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2006 JUN -9 PM 2:07

COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RONALD PATRICK SWINEY,)

)

CV-06-B-1133-S

PETITIONER,)

)

V.)

CASE NO.: _____

)

KENNETH L. JONES, Warden;)

TROY KING, ATTORNEY GENERAL)

FOR THE STATE OF ALABAMA,)

)

RESPONDENTS.)

Swiney v. Jones §2254 Petition
June 9, 2006

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LIST OF EXHIBITS

- Exhibit 1** Two photographs of the kitchen window showing no bullet hole, a diagram illustrating dimensions presented by the State as to position of the bullet hole in the window and chain of custody receipts. Discloses evidence tampering. (5 pages)
- Exhibit 2** Counsel's affidavit disclosing Judge Crowson stating he would deny the rule 32 because Mr. Swiney could have changed his clothes and taken a bath before he was arrested. (1 page)
- Exhibit 3** Witnesses' affidavits refute judicial reasoning that Mr. Swiney could have changed his clothes and taken a bath before he was arrested. These affidavits were obtained in 2004, after Mr. Swiney learned that the Court was rejecting his newly discovered evidence of actual innocence on the basis of conjecture not in the record. (2 pages)
- Exhibit 4** DuPont report, DuPont Statement, Dr. Larkin Statement & Earl Mundt Statement and Tyvek material sample demonstrating that Tyvek is anti-static, electro-neutral and repels particles. Refutes judicial reasoning that Tyvek attracts GSR. (3 pages)
- Exhibit 5** Copy of signed postal receipts and copy of invoice from Mr. Swiney's testing laboratory showing when testing began. Refutes judicial reasoning that the GSR was tested immediately. (2 pages).

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: **Shelby County, Alabama**

(b) Criminal docket or case number: **Shelby Circuit Court: CC88-077.61**
2. (a) Date of judgment of conviction: **June 12, 1989**

(b) Date of sentencing: **June 13, 1989**
3. Length of sentence: **Life Without Parole**
4. In this case, were you convicted on more than one count or of more than one crime?
No
5. Identify all crime of which you were convicted: **Capital Murder**
6. (a) what was your plea (Check one): **Not Guilty**

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: **Not Applicable**

(c) If you went to trial, what kind of trial did you have? (Check one): **Jury**
7. Did you testify at a pretrial hearing, trial, or a post-trial hearing? **Yes**
8. Did you appeal from the judgment of conviction? **Yes**
9. If you did appeal, answer the following:
 - (a) Name of court: **Alabama Court of Appeals**
 - (b) Docket or case number: **89-095 (CC-88-077)**
 - (c) Result: **Affirmed. No Opinion**
 - (d) Date of result: **August 3, 1990**
 - (e) Citation to the case: **Motion Under Rule 39 (K)**
 - (f) Grounds raised: **Motion Under Rule 39 (K) Of The Alabama Rules Of Appellate Procedure To Add An Additional Or Corrected Statement Of Facts to the Court's Memorandum Opinion of August 3, 1990. This motion also was DENIED NO OPINION on September 21, 1990.**

(g) Did you seek further review by a higher state court? **Yes**

If yes, answer the following:

(1) Name of Court: **Supreme Court of Alabama**

(2) Docket or case number: **CR-89-95 (CC-88-077)**

(3) Result: **Denied**

(4) Date of result: **December 14, 1990**

(5) Citation to the case: **Petition For Writ Of Certiorari to issue to the Court of Criminal Appeals under Rule 39, ARAP.**

(6) Grounds raised:

Ground one - The decision was in conflict with a prior decision of the Supreme Court on the same point of law.

Ground two - The trial court erred to reversal in failing to grant appellant's Motion for Judgment of Acquittal in that the State failed to prove a *prima facie* case.

Ground three - The Defendant was denied a fair trial by an impartial jury due to prejudicial and inflammatory remarks of the deceased's mother during her testimony.

(h) Did you file a petition for certiorari in the United States Supreme Court? **No**

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? **Yes**

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court (a): **Shelby County, Alabama**

(2) Nature of proceeding: **Rule 32 State Habeas Corpus/Post Conviction**

(3) Grounds raised: **Ineffective Assistance of Counsel**

(4) Did you receive an evidentiary hearing on your petition, application or motion? **Yes**

(5) Result: **Denied**

- (6) Date of result: **January 28, 1993**
- (b) As to any second petition, application or motion give the same information:
- (1) Name of court: **Northern District of Alabama, Southern Division**
 - (2) Nature of proceeding: **28 USC 2254 Petition**
 - (3) Grounds raised: **Ineffective Assistance of Counsel**
 - (4) Did you receive an evidentiary hearing on your petition, application or motion? **No**
 - (5) Result: **Denied**
 - (6) Date of result: **June 23, 1998**
- (c) As to any third petition, application or motion, give the same information:
- (1) Name of court: **Shelby County, Alabama**
 - (2) Nature of proceeding: **State Habeas Corpus/Post Conviction**
 - (3) Grounds raised: **Newly Discovered Evidence And Actual Innocence.**
 - (4) Did you receive an evidentiary hearing on your petition, application or motion? **No**
 - (5) Result: **Denied With Prejudice**
 - (6) Date of result: **March 5, 2004**
- (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
- (1) First petition: **Alabama Supreme Court**
 - (2) Second petition: **11th Circuit Court**
 - (3) Third petition: **Alabama Supreme Court**
- (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: **Not Applicable**

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

Comes now Ronald Patrick Swiney (“Petitioner”) who has exhausted his remedies in the courts of the State of Alabama and is in custody in violation of clearly-established federal law. This Court has federal question jurisdiction over Petitioner’s exhausted State criminal case because it contains Constitutional right violation claims and is in compliance with 28 U.S.C. 2254. Petitioner is pending approval from the 11th Circuit Court of Appeals to proceed with a second habeas corpus petition to the United States District Court, Northern District of Alabama, Southern Division. Petitioner filed Motion for APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION 28 U.S.C. § 2244(b) in the 11th Circuit on May 11, 2006 and Clerk of the Court returned it on May 15, 2006 based on a form error; the corrected motion was filed on May 17, 2006. The AEDPA deadline for filing in Federal District Court is June 9, 2006. Newly-discovered evidence of exculpatory material was discovered in 2003 and timely presented to the Alabama courts. During adjudication of the state habeas corpus petition, materials clearly disclosing evidence tampering by the Prosecution at trial were discovered. Withheld exculpatory evidence and evidence tampering prejudiced Petitioner at trial and resulted in an unreasonable conclusion by the jury. Petitioner avers that he is innocent of this crime and is incarcerated by the Respondent in violation of clearly-established federal law and rights guaranteed under the 5th, 6th, and 14th Amendments to the United States Constitution. To correct a manifest injustice, this Honorable Court must ORDER that the conviction be reversed or that the case be remanded for a new trial.

BACKGROUND

Mr. Swiney served his community well as a police officer in good standing for 13 years, during which time he nearly lost his life in the line of duty during a drug ring investigation wherein two State officials were sent to Federal Prison for their crimes.

There is no dispute that this crime was heinous. Mr. Swiney avers that unknown parties, perpetrators who have never been sought by the State, murdered Mr. Swiney's wife, whom he loved, and those perpetrators have never been brought to justice. The State has an interest in finality of judgment while Mr. Swiney has an interest in seeing the person or persons responsible for this crime prosecuted.

The community respected Mr. Swiney and knew that he would not have committed murder. When he was arrested for this 1987 crime, the initial bond of \$125,000 was raised to \$500,000 when the District Attorney (D.A.) lied to the judge saying that Mr. Swiney was a transient and a flight risk. Mr. Swiney's community raised bail both times, thereby showing their faith in his character. He assumed he would be cleared of this crime once the facts came out at trial. Instead, the D.A. built a case with tampered evidence and withheld exculpatory evidence. Defense witnesses could have easily discredited State witness' testimonies, had even one of the available defense witnesses been called. The community was so outraged by the lies they heard at trial that they campaigned and removed the D.A. from office at the next election. They knew for certain that Mr. Swiney was not the picture of a crazed, cold blooded killer the D.A. painted at trial (and the State continues to paint).

Mr. Swiney was as shocked as the community was to find himself convicted of murder. In his heart, he knew he was innocent of murder but self-doubt lingered simply because he was knocked unconscious when the murders occurred. His statement at sentencing reveals his uncertainty: "...I have no memory of what happened. I am a victim... I want to say, you know, I am sorry I done it. Mechanically, these hands did it, but I didn't do it here." This is not a confession as the State alleges. It is the statement of a man resigned to a fundamentally unfair trial. Any lingering self-doubt was dispelled when new evidence was discovered in 2003 which exonerates him.

Throughout the years, there had been no way to bring light to the truth in this case because there is typically little physical evidence to refute a circumstantial case. But now Mr. Swiney has the physical evidence, not only in the form of newly-discovered evidence of actual innocence, but of evidence tampering and prosecutorial misconduct.

FACTS OF THE CASE

Ronald Patrick Swiney was convicted of capital murder in violation of ALA. CODE §13A-5-40(a)(10) (1975) in the Shelby County Circuit Court on June 12, 1989 and sentenced to life without the possibility of parole for shooting two people with a rifle in one scheme or course of conduct.

Mr. Swiney was accused of capital murder that occurred in 1987 wherein his wife and her ex-husband died, due to gunshot wounds, inside Mr. Swiney's marriage home. Mr. Swiney was convicted of this crime on circumstantial evidence in 1989 and sentenced to life without the possibility of parole in the State of Alabama. The State's representation

of this case was that Mr. Swiney intentionally killed the victims by firing a Charter Arms AR-7 .22 caliber semi-automatic rifle, loaded with Remington brand .22 caliber rim fire ammunition, eight (8) times in the living room/dining room/kitchen of his marriage home (hereinafter "enclosed space"), at close or point blank range.

