

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

prosecution, yet suppressed in the "open file" that constituted a violation of *Brady*. It is not Patrick Swiney's responsibility to uncover suppressed evidence uniquely within the control of the State. A Defendant is not required to play "Hide and Seek" where the prosecutor hides, and the defense must seek. *Scott v Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002).

The Alabama Court of Criminal Appeals in 1993 ruled that prosecutors did not disclose exculpatory evidence and reversed [the] conviction and death sentence, *McMillan v Monroe County, Alabama*, 520 U.S. 781 (1997). The same principle of law applies in this case.

A *Brady* violation exists when exculpatory evidence is withheld from the trier of fact. The State withheld exculpatory evidence from the jury, the direct appeals Court and the collateral appeals Court.

"There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene* 527 U.S. 263, 283 (1999).

"*Brady* requires the disclosure of exculpatory and impeachment evidence to a defendant even if the evidence is known only to police investigators and

not to the prosecutor." *Martin v. State*, 839 So.2d 665, (Ala.Crim.App.,2001).

Dr. Nordby and the State expert, Ed Moran, are correct in stating that the absence of any residue at all in the tests as recorded by Higgins, standing alone (or all other things being equal), cannot be used to prove that Patrick Swiney did or did not fire the weapon. In light of the fact that according to the State, this particular type of weapon was fired at least eight times in an enclosed space, it is reasonable to expect considerable gun shot residue present - about eight times more present than a single shot, and this gun shot residue would not have been restricted to primer residue. In the context of the eight shots fired there should have been a great deal of gun shot residue if the AR-7 was the murder weapon and Patrick Swiney was the shooter. There may have in fact been that expected amount of gun shot residue, and that considerable amount of gun shot residue may exist on the physical evidence in the possession of the State at this present time. Had David Higgins found any gun shot residue or anything resembling residue ( gunpowder, wadding, barium, powdered glass, burned gunpowder, barrel lubricant ), even in minute traces on the clothing of Patrick Swiney, the prosecutor would have

certainly shown this to the jury. It is reasonable to conclude that the reason that no tests were run for any other kind of gun powder residue was that in fact, gun powder residue (other than antimony) was in fact not found at all on any of the physical evidence available to be tested by the State. The absence of this substantial amount of gun shot residue could be detected by unaided vision, smell, and touch.

David Higgins did not test for an element that would detect any gun shot residue, the prosecutor did not tell the jury about the method of gun shot residue or blood tests at all.

"Thus, where relevant evidence does not reach the jury either as a result of the State's failure to disclose or as a result of the defense's failure to discover, relief is warranted where cumulative consideration of all of the evidence which did not reach the jury undermines confidence in the result of the trial. The issue is whether the undisclosed evidence could have mattered to the jury's evaluation of whether a reasonable doubt existed." *Kyles v. Whitley*, 514 U.S.419, 428 (1995).

Patrick Swiney has shown by a preponderance of the evidence that all three (3) elements of a *Brady* violation are present in this case and that is clearly established harmful error. Exculpatory evidence exists and was revealed through the State's expert witness in the State's Motion to Dismiss

the instant petition; the evidence that is favorable to Patrick Swiney, either because it is exculpatory as well as impeaching; the evidence has been and is being suppressed by the State, either willfully or inadvertently; and prejudice has ensued to Patrick Swiney because the initial misrepresentation of the status of the evidence, with the subsequent refusal, sanctioned by the trial Court, to disallow nondestructive testing, represents continued suppression of evidence of actual innocence.

Had the jury known that a scientific, physical, and actual impossibility had taken place, and was placed into evidence before that jury, it is reasonable to conclude that the outcome of the case would have been different. If the actual scientific facts had been correctly represented to the jury, it is reasonable to conclude that the jury could not, and would not, have found guilt beyond a reasonable doubt. More than a reasonable doubt, but a doubt based upon certainty would have been created, making conviction contrary to the law.

If the jury had known that it was a scientific, physical, and actual impossibility that the State did not find any gun shot residue on Patrick Swiney's hands, and no blood

on his skin, clothes, and shoes after allegedly shooting two people at "point blank" range with an AR-7 .022 caliber rim fire semi-automatic rifle eight times in an enclosed space, the outcome of the trial would have been different. Had trial Counsel and the jury known that the State tested his client's hands for an element that was absent from the primer formulation in the first place, the outcome of the trial would have been different.

Had the jury known that Dr. Nordby's tests are reasonably expected, based upon prior testing with a similar weapon under similar conditions, to indicate that no one can shoot the alleged weapon eight times in an enclosed space and not be covered with gun shot residue, that gun shot residue would be detectable by a variety of means, making the primer residue disclaimer false, the scientific and physical evidence being exculpatory for Patrick Swiney, and the outcome of the trial would have been different. There are viable *Brady* issues replete in this case and all call for a reversal of the judgment in this case, to, as a minimum, allow the scientific testing of the physical evidence in the case.

"[L]et us assume that the State possesses information that blood was found on the victim, and that this blood is of a type which does not match that of the accused or of the victim. Let us

assume that no related testimony was offered by the State, *Giles v Maryland*, 386 U.S. 66, 100 (1967). The suppression of the information unquestionably corrupts the truth seeking process, and the burden on the defendant in establishing his entitlement to a new trial ought be no different from the burden he would face if related testimony had been elicited by the prosecution." *United States v Augers* 427 US 97, 99-101 (1976).

The action of the trial court violated the rights granted to Patrick Swiney by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 6, Consitution of Alabama of 1901.