



UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

RONALD PATRICK SWINEY,

Movant-Petitioner,

v.

No.

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

Respondents.

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

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

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

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

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

FACTS OF THE CASE

Petitioner was accused of capital murder that occurred in 1987 wherein Petitioner's wife and her ex-husband died, due to gunshot wounds, inside Petitioner's marriage home. Petitioner was convicted of this crime on circumstantial evidence in 1989 and sentenced to life without the possibility of parole in the State of Alabama. The State's representation of this case was that Petitioner intentionally killed the victims by firing a Charter Arms AR-7 .22 caliber semi-automatic rifle, loaded with Remington brand .22 caliber rim fire ammunition, eight (8) times in the living room/dining room/kitchen of his marriage home (hereinafter "enclosed space"), at close or point blank range.

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

After the Federal District Court denied Petitioner's first § 2254 petition in 1998, and after the 11th Circuit Court denied Petitioner's request for Certificate of Appealability in 1999, two forensic reports by the Alabama Department of Forensic Sciences (DFS) were found that had not been presented to the jury at the 1989 trial. One forensic report stated that there was no blood found on Petitioner and the other forensic report stated that there was no gunshot residue (GSR) found on Petitioner. The GSR report, and associated disclaimer states:

“Laboratory analysis failed to reveal conclusive evidence that the above-named person fired a weapon, handled a fired weapon, or whether the hands were in close proximity to a firearm when it was discharged.”

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

Petitioner's newly-discovered evidence is that the disclaimer on the GSR report is misleading. Under the specific conditions of this crime, the disclaimer is false. This disclaimer created a false reliance at trial and direct and collateral appeals and had a profoundly biased affect on Petitioner's due process rights. The report states that laboratory analysis did not detect GSR on Petitioner and the disclaimer states, essentially, that not finding GSR may be meaningless. This disclaimer was not questioned by

forensic laboratories or the legal community. The newly-discovered evidence shows that this disclaimer does not apply to .22 caliber Remington rim fire ammunition fired from an AR-7 rifle multiple times in an enclosed space. Had trial Counsel not relied upon this disclaimer, he would have presented this exculpatory evidence at trial.

Attempts were made to procure the original evidence in this case in order to subject the actual evidence to further testing. All attempts failed due to alternating claims by government custodians that the evidence had been either lost or destroyed and requirements that a subpoena issue before the evidence would be released. Since Petitioner no longer had his case before the courts, a subpoena was due to be disallowed. The inability to procure the original evidence in this case led Petitioner to procure the services of Dr. Jon Nordby, Ph.D., D-ABMDI, of Final Analysis Forensics in Tacoma, Washington.

Dr. Nordby is a renowned forensic specialist. He has authored several books on various subjects within forensic sciences. Dr. Nordby specializes in Forensic Science & Forensic Medicine, Medico-legal Death Investigation; Logic, Ethics & Police Policy; Criminalistics; Bloodstain Pattern Analysis, Ballistics & GSR testing, Trace Evidence Analysis; Scientific Crime Scene & Event Reconstruction, and Scientific Methodology. He has guest lectured across the United States and Canada. Dr. Nordby's teaching career spans 26 years; and he has received many formal honors for his work. A complete list of Dr. Nordby's qualifications was included as an exhibit in Petitioner's Rule 32 petition.

Dr. Nordby subjected the state's crime scene scenario to scientific forensic analysis using a replica AR-7 .22 caliber rifle and .22 caliber Remington rim fire ammunition and a

space that duplicated the crime scene as closely as possible to determine whether a shooter could commit this crime without any GSR or blood present on his person.

Dr. Nordby and Dr. Glenn Larkin, MD DABFM FACFE (forensic pathologist) developed the protocol for conducting a weapons test in compliance with forensic protocols.

Following this recreation of the crime scene, Dr. Nordby subjected the gun shot specimens to scientific testing for the detection of GSR.

During the scientific testing, Dr. Nordby investigated the characteristics of the AR-7 .22 caliber rifle. He found that the weapon, unlike other .22 caliber weapons, is an extremely dirty weapon wherein GSR is literally blown-back from the barrel of this weapon in copious amounts covering the weapon and the shooter. This blow-back was filmed during the crime recreation tests, and was detectable on film. Dr. Nordby discovered that when .22 caliber Remington rim fire ammunition was fired from the AR-7, GSR spews from this weapon in such copious amounts that GSR would be detectable on the shooter by "every means employed by forensic science." Therefore, it would be impossible for anyone to shoot an AR-7 with .22 caliber Remington rim fire ammunition eight (8) times in an enclosed space without being covered with GSR. This evidence shows, without a doubt, that the DFS GSR report disclaimer is false under these conditions.

