

**BEFORE THE GOVERNOR OF THE STATE OF TEXAS  
AND  
THE BOARD OF PARDONS AND PAROLE**

In Re

**FRANCES NEWTON,**

Applicant

**APPLICATION FOR REPRIEVE FROM EXECUTION,**

**REQUEST FOR HEARING PURSUANT TO**  
37 Texas Administrative Code §143.43(b)(3) and  
Administrative Procedures Act §2001.001 et seq.

**REQUEST FOR COMPLIANCE WITH**  
Texas Open Meetings Act  
Texas Government Code §551.001 et seq.

**REQUEST FOR COMPLIANCE WITH**  
Texas Constitution  
Article 4, §1

## **Introduction**

Frances Newton is scheduled to be executed on December 1, 2004. She was convicted of murdering her husband and two small children for the purpose of collecting the proceeds from life insurance policies.

But Frances Newton has always denied that she killed anybody, and there are compelling reasons to believe that her denials are truthful. As this Petition will demonstrate, the evidence used to obtain Newton's conviction is highly unreliable, and there are strong reasons for believing that she is actually innocent. Unfortunately, Newton's case has been plagued by inadequate and ineffective representation at every level of court proceedings. One consequence is that her case has never actually been investigated thoroughly, and her side of the story has never been presented to any tribunal. In just a few short weeks, undersigned counsel has learned of information in Ms. Newton's case that casts serious doubt upon the reliability of the determination that Frances Newton committed murders.

At this time, Newton is not asking this Board to commute her sentence to life or to recommend that she be pardoned. Instead, because counsel has good reason to believe that Newton is in fact innocent, but has not yet had a full opportunity (in part for reasons that will be described more fully below) to complete an investigation of the case, Newton hereby requests that this Board recommend to the Governor that he grant a 120-day reprieve in this case to allow further investigation into Ms. Newton's potential innocence.

### **Information Required by 37 Texas Admin. Code §143.42**

#### **1. Name of Applicant:**

Frances Elaine Newton

## **2. Identification of Agents Presenting Application:**

David R. Dow, Distinguished University Professor, University of Houston Law Center, and Director, Texas Innocence Network.

John LaGrappe, Attorney at Law, 663 Hillcroft, Houston, Texas 77081

## **3. Required Copies of Court Documents:**

All required documents are attached as Exhibit 1 to this Application. Frances Newton's execution date is set for December 1, 2004.

## **4. Statement of the Offense:**

Frances Newton was convicted of the capital murder of Adrian Newton, Alton Newton, and Farrah Newton in Harris County, Texas that occurred on April 7, 1987.

## **5. Statement of the Appellate History:**

The Court of Criminal Appeals affirmed Ms. Newton's conviction and sentence in an unpublished opinion. *Newton v. State*, No. 70770, 1992 WL 175742 (Tex. Crim. App. 1992) (unpublished). In state habeas proceedings, the trial court recommended that relief be denied, and the CCA denied relief in an unpublished order. *Ex parte Newton*, WR-47,025-01. (Tex. Crim. App. Dec. 6, 2000).

The United States District Court for the Southern District of Texas denied federal habeas relief on August 29, 2003, and the United States Court of Appeals for the Fifth Circuit affirmed the denial of relief. *Newton v. Dretke*, 371 F.3d 250 (5th Cir. 2004). On November 1, 2004, the Supreme Court declined to review the case by denying the petition for writ of certiorari. *Newton v. Dretke*, \_\_\_ S.Ct. \_\_\_, 2004 WL 2201367 (2004).

While Newton's case was in the midst of federal habeas proceedings, Newton wrote undersigned counsel, requesting assistance in establishing her claim of innocence. Counsel informed Newton that he would agree to assist her if her appointed counsel authorized him to, and in any case, following the termination of her representation by her appointed counsel. Undersigned counsel spoke on several occasions with Professor Kenneth Williams, who was appointed to represent Newton in federal habeas corpus proceedings. Shortly before the petition for writ of certiorari, which had been filed by Professor Williams, was denied, undersigned counsel attempted to visit with Newton to confer with her about additional steps that might be taken to investigate her case and to present the results of that investigation to either this Board or to a judicial tribunal.

Undersigned counsel made arrangements to meet with Newton at the Mountain View prison unit in Gatesville, Texas on October 14, 2004. Counsel complied with all procedures required by the Texas Department of Criminal Justice. Despite this compliance, officials of the TDCJ refused to permit undersigned counsel to have access to his client, Frances Newton. A letter detailing the decision of the TDCJ to deny Newton her constitutional right of access to her attorney is attached to this Petition as Exhibit 2 (Letter from David R. Dow to Gary Johnson, Oct. 15, 2004). In response to this letter, TDCJ acknowledged that it had in fact received the required forms from undersigned counsel.

Because TDCJ had denied Newton access to her counsel, undersigned counsel requested that the state trial court order Ms. Newton to be bench-warranted to Harris County, so that counsel could confer with Newton concerning the conduct of an investigation. *See Exhibit 3* (Motion for Issuance of Bench Warrant). The trial court denied that motion.

Consequently, the TDCJ and the state trial court have to date prevented Ms. Newton from having access to her counsel. The State of Texas has interfered with the ability of counsel and client to confer about strategic and tactical decisions, and has precluded undersigned counsel from completing an investigation into Newton's actual innocence.

This Board should not permit an execution to proceed under such circumstances. The State of Texas, operating through the TDCJ and the state trial court, have interfered with Newton's right of access to her lawyer, and have thereby prevented her lawyer from completing an investigation into the facts of this case. The State cannot be permitted to execute a potentially innocent inmate only after barring that inmate from having access to her lawyer and thereby preventing evidence of the inmate's innocence from being discovered.

#### **6. The Legal Issues Raised:**

On direct appeal, Frances Newton maintained that the evidence adduced against her was insufficient to support the conviction and that she was deprived of a fair trial because the court refused to grant her a continuance so that she could proceed with her desired counsel rather than her court-appointed counsel, with whose performance Newton was dissatisfied.

In her habeas petitions, Newton alleged that her conviction and sentence were invalid because the evidence supporting her conviction was insufficient and because her court-appointed attorney was ineffective. Additionally, she argued that her conviction was invalid as a result of the trial court's refusal to hold a hearing exploring her motion to dismiss her trial attorney and to grant her motion for continuance before the start of the trial. Newton also claimed that the structure of Texas' special issues at the time of her sentencing was unconstitutional because they did not allow the jury to consider and give effect to mitigating evidence presented on her behalf.

**7. Requested Length of Reprieve:**

Because of the extraordinary nature of this case, Frances Newton seeks a reprieve of at least 120 days.

## **8. Grounds for Reprieve:**

Frances Newton asks this Board to recommend to the Governor that she be granted a 120- day reprieve so that she may have sufficient time to uncover conclusive evidence of her innocence. Stated simply, although Ms. Newton has spent over fifteen years in prison and has passed through all of her state and federal appeals, she has never had effective representation at any stage of her appeal, and as a result her case has never been independently investigated.

