

2. It Was Error to Dismiss the Rule 32 Petition

Considering Clearly Established Federal and State Law.

Patrick Swiney contends that the denial of this properly pled and timely filed Rule 32 petition was an abuse of discretion by the trial Court. The specific holdings by the trial Court which denied the petition and denied a hearing on the merits of the petition were;

First, Swiney's claims are barred by the statute of limitations which must be applied as a matter of "jurisdiction." *Arthur*, 820 So.2d at 889. Second,, the requested items were available for testing when he litigated his first Rule 32 petition. Third, the technologies that Swiney 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. ( C. 248).

The linchpin of the reasoning in the Order is that the "newly discovered evidence" is not "newly discovered evidence" at all. If the evidence is in fact "newly discovered evidence," then each and every basis relied upon by the trial Court is not correct, and the Order dismissing the Rule 32 petition is due to be reversed. Patrick Swiney contends that is exactly and precisely the situation, and that the Order of the trial court was an abuse of

discretion, based upon an invalid premise.

The entire essence of this newly discovered evidence is that there is new scientific technology and methodology which scientifically proves a scientific and observable fact that the old technology and methodology could not prove. An advance in scientific testing and methodology may yield newly discovered evidence, as has been demonstrated on a number of occasions in the past. Frye v United States, 293 F 1013 (Cir 1923) is the standard for admission of scientific evidence in a case of this type, and general acceptance in the scientific community is required. Swiney contends that faulty logic was used in order to classify this newly discovered evidence as evidence that is not new at all. The argument goes that if the scientific process is introduced into a trial immediately after discovery, the newly discovered evidence is not allowed because it has not been accepted by the scientific community. Any later attempt to introduce scientific evidence after it has been accepted by the scientific community is rejected as being not "newly discovered ." There will necessarily be a period of time, immediately after discovery, and before general acceptance, when the scientific community goes through the process of

accepting or rejecting new scientific methods, techniques, and protocols.

During this period of time, scientists in the field will evaluate the method, attempt to replicate results, subject test results to statistical analysis, and subject the method to peer review, periodicals, papers and conferences. Patrick Swiney contends that while some of these pieces of equipment and methods may have existed in the past, they were not admissible in the past because this particular kind of scientific inquiry was in the process of being accepted. Acceptance was demonstrated when these results were published in scientific journals and the methods of testing had been refined. It is disingenuous to construct a principle of law, dedicated only to defeating scientific evidence by the use of faulty logic. Patrick Swiney contends that this is the rationale used by the trial court in order to classify this newly discovered evidence as evidence that is not new at all.

The newly discovered testing methodology, and the new technology which makes the testing methodology possible is a combination of technology and advances in knowledge and method. The use of the "new" technology, which has produced

"newly discovered evidence" is the result of testing and scientific analysis of gun shot residue and projectiles discovered and documented in May 2003, which, Patrick Swiney contends, is newly discovered evidence that conclusively proves his actual innocence. ( C.272) The test used was reported in the *Journal of Forensic Sciences* in the May 2003 publication.

The trial Court erred when it held that this new method and supporting technology did not constitute newly discovered evidence.

Newly discovered evidence is discussed in the case of *Tarver v. State*, 769 So.2d 338, 339 (Ala. Crim. App.) cert. denied (Ala. 2000) where it was held;

Rule 32.1 (e) Ala. R. Crim. P. states that evidences newly discovered evidence when:

- (1) the facts relied upon were not known by petitioner or petitioners counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times by the exercise of reasonable diligence;
- (2) The facts are not merely cumulative to other facts that were known;
- (3) The facts do not merely amount to impeachment evidence;
- (4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
- (5) The facts establish that petitioner is

innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received. *id.*

*Tarver, id.*, held that the evidence relied upon in that case was not "newly discovered evidence," because the evidence in *Taver* was available during the hearing on the first Rule 32 petition. The newly discovered evidence alleged in *Tarver* was an affidavit of a Deputy District Attorney. The Deputy District Attorney was available and would have testified at the hearing on the first Rule 32 petition if he had been asked to testify. The Deputy District Attorney was not approached by *Tarver* until after *Tarver* filed his third Rule 32 petition.

The factual situation in *Tarver* is different from the factual situation in this case. The "newly discovered evidence" in *Tarver* existed all the time, available, needing only to be unearthed in time for the hearing on the first Rule 32 petition. In this case, Patrick Swiney did not wait for an extended period of time, then commence looking for additional existing evidence which he could present to the trial Court. The IR Spectroscopy test on the materials that can now be tested did not exist at the time of the trial, or at any time prior to Patrick Swiney having the Infra Red

Spectroscopy test conducted in conditions approximating the conditions existing at the time of the offense in this case. The Scanning Electronic Microscopy with Electron Dispersion Sampling (SEM-EDS), combined with Infra Red Spectroscopy (IR Spectroscopy) (hereinafter, the "new test") is newly discovered evidence because it is evidence that is relevant, material, and competent, and was made possible only because of advances in chemistry, measurement, electronic analysis, and a quantified database, which produced a new methodology for testing. This methodology was followed by scientific validation based upon peer review and replication of results. This complex development of this "newly discovered evidence" is a recent development, and again, did not exist at the time of the trial of Patrick Swiney, or during the time when Patrick Swiney pursued his direct appeal.

The trial Court gave great importance to the "old" testing that was done by the State, and compared the "old" test to the "new" test. The trial Court held that the tests were not "...relevant to the test performed by the Department of Forensic Sciences in 1987...." ( C.242). Patrick Swiney urges that the conclusion about a lack of relevance between the two (2) testing methodologies is not a

-relevant or reasonable conclusion to make, and is not a basis for finding that the new test results are not "newly discovered evidence."

The reason that the conclusion is not reasonable assumes that the test performed by the Department of Forensic Sciences in 1987 represent the "best and final" test available in the scientific community, both in 1987, and today. The new test pled and offered to be proven by Patrick Swiney is necessarily perceived by the trial Court to be a less reliable and less valid test of the same materials. The assumptions underlying the conclusion reached by the trial Court are that the (2) tests are available, with one of these test results being valid and the other test result being invalid.

Patrick Swiney contends that the facts do not support this reasoning and the facts do not support the conclusion reached by the trial Court. He urges that the conclusion reached by the trial Court, and the Order denying his Rule 32 petition are not supported by the law or by the facts.

A comparison can be made when the scientific progression of the knowledge of blood testing is compared to the scientific progression of knowledge of gun shot residue

testing.

Blood testing as a scientific process began with scientist being able to distinguish blood as being a chemically organic compound different from other stains, for example paints, dyes, mineral, vegetable, or other materials which deposited a reddish-brown colored material on other objects. A first step in forensic testing may have been when a scientist was able to testify and prove that a particular stain was dried blood, rather than, for example, dried food, paint, or some other substance that had left a stain.

The next logical step was the ability of scientific testing to not only to detect the presence of blood as opposed to some other substance, but to further distinguish human blood as being different from the blood of a cow, horse, or other animal.

The fact that a first test differentiated blood from paint did not mandate that the later devised test was not relevant to the first test. The second test, differentiating human from animal blood, was relevant to the first in that in both the first and second tests were able to distinguish blood from other compounds. The ability of