While Dr. Nordby used infrared spectroscopy (IS), scanning electron microscopy (SEM) and electron dispersion sampling (EDS) in his experiments, none of those laboratory techniques or equipment comprises the newly-discovered evidence in this case, they are merely tools used by science to conduct experiments. The newly-discovered evidence is Nordby's hypothesis that was subjected to experiments using the scientific method

resulting in an analytical discovery that can be duplicated. Dr. Nordby made this discovery because he objectively applied the scientific method in his thinking and testing procedures in order to determine exactly how physical matter behaves.

To compare Nordby's discovery to new discoveries regarding DNA analysis, scientists involved in DNA techniques carried out various physical experiments on body fluids like blood to determine whether blood could be chemically-differentiated from paint and found that it could. That finding was a new discovery. This DNA analysis continued over the years until a scientist asked an important question: can the DNA from different people be differentiated from each other with a reasonable certainty? By analyzing a single DNA marker, scientists could differentiate within a statistical probability that a fluid sample had a likelihood of say 1 in 1,000,000 of originating from a particular person. That discovery led to more scientific research until science could differentiate fluids as originating from a particular person using six markers. At each of these stages, a scientific discovery was made that could not have been made before a scientist posed a hypothesis and subjected that hypothesis to the scientific method. All scientific discoveries, from medicine to astronomy are made in this manner and this is widely known in the scientific community as the "scientific method."

Other laboratories were not aware of this behavior of physical matter prior to Nordby's discovery in 2003 because no other scientist posed the question (hypothesis) that resulted in a scientific experiment to determine whether the hypothesis was true or false. Nordby's findings show that the DFS GSR disclaimer misled every attorney and judge at trial, direct appeals and collateral appeals in this case to assume that the lack of GSR was not

exculpatory evidence. Nordby's discovery shows with a certainty that the GSR finding is exculpatory.

At the 2003 state habeas corpus proceeding, had the court conducted expert witness qualification it would have recognized that this is newly-discovered evidence that could not have been discovered through exercise of due diligence and would not have dismissed the petition. Instead the court gave deference to the State's witness Ed Moran, a witness who presented information about the scientific testing used by DFS in 1987 which was based upon the false assumption that the GSR disclaimer was applicable in this case. In 1987, prior to Nordby's discovery, everyone relied upon the DFS disclaimer: that not finding GSR on Petitioner was not exculpatory because "certain brands of .22 caliber rim fire ammunition do not contain the elements necessary to make this determination." Dr. Nordby showed in 2003 that the DFS GSR disclaimer created a false reliance that has prejudiced Petitioner since trial.

Petitioner's trial counsel built his trial strategy on the misleading GSR disclaimer not realizing that the GSR test was actually exculpatory evidence. This assumption circumvented a defense and biased the proceedings in violation of Petitioner's constitutional right to due process. While the two forensic reports regarding GSR and blood were available through the State's "open file" policy, both reports were withheld from the jury as unimportant to Petitioner's defense. It is now clear that both reports are exculpatory.

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

bloodstains, and that none were found on any of his clothing. According to Dr. Nordby's expert testimony, if no bloodstains were found on his clothing, then Petitioner did not fire a weapon at close or near contact range, the scenario posed by the State at trial, 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.” (Nordby report, p. 7)

The lack of blood on Petitioner's clothing was presented as additional exculpatory evidence at the state habeas proceeding, however, the State did not defend this exculpatory evidence and the Court gave no opinion about this in its ruling.

The State did not introduce the Petitioner's clothing at trial. We already know that there was no blood found on the clothing because DFS reported that finding. However, a logical assumption arises: if the clothing had blood or GSR on it, the State certainly would have presented this evidence in support of its case. Since there was no blood found on the clothing, the State had no reason to present the clothing to the jury as physical evidence of guilt and the State did not present it. The State has never revealed evidence of GSR testing of Petitioner's clothing or the AR-7 rifle, however we know that additional GSR analysis was conducted by DFS. The State Medical Examiner's transmittal letter to the District Attorney for the subject GSR report states that "Further laboratory analyses are being conducted and additional memoranda will be sent to you when it is completed." This "additional analyses" has never been revealed to Petitioner. Logic dictates that if GSR had been found on the Petitioner's clothing or the rifle the State certainly would have presented that physical evidence of guilt to the jury. The State

did not present any additional findings regarding GSR on the clothing or rifle to the jury because the clothing and rifle did not contain GSR.