### **A. More Time is Necessary to Investigate Frances Newton’s Potential Innocence of the Crime for Which She was Convicted.**

As is discussed above, the State of Texas has so far barred Newton from having access to her counsel. In part as a result, the evidence in this case is underdeveloped. Nevertheless, as this Petition demonstrates, counsel has already learned enough to call into serious question the reliability of the conviction. In a word, Frances Newton appears to be innocent, and this Board should take action to insure that undersigned counsel has time to complete the investigation into this case. Otherwise, there is a substantial risk that the State will execute an innocent woman.

#### **1. The State’s Case Against Frances Newton.**

Frances Newton was convicted of shooting her husband and two small children. The case against her rested entirely on circumstantial evidence. This subsection of this Petition presents the evidence introduced at trial against Frances.<sup>1</sup> In order to ensure that this Petition represents the State’s case against Frances in the best possible light, the facts are taken directly from the brief filed by the State during Newton’s appeal.

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<sup>1</sup> Although it is perhaps unconventional to refer to a death row inmate by her first name, rather than her surname, this Petition will frequently refer to Frances Newton as “Frances” (rather than “Newton”) in order to avoid confusion. Many of the parties that will be discussed in the following pages share the same surname (Newton), and the Applicant will therefore be referred to with some regularity as “Frances.”

At 8:27 p.m. on April 7, 1987, Deputy R.W. Ricks was dispatched to an apartment complex just outside of Houston in Harris County, Texas, where he discovered the bodies of Adrian Newton, Alton Newton, and Farrah Newton, each of whom had been shot one time. Present at the scene when he arrived were Frances Newton and her cousin, Sondra Nelms. Deputy Ricks testified that there were no signs of forced entry into the apartment, nor were there any signs of struggle inside it.

Sondra Nelms testified at trial that she first saw Frances Newton that evening between 7:00 and 7:30 p.m., when Frances came over to her house. While there, Frances asked Nelms to accompany her back to her apartment to visit with her. Before they left, however, Nelms observed Frances retrieve a blue bag out of her car, and place it within an abandoned house next door. They proceeded to Frances' apartment, where they discovered the bodies of Frances' family.

Later that night, homicide detective Michael Talton spoke with Nelms, who took him to the location of the abandoned house where she had seen Newton drop off the bag. Talton opened the bag and discovered a blue steel Raven Arms .25 automatic inside it. He released the gun into the custody of a crime scene officer. Talton later talked to Newton about the weapon he had discovered. He testified that she told him that she put the gun in the bag and took it out of the apartment only after first noticing the strange weapon in her apartment earlier that day. She told him that she put the weapon in the abandoned house because she did not want the strange gun in her house. Frances also told Talton that when she left her apartment that evening, her family was alive.

Police determined that the gun recovered from the abandoned house was owned by a Michael Mouton. Mouton had loaned the gun to Jeffrey Frelow about five or six months prior to the murders. Frelow and Frances had known each other since high school, and he testified that they had started having a sexual relationship approximately one to two months before the murders occurred. Frelow identified the weapon as the gun he possessed. He testified that he kept it in a chest of drawers in his bedroom. He also testified that Frances would have had access to the drawers and the gun.

The pistol that was recovered at the abandoned house was given to Detective Bockel on April 8, 1987 in order to conduct a ballistics examination. Testimony at trial indicated that that firearm was the weapon that was used to shoot Adrian Newton and the two children.

Also on April 8, 1987, Frances accompanied Detective Michael Parinello during a search of her and Adrian's apartment. Frances pointed out to the detective which articles of clothing she had worn the day before. Parinello testified that he collected the clothing and brought it to the Department of Public Safety Crime Laboratory in order to test whether the clothes contained any gunpowder residue. A chemist testified that Frances' skirt contained nitrites, and that it was consistent with somebody having shot a pistol in close proximity to the lower front area of the skirt. The chemist conceded at trial, however, that the nitrite particles could have come from fertilizer rather than gunshot residue.

The State also presented the testimony of Sterling Newton, Ramona Bell, Alphonse Harrison, and Claudia Chapman. Sterling Newton was Adrian Newton's brother. At the time, he was living at the apartment with Frances, Adrian, and their two children. He testified that, on the evening of the murder, he arrived at the apartment at 5:30 or 6:00 p.m. Frances was at the

apartment at that time. Sterling claimed that Frances asked him to leave the apartment so that she and Adrian would have time alone to talk about their marriage. Sterling testified, however, that he remained at the apartment for another hour to an hour and one-half before leaving.<sup>2</sup>

Ramona Bell, an acquaintance of Adrian Newton, testified that she was aware that Adrian and Newton were on bad terms. Bell and Adrian had been dating prior to the shooting, while Adrian and Frances were married. According to Bell, she called Adrian from work at 6:45 p.m., and Frances answered the telephone. Frances gave Adrian the phone, and he talked with Bell for fifteen minutes. Bell further testified that Adrian told her that he was tired and wanted to go to sleep, but that he did not want to do so until Frances left, because he did not trust her.

Alphonse Harrison was a friend of Adrian Newton's. The pair had plans to go out together on the night of the shooting. Harrison testified that he called Adrian between 7:00 and 7:15 p.m. that evening, and that Frances answered the telephone. He stated that Frances put him on hold for possibly 45 minutes until he hung up. Harrison testified that he continued to call back, but did not get an answer until around 9:00 p.m., at which time Sondra Nelms answered the phone and told him that Adrian had been shot.

Finally, the State presented the testimony of Claudia Chapman, who was an agent for State Farm Insurance in 1986. She testified that in September of that year, Frances came in to purchase car insurance. During this visit, Chapman began talking to Frances about purchasing life insurance as well. On March 18, 1987, Frances purchased a fifty thousand dollar life insurance policy on herself, her husband, and her daughter, Farrah. Ivan Nelms was listed as the primary

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<sup>2</sup> The State wrote in its direct appeal brief that Sterling claimed to have stayed at the apartment "for approximately an hour to an hour and a half." In point of fact, however, Sterling testified only that he stayed at the apartment for "about an hour and a half."

beneficiary of Frances' policy, but Frances was listed as the primary beneficiary on Adrian Newton's policy. That policy contained Adrian's signature, but it was signed by Frances. Frances was also listed as the primary beneficiary on Farrah's policy. At the time of trial, both Frances Newton and her mother had made claims on benefits of policies for Adrian and Farrah.

## **2. Internal Inconsistencies in the State's Case**

In this subsection of this Petition, Applicant will identify major inconsistencies in the State's case, and will address new evidence in the following subsection.

### **a. Questionable Timeframe**

The evidence adduced against Frances at trial by the State is not consistent, and this is important given that the case against her was entirely circumstantial. In the first place, the State's witnesses were inconsistent with respect to times. Sondra Nelms testified that Frances came over to her house on the night of the murder between 7:00 and 7:30 p.m. Frances testified she arrived at Nelms' residence at 7:00 p.m. It is approximately a ten to fifteen minute drive between Frances' apartment and Nelms' house. Frances Newton would have had to leave the apartment no later than 7:20 p.m. in order to arrive at Nelms' house by 7:30 p.m.<sup>3</sup>

Sterling Newton testified that he arrived at the apartment between 5:30 p.m. and 6:00 p.m. and stayed there for an hour and a half. Therefore, Sterling Newton did not leave the apartment until, at the earliest, 7:00 p.m., and no later than 7:30 p.m.

