

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