

January 13, 2004

Mary H. Harris
Circuit Court Clerk
P.O. Box 1810
Columbiana, AL 35051

RE: Ronald Patrick Swiney v. State of Alabama
CC 88-077.61

Dear Ms. Harris;

Enclosed please find, for the purpose of filing with the Court, PLAINTIFF'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS.

Thank you for your attention to this matter.

Sincerely,

Wilson Myers, Attorney for Petitioner
Ronald Patrick Swiney

cc: Clay Crenshaw

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
EIGHTEENTH JUDICIAL CIRCUIT

RONALD PATRICK SWINEY,)	
)	
PETITIONER,)	
)	
V.)	CASE NO.: 88-077.61
)	
STATE OF ALABAMA,)	
)	
RESPONDENT.)	

PLAINTIFF’S RESPONSE TO STATE OF ALABAMA’S MOTION TO DISMISS

COMES NOW Ronald Patrick Swiney, Plaintiff in the above-styled case, in response to the State of Alabama’s Motion to Dismiss (with prejudice) the Rule 32 petition filed on August 13, 2003. Plaintiff was convicted in a case that was entirely circumstantial and new evidence shows that the Plaintiff is innocent of this crime. Rule 32.1(e) provides a forum for post-conviction relief when new evidence is discovered if brought before a court of jurisdiction within six (6) months of discovery. Plaintiff has met the burden of Rule 32.1(e)(1)-(5) and 32.2(b)(2). The Court is not required to dismiss this petition under Rule 32.7(d) as alleged by Respondent. The Court is required to proceed under Rule 32.9 as Petition is not procedurally barred and Plaintiff has presented viable material evidence of innocence.

Respondent asserts that the Rule 32 Petition is time barred. Respondent is correct in interpretation of Rule 32 procedural bars that would apply without newly-discovered evidence; however, since the evidence shown is newly-discovered evidence, the Plaintiff is not procedurally precluded and this court has jurisdiction. If the Respondent is attempting to show how any evidence no matter how compelling and in compliance with Rule 32.1(e) it is, is still

precluded from presentation in a habeas corpus petition, then the Respondent is also alleging that Rule 32.1(e) is an ineffective means of procuring post-conviction relief and does not meet the legislative intent of the writ of habeas corpus.

The Respondent has alleged that the petition is insufficiently pleaded. The Plaintiff has shown in clear and specific statements, the newly-discovered evidence grounds upon which relief is being sought. Plaintiff has included disclosure of the full factual basis of those grounds by including the complete 207 page Nordby report (Exhibit 1 to the original petition), specifically stating why Dr. Nordby's discovery constitutes new evidence in this case, and has referenced portions of this report as well as applicable law. For the Respondent to allege that the facts of the case are insufficiently pleaded is an attempt to make an end run around the legislative intent of Rule 32.1(e) and the writ of habeas corpus in general. The facts are sufficiently pleaded and have merit. This merit cannot be lessened by summarily dismissing the claims as insufficiently pleaded.

A legitimate opportunity has arisen to fully develop the factual predicate for these claims. The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. Massaro v. U.S., 123 S.Ct. 1690, 155 L.Ed.2d 714, 71 USLW 4310, 3 Cal. Daily Op. Serv. 3369, 2003 Daily Journal D.A.R. 4285, 16 Fla. L. Weekly Fed. S 238 (U.S., Apr 23, 2003) (NO. 01-1559). When a procedural bar is imposed regardless of the merit of a claim, judicial resources are strained rather than conserved. The ("threat of ... procedural bar has doubtless resulted in many claims being asserted on direct appeal only to protect the record ... unnecessarily burden[ing] both the parties and the court ..."). This concern is far from speculative. See *Massaro*, supra. To dismiss the Petition as procedurally barred

would be contrary to the interests of conservation of judicial resources as the newly-discovered evidence requirement has been met.

I. FACTS OF THE CRIME

Respondent has carefully selected inflammatory hearsay excerpts of the trial record to paint a biased picture for the Court and the Plaintiff must refute that attempt at bias in the interests of judicial fairness. Respondent erroneously uses the words “overwhelming evidence.” As seen from the trial record this was a circumstantial case, as evidenced by the Defense Motion for Acquittal [R-812] at the close of the State’s case. Overwhelming evidence would refer, more appropriately, to cases where the State is actually successful in connecting the defendant to the murder weapon or where physical evidence supported the conviction. Neither is applicable in this case.

The Plaintiff does not dispute that this crime was heinous. The husband of Betty Snow Swiney is more emotionally vested in the heinous nature of this crime than is the State; unknown parties, perpetrators who have never been sought by the State, murdered the Plaintiff’s wife, whom he loved. The Plaintiff is factually innocent of this crime yet he is incarcerated as the perpetrator of this heinous act. The State has an interest in finality of judgment while the Plaintiff has an interest in justice, not the least of which is seeing the person or persons guilty of this crime brought to justice. When the State’s interest in finality of judgment overwhelms societal interests in punishment of the guilty, the State fails to serve the interests of society.

The State’s reliance on presumption of correctness is an outdated viewpoint in light of the recent disclosure of the number of people incarcerated for a decade before being proved innocent by DNA evidence. This outdated presumption can no longer reasonably be forced into the courtroom in place of legitimate adjudication on merit. Published reports, by the National

Institute of Justice (NIJ) and other organizations, have recently shown that circumstantial evidence convicts innocent people at an alarming rate¹. The Innocence Project at the Benjamin N. Cardozo School of Law, created by Barry C. Scheck and Peter J. Neufeld in 1992, has exonerated 138 men since its formation; these men were under sentence of death but were factually innocent. Some of the most common factors contributing to the conviction of innocent people, according to the Innocence Project are: “police misconduct, prosecutorial misconduct, bad lawyering, and defective or fraudulent science.”² Presumption of correctness is not compelling to the issue at hand because the Plaintiff did not commit this crime and that proof of innocence has been provided to the Court. Had the exculpatory evidence been provided to the jury, the results at trial would have been different.

Respondent predictably attempts to paint a picture of the Plaintiff in the worst possible light by liberally quoting hearsay (ARE Rule 801) testimony from the trial record. Plaintiff must respond to these statements to show the true nature of the trial rather than the prejudicial and biased picture painted by the Respondent. The hearsay nature of these statements was known by trial Counsel for the defense and that record is preserved in the former Rule 32 hearing transcript at page 258 (See Plaintiff’s Exhibit A):

Former Rule 32 Attorney, Sheffield, questioning trial attorney Bell -

Q. . . . And is your answer, then, that you knowingly allowed the inadmissible evidence in for the purpose of hopefully getting a manslaughter conviction, realizing at the time you did it that you were eliminating issues that could be preserved after the trial and utilized for appellate purposes later?

A. Certainly.

¹ U.S. Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, June 1996, electronically available at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>

² The Innocence Project, *Factors Leading to Wrongful Convictions, The most common factors leading to wrongful convictions that were found in the first 70 DNA exonerations*, electronically available at <http://www.innocenceproject.org/causes/index.php>

Q. Was that knowingly?

A. Yes, that was knowingly.

At pages 260-261 (Plaintiff's Exhibit A) Bell continues:

A. . . .But I -- the most important thing to me was, again, the connection between the weapon and Mr. Swiney. It just wasn't there as far as I'm concerned and I still have that feeling today. And the -- I was disappointed that the trial -- or that the appellate courts did not write to that.

The hearsay statements that Sheffield referenced in the former Rule 32 petition are the same statements used by the Respondent to paint a biased picture of the Plaintiff using the trial record. The Respondent uses 20 references of hearsay testimony in Section I of the Motion to Dismiss; of those 20, four of the references (20%) are misused as the referenced testimony does not appear on the pages of the transcript cited by the Respondent. Plaintiff cannot properly respond to these misused cites as they are irrelevant to the point Respondent is attempting to make. Respondent uses the following hearsay testimony on pages 3, 4 and 5 of the Motion to Dismiss; each of these statements is inadmissible, prejudicial testimony:

“Shortly after they were married, Swiney began saying that he was going to leave or to divorce Betty.” [R. 610-611, 652-653].

“Swiney also made several threats to kill Pate.” [R. 374, 603-04, 616] Reference to R-616 is an irrelevant reference and cannot be defended for that reason.

“Swiney said she was a Pate woman.” [R. 582-83, 653] Reference to R. 653 is an irrelevant reference and cannot be defended for that reason.

“Swiney said that if he could not have Betty, no one else could.” [R. 605, 637-638]

“Pate told his mother that he and Betty were going to get back together.” [R. 336, 367, 372] Reference to R. 336 is an irrelevant reference and cannot be defended for that reason.

“Betty told her father that her marriage to Swiney was over.” [R. 350, 352, 355] Reference to R-350 is an irrelevant reference and cannot be defended for that reason.

“Swiney said that he was through with Betty.” [R. 610].

“Swiney returned about an hour later, and told Mrs. Snow that he had gone to Betty’s house the night before and had raised the window of Betty’s son’s room and had seen her son in bed.” [R. 608]

This crime occurred on December 10, 1987. The trial was held on June 12, 1989. These witnesses are submitting hearsay testimony from their undocumented recollection of statements allegedly made at least 18 months earlier. The Court allowed some of these hearsay statements into evidence upon objection by defense Counsel, Mr. Bell. While these hearsay statements are part of the record, they are not necessarily indicative of the facts in this case.

