

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

RONALD PATRICK SWINEY,
PETITIONER.

v.

STATE OF ALABAMA,
RESPONDENT.

Case Number

ID YR NUMBER

PETITION FOR RELIEF FROM CONVICTION OR SENTENCE (Pursuant to Rule 32,
Alabama Rules of Criminal Procedure)

IN THE SHELBY COUNTY CIRCUIT CRIMINAL COURT OF COLUMBIANA, ALABAMA

Ronald Patrick Swiney v. State

Prison Number 154406 Place of Confinement William E. Donaldson Correctional Facility, 100 Warrior Lane, Bessemer, AL 35023

County of Conviction Shelby

1. Name and location (city and county) of court which entered the judgment of conviction or sentence under attack CIRCUIT COURT OF SHELBY COUNTY, ALABAMA (CC-88-077), 112 N. Main St., Columbiana, AL 35051, (205) 669-3760
2. Date of judgment of conviction June 12, 1989
3. Length of sentence Life without parole
4. Nature of offense involved (all counts) Violation of S13A-5 40(a)(10) of the Alabama Criminal Code. Murder wherein two or more persons are murdered by one act or pursuant to one scheme or course of conduct.
5. What was your plea (Check one)
(a) Guilty _____
(b) Not Guilty _____
(c) Not Guilty by reason of mental disease or defect _____
(d) Not Guilty and not guilty by reason of mental disease or defect X

If you entered a guilty plea to one count or indictment, and a not guilty plea to another court or indictment, give details:

N/A

6. Kind of trial: (Check one)
(a) Jury X (b) Judge only _____

7. Did you testify at the trial?
Yes X No _____
8. If you did appeal, answer the following:
- (a) As to the state court to which you first appealed, give the following information:
- (1) Name of court Alabama Court of Criminal Appeals
 - (2) Result Affirmed without opinion
 - (3) Date of result August 3, 1990
- (b) If you appealed to any other court, then as to the second court to which you appealed, give the following information:
- (1) Name of court Supreme Court of Alabama
 - (2) Result Writ of Certiorari DENIED
 - (3) Date of result December 14, 1990
- (c) If you appealed to any other court, then as to the third court to which you appealed, give the following information:
- (1) Name of court N/A
 - (2) Result N/A
 - (3) Date of result N/A
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes X No _____
11. If your answer to Question 10 was "yes," then give the following information in regard to the first such petition, application or motion you filed:
- (a)
- (1) Name of court Circuit Court of Shelby County, 18th Judicial Circuit
 - (2) Nature of proceeding Petition for Relief from Conviction or Sentence pursuant to Rule 32, Alabama Rules of Criminal Procedure; Petition Pursuant to Rule 32 of the Alabama Rules of Criminal procedure for Relief from Judgment; Motion for acquittal or new trial.
 - (3) Grounds raised State failed to prove prima facie case; jury verdict against the weight of evidence; court's failure to properly rule on acquittal motions; court's failure to properly rule on motion for a mistrial; court error as a matter of law regarding lesser crimes.
 - (4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes X No _____
 - (5) Result DENIED.
 - (6) Date of result January 28, 1993
- (b) As to any second petition, application, or motion, give the same information:
- (1) Name of court Federal District Court, Northern District, Southern Division
 - (2) Nature of proceeding Application for Habeas Corpus under 28 U.S.C Section 2254
 - (3) Grounds raised Ineffective Assistance of Counsel at bifurcated trial; fundamental unfairness at trial; prosecutorial misconduct.
 - (4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes _____ No X
 - (5) Result DENIED

- (6) Date of result June 23, 1998
- (c) As to any third petition, application, or motion, give the same information:
- (1) Name of court N/A
 - (2) Nature of proceeding N/A
 - (3) Grounds raised N/A
 - (4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes No
 - (5) Result N/A
 - (6) Date of result N/A
- (d) Did you appeal to any appellate court the result of the action taken on any petition, application, or motion?
- (1) First petition, etc. Yes No
 - (2) Second petition, etc. Yes No
 - (3) Third petition, etc. Yes No
- (e) If you did not appeal when you lost on any petition, application, or motion, explain briefly why you did not:
Certificate of appealability denied by the 11th Circuit Court of Appeals, August 13, 1999.

GROUNDS OF PETITION

Listed below are the possible grounds for relief under Rule 32. Check the ground(s) that apply in your case, and follow the instruction under the ground(s):

___ A. *The Constitution of the United States or the State of Alabama requires a new trial, a new sentence proceeding, or other relief.*

For your information, the following is a list of the most frequently raised claims of constitutional violation;

- (1) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding the nature and consequences of the plea.
- (2) Conviction obtained by use of coerced confession.
- (3) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (4) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (5) Conviction obtained by a violation of the privilege against self-incrimination.
- (6) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (7) Conviction obtained by a violation of the protection against double jeopardy.
- (8) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (9) Denial of effective assistance of counsel.

This list is-not a complete listing of all possible constitutional violations.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each constitutional violation that you claim, whether or not it is one of the nine listed above, and include under it each and every fact you feel supports this claim. Be specific and give details. (See, Attached).

___ B. *The court was without jurisdiction to render the -judgment or to impose the sentence.*

If you checked this ground for relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

- ___ C. *The sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law.*

If you checked this ground for relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

- ___ D. *Petitioner is being held in custody after his sentence has expired.*

If you checked this ground for relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

- X E. *Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because; the facts relied upon were not known by the 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; and The facts are not merely cumulative to other facts that were known: and The facts do not merely amount to impeachment evidence; and if the facts had been known at the time of trial or sentencing, the result would have probably have been different; and The facts establish that petitioner is innocent of the crime for which he was convicted or should not have received the sentence that he did.*

If you checked this ground for relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

- ___ F. *The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.*

If you checked this ground for relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

13. **IMPORTANT NOTICE REGARDING ADDITIONAL PETITIONS RULE 32(b) LIMITS YOU TO ONLY ONE PETITION IN MOST CIRCUMSTANCES. IT PROVIDES:**

"Successive Petitions. The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf on the same petitioner. A second or 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 a failure to entertain the petition will result in a miscarriage of justice."

- A. Other than an appeal to the Alabama Court of Criminal Appeals or the Alabama Supreme Court, have you filed in state court any petition attacking this conviction or sentence?