THE FACTUAL PREDICATE FOR THIS CLAIM COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE

Petitioner could not have discovered the results stated in Dr. Nordby's scientific report before 2003 through the exercise of due diligence because the entire scientific community thought the GSR disclaimer was true under all conditions and did not question the scientific validity of the disclaimer. The lack of questioning is not different than what occurred in the scientific community regarding DNA analysis. Dr. Nordby, due to his education, experience, and expertise, questioned the validity of the GSR disclaimer and posed the hypothesis that the disclaimer may not be true under specific conditions. Nordby subjected his hypothesis to rigorous and objective scientific experimentation. This experimentation objectively supported that the hypothesis is true. Dr. Nordby's experiment can be duplicated by any scientist to see that his findings are correct. The DFS could duplicate Dr. Nordby's experiment, subjecting the original evidence to these tests and their experimentation would support Dr. Nordby's findings. This is a basic premise of the scientific method: experiments can be exactly duplicated.

Dr. Nordby discovered that the GSR disclaimer was false under specific conditions in 2003. While the GSR disclaimer may remain true under some conditions, in conditions where an AR-7 rifle, using .22 caliber Remington rim fire ammunition is fired multiple times in an enclosed space, the disclaimer is false and Dr. Nordby proved that it is false.

Until Dr. Nordby posed the scientific question and conducted his experiments in 2003, the forensic community relied upon the disclaimer as true which led the legal community, including defense Counsel at trial and appeals Counsel at direct and collateral appeals to believe the disclaimer was true and reliable and was, therefore, not exculpatory. Dr. Nordby showed, through his new evidence that the disclaimer is untrue under the specific conditions of this case and that the GSR report with its disclaimer is, in fact, exculpatory.

In the state habeas corpus proceedings, the State did not respond to Dr. Nordby's scientific discovery that the disclaimer is false under specific conditions related to this case; instead the State argued that Dr. Nordby used old technology in his test, therefore, this information could have been discovered through exercise of due diligence. This argument is ludicrous and irrelevant to the newly-discovered evidence in this case. The State itself could have discovered this new evidence had it exercised due diligence in the truth-finding process however the State did not question the GSR disclaimer prior to 2003 either. No person at DFS, or other forensic laboratories (per laboratory affidavits procured by Petitioner prior to 2003), or the legal community had previously questioned whether the information presented in the GSR disclaimer was misleading or specifically false in the condition of this case. Anyone could have questioned the truth of this disclaimer. Dr. Nordby is the first scientist to question the disclaimer and subject it to scientific tests that duplicated specific conditions. It is Dr. Nordby's caliber of expertise in the field of investigative forensic science that time stamped this newly-discovered evidence in 2003. Dr. Nordby's education, experience, and expertise are a unique combination that had to be present in order for this evidence to be discovered.

This evidence could not have been discovered earlier through the exercise of due diligence even though scientific instrumentation employed by Dr. Nordby was available earlier. Just as is the case with DNA analysis, even though instrumentation and technologies were available prior to the discovery of uniquely-identifiable DNA, the six DNA markers could not have been discovered without a scientist first posing the hypothesis that if one marker was available were there more DNA markers that could uniquely identify a person. The very essence of a "discovery" requires that a human being be involved. Technology, on its own, can discover nothing. The State failed to apply reliable analyses to its own reasoning. It is impossible to disconnect the scientist from scientific experimentation, instrumentation, and technology. While technology can advance to a stage where previously undiscovered information can be discovered, advancement in technology does not stand alone as the only impetus for newly-discovered evidence. The State's reasoning does not stand up to the most elementary scrutiny.