The Plaintiff’s afternoon meeting with Sgt. Griffin of the Alabaster Police Department was initiated by the Plaintiff. The Plaintiff was concerned about liability issues related to Ronnie Pate driving Betty’s Corvette while drunk and with a suspended license. Any reasonable person would have these concerns in the same set of circumstances. The Plaintiff was concerned about safety and roadworthiness of the car. The Plaintiff went through the proper channels and contacted a police officer to address his concerns. This speaks to the integrity and lawfulness of the Plaintiff. Respondent cites these events for some unknown purpose. There was no impropriety in how the Plaintiff handled this situation.

The Respondent alleges that the Plaintiff “incriminated himself...with his testimony” that Betty made him move out on December 8 because he threatened to call the police after she failed to do anything about her son (Jim Morrison) growing marijuana in the bedroom. Does the Respondent actually expect the Court to believe that Betty’s failure “to do anything about her son growing marijuana in the bedroom” was the Plaintiff’s motive for murder? Betty Snow Swiney commonly “threw” the Plaintiff out of the house and he would take his things and move into the top floor of his mother’s house. This happened frequently throughout the marriage. On the night of December 10th, the Plaintiff went to several night spots in town because formerly

Betty would attempt to find him and make up after throwing him out of the house. The Plaintiff was merely making himself available for her to locate and make up, as they had done several times before in their marriage.

Respondent states “Swiney’s behavior and appearance were not unusual when he was taken in for questioning” [R. 421]. At the cited reference, State’s witness, Sgt. Walters was testifying under cross-examination. Walters said earlier [R. 421], when questioned by the State, that he had “seen him [Swiney] at the Waffle House on a couple of occasions ... having something to eat.” That was the extent of Walters’ familiarity, in his own words, with the Plaintiff. Walters was not qualified to state whether the Plaintiff’s behavior was outside of the ordinary behavior for the Plaintiff since Walters did not know the Plaintiff. Lt. Stanley Oliver, another State’s witness, was familiar with the Plaintiff and stated under cross-examination [R. 567]:

Q. Did you ever make this comment or say this or this in substance, that the man back there in that cell is not the Pat Swiney I know?

A. Yes, sir.

Q. What did you-mean by that?

A. I - - -

BY THE COURT: Excuse me.

MR. OWENS: I withdraw it. Judge.

BY THE COURT: You may answer.

A. I worked with Pat Swiney. He and I were rookie policemen together or, at least, I was a rookie. He was a little older than me in '72 or '73 at the Alabaster Police Department. The statement that I made that night was I never would have thought that Pat Swiney would do something like this.

In redirect by the State, Oliver testifies [R. 567]:

Q. You didn’t notice anything unusual about him?

A. He appeared to be weak.

Q. Was his gait normal?

A. No sir, it wasn’t.

Lt. Oliver certainly noticed that the Plaintiff's behavior and appearance were unusual that night, as would be expected when a person claims to have been knocked unconscious earlier in the evening. The Plaintiff's prior vocation as a police officer or a whether he was a good marksman are irrelevant.

Judge Shaw, concurring in Dowdell v. State, 854 So.2d 1197 Ala.Crim.App., 2002, writes, "A criminal trial is not a lottery, a spin of the roulette wheel or a throw of the dice. The orderly processing of cases through the court is an important value, but it is not the end in itself. It is only the method by which we attempt to achieve the ultimate purpose of the criminal justice system--the fair conviction of the guilty and the protection of the innocent. That is what our constitutional guarantees are all about. Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed." The Alabama habeas corpus statutes are an integral component designed not to serve legal process but to serve the ultimate purpose of the criminal justice system. When legal process fails, as it has in this case, judicial fairness ceases to exist and legal process becomes an anathema to the letter and spirit of the law.

Newly-discovered evidence in this case has revealed the actual innocence of the Plaintiff. The State's Motion to Dismiss contains an affidavit by Ed Moran of the Department of Forensic Sciences (DFS) designed to refute the actual innocence claim. Moran's affidavit reveals distressing information related to the competence and reliability of David Higgins and by inference, Dr. Joseph Embry, State Medical Examiner, in the analysis of evidence gathered in this crime scene investigation. Moran's affidavit is here refuted by Dr. Nordby (Plaintiff's Exhibit B) and Dr. Larkin (Plaintiff's Exhibits C and D). Glenn M. Larkin, M.D. is a Forensic Pathologist with 31 years of experience. He has co-authored several books on forensic

pathology and crime scene investigation and has testified in over 100 trials and 30 civil cases. Dr. Larkin has submitted an affidavit and a medical-legal report that are presented here as Plaintiff's Exhibits C and D respectively. Plaintiff's Exhibit C also contains Dr. Larkin's qualifications for presentation to the Court. The State's circumstantial case was built completely upon hearsay testimony, as cited by the Respondent, incomplete crime scene investigation, questionable forensic testing, and a timeline of key events that is physically impossible as noted by Dr. Larkin. The Plaintiff realizes that these are serious allegations, however, the anomalies revealed by Ed Moran in the State's Motion to Dismiss are serious and must be brought to the attention of the Court. These anomalies were thoroughly analyzed by Dr. Larkin and are not an attempt by the Plaintiff to retry this case but are presented in support of the critical, newly-discovered evidence of actual innocence. Dr. Larkin's findings are presented under the subheadings following. To summarize Dr. Larkin's findings: The State presented a circumstantial case based on a 5-minute window wherein the murders had allegedly taken place. This timeline of the murders is a physical impossibility, the Plaintiff had no blood on his clothing, no GSR was detected, and potentially exculpatory fingerprint evidence was withheld. The State did not connect the murder weapon to the Plaintiff. The record is replete with anomalies in crime scene investigation and forensic testing. Any one of these anomalies, taken separately, casts doubt on the validity and legality of the conviction; taken cumulatively, especially given the newly-discovered critical evidence in this case, the anomalies undermine the confidence in the outcome at trial. Martin v. State 839 So.2d 665, Ala.Crim.App., Nov. 30, 2001 citing Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

TIMELINE

Dr. Larkin spent several weeks conducting the analysis of the time elements used in the State's case, checking time references from testimony and police reports, and plotting this information. Dr. Larkin's conclusion regarding the timeline presented by the State at trial is stated in Plaintiff's Exhibit C, Section I, page 3:

According to the state's case, Swiney was at the crime scene and at Robbie Carter's house at the same time (9:30 p.m.). However, according to the laws of physics currently known it is impossible for a human being to be in two physical locations at once.

The State's case placed the Plaintiff in Alabaster, 10 minutes away from the crime scene, at the time of the murders. Dr. Larkin further states (Plaintiff's Exhibit C, page 3):

The timing in the State's case is not physically possible and could not have occurred in this manner!

Dr. Larkin's analysis (Plaintiff's Exhibit C) shows in detail that the Plaintiff could not have been at the crime scene during the time the murders took place. This is irrefutable fact because the laws of physics are not suspended at will. Did the State know that this time frame presented in its own case was physically impossible? Dr. Larkin determined that the time frame was impossible; the State would certainly have been able to do so. The State had well over a year to prepare its case and this anomaly should have been disturbingly obvious. The most important component in a crime scene investigation is to determine, first and foremost, that the suspect could have actually been present at the crime scene during the time of the murders. The State provided an alibi for the Plaintiff, yet proceeded to try this case. The jury did not have access to the police reports nor the time required to determine the impossibility of the timeline in the State's case. A criminal defendant is entitled to jury determination that he is guilty of every element of a crime with which he is charged, beyond a reasonable doubt. Apprendi v. New

Jersey 120 S.Ct. 2348 U.S.,2000. Decided June 26, 2000. That entitlement fails when the State withholds exculpatory evidence.

CRIME INVESTIGATION

Dr. Larkin's opinion, based upon the time elements discussed above, and crime scene investigation presented by the State (Plaintiff's Exhibit C, page 4) is:

In totality, the sum of the lack of evidence gathered, being greater than each piece of evidence not gathered, makes it appear to this writer that Swiney was their man and that was all the they needed to know, so the police had no reason to look any further or gather any real evidence that would tell them what really happened that night.

Dr. Larkin's professional opinion is that during the investigation of this crime, exculpatory evidence was excluded in the investigation of this case (Plaintiff's Exhibit C, page 10):

A crime scene investigation offers a rich harvest for those investigating the crime, and if properly done, is a truth finding process. A detective working a scene approaches it from one of two directions:

He either has a suspect in mind, and hopes to fit a case around him, which causes him to subconsciously or deliberately filter out evidence that does not fit his theory; or

He may make an intellectually honest attempt to seek the truth behind the crime, search for both inculpatory and exculpatory evidence, reporting the latter if it shows up.

One common dodge is to exclude looking at or examining pertinent material that is believed to be exculpatory, as I believe – from the evidence I received - was done in this case.

Dr. Larkin offers his opinion of the police investigation, based upon reports from those present at the crime scene (Plaintiff's Exhibit C, page 2):

...it is my opinion as a forensic pathologist that the investigation into the deaths of Betty Swiney ... and Ronald Pate ... fell far below the minimum standards of an adequate investigation.