Yes X No ___

- B. If you checked "Yes" give the following information as to earlier petition attacking this conviction or sentence:

(a) Name of court Circuit Court of Shelby County, 18th Judicial Circuit

- (b) Result DENIED
- (c) Date of result January 28, 1993
- C. If you checked the "Yes" line in 13A, above, and this petition contains a different ground or grounds of relief from an earlier petition or petitions you filed, attach a separate sheet or sheets labeled: "EXPLANATION FOR NEW GROUND(S) OF RELIEF."
- On the separate sheet(s) explain why "good cause exists why the new ground or grounds were not known or could have been ascertained through reasonable diligence when the first petition was heard, and [why the] failure to entertain [this] petition will result in a miscarriage of justice."
14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ___ No X
15. Give the name and address, if know, of each attorney who represented you at the following stages of the case that resulted in the judgment under attack:
- (a) At preliminary hearing Richard Bell, 201-A Yeager Parkway, P.O. Box 427, Pelham, Alabama 35124
 - (b) At arraignment and plea Same as above
 - (c) At trial Same as above
 - (d) At sentencing Same as above
 - (e) On appeal Same as above
 - (f) In any post-conviction proceeding Sheffield, Sheffield & Lentine, P.C., 730 Frank Nelson Building, Birmingham, AL 35203 (205-328-1365)
 - (g) On appeal from adverse ruling in a post-conviction proceeding Pro se
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ___ No X
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ___ No X
18. What date is this petition being mailed? August 13, 2003

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

ATTORNEYS' VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

We hereby swear or affirm under penalty of perjury that, upon information and belief, the foregoing is true and correct.

Executed on - August 13, 2003.

Wilson Myers, Attorney for Petitioner
Ronald Patrick Swiney

SWORN TO AND SUBSCRIBED before me this the _____ day of _____,
2003.

Notary Public

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

TABLE OF AUTHORITIES

Cases

<i>Banks v. State</i> , 845 So. 2d 9; 2002 Ala. Crim. App. LEXIS 157	2
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).....	24
<i>Ex Parte Griffin</i> , 790 So. 2d 351; 2000 Ala. LEXIS 361	22
<i>Frey v. United States</i> , 54 App. D.C. 46; 293 F. 1013; 1923 U.S. App. LEXIS 1712; 34 A.L.R. 145.....	24
<i>INS v. Kim</i> , 123 S. Ct. 1708; 155 L. Ed. 2d 724; 2003 U.S. LEXIS 3428; 71 U.S.L.W. 4315; 2003 Cal. Daily Op. Service 3579; 2003 Daily Journal DAR 4599	7
<i>Jackson v. Virginia</i> , 443 U.S. 307; 99 S. Ct. 2781; 61 L. Ed. 2d 560; 1979 U.S. LEXIS 10	22
<i>Martin v. State</i> , CR-99-2249, 2003 Ala. Crim. App. LEXIS 136	21
<i>Ogle v. Long</i> , 551 So. 2d 914, 915 (Ala. 1989).....	21
<i>United States v. Staller</i> , 616 F.2d 1284; 1980 U.S. App. LEXIS 17552	20
<i>West v. Founders Life Assurance Co. of Florida</i> , 547 So. 2d 870, 871 (Ala. 1989).....	21
<i>Wiggins v. Smith</i> , 123 S. Ct. 2527; 156 L. Ed. 2d 471; 2003 U.S. LEXIS 5014; 71 U.S.L.W. 4560; 2003 Daily Journal DAR 7015; 16 Fla. L. Weekly Fed. S 459	8, 22

Miscellaneous

<i>Charles W. Gamble, McElroy's Alabama Evidence</i> § 21.01(1) (5th ed. 1996).....	22
---	----

Rules

ARCrP Rule 32	1, 2, 6, 10, 40
ARE Rule 201	40
ARE Rule 401	22

These material facts could not have been known at time of trial or sentencing since the forensic techniques used at the time were insufficient to reveal Petitioner's innocence; due diligence would not have, heretofore, uncovered these material facts (ARCrP 32.1(e)(1)) . These facts are not merely cumulative to known facts (ARCrP 32.1(e)(2)) or to impeachment evidence (ARCrP 32.1(e)(3)) .

These newly discovered material facts require that the Court vacate the conviction or sentence in order to correct a manifest injustice. Banks v. State, 845 So. 2d 9; 2002 Ala. Crim. App.. In *Banks* the Court notes that Banks pled guilty to a crime that might not have occurred. In the instant case, a crime was certainly committed but the Plaintiff could not have been responsible for this crime. Therefore, Plaintiff is deprived of liberty unlawfully (ARCrP 32.1(e)).

I. PROCEDURAL HISTORY:

1. Petitioner was convicted of capital murder in violation of ALA. CODE §13A-5-40(a)(10) (1975) in the Shelby County Circuit Court on June 12, 1989.

2. A sentencing hearing, wherein Petitioner waived the right to jury sentencing and a pre-sentence investigation report, was held the following day wherein Petitioner was sentenced to life without possibility of parole.

3. Petitioner appealed to the Alabama Court of Criminal Appeals wherein the conviction was AFFIRMED WITHOUT OPINION, on August 3, 1990.

4. Petitioner appealed to the Supreme Court of Alabama wherein the writ of certiorari was DENIED on December 14, 1990.

5. Petitioner filed a Petition for Relief from Conviction or Sentence pursuant to Rule 32, Alabama Rules of Criminal Procedure in the Circuit Court of Shelby County, 18th Judicial Circuit, moving for acquittal or new trial. An evidentiary hearing was GRANTED. The Rule 32 petition was DENIED on January 28, 1993.

Grounds.

A. That the State of Alabama failed to prove a prima facie case against the Defendant in that there was no testimony by the State's witnesses that would create a logical nexus between the weapon and the death of Betty Swiney and Ronald Pate.

B. That the verdict of the jury is against the greater weight of evidence in this cause.

C. That the Defendant, Ronald Patrick Swiney, had previously filed a Motion for Acquittal at the close of the State's case and had renewed a Motion for Acquittal at the close of the Defendant's case. Both motions were denied by the trial court and the Defendant assigns error to the denial of said motions for acquittal. The Defendant states that failure of the trial court to enter a judgment of acquittal in

favor of the Defendant required the Defendant to testify in his defense thereby violating the mandates of the Fifth Amendment to the Constitution of the United States.

D. That the trial court erred in failing to grant a mistrial based upon the continued statements of the State's witness, Nell Snow, in referring to the Defendant as a "murderer" and referring to the fact that the Defendant "murdered" the deceased, Betty Swiney.

E. That the trial court erred as a matter of law in failing to direct a verdict of acquittal to the charge of capital murder and murder due to the fact that the deceased, Betty Swiney, was engaged in an act of adultery at the time of her death.

