

**In the 263rd Judicial District Court
of Harris County, Texas**

and

In the Court of Criminal Appeals of Texas

Ex parte Frances Elaine Newton,

Applicant.

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Cause No. _____

**Application for Postconviction Writ of Habeas Corpus
and Motion for Stay of Execution**

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Frances Newton is currently a death-sentenced inmate under the supervision of the Texas Department of Criminal Justice, TDCJ #999113. *Ms. Newton has an execution date of September 14, 2005.* Pursuant to section 5 of article 11.071 of the Texas Code of Criminal Procedure, Ms. Newton requests that this Court authorize her to pursue any or all of the three independent claims she seeks to raise in this subsequent Application for Post-Conviction Writ of Habeas Corpus.

1. Procedural History.

Newton was convicted of shooting to death her husband and two small children on October 24, 1988. The Court of Criminal Appeals (referred to as “CCA” or “this Court”) affirmed Ms. Newton’s conviction and sentence in an unpublished opinion. *Newton v. State*, No. 70770, 1992 WL 175742 (Tex. Crim. App. 1992) (unpublished). The Supreme Court denied certiorari. *Newton v. Texas*, 509 U.S. 926 (1993). In state habeas proceedings, the trial court recommended that relief be denied, and the CCA denied relief in an unpublished order.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. May 20, 2004). On November 1, 2004, the Supreme Court declined to review the case by denying the petition for writ of certiorari. *Newton v. Dretke*, --- U.S. ---, 125 S.Ct. 441 (Nov. 1, 2004). Newton's execution was scheduled for December 1, 2004.

On November 19, 2004, Newton filed an application under section 5 of article 11.071 of the Texas Code of Criminal Procedure, seeking to file a successive state habeas application. The CCA denied authorization, and the Supreme Court denied certiorari. *Ex parte Newton*, No. WR-47,025-02 (Tex. Crim. App. Nov. 29, 2004); *Newton v. Dretke*, --- U.S. ---, 125 S.Ct. 1591 (Mar. 7, 2005). On November 23, 2004, Newton filed a motion for authorization to file a successive habeas petition in federal court, which was denied on November 30, 2004. *In re Frances Newton*, No. 04-20925 (5th Cir. Nov. 30, 2004) (unpublished). The Supreme Court denied certiorari. *Newton v. Dretke*, --- U.S. ---, 125 S.Ct. 1590 (Mar. 7, 2005). On November 30, 2004, the Texas Board of Pardons and Parole recommended that the Governor grant a 120-day reprieve, and on the next day, Governor Perry granted Newton a reprieve of 120 days. *See* Exhibit 1 (Executive Order granting reprieve, Dec. 1, 2004). Following the expiration of the 120-day reprieve, the state set Newton's execution for September 14, 2005.

The argument in this Application will proceed as follows. In section 2, Newton establishes that the three substantive claims presented in this Application satisfy the State's criteria for subsequent habeas petitions, and this Court should therefore address the claims on the merits. In section 3, Newton raises three claims. First, in section 3.1, Newton establishes that she is actually innocent, and would not have been convicted but for the ineffectiveness of her

trial counsel. Second, in section 3.2, Newton establishes that her death sentence is unconstitutionally unreliable, and no rational jury would have answered the future dangerousness question in the affirmative if Newton had had competent counsel or if the jury had known facts that are presently knowable. Third and finally, in section 3.3. Newton argues that the State's act of destroying potentially exculpatory evidence precludes the State from going forward with her execution.

2. This Application meets the requirements for filing a successive habeas application.

In this successor application, Newton raises three claims that were not contained in her previous application for habeas relief. Each new claim meets the standard set forth in section 5 of article 11.071 of the Texas Code of Criminal Procedure.

Article 11.071 permits a death-sentenced inmate to file a subsequent habeas application in three different circumstances. First, the inmate may file a subsequent application if the legal or factual basis of the claim was unavailable at the time the original habeas petition was filed. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1).¹ Second, an inmate may file a subsequent application if she can show by a preponderance of the evidence that, but for a constitutional violation, no rational juror could have found the applicant guilty beyond a reasonable doubt. *Id.* § 5(a)(2).² Third, an inmate may file a subsequent application if she can show by clear and convincing evidence that, but for a constitutional error, no rational juror would have answered one or more of the special issues in the state's favor. *Id.* § 5(a)(3).³

¹ The claims that Newton raises below in sections 3.2 and 3.3 satisfy this provision of Texas law.

² The claim that Newton raises below in section 3.1 satisfies this provision.

³ The claim that Newton raises in section 3.2 satisfies this provision.

The argument in section 3.1 below implicates the provision of Texas law that provides that a death-sentenced inmate may file a subsequent application for habeas relief if she can establish “by a preponderance of the evidence [that] but for a violation of the United States Constitution no rational juror could have found [her] guilty beyond a reasonable doubt.” Tex. Code. Crim. Proc. art. 11.071 § 5(a)(2). Newton will demonstrate in section 3.1 that the State’s case against her was exceedingly weak. Had her lawyer conducted any investigation at all, he would have located evidence that would have caused any rational juror to conclude that the State had not established Newton’s guilt beyond a reasonable doubt.

The argument in section 3.2 below implicates two provisions of Texas law: first, the section that permits a death-sentenced inmate to file a subsequent application for habeas relief if she can show “by clear and convincing evidence [that] but for a violation of the United States Constitution no rational juror would have answered in the state’s favor one of more of the special issues that were submitted to the jury in the [sentencing phase of the inmate’s trial].” Tex. Code Crim. Proc. art. 11.071 § 5 (a)(3); second, the section that permits a death-sentenced inmate to file a subsequent application for habeas relief if the claim she seeks to raise “ha[s] not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.” *Id.* at § 5(a)(1). Newton demonstrates that if her trial counsel had not been constitutionally ineffective, no rational juror could have answered the future dangerousness question in the affirmative; moreover, she further demonstrates that even if Newton’s trial counsel had been effective, her death sentence rests on evidence that has been recently revealed to be inherently unreliable, and her death sentence therefore violates the Eighth Amendment.

Finally, the argument in section 3.3, below, implicates the provision in Texas law that permits a death-sentenced inmate to file a subsequent application for habeas relief if the claim she seeks to raise “ha[s] not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.” *Id.* at § 5(a)(1). Newton learned in early 2005 that the State destroyed evidence that could have established her actual innocence. Moreover, the State relied significantly on this very evidence at Newton’s trial in arguing that she had fired the weapon that was used to kill the victims. Newton argues in section 3.3. that the State’s action of destroying evidence that would have tended to establish Newton’s innocence – particularly when the State relied critically on that very evidence – bars the State from carrying out her execution.

3. Claims.

Newton seeks to raise three independent claims in this Application. The first is that she is actually innocent, and that had she received effective counsel, no rational juror would have convicted her.

The second is that she is actually innocent of the sentence. Her death sentence rests on inherently unreliable evidence and thereby violates the Eighth Amendment’s heightened reliability requirement. This claim rests on newly discovered evidence. In addition, and alternatively, to the extent the evidence existed at the time of Newton’s trial, her trial counsel was ineffective for not locating it, and had he done so, no rational juror would have sentenced her to death.

Third, Newton argues that her conviction and sentence violate the due process clause, because the State has destroyed potentially exculpatory evidence. The State relied critically on

this evidence at Newton's trial. Indeed, the State destroyed the only physical evidence offered by the State that purports to connect Newton to the shootings. By destroying it, the State has made it impossible for Newton to prove that the State presented false testimony to the jury, and likewise made it impossible for her to prove that there is no physical evidence linking her to the shootings. Under these circumstances, it offends basic decency and the due process clause to permit the State to go forward with an execution where it has destroyed the evidence that would enable the inmate to establish her innocence.

3.1. Claim # 1: No reasonable fact-finder could have found Newton guilty beyond a reasonable doubt, but for the ineffectiveness of her court-appointed trial counsel.

Section 5 of article 11.071 of the Texas Code of Criminal Procedure authorizes Newton to file a successive habeas petition if she can establish, by a preponderance of the evidence, that no rational juror could have found her guilty beyond a reasonable doubt in the absence of a constitutional violation. Tex. Code Crim. P. art. 11.071 § 5(a)(2). Newton, of course, was constitutionally entitled to be represented by competent counsel. *Strickland v. Washington*, 466 U.S.668 (1984). We will demonstrate in this Application that had Frances Newton received competent counsel, no rational juror could have found her guilty beyond a reasonable doubt.

