

APPEAL NUMBER: 06-14865-F

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

RONALD PATRICK SWINEY,

Appellant,

- vs -

KENNETH L. JONES, Warden,
Donaldson Correctional Facility;
TROY KING, Attorney General,
State of Alabama,

Respondents.

MOTION FOR RE-HEARING EN BANC

District Court Case Below: 06-CV-01133

By:

RONALD PATRICK SWINEY
Appellant, Pro Se
Inmate Number 154406
Donaldson Correctional Facility
100 Warrior Lane
Bessemer, AL 35023-7299

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT PURSUANT TO LOCAL RULE 26.1**

INTERESTED JUDGES:

ALMON, RENEAU (Alabama Supreme Court)

ANDERSON, R. LANIER (U.S. Circuit Court Judge, 11th Circuit)

BIRCH, STANLEY F. (U.S. Circuit Court Judge, 11th Circuit)

BLACKBURN, SHARON LOVELACE (U.S. District Court Judge)

BOLIN, MICHAEL F. (Alabama Supreme Court)

BOWEN, WILLIAM M. (Alabama Court of Appeals)

BUTTS, TERRY L. (Alabama Supreme Court)

CAMPBELL, ELIZABETH TODD (U.S. District Court Magistrate Judge)

CARNES, ED (U.S. Circuit Court Judge, 11th Circuit)

CROWSON, D. AL (Shelby County Alabama Circuit Court)

DUBINA, JOEL FREDRICK (U.S. Circuit Court Judge, 11th Circuit)

GREENE, PAUL W. (U.S. District Court Magistrate Judge)

HARWOOD, ROBERT BERNARD JR. (Alabama Supreme Court)

HOUSTON, GORMAN (Alabama Supreme Court)

INGRAM, KENNETH F. (Alabama Supreme Court)

KENNEDY, ANTHONY M. (Alabama Supreme Court)

MARCUS, STANLEY (U.S. Circuit Court Judge, 11th Circuit)

Swiney v. Jones (Appeal Number 06-14865-F), Motion for Rehearing En Banc

McMILLAN, BUCKY (Alabama Court of Criminal Appeals)

NABERS, DRAYTON JR. (Alabama Supreme Court)

POINTER, SAM C. (U.S. District Court Judge)

ROCHESTER, JOHN (Trial Judge, Shelby County Alabama Circuit Court)

SEE, HAROLD F. JR. (Alabama Supreme Court)

STUART, JACQUELYN L. (Alabama Supreme Court)

TAYLOR, SAM (Alabama Court of Criminal Appeals)

INTERESTED DEFENSE ATTORNEYS:

BELL, RICHARD

MORGAN, JOE W.

MYERS, WILSON

SHEFFIELD, LAWRENCE JR.

SHEFFIELD, LAWRENCE III

INTERESTED STATE ATTORNEYS:

BROWN, GENE WILLIAMS (Alabama Assistant Attorney General)

CAMPBELL, MICHAEL J. (Shelby County Alabama District Attorney)

CRENSHAW, CLAY (Alabama Assistant State Attorney General)

POOLE, ANDY S. (Alabama Assistant State Attorney General)

Swiney v. Jones (Appeal Number 06-14865-F), Motion for Rehearing En Banc

SIEGLEMAN, DON (Alabama State Attorney General)

SESSIONS, JEFF (Alabama State Attorney General)

OTHER INTERESTED PERSONS:

SWINEY, RONALD PATRICK (Defendant/Appellant)

INTERESTED CORPORATE ENTITIES:

NONE

VICTIM IDENTITIES:

PATE, RONALD

SWINEY, BETTY SNOW

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FEDERAL STATUTES:	28 U.S.C. § 2254 28 U.S.C. § 2244(b) 28 U.S.C. § 2244(b)(2) 28 U.S.C. § 2244(b)(2)(B)(i) 28 U.S.C. § 2244(b)(2)(B)(ii) F.R.A.P. 47(1) F.R.A.P. 47(2) F.R.A.P. 27
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COURT RULES:	11 th Circuit Rule 22-3(a)
MISCELLANEOUS:	<i>Dr. Jon J. Nordby</i> , Report July 2, 2006 <i>Journal of Forensic Sciences</i> , May 2003

STATEMENT OF THE ISSUES

The appellant herein, Ronald Patrick Swiney, hereby respectfully submits that this proceeding involves questions of exceptional importance that ought to be reviewed by this Court en banc, those questions being:

1. In consideration of the fact that the appellant stands convicted of capital murder as defined under Alabama Code § 13A-5-40(a)(10), was it an error on the part of the Clerk of this Court and unduly prejudicial to appellant that his application for a Application for Permission to File a Second or Successive § 2254 petition was returned unfiled upon the ground that such was not submitted on the form adopted by the Court and required to be used for all such applications, except in capital cases, which limited him to 6 to 9 pages of argument and factual allegations relevant to his claim that newly discovered evidence proves his actual innocence ?