28 USC § 2244(b)(2)(B) NEWLY-DISCOVERED EVIDENCE

After the Federal District Court denied Mr. Swiney's first § 2254 petition in 1998, and after the 11th Circuit Court denied Mr. Swiney's request for Certificate of Appealability in 1999, two forensic reports by the Alabama Department of Forensic Sciences (DFS) were found that had not been presented to the jury at the 1989 trial. One forensic report stated that there was no blood found on Mr. Swiney and the other forensic report stated that there was no gunshot residue (GSR) found on Mr. Swiney. The GSR report, and associated disclaimer states:

“Laboratory analysis failed to reveal conclusive evidence that the above-named person fired a weapon, handled a fired weapon, or whether the hands were in close proximity to a firearm when it was discharged.”

Disclaimer: “It should be noted that certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination.” (N-Exhibit 3)¹

Mr. Swiney's newly-discovered evidence is that the disclaimer on the GSR report is misleading. Under the specific conditions of this crime, the disclaimer is false. This disclaimer created a false reliance at trial and direct and collateral appeals and had a profoundly biased affect on Mr. Swiney's due process rights. The report states that

¹ “N” refers to page or exhibit numbers in the Petition For Relief From Conviction Or Sentence

laboratory analysis did not detect GSR on Mr. Swiney and the disclaimer states, essentially, that not finding GSR may be meaningless. This disclaimer was not questioned by forensic laboratories or the legal community. The newly-discovered evidence shows that this disclaimer does not apply to .22 caliber Remington rim fire ammunition fired from an AR-7 rifle multiple times in an enclosed space. Had trial Counsel not relied upon this disclaimer, he would have presented this exculpatory evidence at trial.

Attempts were made to procure the original evidence in this case in order to subject the actual evidence to further testing. All attempts failed due to alternating claims by government custodians that the evidence had been either lost or destroyed and requirements that a subpoena issue before the evidence would be released. Since Mr. Swiney no longer had his case before the courts, a subpoena was due to be disallowed. The inability to procure the original evidence in this case led Mr. Swiney to procure the services of Dr. Jon Nordby, Ph.D., D-ABMDI, of Final Analysis Forensics in Tacoma, Washington.

Dr. Nordby is a renowned forensic specialist. He has authored several books on various subjects within forensic sciences. Dr. Nordby specializes in Forensic Science & Forensic Medicine, Medico-legal Death Investigation; Logic, Ethics & Police Policy; Criminalistics; Bloodstain Pattern Analysis, Ballistics & GSR testing, Trace Evidence Analysis; Scientific Crime Scene & Event Reconstruction, and Scientific Methodology. He has guest lectured across the United States and Canada. Dr. Nordby's teaching career

spans 26 years; and he has received many formal honors for his work. A complete list of Dr. Nordby's qualifications was included as an exhibit in Mr. Swiney's Rule 32 petition.

Dr. Nordby subjected the state's crime scene scenario to scientific forensic analysis using a replica AR-7 .22 caliber rifle and .22 caliber Remington rim fire ammunition and a space that duplicated the crime scene as closely as possible to determine whether a shooter could commit this crime without any GSR or blood present on his person.

Dr. Nordby and Dr. Glenn Larkin, MD DABFM FACFE (forensic pathologist) developed the protocol for conducting a weapons test in compliance with standard forensic protocols. Following this recreation of the crime scene, Dr. Nordby subjected the gun shot specimens to scientific testing for the detection of GSR.

During the scientific testing, Dr. Nordby investigated the characteristics of the AR-7 .22 caliber rifle. He found that the weapon, unlike other .22 caliber weapons, is an extremely dirty weapon wherein GSR is literally blown-back from the barrel of this weapon in copious amounts covering the weapon and the shooter. This blow-back was filmed during the crime recreation tests, and was detectable on film. Dr. Nordby discovered that when .22 caliber Remington rim fire ammunition was fired from the AR-7, GSR spews from this weapon in such copious amounts that GSR would be detectable on the shooter by "every means employed by forensic science." (N-Exhibit 1, p. 20-21) Therefore, it would be impossible for anyone to shoot an AR-7 with .22 caliber Remington rim fire ammunition eight (8) times in an enclosed space without being covered with GSR. (N-Exhibit 1, p. 27) This evidence shows, without a doubt, that the DFS GSR report disclaimer is false under these conditions.

While Dr. Nordby used infrared spectroscopy (IS), scanning electron microscopy (SEM) and electron dispersion sampling (EDS) in his experiments, none of those laboratory techniques or equipment comprises the newly-discovered evidence in this case, they are merely tools used by science to conduct experiments. The newly-discovered evidence is Nordby's hypothesis that was subjected to experiments using the scientific method resulting in an analytical discovery that can be duplicated. Dr. Nordby made this discovery because he objectively applied the scientific method in his thinking and testing procedures in order to determine exactly how physical matter behaves.

We can, appropriately, compare Nordby's discovery to new discoveries regarding DNA analysis, scientists involved in DNA techniques carried out various physical experiments on body fluids like blood to determine whether blood could be chemically-differentiated from paint and found that it could. That finding was a new discovery. This DNA analysis continued over the years until a scientist asked an important question: can the DNA from different people be differentiated from each other with a reasonable certainty? By analyzing a single DNA marker, scientists could differentiate within a statistical probability that a fluid sample had a likelihood of say 1 in 1,000,000 of originating from a particular person. That discovery led to more scientific research until science could differentiate fluids as originating from a particular person using six markers. At each of these stages, a scientific discovery was made that could not have been made before a scientist posed a hypothesis and subjected that hypothesis to the scientific method. All scientific discoveries, from medicine to astronomy are made in this manner and this is widely known in the scientific community as the "scientific method."

Other laboratories were not aware of this behavior of physical matter prior to Nordby's discovery in 2003 because no other scientist posed the question (hypothesis) that resulted in a scientific experiment to determine whether the hypothesis was true or false.

Nordby's findings show that the DFS GSR disclaimer misled every attorney and judge at trial, direct appeals and collateral appeals in this case to assume that the lack of GSR was not exculpatory evidence. Nordby's discovery shows with a certainty that the GSR finding is exculpatory.

At the 2003 state habeas corpus proceeding, had the court conducted expert witness qualification it would have recognized that this is newly-discovered evidence that could not have been discovered through exercise of due diligence and would not have dismissed the petition. Instead the court gave deference to the State's witness Ed Moran, a witness who presented information about the scientific testing used by DFS in 1987 which was based upon the false assumption that the GSR disclaimer was applicable in this case. In 1987, prior to Nordby's discovery, everyone relied upon the DFS disclaimer: that not finding GSR on Mr. Swiney was not exculpatory because "certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination." Dr. Nordby showed in 2003 that the DFS GSR disclaimer created a false reliance that has prejudiced Mr. Swiney since trial.

Mr. Swiney's trial counsel built his trial strategy on the misleading GSR disclaimer not realizing that the GSR test was actually exculpatory evidence. This assumption circumvented a defense and biased the proceedings in violation of Mr. Swiney's constitutional right to due process. While the two forensic reports regarding GSR and

blood were available through the State's "open file" policy, both reports were withheld from the jury as unimportant to Mr. Swiney's defense. It is now clear that both reports are exculpatory.

The State did not find any blood specimens on Mr. Swiney as revealed in the DFS blood report. The DFS blood report states that clothing worn by Mr. Swiney was analyzed for bloodstains, and that none were found on any of his clothing. (N-Exhibit 4) According to Dr. Nordby's expert testimony, if no bloodstains were found on his clothing, then Mr. Swiney did not fire a weapon at close or near contact range, the scenario posed by the State at trial, striking either victim of this double homicide:

"This finding is very significant. Not only was there no visible bloodstain pattern, but no blood at all was detected on his clothing. Therefore, Mr. Swiney could not have fired a weapon at a close range and struck either decedent in the manner described by the State." (N-Exhibit 1, Nordby Report, p. 7)

The lack of blood on Mr. Swiney's clothing was presented as additional exculpatory evidence at the state habeas proceeding, however, the State did not defend this exculpatory evidence and the Court gave no opinion about this in its ruling.

The State did not introduce Mr. Swiney's clothing at trial. We already know that there was no blood found on the clothing because DFS reported that finding. However, a logical assumption arises: if the clothing had blood or GSR on it, the State certainly would have presented this evidence in support of its case. Since there was no blood found on the clothing, the State had no reason to present the clothing to the jury as physical evidence of guilt and the State did not present it. The State has never revealed evidence of GSR testing of Mr. Swiney's clothing or the AR-7 rifle, however we know

that additional GSR analysis was conducted by DFS. The State Medical Examiner's transmittal letter to the District Attorney for the subject GSR report states that "Further laboratory analyses are being conducted and additional memoranda will be sent to you when it is completed." (N-Exhibit 3) This "additional analyses" has never been revealed to Mr. Swiney. Logic dictates that if GSR had been found on Mr. Swiney's clothing or the rifle the State certainly would have presented that physical evidence of guilt to the jury. The State did not present any additional findings regarding GSR on the clothing or rifle to the jury because the clothing and rifle did not contain GSR.

The State's defense presented in the state habeas corpus response appears to overcome Mr. Swiney's burden of proof simply by stating that GSR can be easily removed from the hands, therefore, the GSR report is meaningless. A reasonable person must pose two questions: 1.) If lack of GSR on the hands is meaningless why would they conduct hand swab and FAAS analysis tests at all? and 2.) If they expected to find GSR on the hands and found none, wouldn't they proceed to test for GSR on other physical evidence?"

DFS may have tested for GSR and blood on the rifle and GSR on Mr. Swiney's clothing but findings have never been revealed to Mr. Swiney and the prosecution did not reveal the presence of GSR or blood on the rifle or Mr. Swiney's clothing at trial or on appeal. It is logical and reasonable to conclude that there was no GSR or blood found on these items otherwise the State would have presented that evidence.

28 USC § 2244(b)(2)(B) DUE DILIGENCE

Petitioner could not have discovered the results stated in Dr. Nordby's scientific report before 2003 through the exercise of due diligence because the entire scientific community

thought the GSR disclaimer was true under all conditions and did not question the scientific validity of the disclaimer. The lack of questioning is not different than what occurred in the scientific community regarding DNA analysis. Dr. Nordby, due to his education, experience, and expertise, questioned the validity of the GSR disclaimer and posed the hypothesis that the disclaimer may not be true under specific conditions. Nordby subjected his hypothesis to rigorous and objective scientific experimentation. This experimentation objectively supported that the hypothesis is true. Dr. Nordby's experiment can be duplicated by any scientist to see that his findings are correct. The DFS could duplicate Dr. Nordby's experiment, subjecting the original evidence to these tests and their experimentation would support Dr. Nordby's findings. This is a basic premise of the scientific method: experiments can be exactly duplicated.