The trial court appointed Ron Mock to represent Newton at trial. Frances Newton realized early on that Mock was incompetent. Several months after counsel was appointed, Newton 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 2* (Letter from Frances Newton to Judge Hearn, Nov. 16, 1987). She wrote the judge and told him 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, still represented by Ron Mock who was still doing nothing, Newton wrote a pro se motion to dismiss her court appointed counsel and to have new counsel appointed. *See Exhibit 3 (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 Newton 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 Newton 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, Newton's family contacted attorneys David Eisen and Gerald Fry in order to retain them to replace Mock, in whom the family also had no confidence.⁴ The family had attempted to retain counsel before, just after Newton was arrested, but they did not have sufficient funds to do so. Only immediately before trial – and facing the prospect of having Newton's fate rest in Mock's unsteady hands – did the family raise enough money to retain counsel. On the day Newton's trial was set to begin, the trial court held a hearing to address whether he would permit a substitution of counsel and grant counsel a continuance so they could become prepared. During that hearing, Mock testified. He was asked about Sondra Nelms, who (as indicated in greater detail below) could have provided testimony favorable to Newton's claim of innocence, and to whom he had never spoken. Mock was asked: "You knew the name of Ms. Newton's cousin [Sondra Nelms] the day you read the State's file.

⁴ The Newton family's lack of confidence in Mock was not unwarranted. 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).

Why didn't you go out and talk to her?" Mock answered: "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. *On the very day of trial, Mock could name not a single witness that he had interviewed.* Not only had Mock interviewed no one, but no defense witnesses had been subpoenaed on the day the trial was set to begin. In short, no investigation of the case whatsoever occurred in Frances Newton's defense at trial.⁵ Newton protested this inadequacy throughout, but to no avail.

It is now clear that a lawyer representing a capital defendant is ineffective, within the meaning of *Strickland v. Washington*,⁶ if he or she conducts no investigation. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003) (noting an absolute obligation on counsel either to investigate or to make a reasonable, informed determination that investigation is unnecessary); *Rompilla v. Beard*, 125 S.Ct. 2456, 2465-66 & n. 4 (2005) (noting counsel's obligation to review any easily available and relevant materials). There can be no doubt that Mock was ineffective within the meaning of *Strickland*, *Wiggins*, and *Rompilla*. And as this Application will indicate, there is no doubt that Newton was prejudiced by Mock's ineffectiveness: no reasonable juror would have found her guilty beyond a reasonable doubt had she received competent counsel.

⁵ Mock's second-chair, Catherine Coulter, likewise testified that she had not spoken with any witnesses on the day of trial. 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 some how hampered by any lack of cooperation from Newton and her mother. There is simply no excuse for failing to interview any witnesses before a trial begins.

⁶ 466 U.S. 668 (1984).

Undersigned counsel are the first lawyers to have investigated the case. As this Application demonstrates, the evidence that points away from Newton's guilt is substantially more cogent than the evidence that points toward her guilt, meaning that had she received competent counsel, no rational juror could have found her guilty beyond a reasonable doubt.

In this section of this Application, counsel for Newton will first (in section 3.1.1) summarize the case against Newton, in terms strongly favorable to the State. Newton will then (in section 3.1.2) indicate how, even giving the State's case the benefit of every doubt, the evidence of Newton's innocence is substantially weightier than the evidence of her guilt. Finally, in section 3.1.3, we will summarize the evidence of Newton's innocence and explain why she was convicted in spite of the fact that she committed no crime.

3.1.1. The State's Case Against Frances Newton.

Frances Newton was convicted of shooting her husband, Adrian, and their two small children, Alton, who was eight, and Farrah, who was 20 months. The principal virtue of the State's case was simplicity. However, as this Application will show, the case against her rested entirely on circumstantial evidence and a bogus motive. This subsection of this Application presents the evidence introduced at trial against Newton.

At 8:27 p.m. on April 7, 1987, after being dispatched to an apartment complex just outside the city limits of Houston, Harris County Sheriff's Deputy R.W. Ricks discovered the bodies of Adrian Newton, Alton Newton, and Farrah Newton. Each victim had been shot one time: Adrian, Frances Newton's husband, had been killed with a single shot to the head; Alton and Farrah, Newton's two children, had been killed by single shots to the chest.

When Deputy Ricks arrived at the scene, Frances Newton and her cousin, Sondra Nelms, awaited him. 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 Newton came over to her house. While there, Newton asked Nelms to accompany her back to her apartment to visit with her. Before they left, however, Nelms observed Newton retrieve a blue bag out of her car, and place it within an abandoned house next door. They proceeded to Newton's apartment, where they discovered the bodies of Frances Newton's 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 Adrian had told her that he was expecting trouble, and she became worried by his comment and therefore did not want the strange gun in her house. Newton 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 Newton had known each other since high school, and he testified that they had started having a sexual relationship approximately a month or two 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 Newton 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 ostensibly indicated that that firearm was the weapon that was used to shoot Adrian Newton and the two children.⁷

Also on April 8, 1987, the day after the murders occurred, Newton accompanied Detective Michael Parinello during a search of her and Adrian's apartment. Newton pointed out to the detective which articles of clothing she had worn the day before – i.e., which clothes she had been wearing the day of the murders. 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 Newton's skirt contained nitrites, and that the nitrites were consistent with somebody's having shot a pistol while holding it in close proximity to the lower front area of the skirt. (The chemist conceded at trial that the nitrite particles could have come from fertilizer rather than gunshot residue, but neither the State nor Newton's defense counsel conducted the testing that would have enabled a chemist to state whether the nitrites came from fertilizer or gunpowder.)

⁷ As will be discussed further below, there is some uncertainty as to whether the gun Newton placed in the abandoned house was the murder weapon, or whether police recovered two weapons, and a second weapon was the murder weapon. Newton's counsel retained an expert to conduct additional ballistics testing following this Board's recommendation of a 120-day reprieve. The testing appears to corroborate the testimony offered at trial, although, as will be discussed at greater length below, some curiosities remain. For purposes of this Application, Newton cannot say with certainty which gun fired the fatal shots, but regardless of which gun fired the fatal shots, there is no evidence whatsoever that Newton fired any weapon at all, and substantial evidence that she did not.

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 Newton was at the apartment at that time. Sterling claimed that Frances⁸ 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.

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.

⁸ Although it is unconventional to refer to a death row inmate by her first name, Frances Newton will at times be referred to in this Application as "Frances" rather than "Newton" because several people share the same surname; referring to Newton as "Frances" on occasion will, it is hoped, avoid confusion.

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, Newton came in to purchase car insurance. During this visit, Chapman began talking to Newton about purchasing life insurance as well. On March 18, 1987, Newton purchased a fifty thousand dollar life insurance policy on herself, her husband, and her daughter, Farrah. Iva Nelms was listed as the primary 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.

To summarize: As stated above, the State's theory in this case was simple and straightforward. Newton, according to the State, had motive and opportunity. According to the State's theory, the motive was that Newton killed her husband and children to collect life insurance proceeds. Her opportunity, according to the State, was that she had access to a gun that she placed in an abandoned house, and that gun proved to be the murder weapon. The State's theory is simple, and it is superficially compelling. As we will see, however, appearances can be misleading. The simplicity of the State's theory masks the fact that is based on mistaken assumptions and factual errors. Had Newton received competent trial counsel, these shortcomings would have been made apparent to the jury.

3.1.2. The Case for Newton's Innocence.

The first point Newton wishes to stress in this Application is that the issues and arguments that will be discussed in the following paragraphs and pages have not been addressed or considered by any court, nor were most considered by the jury that found Newton guilty. The reason is that Newton's trial lawyer did not do his job. He conducted no investigation; he did

not subject the State's case to rigorous adversarial testing. This failure was significant, because every aspect of the State's case is vulnerable, and there is independent evidence of Newton's innocence that her lawyer never placed before the jury.