6. Petitioner filed a writ of habeas corpus under 28 U.S.C. Section 2254 in the Federal District Court, Northern District, Southern Division wherein the Court DENIED his petition on June 23, 1998.

Grounds.

A. Petitioner was denied effective assistance of counsel to which he was and is constitutionally entitled under the sixth and fourteenth amendments to the United States Constitution, laws or treaties.

B. Trial court's action rendered petitioner's trial fundamentally unfair, thus violating petitioner's right to a fair trial.

C. Petitioner was denied of his right to fair trial by the prosecutor's improper conduct/remarks during closing arguments.

D. Petitioner was denied effective assistance of counsel during the sentencing phase.

7. Petitioner filed a certificate of appealability to the 11th Circuit Court of Appeals wherein this petition was DENIED on August 13, 1999.

II. GROUND S SUPPORTING THE PETITION FOR RELIEF

A. Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because; the facts relied upon were not known by the 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; and the facts are not merely cumulative to other facts that were known: and the facts do not merely amount to impeachment evidence; and if the facts had been known at the time of trial or sentencing, the result would have been different; and the facts

establish that petitioner is innocent of the crime for which he was convicted or should not have received the sentence that he did. (ARCrP Rule 32.1(e))

1. Good cause exists why the new ground or grounds were not known or could have been ascertained through reasonable diligence when the first petition was heard, and why the failure to entertain this petition will result in a miscarriage of justice. (ARCrP Rule 32.2(b)) 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.

2. Petitioner is being held under sentence of Life Without Parole and is not guilty of the crime for which he was convicted. New evidence [Exhibit 1 – Final Analysis Forensics Report] shows that Petitioner could not have committed these crimes. The Primer Residue Analyses Report from the Alabama Department of Forensic Sciences revealed the absence of gun shot residues (GSR) on Petitioner’s person [Exhibit 3 – Primer Residue Analyses and Transmittal]. This evidence was not admitted at trial due to the potential for “false positive” results and the generally-accepted belief that GSR from certain brands of .22 caliber rim fire ammunition did not contain the elements necessary to make a determination of negative results when laboratory analyses failed to reveal conclusive evidence. New techniques established in 2003 reveal that an “inconclusive” result is highly reliable and is, in fact, a negative and exculpatory result (Exhibit 1, p. 14).

3. The Alabama Department of Forensic Sciences used the aforementioned standard disclaimer on the Primer Residue Analyses report claiming that “It should be noted that certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination.” That disclaimer has been found, through new forensic techniques, to be false (Exhibit 1, p. 9).

4. These assumptions regarding the GSR testing results were relied upon by both counsel at the time of trial, however, new technology reveals that this reliance was a false presumption that heavily influenced the outcome at trial. This false presumption created an inadvertent violation of substantive due process. In *INS v. Kim*, the U.S.S.C. declared that, “the institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.” *INS v. Kim*, 123 S. Ct. 1708; 155 L. Ed. 2d 724; 2003. The Court also noted: “As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.” See *INS*, supra. Since the results of the GSR testing are, in fact, evidence of the Plaintiff’s innocence, (Exhibit 1, p. 9) Plaintiff is illegally deprived of a substantive due process right to freedom.

5. Reliance on the GSR inadmissibility and the associated disclaimer further contributed to a secondary false presumption regarding the results of the Examination of Serological Evidence [Exhibit 4 – Examination of Serological Evidence and Transmittal] wherein the Alabama Department of Forensic Sciences states, “The items listed below were examined and analyzed for

the presence of blood, however, none was detected: Jacket, Shirt, Blue jeans, tennis shoes.” The lab is referring to the clothing worn by the Plaintiff at the time of arrest. The absence of blood on the Plaintiff’s clothing was not considered exculpatory evidence at the time of trial probably due to reliance on what they considered an inconclusive GSR test. However, new technology shows that the absence of blood on the Plaintiff’s clothing is exculpatory evidence (Exhibit 1, p. 7).

6. Had the Jury viewed this evidence in light of its true exculpatory nature, “there is a reasonable probability that at least one juror would have struck a different balance” resulting in acquittal. Wiggins v. Smith, 123 S. Ct. 2527, 2003. Further, had both counsel not made a false presumption regarding the GSR report disclaimer and had that presumption not tainted both counsel’s assessment of the examination of blood evidence results, Plaintiff would probably have been acquitted.

III. PRELIMINARY STATEMENT

Petitioner is a graduate of the Alabama State Police Academy (1967) and the Huntsville Police Academy (1976). He is a former Deputy Sheriff for the Shelby County Sheriff’s Office in Columbiana where he served from 1964-1969; a former Police Officer serving with the Huntsville Police Department in Huntsville (1965-1969), the Vestavia Police Department in Vestavia Hills (1969-1973), and the Gulf Shores Police Department in Gulf Shores (1973-1977). Petitioner served as Vice-President of the Fraternal Order of Police while with the Vestavia Police Department. While working for the Gulf Shores Police Department, Petitioner was instrumental in exposing a drug smuggling operation resulting in the conviction of the District Attorney in Baldwin County and the Sheriff’s Department chief investigator. Petitioner left

police work due to his disillusionment with the law enforcement community (after the drug smuggling incident in Gulf Shores) and went to work first as a legal investigator (1977-1980) and then as an over-the-road driver (1980-1986).

Petitioner has been incarcerated for the past fourteen years.

Attempts were made to procure the original evidence in this case in order to subject that evidence to further testing. All attempts have failed due either to lost/destroyed evidence or requirements by the custodians that a subpoena issue before they will release evidence. Results of evidence procurement attempts are included in the form of affidavits and response letters [Exhibit 5 – Trial Evidence Procurement Attempts]. The inability to procure the original evidence in this case led the Plaintiff to procure the services of Dr. Jon Nordby, Ph.D., D-ABMDI, to subject the claims presented by the State, whereby Petitioner was convicted, to scientific forensic analysis. Dr. Nordby's findings, included as **Exhibit 1**, show that Petitioner could not have committed the crimes for which he was convicted. Dr. Nordby's findings were not available before July 2, 2003, therefore, Petitioner could not have discovered this evidence through due diligence in either direct or indirect appeals (ARCrP 32.1(e)(1)).