Dr. Nordby discovered that the GSR disclaimer was false under specific conditions in 2003. While the GSR disclaimer may remain true under some conditions, in conditions where an AR-7 rifle, using .22 caliber Remington rim fire ammunition is fired multiple times in an enclosed space, the disclaimer is false and Dr. Nordby proved that it is false.

Until Dr. Nordby posed the scientific question and conducted his experiments in 2003, the forensic community relied upon the disclaimer as true which led the legal community, including defense Counsel at trial and appeals Counsel at direct and collateral appeals, to believe the disclaimer was true and reliable and was, therefore, not exculpatory. Dr. Nordby showed, through his new evidence that the disclaimer is untrue under the specific conditions of this case and that the GSR report with its disclaimer is, in fact, exculpatory.

In the state habeas corpus proceedings, the State did not respond to Dr. Nordby's scientific discovery that the disclaimer is false under specific conditions related to this case; instead the State argued that Dr. Nordby used old technology in his test, therefore, this information could have been discovered through exercise of due diligence. This argument is ludicrous and irrelevant to the newly-discovered evidence in this case. The State itself could have discovered this new evidence had it exercised due diligence in the truth-finding process however the State did not question the GSR disclaimer prior to 2003 either. No person at DFS, or other forensic laboratories (per laboratory affidavits procured by Petitioner prior to 2003) (N-Exhibit 7), or the legal community had previously questioned whether the information presented in the GSR disclaimer was misleading or specifically false in the condition of this case. Anyone could have questioned the truth of this disclaimer just as scientists questioned DNA analysis potential. Dr. Nordby is the first scientist to question the disclaimer and subject it to scientific tests that duplicated specific conditions. It is Dr. Nordby's caliber of expertise in the field of investigative forensic science that time stamped this newly-discovered evidence in 2003. Dr. Nordby's education, experience, and expertise are a unique combination that had to be present in order for this evidence to be discovered.

This evidence could not have been discovered earlier through the exercise of due diligence even though scientific instrumentation employed by Dr. Nordby was available earlier. Just as is the case with DNA analysis, even though instrumentation and technologies were available prior to the discovery of uniquely-identifiable DNA, the six DNA markers could not have been discovered without a scientist first posing the hypothesis that if one marker was available were there more DNA markers that could

uniquely identify a person? The very essence of a "discovery" requires that a human being be involved. Technology, on its own, can discover nothing. The State failed to apply reliable analyses to its own reasoning. It is impossible to disconnect the scientist from scientific experimentation, instrumentation, and technology. While technology can advance to a stage where previously undiscovered information can be discovered, advancement in technology does not stand alone as the only impetus for newly-discovered evidence. The State's reasoning does not stand up to the most elementary scrutiny.

The trial court held that Petitioner was procedurally barred under Alabama's Rule 32.1(e) provision based upon its inappropriate determination that the newly-discovered evidence in this case is not newly-discovered evidence. That determination was not a reasonable conclusion based upon the evidence presented. Had the trial court understood the technical information or science presented in the newly-discovered evidence it would not have concluded that Petitioner was time barred. Had the trial court taken the initiative to recognize that the State's actions were designed to commit fraud upon the court, it would not have enforced an inappropriate procedural barrier.

UNDISPUTED FACTS

1. It is undisputed that the DFS report says there was no gun shot residue found on Mr. Swiney's hands. (N-Exhibit 3)
2. It is undisputed that the DFS report says there was no blood found on Mr. Swiney's clothes or shoes. (N-Exhibit 4)

3. It is undisputed that neither of the two above DFS reports was introduced as evidence at trial. (List of Exhibits presented at trial at approximately p. 056 – page is not numbered)
4. It is undisputed that the DFS testified to deviating from standard autopsy protocol at the request of the State’s investigator. (R-806)²
5. It is undisputed that the DFS did not dust the telephone at the crime scene for fingerprints (R-975), even though that telephone was a key element to State's trial strategy. (R-738, R-937)
6. It is undisputed that the shot through the kitchen screen and window was the lynchpin of the State's circumstantial case. (R-426, R-427, R-428, R-429, R-430, R-434, R-435, R-445, R-459, R-460, R-509, R-510, R-512, R-513, R-514, R-523, R-967, R-980, R-981, R-982)
7. It is undisputed that State could not place the AR-7 rifle (State’s Exhibit #47 at R-494) in Mr. Swiney’s hands at any time. (R-813)
8. It is undisputed that a determination could not be made as to whether the bullets recovered from the male victim’s body had been fired from the alleged murder weapon. (R-749, R-751-752) The same was true of the fourth bullet recovered from the female victim’s body. (R-752)
9. It is undisputed that the conviction was based solely on circumstantial evidence. (Magistrate’s Findings, 1998, p. 18, para 2)
10. It is undisputed that there were no witnesses for the defense called to testify at the trial, although several witnesses were available. (R-811-908 defendant’s case)

² “R” refers to page numbers in the trial transcripts

11. It is undisputed that there was one witness for the defense subpoenaed who was never called to testify. This witness was Mr. Swiney's sister who made the 911 call. (R-422)
12. It is undisputed that the State has destroyed the GSR swabs that were allegedly used to test Mr. Swiney's hands (Court's ORDER, 2004, p. 16 footnote) and lost, destroyed, or refused to produce other evidence without court subpoena. (N-Exhibit 5)
13. It is undisputed that the State cannot or will not produce any of the physical evidence. (N- Exhibit 5) (Court's ORDER, 2004, p. 34)
14. It is undisputed that the DFS testing methods for GSR were not revealed until the year 2003. (State's Motion to Dismiss, Exhibit B affidavit of State's expert)
15. It is undisputed that the defense relied on State's "open file" policy. (Magistrate's Findings, 1998, p. 5, para (1))

DISPUTED FACTS

1. It is disputed that the Charter Arms AR-7 .22 semi-automatic rifle is the murder weapon. (N-Exhibit 1, p. 49 para 2-4 and p. 50 para 1-2) (R-795) Refer to 8 Undisputed Facts above.
2. It is disputed that the disclaimer on the DFS gunshot residue report applies across the board to all weapons firing .22 caliber rim fire ammunition. (N-7, para 3) Refer to 1 Undisputed Facts above.
3. It is disputed that the bullets listed in the DFS ballistics report are all from the same weapon. (R-795) (N-Exhibit 1, p. 45) (NR-Exhibit D, p. 15 para E)³ Refer to 8 Undisputed Facts above.
4. It is disputed that any shot was fired through the kitchen window (R-426) indicating one clear component of evidence tampering.
5. It is disputed that Mr. Swiney lied about not knowing what happened that night. (NR-7-8 and 22-23)
6. It is disputed that Mr. Swiney's efforts to involve police in tracking down the male victim earlier that day for driving his wife's vehicle while drunk and without a license constituted overwhelming evidence that Mr. Swiney killed him that night. (State's response brief November 2003, p. 3-5 – and generally all other briefs by the State) (NR-6, para 3)
7. It is disputed that Mr. Swiney speaking to friends to locate his wife earlier that day constituted overwhelming evidence that Mr. Swiney killed her that night.

³ "NR" refers to page number and exhibits in the Petitioner's Response to State of Alabama's Motion to Dismiss

(State's response brief November 2003, p. 5 – and generally all other briefs by the State)

8. It is disputed that the female victim was fully clothed when she was shot. (R-819, R-821, R-975) (N-Exhibit 1, p. 6, para 4, 5 & 6) (NR-Exhibit D, p. 8, para 7; p. 21, para 3)
9. It is disputed whether two State witnesses committed perjury at trial when they attested to the time of death of the victims. (R-552-554) (NR-beginning at p. 10)
10. It is disputed whether the newly-discovered evidence meets the definition of newly-discovered. (Court's ORDER, 2004, p. 16 footnote)
11. It is disputed that Mr. Swiney admitted guilt. (R-1044-1047)
12. It is disputed that exculpatory evidence was withheld by the State. (Appellant's Brief and Argument Oral Argument Requested, CR-03-1163, p. 58)
13. It is disputed that the Prosecution instructed the DFS to deviate from standard laboratory protocols to preclude a manslaughter defense. (R-806)
14. It is disputed that Mr. Swiney is guilty of these crimes. (R-001)
15. It is disputed that the trial court abused its discretion when it dismissed this case without a hearing or oral argument. (Appellant's Brief and Argument Oral Argument Requested, CR-03-1163, p. 13)

GROUND WHEREBY RELIEF IS DUE TO BE GRANTED

GROUND 1: The Court abused its discretion when it refused to hear expert witnesses for the Petitioner and admitted unreliable testimony from the State in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

The U.S. Supreme Court has held that judges must only admit scientific evidence when it is reliable. The Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), that once a court determines that the evidence is reliable, it must then satisfy itself that the evidence will assist the jury or trier-of-fact. Under *Daubert* and the F.R.E., expert testimony should be excluded if it is not relevant to the issue in the case. State defenses in state habeas corpus proceedings did not assist the trier-of-fact; State defenses did not refute Mr. Swiney's newly-discovered evidence. State defenses merely presented an irrelevant opinion that was unrelated to Dr. Nordby's findings and should have been excluded from judicial consideration.

The State's recently-revealed testing processes in this case were remarkably unsound, unreliable and misleading. The State's expert, Mr. Moran, revealed these unsound processes (the "old" testing) in an attempt to undermine Mr. Swiney's burden of proof by making an end-run around scientific fact (the "new" testing). The trial Court gave great importance to the "old" testing that was done by the State, and compared the "old" testing to the "new" testing. The Court did not address Mr. Swiney's new evidence. Instead the trial Court held that the "new" testing performed by Dr. Nordby were not ". . . relevant to the test performed by the Department of Forensic Sciences in 1987" See Court's Order, p. 16, para 1. This finding is not supported by the evidence and is irrelevant to the issues in this case.