Undersigned counsel has located important evidence that, when combined with the internal inconsistencies and incongruities within the State's circumstantial case against Newton, casts serious doubt on Frances Newton's conviction for capital murder. Further, in addition to the evidence that existed at the time of trial but of which Newton's jury was unaware (i.e., the evidence discussed above), there is additional evidence, developed by undersigned counsel, that further points toward Newton's innocence.

Motive.

Newton loved her husband and her children. The State put on *no* evidence at trial – nor has any since developed – denying that she was a caring and loving mother. Instead, the State was able to insinuate that Newton went out and purchased life insurance coverage in anticipation of killing her family to collect the proceeds.

The truth is rather different.

At trial, the State presented the testimony of Claudia Chapman, who worked as an agent for State Farm. Insurance policies were taken out on Adrian and Farrah's lives three weeks before the murder, and both named Frances Newton as the primary beneficiary. Newton also at this time took out a life insurance policy on herself. *But Newton's son, Alton, was not covered by any insurance policy held by Frances, yet he too was murdered.* The State does not even attempt to explain the murder of Alton. The State's theory of the case is that Frances Newton purchased a \$50,000 insurance life insurance policy on her husband with whom she was having marital problems at the time with the intent to kill him for the proceeds, that she killed her

daughter Farrah, whom she dearly loved, for an additional \$50,000, and that she killed her son Alton, whom she also dearly loved, for free. This theory of motive is absurd, but absurdity is far from the biggest problem with the State's theory.

In the first place, the insinuation that Newton went out looking for insurance once she began to develop marital problems is false. As early as June 1986, when Newton was hired by Popeye's Chicken, Newton signed up for dependent coverage, which included life and medical benefits for herself, Adrian, and the two children. S.F. Vol. 36:859-864. The policy, however, was not to go into effect until after a 90-day waiting period, which would have been October of that year. *Id.* A month later, in July of 1986, Newton changed the policy, dropping the dependency coverage, due to its cost. *Id.* at 881.

More importantly, according to Chapman herself, the State Farm insurance agent, Newton originally came to her to purchase *automobile* insurance in September of 1986. Newton did not come to State Farm looking for life insurance. Instead, *Chapman* brought up the subject of life insurance. She – Chapman – persuaded Newton to acquire life insurance, in addition to the automobile insurance that Newton had been seeking, convincing her that universal life insurance had an added benefit of functioning as a savings program.

Newton was vulnerable to this sales pitch, not just because Chapman was an aggressive and effective saleswoman, but for two more particular reasons that her trial lawyer did not bother to learn. First, just months before Newton met with Chapman, three of Newton's cousins had perished in a house fire and the family had not had money to bury them. The house that burned was owned by Newton's father, Bee Nelms, and is the very house in which the firearm related to this case was later recovered. The house fire and its attendant loss of life, in which Newton's brother, Michael, had made an unsuccessful attempt to rescue the children, were written up in the

Houston Chronicle at the time. *See* Exhibit 4 (Steve Friedman, *Fire Killing 3 Infants Mars Birthday*, HOUSTON CHRON., March 23, 1986, at 3-13); Exhibit 5 (*Intense Heat Prevents Man from Saving 3 Infant Cousins*, HOUSTON CHRON., March 23, 1986, at 3-14); Exhibit 6 (Affidavit of Bee Henry Nelms, Jr.).

Newton was approached by Chapman to purchase life insurance, in other words, soon after family members of hers had suffered a tragedy that was compounded by an absence of insurance. But that is not all. For undersigned counsel have also learned that Newton's father had told Newton, as well as her other siblings, that everyone had to prepare for the future, and that it was wise to purchase such insurance policies. Newton's trial lawyer did not know either of these facts, because he conducted no investigation, yet both of these facts severely undermine the State's theory of motive in this case.

The State never presented any evidence that Newton was anything other than a loving and devoted mother. Yet the State made it appear to the jury that this loving mother suddenly became so greedy that she went out and bought life insurance, intending to cash in the policies after murdering her family. As it happens, that is not why Newton bought the policies at all. She bought them because an effective insurance agent convinced her that she needed it, and Newton was especially vulnerable to that sales pitch, for the reasons mentioned above. The jury never heard most of these facts. The jury viewed Newton as a monster who would kill her children to profit because Newton's lawyer, who did not know the facts himself, also did nothing to explain to the jury what the facts really were.

Opportunity.

At Newton's trial, the State pointed out that Newton had placed a weapon in an abandoned house. It would have been extremely odd for Newton to have made no effort to hide

from Sondra Nelms what she was doing if she was in fact hiding a murder weapon, knowing that she was bringing Nelms directly to discover the bodies. But beyond the fact that Newton's behavior is not the behavior of a murderer, there are far more serious problems with the "opportunity" component of the State's case. Had Newton's counsel performed the simple and basic task of constructing a time-line and scrutinizing the offense reports provided to them, it would have been clear to the jury that Newton simply had no time to commit these murders.

A major inconsistency in the State's evidence against Newton as presented at trial regards the time at which certain events occurred. Thus, for example, Sondra Nelms testified that Newton came over to her house on the night of the murder between 7:00 and 7:30 p.m. Newton testified somewhat more precisely that she arrived at Nelms' residence at 7:00 p.m. It was approximately a ten or fifteen minute drive between Newton's apartment and Nelms' house. Frances Newton would therefore have had to have departed from the apartment no later than 7:20 p.m. in order for her to have arrived at Nelms' house by 7:30 p.m.⁹

Sterling Newton testified that he arrived at the apartment where the murders occurred 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.

Thus, assuming that Frances Newton left the apartment as late as possible (i.e., 7:20 p.m.), and that Sterling Newton left it as early as possible (i.e., 7:00 p.m.), Frances Newton would have had a mere *twenty minutes* to kill her husband and two small children; remove all traces of gunpowder residue from her hands; remove any blood from herself, her clothes, and the

⁹ Frances actually testified that she left the apartment where she had been visiting with Adrian by 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 – meaning that her whereabouts cannot be independently corroborated – this Application 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.

gun; change her clothes; compose herself; walk out the door; and remove any evidence of the crime (like blood) from the interior of her car.¹⁰ A seasoned murderer could not have accomplished so much in so short a period; it defies common sense to believe that Newton could have done so.

Furthermore, the overlap between Sterling Newton's recollection of what happened and that of Sondra Nelms is substantial. This overlap suggests that Newton 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 the last person known to have been alone with Adrian, Alton, and Farrah was Sterling Newton, not Frances. If Frances Newton 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.¹¹

Another fact, inexplicably not presented in Newton's defense at trial, is that a witness living in a near-by apartment told investigating officers on the night of the shooting that he heard a gunshot around 7:30 p.m. 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 one of the neighboring apartments, Salinas interviewed Clive and Rita Adams. Clive Adams told officer Salinas that he heard a gunshot at about 7:30 p.m. that night. *See Exhibit 7 (Harris County Sheriff's Department Supplement Report, J.G. Salinas).*¹²

¹⁰ As is discussed below, there is no physical evidence connecting Newton to the crime or the crime scene – meaning that one must assume that she eliminated all such evidence during the narrow period in between the time Sterling saw her and the time Sondra Nelms saw her, after which she was never alone again until law enforcement arrived.

¹¹ 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.

¹² Although the witness said he could not be sure about the time, he was the only person officers spoke to who could affix any time to the shooting, and his testimony should have been presented to the jury by Newton's counsel

The witnesses all agree that Newton was not at the apartment at 7:30. If Newton's trial counsel had learned of the witness's statement, there would have been evidence before the jury from a disinterested party establishing that the murder took place at a time when Newton was indisputably not present at the scene.

Physical Evidence.

When scrutinized, the State's theory as to motive evanesces; and when the testimony of the State's own witnesses, in conjunction with the evidence defense counsel failed to present, is examined carefully, it becomes clear that Newton also had no opportunity to commit this crime. But the most probative evidence of Newton's innocence is the physical evidence – or, more precisely, the lack thereof. The State, lacking eyewitnesses, admissions, or any confession, necessarily attempted to connect Newton to the shootings through the use of physical evidence. Only two pieces of physical evidence were used, one to connect Newton to possession of the murder weapon and one to connect Newton to the actual shooting. Both pieces of evidence are flawed.

Gunshot and Gunpowder Residue.

We will begin with the second piece of physical evidence, which purported to connect Newton not to the weapon but to the actual shootings of the victims, because this second piece of evidence is even more dubious than the first.