Further, Dr. Larkin notes that he suspects the crime scene investigation fell so far below the standard required for an unbiased investigation that the Plaintiff was prejudiced at the onset of the investigation (Plaintiff's Exhibit C, page 6):

The fact that the police already had a suspect, does not mean that that suspect is automatically guilty, to the point where adequate crime scene investigation is forgone, such as in this case.

The State's trial strategy, presented to the jury, attempted to show a connection between the Plaintiff observing the victims engaged in sexual activity through the kitchen window and then firing the first shot through that window. This theory is pivotal because the Plaintiff was never connected to the murder weapon. However, Dr. Larkin notes that the kitchen window theory is not supported by physical evidence (Plaintiff's Exhibit C, page 8):

As mandated by the laws of physics if the glass came from a perforation caused by a bullet fired from the outside of the home there would be fragments of glass somewhere. The lack of any trace evidence of glass seriously questions Higgins' statement that the bullet that struck Pate in the neck came through a window.

The jury did not benefit from expert testimony regarding these glass fragments. The State's case was not challenged therefore the jury would have had to assume that the State's allegation was true. While further discussing the crime scene investigation that was performed in this case, Dr. Larkin notes (Plaintiff's Exhibit C, page 9):

In my opinion, these numerous incongruities severely weaken the confidence in Swiney's conviction.

Dr. Larkin's extensive experience as a forensic pathologist lead him to conclude that, while the investigation does not have to be perfect, in order to serve public policy needs to convict the guilty and exonerate the innocent, an unbiased investigation is vital (Plaintiff's Exhibit C, page 11):

While Swiney was not entitled to a “perfect” police investigation of the circumstances surrounding his wife’s murder, he was entitled to more than a scavenger hunt designed to convict him.

FINGERPRINT EVIDENCE

One of the many anomalies noted by Dr. Larkin is the lack of fingerprint evidence gathered and/or presented in this case (Plaintiff’s Exhibit C, page 9):

There is no mention anywhere of dusting for fingerprints in any report, except a dusting of the AR-7 rifle that was the alleged murder weapon. ... Not taking fingerprint evidence throughout the house, especially of the telephone ... is indicative of sloppy crime scene investigation, indifference or ignorance of what to look for.

A crucial element of the State’s case established the time of the murders within a 5-minute span (between 9:25 P.M. and 9:30 P.M.). A State witness testified that someone answered the telephone at the crime scene at 9:30 P.M. [R. 738, R. 937] and was emphatic about the time being absolutely correct. The State, unchallenged by the Defense, allowed the inference that the voice was that of the Plaintiff. That testimony, without even requesting that the witness identify the Plaintiff’s voice under oath, established crucial elements of the State’s case. However, fingerprint evidence was apparently not gathered from the subject telephone and was certainly not presented to the jury.

Fingerprint evidence was taken of the AR-7 rifle and magazine, alleged to be the murder weapon, however, this evidence was not presented at trial. The State’s unwillingness to present this evidence at trial, when the State needed, legally, to connect the Plaintiff to the murder weapon, appears to be indicative of exculpatory evidence as explained by Dr. Larkin (Plaintiff’s Exhibit C, page 9):

It is more than curious that the latent prints on the rifle were not processed. A match to Patrick would have sewn up the case for the state. Since the fingerprint expert did not know before he examined the prints whose prints he would find, but certainly would not be surprised if he found Swiney's prints on the rifle, satisfying a major element of this

case--connecting Swiney to the alleged murder weapon as stated in the indictment, that he did not report on his findings is most suggestive of "foreign" prints on the rifle, or that he was told by someone not to examine these latent fingerprints.

The Examination for Latent Prints report from the DFS (Plaintiff's Exhibit C, Appendix

A) states:

Laboratory examination of the submitted item reveals latent prints of possible value on the stock and magazine of the rifle. Lifts and photographs were taken. The lifts and photographs are to be released to the investigating officer. The submitted evidence is transferred to Forensic Lab Analyst III David Higgins....

The Plaintiff has never had access to the results of the latent print examination other than the letter reporting that there were latent prints of possible value. Latent print evidence was not presented to the jury.

BLOOD EVIDENCE

Further exculpatory evidence exists in this case in the form of the Examination of Serological Evidence (Rule 32 Petition, Exhibit 4). Dr. Nordby has previously stated in the Rule 32 Petition, Exhibit 1, that a shooter cannot fire close or contact shots and not have blood detected on his clothing.

Nordby Report (Rule 32 petition, Exhibit 1, Pg. 7):

"The report states that clothing worn by Patrick Swiney was analyzed for bloodstains, and that NONE WERE FOUND on his jacket, shirt, blue jeans or his tennis shoes. If no bloodstains were found on his clothing, then he did not fire a weapon at close or near contact range 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."

Dr. Larkin supports Dr. Nordby's conclusions when he states that there is no evidence that the state tested for blood stains anywhere else in the crime scene. This omission is inexcusable and can only reveal that during the investigation of this crime, forensic investigators approached this case in a manner prejudicial to the Plaintiff (Plaintiff's Exhibit C, page 9):

There is no mention whatsoever of any blood stains under or around either victim. Bloodstain analysis is complex and time consuming, but can help determine the relative positions of the players when shot. Being shot at least six times must have cost Betty much blood loss, but no recognition of this is made on any written report I received. Blood splatter evidence could have helped determine exactly what happened during the shootings, and place each victim in a certain locus.

AUTOPSY AND FORENSIC PROTOCOLS

Dr. Larkin conducted an analysis of the forensic and medical reports (Plaintiff's Exhibit

D). His conclusions are, briefly, as follows:

In my opinion as a forensic pathologist,

The crime investigation was far below the standard needed for a murder investigation, and therefore prejudiced Patrick Swiney;

The medical examiner, for whatever reason, neglected to collect pertinent samples, which prejudiced Patrick Swiney, thereby preventing him from getting a fair trial;

The conclusion that Patrick Swiney could fire an AR-7 rifle at least eight times without getting any primer residue on him is blatantly erroneous, misleading, and prejudiced Patrick Swiney, thereby denying him a fair trial.

In Dr. Larkin's Conclusion (Plaintiff's Exhibit C, p. 11), he states:

In my review of the documents presented to me I found none of these items properly evaluated in accordance with routine objectivity of a crime investigation. This type of investigation, which I have disclosed in this report as biased and partial, was a surprise to me given the published mission statement by the Alabama Department of Forensic Sciences.

Based on my experience of 31 years as a Forensic Pathologist, it is my best opinion to a reasonable medical and scientific certainty that the crime scene investigation relative to the deaths of Betty and Pate fell far below the accepted practice of crime scene investigation. The investigation negated the truth finding process for a quick fix, without even considering other alternatives.

The entire investigation appears to have been biased toward finding Swiney guilty.

With the investigators assuming a "slam-dunk" mind-set, and for the reasons stated above, it is clear that the on-scene investigation fell grossly below the standards demanded for an adequate investigation in a murder case.

Newly-discovered evidence clearly shows that exculpatory evidence exists and the Plaintiff is factually innocent of the crimes for which he was convicted. The Plaintiff was denied due process at trial because this evidence was suppressed in both trial phases and could not have been revealed through due diligence by Plaintiff at trial, in direct appeals, or prior collateral appeals. Additional exculpatory evidence was not known until Ed Moran disclosed David Higgins' testing methods in the State's Motion to Dismiss. The evidence of actual innocence was discovered initially by Dr. Nordby as related to the lack of GSR (Rule 32 Petition). Further information, presented in the affidavit by Ed Moran, included in the Respondent's Motion to Dismiss, discloses unconscionable practices by David Higgins. Dr. Larkin has further shown that the crime scene, medical and forensic examination in this case "fell grossly below the standards demanded for an adequate investigation in a murder case." More importantly, Dr. Larkin has also shown that the Plaintiff could not have been present at the crime scene when the murders took place using time-element evidence relied upon by the State.

"There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 119 S.Ct. 1936, U.S.Va.,1999. *Brady* requires the disclosure of exculpatory and impeachment evidence to a defendant even if the evidence is known only to police investigators and not to the prosecutor. Martin v. State 839 So.2d 665, Ala.Crim.App.,2001., Nov. 30, 2001. The Plaintiff has shown by a preponderance of the evidence that all 3 elements of a *Brady* violation are present in this case.

II. PLAINTIFF'S SUCCESSIVE RULE 32 PETITION IS TIMELY FILED PURSUANT TO RULE 32.2(C)

Rule 32.2.(c) states in relevant part: "The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable two-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later..." The Nordby report was published on July 2, 2003 and the petition was filed August 13, 2003, less than 2 months later. Therefore, the petition is timely filed under Rule 32.2(c). Petitioner makes no attempt to "make an end run around the statute of limitation", as Respondent claims, but merely shows that he is factually innocent of the crimes for which he is currently incarcerated. This reasoning is the very intent behind Rule 32.1(e) and without that intent Rule 32.1(e) has no purpose whatsoever.

Respondent claims that the instant petition is successive. A "successive habeas petition" raises grounds identical to those raised and rejected on the merits in a prior petition. (citations omitted). The instant petition raises grounds not raised in any other direct or collateral proceeding. The grounds claimed are those specified in Rule 32.1(e) and sufficiently pleaded before this Court.