Mr. Swiney avers that the Court's conclusion is not based upon solid scientific fact. The "old" testing allegedly employed FAAS testing of hand swabs to detect an element (antimony) that DFS knew was not present in the subject ammunition (Moran's affidavit,

Appendix B, State's Motion to Dismiss). The only conclusion that could explain why DFS conducted a test for a non-present constituent is that they were attempting only to determine whether Mr. Swiney fired the subject ammunition or some other ammunition (one that contained antimony). The "inconclusive" results were interpreted by DFS as a conclusion. That conclusion was that "this does not mean that the defendant did not fire a gun"

Disclaimer: "It should be noted that certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination." See N-Exhibit 3.

Had the "old" testing been actually scientific or reasonable, the DFS would have tested for constituents known to be in the subject ammunition (barium or lead) rather than a constituent they knew could not be present. The Court's conclusion represents a total lack of scientific understanding regarding the evidence. The "new" testing discovered in 2003 by Dr. Nordby, found that the subject weapon and ammunition (fired 8 times in an enclosed space) would deposit copious amounts of GSR that would have been detectable by any means performed by a forensic laboratory if GSR were present making the GSR disclaimer patently false in this case. The Court's conclusion that there is no relevance between the two testing methodologies is not a solid basis for finding that the "new" testing results are not newly-discovered evidence. The Court's deference to unreliable testimony over reliable testimony without even a cursory assessment of reliability on the part of the presented witnesses is contrary to *Daubert* and resulted in an unreasonable conclusion.

The reason that the conclusion is not reasonable assumes that the testing performed by the DFS in 1987 represent the "best and final" testing available in the scientific community, both in 1987 and today. The "new" testing, pled and offered for scientific verification by Mr. Swiney, was perceived by the trial court to be a less reliable and less valid testing method of the same materials. The assumptions underlying the conclusion reached by the trial Court were that two tests are available, with one of these test results being valid and the other test result being invalid. The Court erred when it focused on the tests rather than the results of the tests. Mr. Swiney contends that the facts do not support this reasoning and the facts do not support the conclusion reached by the trial court. He urges that the conclusion reached by the trial court, and the order denying his habeas corpus petition are not supported by the law or by the facts and that this conclusion was the basis for procedurally barring Petitioner.

The State's expert, Ed Moran, has shown that unsound testing methods were used by the DFS in this case. Mr. Swiney refuted the State's expert's claims that the DFS tested for GSR only on Mr. Swiney's hands using swabs which have now been destroyed and the test was analyzed for an element the State knew would not be present (NR-25 last para, NR-26). No reasonable person would consider Mr. Moran's testimony reliable. The State contends that meaningless science by the DFS voids the scientific opinions of Mr. Swiney's experts. This is a blatant attempt to circumvent due process in violation of *Daubert*. The evidence in this case is clearly exculpatory and the State has tainted the evidence throughout this case and again by offering an irrelevant opinion by Mr. Moran. The "dignity of the United States cannot allow a conviction based on tainted evidence," *Mesarosch v United States*, 352 US 1.

Under F.R.E. 403, relevant evidence can be excluded on the grounds of prejudice, confusion or waste of time. The trial court should have excluded Mr. Moran's testimony under *stare decisis* and would have excluded it had the court attempted to "satisfy itself that the evidence is reliable" under *Daubert*. The court would have recognized that the probative value was misleading. Even if Mr. Moran's testimony were relevant, which it was not, the State's arguments regarding that evidence were clearly designed to mislead the Court.

The Federal Rules of Evidence, F.R.E. 702 demands that an "expert witness" be examined and cross-examined by any due process means (litigation, discovery, or interrogatories). Mr. Swiney's forensic experts, Jon Nordby, Ph.D. D-ABMDI and Glenn Larkin, MD DABFM FACFE, both of whom submitted their curriculum vitae to the Court, have shown through sound forensic scientific methods that the State possesses exculpatory evidence that was withheld in violation of clearly-established federal law. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The general acceptance test, established in *Frey* and *Daubert* was met by Mr. Swiney's experts. The experts are qualified in their respective fields but the trial court dismissed their testimony out-of-hand. The dismissal was so flagrant that Dr. Larkin's affidavit (NR-Exhibit C) and Dr. Larkin's report (NR-Exhibit D) were wholly ignored by the Court.

The purpose of expert testimony is to provide understanding to those of us without technical knowledge. Expert witnesses must convince the trier-of-fact that their testimony is sound. These witnesses are subjected to the adversarial principle in order to extract the truth from their findings as those findings support or falsify elements

presented as evidence. Without expert testimony, courts and lawyers are ill-equipped to answer questions of fact in this environment of vast technological advancement. Experts are willing to serve in our courtrooms to further the truth-finding process knowing that their knowledge, opinions and qualifications will be subjected to thorough scrutiny. In the habeas corpus proceedings, the Court made no attempt to qualify Mr. Swiney's witnesses or the State's witness. The Court dismissed Petitioner's witnesses out-of-hand while relying upon the State's witness without qualification in the face of clear misleading testimony.

The state trial court did not subject any of the presented experts to scrutiny or hold hearings, hear oral arguments, or subject these experts to litigation, discovery, or interrogatories in order to ascertain the weight of expert testimony. Instead, the court relied upon the State's wanton dismissal of Mr. Swiney's experts while relying on the convoluted and unreasonable testimony of Mr. Moran.

The action of the state courts violated the rights granted to Mr. Swiney by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Based upon these flagrant violations of clearly established federal law, relief should be GRANTED. At a minimum, Mr. Swiney should be afforded the opportunity to present his newly-discovered evidence in a forum that is not biased beyond State presumption-of-correctness.

GROUND 2: The State has engaged in deliberate attempts to convict and maintain the conviction of an innocent man in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and the Racketeer Influenced and Corrupt Organizations Act (RICO).

Governmental agents have a great deal of discretion when deciding how to exercise the powers of the government. The term "extortion" means the obtaining of property from another, with his consent, (as opposed to robbery which is without consent) induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. *The Hobbs Act* 18 U.S.C. S 1951(b)(2). When a person is convicted of a crime, all property, as well as freedom, is taken from him under color of official right. When an agent engages in extortion "under color of official right," he is using the governmental powers with which he is entrusted to gain personal or illegitimate rewards.

Extortion under color of official right occurs when an agent of the government uses his or her legitimate governmental powers to obtain an illegitimate objective. Governmental power, by its nature, is legalized extortion. Pursuant to the basic social contract upon which all governments are based, people have consented to the government's use of extortion to keep all of us in line and to make sure that we all abide by the prevailing standards of decency. The government's power to extort proper behavior from each of us is limited only by due process.

At any time and in any direct or collateral appeal or state habeas corpus proceeding since 1989, any judge, prosecutor, district attorney or other officer of any court could have affected this case in furtherance of due process. Although ample opportunities were presented, for 17 years prosecutors have used procedural barriers to maintain a conviction that is clearly illegal. Finally, in 2003, newly-discovered evidence became the impetus to expose elements of extortion activities by prosecutors. Rather than utilizing the adversarial principle, the courts chose to heed only the State's expert, Mr. Ed Moran,

with his wildly unbelievable defense. Coupled with the newly-discovered evidence in this case, Mr. Moran's clearly irrelevant testimony is the very testimony that revealed the pattern of *Brady* violations by undermining fiduciary confidence in the State's trustworthiness.

The trial court's refusal to hear expert witnesses, other than the aforementioned outrageous defense presented by Mr. Moran, was coupled with *ex parte* communications between the State and the Court. The Alabama Court of Appeals refused a hearing and dismissed the appeal. The Alabama Supreme Court refused to hear the case. While exculpatory evidence and proof of evidence tampering clearly shows that Mr. Swiney is innocent of this crime, the State's case showed that Mr. Swiney could not have committed this crime, and expert testimony proved that the State's case amounted to an illegal prosecution and continued illegal confinement. The Alabama courts dismissed Mr. Swiney as though due process has no meaning in the State of Alabama.

RICO encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 452 U.S. 576 (1981). A RICO enterprise need not be economically motivated. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1993). Proceedings throughout this case show overwhelming evidence of racketeering as defined by Congress in the Racketeering Influenced and Corrupt Organizations Act in violation of due process. Prosecutors and judges are an "association-in-fact enterprise" with a common or shared purpose to uphold the conviction of Mr. Swiney in violation of the rule of law.

Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 769 (8th Cir. 1992)

Admittedly, circumstantial evidence can be irresistible enough to convict but when exculpatory evidence is withheld from defense counsel and the jury, a proceeding becomes overwhelmingly biased against the defendant and a violation of due process protections. Due process exists to prevent what has occurred in Mr. Swiney's conviction and appeals. When the State withholds exculpatory evidence, direct and collateral appeals are heavily biased in violation of due process. When Judges determine the outcome of a case based upon a presumption-of-correctness that violates minimal standards of reasonableness, due process is frustrated.

The State's response to Mr. Swiney's newly-discovered evidence highlighted a pattern of *Brady* violations, evidence tampering, and prosecution targeting in violation of Constitutionally-guaranteed rights and clearly-established federal law and in direct opposition to the truth-finding process. While this pattern was suspected prior to 2003, State procedural barriers prohibited Petitioner from presenting evidence that proves his innocence. The Prosecution had the burden to prove its case beyond a reasonable doubt which it did only due to absence of defense. Petitioner was illegally convicted and has borne the burden of proving his innocence for 17 years in a legal environment replete with procedural barriers. Facts (not conjecture) reveal the violations of law that occurred to convict and maintain the conviction of Mr. Swiney:

1. **Withholding evidence to support trial strategy.** The alleged murder weapon was found in the possession of Mr. Swiney's mother and could not be placed in the possession of Mr. Swiney. (R-815) Experts did not determine whether the alleged murder weapon was actually the murder weapon. See N-Exhibit 1, p. 49, para 2-4 and p. 50, para 1-2;

(R-795). Mr. Swiney owned only an AR-7 rifle, therefore the State fixated Mr. Swiney as the target of prosecution and fit this rifle to the crime regardless of evidence that strongly suggests the use of multiple weapons (see Item 3 below) and the apparent absence of GSR and blood on this rifle. (R-426 & 795); See N-Exhibit 1, p. 42; See NR-7-8 and 22-23, N-Exhibit 1, p. 45; See NR-Exhibit D, p. 15 , para E.