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<sup>3</sup> Frances actually testified that she left the apartment at 6:00 p.m. and that she made an attempt to pay her car insurance before driving over to Sondra Nelms' house. However, because Frances claimed to be alone during this period and thus her whereabouts cannot be corroborated, the petition will assume, for timing purposes, that Frances left her apartment and went directly to Sondra Nelms' residence, the first place where she can be placed at a specific time outside of her apartment. This will ensure that the State's best-case scenario against Frances is being presented in that Frances Newton's testimony is being completely ignored.

Thus, assuming that Frances left the apartment as late as possible, and that Sterling left it as early as possible, Frances would have had a mere *twenty minutes* to kill her husband and two small children, clean herself and her clothes, compose herself, and walk out the door.<sup>4</sup>

However, the times laid out above make clear that the overlap between the times given by Sterling Newton and Sondra Nelms is quite significant, suggesting that Frances was telling the truth when she told officers that her family was alive when she left. In fact, the times testified to by the witnesses indicate that Sterling Newton, not Frances, was alone with Adrian and the two children. If Frances left the apartment at the earliest time possible and Sterling Newton left at the latest time possible, Sterling would have been alone in the apartment with Adrian and the children for 45 minutes.<sup>5</sup>

**b. Nitrites on Skirt**

The State presented evidence that nitrites, which are present in gunpowder residue, were detected on the lower front part of the skirt which Frances wore the evening of the murders, but changed out of before leaving the apartment. As the State concedes, both the State's expert and a defense expert testified that the nitrites could have derived from a source other than gunpowder residue, such as fertilizer. Other sources that are not inconsistent with the detection of nitrites and that could account for their presence on the skirt include urine, nicotine, and cosmetics.

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<sup>4</sup> This assumes that Frances would have left at 7:20 to make it to Nelms' residence by 7:30 and that Sterling Newton would have left the apartment at 7:00 p.m.

<sup>5</sup> This assumes that Frances left at 6:45 p.m. to make a 15-minute drive to Sondra Nelms' residence and that Sterling Newton left the apartment at 7:30 p.m.

Testimony at trial revealed that Frances' 20-month-old daughter came into contact with fertilizer on the day of the murders.<sup>6</sup>

The State's expert testified that gunpowder residue in this location would be consistent with shooting a pistol in close proximity to the lower front area of the skirt and with shooting somebody who is on the floor. However, although it is certainly *possible* that gunpowder residue from firing a weapon could accumulate on a person's clothes, it is highly unlikely given the small caliber of the weapon that was used. It is even more unlikely in the specific location on the skirt – *lower* front – where the nitrites were detected. Moreover, the sweater that Frances wore that evening tested negative for nitrites, casting serious doubt on the theory that the substance on the skirt is gunpowder residue. Thus, the presence of nitrites on Frances' skirt, while not inconsistent with the State's case, is not very probative of Frances' guilt, given the myriad other common sources that could account for the presence of nitrites, the unlikelihood of its accumulation on that location of the garment, and the fact that Frances' sweater tested negative for nitrites.<sup>7</sup>

### **c. Gunpowder Residue Tests**

When the bodies of Adrian, Alton, and Farrah were discovered by Frances and Nelms, the Harris County Sheriff's Department immediately arrived at the crime scene. While at the scene, the officers performed an atomic absorption test on Frances Newton's hands in order to detect the presence of gunpowder residue. Harris County Sheriff's Department crime scene investigator

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<sup>6</sup> Transfer of nitrites could have occurred, for example, by the tugging of a toddler's hands on the lower front part of Frances' skirt.

<sup>7</sup> It is, of course, possible, that gunpowder residue could have accumulated on the skirt for other reasons. If it is assumed that Frances Newton changed out of the skirt before leaving the apartment and before the murders occurred, then gunpowder residue could have been transferred to the skirt by any number of means, including by the shooter having wiped his hands on it. The location on the dresser where the skirt was left increases the likelihood of this kind of transference. *See* Exhibit 4 (crime scene photo of skirt on dresser).

Pete Shroedter testified that the results of the atomic absorption test that was given to Frances at the crime scene shortly after the murder were negative for gunpowder residue. Although the investigator testified that gunpowder residue might be removed by hand washing, in fact it cannot be, at least not completely, so soon after the shooting.

It should be possible to detect stippling on the hands of any person who has recently fired a .25 caliber weapon. Although about 90% of the exploded gunpowder leaves the barrel of the weapon, about 10% is ejected onto the hands of the shooter. This gunpowder residue actually embeds in the hands, and cannot immediately be washed off. An atomic absorption test will reveal the presence of this stippling, even if there has been an attempt to clean or wash it off. The atomic absorption tests in this case were run within a mere few hours after the time the shooting occurred. That they did not detect the presence of any gunpowder residue demonstrates that Frances had not recently fired a .25 caliber weapon.<sup>8</sup>

In any event, Shroedter testified that when he asked her “off the cuff” before he administered the test if she had washed her hands, Frances told him that she had *not* done so. Given her candor that night with respect to the weapon that she removed from the house – and her candor the next day in pointing out to police officers which clothes she had worn on the eve of the murder – there is no reason to disbelieve Frances’ answer. Thus, although the State found nitrite particles on the lower part of Frances’ skirt – which, according to testimony, *may* have been from gunpowder residue – it did *not* find any actual gunpowder residue on Frances’ hands on the night of the shooting. This inconsistency is not easily explained away.

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<sup>8</sup> Undersigned counsel will supplement this Petition with an affidavit from Bernard Ash, a firearms expert, who will attest to this.

That no gunpowder residue was detected on Frances' hands within mere hours of the shooting is important, because it casts doubt on the State's theory that the presence of nitrates on the skirt Frances wore was gunpowder residue rather than some other substance. The State has therefore theorized that gunpowder residue escaped the gun upon firing such that it accumulated on Frances' skirt, but not on either her sweater or hands. This is in fact the opposite of what one would expect, given that the hands and sweater would be much more likely than the lower front part of a skirt to absorb gunpowder residue upon the firing of the weapon.

**d. Lack of Blood**

Adrian Newton was killed as he lay on the living room couch. The gunshot wound was execution-style, meaning that the weapon was pressed against his temple as it was fired. The two children were likewise shot at very close range, obviously after Adrian was already killed.<sup>9</sup> Offense reports describing the scene note that "[t]here were several red stains on the carpet in the hallway and the floor inside the children's bedroom which appeared to be blood. *These stains appeared to form a trail.*" See Exhibit 5 (Harris County Sheriff's Department Supplement, P.F. Schroedter) (emphasis added).<sup>10</sup> Another report states that "[u]pon walking west out of the living room down a small hall way leading to the master bedroom was found *several small blood stains that trailed into a second bedroom* located midway down the hall and off to the north. The blood stains were also found in the second bedroom." See Exhibit 6 (Harris County Sheriff's Department Supplement, Det. M. Cox) (emphasis added).

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<sup>9</sup> Alton Newton was shot through a pillow.

