

C.R.-03-1163

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

RONALD SWINEY

Appellant

vs,

STATE OF ALABAMA

Appellee

On Appeal From The

CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

Case No. CC88-77.61

APPELLANT' BRIEF AND ARGUMENT

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Patrick Swiney requests that oral argument be allowed in this appeal. He contends that oral argument would be helpful to this Court in making the decision in this case. Reasons that oral argument would be helpful to the court is because there are a number of mixed questions involved in the issues in this appeal.

The major issue is a question of fact, to be decided de novo by this Court. The question of fact is whether the evidence presented in the Rule 32 petition of Patrick Swiney is "newly discovered evidence." Patrick Swiney contends that the evidence that he has presented in his appeal is in fact, newly discovered evidence. While there is a legal definition for newly discovered facts, that definition involves first of all answering questions of fact. Oral argument would be helpful in terrifying and offering examples and differentiating questions of fact involved in this determination.

There is also a series of technical questions involved, with these questions involving the operation of the scientific equipment used in the preliminary testing in this case. Oral argument would be a helpful way to resolve

questions relating to the capabilities, limitations, and development of this equipment, and of the methodology used to gather test samples for the equipment. Older technical methods could be compared and contrasted in oral argument, where the experience and background of individuals, including the learned Judges of this court, vary greatly.

Technical questions concerning the operation of firearms, blood spatter, and the relationship to the scene of the crime could be effectively discussed in relation to the legal issues to be decided.

Mixed questions of law and fact, as well as issues concerning technical information, and familiarization with a specific location, are all presented in the factual setting of this appeal. Oral argument would be especially helpful in comparing, contrasting, and differentiating questions of fact as they apply to principles of law in this case. Patrick Swiney respectfully requests oral argument in this case.

Respectfully submitted;



JOE W. MORGAN, III

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Statement Of The Case

Patrick Swiney was convicted in the Shelby County Circuit Court of Capital Murder in violation of Ala. Code §13A-5-40(a) (10), murder of two or more people, on June 12, 1989. (C.1) The conviction was affirmed on appeal. *Swiney v. State*, 555 So. 2d 1207 (Ala. Crim. App. 1989). (C. 4) In 1993, Swiney filed a Rule 32 petition which was denied following an evidentiary hearing. (C. 4) The denial was affirmed. (*Swiney v. State*, 662 So. 2d 305 (Ala. Crim. App. 1994), cert. denied, *Ex Parte Swiney*, 668 So. 2d 579 (Ala. 1995)). A petition for writ of habeas corpus was denied in the United States District Court for the Northern District of Alabama on June 23, 1998. (C.4) Certificate of Appealability was denied by the 11th Circuit Court of Appeals on August 13, 1999. (C.5) On August 13, 2003, Swiney filed a subsequent Rule 32 Petition in the Shelby County Circuit Court challenging his conviction under Rule 32.1(e), Ala. R. Crim. P. claiming newly discovered evidence of factual innocence. (C. 159) On January 10, 2004, Request For Production Of Evidence was filed by Patrick Swiney. (C. 90) This Rule 32 Petition and the Request For Production Of Evidence were then denied without a

hearing and with prejudice on March 5, 2004. (215-250)
Notice Of Appeal was filed on April 14, 2004. (C. 251)
This appeal followed.

Statement Of The Issues

1. Evidence of Actual Innocence Exists and Is Timely Filed under Rule 32.1(e) A.R. Crim.P..
2. It Was Error to Dismiss the Rule 32 Petition Considering Clearly Established Federal and State Law.
3. Dismissal Of The Petition With Prejudice Without Hearing Was A Denial Of Due Process.
4. Exculpatory Brady Material Was Wrongfully Withheld from Patrick Swiney.
5. It Was Error to Dismiss the Rule 32 Petition Containing Newly Discovered Evidence of Actual Innocence.
6. It Was Error Not To Rule On all The Issues Pled in the Petition..

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 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 1987, 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