2. Lack of GSR on alleged murder weapon. Forensic testing apparently did not include GSR testing on the AR-7 prior to or following test firing by the DFS. This is a deviation from standard crime scene and forensic investigation protocol and biased the fact-finding process. Due to recently discovered, withheld *Brady* material, Mr. Swiney questions whether GSR testing was done on the AR-7; no report has ever been released and no claim to that effect was ever made by the State or released to Petitioner. If forensic testing revealed no GSR on the AR-7 then this weapon was not the murder weapon and lack of GSR is exculpatory evidence that was withheld from the jury and in the State's "open file" policy. Mr. Swiney avers that the only GSR on the AR-7 today resulted from test firing by DFS in the laboratory. If GSR exists on the AR-7, current ballistics techniques could determine the difference between two test firings by the DFS and the eight shots at the crime scene due to the quantity and quality of GSR present. See NR-4-5 and 23, See N-Exhibit 1, p. 5 subpara 4 and para 2, subpara 1 and footnote.

3. Bias in ballistic testing and crime scene ballistics investigation. Forensic testing failed to identify crime scene bullets and casings as positively originating from the alleged murder weapon (AR-7 rifle). (R-795); See N-Exhibit 1, p. 45; NR-Exhibit D, p. 15, para E. Bullets recovered from the male victim and one bullet recovered from the

female victim were not identified as being a match to the AR-7, possibly indicating a second murder weapon. Refer to item 8 in Undisputed Facts. Taken separately these issues would not necessarily indicate evidence tampering. However, taken together with the bulk of withheld evidence in this case, these issues certainly indicate target fixation and potential exculpatory evidence withheld by the State to build a circumstantial case to convict Mr. Swiney even though the physical evidence did not support the State's representation of the crime to the jury.

4. **Evidence tampering.** Mr. Swiney's counsel is in possession of crime scene photos, released in 2002 by Robbie Owens, current District Attorney for Shelby County. Until Counsel became aware of exculpatory evidence withheld by the State in 2003 and underwent a breach of fiduciary trust these photos did not seem relevant. However, in light of other evidence of crime scene tampering, (see Item 7 below and Ground 3) these photos become vital to the truth-finding mechanism of this Court. These photographs were withheld by the State in violation of *Brady*. The photographs show the outside view of the kitchen window of the crime scene the morning after the crime occurred (when investigators completed all outside investigation). A shot fired through this window was pivotal to the State's case. As we can clearly see from these photographs taken by State witness, Richard Fox, and held until 2002 by the District Attorney's office, there is no bullet hole in this window or in the screen. See Exhibit 1: two photographs, window diagram and chain of custody.

The only photo introduced into evidence at trial of the outside of the house was State's Exhibit #26, a distance photo. State's Exhibit #7 showed a close-up photo of a hole in

glass but there were no *in situ* photos for this glass hole disclosed to the defense or presented at trial. The photographs presented herein are the *in situ* photos taken by Sergeant Fox and held by the Shelby County D.A. until 2002. Broken glass, allegedly removed from this window, was presented at trial as three broken pieces of glass (R-758) allegedly removed from the window in State's Exhibit #7. Clearly, if the glass was removed from some window, it was not the kitchen window that the State's case was built upon. State Exhibit #7 was clearly fabricated evidence meant to commit fraud upon the Court. There was no reason to withhold these *in situ* photographs from the jury except that the photographs do not support the State's case.

Mr. Swiney's habeas corpus on actual innocence was dismissed with prejudice as untimely and procedurally barred without a hearing or oral argument on March 5, 2004 after receiving State's Motion to Dismiss on November 12, 2003. This photo did not become known as evidence tampering until after State's Motion to Dismiss revealed its fallacious GSR testing method. Had any state court granted a hearing or oral argument, this photo evidence would have been presented. Mr. Swiney is prohibited relief in the state court regarding evidence tampering due to constraints of Rule 32, therefore, this question must be adjudicated under 28 U.S.C. 2254. *Brown v. Hooks*, No. 05-145-28, 11th Circuit Court of Appeals, Decided April 18, 2006.

5. **Exculpatory GSR and blood reports** were withheld from the jury in violation of due process. No GSR or blood were found on Mr. Swiney. See N-Exhibits 3 & 4. This evidence is exculpatory because this crime could not have been committed without GSR and blood in ample supply on the person of the perpetrator. See N-Exhibit 1, p. 7, para 1.

The courts have refused to acknowledge Swiney's forensic experts in this case, relying instead upon the State's wanton dismissal of these expert reports. The State's expert, Mr. Moran, claimed that the State tested for GSR only on Mr. Swiney's hands using cotton swabs which have now been destroyed and the swabs were analyzed for an element the State knew would not be present. See Court's Order, 2004, footnote, p. 16. No reasonable person would consider this testimony reliable. The State has not yet divulged taking GSR samples of Mr. Swiney's clothing or face although the State has shown a pattern in this case of defending its actions with previously undivulged information in defense of Petitioner's claims. If there was GSR on Mr. Swiney's clothing or body, it would have been detectable. See N-Exhibit 1, p. 20. Had GSR been present on the rifle or Mr. Swiney's clothing, the State certainly would have presented that evidence.

DFS tested the Petitioner's clothing for blood and found none; this exculpatory information was not revealed to the jury. The trial court's ORDER (2004) does not address the lack of blood. In conference with Mr. Swiney's Counsel, Judge Crowson divulged that he was tempted to dismiss the petition because Mr. Swiney could have changed his clothes. (See Exhibit 2 Counsel's affidavit) This argument was not pled by the State. When arrested, Mr. Swiney was wearing the same clothing he had worn all day. (See Exhibit 3 Witnesses' affidavits) No bloody clothing was ever found and the record shows that no investigator ever searched for discarded clothing; there is no evidence that Mr. Swiney bathed or changed clothing and there was no opportunity to do so. This assumption by Judge Crowson was unsupported by the facts and biased in favor of upholding this conviction regardless of the overwhelming evidence of innocence.

The Prosecution certainly would have attempted to prove their case using “hard evidence” if they had it. Instead, they targeted Mr. Swiney for prosecution, ignored and withheld exculpatory evidence, and invented evidence to support a case that was undefended at trial.

6. Exculpatory physical location of Mr. Swiney. A telephone call at the crime scene was a key element in the State's case establishing the time of the murders. A State witness testified that she spoke to the male victim on the telephone at 9:25 p.m., another State witness testified that she telephoned at 9:30 p.m. and another man answered the telephone (R-738) assumed to be Mr. Swiney (R-934). However, Mr. Swiney’s sister called emergency 911 a little before 9:30 p.m. (R-396) to report the shootings while Mr. Swiney was at her house (R-422) where he was subsequently arrested (R-552). Police testimony revealed that it was a 10 minute drive from the crime scene to Mr. Swiney’s sister’s home (R-553). It was physically impossible for Mr. Swiney to be at the crime scene at 9:30 p.m. and 10 minutes away at precisely the same time. The Prosecution knew or should have known that Mr. Swiney was not the murderer because they went to great lengths to establish the exact time of the crime through the State witness’ testimony, knew the time of the 911 call, and knew that Mr. Swiney was 10 minutes away at 9:30 p.m. A reasonable person would deduce deliberate intent by the State to defraud the Court. Whether these witnesses committed perjury or not is unclear but the jury was presented with a physical impossibility shrouded in convoluted information; no reasonable juror could have teased the timeline anomalies apart without copies of the trial transcripts, a map, and many days of deliberation. The jury relied upon the Prosecution to present truthful evidence; that reliance was harmful error.

7. Evidence was destroyed and exculpatory evidence omitted in order to ensure a capital murder conviction in violation of due process. The Alabama DFS deviated from standard laboratory protocols in victim autopsy. Alabama law dictates a charge of manslaughter if a person kills in the heat of passion.

"A person does not commit murder . . . if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof." *Biggs v. State*, 441 So. 2d 989; 1983 Ala. Crim. App. (1983), § 13A-6-2(b). Code of Alabama 1975, § 13A-6-2(b).

DFS took no vaginal swabs of the female victim, thereby destroying the only physical evidence that could have clearly supported such a defense. DFS did not take these swabs because they were instructed by the Corner of Shelby County not to take them (R-805, 806, 807). Further, Petitioner's expert determined that the female victim was not fully clothed when she was shot. (R-819, R-821, R-975) (N-Exhibit 1, p. 6, para 4, 5 & 6) (NR-Exhibit D, p. 8, para 7; p. 21, para 3). The Prosecution avoided a clear anomaly in one of the gun shot wounds (GSR stippling on the skin but not in the corresponding position on her clothing). This is another issue that could not have been deduced by the jury.

Although Mr. Swiney did not commit this crime, had he done so in the heat of passion, mitigating evidence that would have dictated manslaughter was deliberately destroyed by the State. This fact speaks directly to intent on the part of the State to defraud the Court and procure a capital murder conviction in violation of due process.

Mr. Swiney has avowed consistently that he was struck on the head and rendered unconscious after viewing the victims through the kitchen window engaged in a sexual act. (R-420, 868, 951; See police interrogation report). Defense Counsel, Mr. Bell, failed to plead a "heat of passion" defense due to lack of physical evidence to support that trial strategy (no vaginal swabs taken of the female victim). The State's strategy also included a shot through the kitchen window (see Item 4 above) specifically designed to preclude a "heat of passion" defense that the State had to know would be a primary trial strategy in a case of this type.

Further, the State's closing arguments at trial presented an aggravating factor scenario related to the shooting of the male victim, Ronnie Pate. The State's case presented the scenario that a bullet shot through the kitchen window (See Item 4 above) struck Pate in the neck, rendering him paralyzed. The shooter then shot the paralyzed Pate at point blank range. (R-937) Mr. Swiney's expert has shown that the bullets that injured and killed Ronnie Pate were not identified as coming from the AR-7 rifle and more likely originated from a pistol than from a rifle indicating either that the murder weapon was a pistol or a second weapon was involved. Refer to item 8 in Undisputed Facts. See NR-Exhibit D, p. 15, para E3.

Petitioner is stating these facts to show a Prosecution pattern of targeting Mr. Swiney in a manner that is contrary to the evidence and indicative of prosecutorial misconduct and fraud upon the Court.