The State presented evidence that nitrites, which are present in gunpowder residue, were detected on the lower front part of the skirt that Newton had been wearing on the evening of the murders (but changed out of before leaving the apartment). The State's expert testified that

to show that she could not have committed the offense because the witness' account conflicted with the State's own evidence.

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.

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 and the length of the dress Newton wore that day. To infer that the nitrites detected on the *lower* front portion of Newton's long skirt resulted from gunshot residue requires one to assume that Newton held a gun down around her ankles while firing it. That would be a most awkward firing position, and yet the State's theory requires one to believe not only that Newton held the gun in that awkward position, but that she did so and still had such perfect marksmanship that she was able to kill three victims with three shots.

Other physical evidence casts severe doubt on the hypothesis that the nitrites detected on the lower portion of Newton's clothing were from gunshot residue or in any way related to the murders. First, while nitrites were detected on the lower portion of her skirt, nitrites were not detected on any other article of clothing or on any other area of the skirt. The sweater Newton was wearing that evening was examined and tested *negative* for nitrites. S.F. Vol. 35:745; Exhibit 8 (Texas Department of Public Safety Criminalistics Results). One would not expect to discover nitrite particles on the lower portion of a skirt without also discovering such particles elsewhere, such as the sleeves of her sweater.

Second, law enforcement officers administered an atomic absorption test to Newton's hands just hours after the murders. According to the testimony of Harris County Sheriff's Department crime scene investigator Pete Shroedter, the results of the atomic absorption test that was given to Newton at the crime scene shortly after the murders occurred 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.

If Frances Newton had fired a .25 caliber weapon on the evening of the murders, it would have been detected. Although approximately 90% of the exploded gunpowder leaves the barrel of the weapon, around 10% of the gunpowder is ejected onto the hands of the shooter. This gunpowder residue actually embeds in the hands of the shooter, 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 mere hours after the time the shooting occurred. That they did not detect the presence of any gunpowder residue demonstrates beyond doubt – much less beyond any reasonable doubt – that Newton had not recently fired a .25 caliber weapon.¹³

Not only would Frances Newton have been unable to remove all trace of gunpowder residue by a quick wash of her hands, but investigator Shroedter testified that when he asked her “off the cuff” before he administered the test if she had washed her hands, Newton 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 evening of the murder – there is no reason to disbelieve Newton’s answer.

It is curious that of all the places where gunshot residue or gunpowder should have accumulated from firing a weapon, the only place in which the State purported to actually detect it was on the lower part of Newton’s skirt. That no gunpowder residue was detected on Newton’s hands within mere hours of the shooting is important, because it casts doubt on the State’s theory that the presence of nitrites on the skirt Newton wore was gunshot residue rather

¹³ Attached to this Application as Exhibit 9 is an affidavit from Bernard Ash, a firearms expert, attesting to this.

than some other substance. The State has therefore theorized that gunshot and gunpowder residue escaped the gun upon firing such that it accumulated on the lower part of Newton's skirt, but not on either her sweater or her hands. This hypothetical version of events is in fact precisely the opposite of what one would expect, given that the hands and sweater would be more likely than the lower front part of a skirt to absorb residue upon the firing of the weapon.¹⁴

Yet there were nitrites on the skirt. So where did they come from, if Newton had not fired a weapon? The answer is that they came from Newton's uncle's garden. Indeed, the State's own expert conceded (and as a defense expert confirmed), that the nitrites could have come from a source other than gunpowder residue. One such source, according to the experts, would have been fertilizer. Testimony at trial revealed that Farrah, Newton's 20-month-old daughter, came into contact with fertilizer on the day of the murders.¹⁵ S.F. Vol. 37:1014-18. This fertilizer could have been transferred to Newton's skirt by the act of Farrah's grabbing the lower front portion of the skirt, either to hold on to her mother, or to use the skirt to pull herself up to her feet. The testing done prior to Newton's trial did not distinguish between nitrites that come from fertilizer and nitrites that come from gunpowder.

¹⁴ It is, of course, possible, that gunshot 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 fired a gun over the skirt or having wiped his hands on it after firing a gun. The location on the dresser where the skirt was left increases the likelihood of this kind of transference.

¹⁵ Transfer of nitrites could have occurred, for example, by the tugging of a toddler's hands on the lower front part of Frances' skirt. Frances's daughter Farrah was playing in a garden the day of the murders. Fertilizer she got on her hands could easily have been transferred to her mother's clothing.

In sum, therefore, the presence of nitrites on Newton's skirt proves exceedingly little, yet, as we will see, it was the only piece of evidence, physical or otherwise – the *only* piece – that connected Newton to the actual shootings.¹⁶

Governor Perry's statement granting Newton a reprieve last December stressed the need to conduct additional forensic analysis on the skirt Newton was wearing the night of the murders, in order to determine whether the nitrites found there came from fertilizer rather than gunpowder. Because the State relied exclusively on the presence of nitrites on the skirt to connect Newton to the shootings, determining whether these traces actually came from gunshot residue was of critical importance.

Especially in view of the utter absence of any other physical evidence placing Newton at the scene – including a lack of gunpowder on her hands or on her sweater, and including a lack of blood on her body, on her clothes, or in her car – ascertaining whether the State had been mistaken when it told the jury that the skirt had gunpowder residue was, as Governor Perry realized, essential. Yet Newton's counsel have been unable to subject the skirt to additional chemical analysis, because the State destroyed the evidence.

The State did two things that have prevented Newton's current counsel from proving that the nitrites came from fertilizer – and thereby proving that there is no physical evidence connecting Newton to the crime. First, just weeks before trial, the State performed a destructive test on the dress, potentially removing all relevant particles from it, and thereby making subsequent independent testing worthless. The technology to subject the skirt to testing that would differentiate between fertilizer and gunshot residue – scanning electron microscopy –

¹⁶ This fact is highly relevant given that the State chose not to prosecute Newton as a party to capital murder but as the actual shooter.

existed at the time of the trial, but, rather than undertake this testing, the State chose to subject to the dress to a “one-time destructive test” usually reserved for analyzing clothing worn by gunshot *victims*.¹⁷

Second, after the trial and without wrapping it in protective plastic, the State placed the skirt in the same box with the clothes it recovered from the murder victims, thereby cross-contaminating all the evidence, and making it impossible to prove that the skirt contained the remnants of fertilizer, rather than gunpowder residue. Thereafter, once Newton’s counsel sought to conduct additional testing on the skirt following the issuance of the 120-day reprieve, the State obtained an affidavit signed by Ron Urbanovsky, Director of the Crime Laboratory at the Texas Department of Public Safety. The State used this affidavit in opposing Newton’s request to conduct new testing of the dress. In pertinent part, the affidavit states: “In my professional opinion, I would consider retesting the clothing to be of no value due to the destructive nature of the original tests and unknown handling and storage of the evidence.” *See* Exhibit 10 (Affidavit of Ron Urbanovsky).

Newton’s counsel is not suggesting that the State destroyed this evidence maliciously or in bad faith. But that does not change the fact that the State is responsible for destroying the only piece of physical evidence that it relied upon as linking Newton to the crime. Because of the State’s use of a mildly probative destructive test and because of the State’s subsequent haphazard manner of storing that evidence, Newton’s counsel have been unable to subject the skirt to additional analysis, and thereby determine that the nitrites indeed came from fertilizer,

¹⁷ The destructive testing the State utilized consists of applying acid to the dress and pressing out the nitrite particles.

which would mean that there is literally zero physical evidence connecting Newton to the shootings.

Whether the nitrites came from fertilizer or from gunpowder is obviously a significant issue. The significance is underscored by the fact that at least one juror in Newton's case has expressed their belief that it would have been helpful to know at trial with certainty what the source of the nitrites was. *See* Exhibit 11 (Affidavit of Faye Ivy West). Had the nitrites been determined to come from fertilizer, juror West would have found it important in her deliberations as a fact supporting Newton's innocence. *Id.*

Governor Perry's decision implicitly acknowledged that without certainty concerning the skirt, no reasonable person can be confident that Newton committed this crime. The State has now destroyed that skirt, meaning that it is not possible to be reasonably certain that Newton committed these murders. The State should not be permitted to destroy evidence that would tend to point toward an inmate's innocence, and then say that because the evidence has been destroyed, there is no evidence that the inmate is in fact innocent. In the absence of certainty regarding the skirt, we cannot be reasonably certain that Newton fired a gun.

