

5. It Was Error to Dismiss the Rule 32 Petition Containing Newly Discovered Evidence of Actual Innocence.

There is reason to believe that scientific testing of physical evidence that has been stored and preserved for all the years since this incident took place, can be subjected to nondestructive scientific testing. Patrick Swiney contends that there is reason to believe that this scientific testing will be determinative of his actual innocence. The relatively recent availability of testing procedures, combined with test results obtained from testing with a similar rifle, firing similar ammunition, during the same elapsed period of time, in a similar size area have yielded results which indicate probable cause to believe and conclude that specific testing of the actual physical evidence will prove the actual innocence of Patrick Swiney.

Additionally, there are unfired cartridges that are stored as evidence in this case at this time. While some testing could be conducted with other cartridges, it may be reasonable to assume that the cartridges that work in the magazine of the rifle at the time the rifle was seized are consistent with the cartridges allegedly fired from the same rifle. This testing then could replicate the firing of

the weapon using ammunition available at the last time the rifle was fired.

Scientific testing will demonstrate the pattern of scatter of the gun shot residue, and the pattern will indicate that gun shot residue by this particular rifle is emitted not only down and out of the barrel at the muzzle of the rifle, but that a large amount of gun shot residue is also emitted from the rifle by the right exhaust port. This particular gun shot residue is emitted after each discharge of the rifle, and the amount of gun shot residue can be accurately measured, in terms of weight, chemical composition, pattern, appearance, and durability of surface adhesion.

The pattern of ejection of fired cartridges from the particular rifle used in the commission of this offense can also be determined by the vertical angle, height, lateral angle, and repetition of the throw angle of the particular weapon that was used in the commission of this offense.

With this test result data from testing of the actual rifle that was used in the commission of this offense, scientifically valid observations and conclusions can be drawn as to the ability of the rifle to scatter and deposit