<sup>10</sup> Undersigned counsel will cite statements and observations from portions of offense reports throughout this Petition. While the undersigned frankly acknowledge that other portions of the offense reports contain evidence against Frances Newton, undersigned's intent is to point out to this Board specific and even fundamental incoherencies within the State's case against Frances. It should be kept in mind that for any erroneous conviction, there must be *some*

Tests of the stains the officers described on the carpet were positive for blood, although DPS was unable to type it. *See* Exhibit 7 (Texas Dept. of Public Safety Criminalistics Results). It is, however, apparent that this blood was dripping from the shooter as the shooter, after having already shot Adrian Newton in the temple, made his way back to the bedroom. The blood was Adrian Newton's blood. The shooter, therefore, had a significant amount of blood on him, it having been sufficient to drip as the shooter walked through the apartment.<sup>11</sup> The murder weapon itself likewise should have had some blood on it, having been pressed directly against Adrian's head as it was fired.

Despite this, no blood evidence was ever presented at trial connecting Frances Newton to the offense. No blood was detected on Frances Newton's skirt or on her hands or body. Nor was any blood detected on the alleged murder weapon. Additionally, no blood was detected in the automobile that Frances Newton drove after the State alleged she committed the murders.<sup>12</sup> Nor is it possible that Frances Newton could have cleaned up sufficiently to remove all traces of blood evidence from these locations. As laid out above, under the best-case scenario for the State, Frances had a mere twenty minutes to commit the murders and clean up before she had to leave to drive to Sondra Nelms' residence.

Furthermore, there is no evidence that Frances Newton cleaned *anything* up, and the evidence actually suggests that no cleanup *could have* occurred in the apartment. Photos taken by Harris County Sheriff's Department crime scene investigators on the night of the murder reveal that the bathroom and kitchen in the house were spotless and had not been used. Neither the

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evidence against the wrongly convicted.

<sup>11</sup> Crime scene photographs do not reveal a lot of blood surrounding the children. They do, however, reveal a lot of blood around Adrian, who was covered with the sheet that he had been sleeping under.

bathroom sink nor the bathroom shower contained any evidence of blood or even recent use. *See* Exhibit 8 (crime scene photos of kitchen, bathroom sink, and shower). It is likewise clear that Frances hardly could have had time to wash the skirt that she wore in the twenty minutes before she had to leave. Nor is this explanation available to the State, even if time was available to wash the wash the skirt, because nitrites were detected on the lower front part of it, which could not have been detected had the skirt been washed. In short, following the murders and upon leaving the apartment, the shooter had to have been covered with blood. Frances, however, had no blood on her.

**e. Ramona Bell**

Ramona Bell's testimony indicated that Adrian Newton told her on the night of the murders that he did not trust Frances. Bell testified that Adrian told her that he wanted to go to sleep, but would not do so until Frances left. Bell's testimony, if true, obviously indicates some disagreement between Frances and Adrian on the night of the murder; *however, it also suggests that Frances was not in fact home when Adrian was murdered.* Adrian Newton was murdered while he apparently slept on the couch. If Adrian meant what he said to Ramona Bell, Frances Newton had already left the house when he was shot, because he had gone to sleep.

**f. Motivation**

The State theorized at trial that Frances Newton killed her husband, with whom she was having marital problems, and her two small children, in order to collect the benefits from insurance policies that she had earlier taken out on their lives. Specifically, the State presented the testimony of Claudia Chapman, who worked as an agent for State Farm. Insurance policies

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<sup>12</sup> Frances signed a voluntary consent to search form for her automobile.

were taken out on Adrian and Farrah's lives three weeks before the murder, and both named Frances Newton as the primary beneficiary. Frances also at this time took out a life insurance policy on herself.

The primary problem with this theory of the case is that Alton Newton, Frances' seven-year-old son, was not covered by any insurance policy held by Frances, yet he was murdered anyway. In essence, and with respect to Alton Newton, the State's theory was that Frances Newton killed her seven-year-old son merely to help cover up her murder of Farrah and Adrian for insurance proceeds. This is not a very credible motivation for killing one's seven-year-old child, nor is it particularly believable.

Additionally, there is no conceivable reason why Frances would kill her 20-month-old daughter for \$50,000 in insurance proceeds, nor does the State offer one. The State did present evidence of marital problems between Adrian and Frances, from which one could reasonably infer a motivation for killing him for insurance benefits. The State's theory of the case, however, requires us to believe not only that Frances killed Adrian Newton for \$50,000, but also that Frances killed her 20-month-old daughter for an *additional* \$50,000, and furthermore, that she killed her seven-year-old son for nothing at all.

### **3. New Evidence**

In just a few short weeks looking into the case, undersigned counsel has located important evidence that, when combined with the internal inconsistencies and incongruities within the State's circumstantial case against Frances, casts serious doubt on Frances Newton's conviction for capital murder. First, the ballistics evidence – the cornerstone of the State's case against Frances Newton – was processed by the Houston Police Department Crime Laboratory, whose

work is no longer credible or reliable in the wake of recent revelations and discoveries about the quality of its scientific analyses. Additionally, Sondra Nelms has clarified and provided details regarding the events that she observed on the night of the murder while she accompanied Frances Newton from her residence back to her apartment. Her statements describe Frances' demeanor in general and her reaction to locating the bodies in the apartment. She also explains how Alphonse Harrison's phone call – which the State purported to show occurred before the murder – actually first came only after the murders, and in fact prompted the discovery of the bodies. Last, an additional witness fixes the actual time of the shooting at about 7:30 p.m., a time that makes it impossible for Frances to have been at the apartment.

**a. Unusual Circumstances of Ballistics Examination**

Harris County Sheriff's Department homicide detective Michael Talton recovered the bag and gun that Frances had placed in the abandoned house on the night of the homicide. Sergeant J.J. Freeze testified that he contacted Frances Newton – who had not yet been arrested – at 7:45 p.m. on April 10 and asked her to come to the station to discuss “some new information” that the investigators had learned. Frances and her mother agreed. An article in the Houston Chronicle published on April 10, 1987, indicated that the Sheriff's Department was expecting the results of the ballistics examination that day. *See Test Results Expected Today in Probe of Triple Slaying*, HOUSTON CHRON., Apr. 10, 1987, Sec. 1, p. 20 (Attached as Exhibit 9).

The State presented evidence at trial that the results of the ballistics testing demonstrated that this gun was the murder weapon. Thus, if the ballistics examination was completed as expected, Sergeant Freeze possessed this information on the night of April 10. Yet Frances Newton was not arrested that night. She was interviewed and released. In fact, Frances was not

arrested until April 22, almost two weeks after the Harris County Sheriff's Department had the results of the ballistics examination that proved Frances had control of the supposed murder weapon. It is unusual that a law enforcement agency waits two weeks to arrest an available suspect after making a positive identification of a firearm as the murder weapon.<sup>13</sup> If the test results had been positive, it is unclear why Frances Newton was not arrested that day or sooner.

Although under normal circumstances one would not have reason to be suspicious about the results of a ballistics examination, in this case there is reason. The agency that performed the ballistics examination in Frances' case was the troubled Houston Police Department Crime Laboratory, whose firearms division has a well-documented pattern of unreliable examinations, especially in capital cases.<sup>14</sup> See Wendy Grossman, *An Absolute Maybe*, HOUSTON PRESS, August 8, 2002; Roma Khanna, *Cases Case Doubt on Ballistics Work at HPD Lab*, HOUSTON CHRON., Mar. 23, 2003, at A1.

