

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

gun shot residue and fired cartridges.

Scientific testing will demonstrate that the clothing worn by Patrick Swiney has been preserved as evidence and is available for nondestructive testing. Specifically, there is a jacket, shirt, blue jeans, and tennis shoes that were entered as evidence in this case, and which have been preserved for future testing, as the law requires. (C. 90).

These items of clothing, when entered as evidence at the trial of the case, would lead to the conclusion that these were the items of clothing worn by Patrick Swiney during that time that the shooting took place. With specific scientific data concerning gun shot residue specific to the actual rifle that was used, that data can be compared with specificity to other items. A first item would be to specimen fabric items, and a comparison could be made between specimen fabric and the actual clothing.

Testing of the shooter soon after the shooting would not need to be especially scientific, as the gun shot residue would be obvious in the booking photographs that were made, and in the appearance and odor of the skin, hair, and clothing of Patrick Swiney.

The juror could then have seen the appearance of Patrick Swiney soon after his arrest, and could have heard testimony from witnesses, to include family members and police officers who would testify that Patrick Swiney had no blood stains or gun shot residue on his body or clothing, and that he did not show any other characteristic of being the shooter.

The reasonable conclusion to be reached by any juror in the face of this scientific evidence, coupled with the factual situation that was presented at the trial of the case, would be that the law-enforcement officers at the scene did not arrest the shooter. The conclusion would be that Patrick Swiney is actually innocent.

Applicable law on this point of law is;

"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. at 438.

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,
Constitution of Alabama of 1901.

The judgment of the trial Court is due to be reversed.