BECAUSE THE TRIAL COURT DID NOT UNDERSTAND DR. NORDBY'S REPORT, AND DID NOT SUBJECT WITNESSES TO QUALIFICATION, IT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S MOTION TO DISMISS WITHOUT A HEARING OR ORAL ARGUMENT

Dr. Nordby's 207 page report is scientifically technical in nature. The Court improperly barred Petitioner by giving deference to a State witness who illustrated that he is not qualified and not admitting testimony from Petitioner's experts who illustrated that they are qualified, in violation of *Daubert* and *Frey*. *Frey v. United States*, 54 App. D.C. 46; 293 F. 1013; 1923 U.S. App. LEXIS 1712; 34 A.L.R. 145, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

The state habeas trial court abused its discretion when it ruled against Petitioner without an evidentiary hearing or oral arguments. The Court's deference to fallacious testimony by a State witness over compelling testimony by Petitioner's expert witnesses resulted in an unreasonable conclusion in violation of clearly-established federal law. Further, additional exculpatory evidence, supporting conclusions of the newly-discovered evidence, was revealed by the State through its fallacious witness affidavit in the State's MOTION TO DISMISS.

In the State's MOTION TO DISMISS, the State procured the services of Ed Moran who is currently with the DFS. Moran supposedly investigated the work of DFS personnel on this case in 1987 and revealed the GSR testing methods used in this case to the Petitioner for the first time. He stated that an FAAS test was conducted in 1987 to test for the presence of antimony on hand swabs (which have now been destroyed) taken from Petitioner. This testimony brought up two extremely disconcerting points: 1.) until this time, Petitioner assumed that the paraffin test administered upon his face and hands was the subject of DFS GSR testing report and the Petitioner has no knowledge of any hand swabs being taken, and 2.) the DFS tested for a chemical constituent (antimony) that the scientific community knew with a certainty did not exist in Remington .22 caliber ammunition until 1989 (two years after this crime took place). The Petitioner questioned and refuted this testimony. However, the Court paid no heed and deferred to the State in defiance of *stare decisis* regarding expert testimony and contrary to even the most elementary logic. The Court's ORDER states, "There can really be no 'newly-discovered evidence' in this case because the swabs that were used to test Swiney's hands are no longer available and, obviously, Swiney's hands can no longer be tested for primer

residue" (Court's Order Granting Motion to Dismiss, footnote, p. 16). Using the Court's logic, any prosecutor could simply dispose of trial evidence precluding any newly-discovered evidence from ever emerging. Post-conviction relief is guaranteed under Alabama's habeas corpus statute (Rule 32) and the State of Alabama Unified Judicial System on Records Retention dictates that records in a capital murder case will be retained for 75 years from the final disposition of the case. This crime happened 18 years ago.

If the State was ever in possession of hand swabs taken of the Petitioner in the first place, we are asked to believe that they either had only one swab or that they subjected every swab they had to destructive testing (FAAS) and are no longer available, therefore we can never show any new evidence in this case. According to the trial court, the answer to that question is "yes." No reasonable person could possibly believe that newly-discovered evidence can only be based upon evidence that the State has subsequently destroyed. Yet that is what the trial court declared in its ORDER.

The State did not and could not refute Dr. Nordby's newly-discovered evidence, therefore, the State fixated on the fact that Dr. Nordby reported that he used technology that existed in 1987 and argued that this was not new evidence because the technology for discovering the evidence was not new. Further, the State fixated on GSR testing of hand swabs including a magazine article about how GSR is easily removed from the hands. Even if GSR can readily be removed from hands, GSR cannot readily be removed from hairy or oily areas of the body (such as face and ears, the purpose of paraffin tests on the suspect's face) clothing, or objects like rifles. There are certainly additional GSR

testing results that the DFS conducted in this case, that are still being withheld, that clearly show that GSR was not detected on Petitioner's face, hair, clothing, or rifle either.

The State asked the Court to believe that the DFS technician conducted a test for an element that he knew would not be present, with a single swab (or swabs) that were destroyed, thereby forever precluding any possibility of new evidence in this case. There is clearly no scientific or logical basis for reasoning of this nature. Ed Moran's testimony should have been excluded under *stare decisis*; instead the Court gave deference to this unscientific and illogical testimony while dismissing out-of-hand testimony by Petitioner's experts. The State Court violated clearly established federal law when it favored an outrageous claim by a State's witness over sound scientific evidence by Petitioner's expert witnesses, thereby denying Petitioner his right to due process.