The Respondent cites Farris v. State, 2003 WL 22220357, *4 apparently to support an erroneous opinion that the Plaintiff does not meet the Rule 32 burden, specifically the stipulation that had this evidence been known by the jury it would have prevented the original conviction. The Plaintiff does meet the burden; any trier-of-fact would not adjudicate a defendant guilty when scientific evidence clearly shows that he is innocent. The Court has the liberty to determine these matters as stated in a reading of *Farris* taken in context:

"A petition for writ of error coram nobis on grounds of newly discovered evidence does not ask the trial judge to substitute his judgment for that of the jury. It requires the trial court to weigh

evidence other than what the jury had before them at trial, and it requests the court to determine whether, based on evidence the jury did not hear, the petitioner is entitled to a new trial.

"Thus, a trial court who rules on whether newly-discovered evidence entitles a petitioner to a retrial cannot usurp the function of the original jury. Unlike a trial judge who grants a post-judgment motion for new trial based on his own belief that the jury verdict was wrong, a court which grants a coram nobis petition on grounds of newly-discovered evidence has not determined that the jury verdict was in error. Instead, he has found that, notwithstanding the sufficiency of the evidence originally testified, the newly-discovered proof, had it been known, would have prevented the original conviction.... See *Farris*, *Supra*.

Of particular note is that in the *Farris* case cited by the Respondent, the Alabama Court of Appeals remanded the case to the trial court with directions. In *Farris*, the State had presented a similar procedural bar claim as that which the Respondent is attempting to use in the instant petition. The Appeals court pointed out the judicial discretion that is applicable to "newly-discovered proof" and disagreed with the State. *Farris* was adjudicated as not procedurally barred.

Respondent claims that application of the limitations period is "mandatory and jurisdictional" relying upon Arthur v. State, 820 So. 2d 886, 889 (Ala. Crim. App. 2001) citing Williams v. State, 783 So. 2d 135 (Ala. Crim. Appl. 2000). Plaintiff agrees with this recently-established precedent in Siebert v. Campbell, 334 F.3d 1018 (June 23, 2003). However, the Plaintiff has presented newly-discovered evidence and the mandatory and jurisdictional limitations period of 6 months has been met, therefore, the Court has jurisdiction to hear this petition.

Further, the Respondent claims that there can be no newly-discovered evidence since the swabs allegedly used in the primer residue test are no longer available. This is an erroneous understanding of newly-discovered evidence. Newly-discovered evidence is defined in Rule 32.1(e), Ala.R.Crim.P., as:

- (1) The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
- (2) The facts are not merely cumulative to other facts that were known;
- (3) The facts do not merely amount to impeachment evidence;
- (4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
- (5) The facts establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received.

Newly-discovered evidence can take many forms: new eye witness testimony or recanted testimony; a suicide note left in an unknown or not readily accessible location; examples of newly-discovered evidence that are disassociated with the original evidence are plentifully supported and there is no need to iterate further examples for this Court.

Testing old evidence using new methods is only one form that “newly-discovered evidence” might take. In older techniques for DNA analysis, Restriction Fragment Length Polymorphism (RFLP) was crude by today’s standards. Newer techniques that further individualize DNA with greater accuracy, namely Polymerase Chain Reaction (PCR) has been considered new evidence and admitted into courts throughout the nation as newly-discovered evidence even though generic DNA analysis has been known for years. Dr. Nordby’s newly-discovered evidence uses scientific processes that have been in existence for several years (IR Spectroscopy and SEM), however, it is the application of these processes specifically to the class characteristics of the AR-7 rifle firing .22 cal Remington rim-fire ammunition and the GSR generation that is newly-discovered and was heretofore unknown, as discussed extensively in the Rule 32 petition and incorporated Exhibit 1. DNA analysis has been in use for many years but PCR (a new application of DNA analysis) is relatively new. IR Spectroscopy and SEM are

already accepted analytical methods under *Frye* (citations omitted). For evidence to be newly-discovered does not require that a new scientific technique or device be developed or devised although that can be one method of discovering new evidence. Dr. Nordby's newly-discovered evidence, as applied to the class characteristics of the AR-7 rifle and .22 caliber Remington ammunition, were not known in time to be included in any previous direct or collateral proceeding; the information could not have been discovered through the exercise of reasonable diligence since the Plaintiff has no control over discoveries within the scientific community. Plaintiff has established that "the facts relied upon were not known" prior to July 2, 2003.

The facts revealed by Dr. Nordby's newly-discovered evidence, are not merely cumulative to other known facts. The newly-discovered evidence that firing an AR-7 rifle equipped with .22 caliber Remington rim-fire long ammunition 8 times in an enclosed space would have left detectible levels of GSR on the shooter and that the GSR would have been "detectible by any means (emphasis added) employed by the forensic lab" is clearly established in the instant petition.

Plaintiff has established that the facts revealed by the newly-discovered evidence do not merely amount to impeachment evidence. While these facts certainly point to the potential impeachment of the testimony of more than one State's witness at trial, that is collateral to the newly-discovered evidence in this case.

The outrageous statement by the Respondent that "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 contend that newly-discovered evidence related to the GSR tests is impossible because the State has destroyed the evidence. The Supreme Court of Alabama authorizes retention of criminal evidence for 75 years. If the State has lost or destroyed these swabs, they

may provide any piece of the Plaintiff's clothing that was introduced into evidence for testing using the new application of technology recently discovered by Dr. Nordby. That testing will show that there are no GSR component materials on the Plaintiff's clothing either, just as there were no GSR component materials on the Petitioner's hands. Due to the fact that Dr. Nordby's newly-discovered application of GSR testing using a class characteristic-indicative .22 cal AR-7 rifle is the basis of this claim, the State can provide the actual rifle alleged to be used in these murders to duplicate the procedure on the actual weapon said to be used in this crime. That rifle will be subjected to this newly-discovered technique to further verify for the Court that proof exists that the Plaintiff is innocent of these crimes. Discovery in post-conviction proceedings is available if petitioner has established "good cause" for the disclosure of the requested information. Ex Parte Land, 775 So.2d 847 (Ala.2000). Not only does the State possess the GSR exculpatory evidence and testing results but other potentially exculpatory evidence that was not revealed to the jury or the Petitioner. This other exculpatory evidence is noted by Drs. Nordby and Larkin in their affidavits (Plaintiff's Exhibits B and C). See *Martin, Kyles*, Supra.

The Respondent claims: "Swiney admitted in his testimony that he was at Betty's house with the murder weapon around the time the murders occurred. R 866-68" This is another of the many irrelevant references inserted by the Respondent. The cited pages of the transcript relate to the Plaintiff on the stand giving defense testimony. The Plaintiff had removed his AR-7 rifle and other articles from the marriage home earlier in the day and placed them in his pickup to transport them to his mother's house. The Plaintiff consistently claimed prior to trial and during trial that the AR-7 rifle remained in his truck. At cross-examination of the Plaintiff, was the first time the State introduced the elements of their trial strategy, [R. 892]:

Q. At that point, you got outraged and went back to the truck and got your gun, isn't that what happened?

A. No, sir.

Q. And you returned to that window, didn't you?

A. No, sir.

Q. And you stood there and aimed that lethal little rifle through that window and you took aim at Ronnie Pate, didn't you?

A. No, sir.

The State did not connect the Plaintiff to the murder weapon. The State failed to meet its burden of proof and the Defense Motion for Acquittal was due to be granted at the close of the State's case.

The Respondent states: "Swiney claimed that he went blank and the next thing he could remember was being in a daze at his sister's house. R. 866-68, 875, 905." Plaintiff has consistently claimed that he was hit in the back of the head and knocked unconscious after viewing his wife and a man he didn't recognize through the kitchen window. This claim was never verified as either true or untrue during the investigation or trial testimony, not even during examination by Defense counsel, which certainly would have been the appropriate time to defend his client since the Plaintiff was the sole defense witness. Plaintiff's sister, Robbie Carter, was subpoenaed to appear but was never called by the defense. Carter was a key witness since she made the 911 call, was found in the crime scene by first-responders, and was present when the Plaintiff was removed from her home by Alabaster Police Officers. Robbie Carter was not called to the stand. A trial strategy such as Mr. Bell alleges that he used was woefully deficient. Defense examination of the Plaintiff, [R. 868]:

Q. Now, after you saw that, Mr. Swiney what, if anything, occurred?

A. I went blank.

Q. Do you recall anything about the events after that particular observation that you just described?

A. No, sir. It was like somebody had hit me in the back of the head with a baseball bat. It was vibrating and I was having - - -

MR. CAMPBELL: We object. It's non-responsive.

BY THE COURT: Sustained.

Q. Now, Mr. Swiney, after you observed that, what is the next thing, matter of memory, that you have, sir?

A. I remember partially being at my sister's house --- it was parts of it were like a daze.

Defense counsel immediately abandoned the line of questioning on an objection as simple to cure as an objection for non-responsiveness. While this is certainly an element of Mr. Bell's alleged trial strategy, any reasonable defense attorney would have realized the importance of this line of questioning in defense of his client.

