

Case No. CR-06-1163

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

RONALD PATRICK SWINEY            )  
  )  
    Appellant                        )  
  )  
vs.                                    )  
  )  
STATE OF ALABAMA                 )  
  )  
    Appellee                         )

MOTION TO ADD FACTS

APPLICATION FOR REHEARING

BRIEF AND ARGUMENT IN SUPPORT OF APPLICATION FOR REHEARING

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  )  
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MOTION TO ADD FACTS


Comes now Ronald Patrick Swiney, the Appellant in the case as styled above and moves this Honorable Court to add the facts attached at the Statement of the Facts attached hereto, and as grounds would show ;

1. That your appellant is not satisfied with the facts stated in the opinion.

2. That your appellant wishes to add the facts attached hereto.

3. That this action is authorized by Rule 39,  
A.R.App.P

WHEREFORE, the premises considered, Ronald Patrick Swiney prays that the Statement Of The Facts attached hereto will be added to the Opinion in this case.

  
JOE W. MORGAN, III  
Attorney for Appellant

Statement Of The Facts

A Petition for Relief from Conviction or Sentence (Pursuant to Rule 32, Ala. R. Crim. P.) was filed on August 13 2004 by Patrick Swiney. ( C.1) The Rule 32 petition sought relief from his conviction for Capital Murder, the murder of two or more people. ( C. 3) The two(2)people who were shot to death are Betty Swiney, the wife of Patrick Swiney and her former husband, Ronald Pate ( C.60) A Rule 32 petition had earlier been filed by Patrick Swiney alleging ineffective assistance of counsel, which prior Rule 32 was denied on January 28, 1993 ( C.4)

This instant Rule 32 Petition pleads that Patrick Swiney has newly discovered evidence that was not known at the time of trial or in any other proceeding, could not have been earlier discovered, are new factual matters, and that this newly discovered evidence proves that Patrick Swiney is actually innocent of the crime for which he was convicted. He further pleads that the newly discovered evidence, if known at the time of the trial, would have resulted in a different outcome at the trial of the case. ( C.6)

The specific newly discovered evidence is scientific evidence concerning analysis of a specific type of firearm,

the type of firearm that was used in the commission of the offense. The specific firearm is the 22 caliber rifle ( C.33). This particular test was the first reported by Dr. Jon J. Nordby on July 2, 2003 ( C.33)and is based on information contained in a research publication published in May, 2003, the Journal of Forensic Sciences [JFS, vol. 48, no. 3, pp. 538-553, May, 2003]. The newly discovered evidence was discovered by the use of existing scientific equipment using a unique and different test in order to perform a new type of test of gun shot residue. The equipment used includes the Scanning Electron Microscope (SEM), combined with equipment which allows Electron Dispersion Sampling (EDS), combined with the use of Infra Red Spectroscopy (IR Spectroscopy). ( C.270).(hereafter, the "new test").

A summary of test procedures was stated in the affidavits and test reports submitted as evidence. An earlier test to detect gunshot residue was the dermal nitrate test. ( C. 272). This earlier test featured the use of cotton swabs wiped over the skin of a suspected shooter, then testing the swabs for the presence of gunshot residue. ( C. to 72). This test was discredited by the

scientific community, as the test protocol erroneously indicated the presence of gun shot residue, when the actual chemicals tested turned out to be, not gun shot residue, but newspaper ink, photocopy ink, paint, specialty papers, and other kinds of common chemical substances. ( C. 272).

There was a need for a more precise test, with the test requirement being that the test must detect the presence of gun shot residue, as different from other common chemicals.

The replacement test (hereafter the "old test") was a chemical test used to determine the presence of the chemical antimony in gun shot residue. Antimony is a chemical that was used in the primer component of several types of ammunition and, after 1987, began to be used in the primer components of 22 caliber ammunition. Prior to 1988, antimony was not used in the primer of 22 caliber ammunition. ( C.271). When antimony was used in the primers of 22 caliber ammunition, after 1987, there was a specific test ready and available to test for the presence of the chemical antimony in gun shot residue produced by 22 caliber ammunition.

These first described tests, the dermal nitrate

test and the "old test" were inadequate to produce a valid result on gun shot residue produced by 22 caliber ammunition at the time this offense was committed on December 10, 1987. ( C. 62).

The present test, with the descriptive title of Scanning Electron Microscope (SEM), combined with Electron Dispersion Sampling (EDS), and Infra Red Spectroscopy (IR Spectroscopy) (hereinafter the "new test") is capable of detecting the presence of gun shot residue with a high degree of certainty and reliability. This enhanced reliability is based in part on the use of recent technology which measures the wavelength of an electronic cloud, and produces a visible test result. ( C. 271). Parts of this "new test" were developed throughout the 1990's but has only recently culminated in the final "new test" as reported in the predecessor test in May, 2003, developed in its present form by Dr. Nordby in July, 2004. ( C.272).

