence that was destroyed are a number of cotton swabs. These swabs were used on the hands of Patrick Swiney shortly after the incident, when cotton swabs were used to detect the presence of any gunpowder residue on the hands of Patrick Swiney.

The swabs were properly preserved at the time and the swabs were sealed in a plastic container. The plastic container was then sent to the Alabama Department of Forensic Sciences for testing. At the time the test used by the Department of Forensic Sciences was a test to determine the presence of the chemical element antimony. Antimony was not used in the manufacture of bullets at the time of the offense. The "lost swabs" argument is no applicable in this case as a grounds to dismiss the Rule 32 Petition.

Applicable law on this point of law concerning newly discovered evidence begins with Rule 32.1 (e) (1-6), Ala. R. Crim. P. The evidence that is the basis for the petition is newly discovered evidence. This evidence, Patrick Swiney contends, is so compelling that it is determinative as to the innocent of Patrick Swiney. The evidence proves that Patrick Swiney could not physically, scientifically, or actually have committed the offense of murder in the manner alleged in the indictment. This scientific evidence could not have been known at any time prior to the filing of this petition. The reason being that, prior to the filing of this petition, the scientific test that is the basis of this petition did not exist at all. The petition is not precluded by Rule 32.1 (a) (1), Ala. R.Crim. P.

The facts of the petition, in the form of evidence of scientific testing results are not merely cumulative of the evidence introduced at any prior proceeding. The scientific test evidence does not contradict evidence of the actual innocence of Patrick Swiney, but is more than merely cumulative. The scientific testing results are, in and of themselves, determinative when standing alone and in the company with other evidence of actual innocence. The

petition is not precluded by Rule 32.1 (a) (2), Ala. R. Crim. P.

The scientific test result does not have as its purpose the impeachment of evidence offered by the State. The scientific test results prove a proposition of independent fact. This independent scientific fact leads to a single conclusion. That conclusion being that it was physically, scientifically, and actually impossible for Patrick Swiney to have committed the offense. The scientific test result does not merely cast doubt on existing evidence or raise a question as to the conclusiveness of evidence produced by the State. The scientific test result is independently determinative of the innocence of Patrick Swiney. The Rule 32 petition is not precluded by Rule 32.1 (a) (3) Ala. R. Crim. P.

If this scientific evidence had existed at the time of the trial and had been presented to the jury at the trial of the case, there is a reasonable probability that the result of the trial would have been different. The jury would have seen conclusive and exhaustive scientific evidence that Patrick Swiney could not have fired the weapon that caused the death in this case. It is reasonable to conclude that,

if this evidence had been known prior to the bringing of the indictment, the District Attorney would not have sought an indictment charging Patrick Swiney with this offense. It is reasonable to conclude that the District Attorney would have ordered further investigation to determine the identity of the person or persons who actually committed the crime.

This second conclusion, theorizing what the District Attorney would have done, goes beyond what Patrick Swiney has the burden to show in this case. The lesser burden, the reasonable effect on the jury, would be met by valid scientific evidence supported by expert testimony, which test results are determinative of the innocence of Patrick Swiney. The petition is not precluded by Rule 32.1 (a) (4), Ala. R. Crim. P.

Facts of the scientific test results establish the actual innocence of Patrick Swiney by proving that Patrick Swiney did not fire the weapon, or any weapon, during the window of time when the shooting took place. The scientific test results show that some other person committed the offense, and provides valid and reliable scientific evidence of the actual innocence of Patrick Swiney. The petition is not precluded by Rule 32.1 (a) (5) Ala. R. Crim. P.

While Rule 32.1 (a) (1-5) prescribes the affirmative requirements for a petition, Rule 32.2 provides negative requirements which forbid or preclude relief. Rule 32.2 (a) (1-5).

Rule 32.2 (a) preclusion does not apply to this case because there is no additional direct appeal allowed by law (Rule 32.2 (a) (1)), and this scientific evidence was not raised on direct appeal because the scientific methodology did not exist at the time of trial [Rule 32.2 (a) (2)]. For the same reason, that the scientific test did not exist at the time, the issue in this petition was not addressed on appeal or in any collateral proceeding, and this issue could not have been, and was not, raised on appeal or in any collateral proceeding [Rule 32.2 (a) (4)]. Again, because the scientific test methodology did not exist at the time, the issue raised in this petition could not have been raised on appeal. Rule 32.2 (a) (5).

The petition is not precluded by any of the preclusion provisions of Rule 32.2, Ala. R. Crim. P.

Rule 32.2 (b) precludes successive petitions.

The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf of the same petitioner. A

second or successive petition on different grounds shall be denied unless the petitioner shows both that good cause exists on the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice. *id.*

Rule 32.2 (c) establishes limitation periods, and prescribes that the petition must be filed within the applicable time. "...or within six (6) months after the discovery of the newly discovered material facts, whichever is later." *id.*

In this case there has been no "...decision on the merits of issues raised and, thus, could not constitute a prior petition for purposes of the rule precluding successive petitions." *Blount v. State*, 572 So.2d 498 (Ala. Crim. App. 1990). It was held in *Blount, id.*, that the denial of a petition without a hearing was an error.

Patrick Swiney contends that the petition that he has filed in this case meets all of the affirmative criteria required, and is not precluded by any part of the rules of preclusion found in Rule 32, Ala. R. Crim. P. Patrick Swiney contends that it was error to deny his petition without a hearing on the merits of the petition.