IV. STATEMENT OF THE FACTS

Plaintiff was arrested, tried, and convicted of these crimes because circumstantial evidence pointed to his guilt. However, a false presumption, based upon the disclaimer used in the Primer Residue Analysis report from the Alabama Department of Forensic Sciences (Exhibit 3), caused inadvertent suppression of exculpatory evidence from proper consideration and presentation to the Jury. This resulted in a violation of substantive due process as the Plaintiff

was convicted of a crime that new technology (Exhibit 1) shows he could not have committed. Plaintiff's actual innocence is established in the findings of Dr. Jon Nordby, based upon new technology (IR Spectroscopy applied to GSR analysis) wherein Dr. Nordby shows that the GSR findings are exculpatory. Nordby further supports his findings with the lack of blood present on the Plaintiff's clothing and other anomalies in scientific method. Nordby's experiments and subsequent findings show that the Plaintiff could not have committed the crimes for which he was convicted.

Clarification of certain forensic ballistic terms is necessary before proceeding. "Gun shot residues" (GSR) refers to burned and unburned gunpowder exiting the weapon from anywhere other than from the muzzle. "Muzzle blast effluent" (MBE) refers to burned and unburned gunpowder exiting the weapon from the muzzle. "Primer residue analyses" refers to the results of tests conducted to determine whether GSR, MBE, burned gunpowder, and unburned gunpowder exists upon the person of the alleged shooter (Exhibit 1, Page 20).

A. CASE BACKGROUND

On December 10, 1987, Betty Snow Swiney and Ronnie Lynn Pate were found shot to death in the marriage home of Petitioner and Betty Snow Swiney near Saginaw, Alabama. Mr. Pate was Mrs. Swiney's ex-husband. Petitioner had moved out of the house at the request of Betty Snow Swiney a few days earlier. Petitioner was arrested that night at the home of his sister, Robbie Carter, in Alabaster, Alabama. A model AR-7 rifle was recovered from the front porch of Ms. Carter's home where she and her mother, Odelle Swiney, had placed it after removing it from Petitioner's pickup truck.

(TR-559) Officer Stanley Oliver, Alabaster Police Department, testimony –

I told her, I said Mrs. Swiney, we need the gun. She took me out on the front porch where we just came in and outside the door there was some kind of a rack there. I don't know if it was a wood rack or what. There was a white towel on it and she raised the white towel and give me a rifle and give it to me 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.

Petitioner was taken to the Alabaster Police Department where he cooperated with police and voluntarily answered questions. Plaintiff asserted that he remembered nothing after seeing Betty Snow Swiney and Ronnie Pate through the kitchen window of the Saginaw house when he arrived to feed his dog. Plaintiff was confused and unable to remember anything following the view through the window other than calling his sister, Robbie Carter, from a convenience store.

Robbie Carter initiated the 911 call that brought police and paramedics to the crime scene. Therefore, Ms. Carter apparently found out about the crime from the Plaintiff. This potentially places the Plaintiff at the scene of the crime both before (by his own admission) and after the murders took place. This circumstantial evidence and testimony regarding the Plaintiff's state of mind earlier in the day are what convicted him. Sans exculpatory evidence, the State had a circumstantial case against the Plaintiff.

Petitioner was indicted for intentionally causing the death of Betty Snow Swiney and Ronnie Lynn Pate by shooting them with a rifle by one act or pursuant to one scheme or course of conduct in violation of Section 13A-5-40(a)(10) of the Alabama Criminal Code. Petitioner pled NOT GUILTY AND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT. Petitioner was charged with CAPITAL MURDER and released on bond pending trial.

According to the trial record, an AR-7 rifle and .22 caliber Remington rim fire ammunition were used in the murders.

(TR-466) Mike Smitherman, Shelby County Sheriff's Department –

Q. Would you observe what's in State's Exhibit 44?

A. It is a spent cartridge hull, Remington brand, 22 caliber.

(TR-467) Mike Smitherman, Shelby County Sheriff's Department –

Q. Would you please observe what is marked as Stated Exhibit 43?

A. It also contains a spent Remington brand, 22 caliber, cartridge.

(TR-469) Mike Smitherman, Shelby County Sheriff's Department –

Q. What is in State's Exhibit 41, please, sir?

A. It is a live 22, Remington brand, cartridge.

(TR-494) **Mike Smitherman, Shelby County Sheriff's Department --**

Q. Mike, let me show you what's been marked again for identification purposes. State's Exhibit #47 and ask you if you can describe for the ladies and gentlemen of the Jury what that is.

A. This is a stock to a Charter Arms AR7 semiautomatic 22 rifle.

Forensic testing was completed by the Alabama Department of Forensic Sciences during the investigation of this crime. The Plaintiff was tested for presence of primer residue. The Primer Residue Analyses report (Exhibit 3) states that:

Laboratory analyses 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.

Primer Residue Analyses results were not admissible as evidence during trial. The reasoning was that if any person had handled a newspaper, photocopies, or certain other types of common items, the GSR testing would produce a false positive result. Use of the words "failed to reveal conclusive evidence" in concert with the disclaimer used by the Alabama Department of Forensic Sciences (Exhibit 3), as shown below, created a false presumption by counsel.

It should be noted that certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination.

This false presumption that the Remington .22 caliber rim fire ammunition does not contain the elements necessary to determine, through primer residue analyses, whether a person has fired, handled, or was in close proximity to a firearm when it was discharged is prevalent today not only in Alabama but in other states. Calls were made to several forensic labs when attempting to find a lab that would be willing to conduct testing related to this case. Results of Laboratory Procurement Attempts [Exhibit 7] shows that all of these labs made the same mistake that the Alabama Department of Forensic Sciences made. As late as April of 2002, several other labs in Alabama, Illinois, Michigan, Florida, Texas, and Arizona claimed that .22 caliber ammunition GSR testing is not reliable due to the lack of gunpowder “making it hard to tell if GSR is present.” (Exhibit 7 Affidavits) We will show that new technology, developed by Dr. John Nordby of Final Analysis Forensics in Tacoma, Washington, proves that in the case of .22 caliber ammunition fired from an AR-7 rifle, GSR is reliably detectable by any means that an accredited lab would employ.

The Alabama Department of Forensic Sciences report titled “Examination of Firearms Evidence” [Exhibit 6] shows the ballistics tested and the results of that testing performed on the cartridge casings, bullets, and unfired cartridge retrieved from the crime scene. All of the evidence, with the exception of the 2 bullets retrieved from Ronnie Pate (RT. 749, 751-752) and 1 of the bullets retrieved from Betty Snow Swiney (RT. 752), were positively identified as having been fired from this AR-7 rifle.

The Alabama Department of Forensic Sciences report titled *Examination of Seriological Evidence* [Exhibit 4] states:

The items listed below were examined and analyzed for the presence of blood, however, none was detected: Jacket, Shirt, Blue jeans, tennis shoes.