8. State's failure to redress Constitutional violations. Throughout the collateral appeals process, the State has stood on procedural barriers and the courts have upheld

them refusing to adjudicate this case on the facts. Mr. Swiney's new evidence, presented in the 2003 habeas corpus petition, was also procedurally barred in violation of the legislative intent of State habeas corpus statutes, thereby denying the writ of habeas corpus to Mr. Swiney (See Ground 1 and item 10 in Disputed Facts). The volume of exculpatory evidence in this case demands that the facts be heard on the merits.

At trial, Defense Counsel moved for acquittal following the State's case, "In 18 years of practice of law, I have never ever seen in a Court room what amounts to obstruction of justice, as far as I am concerned, perpetrated by the State of Alabama as far as tampering with evidence and the lack of professional conduct. I submit to this Court that there has been a deliberate and intentional and interference with the investigative process as to the facts in this case." (R-812 to R-823) Counsel's motion was denied.

The trial court abused its discretion when denying Mr. Swiney's petition on procedural bars. The court stated, "There can really be no 'newly discovered evidence' in this case because the swabs that were used to test Swiney's hands are no longer available and, obviously, Swiney's hands can no longer be tested for primer residue." See Court's Order Granting Motion to Dismiss, footnote, p. 16. By this reasoning, the State could simply destroy all evidence used in criminal proceedings to preclude post-conviction relief guaranteed under Alabama's habeas corpus statute and the State of Alabama Unified Judicial System on Records Retention which dictates that records will be retained for 75 years from the final deposition. Also see Ground 4.

"[S]tate and federal courts share equal responsibility to step in and redress violations of the federal constitution." (Judge Myron Thompson, Middle District, Alabama, statement

to the Commission on Safety and Abuse in America's Prisons Feb. 9, 2006, p. 3). The trial court took this responsibility lightly at best and at worst has engaged in deliberate violations of clearly-established federal law. Had the State not withheld exculpatory *Brady* material at trial and tampered with evidence, Mr. Swiney would not have been convicted of capital murder.

Alabama has refused to redress Constitutional violations in this case for 17 years. Instead, it has fallen to Mr. Swiney to prove his innocence by conducting a fishing expedition to uncover *Brady* that the state had a duty to disclose. *Banks v Dretke*, 540 U.S. 668; 124 S. Ct. 125 (2004). The Prosecution clearly committed fraud upon the trial court by tampering with evidence. Direct and collateral appeals courts have shirked their duty by allowing the State to stand on procedural bars in light of overwhelming evidence of due process violations.

9. Abuse of Judicial discretion. Mr. Swiney's habeas corpus petition to the State is based upon newly-discovered evidence, which is a clear provision under Alabama law. The State capriciously argued that this is not new evidence and is, therefore, procedurally barred. The trial court (lacking personal experience with this case and lacking the technical knowledge to determine whether the evidence is new evidence) relied upon the State's flippant assessment of the issue and dismissed, out-of-hand, overwhelming testimony by Mr. Swiney's experts without an evidentiary hearing or oral arguments. This was an abuse of judicial discretion and a violation of substantive due process.

Withheld exculpatory evidence and evidence tampering were detected by Mr. Swiney's experts. These imminently qualified experts (Dr. Jon Nordby and Dr. Glenn Larkin) are

experts in forensics and forensic pathology respectively. Their affidavits are extremely technical and cannot be understood by a person without a working knowledge of crime scene forensics and pathology. *Frey v. U.S., supra, Daubert v. Merrel Dow, supra.* The State presented testimony from only one witness to defend the allegations of Mr. Swiney's experts, Ed Moran from the DFS. Instead of a valid defense, Moran ludicrously claimed that the only GSR test was on swabs which have destroyed and that DFS tested for a GSR constituent that they knew would not be present in the subject ammunition. Moran's affidavit is nothing more than an attempt to circumvent the truth-seeking process and defraud the court by allowing the State to erect a procedural barrier.

10. ***Ex parte communication.*** The trial court ignored Dr. Nordby's discovery of new evidence while erroneously stating facts not in evidence:

“In his experiment, Nordby, or whoever was test firing the gun, employed optimal conditions to obtain gun shot residue. These conditions were: the shooter fired eight times in an enclosed environment, wore a Tyvek suit that is designed to attract gun shot residue, and immediately tested the Tyvek suit for the presence of gun shot residue.” See State Court’s Order, p. 3 and 4:

In this statement, the Court relied upon an ORDER prepared by the State and submitted with the State's response. None of these statements are factual. Nordby employed solid scientific testing to duplicate, as closely as possible, the conditions of the crime scene (the enclosed environment of Mr. Swiney’s marriage home). Tyvek was worn because it is clean, antistatic, electro-neutral and repels particles. (See Exhibit 4 DuPont Statement, Experts’ Statements and Tyvek sample.) Nordby's testing was conducted five months after the weapons test (May 2002; October 2002). (See Exhibit 5 Chain of Custody Receipts.) The Court never endeavored to seek the truth although Nordby's affidavit

clearly stated the scientific methods he used. The State presented a ludicrous defense which the trial Court used in its reasoning.

The product of *ex parte* communication between the presiding judge and the State showed extreme judicial bias which should have resulted in reversal of the Court's decision. 28 USC 144.

GROUND 3: The Courts allowed the State to withhold Brady material in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Mr. Swiney bases his *Brady* claims on the following three exculpatory forensic reports: (1) DFS Primer Residue Analysis report and associated disclaimer, (2) DFS recently-revealed testing methods for GSR, and (3) DFS Examination of Serological Evidence report. See N-Exhibit 3, N-Exhibit 4, and NR-8, para 3. Prosecutors possessed exculpatory information that, if presented in court, would have affected the trial's outcome and should have led the investigation away from Mr. Swiney in the first place. This evidence so strongly reveals the innocence of Mr. Swiney that to continue prosecution in light of the DFS findings in these reports cannot be explained by anything other than targeting by the prosecution and prosecutorial misconduct. Report number (3) listed above, was available to Defense Counsel, however, Counsel's reliance on truthfulness and integrity of the Prosecution caused him to dismiss this report as irrelevant to his defense. The physical report was not withheld from Defense Counsel, however in concert with the GSR disclaimer, led Counsel to believe that the results of this report were also irrelevant.

Defense Counsel, Mr. Bell, defended only four (4) criminal cases in his career and procured convictions in every one of them. In the first Rule 32 proceedings, the trial court determined that Mr. Bell was not ineffective because his incompetence was part of his trial strategy. Bell's trial strategy was based upon misleading information and withheld evidence by the Prosecution. Mr. Bell was not qualified to represent a client in a murder case as any qualified attorney can clearly see. While the Prosecution presented numerous witnesses and argued its case to the tune of 700 pages of trial transcript, Bell did not bother to call one single defense witness although several were available and the Defense case is less than 100 pages. This did not occur because the Prosecution possessed a "slam dunk" case; it occurred because the Prosecution doctored and convoluted evidence with impunity.

Exculpatory evidence was withheld from Mr. Swiney in the course of the "open file" discovery practiced by the State Prosecutor at the trial of this case. The State offered DFS testing as reliable, relevant, material, and competent to Defense Counsel and the jury (and continues to perpetuate that misinformation on the courts) while withholding evidence that revealed Mr. Swiney's innocence. That action constituted a gross misrepresentation of the facts, a violation of the "open file" policy and an egregious violation of due process established in *Brady*.

At trial, the State disclosed only testimony that circumstantially supported its trial strategy. Undisclosed evidence that disproved the State's case: lack of GSR and blood on Mr. Swiney's person and clothing and the true nature of GSR testing were withheld, therefore this exculpatory evidence did not reach the jury or the trial court. At habeas

corpus, this evidence was revealed to the Court but the Court abused its discretion when it lacked technical understanding, chose not to gain technical understanding by hearing expert witnesses, and summarily dismissed the evidence.

“[T]he court finds that these state procedural rules should be applied to Swiney’s rule 32 petition. Accordingly, Swiney’s rule 32 petition is due to be, and is hereby dismissed.” See State Court’s order granting State of Alabama’s Motion to Dismiss Swiney’s Successive Rule 32 Petition, page 11.

The State propagated a circumstantial case and withheld exculpatory evidence (delineated above) to convict Mr. Swiney and to maintain that conviction throughout direct and collateral appeals. In addition, the State still has not revealed the fingerprint report that was transmitted from the DFS laboratory to the District Attorney in 17 years of post-conviction appeals. Mr. Swiney’s forensic team has had no chance to examine what that fingerprint report revealed. Obviously, the fingerprint report does not support the State’s circumstantial case against Mr. Swiney or this would have been presented to the jury.

The purpose of *Brady* and progeny is to prevent the prosecution from presenting a theory of the case that it should have known was misleading while suppressing evidence that would have enabled the jury to undertake informed and meaningful deliberations. The *Brady* rule was violated multiple times in prosecution and appeal of this case.

Specifications regarding the GSR testing were not disclosed at trial or in 17 years of post-conviction litigation. No laboratory methods and finding were revealed until the State's response to Mr. Swiney's habeas corpus petition in 2003. In that response the GSR testing methods used preceding trial were for the first time presented by the State's expert witness, Ed Moran of the DFS. Mr. Moran reportedly perused the laboratory information

of David Higgins, the DFS examiner from 1987. Moran stated that hand swabs were taken of Mr. Swiney, the swabs were tested for antimony using an FAAS test (the swabs were destroyed by this test) revealing no antimony and a report proclaimed that the results were "inconclusive." See N-Exhibit 3 disclaimer at bottom of form. *Prima facie* this testimony may appear to be legitimate; however, several anomalies are immediately apparent. Due to conflicting reports from the State and the sudden divulgence of information heretofore unknown, Mr. Swiney has little confidence that the State is not simply fabricating information to support its defense.