Lack of Blood.

One striking defect in the State's case, which pertains to evidence that was not put before the jury, involves the lack of blood evidence connecting Frances Newton to the shootings. If Newton was the killer, blood evidence connecting her to the murders would have existed. Given what is known about the crime scene and the style of the shootings, we can say with near certainty that a significant amount of blood covered the shooter. Newton's defense counsel utterly failed to present evidence within its possession to demonstrate to the jury this fatal blow to the State's case.

Adrian Newton was killed as he lay sleeping 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, most likely after Adrian had already been killed. 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 12 (Harris County Sheriff’s Department Supplement, P.F. Schroedter) (emphasis added). 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 13 (Harris County Sheriff’s Department Supplement, Det. M. Cox) (emphasis added).

The Harris County District Attorney’s Office sent samples of two stains that were collected from the carpet to be tested by the Department of Public Safety (“DPS”). Tests of the stains the officers described on the carpet were *positive* for human blood. DPS was unable to type it, and was ordered to cease further testing by the Harris County District Attorney’s Office. See Exhibit 8 (Texas Department of Public Safety Criminalistics Results).

The murderer shot Adrian in the head at point-blank range. The lack of an exit wound meant that all the blood and brain matter should have ejected back out of the entry would. The shooter, therefore, would have had a significant amount of blood on him, and that blood dripped onto the carpet as the shooter walked through the apartment. The murder weapon itself likewise should have had some blood on it, having been pressed directly against Adrian’s head as it was fired. The crime scene photos, together with the offense reports, make it evident that this blood

was dripping from the shooter or the gun as the shooter, after shooting Adrian Newton in the temple, made his way down the hall.

Yet there was no blood on Frances Newton, nor was there blood on anything connected to her. There was no blood on her clothes (including the skirt and the sweater), or in the car that she drove after she supposedly committed these murders.¹⁸ Nor was any blood detected on the weapon that Newton admitted to having placed in the abandoned house. 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, Newton 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 had not been used. Neither the bathroom sink nor the bathroom shower contained any evidence of blood or even recent use. *See* Exhibit 14 (crime scene photos of kitchen, bathroom sink, and shower). It is likewise clear that Newton hardly could have had time to wash the skirt that she wore in the twenty minutes before she had to leave. And in any case, the State cannot plausibly claim that Newton washed the skirt, because if she had done so, no nitrites could have been detected on it.

Newton's trial lawyer apparently did not sufficiently scrutinize the Harris County Sheriff's Department and DPS reports provided to him. Attorney Mock missed the significance of all the blood-related evidence in the case. Although Newton's defense counsel did attempt to

¹⁸ Newton signed a voluntary consent to search form for her automobile.

point out to the jury that there was no blood detected on Newton's clothing, they did not present to the jury the very reason why this fact had significance for the case. In particular, the jury did not know that the DPS had actually tested the carpet stains and discovered that they were, in fact, blood. More egregiously, the State affirmatively misrepresented what it knew, claiming it had no knowledge that the stains were in fact blood.

The State first presented the testimony of Maurita Howarth, a forensic chemist who actually performed the blood testing on the evidence in this case, including the identification of the carpet stains as blood. The State, as it was of course entitled to do, did not question Howarth about the blood stains on the carpet, which were identified as such in the DPS report. The State's decision is therefore explicable, but the decision of defense counsel is not, for Newton's defense counsel did not cross-examine Howarth this topic. In fact, Newton's lawyers asked Howarth no questions at all. The only possible explanation for this egregious failure is that Newton's trial counsel was simply unaware of the significance of the blood evidence in this case.

Still more astonishingly, during its case-in-chief, the defense presented the testimony of James Ebdoner, then an investigator with the Harris County Medical Examiner's Office. Ebdoner had taken some photographs of the crime scene in connection with his employment. He photographed the trail of blood in the hallway of the apartment because he thought it might have relevance to the manner of death. Newton's defense counsel appeared to put Ebdoner on the witness stand primarily to ask about these blood stains. All that defense counsel was able to get from Mr. Ebdoner, however, was that he took pictures of stains that *appeared* to be blood, because all Mr. Ebdoner had done as an investigator was take photos. S.F. Vol. 35:794-95. He had not actually analyzed the stain, as Maurita Howarth had done. When defense counsel asked

Mr. Ebdoner where he “[saw] blood on that picture,” the State objected to the form of the question. *Id.* Mr. Ebdoner replied, “There are spots but I cannot say whether they are blood or not.” *Id.* at 795. During Mr. Ebdoner’s cross-examination, the State misrepresented the evidence as it knew it to exist, eliciting from Mr. Ebdoner that the stains he observed “might not” be blood. *Id.* at 798-99.

During closing arguments, Newton’s defense counsel attempted to explain the importance of the lack of blood detected on any object connected with Frances Newton by contrasting it with the trail of blood in the apartment. The State’s objected on the basis that the argument was “outside the evidence” because there was no evidence that the stain was blood, and the trial court sustained the objection:

Now what is there not? There is no blood on the clothing. There is blood on the floor in the hallway. There is blood all over the sheets.

MR. MAGLIOLO: Object to that, there is certainly no record there is blood in the hallway. I object to it, outside the record.

THE COURT: Stay within the record.

S.F. Vol. 37:1040-41.

The State, of course, *did* have a record that that there was blood in the hallway. Moreover, defense counsel should have been in possession of it. The record that indicated that the stain on the carpet was blood was the same record that showed there was no blood on the clothes and the same record that showed the results of the nitrites test on the skirt. Pretrial proceedings indicate that the defense was in possession of this report.¹⁹ Yet, inexplicably, the

¹⁹ During a pretrial hearing for a continuance to have the skirt tested by the defense, defense counsel acknowledged receiving the “written copy of the results of the tests” on the dress. That report also contained the results of the blood testing. S.F. Vol. 30:8. See also Exhibit 8 (Texas Dept. of Public Safety Criminalistics Results). In any event, if defense counsel did not in fact have the results of the blood testing on the carpet stains, the State will have suppressed the evidence (and misrepresented the evidence as it knew it to be before the trial court) in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

defense did not even question the one witness (Maurita Howarth) who could have established the carpet stains to be blood, thereby failing to get in the record the known evidence at the time with respect to the blood trail within the apartment.

This is a failure of defense counsel of monumental proportions. What the photos and records reveal is crucial, for they demonstrate that the person who killed Adrian Newton, and then proceeded to kill Alton and Farrah, had blood on him. Frances Newton, however, had no blood on her at all, or on any object or article of clothing associated with her.

Dubious Ballistics Evidence.

The reprieve that Governor Perry issued on December 1, 2004, following the recommendation of the Texas Board of Pardons and Parole, stressed the need to conduct additional ballistics analysis. The additional testing conducted by an expert retained by the undersigned counsel appears to indicate that the testimony given at trial by the State's ballistics expert was correct, but serious questions remain as to whether the murder weapon was the gun that Newton placed in the abandoned house.

Shortly after the murders occurred, Harris County Sheriff's Department homicide detective Michael Talton recovered the bag and gun that Newton had placed in the abandoned house on the night of the homicide. The next day, a firearm was sent to the Houston Police Department Crime Laboratory for ballistics analysis to compare it to the projectiles recovered from the bodies of the victims. The HPD Crime Lab reported a ballistics match on April 8.

Yet, although HPD reported a presumed match while Frances Newton was still at the Sheriff's Department, she was not arrested. She was released. Further, she was also not arrested two days later, when she was once again in police custody. Sergeant J.J. Freeze testified that he contacted Frances Newton 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. Newton and her mother agreed. Yet Frances Newton was not arrested that night either. She was again interviewed and released.

In fact, Newton was not arrested until April 22, 1987, almost *two weeks* after the Harris County Sheriff's Department had the results of the ballistics examination that supposedly proved Newton had control of the ostensible murder weapon shortly after the shootings. The arrest was

prompted not by any physical evidence, but by claims that Newton and her mother had made on the life insurance policies.

