

3. Dismissal Of The Petition With Prejudice Without Hearing Was A Denial Of Due Process.

A key question to be answered is whether the "new tests" are in fact new tests, or has this "new test" been in existence for a long time, dating back to the time of trial. That question was definitively answered by the trial Court, which held that;

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. (C.248)

There is evidence in the affidavit and report of Dr. Nordby where he provides information as to the history of the "new tests." In the description of the "new tests" he describes the subject matter of the test that makes the test different, as well as providing the date of the research reporting the new protocol, technology, and methodology.

In fact, current research published in the May, 2003 issue of the *Journal of Forensic Sciences* [JFS, vol. 48, no. 3, pp.538-553] explains that glass particles used as a frictionizer in 22 cal. ammunition of various sorts including Remington rounds produce unique gunshot residue particles suitably unique in nature. This newly discovered type of how a unique particle associated with GSR (gun shot residue) from such rounds even absent traditional antimony markers, previously thought to be necessary for any

unique GSR determinations. This discovery occurred simultaneously in different parts of the forensic community during the 1990s, but the most compelling research has been presented by Australian forensic scientists in the past several years. (C. 272).

Making the same point, by a different set of facts, the report of Dr. Nordby provided testimony that the tests that were run at the time leading up to trial were not appropriate or suitable to determine the proper type of gun shot residue. The only component of the "old" test was to test for the presence of the chemical element antimony in gun shot residue. That test could have only one result. It is the same result as a test for any other chemical known not to be present in the residue. The reason is that;

Prior to 1987, Remington did not use antimony in its rim fire primers. Remington did use barium and lead prior to 1987. After 1987, however, Remington introduced traces of antimony, making the statement "No 22 caliber LR(long rifle) ammunition releases GSRs(Gun Shot Residues)" false even under the very restricted sense of "GSR detection" being limited to the presence of combinations of use of barium, antimony, and lead. (C. 271).

No antimony was found in the gun shot residue because antimony was not used in the manufacture of this type of ammunition at the time.

Applicable law pertaining to this argument is found in

King v. State, 689 So.2d 929, 930 (Ala. Crim. App.) Where it was held;

In regards to King's contention that he is entitled to an evidentiary hearing on this claim, we note that the Circuit Court may properly dispose of Rule 32 allegations without holding an evidentiary hearing if it has before it "facts supporting the position of each party [that] are fully set out in supporting affidavits." (Citations omitted) However, in any case, the Circuit Court should make "specific findings of fact relating to the issues raised by the appellant." (Citation omitted) In the event that the circuit judge has personal knowledge of the actual facts underlying King's claim, he may deny the allegation without further proceedings as long as he states the reason for the denial in a written order. *Sheats v. State*, 556 So.2d 1094 (Ala. Crim. App. 1989).

It was held that the circuit court did not have jurisdiction in *King, id*, and that the conviction of King was void.

The "specific findings of fact relating to the issues" entered in this case are not supported by any evidence in the record, or in affidavits supplied by the experts in this case. Additionally, since this matter involves questions of scientific technology, methodology, and advances in scientific knowledge, the trial Judge may not be presumed to have "personal knowledge of the actual facts" involving the claim of Patrick Swiney, and the trial Judge does not make

any mention of his having personal knowledge of the scientific principles that are the basis of this Rule 32. The judgment in this Rule 32 action must be based on either personal knowledge of the trial Judge, or upon evidence that is apparent in the record to support the judgment. Patrick Swiney contends that neither exists in this case.

As may often be the case, the basis for any decision involving voluminous amounts of information may revolve around a small number of material and relevant facts, extracted and relied upon for factual support of a conclusion. Patrick Swiney urges that this is the method used in reaching the judgment of the trial Court in this case. This judgment was, in the text of the Order, based upon information supplied in the form of affidavits by Ed Moran, the expert for the State, and Dr. Nordby, the expert who offered testimony by affidavit to support the Rule 32 of Patrick Swiney.