The lab is referring to the clothing worn by the Plaintiff at the time of arrest. The laboratory finding regarding the absence of blood on the Plaintiff's clothing was not presented at trial. We will show the relevance of this evidence in light of the false presumption related to the GSR evidence.

We do not dispute the legal procedures or trial strategies of either counsel or of this honorable Court. We make no allusion to impropriety. The Plaintiff certainly could have avowed absolute innocence of this crime but he did not; he consistently and repeatedly said that he did not remember what happened. That lack of declaration of innocence on the part of the Plaintiff certainly did not assist him in procuring an acquittal in a circumstantial case. Would not a person, who is guilty of such a heinous crime as this, proclaim his innocence of the crime? Yes. Would not a person who is innocent of this crime proclaim his innocence loudly and forthrightly in defense of his own life? Yes. What kind of a person would say, "I don't remember?" There is only one viable explanation of human behavior for making that declaration and that explanation is two-fold. First, there is the element of trust in the justice system and secondly there is the element of truthfulness. A former police officer, who previously had

exposed a drug ring resulting in federal prison sentences for the District Attorney of Baldwin County and the Sheriff's Department chief investigator, is uniquely disposed to both elements of that explanation.

In presentation of the defense case, the Plaintiff was the sole defense witness. What was the explanation for the statement, "I don't remember?" We see that explanation by the Plaintiff's testimony in the defense case. The reason for inclusion of this information is meant to shed light on not only the failure to acquit at trial but the subsequent failures in post-conviction relief that bring us to our current position.

(TR-868) **Patrick Swiney testimony** –

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.

The defense, Mr. Bell, did not expound on the testimony where the Plaintiff testified that he had been struck from behind. We present this portion of the record to show that during trial, defense counsel did not present evidence related to Plaintiff's actual innocence and no other defense witnesses were called, although they were available to testify for the defense. We do not present these portions of the record to claim ineffective assistance of counsel. These actions on the part of defense counsel speak directly to the false presumption regarding the GSR and blood testing. Defense counsel, Mr. Bell, did not believe in his client's innocence; his trial strategy was to keep his client from getting the death penalty. Testimony in the prior Rule 32 hearing regarding this case shows this clearly:

(Rule 32 Hearing, Page 0071) **J. Michael Campbell, Respondent**

In conclusion, both Petitioner's expert and Mr. Bell testified that one of the most important, if not the most important objective of a criminal attorney in representing a capital murder defendant is to keep his client from getting the death penalty. It is obvious to the Court that Mr. Bell had a theory to do this and apparently the selection of this course of conduct was successful. However, Petitioner was found guilty and given life without parole.

The prosecution's event reconstruction theory was shown for the first time in the trial record during cross examination of the Plaintiff.

(RT-892-894) **Prosecution cross-examination of Patrick Swiney:**

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.

Q. And you fired one round through that window and - dropped Ronnie with one shot at the back of his neck, didn't you?

A. No, sir.

Q. And when Betty was shrieking and trying to get out of the place, you went around to the front door and knocked it open and shot her in the face, didn't you?

A. No, sir.

Q. And you shot her twice in the front, didn't you?

A. No, sir.

Q. And when you did that and she was lying helpless on the floor, you emptied three more shots out of this gun into her backside, didn't you?

A. No, sir.

Q. And you did that at close range, didn't you?

A. No, sir.

Q. And then you walked over and you stood over the body of Ronnie Pate and you held this gun two feet above his temple, didn't you?

A. No, sir.

Q. And you pulled that gun and tried to fire a shot into Ronnie Pate's brain, didn't you?

A. No, sir.

Q. And the gun misfired that time, didn't it?

A. No, sir.

Q. And you fired again two or three feet from his head and put a bullet through his brain, didn't you?

A. No, sir.

Q. And you killed him right there, didn't you?

A. No, sir.

We wish to emphasize a point from the State's case at this time for ease of the Court. We will expound on the relevance of this testimony as it supports the Plaintiff's actual innocence. Note that the State's theory of the event reconstruction includes the close range shooting of both victims (RT. 892-894). This claim is supported by the forensic evidence of gunpowder on the skin and hair of the victims (Exhibit 6). Mr. David L. Higgins, a fire arms examiner who testified at trial, opined that the distance of the weapon to the body of the male victim was three feet or less (RT, 768).

B. SUFFICIENCY OF THE EVIDENCE

We have the difficult task of presenting this case of actual innocence before this honorable Court with no direct legal precedent upon which to stand regarding the reliability of GSR results. We all know that the law is constantly refined; our legal system is a work in progress. In the interests of justice, the legal community works together to refine this system so that the foundation upon which our legal system was built serves the ends of justice for this is our sworn duty.

We wish to be clear that in the instant case, Petitioner expounds upon the case background in order to show how this evolutionary process brings us to the present day and that is the sole reason for doing so. This is information presented for the sake of clarity and in the interests of justice.

Plaintiff has the burden of showing, by a preponderance of the evidence and in a light most favorable to the State, that he is more likely innocent than guilty of these crimes. The United States Court of Appeals for the 5th Circuit defined sufficiency of evidence: “The appropriate test for reviewing the sufficiency of the evidence is whether a reasonably minded jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence.” United States v. Staller, 616 F.2d 1284; 1980 U.S. App. With the new evidence that we will present, we are convinced that no reasonably minded jury would find the Plaintiff guilty of these crimes.

ARE Rule 401, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Martin v. State, CR-99-2249, 2003 Ala. Crim. App.. "In order to be admissible under Alabama law, evidence must merely have 'any probative value, however slight, upon a matter in the case.'" (quoting Charles W. Gamble, McElroy's Alabama Evidence § 21.01(1) (5th ed. 1996)). The evidence we present here is relevant in that it shows that the Plaintiff could not have committed the crimes for which he was convicted.

"Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); Ogle v. Long, 551 So. 2d 914, 915 (Ala. 1989). The evidence we present here is exculpatory and is substantiated as exculpatory by a renowned expert in the field of forensics who has no interest in this case other than a scientific interest related to his field of work. An unbiased jury of "fair-minded persons" would view this evidence as proof of innocence.

The State met its burden at trial with false reliance on the GSR disclaimer and a conviction resulted. Given this new evidence that was unavailable at the time of trial or direct appeal, we must now meet ours. We feel that we have met our burden and in the interests of justice that the resultant conviction must now be reversed in the interests of correcting a manifest injustice.