It is beyond unusual that a law enforcement agency would wait two weeks to arrest an available suspect if the law enforcement agency believed that the suspect had hidden a firearm known to be the weapon used to murder three people.²⁰ In other words, if the authorities believed on April 8th that ballistics testing proved that the murder weapon was the gun Newton had placed in the abandoned house, they should not have waited until April 22nd to arrest her. They would have arrested her on April 8th, or April 10th, at the latest.

But there is a possibility that explains the authorities' behavior. The record in this case contains indications that the police may have recovered *two* guns, rather than one. Thus, for example, during the testimony of Sgt. Freeze, the police officer admitted that he had heard talk about a second gun. Defense attorneys during closing argument at trial made an issue about whether the gun that was tested was the same gun that was recovered from the abandoned house. If the ballistics analysis indicated that the murder weapon was the second gun recovered, rather than the one Newton had placed in the abandoned house, then it would make sense that the authorities would not arrest Newton upon receiving that analysis. This hypothesis of what occurred is confirmed by what Sgt. Freeze told Newton's father, Bee Henry Nelms, when Newton was arrested. Although Sgt. Freeze, who is now the police chief of the Kemah, Texas police department, has not been willing to talk to counsel for Newton, Newton's father recalls that Freeze told him that Newton would be released, because the ballistics analysis failed to implicate her. *See* Exhibit 6 (Affidavit of Bee Henry Nelms, Jr.)

²⁰ 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 8 that Frances Newton killed her husband and

There is, therefore, a simple explanation of why police did not arrest Newton the night they received the ballistics analysis. The explanation is hinted at by Freeze's recollection that he had heard that talk about a second gun, and the explanation is given additional weight by Freeze's statement to Newton's father that she, Frances Newton, would eventually be released. The explanation is that police recovered two guns, and the gun that fired the shots that killed Adrian, Alton, and Farrah is not the same gun that Newton, in plain view of Sondra Nelms and making no effort to hide what she was doing, placed in an abandoned house. Further, this theory, which explains why police did not arrest Newton two weeks earlier than they did, also fits all the other physical evidence in this case – whereas the theory that Newton was the murderer fits none of it.

Sondra Nelms.

Sondra Nelms was with Newton when they discovered the bodies of Adrian, Alton, and Farrah Newton. Both she and Newton cooperated with the police, Newton having revealed that she had removed a firearm from the apartment that evening, and Nelms having revealed that she saw Newton 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 effectively testify to at trial, because she was not interviewed by Newton's trial counsel before the trial started. *See* Exhibit 15 (Affidavit of Sondra Nelms). Nelms states, as she did at trial, that Newton arrived at her residence sometime between 7:00 p.m. and 7:30 p.m. Newton invited Nelms and Nelms'

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 society.

sister to her apartment, because they had not seen it since she and Adrian had moved in. Only Nelms agreed to go. Nelms reiterates that as they got into the car to leave, Newton picked up a blue bag from the car and walked it over to the abandoned house.

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

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

According to Nelms:

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 15.

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." After Nelms called 911, Nelms and Newton then proceeded to her neighbor's apartment, where they remained until the officers arrived at the scene.

Nelms' statement is important for several reasons. First, she describes Newton's demeanor before discovering the bodies. According to the State, Newton had just killed her husband and two small children. Yet Newton 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. This evidence was not elicited by defense counsel at trial.

Nelms also describes Newton's reaction upon discovering the murders. She "frantically scream[ed] uncontrollably," and Nelms could not calm her down. Newton's 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; Newton's 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 15.*

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 that he was thereafter put on hold for approximately 45 minutes. At trial and on appeal, this testimony was presented as though Newton had put Harrison on hold while she murdered her husband and children. That is obviously an absurd scenario, and Nelms makes it clear that Harrison was simply wrong about what time he called. He actually called right around 8:00 p.m. – the very time that Nelms and Newton were entering the apartment upon returning. He was placed on hold not while a murder was being committed, but while Newton 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 15.*

Nelms' description of Newton's 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 16 (Harris County Sheriff's Department Supplement Report, R.W. Ricks). Indeed, Deputy Talton had an ambulance called to the scene to treat Newton because she fainted when told that Adrian was dead.

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 17 (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. No follow-up ever appears to have been conducted on this lead by the Harris County Sheriff's Department.²¹

²¹ Catherine Coulter, who was appointed as second chair to assist Ronald Mock at trial in Newton's case, has provided an affidavit averring that defense counsel never received this offense report. *See* Exhibit 18 (Affidavit of Catherine Coulter). The State's failure to reveal this exculpatory evidence is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and this Court should remand this case to the trial court for an evidentiary hearing on the issue.

3.1.3. Summary of Claim # 1.

We do not know who committed the murders of Adrian, Alton, and Farrah Newton. One reason we do not is that police neglected to pursue promising leads, leads which have long since grown cold. For example, and most prominently, police refused to take seriously the possibility that the murder of the Newton family was connected to Adrian's being a drug-user and small-time dealer. Testimony at trial revealed trace amounts of cocaine metabolite in his urine. Moreover, Newton testified that some kind of trouble was brewing that concerned Adrian, and that he and Sterling were discussing it when she left. Yet the police neglected to follow through.

Officer Frank Pratt, with the Harris County Sheriff's Department, spoke to Newton's 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?

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 19 (Harris County Sheriff's Department Supplement Report, F.J. Pratt).

Also on the night of the murder, Newton's 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 19. He further reported to the officer that Newton 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 Newton's trial attorney.*

An individual who was incarcerated at the Harris County Jail facility at 1301 Franklin between May 1986 and August 1987 has provided counsel a sworn affidavit that a person who was in the same holding cell as he during that period actually took credit for the murders of the family, claiming that he worked for a drug dealer and was sent to the house to collect a debt. *See* Exhibit 20 (Affidavit of Darrell Chiles). Darrell Chiles was married to Frances Newton's first cousin at the time. The person first began talking about the shooting after a newscast came on

the television regarding one of Newton's court appearances; he told Chiles and several others who had been sitting around a table that he had orders to kill everybody present if the man did not have the money. Chiles avers the man talked about several other crimes he committed that evening as well.

It is obvious, of course, that Newton's testimony that she was not present when the murders occurred was rejected by the jury. But the jury that convicted her did not know facts and details that it should have known, because Newton's trial lawyer conducted no investigation. For example, the jury that convicted Newton did not know that the police appear to have recovered two guns, and that two weeks went by in between the time the police obtained the results of the ballistics examination and the time they arrested Newton—facts indicating the gun Newton placed in the abandoned house was not the murder weapon. The jury did not know whether the nitrites on the skirt were from fertilizer or gunpowder. The jury did not know that there was in fact a trail of blood in the apartment, demonstrating the significance of the lack of blood on Newton's body, clothing, or car. The jury did not know that Newton could physically not have committed this crime, because she would have had no more than twenty minutes to kill three people and then eliminate any physical evidence connecting her to the crime. The jury did not know that a witness fixed the time of the shooting at a time in which the State's own witness placed her elsewhere. The jury did not know that a neighbor spotted a truck in the driveway of the victims' apartment at the time of the killing, the truck being unordinary enough such that the neighbor noted the license plate at the time and placed an anonymous call to the police the next day. The jury did not know that the police did not pursue that lead. The jury did not know that Newton was vulnerable to the saleswoman's pitch because of a tragedy that had struck her family only months before. The jury knew none of these things. Had they, Newton would

surely have been acquitted, because no reasonable juror could find Newton guilty in view of this massive doubt.

Why did the jury learn none of these details? Because Newton's notoriously incompetent attorney conducted no investigation. The failure to conduct any investigation – indeed, to even seriously scrutinize offense reports provided by the State – means, as a matter of law, that his performance was deficient, within the meaning of *Strickland*. See *Wiggins, supra*; *Rompilla, supra*. Catherine Coulter, appointed to assist Ron Mock in the representation of Ms. Newton, has signed an affidavit in which she “unequivocally state[s] that Frances Newton did not receive effective representation at her trial.” See Exhibit 18 (Affidavit of Catherine Coulter). As this Application demonstrates, moreover, that deficient performance resulted in prejudice.

3.2. Claim # 2. But for the ineffectiveness of trial counsel, no reasonable fact-finder could have answered the future dangerousness special issue in the affirmative. In addition, or alternatively, in view of newly discovered evidence—including the unreliability of predictions of future dangerousness generally as well as the good-conduct record in Newton's case—the finding of future dangerousness in her case was and is unreliable, and therefore represents a violation of the Eighth Amendment's requirement of heightened reliability in capital sentencing.