There was scientific testing of gun shot residue at the time of the arrest of Patrick Swiney. The testing took place soon after the shooting. ( C. 78). The testing that was conducted was the "old test" which tested for the presence of the chemical element antimony. ( C. 77). The

test was performed by the Alabama Department of Forensic Sciences and the methodology used for the testing was that cotton swabs were rubbed over the hands of Patrick Swiney. ( C.77). The cotton swabs were then tested to determine if there was any trace of antimony in the gunshot residue left on the hands of Patrick Swiney. ( C. 77). The test did not reveal the presence of any antimony and no further testing of gun shot residue was done by the Department of Forensic Sciences. ( C. 77).

The cotton swabs that were used for the test conducted by the State have now been "lost or destroyed" by the State. ( C. 75). The trial Court took note of the fact that the swabs cannot be located and that the swabs cannot be tested using the "new test." ( C.247). The cotton swabs are a red herring. While the swabs would be an "extra" there is adequate physical evidence to be tested. There is the actual rifle that may have been used to shoot Betty Swiney and Ronald Pate, to include expended cartridges, and a magazine containing seven (7) cartridges that have never been fired. ( C.90). There is also a jacket, shirt, pair of blue jeans, and a pair of "Nike" brand tennis shoes. ( C.90). These physical items were evidence at trial, have

been preserved, and are available for nondestructive testing. ( C.90). The trial court denied Patrick Swiney's request to test these items. ( C. 247). The trial Court held;

Even if good cause is demonstrated a trial court is not required to order discovery, but "may exercise its inherent authority to order discovery in a proceeding for post-conviction relief." Citation from *Ex parte Land*, 775 So.2d 847,852 ( Ala. 2000). For a myriad of reasons, Swiney has not demonstrated good cause for his requested discovery. ( C.248).

The type of testing done by Dr. Nordby in connection with this case started with a rifle of the same type, make, and model as the rifle that was used to kill Betty Swiney and Ronald Pate. This rifle is a Charter Arms 22 caliber AR-7 rifle. ( C.145). There was no controversy about the type of rifle used. The tested rifle was fired eight times in an enclosed space, the enclosed space being the same size as the room in the Swiney house, where the shooting actually took place. ( C.278,307). The shooter in this test wore a suit made of Tyvek, a neutral fabric sealed prior to the test firing, then sealed until tested. ( C.278). The results of the test firing proved that gun shot residue was produced by the rifle in such a quantity as to be

"....detectable by every means employed by forensic science." ( C. 278).

This testing was done to replicate the shooting and to observe the gun shot residue deposited on the clothing of the shooter. ( C.278). The test firing resulted in gun shot residue being deposited on the clothing in ample amounts to be easily detected by every means employed by forensic science, as compared to there being no trace of any gun shot residue found by any testing done on the clothing of Patrick Swiney, in tests that the State Department of Forensic Sciences conducted. ( C. 279).

The state did conduct forensic testing, but only of the cotton swabs. ( C.77). The sole test that was conducted was to test the cotton swabs for the presence of antimony. ( C.77). No antimony was found and no further testing was conducted by the Department of Forensic Sciences. ( C. 77). As was previously discussed, antimony was not used in ammunition manufactured for this rifle at the time of the shooting. The test was a sham.

The only test performed was to detect the presence of antimony, even though it was possible, even at that time using the old test, to test for other chemical elements that

would be expected to be in gun shot residue. ( C. 148).  
These other elements would include the chemical elements  
boron and lead. ( C. 148). The limitations of the  
equipment in use at that time in the old test made it  
possible to test for only one element at the time, and the  
only element that the State Department of Forensic Sciences  
tested for was an element that the State knew would not be  
present in the gun shot residue. ( C. 148). The State also  
tested the least probable place for gun shot residue to be  
deposited, the hands of the suspected shooter, rather than  
the clothing of the suspected shooter, where gun shot  
residue would more likely be deposited for a longer period  
of time. ( C. 148).

The "new test" can test for gun shot residue by  
detecting not just chemical elements, but additionally, can  
detect boron glass residues which are fused with barium and  
lead residues and deposited on clothing. ( C. 43,156). The  
projectile can now be tested to detect boron glass  
frictionizer or residues fused with lead and barium at high  
temperatures, which fused combinations do not appear in  
nature. ( C. 43,150).

The major part of the case in chief for the State