C. DUE PROCESS

The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that no person shall be made to suffer the onus of a criminal conviction unless evidence beyond a reasonable doubt exists. If that evidence existed at trial but is now shown to be erroneous, then that person must no longer suffer the onus of the conviction and has a constitutional claim. Jackson v. Virginia, 443 U.S. 307; 1979.

In Wiggins, the U.S. Supreme Court distinguishes the due process right as a “meaningful opportunity to defend, as such opportunity...presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.” Wiggins v. Smith, 123 S. Ct. 2527, 2003. Further, the Supreme Court continues: “a criminal conviction based upon a record wholly devoid of any relevant evidence of a crucial element of an offense is constitutionally infirm, the most elemental of due process rights being freedom from a wholly arbitrary deprivation of liberty.” See Wiggins, *supra*. While the Plaintiff was convicted by jury fully within the letter of the law and due process, the new evidence shows that a crucial element of the offense is, indeed missing. That makes the conviction constitutionally infirm and the subsequent deprivation of liberty arbitrary.

In Ex Parte Griffin, the Supreme Court held that Griffin’s Constitutional rights to due process superceded the ARE hearsay rule. The Court expounds that not all cases will supercede the hearsay rule but would if based upon “a probative alternative theory of culpability and not an alternative theory that is merely speculative and meant only to confuse the jury.” Ex Parte Griffin, 790 So. 2d 351; 2000 Ala. LEXIS 361. There is no more probative alternate theory of

culpability than actual evidence that the convicted person could not have committed the crime; this theory is not speculative but based on sound scientific evidence. The Court's intent is clear regarding due process. If a party is convicted of a crime and later it is probatively shown that the party cannot be guilty of that crime, to disallow presentation of that evidence is a violation of the Constitutionally-protected right of due process. The Court declares, "to prevent its admission into evidence would violate the defendant's constitutional rights." See *Griffin*, supra.

As members of the legal community we have a duty to contribute, to the best of our ability, to see that justice is served. That is what we are paid to do. We are bound to follow the law to ensure that those who are guilty of breaking the law are punished or removed from society as provided by law. We have an equal duty to ensure that those who prove themselves not guilty are not illegally incarcerated.

D. EXPERT TESTIMONY

Dr. Jon Nordby Ph.D., D-ABMDI, of Final Analysis Forensics in Tacoma, Washington, is a forensics specialist of some notoriety. He has authored several books on various subjects within the forensic sciences. Dr. Nordby specializes in Forensic Science & Forensic Medicine, Medico-legal Death Investigation; Logic, Ethics & Police Policy; Criminalistics; Bloodstain Pattern Analysis, Ballistics & GSR testing, Trace Evidence Analysis; Scientific Crime Scene & Event Reconstruction, and Scientific Methodology. He has guest lectured across the United States and Canada. Dr. Nordby's teaching career spans 26 years; and he has received many formal honors for his work. A complete list of Dr. Nordby's qualifications is included in Exhibit 1, Appendix III.

Dr. Nordby's services were requested in *Sewell v. City of Jacksonville* in the U.S. District Court Middle District of Florida, Jacksonville Division. When faced with *Daubert* and *Kumho Tire* challenges, an order filed May 8, 2001, by United States District Judge Ralph W. Nimmons Jr., finds that "Dr. Nordby is qualified to testify as an expert witness under *Fed.R.Evid. 702* [limited to scientific areas described by Judge Nimmons, of course excluding mere conjecture or personal opinions], based on his knowledge, experience, training, education and skills" (Exhibit 1, p. 205). These "scientific areas" are ballistics, injury analysis of gunshot wounds, crime scene processing and reconstruction, police policy and use-of-force guidelines.

IR Spectroscopy is a technique that was developed during the 1990s. However, recently Dr. Nordby developed a new application of IR Spectroscopy for use in the analysis of GSR evidence. Dr. Nordby conducted testing and examination of .22 caliber weapons, including the AR-7, and .22 caliber ammunition and completed a report of his findings on July 2, 2003. Dr. Nordby's techniques have been peer-reviewed and are already becoming accepted practice within the forensic sciences community. The IR Spectroscopy technique with GSR has appeared in the *Journal of Forensic Sciences*, the *Illinois Microscopy Society's journal*, an article on *Law Enforcement Technology*, and a book on high-beam IR for GSR by Henry Lee and Marilyn Millie. Therefore, Dr. Nordby qualifies as an expert witness under *Frey*. *Frey v. United States*, 54 App. D.C. 46; 293 F. 1013; 1923 U.S. App.

Dr. Nordby includes in his report, for clarity, the basis upon which he formed the opinions presented. In part, he says:

Exhibit 1, Page 5 -- Since none of the physical evidence collected in this case has yet been provided to me for independent analysis, I have designed experiments to test various scientific claims advanced during the trial and conviction of Patrick Swiney for these murders. In the absence of that original physical data, experiments were designed to test specific scientific conclusions reached in the scientific investigation of these homicides by police technicians and other forensic specialists working for the Alabama Forensic Science Laboratory system. These conclusions are stated in laboratory reports and in the transcripts of Patrick Swiney's murder trial.

Dr. Nordby, in his scientific testing using an AR-7 rifle and rim-fire ammunition similar to that recovered at the crime scene states the relevance and reliability of using a replica weapon for this testing:

Exhibit 1, Page 4 – Therefore, this initial study has been limited to an analysis of a weapon similar to the one alleged by Police to have been involved in these shootings, a Charter Arms AR-7 22 cal. Survival Rifle. The analysis includes a study of the weapon's general properties, its production of gun shot residues and muzzle effluent when fired, and the properties of the Remington 22 cal long rifle cartridge cases fired from this weapon. This work is relevant since it is based upon strong similarities among all AR-7 survival rifles in the specific areas under investigation.

1. GSR EVIDENCE

Dr. Nordby has shown, according to the IR Spectroscopy application to GSR, that the AR-7 rifle and .22 caliber rim fire ammunition used in this crime would have left detectible GSR on the Plaintiff if he had fired this weapon 8 times in an enclosed space (emphasis added) as claimed in the State's case and that the GSR would have been detectible by any means (emphasis added) employed by the forensic lab at the time the original testing was performed if GSR was on the Plaintiff.