First, dubious ballistics evidence from the firearms division of the HPD Crime Lab was presented during Nanon Williams' capital murder case. An HPD firearms examiner testified that a fatal shot had been fired by a .25-caliber weapon. In point of fact, the fatal shot had been fired by a .22-caliber weapon, and this fact should have been easily detectable by any firearms examiner.

*Id.*

Second, Johnnie Bernal's capital murder trial likewise involved scientifically unsound analysis and testimony from an HPD firearms examiner. In that case, the examiner grossly

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<sup>13</sup> Moreover, this completely undermines the State's assertion that Frances Newton posed a "future danger" to society. If the Harris County Sheriff's Department knew on April 10 that Frances Newton killed her husband and children, yet waited two weeks to arrest her for the offense, it is abundantly clear that they believed Newton did not pose a danger to anybody else.

<sup>14</sup> The entire HPD Crime Lab has come under intense scrutiny the last two years, including the DNA/Serology division and the toxicology division. The lab's foibles have run the gamut from sheer incompetence to negligence and in

deviated from professional norms of ballistics examination by firing 25 test-fires rather than the customary two or three, and even applied a solvent to the barrel of the gun mid-test rendering a match “astronomically improbable, if not impossible,” according to an expert who reviewed the case. Nonetheless, a “match” was declared in the case by the HPD lab. *See* Wendy Grossman, *An Absolute Maybe*, HOUSTON PRESS, August 8, 2002; Roma Khanna, *Cases Case Doubt on Ballistics Work at HPD Lab*, HOUSTON CHRON., Mar. 23, 2003, at A1.

Third, Anibal Rousseau was sentenced to death despite the fact that a file, located by Rousseau’s habeas counsel twelve years after Rousseau arrived on death row, revealed exculpatory ballistics evidence in the possession of the HPD and Harris County District Attorney. *See generally* Roma Khanna and Steve McVicker, *Fingers Pointed at HPD Crime Lab in Death Row Case*, HOUSTON CHRON., April 24, 2003, at A1.

Fourth, a federal district court judge has recently granted relief to Martin Draughon based upon a faulty ballistics examination performed at the HPD Crime Lab. *See Draughon v. Dretke*, No. 02-CV-1679 (S.D. Tex. 2004). In Draughon’s case, an HPD ballistics examiner testified that Draughon’s account of the shooting, in which he claimed to have fired his weapon away from any persons in an attempt to scare them only, could not possibly be accurate because the bullet recovered from the victim did not contain any evidence of having ricocheted and instead entered directly into the victim. When an independent expert analyzed the bullet during federal habeas review, however, he did find a ricochet mark on the bullet, and the HPD analyst had even marked it on the bullet, indicating that he was aware of it before he testified at the trial.

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some cases even to outright perjury.

HPD firearms analyst Anderson testified at Frances' trial that he conducted the examination of the firearm in this case, and that there was a match. He did not support his opinion with any evidence or data. *See* Exhibit 10 (Testimony of C.D. Anderson). The circumstances surrounding the ballistics examination call for skepticism in this case, because whatever was learned on April 10, 1987, about the testing of the weapon discovered in the abandoned house, did not cause the Sheriff's Department to arrest Frances that night or immediately thereafter.<sup>15</sup>

**b. Sondra Nelms**

Sondra Nelms was with Frances when they discovered the bodies of Adrian, Alton, and Farrah Newton. Both she and Frances were very cooperative with the police, Frances having revealed that she had removed a firearm from the apartment that evening and Nelms having revealed that she saw Frances place a bag in an abandoned house next door to her residence. Nelms later led the police directly to the house, where the firearm was found. Yet, Sondra Nelms provides evidence that undercuts the State's case against Frances Newton.

Nelms' affidavit describes in more detail what she was not able to testify to at trial.<sup>16</sup> *See* Exhibit 11 (Affidavit of Sondra Nelms). Nelms states, as she did at trial, that Frances arrived at

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<sup>15</sup> The ballistics evidence was the State's key piece of evidence against Frances Newton. Frances told detectives that she picked up her children after work, went home, and remained at the apartment until she left at 6:00 p.m., whereupon she removed a firearm from the house and placed it at an abandoned house next door to Nelms' residence. When Frances left, she said, her family was alive. If the ballistics evidence established that the weapon she admittedly removed from the house was the murder weapon, then it follows necessarily that Frances Newton was present when Adrian and the two children were shot and had knowledge of their shooting before she left the house. Nobody else could have shot Adrian and the two children with that weapon, since she was the person who removed it from the house. The Harris County Sheriff's Department had all of this information at least by April 10, yet did not arrest Frances that night or at any time in the immediate future.

<sup>16</sup> Sondra Nelms testified at trial, but defense counsel did not ask her important questions regarding Frances' reaction to discovering the bodies, where they went prior to returning to the apartment, and – perhaps most importantly – the circumstances of Alphonse Harrison's phone call to the apartment. These issues are discussed in the body of the

her residence sometime between 7:00 p.m. and 7:30 p.m. Frances invited Nelms and her sister to the apartment, because they had not seen it since Frances and Adrian had moved in. Only Nelms agreed to go. She reiterates that as they got into the car to leave, Frances picked up a blue bag from the car and walked it over to the abandoned house.

As they began driving, Frances and Nelms began discussing the recent problems that Adrian and Frances were having in their marriage. Frances told Nelms that she loved Adrian, and that they were going to reconcile their relationship. On the way, the pair stopped off at a friend's house so that Frances could pick up a necklace that she was going to give to Adrian.

Frances and Nelms arrived back at the apartment between 7:45 p.m. and 8:00 p.m. Nelms states:

Immediately upon opening the door, the phone rang. Frances answered the phone and stated "I think he's asleep, I'll see if I can wake him." At this point, all Frances could see was a sheet over Adrian's lower torso. Neither of us could see his upper torso. As Frances walked around the couch and saw his upper torso, she immediately screamed and bolted to the children's bedroom. Frances began to frantically scream uncontrollably. I could not calm her down enough to elicit the apartment's address.

*See Exhibit 11.*

Nelms noticed that the phone was off the hook and told the person on the line that he needed to call back later. She heard in response, "I think you[r] brother has been shot." Nelms and Frances then proceeded to her neighbor's apartment. The neighbor called the police close to 8:30 p.m., and Frances and Nelms remained there until the officers made the scene, because they were afraid they would both get killed.

Nelms' statement is important for several reasons. First, she describes Frances' demeanor before discovering the bodies. According to the State, Frances had just killed her husband and

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petition.

two small children. Yet Frances talked to Nelms about the status of her and Adrian's relationship and how they had decided to get back together. She even stopped off to pick up a present for her husband on the way home.

