

4. Exculpatory Brady Material Was Wrongfully Withheld from Patrick Swiney.

Evidence that was exculpatory was misrepresented to Patrick Swiney in the course of the "open file" discovery practiced by the State Prosecutor at the trial of this case. The State offered evidence of scientific testing, which evidence was represented to the jury as being relevant, material, and competent. The jury was never told that the test for gun shot residue was a sham. The test was a sham, because the test attempted to determine the presence of a chemical element that the State knew could not possibly be present. The test was presented as a valid scientific analysis, but was not scientific, and represented no analysis. The jury could not help but form the impression that there was no scientific evidence that could help the jury to determine the truth. That conclusion, foisted upon the jury by the State Prosecutor and the scientific experts for the State, misrepresented a material fact, and lulled Patrick Swiney and his defense counsel into believing the same misrepresentation that had been made to the jury. The representation was that there was no scientific evidence to prove or disprove the guilt or innocence of Patrick Swiney.

The opposite was true then, and is true today.

The State, knowing that the jury and Defense Counsel would be given the wrong impression by this misinformation, had the duty to correct the misrepresentation at the time of the trial, or at some other point when this case has been before the Court. The State continues to perpetuate and embed this misrepresentation of the evidence by the denial of a fair chance to test the physical evidence remaining, and to allow Patrick Swiney a chance to be heard, and to present his evidence of actual innocence.

In Patrick Swiney's first Rule 32 evidentiary hearing, trial counsel said there were no surprises ( C. 215) because he relied on the State's "open file" policy. *id.* Defense counsel cannot know when the State prosecutor or State laboratory withholds evidence from the open file when there is a fiduciary trust that the State will not withhold. While the State has the duty to uncover mitigating and exculpatory evidence, the defense, while relying on an open-file policy, may rely on the assurances of the State. The information in this case has been concealed for years prohibiting a prior *Brady* claim. *Strickler v Greene*, 527 U.S. 263, 283 (1999). If the exculpatory evidence was otherwise available to the