



UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

RONALD PATRICK SWINEY,

Movant-Petitioner,

v.

No.

KENNETH L. JONES, Warden; TROY
KING, Attorney General for the State of
Alabama,

Respondents.

Motion for Request to File Second or Successive § 2254 Habeas Petition

Comes now the Petitioner, Ronald Patrick Swiney, by and through his attorney of record, requesting permission to file a second § 2254 petition in the Federal District Courts, pursuant to 28 U.S.C. § 2244(b)(2)(B). Petitioner filed his first writ of habeas corpus, pro se, under 28 U.S.C. § 2254 in the Federal District Court, Northern District, Southern Division, wherein the Court DENIED his petition on June 23, 1998. Grounds presented in that petition were ineffective assistance of counsel during trial and sentencing, fundamental unfairness of trial court, and denial of right to fair trial regarding prosecutor's improper conduct during closing arguments.

Petitioner filed a second habeas corpus (Rule 32) petition in the trial court on August 13, 2003 after new evidence supporting Petitioner's actual innocence was discovered. The trial court improperly procedurally barred Petitioner and dismissed without a hearing or

oral arguments. Petitioner appealed in the Alabama Court of Appeals and then in the Alabama Supreme Court. Petitioner's state habeas remedies were exhausted on June 10, 2005 when the Alabama Supreme Court DENIED *ex parte*, Petitioner's PETITION FOR WRIT OF CERTIORARI without comment.

The AEDPA strictly limits the filing of second or successive § 2254 habeas petitions. According to 28 U.S.C. § 2244(b)(2)(B), A claim presented in a second or successive habeas corpus application under § 2254 that was not presented in a prior application shall be dismissed unless: (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the Petitioner guilty of the underlying offense. Petitioner's second § 2254 habeas corpus petition meets these requirements.

FACTS OF THE CASE

Petitioner was accused of capital murder that occurred in 1987 wherein Petitioner's wife and her ex-husband died, due to gunshot wounds, inside Petitioner's marriage home. Petitioner 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 Petitioner 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.

**NEWLY-DISCOVERED EVIDENCE IN THIS CASE IS BASED UPON
INFORMATION RELEASED BY A RENOWNED FORENSIC EXPERT
DISPROVING THE VALIDITY OF A GUN SHOT RESIDUE REPORT
DISCLAIMER**

After the Federal District Court denied Petitioner's first § 2254 petition in 1998, and after the 11th Circuit Court denied Petitioner'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 Petitioner and the other forensic report stated that there was no gunshot residue (GSR) found on Petitioner. 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.”

Petitioner'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 Petitioner's due process rights. The report states that laboratory analysis did not detect GSR on Petitioner 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 Petitioner 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 Petitioner 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 Petitioner'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 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 detectible 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." 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. 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.

To 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 Petitioner 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 Petitioner since trial.

Petitioner'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 Petitioner'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 Petitioner's defense. It is now clear that both reports are exculpatory.

The State did not find any blood specimens on Petitioner as revealed in the DFS blood report. The DFS blood report states that clothing worn by Petitioner was analyzed for