When she was convicted of murder, Frances Newton had no history of having acted violently. Consequently, in order to persuade the jury to answer the future dangerousness question affirmatively during the penalty phase of Newton's trial, the State relied heavily—indeed, almost exclusively—on the testimony of Dr. Charles Covert.²²

Dr. Covert graduated from medical school in 1971. He completed his psychiatric residency in 1974. Since that time he has been working as a psychiatrist in private practice. He

²² The prosecution also reoffered the evidence from the guilt phase; introduced a certified copy of prior judgment showing that Newton had pleaded guilty to a nonviolent crime (namely, forgery); and called as a witness Ms. Wanda Buckner, who testified that Newton had been fired from her job at Foley's department store after Newton admitted to stealing approximately \$85.00. (This nonviolent, unadjudicated incident was never reported to the police.)

testified for the State at Newton's trial, telling that jury that she would be dangerous in the future if not executed. Dr. Covert never met Frances Newton. He did not interview her or visit with her at all. Yet he nonetheless testified that she would be dangerous in the future.

Q. Is it possible to examine what a person has done and within reasonable medical probability have an opinion on what they may or may not do in the future?

A. I believe you can come to some reasonable conclusions.

Q. If I give you a hypothetical, that is, some facts, would you listen to them and tell the jury whether or not based on those facts you could, in fact, reach a conclusion as to the probability of some conduct in the future.

A. Yes, sir.

S.F. Vol. 38:24-25.

The prosecutor then posed the following hypothetical:

We have a 23-year-old woman, married to a man for some period of time, engaged in a stormy relationship. A relationship in where the husband was not always faithful to the wife and the wife not always faithful to the husband. Assuming there were two children born to this relationship, one a seven-year-old born prior to the marriage and one a 21-month-old born after the actual marriage ceremony.

Assume with me that the wife initially stole from her employer and was terminated without charges filed and subsequent to that committed a felony forgery offense in which she was prosecuted for and which she pled guilty to. Assume with me that some point in time during the course of the relationship that the husband decided he didn't want to have her around any more and she decided she didn't want him around any more. Assume with me again that during the course of that relationship at some point in time she decides that instead of divorcing the man and leaving him she will kill him.

Assume with me that she decides not only she is going to kill the husband but also the children, to wipe out that part of her life so she can have a new start. Assume with me further that not only does she want to start without this excess baggage in the form of a family but she wants to start a hundred thousand dollars richer so she goes to an insurance agent three weeks before the murder and takes out a hundred thousand dollars' worth of insurance on her family.

Assume with me that she spends the night before the murder with her boyfriend, that she takes his pistol unknown to him from his drawer the morning of the murder, she has her children with her. She takes her children to the folks that are taking care of them, one to be sent to school and the other to be taken care of by some friends. She then picks those children up, takes them with her to her husband's. She waits until the husband falls asleep, places a pistol to his temple, contact wound, shoots him in the head. She then takes her seven-year-old boy, places him on the bed and puts a pillow over his head and shoots him close range to the head; takes her 21-month-old baby and puts her on the floor and holds a pistol eight to twenty inches from her chest and shoots her to death, leaves the scene and within 30 minutes is at a relative's and is able to pretend nothing is wrong. She talks her relative into coming back over to the house, already planning an alibi, pretends to have just discovered the bodies and reports the offense as being murders, the person unknown to her, and then a short time later puts in a claim to the insurance company for the proceeds.

Id. at 25-28.

On the basis of this hypothetical, the prosecutor and Dr. Covert engaged in the following question-and-answer dialogue:

Q. Would you have an opinion based on the hypothetical as to the probability of that person committing criminal acts of violence that would constitute a continuing threat to society?

A. I believe there would be considerable concern on my part.

Q. So you would believe that in your opinion there would be a probability that person would commit acts that would constitute violent acts that would constitute a threat to society?

A. Yes.

Id. at 28. Other than Dr. Covert's testimony, which was offered despite the fact that he never even met Newton, the prosecution offered no evidence that Newton would be dangerous in the future.

We now know that psychiatric predictions of future dangerousness are inherently unreliable, because they are wrong, as a general matter, nearly twenty times as often as they are

right. Furthermore, we also know that Dr. Covert's prediction of future dangerousness was wrong in this particular case. Newton has been living on death row for nearly two decades, without having committed a single violent act. *See* Exhibit 21 (Disciplinary record for Frances Newton). That fact alone, and the views of present and retired corrections officials, reveal that Newton is not dangerous. *See* Exhibit 22 (Affidavit of Larry Todd) ("I support her sentence being commuted because I believe she is not a threat to anyone, including TDCJ staff and the general public."); Exhibit 23 (Affidavit of Larry Fitzgerald) ("While I certainly am not qualified to address the question of a person's future dangerousness, I believe the behavior exhibited by Frances Newton during her incarceration certainly exhibits the panel was wrong in their assessment of her future dangerousness."). Dr. Covert's prediction was wrong; his testimony was unreliable; and Newton's death sentence therefore violates the Eighth Amendment. Her sentence, like her conviction itself, rests upon a fact that we now know with certainty to be false.

3.2.1. This claim satisfies art. 11.071 § 5.

A recent study has conclusively demonstrated that mental health expert testimony, like that of the expert who testified at Newton’s trial, is inherently unreliable. That study, relevant excerpts of which are attached as Exhibit 24, identifies 155 capital murder convictions in which prosecutors used experts to opine on future danger.²³ The study examined the subsequent behavior of those defendants, either through prison disciplinary records or, in some cases, post-release histories. Using the definition of “serious assault” used by the Texas Department of Criminal Justice (TDCJ),²⁴ the study concluded that in 95% of the cases, the defendant did not in fact pose a future danger. *See also* John F. Edens, et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to “Disinvent the Wheel?”*, 29 *Law & Human Behavior* 55 (Feb. 2005) (summarizing literature on studies of predictions of future dangerousness and concluding that despite the “poor predictive validity” of these predictions, juries defer to them because the psychiatrists who offer the testimony are “cloaked in the guise of science.”). *Id.* at 81.

The recent study, as well as the article by Dr. Edens et al., constitute “new evidence” as that term is intended in article 11.071 § 5, because the data that demonstrate the unreliability of Newton’s death sentence did not exist at the time of Newton’s trial, or at the time she filed her original habeas application. This Court should authorize a subsequent habeas petition to address the substantial implications of these new findings.

As the Supreme Court and this Court have long acknowledged, the Eighth Amendment requires that capital sentencing procedures must provide for a high degree of reliability. *See*

²³ The entire report is available online, at <http://www.texasdefender.org>.

Caldwell v. Mississippi, 472 U.S. 320 (1985); *Eddings v. Oklahoma*, 455 U.S. 104, (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *see also Arnold v. State*, 823 S.W.2d 27, 38-39 (Tex. Crim. App. 1993). When the State uses highly and demonstrably unreliable evidence to establish future dangerousness, particularly when there is no other evidence before the jury establishing future dangerousness, the Eighth Amendment's reliability requirement is violated.

The claim that Newton seeks to raise in this successive application was unavailable for two independent reasons when she filed her original habeas application. First, evidence of the general unreliability of the future dangerousness predictions was not available until the publication of a comprehensive study in early 2004. Second, Newton has been on death row for more than seventeen years. Over that period, she has maintained a spotless and impeccable disciplinary record. She has shown no signs of violence whatsoever. This long record was obviously not available at the time of her first habeas application, and it belies the predictions that she would constitute a future danger if not executed. When Newton was convicted and sentenced to death, she had never previously been in prison, and therefore could not point at her capital murder trial to evidence demonstrating that she would not be a future danger in the institutional setting of a prison. This key fact—that she has been on death row for seventeen years without committing a single violent act—establishes that her death sentence, which rested entirely upon the prediction that she would be dangerous in the future, is unreliable.

²⁴ “Serious assault” as defined by TDCJ and as used in the study is an assault that results in an injury requiring more than the administration of first aid. *Deadly Speculation* at xiii.

3.2.2. Psychiatric predictions of future dangerousness are inherently unreliable, and death sentences that are dependent on such predictions should be deemed, generally, to violate the Eighth Amendment.