Respondent's reference to [R. 905] is again irrelevant to the subject matter, but it does show Plaintiff's testimony where he specifically says that he did not have the rifle in his immediate possession on the night of the crime as we can see in the State's cross-examination of the Plaintiff [R. 905]:

Q. When you got out of that truck, you didn't have your gun with you, did you?

A. No, sir.

Q. You don't remember going back to the truck and getting your gun, do you?

A. No, sir.

The Respondent claims: "Swiney's rifle which was identified by Higgins as the murder weapon, was found under a towel at Swiney's sister's house. R. 413, 555-556, 558-559."

Further, the Respondent claims: "Swiney's mother stated that she did not know whether she should give the rifle to the police. Id." The Plaintiff has already presented this information to

the Court in the Rule 32 Petition (pages 10-11). The Plaintiff was not under arrest but was in the police car when Lt. Oliver procured the rifle from Odelle Swiney and not from the Plaintiff. In testimony by Lt. Oliver, [R. 559]:

“There was a white towel on it and she raised the white towel and give me a rifle and give it to me [sic] and told me that her and Robbie had taken it out of Pat’s truck and further that they were scared he might do something to himself before they went back down to the house.”

According to Lt. Oliver’s testimony, Odelle Swiney was in possession of the AR-7 rifle because she feared that the Plaintiff would “do something to himself.” The implication by the State is that Odelle Swiney and Robbie Carter were trying to hide the rifle from the police. If the police truly suspected this, Carter and Odelle Swiney should have been arrested on charges of accessory. This is yet another example of inadmissible, hearsay testimony that was key to building this circumstantial case. The Respondent’s reference to [R. 555-556] in this instance is another of the irrelevant references inserted by the Respondent. Therefore, no defense can be presented for this claim.

The Respondent states at the bottom of page 17 of the Motion to Dismiss, “The autopsy on Betty revealed that she had been shot six times, an obvious indication that the person who murdered her was angry and fully intended that she die.” Dr. Larkin (Plaintiff’s Exhibit C, Page 10) states:

It is well known that a face shot is indicative of a killer who didn’t know the victim, and not of someone who loved the victim [R-951].

It is well established, by the FBI Behavior Sciences lab at Quantico, that if the killer knows the victim he will not shoot her in the face. Contrary to the claim posed by the Respondent, the manner in which Betty Snow Swiney was killed indicates that a person or persons who did not know the victims was the perpetrator(s) of this crime. A competent

investigator would have interpreted this “clue” as an indication that the estranged husband was not the most likely suspect.

Respondent presents an affidavit from Ed Moran of the Alabama Department of Forensic Sciences (State’s Motion to Dismiss, Exhibit B) wherein Moran states on page 3, paragraph 1, “The FAAS test, which is still used in many labs today, is designed to detect antimony and/or barium, chemicals that were contained in the primer composition of some rim fire and center fire primers.” This is a false statement that, if taken as truth, misleads the Court regarding the use of this scientific testing method. The FAAS test is designed to detect known components of GSR, which are usually barium and lead, in combination with antimony IF antimony is known to be present in the primer composition (Plaintiff’s Exhibit B, Page 4).

Note that after 1987, antimony was added to the gunpowder of Remington .22 caliber rim-fire cartridges as a fusing element. (Rule 32 Petition, Exhibit 1, p. 13) Any reasonably competent forensic lab knew in 1987 that .22 caliber Remington rim-fire ammunition did not contain antimony, yet the Respondent’s witness, Ed Moran, states under oath that Mr. Higgins tested for antimony ONLY completely disregarding barium and lead which were known to be the ONLY components present in the subject ammunition in 1987. The only possible conclusions that a reasonable person could draw from Moran’s statement are: Higgins was incompetent, Moran is not telling the truth, or the primer residue analysis attempted purely to connect the Plaintiff to a type of ammunition that lacked antimony. Each one of these potential conclusions is reprehensible.

The purpose of the FAAS test allegedly used by the DFS and Mr. Higgins, is designed to analyze essentially three metal components known to be present in GSR (antimony, barium, and lead). For Mr. Higgins to conduct an FAAS examination of swabs taken from the Plaintiff’s

hands for ANTIMONY only while knowing that antimony was not present in .22 cal rim-fire Remington ammunition in 1987 is an unarguably ludicrous claim by the Respondent's witness and is designed to do nothing but undermine the Plaintiff's burden of proof by making an end-run around scientific fact.

On page 3 of Moran's affidavit he states: "The fact that Higgins was unable to detect the presence of antimony is not surprising because even Nordby's report at page 13 concedes that Remington added antimony to its rim fire primer mix only after 1987, a point in time after the murders occurred in December 1987." This statement is an outrageous concoction designed to support Moran's distortion of the truth. Since Dr. Nordby knew that antimony was not present in this primer mix, Higgins also knew that antimony was not present but Higgins tested for it regardless of that knowledge? How incompetent would Higgins have to be to test for an element he KNEW not to be present? Would Higgins also check the wiper blades on his car if his breaks were malfunctioning? Is the Court to believe that Higgins was that incompetent or that Moran is misstating Higgins actual testing? Either way, their claim does not hold up to an elementary logic test.

Moran further states: "Nordby's report that contains allegations that DFS performed paraffin tests in this case is false." This statement is not supported by any such allegation by Dr. Nordby. At the top of Page 9 of Dr. Nordby's report (Rule 32 Petition, Exhibit 1), Nordby states, "With respect to GSR, the Alabama Department of Forensic Sciences primer residue analyses report does not indicate which method of GSR testing was applied to the samples taken from Mr. Swiney's hands. Nor does it describe exactly how the residues were collected." Nordby then poses a question: "For example, were Mr. Swiney's hands analyzed for the presence of GSR using the so-called paraffin test, or was some other method such as chemical, or

microscopic?" Dr. Nordby did not allege that paraffin tests were used but included paraffin testing as a possibility in his analysis because he was told by the Plaintiff that a paraffin test was conducted upon him by the Alabaster Police Department:

"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

Dr. Nordby, as he stated, was not in possession of DFS documentation revealing what analytical methods, procedures, or data were used in this case, therefore, he included all known testing methods that could have been employed by DFS. Nordby produced a comprehensive report of his findings that are scientifically reliable regardless of what testing method was used in the primer residue analysis by DFS.

The Plaintiff is not now nor has he ever been in possession of information regarding the testing procedures, analysis methods, or scientific data used or produced at the DFS lab. As a leading scientist in the United States, Dr. Nordby evaluated all possibilities when conducting his analysis including but not limited to the paraffin test. The Plaintiff's rather detailed recollection of a paraffin test followed by Mr. Moran's claims that no paraffin test was performed is one of the many distressing incongruities that are rife throughout this case.

Moran states on Page 4 of his affidavit, "Swiney's hands were swabbed at least 2 hours after the best known time of the shooting....DFS policy was not to accept swabs taken more than three hours after the shooting." Therefore, as Moran points out, the swabs taken from the Plaintiff were within the time frame acceptable to the DFS for reliable testing of GSR. Moran goes on to state, "Some firearms also do not deposit sufficient quantities of residues for

detection.” Moran is correct; some firearms do not deposit sufficient residue for detection. However, as Dr. Nordby has conclusively shown, the AR-7 rifle deposits more than sufficient quantities especially when fired 8 times in an enclosed space that would be detectable by any competent GSR testing method.

Moran attempts to discredit Nordby’s finding under *Frey* by pointing out that an article mentioned by Nordby (“Glass-Containing gunshot Residue Particles: A New Type of Highly Characteristic Particle?”) is titled as a question. Boron glass residues fused with barium and lead residues are the focus of this article. Nordby is discussing that this technique could be used on the original evidence in this case to show that GSR does not exist on the physical evidence. Nordby does not pose that this glass frictionizer discovery is associated with his newly-discovered evidence in this case (Plaintiff’s Exhibit B, Page 5).

Dr. Nordby conducted a review of Ed Moran’s affidavit and the State’s Motion to Dismiss. Dr. Nordby’s affidavit is attached as Plaintiff’s Exhibit B. A conclusion regarding Moran’s affidavit is best stated by Dr. Nordby (Plaintiff’s Exhibit B, Page 6):

Unfortunately, neither “better science” nor a clear reading of my report appears evident in Mr. Moran’s obviously sincere but potentially misleading statements attached as [State’s Motion to Dismiss] Exhibit B.

Respondent states, “the prosecution had an ‘open file’ policy and that there were no surprises at trial. R32R at 225, 273.” As stated in the Rule 32 petition, the disclaimer used by the Alabama Department of Forensic sciences lab that states, “It should be noted that certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination” is a false statement. (Nordby) Defense counsel relied upon this statement during discovery and in direct appeal. Dr. Nordby has shown through newly-discovered evidence that reliance upon that statement tainted the evidence. Reliance by defense counsel, Mr. Bell, on that

statement is collateral to the ‘open file’ policy. The defense did not know prior to trial or during trial that the disclaimer was false and could not have known the disclaimer was false. If Mr. Bell had hired experts to review the work product of DFS he may have discovered other anomalies that he could have used to defend the Plaintiff but he could not have discovered that the disclaimer was false since the trial and direct appeals took place prior to July 2, 2003, the publication date of the Nordby report. Counsel at the prior Rule 32 hearing could not have discovered the falsehood of the disclaimer either as those proceedings were also prior to July 2, 2003. Therefore, Respondent’s assertion that the State’s “open file” policy was sufficiently curative in this case is an attempt to enforce a procedural bar where one does not exist.