2. Did the Federal District Court below err in determining appellant's most recent application for relief under 28 U.S.C. § 2254 constituted a second or successive petition within the meaning of 28 U.S.C. § 2244(a)(3)(A), thus requiring leave of this Court for permission to file when undeniable is that the factual predicate for that petition could not have been discovered through the exercise of due diligence prior to the filing of his first petition and when the facts underlying that petition, if proven and viewed in light of the evidence as a whole, are sufficient to establish by clear and convincing evidence that if not but for the constitutional errors attendant to the State's intentional destruction and withholding of exculpatory evidence, no reasonable factfinder would have found appellant guilty ?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Following trial by jury held before the Shelby County Alabama Circuit Court, on June 12, 1989 the appellant herein, Ronald Patrick Swiney, was convicted of capital murder in violation of Alabama Code § 13A-5-40(a)(10) and was sentenced to life without the possibility of parole for allegedly shooting two people with a rifle in one scheme or course of conduct. His conviction was thereafter affirmed without opinion by the Alabama Court of Criminal Appeals on August 3, 1990. Certiorari to the Supreme Court of Alabama was then denied on December 14, 1990.

Following denial of his direct appeals the appellant moved the state courts for *habeas corpus* relief based on a claim of ineffective assistance of trial counsel, resulting in an evidentiary hearing being granted, following which said application was in all respects denied on January 28, 1993.

Mr. Swiney then filed for relief under 28 U.S.C. § 2254 with the United States District Court, Northern District of Alabama. That application was denied by said court on June 23, 1998. Following a series of extensions for filings his appeal from that denial was thereafter denied by this Court on June 10, 1999.

On August 12, 2003 the appellant again petitioned the Alabama state courts for *habeas corpus* relief, arguing newly discovered evidence made a part thereof showed his actual innocence. By order dated March 5, 2004 said application was in all respects denied with prejudice. Following, his appeal therefrom to the Alabama Court of Criminal Appeals for a rehearing was denied on February 11, 2005. Thereafter he

applied to the Alabama Supreme Court for a writ of certiorari, which such application was denied, without comment, on June 10, 2005.

On May 11, 2006 the appellant, through his attorney, mailed to this Court and to the respondents an application for leave to file a second or successive petition under 28 U.S.C. § 2254. That application was returned to Mr. Swiney's attorney by the clerk unfiled under cover letter dated May 12, 2006 upon the ground it had not been submitted on the forms adopted by the court.

On June 9, 2006 the appellant filed another petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 with the United States District Court for the Northern District of Alabama in which he further argued that newly discovered evidence not previously available showed his actual innocence. Said petition was then amended on June 22, 2006. By order dated July 31, 2006 the District Court dismissed that petition, concluding it was without jurisdiction to consider such as a second or successive petition in the absence of this Court's advance permission to file.

The appellant then filed timely Notice of Appeal from the District Court's above-referenced order dismissing his most recent petition for *habeas corpus* relief based on newly discovered evidence showing actual innocence. Such application for a Certificate of Appealability was thereafter denied by the District Court by order dated September 19, 2006, and on appeal therefrom this Court also denied such request for a Certificate of Appealability by Order dated January 16, 2007.

On February 2, 2007 appellant filed with this Court his timely Motion to Reconsider, Vacate or Modify its aforementioned Order dated January 16, 2007. Said motion was thereafter denied by this Court on March 7, 2007.

**STATEMENT OF FACTS
(LIMITED TO INSTANT APPLICATION)**

INTRODUCTION

The appellant herein, Ronald Patrick Swiney, enjoyed an unblemished 13-year long career as a police officer, during which time he nearly lost his life in the line of duty in the course of an investigation into an illegal drug ring operating in his community. Resulting was that he secured the arrests of the Baldwin County Alabama District Attorney and the Chief Investigator of the Baldwin County Sheriff's Department, both of whom were eventually sent to federal prison upon their convictions for operating such illegal drug ring. It was his well-documented role in that criminal investigation and prosecution, Mr. Swiney continues to maintain, that resulted in his being framed for the murders of his wife and her former husband.

FACTS RELATING TO WHETHER APPELLANT'S IS A "CAPITAL CASE" FOR
PURPOSES OF APPLYING TO THIS COURT FOR PERMISSION TO FILE A
SECOND OR SUCCESSIVE PETITION FOR RELIEF UNDER 28 U.S.C. § 2254.

The appellant herein presently stands convicted of "capital murder" under Alabama Code § 13A-5-40(a)(10), a crime for which a sentence to death is permissible. In fact, throughout the trial the prosecutor repeatedly made clear to the jury that he would indeed be seeking the death penalty in the event of conviction on the top counts of the