Exhibit 1, Page 20 – The State's theoretical conclusion of the murders could be based upon erroneous assumptions about 22 cal weapons and GSR, as discussed above. Traditionally, GSR refers to burned and unburned gun powder exiting the weapon from anywhere other than from the muzzle. The results of this testing of the evidence Tyvek suit show clearly that the AR-7 amply produces GSR when fired – and certainly produces enough GSR to be detectable by every means employed by forensic science. This means that "every" means including any means employed by the state, would have been able to detect GSR on Mr. Swiney's hands, if GSR were present. It also means that if paraffin was the method of testing, GSR would have been detected but the fact that the tests "failed to reveal evidence" of GSR (i.e., a negative result, especially if paraffin were the method used) makes it UNQUESTIONABLE that no GSR was found.

The significance of this conclusion is that the findings of the Alabama Department of Forensic Sciences laboratory where the analyses "failed to reveal conclusive evidence" proves

that the Plaintiff did not commit these crimes. Dr. Nordby states that “any means employed by the state, would have been able to detect GSR on Mr. Swiney’s hands, if GSR was present.” The recent discovery of this fact shows that the disclaimer regarding the reliability of GSR testing is patently false.

Dr. Nordby further elucidates his findings regarding the extensive deposition of GSR on a person who fires the AR-7 rifle:

Exhibit 1, Page 36 – The above testing shows that the AR-7 Survival rifle indeed produces discoverable levels of gun shot residues on the shooter’s clothing when fired 8 times. To reiterate, the test results above indicate that it is impossible for anyone to shoot an AR7 Survival rifle eight (8) times in a confinement space without the rifle and the shooter being covered with detectible GSR.

Exhibit 1, Page 11 – The relatively new weapon I examined and used in these tests is an extremely cheap, unreliable weapon with a poorly executed design which jams regularly, and presents a great deal of gas leakage after cartridge detonation, making all weapons of this design very “dirty” in nature. Note that the U.S. Air Force rejected the design for use by downed pilots needing a basic survival weapon of lightweight and simple design for these very reasons. It has been uniformly reviewed as a poor choice for a light duty portable rifle in the available literature.

To clear up any confusion regarding positive, not conclusive, and negative results of GSR, we refer again to Dr. Nordby's report:

Exhibit 1, Page 9 – The Alabama Department of Forensic Sciences Report form supplies no place to check "Negative GSR" whatever that could mean? Not finding any residues is a conclusive result in the sense that it proves for a fact that NO RESIDUES were present. It does not mean "inconclusive," which means neither positive NOR NEGATIVE. There is no scientific justification available to twist a NEGATIVE GSR result into anything other than proof that the person tested DID NOT FIRE A WEAPON other than a cross bow.

Dr. Nordby is saying that the Primer Residue Analyses testing that “failed to reveal conclusive evidence that the above-named person fired a weapon” shows that the Plaintiff did not fire a weapon. Had the Plaintiff fired a weapon the Primer Residue Analyses would have revealed that in a positive finding. Therefore, the Plaintiff did not fire the murder weapon and cannot be guilty of the crime for which he was convicted. The disclaimer is what introduced error into the laboratory findings because it implies that the finding may not be reliable. However, Dr. Nordby shows, through his scientific testing and new procedures that the disclaimer is patently untrue because the “inconclusive” finding is actually a negative finding.

Dr. Nordby's report includes information related to the reliability of dermal nitrate tests, such as the test that may have been conducted on the Plaintiff and reported in the Primer Residue Analyses [Exhibit 3].

Exhibit 1, Page 14 – *The Association of Firearm and Tool mark Examiners*

defines the dermal nitrate, or so called paraffin test, as an obsolete and unreliable test to determine if a person has fired a firearm. [See footnote 2] The test consists of treating paraffin casts taken of the person's hands with diphenylamine which is a reagent that reacts positively with most oxidizing agents present in GSR and MBE. The major problem with such tests becomes the inability to distinguish oxidizing agents found in GSR and MBE from the many other oxidizing agents commonly present in anyone's everyday environment. These agents include photocopy pages, newspapers, and print media such as books, paints, inks, and paper, as well as many other commonly available sources. As such, the only significant finding with such dermal nitrate tests would be a negative outcome, such as the negative outcome indicated in the Alabama Department of Forensics Report on GSR cited above.

2. BLOOD SPATTER EVIDENCE

In his report, Dr. Nordby details how proper scientific method was applied to the experiments that he conducted and how proper scientific method must be applied to an event reconstruction in any crime to arise at the most plausible explanation for seemingly related events.

Dr. Nordby offers his opinion on other aspects of the forensic analyses that were conducted by the Alabama Department of Forensic Sciences. We present some of those expert opinions here, not with the intent to present impeachment evidence but to support our claim that in light of the presumption regarding the disclaimer on the Primer Residue Analyses report, error

was propagated throughout the trial resulting in a guilty verdict. In light of the negative GSR result, the trier-of-fact would not have returned a guilty verdict. The results of the trial would have been different.

The blood evidence was not viewed as exculpatory at the time of trial probably due, again, to reliance on the Primer Residue Analyses disclaimer. According to Dr. Nordby, however, the results of testing presented in the Examination of Serological Evidence [Exhibit 4], as that testing relates to the findings of “no blood on the Plaintiff’s clothing”, is exculpatory as well.

Exhibit 1, Page 7-- Mr. Larry Huys’ serological report bears on the issue of bloodstain pattern analysis. [This Alabama Department of Forensic Science Report, listed in Appendix I, and referenced above, is reproduced below.]

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.

3. RELATED FINDINGS

Dr. Nordby was supplied a copy of the Reporter's Transcript of the trial, as noted in his report, to provide as complete a record of the forensic evidence as possible. As an expert in crime scene reconstruction, Dr. Nordby requested all materials that could assist him in drawing a scientific conclusion related to the GSR evidence. Since the physical evidence was not available we provided him with all records that we had. As a result, Nordby analyzed all of the material within the confines of proper scientific method.

Exhibit 1, Page 1 -- A crime scene or event analysis and reconstruction logically link a detailed series of scientific *explanations* to provide an understanding of the sequence of events leaving physical evidence. Each explanation is developed, linked, and evaluated by applying *the scientific method* to this available data.

Dr. Nordby noted in the Conclusion of his report what he observed in this limited (due to lack of the physical evidence retained by the State) event reconstruction that lent support to his findings related to the lack of blood on the Plaintiff's clothing and the GSR results. Those observations are included in the following section.

4. EXPERT CONCLUSION

In the Conclusion section of Dr. Nordby's report, he states:

Exhibit 1, Page 38-- According to the trial transcripts on page R-768, Mr. David L. Higgins, as a fire arms examiner, opined that the distance of the weapon to the

body of the male victim was three feet or less. As stated in the transcript document, Mr. Higgins' opinion was based on gun powder found on the body. However, as stated above, if no bloodstains were found on Mr. Swiney's clothing, then he did not fire a weapon at close or near contact range striking either victim of this double homicide.