First, Mr. Swiney recalls, in great detail, a paraffin test that was administered and not hand swabs:

“The guy that came and got all my clothes is the one who did the paraffin test. I was expecting it to burn but it was just warm and I remember it on my cheekbone. I was standing in the cellblock at the county jail. He brushed the paraffin on with something then peeled it off not long after that. I distinctly remember hearing the guy saying 'paraffin test' and I didn't know what a paraffin test was, that's why I was expecting it to be hot. That's the first time I ever heard the word paraffin test. I've never been in that situation in the police force. That was the detective division." -- R. Patrick Swiney July 2003. (NR-27)

This recollection contains specificity regarding the tests as Mr. Swiney uses the words "cheekbone," "hot," "burn," "peeled," and "warm." None of these recollections apply to hand swabs. Note that hand swabs were never mentioned by the State prior to the necessity of defending the newly-discovered evidence.

Second, Moran stated that an FAAS test was conducted to test for the presence of antimony. It was widely known in the scientific community that the subject ammunition did not contain antimony until 1989 (this crime took place in 1987). Therefore, we are

asked to believe that Higgins conducted a test for an element that he knew would not be present with swabs that no longer exist. There is clearly no scientific or logical basis for reasoning of this nature. Note that antimony was never mentioned by the State prior to the necessity of defending the newly-discovered evidence.

Third, the test was reported as inconclusive. Mr. Swiney's expert, Dr. Nordby proved through his "new evidence" method that "no person can fire a .22 cal AR-7 rifle in an enclosed space eight times without being covered with GSR that is detectible by any means". See N-Exhibit 1, pages 6, 42, and 53. If Higgins tested paraffin, clothing, or the rifle, he would have seen copious amounts of GSR if Mr. Swiney committed this crime. Had Higgins found any GSR or anything resembling residue (burned and unburned gunpowder, wadding, barium, powdered glass, barrel lubricant), even in minute traces on the clothing of Mr. Swiney or the AR-7, the prosecutor would have certainly shown this to the jury.

DFS apparently conducted no scrapings of the clothing before testing for blood samples and no GSR testing of the rifle. If this is true, then the Prosecution fixated on Mr. Swiney without probable cause because these practices are a standard methodology for any forensic laboratory. If the State possesses the results of scrapings or GSR testing of the rifle, these items have been withheld. The State did not present evidence showing that GSR was detected on Mr. Swiney's clothing or on the rifle; they certainly would have done so if the evidence supported their case.

The State has never revealed laboratory reports disclosing the actual GSR tests conducted upon any of the evidence in this case. Moran could have included Higgins' reports in his

affidavit but he did not. Any reasonable person, when asked to defend an allegation such as that which Dr. Nordby made would expect to provide information with a modicum of reliability. If a construction company were asked by an inspector to show the strength and reliability of its concrete pour, engineers would provide structural test results, break samples, and the exact measurement (ratio) of constituents in the mix; they would not enclose an article from Construction Digest on how to mix concrete! This is essentially what Ed Moran provided. We have only Moran's assessment and that is replete with anomalies indicating exculpatory evidence.

Further exculpatory evidence exists in this case in the form of the Examination of Serological Evidence. See N-Exhibit 4. This report states that clothing worn by Mr. Swiney at the time of arrest was “examined and analyzed for the presence of blood, however, none was detected.” If no bloodstains were found on the clothing, then

“[H]e did not fire a weapon at close or near contact range striking either victim of this double homicide. This finding is very significant. Therefore, Mr. Swiney could not have fired a weapon at a close range and struck either decedent in the manner described by the State.” See NR-Exhibit 1, p.7

Whether the focus is on the lack of scientific methodology employed by DFS, erroneous conclusions relied upon by Defense Counsel, or misstatement of the forensic facts of this case, that doubt undermines the reliability of the Mr. Swiney’s conviction. “[T]he question is not whether the defendant would more than likely not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Shields v. State*, 680 So.2d 969, 1a.Cr.App.,1996. March 8, 1996.

The omission of exculpatory evidence prejudiced Mr. Swiney before the jury in violation of *Brady*. This misrepresentation of evidence by the Prosecution opened the door for the State to procure the conviction with circumstantial evidence.

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. The State continues to perpetuate and embed this misrepresentation of the evidence. Mr. Swiney has shown by a preponderance of the evidence that these reports are exculpatory.

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 no duty to uncover mitigating and exculpatory evidence, the defense, while relying on an open-file policy, may rely on the assurances of the State that exculpatory evidence does not exist. The exculpatory evidence in this case has been concealed for years.

The three essential components of a *Brady* violation exist: the evidence at issue is favorable to the accused because it is exculpatory; the evidence was suppressed by the State; and prejudice ensued." *Strickler v. Greene*, 527 U. S. 263, 283 (1999).

Exculpatory evidence was withheld from the jury, the direct appeals court and the collateral appeals court.

Exculpatory evidence exists and is being suppressed by the State. It was not Mr. 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 Mullan*, 303 F.3d 1222, 1229 (10th Cir. 2002). The State has been "hiding" and Mr. Swiney has been "seeking" for 17 years. New evidence, discovered in 2003, revealed the egregious actions of the State in procuring and sustaining Mr. Swiney's conviction in light of exculpatory evidence.

David Higgins did not test for an element that would detect any gun shot residue, the prosecutor did not disclose the grossly-inadequate method of gun shot residue testing or serological evidence tests to the jury. The State propagated a misleading GSR disclaimer which has come to light as newly discovered evidence and this misleading disclaimer improperly biased the Mr. Swiney at trial. The true nature of the GSR disclaimer was unknown until Mr. Swiney's experts discovered it in 2003.

"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. 479, 428 (1-995). (emphasis added)

Had the jury known that a scientific, physical, and actual impossibility had been placed into evidence before them, it is reasonable to conclude that the outcome of this 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.

Had trial Counsel and the jury known that Mr. Swiney's hands were tested for an element that the DFS knew was absent from the gun powder formulation in the first place (Moran's affidavit, Exhibit B, p. 3, six lines from the bottom, State's Motion to Dismiss), the State's burden would have been undermined and the outcome of the trial would have been different; defense Counsel would have undertaken a line of questioning that revealed this fact to the jury.

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 an AR-7 eight times in an enclosed space and not be covered with gun shot residue, that gun shot residue from this particular weapon would be detectable by a variety of means making the DFS primer residue disclaimer false, and that the scientific and physical evidence was exculpatory for Mr. Swiney, the outcome of the trial would have been different.

Had the jury known this about the AR-7, and if the false GSR report disclaimer had been revealed showing that DFS finding that Mr. Swiney never fired or handled a weapon or was even in close proximity of a firearm when it was discharged, See N-Exhibit 3, the outcome of the trial would have been different because the absence of GSR (in this specific case of an AR-7) meant that Mr. Swiney certainly did not fire the AR-7. The DFS knew or should have known this about the AR-7. The true nature of this exculpatory evidence should not have been withheld from the jury. Withholding this evidence from the jury biased the jury and represents harmful error to Mr. Swiney.

It is not the pleading of a conclusion "which, if true, entitle[s] the petitioner to relief." *Lancaster v. State*, 638 So.2d 1370, 1373 (Ala.Crim.App.1993). It is the allegation of facts in pleading which, if true, entitles a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R.Crim. P., to present evidence proving those alleged facts. *Boyd v. State*, 746 So.2d 364, 406 (Ala.Crim.App.1999)

In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The words, "upon request" are fulfilled within the State's "open file" policy.

Subsequent Supreme Court decisions have held that the government has a constitutionally mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant's right to a fair trial under the Fifth and Fourteenth Amendments' Due Process Clauses. See *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."). The Court cited as justification for the disclosure obligation of prosecutors "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutor serves as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

In this case, justice has clearly not been done and a miscarriage of justice has occurred. FR CivP Rule 26(b)(1) grants parties discovery of unprivileged matter that is "relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things." Due to Mr. Moran's sudden disclosure during State habeas corpus proceedings of unbelievable DFS testing methods, Mr. Swiney contends that disclosure of physical evidence and laboratory testing documents will aid this Court in determination of the facts presented in order to cure this miscarriage of justice.

All of Mr. Swiney's *Brady* claims in habeas corpus proceedings have been ignored by the state courts. The action of the state courts violated the rights granted to Mr. Swiney by the Fifth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution (1901) § 6, Alabama's clear legislative intent, and clearly-established federal law.

Based on these violations of clearly established federal and state law, relief should be GRANTED. Mr. Swiney should be afforded access to the trial evidence to prove to the State that Dr. Nordby's newly-discovered evidence is evidence of actual innocence. This Court should grant a reversal or remand for a new trial consistent with the dictates of due process.

GROUND 4: State cannot reproduce the trial record; the trial record is a fundamental component of the due process provision guaranteed under the Fifth and Fourteenth Amendment of the U.S. Constitution.

The "official record" in a criminal trial comprises five kinds of material. The physical exhibits offered at trial are an important component of the official record. In *Gurley v. State*, the Court of Criminal Appeals of Alabama analyzed *Ex Parte Gingo* against *Arizona V. Youngblood*. *Wilson Calvin Gurley v. State*, 639 So. 2d 557; 1993 Ala. Crim. App., *Ex parte Gingo*, 605 So. 2d at 1241, *Arizona v. Youngblood*, 488 U.S. at 57-58, 109 S. Ct. at 337. In *Gurley*, the Court wrote (quoting *Youngblood* in part):

"there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. . . . If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest . . . "

When *Gurley* was remanded for retrial the Court instructed that the circuit court conduct a hearing to determine the State's culpability for loss of evidence and if the court found that the evidence was destroyed "in bad faith by agents of the State" then it may dismiss the indictment. In *Gurley* a single piece of evidence that was related, not to guilt or innocence, but merely to the death penalty provision was in question. In the Petitioner's case, not only key evidence but all physical evidence has been lost or destroyed by the State.

In *Arizona v. Youngblood*, the Court held that in cases involving only potentially exculpatory evidence, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona, supra*. While *Youngblood* has not been completely resolved, in a totality-of-circumstances analysis of this case the reasoning of *Lowenfield* applies. *Lowenfield v. Phelps*, 484 U.S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988). Dissenters

in Youngblood pointed out that police ineptitude can be as marked a contributor to due process violations as bad faith and that where comparable evidence is unavailable, destruction of this evidence deprives defendants of fair adjudication. In the totality-of-circumstances in this case, evidence was destroyed prior to trial, exculpatory evidence was withheld during and following trial, evidence tampering occurred and 17 years after trial the State continues to withhold and obfuscate evidence.