Nelms also describes Frances' reaction upon discovering the murders. She "frantically scream[ed] uncontrollably," and Nelms could not calm her down. Frances' reaction does not, of course, exclude her as being the person who murdered Adrian, Alton, and Farrah. But it is unlikely that it was a performance; Frances' grief and surprise were so genuine that Nelms, who knew her well, concluded: "I know in my heart that after watching the reaction of Frances upon discovering her husband and children, there is absolutely no way she had any involvement in their deaths." *See Exhibit 11.*

Nelms also casts doubt on the timing of the first phone call placed to the Newton residence from Alphonse Harrison. Harrison testified that he first called at 7:00 p.m., and he was thereafter put on hold for approximately 45 minutes. At trial and on appeal, this was presented as though Frances had put Harrison on hold while she murdered her husband and children. Nelms makes clear that Harrison was simply wrong about what time he called. His call was actually placed around 8:00 p.m., right when Nelms and Frances entered the apartment upon returning. He was placed on hold not while a murder was committed, of course, but while Frances and Nelms had just discovered the bodies. Nelms states, "I later learned that the person on the telephone who called was Alfonso Harrison. I was present at the apartment when a phone call was received and the only reason he was left on hold so long, was because we had just discovered that Adrian and two children were dead and we were much more concerned about their deaths than a simple telephone call." *See Exhibit 11.*

Nelms' description of Frances' reaction to the murders is corroborated by the officers who arrived on the scene. Deputy R.W. Ricks noted in his report that upon arriving, "Mrs. Newton was crying and hysterical." *See* Exhibit 12 (Harris County Sheriff's Department Supplement Report, R.W. Ricks). Indeed, Deputy Talton had an ambulance called to the scene to treat Frances because she fainted when told that Adrian was dead.

**c. Time of Shooting**

After the Harris County Sheriff's Department arrived at the Newton residence on the night of April 7, Officer J.G. Salinas canvassed the surrounding apartment units. At 6122 W. Mount Houston, apt. C, Salinas interviewed Clive Ahead Adams and Rita Adams. Clive told officer Salinas that he heard a gunshot at about 7:30 p.m. that night. *See* Exhibit 13 (Harris County Sheriff's Department Supplement Report, J.G. Salinas).

If the shooting occurred at this time, it is impossible, according to the State's evidence, for Frances Newton to have been present when the murder occurred. Sondra Nelms testified that Frances Newton arrived at her residence by 7:30 p.m., and perhaps as early as 7:00 p.m. Because it is at least a ten minute drive between the residences, Frances Newton could not have been at her apartment at 7:30 p.m. Based on the testimony at trial, however, Sterling Newton – who was living at the residence and who possessed a key to the residence – could have been at the residence at 7:30 p.m. Moreover, as the State's version of the case emphasizes, there were no signs of forced entry in the apartment. Sterling Newton's potential presence in the apartment at 7:30 p.m. is consistent with that fact.

**d. Anonymous Caller.**

Shortly before 1:00 a.m. on April 9, 1987, a little more than one day after the murder, the Harris County Sheriff's Department received an anonymous call from what they perceived to be a black woman. *See Exhibit 14 (Harris County Sheriff's Department Supplement Report, F.J. Pratt)*. The woman refused to give her name or speak with any police officer. She gave her information instead to a complaint clerk, while the call was being recorded.

The anonymous caller told the clerk that she had seen a red pickup truck at the scene of the murders on April 7. She claimed that the truck was driven by a black male who was approximately 30 years old. The caller relayed to the clerk a license plate number that she had taken down, which the Department later traced to a William Boyd Heffington. No follow-up ever appears to have been conducted on this lead by the Harris County Sheriff's Department.

#### 4. Alternative Theory of the Crime

At trial, Frances Newton testified that she picked up her children after work and arrived at their apartment around 4:30 p.m. That day, Frances and Adrian decided to attempt to reconcile their differences.<sup>17</sup> Frances would no longer see Jeffrey Frelow and Adrian would likewise stop seeing other people. To consummate their reconciliation, the couple made love. Frances changed out of the clothes that were later determined to have contained nitrite particles, and left the apartment around 6:00 p.m. to make a payment on her car insurance. Before leaving, she removed a handgun from the apartment because she had overheard a conversation between her husband and his brother indicating that Adrian was in trouble. In short, Frances was worried about leaving the gun at the house where she believed trouble was brewing, so she removed it. When Frances left, Sterling Newton was still present at the apartment.

Frances testified that she arrived at Sondra Nelms' house at 7:00 p.m. She was trying to stay away from her apartment so that Adrian and Sterling could talk. Before leaving Nelms' house to return to Frances' apartment, Frances took the bag which contained the gun she had earlier removed from the house and placed it in the abandoned house next door. When the pair arrived back at Frances' apartment, they noticed that the door was slightly ajar, and upon entering they discovered the bodies of Adrian and the two small children.

Frances' testimony that she was not present when the murder occurred was obviously rejected by the jury. It is apparent that the key piece of evidence against her was ballistics evidence that linked the gun which she had placed in the abandoned house to the murders.

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<sup>17</sup> It should be noted that Frances' intent to reconcile her and Adrian's relationship was independently corroborated by Frances' father on the night of the murder. *See* Exhibit 15 (Harris County Sheriff's Department Supplement Report, F.J. Pratt).

Without this piece of evidence, the only other piece of forensic evidence purporting to link Frances Newton to the shooting was the detection of nitrite particles on the lower part of Frances Newton's skirt, which may or may not have been gunpowder residue. But the jury did not know that there were suspicious circumstances surrounding the ballistics evidence. Although the jury did know that Frances was interviewed and released on April 10, the jury did not know that the Harris County Sheriff's Department already possessed information with respect to the results of the ballistics examination, yet did not arrest her. Moreover, the jury did not know about the pattern of unreliable examinations being conducted by the firearms division of the HPD Crime Laboratory. In short, there was no reason to question the testimony establishing for the State that the weapon which Frances had control of was the murder weapon. Today there is.

As testified to at trial by both forensic experts, the nitrite particles detected on the lower front side of the skirt Frances wore that evening could have been from fertilizer. This is because the testing employed by DPS was only for the detection of nitrites, and not for the detection of elements unique to gunpowder residue, such as barium, antimony, and lead. Both fertilizer and gunpowder residue are consistent with the detection of nitrites, and therefore fertilizer could not be excluded as the source of the nitrites detected on the skirt.<sup>18</sup> Frances' 20-month-old daughter, Farrah, stayed with Frances' uncle during the day of the murder while Frances was at work. Frances' uncle had a large garden off to the side of their house, which could account for the presence of fertilizer on the *lower front side* of Frances' skirt. The nitrite particles easily could have been transferred from Frances' toddler to her skirt front. The lack of *any* blood on the skirt – or on any clothing worn by Frances Newton that evening – serves to support this theory. This

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<sup>18</sup> The detection of nitrites is also consistent with the presence of urine, tobacco, and cosmetics.

is especially the case given that it is apparent from crime scene that the shooter dripped blood throughout the apartment.

This forensic evidence having been either cast into doubt or inconclusive, the only remaining evidence against Frances Newton is that she and Adrian had marital problems, and that she took out \$50,000 insurance policies on Adrian's and Farrah's lives.<sup>19</sup> This evidence is insufficient to sustain her conviction.

But if Frances Newton did not kill her husband and two small children, who did? Although Frances cannot answer that at this time, there are promising leads which have yet to be adequately investigated.