In *Holmes v. South Carolina*, the Supreme Court stated that, "By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Bobby Lee Holmes v. South Carolina*, No. 04-1327, 2006 U.S. LEXIS 3454, Decided May 1, 2006. This is exactly what occurred in the state habeas corpus proceedings. The state court denied Petitioner due process in not subjecting the State witness to any form of scrutiny whatsoever, choosing to rely on testimony from the State that is clearly designed to mislead. Had the courts subjected all expert witnesses to scrutiny, Petitioner would have prevailed at state habeas proceedings proving with certainty that he is factually innocent of the crime for which he was convicted.

PETITIONER DISCOVERED THROUGH STATE HABEAS CORPUS PROCEEDINGS THAT THE STATE HAD WITHHELD ADDITIONAL EXCULPATORY EVIDENCE AND TAMPERED WITH EVIDENCE

In the process of the state habeas corpus proceedings, the Petitioner discovered additional *Brady* material had never been presented to the jury or known to the defense. This material was discovered due to actions on the part of the State revealing its wanton disregard for the truth-finding process and its willingness to present clearly fraudulent testimony to the Court in order to maintain Petitioner's conviction.

Already stated, is the State's presentation of Mr. Moran and his non-present constituent test. By itself the State's fallacious GSR testing, if true, may not appear as evidence tampering (though it is almost certainly fraudulent), however while testing for an element that could not have been present, if a hand swab ever existed the State destroyed it preventing proper testing in perpetuity. The State had never revealed any laboratory methods to which evidence was subjected until challenged in 2003. When challenged, the State offered such a profoundly ludicrous defense and the Court accepted the defense even though it flew in the face of all logic. The Petitioner lost all faith in the integrity of the State, the DFS, and the state courts. This caused the Petitioner to doubt all circumstantial evidence presented by the Prosecution at trial.

The DFS blood report has already been discussed and that report is exculpatory and was not presented to the jury. The Petitioner knew that the Prosecution could not have garnered this conviction without withholding exculpatory evidence but since this was a circumstantial case, there is little physical evidence to refute in post-conviction appeals.

Access to any physical evidence held by the State has been consistently denied to Petitioner.

However, Petitioner's counsel is in possession of crime scene photographs released in 2002 by the current District Attorney for Shelby County, Alabama that were not admitted at trial. Before Petitioner became aware of the GSR testing procedures revealed by the State, these photographs did not seem particularly relevant. These photographs clearly show that evidence tampering occurred at trial. The Prosecution's case relied heavily on circumstantial evidence that Petitioner allegedly shot through the kitchen window, hitting the male victim in the neck, then ran around to the front of the house, breaking down the door and finishing him off by shooting him at point blank range in the head. The State presented a photograph of a piece of glass with a hole in it to the jury. State's Exhibit #7 at trial showed a close-up of a hole in glass but there were no *in situ* photographs of this glass hole shown to the jury. The photographs received in 2002 clearly show that there is no bullet hole in the glass of the subject kitchen window. The significance of these photographs is that since the kitchen window did not contain a bullet hole in the glass, State's Exhibit #7 pictures fabricated evidence. These photographs will become vital to the truth-finding mechanism of the Federal District Court if Petitioner is GRANTED leave to file a habeas corpus petition under § 2254.

Evidence tampering was also found in the form of the Alabama State Medical examiner's deviation from standard laboratory protocols in victim autopsy. This is significant because one of trial Counsel's possible strategies was to defend Petitioner under a "sudden heat of passion" defense due to a declaration by Petitioner that he saw the

victims through the kitchen window engaged in a sexual act. Alabama law dictates a charge of manslaughter if a person kills in the heat of passion:

"A person does not commit murder . . . if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof." *Biggs v. State*, 441 So. 2d 989; 1983 Ala. Crim. App. (1983); The Code of Alabama 1975, § 13A-6-2(b).

The State Medical Examiner took no vaginal swabs or fingernail samples of the female victim during the autopsy, thereby destroying the only physical evidence that could have supported such a defense which would have indicated that a lesser sentence was legally dictated by Alabama law. The State Medical examiner did not take these swabs because he was instructed by the Coroner of Shelby County, Alabama, not to take them. Although Petitioner did not commit this crime, had he done so in the heat of passion, mitigating evidence that would have dictated manslaughter as the maximum allowable conviction under state law was deliberately destroyed by the State. This fact speaks directly to intent on the part of the State to defraud the Court and procure a capital murder conviction in violation of clearly-established federal and state law.