Dr. Nordby elucidates regarding the “class characteristics” testing he conducted that led to the newly-discovered evidence (Plaintiff’s Exhibit B, page 1):

Absent the actual weapon, these facts about the nature and function of the .22 cal AR-7 RIFLE are restricted to what we call “class characteristics” or general properties common among all such .22 cal AR-7 rifles. By applying generally accepted scientific methods, the deposition of gunshot residues from the rifle at specific distances between this rifle and its targets, and on any shooter firing 8 rounds in a confined space were investigated. In place of the actual clothing, experiments involved testing Tyvek suits which were worn by the experimental shooter for GSR analysis.

Dr. Nordby refutes Ed Moran’s statement in his point # 7, on page 6 where Moran misrepresents Dr. Nordby as saying, “a negative result for gunshot residue is proof that the ‘person tested did not fire a weapon’ is erroneous.” Mr. Moran extracted out-of-context statements and assertions allegedly presented by Dr. Nordby, added his own twist to them, and came up with arguments designed to refute Dr. Nordby’s findings. Dr. Nordby easily refutes Ed Moran’s allegations in his own affidavit.

*Mr. Moran is incorrect in stating that my methods are “irrelevant” because **he is incorrect in assuming that they relevantly differ.** First, all scientific tests for gunshot residues have the identical objective of determining the presence, absence and relative*

concentrations of specific elements constituting that residue – each method is relevant in that all share this common objective.

After reading Ed Moran's sworn account of the testing completed by Higgins, Nordby states (Plaintiff's Exhibit B, page 4):

Knowing that a .22 cal LR cartridge fired from a RIFLE was involved, several scientific issues arise.

*First, at that time in 1987, the presence of antimony would not have been expected since it was well known not to be present in pre-1989 Remington .22 cal LR rim-fire ammunition. Therefore a negative result for antimony (S_b) should have been **expected** by Higgins as a matter of routine. Secondly, for GSR in general, meaning GSR from ordinary center fire ammunition with antimony (S_b) as well as barium (B_a) and lead (P_b) present, the issue is not simply the presence or absence of antimony (S_b) but its concentration relative to the other elements thought to be unique to GSR. In fact it is the ratio of barium (B_a) to antimony (S_b) that is important, not its simple presence or absence. To be indicative of GSR, in fact, its concentration should be $8.3 \pm 2 (B_a)$ to $1 (S_b)$ otherwise the elements may have a source other than a gunshot.^{footnote 3}*

*The relevant samples from Swiney for the potential detection of someone firing a .22 cal RIFLE involve testing the **clothing**, including the shirt at the shoulders, collar, chest and arms as well as the pants. Samples must also be taken from the suspected shooter's **face, including both nostrils and both ears**, and not simply from the suspected shooter's hands.*

The purpose of my scientific study and report was to raise clear scientific questions which can be definitively answered though properly applying scientific principles to the actual evidence from Swiney's case, especially to the clothing worn by Swiney at the time of the shootings. From my perspective as an independent forensic scientist, and in point of neutral scientific fact, this proper analysis has just as much chance of proving him guilty as it does of proving him innocent.

On page 3 of Moran's affidavit he states, "The documents that I reviewed in the DFS file indicate that Higgins conducted a test that was screening for antimony. Higgins tested the swabs that were made from Swiney's hands and received a negative result for antimony. Because Higgins received a negative result, he did not do any more testing." It is clear from Ed Moran's

^{footnote 3} What I in fact objected to in my report dated July 2, 2003, from Higgins's report involved the error involved in the inference from the **absence of antimony**, supposedly supported by Higgins's mystery flameless science, what ever it was, **to the conclusion that THEREFORE, Swiney fired a .22 cal weapon** since that weapon lacks antimony in the primer!! That inference is even more outrageous, and certainly much more prejudicial, than the one Moran falsely accuses me of advancing.

presentation that Higgins conducted an incomplete and biased test for GSR, reported that no GSR was found, and then disclaimed the results as applied to “some brands of .22 cal ammunition.” A non-scientist reading the Primer Residue Report would interpret this report as: “We tested the hands, didn’t find anything, but that doesn’t mean he’s not guilty.” What the results really mean is that Higgins conducted an irrelevant test and reported that the test showed that the results did not exclude the Plaintiff as the shooter. If Higgins tested for antimony ONLY, knowing that antimony could not be present in the test results, he must have expected not to find antimony and then relied on the disclaimer to report that the testing did not exclude the Plaintiff as the shooter. Therefore, the only point in Higgins testing for GSR on the Plaintiff’s hands was to attempt to connect the Plaintiff to an ammunition type that did not contain antimony. (See Nordby affidavit footnote 3).

Dr. Nordby agrees with the transitory nature of GSR on the hands of a potential shooter especially when referring to .22 cal hand guns (State’s Motion to Dismiss, Exhibit B, Appendix A), but takes exception in GSR detection when related to the specific testing he completed on the AR-7 rifle fired 8 times in an enclosed space and GSR components that remain replete on other areas of the body and clothing:

However, as I have detailed in my July 2, 2003 report, the weapon at issue in this case was not a hand gun, but a RIFLE. For example, the ears, usually both oily and waxy, and in males, often hairy, remain very good sources for potential GSR/GPR when a rifle is fired. They are not easily subject to the type of shaking or wiping contact characteristic of GSR loss from the hands, and they are not subject to the same vectors associated with the force of gravity.

And the main source of GSR samples, currently both well known and well accepted by forensic and crime laboratories across the nation for being a much more receptive vessel for trace evidence analysis, remains the CLOTHING evidence, not evidence from hand swabs. This is confirmed in my scientific work as detailed in my July 2, 2003 report. I agree with the points made in the attached FBI Bulletin article with respect to the proposed analogy between GSR on the hands and chalk dust on the hands. But now I ask you to apply that same analogy of chalk a bit further, in order to make the comparison

*relevant to the well accepted scientific points presented in my July 2, 2003 report. Toss a bunch of chalk dust onto a blue woolen blazer, for example, and NOW simply try to shake it off, or wipe it off with a towel. The attempt is guaranteed to fail. In fact, those attempts may even imbed the residues deeper into the fabric. That is my point with respect to the durability of the **relevant GSR evidence in this case. It has nothing to do with hands.***

In item 6 of Moran's affidavit, he challenges the scientific testing methods that Dr. Nordby used as accepted in the scientific community by referencing an article that Dr. Nordby cited from the Journal of Forensic Sciences, May 2003, Vol. 48 about glass frictionizer found in GSR. Glass frictionizer is not the basis for the newly-discovered evidence in this case as one can readily see by reading Dr. Nordby's report. The basis of the newly-discovered evidence has been restated many times, but for sake of clarity: **the newly-discovered evidence is that nobody can fire an AR-7 rifle 8 times in an enclosed space without depositing GSR on themselves in such liberal quantities that the GSR would be detectable by any means employed by any competent laboratory.** Dr. Nordby previously noted in Exhibit 1 of the Rule 32 petition on pages 6, 42, and 53:

"In light of the above faulty and misleading conclusions, apparently reached without sound scientific support, or the application of relevant scientific principles, the original physical evidence in this case must be re-examined and reanalyzed by applying sound scientific methods from the relevant forensic sciences in place of the errant applications evidenced in the original trial."

"The lack of this testing provides another indication of misleading or absent science glossed over in order simply to procure a conviction."

"Given the incomplete nature of the scientific work in this case in the face of rather obvious questions concerning the mechanisms of wounding, the potential for inaccurate and misleading event reconstructions remains high if not certain. Given this prodigious problem, in turn, the potential for injustice based upon an improper and inadequate analysis of the scientific data also remains high if not certain."

"There are many unexplained anomalies, contradictions, scientific inefficiencies and outright scientific voids in the forensic analysis of this case."

The previous statements by Dr. Nordby are very strong statements but worthy of note by the Court since the opinion is given by one of this country's leading forensic scientists. Dr. Nordby's prior cautions and concerns about the lack of sound scientific methods used in the investigation of this case have been illustrated with striking clarity in Ed Moran's presentation of Higgins alleged GSR testing techniques and findings. Moran's claims are patently absurd, yet the Court is expected to accept them. We are fortunate to have men like Drs. Nordby and Larkin who have the education and work experience to detect "forensic nonsense."

Heretofore, the Circuit Court of Shelby County, the Shelby County Sheriff's Office, and the Alabama Department of Forensic Sciences have been unwilling to release any of the crime scene evidence for independent testing. Information portrayed by Ed Moran in his affidavit reveals serious anomalies in the conduct of forensic testing by the Alabama Department of Forensic Sciences. At trial, defense Counsel did not independently verify any of the findings of the Alabama Department of Forensic Sciences. Defense counsel's reliance on questionable testing procedures conducted by the State is harmful error that tainted the results of the trial. Discovery in post-conviction proceedings is available if petitioner has established "good cause" for the disclosure of the requested information. Ex Parte Land, 775 So.2d 847 (Ala.2000). The 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. That claim, if true, would constitute a denial of the writ of habeas corpus for all collateral proceedings under Rule 32.1(e).