F. R. Civ. P., Rule 60(b) states that a litigant can request relief from a judgment based upon a showing of “mistake, inadvertence, surprise, or excusable neglect.” Petitioner has met the burden of proof showing that structural errors in the trial mechanism existed at the time of trial and have persisted throughout the appeals process. Newly-discovered evidence coupled with the State’s revelations regarding evidence destruction and tampering show that the appeal mechanism is fundamentally flawed. The State’s unwillingness or inability to produce the official record has resulted in structural errors that constitute extreme deprivation of constitutional rights.

If a federal court is "in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless." *Smith v. Singletary*, 61 F.3d 815, 818-19 (11th Cir. 1995) (quoting *O'Neal*, 513 U.S. at 436) (applying *Brecht* standard). Evidence presented by Petitioner clearly shows that a substantial and injurious effect occurred due to State violations of due process defined by clearly-established federal law. These errors at trial and appeal seriously affect the fairness, integrity, and public reputation of judicial proceedings. *U.S. v. Olano*, 507 U.S. 732. Withheld exculpatory evidence and evidence tampering in this

case meet the totality-of-the-circumstances test of 1988 Supreme Court precedent.

Lowenfield supra.

The Petitioner has made requests of appropriate evidence custodians to procure any of the physical evidence in this case under the correct assumption that the State would argue that the newly-discovered evidence is irrelevant since original evidence was not tested. Responses from these State officers varied but all requests, except for the photograph request from the Shelby County District Attorney's office, resulted in denial. Conflicting reports of "destroyed (hand swabs)," "retained but unavailable without subpoena (DFS records)," and "lost (all physical evidence)," resulted. (See N-Exhibit 5).

The physical evidence (rifle, magazine, unspent cartridges, shell casings, bullets, fragments, and clothing) should have been retained at the Shelby County Courthouse in custody of Donna Gardener, the Clerk of Courts. In 2002, Gardener's affidavit states that physical evidence is no longer available and that: ". . . jail inmates performed the move of a number of boxes and exhibits. . . from the Courthouse to the Health Department Building . . . possible that the Swiney exhibits and evidence . . . were lost or destroyed during the move." (See N-Exhibit 5)

There are clearly two concerns related to Gardener's statement. The first is that the Swiney evidence contained an operational rifle and live ammunition. Allowing jail inmates to move this type of material without sufficient supervision to prevent the loss of these items does not seem credible. For this reason, a definitive conclusion about the whereabouts of this evidence has not been reached.

Secondly, evidence retention is dictated in Alabama by Rule 10(c)(1) of the Alabama Rules of Appellate Procedure wherein physical evidence must be retained by the Clerk of Courts. The State of Alabama Unified Judicial System on Records Retention states:

“Retain 75 years from the final deposition, then file can be destroyed if minute entry is available...In all criminal proceedings which have reached final disposition, exhibits of evidence in criminal cases which have not been released to their owner(s) by Order of the Court, and which are not contraband or firearms, shall be disposed of upon written consent of the District Attorney and the judge who presided over the trial of the case. If the trial judge is no longer active, the consent of the presiding circuit judge shall be obtained in lieu of the trial judge’s consent.” (See form RM 9 Records Retention Schedule, Schedule Number One-A dated July 22, 1980, page 5 and 18 of 43)

These regulations define a legitimate government purpose recognized by the State of Alabama. Petitioner avers that the Prosecution deliberately destroyed evidence with knowledge that the evidence was exculpatory. The State’s failure to protect the trial record in this case is excessive and Mr. Swiney avers that this is intentional, in bad faith, and has consistently deprived him of fair adjudication.

Mr. Swiney avers that the physical evidence that the State claims to have lost were items whose loss is designed to circumvent the truth-seeking process. The lost physical evidence with trial Exhibit numbers and admission status are:

Rifle, State Exhibit #47, admitted

Magazine, State Exhibit #35, admitted

Defendant clothing, Not admitted and not returned to Petitioner.

Shell Casings, State Exhibits #36, #37, #39, #40, #42, #43 & #44, admitted

Unspent Round, State Exhibit #41, admitted

Bullets and fragments, State Exhibits, #38, #43, #44, #51, #52, #55, #56, & #58, admitted

Victim clothing (female), State Exhibit #11, admitted

Victim clothing (male), not admitted

Video tape, State Exhibit #13, admitted

Telephone answering machine (codephone) and tapes, Defense Exhibits #9, #10, #11, admitted

Evidence retained by the DFS “includes notes, photographs, case related documents or entire case file” and cannot be released without subpoena (See N- Exhibit 5, Letters of Joe Embry and F. Taylor Noggle, Jr.).

Just as Defense Counsel relied upon the State's “open file” policy, Mr. Swiney has relied on the State to be truthful in direct and collateral appeals. It was not apparent until the habeas corpus response by the State in 2003 that the State continues to withhold additional exculpatory evidence beyond the GSR disclaimer (the target of the newly-discovered evidence). This knowledge was presented in the habeas rebuttal, upon appeal, and to the AL SC. State courts did not afford Petitioner the opportunity to uphold his burden against the State’s clearly-ludicrous rebuttal argument. The State defended the conviction using inapplicable procedural bars; the trial court failed to comprehend the newly-discovered evidence, failed to hold a hearing or qualify expert witnesses, and agreed with the State’s unreasonable arguments regarding the newly-discovered evidence

and time bar of Rule 32.1(e). (See also Ground 2, item 4). The state courts were overwhelmingly prejudiced in favor of the State and against Petitioner. (See also Ground 1). Cause is apparent in the State and state courts' desire to ensure finality of judgment even in the face of overwhelming evidence of actual innocence. *Wainwright v. Sykes*, 433 U.S. 72 (1977). If state prosecutors can unreasonably apply procedural bars which are upheld by state courts, then the legislative intent of 28 U.S.C. 2254 is frustrated and cause shown by the state is merely to preclude the federal courts from acting to ensure the preservation of federally-guaranteed due process.

The State courts were not shown evidence tampering, since that fact was brought to light amidst state habeas corpus proceedings and not in time for pleading. Petitioner is prohibited relief in the state courts regarding evidence tampering due to constraints of Rule 32, therefore, Petitioner is without state remedies. *Brown v. Hooks*, No. 05-14528, 11th Circuit Court of Appeals, decided April 18, 2006.

The Prosecutor misled the jury and the trial court. State prosecutors further misled appeals courts. This deception has resulted in the conviction and continued incarceration of an innocent person. This erodes public confidence in the judicial system and cries out for judicial estoppel. Justice demands that no innocent person suffer a wrongful conviction; public safety demands accuracy in convictions to ensure that the true perpetrator does not go unpunished, free to commit additional crimes that may have been prevented. Waylaying Petitioner's attempts for relief by means of procedural obstacles clashes with constitutional safeguards and does nothing to inspire confidence in the underlying correctness of the decisions rendered by the courts. Limits on powerful

claims of innocence are not only prudentially unjustifiable but also violate the fundamental premises of the Supreme Court's own procedural due process jurisprudence.

The State's refusal to release evidence coupled with the Respondent's claim: "there can be no newly discovered evidence in this case because the swabs that were used to test Swiney's hands are no longer available" is to allege that newly-discovered evidence does not and cannot exist in any criminal case in the state of Alabama wherein the trial record has been lost or destroyed. That claim, if true, would constitute an across-the-board denial of the writ of habeas corpus for all collateral proceedings under Rule 32.1(e) wherein the State has lost or destroyed evidence. The State's use of a procedural time bar is, Mr. Swiney avers, an attempt to preclude due process guarantees by the federal courts.

For these reasons set forth, and in the interest of due process, Petitioner requests that this Court require the State to produce the trial record. Petitioner has established good cause for disclosure and production of a complete trial record in light of ludicrous and unreliable testimony by Ed Moran for the State and clear proof of tampered and fabricated evidence and withheld exculpatory evidence. Defense counsel's reliance on questionable testing procedures conducted by the State is harmful error that tainted the results of the trial and continue to frustrate the truth-finding process.

Petitioner avers that independent testing of evidence in this case will support the newly-discovered evidence finding of Dr. Nordby. Petitioner is not on a fishing expedition; proof of innocence, withheld exculpatory evidence, and evidence tampering already exist and were proved by Petitioner. Petitioner only asks that the State be required to defend its position with information that is reasonably reliable. In the state habeas corpus

response, the State could have presented Dr. Higgins' forensic findings verifying that his findings supported the guilty verdict. Instead, the State presented Ed Moran, who revealed that Dr. Higgins tested hand swabs that were subsequently destroyed, for a GSR constituent that Dr. Higgins knew would not be present. This testimony is no defense; it is a response designed to sidestep a defense in an environment where the State is afforded an unreasonable presumption of correctness.

Petitioner avers that independent testing of any of the physical evidence in this case will support the newly-discovered evidence and show that the State knew or should have known that this evidence is exculpatory. Petitioner is innocent of this crime and imprisoned in violation of clearly-established federal law.

CONCLUSION

The State contends that overwhelming evidence of guilt should keep Mr. Swiney in prison for the rest of his life:

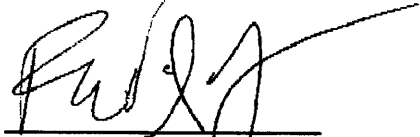
“Swiney’s allegations must be considered in the context of the overwhelming nature of the evidence that established Swiney guilty of capital murder...” Court’s Order, page 16, last para

Mr. Swiney avers that the State’s procurement of a guilty verdict must be considered in the context of the overwhelming nature of the evidence that establishes his factual innocence in this crime and in light of exculpatory evidence and proof of evidence tampering.

In light of the violations of clearly established federal law, constitutional violations, abuse of discretion, and clearly erroneous judgments that are not supported by substantial

or competent evidence or by reasonable inferences (Federal Rules of Civil Procedure Rule 52(a)), together with the overwhelming exculpatory, withheld evidence in this case, and proof of evidence tampering, this Court must GRANT Mr. Swiney a reversal or remand for new trial.

ORAL ARGUMENTS REQUESTED



Frank Wilson MYERS, Sr.
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I have served all parties to this cause by placing a copy of the foregoing in the United States Mail First class postage prepaid, properly addressed as shown below, on this the 7 day of June 2006.



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