The State clearly described the testing that was done by the Alabama Department of Forensic Sciences. The testing was described in the State of Alabama's Motion to Dismiss Swiney's Successive Rule 32 Petition at 77.

The FAAS test, which is still used in many lamps 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 (Department of Forensic Sciences) file indicate that Higgins (the forensic scientist who performed the test) conducted a test that was screening for antimony. Higin (sic) tested the swabs that were made from Swiney's hands and received a negative result for antimony and because Higgins received a negative result, he did not do any more testing. Nordby's report that contains allegations that DFS performed paraffin testing in this case is false. The fact that Higgins was unable to detect the presence of antimony is not surprising because even Nordby's report at page 13 concedes that Remington added antimony only after 1987, a point in time after the murders occurred in December 1987. (C. 77-78).

The trial Court obviously concluded that simply more testing would not yield any additional information and that the test results already obtained answered every question to be answered by forensic testing. These conclusions are not correct.

It should be pointed out that the testing at issue may require some explanation. The totality of the testing was to detect chemical elements in a particular component of the ammunition. The "new" testing that is proposed by Patrick Swiney would test for the presence of chemicals that were actually used in ammunition at the time, and would test for several characteristics other than the simple depositing of

trace chemical elements.

There are two (2) different, in lay terms, "explosions" that take place when a bullet is fired from a rifle of this type. The discharge of the bullet takes place, not with an explosion of chemical elements, but with a mechanical action. The mechanical action starts when the trigger of the rifle is pulled, and ends when the firing pin of the rifle strikes the rear end of the bullet. The rear end of the bullet contains the primer. When the firing pin, a small metal pin, is forced by mechanical action into the back of the bullet, the primer is moved forward by the mechanical action of the firing pin. The primer encounters friction, which generates heat, which heat starts a chemical reaction.

This chemical reaction is the first "explosion" as powdered glass (used to increase friction inside the primer) reacts with barium, antimony, and other chemicals, which reaction causes a rapid burning of the chemical elements of the primer, the burning being so rapid it is properly called a small explosion. This small explosion takes place in a unique environment. That environment is the inside of a sealed bullet, and the inside of the bullet is packed with

gunpowder. The first explosion, that being of the chemicals inside the primer, causes a larger explosion, that second explosion being of the gunpowder contained inside the bullet.

Both of these "explosions" leave trace elements of chemicals burned in the two (2) explosions. Both explosions produce gas, and that gas forces chemicals out of the bullet through the only available escape route (in most rifles). That easy escape route is down the unrestricted and open barrel of the rifle.

Both of these "explosions," the firing of the primer, then the firing of the gunpowder, emit particles of burned, partially burned, and unburned chemicals out of the barrel. All the materials that exit the barrel, except the projectile itself, make up gun shot residue. Gun shot residue is made up of primer material, gunpowder, and packing materials used to keep the chemical components separate before firing. The amount of gun shot residue left by the burned, unburned, and partially burned elements in the primer could reasonably be expected to be smaller in quantity than the amount of gunpowder. The primer is

smaller in quantity, with a smaller amount of chemicals, than chemicals present in the gunpowder. The chemicals blown out of the barrel are the gun shot residue (GSR), consisting both of primer material that is discussed in both tests, the old test that was conducted as well as the "new test" that Patrick Swiney was not allowed to conduct on the actual materials. The purpose of the requested testing by Patrick Swiney included testing to determine the presence or absence of gun shot residue evidence that has a high probability of still being available in evidence stored in the possession of the State.

The "old test" is informative. The only chemical test that was performed was the test for a trace element found in the primer explosion, as contrasted to any test conducted on any other gunpowder residue, residue resulting from the second explosion, the gunpowder explosion.

When the "old test" was conducted, the only test used was to screen for the presence of antimony in the gun shot residue. The precise testimony from the affidavit of Ed Moran, the Discipline Chief of the Fire Arms and Tool Marks Identification Unit of the Alabama Department of Forensic Sciences described the totality of the testing performed on