The assertions in Ed Moran's affidavit do not refute the validity of Dr. Nordby's findings. Whether the errors in analysis of evidence are intentional or not they reveal tremendous

inadequacies in well-established scientific procedures and logic related to the testing of evidence used to convict the Plaintiff. 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 Plaintiff'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.

Higgins work is in question due largely to the information revealed by Ed Moran in his affidavit included in the State of Alabama's Motion to Dismiss. The work processes of the DFS have been shown by one of their own employees to be questionable. Moran's claims cast substantial doubt on the reliability of testing by the DFS. While Dr. Nordby referenced the lack of scientific method used by the lab in his July report, Moran has now presented an opportunity for non-scientists to doubt either the reliability of Higgins' testing processes or the truthfulness of Moran.

The Plaintiff has shown by a preponderance of the evidence that he is innocent of these crimes. Dr. Nordby's report shows with newly-discovered evidence, obtained through proper scientific analysis, that no person can fire a .22 cal AR-7 rifle in an enclosed space 8 times without being covered with GSR that is detectable by any means employed by a competent forensic lab. The Nordby report was released on July 2, 2003 and this petition was filed on August 13, 2003, well within the time limitations of Rule 32. Ed Moran, of the DFS has revealed that David Higgins conducted GSR testing using the FAAS method to detect a single

component of GSR (antimony) that was known not to be present in .22 cal Remington rim-fire ammunition (the alleged ammunition used in this crime).

III. PLAINTIFF'S SUCCESSIVE RULE 32 PETITION SHOULD NOT BE DISMISSED BECAUSE IT IS SUFFICIENTLY PLEADED

Respondent is in error when he claims that Plaintiff does not demonstrate that he meets each one of the requirements of Rule 32.1(e) (1)-(5).

The facts relied upon were not known by the Plaintiff until July 2, 2003, well after the time of the trial, direct and previous collateral review. Dr. Nordby's technique applied to the class characteristics of the AR-7 rifle was not known in time to be included in any previous direct or collateral proceeding; the information could not have been discovered through the exercise of reasonable diligence since the Plaintiff has no control over discoveries within the scientific community. Rule 32.1(e)(1).

The scientific error revealed by Dr. Nordby is critical evidence and is not merely cumulative to other facts that were known (Respondent stated Rule 32.1(e)(2) as "other facts that were not known"). This critical evidence is established in the instant petition and clearly reveals exculpatory evidence that was withheld constituting a violation of *Brady*. The Respondent's witness, Ed Moran, in an attempt to refute the facts of Dr. Nordby's discovery, reveals other anomalies that also disclose a high potential for additional exculpatory evidence in this case but those issues were not revealed until the State's Motion to Dismiss was submitted on November 12, 2003. These other anomalies were heretofore unknown by the Plaintiff as the State has never revealed the actual contents of its lab testing results. Therefore, the Plaintiff meets even the misstated criteria of Rule 32.1(e)(2) used by the Respondent.

Plaintiff has established that the newly-discovered evidence does not merely amount to impeachment evidence. While these facts certainly point to the potential impeachment of the testimony of more than one State's witness, the newly-discovered evidence in this case is not merely impeachment evidence. The newly-discovered evidence is critical evidence that, standing alone, would have acquitted the Plaintiff regardless of other evidence presented against him at trial. Rule 32.1(3).

Had this critical evidence been presented at trial the result probably would have been different. The jury would not have been left to deliberations using only conjecture by the prosecution based on a circumstantial case. The jury would have been presented with critical scientific evidence upon which to base their decision. That evidence would have shown that the Plaintiff could not have been the shooter. Therefore, the State would not have been able to uphold its burden and the Plaintiff would have been acquitted. Rule 32.1(4). Had this critical evidence been known before trial, the Grand Jury would not have enough "evidence" to file an indictment against Petitioner. Had this critical evidence been known by police investigators the Plaintiff would not have been charged with this crime; investigators would have sought the person(s) who actually committed this crime.

Whether the Respondent is actually unclear about this critical evidence or is feigning confusion in order to uphold this conviction, it is relevant to say that if scientific forensic techniques and procedure were simple to understand we would have no need for experts or scientists in the field of forensic science. Plaintiff has stated the relevance and strength of the new evidence as concisely as possible without resorting to production of a textbook. The purpose of testimony by qualified scientific experts is to elucidate this information so laypeople can understand the quality and significance of their findings. Rule 32.6(b) requires that the

petition itself disclose the facts relied upon in seeking relief. The petition discloses that newly-discovered evidence was detected in July 2003 when Dr. Jon Nordby released his findings of experiments conducted on the class characteristics of an AR-7 rifle firing .22 caliber Remington rim-fire ammunition. Nordby discovered scientifically that a person could not fire an AR-7 rifle equipped with .22 caliber Remington rim-fire ammunition 8 times in an enclosed space without leaving GSR that would have been “detectable by any means (emphasis added) employed by the forensic lab” on the alleged shooter of the weapon. The results of GSR testing of Plaintiff, as noted in the Primer Residue Analysis report (Rule 32 Petition, Exhibit 3), “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.” Dr. Nordby has found the disclaimer to be untrue when applying it to the class characteristics of an AR-7 rifle firing .22 caliber Remington rim-fire ammunition. Nordby notes in his findings that the disclaimer (certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination) is a false statement. Defense counsel relied upon this false statement during discovery and in direct appeal. Dr. Nordby has shown through newly-discovered evidence that the GSR testing of the Plaintiff was factually exculpatory. This critical evidence establishes that the Plaintiff is innocent of the crime for which he was convicted. (Rule 32.1(e)(5). Respondent’s witness, Ed Moran, in his affidavit attached to the State’s Motion to Dismiss attempts to undermine the Plaintiff’s burden of proof by alleging that Higgins tested for antimony only, got a negative result, and didn’t do any further testing. This claim by Moran is an unarguably ludicrous claim and is clearly an attempt to make an end-run around scientific fact.

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)

IV. PLAINTIFF'S SUCCESSIVE RULE 32 PETITION SHOULD NOT BE DISMISSED BECAUSE IT SATISFIES THE REQUIREMENTS OF RULE 32.2(B)

Rule 32.2(b)(2) states: "A successive petition on different grounds shall be denied unless ... the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

Dr. Nordby's technique applied to the class characteristics of the AR-7 rifle was not known in time to be included in any previous direct or collateral proceeding; the information could not have been discovered through the exercise of reasonable diligence since the Plaintiff has no control over discoveries within the scientific community. Failure to rule in favor of the Plaintiff would circumvent substantive due process and a fair trial as guaranteed by Article I, §6 and §13 of the Alabama Constitution (1901) and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Plaintiff was denied due process at trial because this evidence was suppressed in both trial phases resulting in a clear violation of *Brady*.

Respondent states that the petition should be denied because IR Spectroscopy and SEM technologies have been available since the mid-1970's and mid-1980's respectively. Plaintiff agrees that those technologies have been in existence for years, however, it is the application of

these processes specifically to the class characteristics of the AR-7 rifle firing .22 cal Remington rim-fire ammunition and the GSR generation that is newly-discovered and was heretofore unknown, as discussed extensively in the Rule 32 petition and incorporated Exhibit 1.

Due to presentation of information in the affidavit by Ed Moran in the State's Motion to Dismiss regarding the testing that David Higgins performed, the Plaintiff now recognizes that there are even more serious anomalies present in the investigation of this case than previously realized. Several pieces of exculpatory evidence were withheld by the State resulting in *Brady* violations. That withheld evidence was exposed by the State in its Motion to Dismiss. Whereas, the evidence of actual innocence was solidly established in the Rule 32 petition, the State's attempt to refute the Plaintiff's claim resulted in exposure of misconduct by David Higgins and the DFS, heretofore unknown by Plaintiff. Whether the State was aware that this exculpatory evidence existed or not, the prosecution is responsible when exculpatory evidence is withheld. See *Martin*, Supra.

The conviction of an innocent person represents a fundamental miscarriage of justice. See *Schlup*, Supra. The Plaintiff has made a colorable showing of actual innocence. *Coleman v. Thompson*, 111 S.Ct. 2546, U.S.Va.,1991. The Plaintiff has met the cause-and-prejudice rule. Exculpatory evidence was withheld from the jury due to misconduct by the State that prejudiced the Plaintiff and denied him his right to due process.

V. PLAINTIFF'S SUCCESSIVE RULE 32 PETITION SHOULD NOT BE DISMISSED BECAUSE IT RAISES CLAIMS OF NEWLY DISCOVERED EVIDENCE THAT COULD NOT HAVE BEEN RAISED AT TRIAL OR ON DIRECT APPEAL

The instant petition is filed under Rule 32.1(e), Ala R. Crim P. Rule 32.2(a)(3) and (a)(5) do not apply. Plaintiff has established that "the facts relied upon were not known" prior to July 2, 2003.

Plaintiff had no control over the discoveries of the scientific forensic community. Therefore, reasonable diligence on the part of the Plaintiff could not have revealed this newly-discovered evidence before Dr. Nordby made his discoveries in July of 2003.