Adrian Newton was a drug user and drug seller. Testimony at trial revealed trace amounts of cocaine metabolite in his urine. Moreover, Frances testified that some kind of trouble was brewing that concerned Adrian, and that he and Sterling were discussing it when she left, removing a firearm from the apartment for this very reason. Officer Frank Pratt, with the Harris County Sheriff's Department, spoke to Frances' brother, Terrence Lewis, on the night of the murder. Lewis told Pratt that Adrian Newton had been dealing some form of drugs, and that he was at the time in debt to his supplier, whom Lewis identified as somebody he knew only by the name of "Charlie." Lewis further told the officers the name of the street where Charlie resided and that he could lead them to where Charlie lived. At the trial, Officer Pratt was questioned as follows:

Q: Did you interview a number of people out there at the scene that night?

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<sup>19</sup> Frances also took out a policy on her own life on the same day.

A: Yes, I did.

Q: Among those people, did you interview Terrence Lewis?

A: I did.

Q: Who did he identify himself to be?

A: As the brother of Adrian Newton.

Q: Did you have a relatively brief conversation with him?

A: Yes.

Q: What did he tell you from your notes?

A: He told me that Adrian Newton had been dealing some form of drugs. He thought it was marijuana. He said that Adrian had told him he was in debt to his supplier. He said that the name of the supplier was Charlie and that was all he could tell me about the supplier besides the supplier lived off of Martin Luther King.

**Q: Did he offer to show you or some other officer where Charlie lived?**

**A: Yes he did.**

**Q: To your knowledge, Detective Pratt, did anyone subsequently take Terrence Lewis up on his offer?**

**A: No.**

**Q: To your knowledge, was the alleged drug dealer ever interviewed by anyone in connection with this case?**

**A: No.**

S.F. Vol. 35: 828 (emphasis added). *See also* Exhibit 15 (Harris County Sheriff's Department Supplement Report, F.J. Pratt).

Also on the night of the murder, Frances' father, Bee Henry Nelms, independently gave detectives this same information. He reported that Adrian was "heavily into dope, marijuana and

crack, and that he was in debt to his supplier, a man named Charlie.” See Exhibit 15. He further reported to the officer that Frances was scared to stay at the apartment because of the type of people that came over there to visit Adrian. *Id.* This lead – and the possibility that Adrian’s and the two children’s deaths were drug-related – ***was never investigated either by law enforcement or by Frances’ trial attorney.*** Indeed, it has yet to be adequately investigated to this day by anybody. Especially in view of the fact that the style of the killings has the appearance of a drug-related hit,<sup>20</sup> it is astonishing that no serious investigation has been conducted – and egregious that the State of Texas has attempted to interfere with undersigned counsel’s desire to conduct such an investigation.

As indicated above, in part because the State of Texas has denied Newton her right to meet with and confer with her lawyer, undersigned counsel cannot at this time prove that Frances Newton is innocent of capital murder by clear and convincing evidence, as would be required to obtain judicial relief from her conviction and sentence. Undersigned counsel can, however, describe the means by which such clear and convincing evidence can be gathered, given enough time to do so.

##### **5. Additional Forensic Testing is Required.**

Additional forensic testing can demonstrate Frances Newton’s innocence of the crime of capital murder. There are questions surrounding both the reliability of the ballistics evidence presented in this case as well as whether the nitrite particles detected on Frances Newton’s skirt derived from gunpowder residue or from some other source, such as fertilizer. If the ballistics

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<sup>20</sup> Although the officer noted and testified to Lewis’ statements to him on the night of the murder regarding Charlie, Lewis denied at trial that he ever told the officer this.

evidence is in fact wrong, meaning that the gun recovered from the abandoned house was not the murder weapon, and if the nitrite particles detected on Frances' skirt are derived from another source rather than gunpowder residue, then Frances can establish her innocence.

Frances has asked for additional forensic testing to be performed since the beginning, but her court-appointed attorneys have not vigorously sought it. Her trial counsel failed to independently test or review either the ballistics evidence or the testing of the skirt, and neither did her habeas counsel assist her in this endeavor. As recently as last year, Frances Newton requested that her federal habeas attorney seek to have the dress tested for the specific presence of gunpowder residue rather than the general presence of nitrites. Habeas counsel wrote to the Harris County District Attorney's Office, requesting that they retest the dress based upon the "significant problems with the crime lab." The Harris County District Attorney's Office would not agree to the tests.<sup>21</sup> *See* Exhibit 16 (Letter from Roe Wilson to Kenneth Williams, Nov. 18, 2003).

Although ballistics testing was performed in Frances Newton's case, the circumstances of it require skepticism of the results. In the first place, the testing was performed by the Houston Police Department Crime Laboratory, for which a well-documented pattern of unreliable examinations and outright erroneous conclusions exists in capital cases, described above. Skepticism of the trial testimony declaring a match of the ballistics is further warranted by the fact that the Harris County Sheriff's Department apparently released Frances even after the results of

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<sup>21</sup> As the letter reveals, Frances' federal habeas attorney asked for testing based upon significant problems that have occurred at the Houston Police Department crime laboratory. Assistant District Attorney Roe Wilson pointed out, correctly, that the Texas Department of Public Safety, not the HPD crime lab, originally analyzed the dress. However, this is irrelevant. Frances does not necessarily dispute the conclusion that nitrites were detected on the skirt. The issue that Frances seeks to have resolved is whether those nitrites derive from gunpowder residue or another source, such as fertilizer.

the testing were in and did not arrest her for another two weeks. If given sufficient time to pursue evidence of innocence, Frances will ask that an independent expert review the ballistics evidence in this case – including the test fires from the previous examination – in order to determine its reliability and whether there is any match at all. Frances would also seek to perform her own ballistics examination of the weapon for comparison with the evidentiary bullets and the shell casings that were collected by the Harris County Sheriff’s Department at the scene.<sup>22</sup> Frances would also like to examine the purported murder weapon in order to determine whether any DNA or blood evidence is present on it, given the close range at which it was fired at Adrian Newton and the children.

At the time of trial, Frances’ dress was tested only for the presence of nitrites, which can be derived from a variety of sources, including urine, tobacco, fertilizer, and cosmetics. Hence, at Frances’ trial, both experts testified that the nitrites could have derived from fertilizer, and they could not state that they actually derived from gunpowder residue. The technology exists to make that distinction. Certain elements are unique to gunpowder residue that will not be found in, for example, fertilizer. Lead, barium, and antimony are elements of gunpowder residue that are not in fertilizer. Scanning electron microscopy with energy dispersive x-ray (SEM) is the proper method of detection of these substances, and there are laboratories in Texas that perform the test.<sup>23</sup> This test can exclude gunpowder residue as the source of the nitrites on Frances’ skirt and help establish her innocence.

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<sup>22</sup> Shell casings, like fired bullets, can be matched to specific firearms, based on the mechanism of the gun firing. HPD analyzed the shell casings in this case, and the results were “inconclusive.”

<sup>23</sup> These laboratories are Armstrong Forensic Laboratory in Dallas; A & B Labs in Houston, Mercury Environmental Lab in Deer Park; E Lab in Houston; and Pace Laboratory in Clear Lake City.