While comparing the crime scene sketch and trial testimony, Dr. Nordby noted other anomalies in the State's crime scene reconstruction theory that support his GSR findings. We use this information to support the GSR findings of Dr. Nordby's new application of IR Spectroscopy and not to present impeachment evidence.

Exhibit 1, Page 49 -- Clearly the AR-7 ejects cartridge cases upward and to the right in a slightly forward direction. According to testimony in the trial transcripts on page R-434 and the sketch of the crime scene presented by Police Officer Fox, there were three (3) cartridge casings in the living room and one (1) cartridge casing in the dining room, and none found outside of the house. Yet Mr. David L. Higgins received seven (7) expended cartridges for testing. The position of the expended cartridges shown on the crime scene sketch indicates the close quarters inside the house where the shooter would have to be standing in the State's scenario. Again, since there was no GSR found, Mr. Swiney could not have been the person who fired these shots.

A scientific analysis of the forensic evidence in this case led Dr. Nordby to a disconcerting conclusion about the evidence that was provided to him. A statement like this, made by a criminologist of the stature of Dr. Nordby must receive our utmost attention.

Exhibit 1, Page 53 -- 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 remain 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.

In light of these findings, we present the Opinion section of Dr. Nordby's report:

Exhibit 1, Page 53 & 54 -- Opinion

There are many unexplained anomalies, contradictions, scientific inefficiencies and outright scientific voids in the forensic analysis of this case. Each of these beg for further scientific analyses, for example, of the suspected weapon, the recovered bullets, the recovered cartridge cases, the victims and the suspects clothing as well as a thorough review of the crime scene photographs, video tapes, tape recordings, sketches and notes for the purpose of bloodstain pattern analysis, autopsy reports, autopsy photographs, and fingerprint reports, none of which the State of Alabama has been willing to provide

Legal counsel has stated that they have seen crime scene photographs at the police station in Columbiana, Alabama, with Betty Snow lying on a bed, when police reports found Betty Snow lying in the living room (either face up or face down, depending on who was reporting). These anomalies demand cogent analysis, and certainly cast great scientific doubt upon the State's theory of the homicides.

The Alabama Department of Forensic Sciences lab produced reports that show no GSR found on Mr. Swiney's hands, and no blood found on Mr. Swiney's clothing or shoes. Yet these two very important reports were not submitted at the trial by either the prosecution or the defense. These reports alone should have exonerated the accused at the investigative stage, and turned efforts to solve the double homicides in an entirely different direction.

Techniques available today that were not available when this case was initially investigated, such as using glass frictionizer fused with barium and lead as an identifier of 22 cal GSR [subject to the elimination of all other sources of such materials in the immediate environment] may prove invaluable in helping to develop the scientific evidence to tell us what in fact did happen in this case.

However, I have demonstrated in this report that it is impossible for a person to fire any AR7 eight (8) times in a confined space without being covered with

GSR. I have shown that any AR7 clearly produces ample detectible GSR when fired, by “every” means employed by forensic science. I have shown that the State erred by stating that “certain brands of 22 caliber rim fire ammunition do not contain the elements necessary to make this [GSR] determination.”

My professional opinion is based upon my own analyses; including the testing that I performed with an AR7 as described and documented in this report [an AR-7 other than the AR-7 being held by the State of Alabama]. In my opinion, Patrick Swiney could not have fired this weapon as the State has argued. The Alabama State Forensic lab reports that: "Laboratory analyses 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 fire arm when it was discharged." This is not an inconclusive result, but proof that no GSR is present.

The legal community is fortunate to have the services of expert witnesses in our search to reveal the truth in crimes that are often complex. As technology becomes more complex, the courts will rely more on expert testimony. Often the work of an expert reveals information that was impossible to know even a few years ago. The advances made in forensic science assist us with these complex issues.

E. CONCLUSION

We have presented conclusive evidence by a prominent expert in forensic science that the Plaintiff could not have committed the crime for which he was convicted. The disclaimer on the Primer Residue Analyses (Exhibit 3) prepared by the Alabama Department of Forensic Sciences

declaring that “some brands of .22 caliber rim fire ammunition do not contain the elements necessary” to make a determination of a negative result is untrue. The failure to reveal conclusive evidence is, in fact, conclusive evidence of a negative result. Therefore, the Plaintiff could not have fired the weapon that killed Betty Snow Swiney and Ronnie Pate.

Further, the Examination of Serological Evidence (Exhibit 4) shows that the Plaintiff’s clothing contained no blood. This is secondary exculpatory evidence that the Plaintiff did not commit these murders. Some of the gunshots were fired at close range according to trial testimony and the Examination of Firearms Evidence (Exhibit 6). Expert testimony by Dr. Nordby revealed that had the Plaintiff committed these crimes, his clothing would have certainly contained evidence of blood spatter.

Expert testimony, admissible under Alabama law clearly shows that the Plaintiff is not guilty of the crimes for which he was convicted.

V. PRAYER FOR RELIEF

Due to the weight of this new evidence, the appropriate action for this honorable Court is to reverse the decision in this case and release the Plaintiff from custody. The Plaintiff has spent 14 years in prison and is not guilty of any crime. New evidence, in the form of IR Spectroscopy clearly shows that the Alabama Department of Forensic Sciences findings include exculpatory evidence. Had this been known at the time of trial, the jury would not have convicted the Plaintiff of this crime for the evidence clearly shows that the Plaintiff did not fire a weapon.

Further, the lack of blood on Plaintiff's clothing supports the exculpatory nature of the GSR laboratory findings.

This honorable Court must correct a manifest injustice and a violation of substantive due process by overturning the original conviction and releasing the Plaintiff from custody. (ARCrP 32.2(b)).

We have presented the necessary information to invoke ARE 201, Judicial notice of adjudicative facts. These "facts are beyond reasonable controversy and possess a high degree of indisputability." (ARE Rule 201(d)). Therefore, we request a timely adjudication of this matter by this honorable Court.

Respectfully submitted,

Wilson Myers, Attorney for Petitioner
Ronald Patrick Swiney

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

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of this PETITION PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE FOR RELIEF FROM JUDGMENT upon the Honorable Robert E. Owens, Jr., District Attorney of Shelby County, Alabama, P.O. Box 706, Columbiana, AL 35051 by hand delivering a copy of the same on this the _____ day of _____, 2003.

Wilson Myers, Attorney for Petitioner