If the exculpatory evidence was suppressed by the DFS, that suppression from the prosecution made certain documents unavailable to the defense under the State's "open file" policy. While the State has the duty to uncover mitigating and exculpatory evidence, the defense while relying on an open-file policy, does not. This information has been concealed for years prohibiting a prior *Brady* claim. See Strickler v. Greene, 527 U.S. 263, 283 (1999). If the exculpatory evidence was otherwise available to the prosecution, yet suppressed in the "open file" policy, that constituted a violation of *Brady*. It is not a petitioner's responsibility to uncover suppressed evidence uniquely within the control of the State. Scott v. Mullin, 303 F.3d 1222, 1229 (10th Cir. 2002).

The defense did not know prior to trial or during trial that the disclaimer used by Higgins in the Primer Residue Analysis report was false and could not have known the disclaimer was false through exercise of due diligence. If Mr. Bell had hired experts to review the work product of DFS he may have discovered other anomalies that he could have used to defend the Plaintiff but he could not have discovered that the disclaimer was false since the trial and direct appeals were all prior to July 2, 2003, the publication date revealing discoveries made by Dr. Nordby. Counsel at the prior Rule 32 hearing could not have discovered the falsehood of the disclaimer either as those proceedings were also prior to July 2, 2003. The instant petition is the first time that this information could have been presented since the newly-discovered evidence was found in July of 2003. Plaintiff could not have discovered this evidence before Dr. Nordby released his findings.

"The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable two-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly-discovered material facts, whichever is later; provided, however, that the two-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987." Dowdell v. State, 854 So.2d 1197, Ala.Crim.App., 2002. The instant petition was filed within six (6) months after the discovery of the newly-discovered material facts, therefore, the petition is timely filed and is not due to be dismissed.

VI. Conclusion

The Plaintiff has shown by a preponderance of the evidence that he is innocent of these crimes. Dr. Nordby's report (Rule 32 Petition, Exhibit 1) discloses newly-discovered critical evidence obtained through proper scientific analysis, that no person can fire a .22 cal AR-7 rifle in an enclosed space 8 times without being covered with GSR that is detectable by any means employed by a competent forensic lab. The Nordby report was released in July 2003 and this petition was filed in August 2003, well within the time limitations of Rule 32.1(e).

Ed Moran, attempts to refute the Plaintiff's case by offering evidence that David Higgins of the DFS conducted GSR testing using the FAAS method to detect a single component of GSR (antimony) that was widely known not to be present in .22 cal Remington rim-fire ammunition (the alleged ammunition used in this crime). Revelation of this information casts solemn doubt on the reliability of all testing done by DFS in this case. Dr. Nordby pointed out that the lack of blood on the Plaintiff's clothing is further evidence of his innocence due to the facts alleged in the State's case regarding shooting distance from the victims. If the Plaintiff were guilty of these crimes his clothing would have contained the victim's blood. Is Ed Moran prepared to claim in a

subsequent affidavit that Higgins tested the clothing for blood evidence using a “really big magnifying glass” and only looked for the Plaintiff’s blood type and finding none, concluded that the lack of blood is meaningless? Moran’s claims regarding the FAAS testing of GSR are as ludicrous as the previous statement. Ed Moran’s statements about Higgins testing methods and results have no scientific basis in fact. Dr. Nordby’s affidavit (Plaintiff’s Exhibit B) refutes the claims of Ed Moran using sound scientific principles.

Dr. Larkin’s Affidavit (Plaintiff’s Exhibit C) and Medical-Legal Report (Plaintiff’s Exhibit D) reveal that the crime scene investigation, forensic testing and analysis of evidence in this case fell “grossly” below the standard set in the field of forensic investigations. Dr. Larkin’s analysis of the forensic pathology in this case shows clearly that not only is the Plaintiff innocent of this crime but that the State’s case was prejudicial from the outset. The trial contained anomalies in forensic reports and testimony by prosecution witnesses wherein the State built a case against the Plaintiff that was literally impossible. The State’s case provided an alibi for the Plaintiff placing him in two physical locations 4 miles apart at the exact same moment in time.

Exculpatory evidence was withheld constituting a *Brady* violation. The “open file” policy of the prosecution was meaningless to the defense because the exculpatory evidence was not known until July 2003. Critical exculpatory evidence was withheld from presentation to the jury. Had that evidence been known by the jury the results at trial would have been different. Had this case been investigated within a reasonable standard set for crime scene investigation, the State would not have been able to procure an indictment against the Plaintiff.

The Plaintiff has been denied the U.S. Constitutional protections accorded him under the 5th, 6th and 14th Amendments and Article I, §6 and §13 of the Alabama Constitution (1901). The Plaintiff will succeed in federal court under the federal rules of civil procedure (28 USC 2254)

because the conviction of an innocent person represents a fundamental miscarriage of justice Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808, 63 USLW 4089 (U.S.Mo., Jan 23, 1995) (NO. 93-7901) and this case is a violation of clearly established federal law. See *Apprendi*, supra. Therefore, in the interests of conservation of judicial resources and finality of judgments, that State must overturn this conviction before the case requires federal judicial review.

Under clearly established federal law, a state violates a defendant's right to due process when it fails to disclose evidence favorable to the accused prior to trial and the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). The United States Supreme Court has long recognized that due process is violated when a prosecutor fails to correct testimony that he knows to be false or fails to reveal exculpatory evidence. These principles illustrate "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). In our system, the prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" United States v. Bagley, 473 U.S. 667, 675 (1985) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The prosecution in a criminal matter has a constitutional obligation to disclose exculpatory evidence to the defendant. See Brady v. Maryland, 373 U.S. 83 (1967), Giglio v. United States, 405 U.S. 150 (1972). A finding of materiality of the evidence is required under *Brady*. Giglio v. United States, 405 U.S. 150, 154 (1972). Exculpatory evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v.

Greene, 527 U.S. 263, 280 (1999) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). Nondisclosure merits relief only if the prosecution's failure "undermines confidence in the outcome of the trial." Kyles v. Whitly, 514 U.S. 419, 434 (1995) (quoting Bagley, 473 U.S. at 678). The Supreme Court has rejected any distinction between impeachment evidence and exculpatory evidence. See Bagley, 473 U.S. at 676. "Impeachment evidence" is 'evidence favorable to an accused,' Brady, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.* The "individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437.

Three (3) questions are currently posed to the United States Supreme Court in Delma Banks, Jr. v. Janie Cockrell, Director, Texas Dept. Criminal Justice No. 02-8286, and are pending adjudication at this time. One of those questions pertains to Rule 15(b) of the Fed. R. Civ. P. and one is a *Brady* question. An opinion by the Supreme Court may affect the instant case at some point in the future. Information regarding exculpatory evidence, potentially withheld not only from the Plaintiff but also from the State and the Courts has come to light in the instant case but the extent of some of that evidence is unknown at this time. This evidence may relate to litigation posed in prior direct and collateral proceedings. Not knowing with specificity what some of that evidence will contain, it is only the Plaintiff's duty to present that which is now known or becomes know during the proceedings before this Court. The Petitioner prays that this Court will consent to presentation of this evidence whether the evidence is uncovered in an evidentiary hearing or is specifically stated in the pleadings. This request serves the State's interest in conservation of judicial resources and the finality of judgments and the Plaintiff's interest in substantive due process.

In the instant case, Petitioner cannot reveal contents of evidence testing because the DFS has withheld the information. The Plaintiff should not have the burden of discovering *Brady* evidence that has been wrongfully withheld. The State should not be permitted to rely on its own wrongful conduct to avoid adjudication of a clear constitutional violation that was responsible for the jury's guilty verdict. Evidence was suppressed and defense counsel relied upon prosecution's open-file policy. Ineffective assistance claims were presented in prior proceedings and found to have no basis. However, suppression of documents (testing results) from the prosecution would make those documents unavailable to the defense under the State's "open file" policy. While the State has the duty to uncover mitigating and exculpatory evidence, the defense while relying on an open-file policy, does not. This information has been concealed for years prohibiting a prior *Brady* claim. See Strickler v. Greene, 527 U.S. 263, 283 (1999). The interference of public officials (DFS) impeded defense counsel's efforts to comply with state procedural rules. Murray v. Carrier, 477 U.S. 478, 488 (1986). It is not a petitioner's responsibility to uncover suppressed evidence uniquely within the control of the State. Scott v. Mullin, 303 F.3d 1222, 1229 (10th Cir. 2002).

The Nordby report was released in July 2003 and this petition was filed in August 2003, well within the time limitations of Rule 32.1(e) and within compliance of all sections of Rule 32.

The Respondent's motion to dismiss is due to be denied.

Respectfully submitted,

Wilson Myers, Attorney for Petitioner
Ronald Patrick Swiney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of this PLAINTIFF'S RESPONSE TO STATE OF ALABAMA'S MOTION TO DISMISS upon Clay Crenshaw, Attorney General's Office, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130, by placing a copy of the same in the United States Mail, first class, postage prepaid on this the _____ day of _____, 2004.

Wilson Myers, Attorney for Petitioner

OF COUNSEL:

WILSON MYERS (mye006)
156 E. 15th Avenue - Suite 6
Gulf Shores, Alabama 36542
251-968-3090, Fax 968-3611
E-Mail: myerswl@gulftel.com