## **6. Additional Investigation is Required.**

As will be discussed more below, Frances Newton's case has never been adequately investigated by any of her appointed attorneys. Whether the deaths of Adrian, Alton, and Farrah Newton were drug-related has not been investigated by anybody, and there are leads that need to be followed up on. Specifically, investigation needs to be conducted with respect to Adrian's drug supplier, Charlie. Charlie is not a fictional character that was simply made up by Frances Newton. His name was given to officers on the night of the murder both by Adrian's brother, Terrence Lewis, and by Frances' father, Bee Nelms, who each independently told detectives that Charlie was Adrian's supplier and that Adrian was currently in debt to him at the time he was killed. Frances requires adequate time to pursue this credible lead that has yet to be investigated.

### **B. Poor Representation**

It is unfortunate that only now has investigation been undertaken in this case. But Frances Newton cannot be held responsible for the failures of her attorneys. She has, in fact, repeatedly asked for help from the courts and from others, maintaining her innocence throughout her proceedings and incarceration.

Frances Newton was appointed Ron Mock as lead defense counsel at trial. Several months after counsel was appointed, Frances wrote a letter to the trial judge expressing concern that she had as yet had only very minimal contact with him and that no investigation of her case was ongoing. *See* Exhibit 17 (letter from Frances Newton to Judge Hearn, Nov. 16, 1987). She wrote the judge that the attorney he appointed to handle her case was "like not having [an attorney] at all." She concluded her letter by asking the court "to resolve this case by ordering an

investigation of the case.” One month later, Frances wrote a pro se motion to dismiss her court appointed counsel and to have new counsel appointed. *See* Exhibit 18 (Defendant’s Motion to Dismiss Court Appointed Counsel and Appoint New Counsel to Act on Behalf of Defendant, Dec. 11, 1987). The motion states that Mock had no contact with Frances for the five previous months, that he had taken no affirmative action to preserve and protect her rights in that no research had been done on the case, and that Frances had “no faith or confidence” in Mock. She also stated that she was unable to work with and place her trust in court-appointed counsel. The motion was summarily denied on the day of submission without hearing.

The week before the trial was to begin, Frances’ family contacted attorneys David Eisen and Gerald Fry in order to retain them to replace Mock, in whom they had no confidence, as attorney for Frances. They had attempted to retain counsel before, just after Frances was arrested, but they did not have sufficient funds to do so. Only right before trial did the family have enough money to retain counsel. The newly retained attorneys submitted motions for substitution and counsel and a continuance on the day trial was set to begin in order to afford them sufficient time to prepare. The motion for continuance was denied, in effect denying the motion for substitution of counsel as well, since the newly retained lawyers had not yet had an adequate opportunity to prepare for trial. Upon the denial of the continuance, the attorneys withdrew the motion to substitute counsel. Frances went to trial with Ron Mock as lead counsel.

Frances’ and her family’s lack of confidence in Mock was not unwarranted. Although Mock did not have a known poor reputation at the time of Frances’ trial, his poor representation of criminal defendants in capital trials is now widely acknowledged. *See* Mary Flood, *What Price Justice?*, HOUSTON CHRON., July 1, 2000, at A1 (describing Mock’s poor reputation regarding his

representation of capital murder defendants in the 1980's and early 1990's). Thus, Frances was right to be concerned about the effectiveness of the representation she would receive from Mock.

Ron Mock did not adequately investigate Frances Newton's case and this ultimately caused his representation to be ineffective. Mock did not interview any witnesses, including Sondra Nelms, whose name Mock knew from the State's file and whose testimony, described above, could have been helpful to establish Frances' innocence at trial. Mock testified on the day of trial during the hearing on the motion for a continuance and substitution of counsel. When asked, "you knew the name of Ms. Newton's cousin [Sondra Nelms] the day you read the State's file. Why didn't you go out and talk to her?" Mock replied, "I tell you I'm a lawyer, I'm not an investigator." S.F. Vol. 30: 53. When asked if he could provide the names of any witnesses, either for the State or defense, that he had talked to, Mock replied that he could not do so "off the top of [his] head." S.F. Vol. 30: 50. Mock's second-chair, Catherine Coulter, likewise testified that she had not spoken with any witnesses on the day of trial.<sup>24</sup> No defense witnesses had been subpoenaed on the day the trial was set to begin. In short, no investigation of the case occurred in Frances Newton's defense at trial. Frances protested this inadequacy throughout, but to no avail.

The failure of counsel to conduct *any* factual investigation continued during Frances' habeas appeals, both state and federal.<sup>25</sup> In fact, her federal habeas petition claiming that her

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<sup>24</sup> The State has argued that Mock and Coulter made attempts to get names of witnesses from Frances and her mother but that none had been provided. However, the fact that neither attorney had spoken to Sondra Nelms or any other witnesses, such as Terrence Lewis, whose names were freely available from the State's file, belies any suggestion that the attorney's were somehow hampered by any lack of cooperation from Frances and her mother. There is simply no excuse for failing to interview any witnesses before a trial begins.

<sup>25</sup> Frances Newton's state habeas counsel repeatedly complained in court documents that Ron Mock had not turned over his file on the case to him, even after repeated requests to do so.

appointed trial counsel was ineffective for failing to investigate the case was rejected for the very reason that *that* counsel had conducted no independent investigation and thus could not prove how Frances' trial counsel's failure to investigate could have affected the outcome of the trial. The federal district court wrote, "The petitioner has apparently made *no effort in state or federal* post-conviction proceedings to investigate the possibility that 'Charlie' killed the victim." Memo. Op. and Order, *Newton v. Cockrell*, No. H-01-CV-4240, at \*24 (emphasis added).

Frances could not investigate her case from prison. Nor could she force her court-appointed attorneys to investigate the case. With federal habeas counsel's statutory appointment recently coming to an end, undersigned counsel have only just begun to investigate Frances' case. Since 1987, this will be the first time that anybody has conducted an independent investigation of Frances Newton's guilt or innocence. Frances should not be held accountable for the system's failures. She asks this Board only for time.

#### **9. Effect of Crime Upon Victim's Family.**

There were three victims in this case, all from the same immediate family. Frances, the only member of the family who was not killed, was convicted of the offense. The loss of these three individuals was undoubtedly devastating to all who knew them. At the time of the offense, relatives of Adrian Newton's family could not believe that Frances could have committed the murders, because of her love of the children and even Adrian. Frances' mother, the grandmother to the two children who were killed, continues to support Frances and believe in her innocence.

### **CONCLUSION**

Frances respectfully requests that this Board grant her request for a recommendation for a 120-day reprieve so that she may given sufficient time to have additional forensic tests conducted and to adequately investigate her claim of innocence.

Additionally, Frances respectfully requests that the Board grant her a hearing, pursuant to 37 T.A.C. §143.43(b)(3) and Administrative Procedures Act §2001.001 *et seq*, and allow her to present evidence in support of her request for a reprieve. She further requests the Board comply with the Open Meetings Act, §2001.001 *et seq* Texas Government Code, and with the Texas Constitution, Article 4, § 11 requirement that the Board give its reasons for its actions in granting or denying this application.

Dated: November 9, 2004

Respectfully Submitted,

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