These facts reveal gross prosecutorial misconduct carried out to convict an innocent person. These facts reveal that the State fraudulently defended prosecutorial misconduct in order to maintain a conviction.

PETITIONER'S APPLICATION MAKES A *PRIMA FACIE* SHOWING THAT THE APPLICATION SATISFIES THE REQUIREMENTS OF 28 U.S.C. § 2244(b)(2)(B)

Petitioner's motion makes a *prima facie* showing that his second habeas petition complies with the statute's successive petition standards. Petitioner demonstrates sufficient scientific confirmation of newly-discovered evidence to establish the fact that the evidence is actually newly-discovered and could not have been discovered through the exercise of due diligence. The lack of GSR and blood on the Petitioner show that Petitioner could not have been the perpetrator of this crime. Exculpatory evidence was known, or should have been known, to the prosecution during trial but was withheld in violation of due process.

If these facts had been known at the time of trial or sentencing, the result would have been different. The jury were presented with a circumstantial case built around withheld exculpatory evidence and evidence fabricated to support the State's scenario of the crime. Had these facts been revealed at trial, Petitioner would not have been convicted and sentenced for this crime. The jury would have seen that Petitioner did not fire the weapon and was not in close proximity to the victims when they were killed. The jury would have seen that the Prosecution fabricated evidence to procure a circumstantial conviction of capital murder. The conviction obtained in this circumstantial case was obtained partly by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant and partly by prosecutorial misconduct.

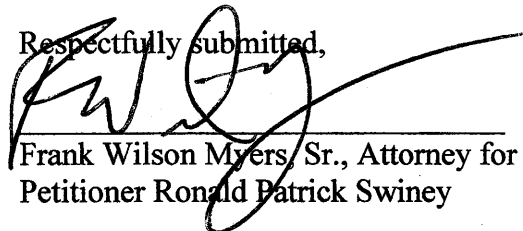
PRAYER FOR AUTHORIZATION

The instant petition is based upon newly-discovered evidence, discovered in July 2003 by Dr. Jon Nordby. The newly-discovered evidence applies directly to the alleged murder weapon and ammunition used in this crime. This evidence could not have been

discovered previously through the exercise of due diligence because no one in the forensic or legal community ever questioned the validity of the DFS GSR disclaimer and the fact that the disclaimer is misleading was not known until Dr. Nordby's discovery in 2003. Within one month of this discovery, Petitioner began the state habeas corpus process in his Rule 32 petition on actual innocence on August 13, 2003. The facts relied upon were not known by the Petitioner in time to be included in any previous collateral proceedings, and could not have been discovered through the exercise of due diligence.

The State's interest in finality of judgments must not preclude substantive due process otherwise the very purpose of our judicial system is frustrated. Petitioner prays that this honorable Court will GRANT leave to proceed in the Federal District Courts.

Respectfully submitted,



Frank Wilson Myers, Sr., Attorney for
Petitioner Ronald Patrick Swiney

OF COUNSEL:

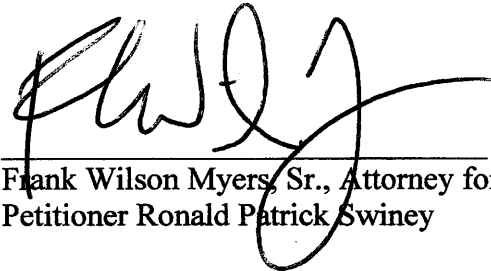
FRANK WILSON MYERS, SR.
308 Hall Ave., PO Box 1704
Bay Minette, AL 36507-1704
251-580-8003, Fax 580-8022
E-Mail: wilsonmyers@yahoo.com

PROOF OF SERVICE

I certify that on 5-10-06, I mailed a copy of this Motion and all attachments to the parties listed below at the following addresses:

Troy King, Alabama Attorney General
Alabama State House
11 South Union Street, Third Floor
Montgomery, AL 36130

Kenneth L. Jones, Warden
100 Warrior Lane
Bessemer, AL 35023



Frank Wilson Myers, Sr., Attorney for
Petitioner Ronald Patrick Swiney

OF COUNSEL:

FRANK WILSON MYERS, SR.
308 Hall Ave., PO Box 1704
Bay Minette, AL 36507-1704
251-580-8003, Fax 580-8022
E-Mail: wilsonmyers@yahoo.com