At the time of Newton's trial, the jury answered only two questions in assessing sentence: whether her conduct had been deliberate, and whether there was "a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society." Once the jury answered these questions "yes," Newton was automatically sentenced to death.

Unlike other death penalty states, in which the jury's assessment of a defendant's future dangerousness is one of many factors that the sentencer takes into account in deciding punishment, the future dangerousness criterion in Texas is the only statutorily enumerated aggravating factor. For that reason, it is not surprising that counsel for the State has acknowledged that future dangerousness is a critical issue in every Texas capital sentencing proceeding. *See* Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. LAW & POL. 49, 128 (Fall, 2000).

Because future dangerousness is the only aggravator in Texas that can support a death sentence, the State in a capital sentencing proceeding *must* convince the jury that the defendant poses a future danger to society. To aid in this effort, Texas prosecutors often seek the testimony of mental health experts – psychologists or psychiatrists – to opine as to whether they believe that the defendant will pose a future danger. As the Supreme Court has acknowledged, and as the Edens et al. analysis corroborates, jurors ascribe a high degree of credibility to a doctor's opinions, a fact that prosecutors are aware of and exploit. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249, 258 (1988); *Deadly Speculation*, at 12 & n. 74; Edens et al., *supra*. Indeed, when a medical doctor whose specialization is psychology testifies that a defendant poses a future

danger, juries are almost always persuaded. *See, e.g., Satterwhite*, 486 U.S. at 258; *Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting); *Flores v. Johnson*, 210 F.3d 456, 466 (Garza, J., specially concurring) *cert. denied*, 531 U.S. 987 (2000); *White v. Estelle*, 554 F. Supp. 851, 858 (S.D. Tex. 1982), *aff'd*, 720 F.2d 415 (1983)).

The Study published in *Deadly Speculation* involved 155 inmates either currently or previously on Texas death row. Each of the inmates studied was sentenced to death after the jury heard state-sponsored future dangerousness testimony. *Deadly Speculation*, p. 22. The disciplinary records of all of the inmates were obtained from the TDCJ, and the records spanned the period of incarceration for the capital murder charge. *Id.* The prison records were then examined for disciplinary infractions involving serious assaults by the inmate. *Id.*

Of the 155 inmates identified, 67 have been executed by the State of Texas, 40 are currently on death row, and 48 were sentenced to death by juries but have had their sentences reduced. *Id.* at 23. Of the total 155 inmates, eight engaged in assaultive behavior that required treatment beyond first aid. *Id.* Thirty-one, or 20%, have no disciplinary infractions at all, and the remaining 75% have records of minor disciplinary infractions involving conduct not amounting to serious assaults. *Id.* Not one of the inmates committed another homicide, and only two were prosecuted by the Texas Special Prosecution's Unit, the agency responsible for charging and prosecuting crimes committed in prison. *Id.* Four of the inmates in the study have been released from prison. Not one of the four has been arrested, charged with, or prosecuted for any offense since his release. *Id.* at 24-27.

The study's conclusion is that "state-paid expert predictions were inaccurate 95% of the time." *Id.* at 34. Thus, juries were made to believe that imposition of the death penalty was the only way to protect society – both the society behind the walls of the prison, and the society at

large – from dangerous inmates. Those juries had been assured that these defendants would commit serious acts of violence or kill again. Because of the significance of the future dangerousness inquiry to the assessment of punishment and because of the overwhelming rate of error in the assessment of future danger, a sentence of death based on the state-paid expert testimony relating to future dangerousness is fundamentally unreliable.

Three considerations warrant revisiting the issue presented by predictions of future dangerousness in light of the recently revealed evidence. First, more than two decades have gone by since the Supreme Court examined the admissibility of future dangerousness evidence. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In *Barefoot*, the Court upheld the admission of that evidence because it was “not persuaded that such testimony is almost entirely unreliable.” *Id.* at 899. The Court cited testimony that indicated a 66% error rate in testimony predicting future dangerousness, together with the equivocations of petitioner’s expert witnesses regarding whether future dangerousness could ever be accurately predicted. *Id.* at 901 & n. 7. The reality revealed by *Deadly Speculation* is that the 66% error rate mentioned in *Barefoot* was actually optimistic. The error rate is 95%. The testimony is accurate so infrequently that it is “almost entirely unreliable.” In view of the new data revealing an error rate of 95%, the premise of *Barefoot* has been undermined and the decision upholding the admission of this type of evidence is no longer sound.

Second, it has also been more than a decade since this Court addressed the use of psychiatric testimony during the punishment phase in a capital murder trial. *Clark v. State*, 881 S.W.2d 686, 698 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1156 (1995). In *Clark*, however, this Court also noted that “to be reliable, evidence must have its basis in sound scientific methodology. Evidence that is not reliable is not helpful to the jury because it

frustrates rather than promotes intelligent evaluation of the facts.” *Griffith v. State*, 983 S.W.2d 282 (Tex. Crim. App. 1998), *cert. denied*, 528 U.S. 826 (1999). The newly available data demonstrate that future dangerousness testimony is not reliable, nor is it based in any sort of “sound scientific methodology.” Thus, this Court should reexamine its assessment of future dangerousness predictions and conclude that their admission renders the resulting sentence unconstitutionally unreliable.

Third and finally, neither this Court nor the Supreme Court has reassessed the holding in *Barefoot* in light of *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 587 (1993), and its test of the admissibility of expert testimony. *Daubert* established that trial court judges must act as “gate-keepers” and must assess scientific evidence before it is presented to a jury. *Id.* The gatekeeping function requires, among other things, an analysis of the potential error rate for the evidence and whether the method is accepted generally within the field. *Id.*

As Judge Garza of the Fifth Circuit has recognized, if the factors enunciated in *Daubert* were ever applied to this form of expert testimony, the testimony would be excluded. *Flores*, 210 F.3d at 465 (Garza, J., specially concurring). Judge Garza based this conclusion in some measure on the fact that “[t]he scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific.” *Id.* at 463. Justice Blackmun, in his dissenting opinion in *Barefoot v. Estelle*, likewise recognized this problem, stating that “neither the Court [in its majority opinion] nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right.” *Barefoot*, 463 U.S. at 921 (Blackmun, J., dissenting). Now that it has been demonstrated that psychiatric predictions of long-term future violence issued in

Texas capital sentencing proceedings are wrong more than nine times out of ten, it is time to re-examine the use of those predictions. Even a cursory examination of the testimony of Dr. Covert in this case or of the other psychiatrists who were willing to ignore their colleagues and offer opinions of future dangerousness in light of *Daubert* makes clear that such testimony is insufficiently reliable to be admitted and that it therefore results in a constitutionally unreliable sentence.

Further, the issue of whether a capital defendant will be dangerous in the future has salience in Texas that it does not have elsewhere, insofar as future dangerousness is the only aggravating factor at the punishment phase of a capital proceeding in Texas. This Court should not wait for the Supreme Court to address an issue that has especial relevance in Texas. Rather, in view of the recently revealed evidence concerning this unreliability of psychiatric predictions of future dangerousness, this Court should authorize Newton's habeas application in order to examine the constitutionality of a death sentence that is based on nothing other than a psychiatric prediction of future danger.

3.2.3. The death sentence in Newton's particular case is unreliable.

In Newton's case, as is typical, the psychologist who testified that Newton would pose a future danger had never examined or even met her. See generally *Deadly Speculation* at 14. Rather, the expert called by the State to testify against Newton, as is commonly the case, formed his opinions by examining nothing other than records *provided by the State* – meaning that the State selected the entirety of the data upon which the conclusion of future dangerousness was based.

Examination of Newton's prison records since the time of her incarceration in 1988 yields a result that is consistent with the results of the study published in *Deadly Speculation*. A

copy of Newton's disciplinary records is attached as Exhibit 21. In the more than seventeen years since Dr. Covert testified that there was a high probability that Newton would be dangerous, she has had exactly zero disciplinary infractions for violence. In other words, despite so-called expert testimony that she would be dangerous if not executed, Newton has, over the entire period she has been incarcerated, *committed not a single violent act*. As is the case with 95 percent of the predictions documented in the *Deadly Speculation* study, the prediction that Newton would be a future danger is demonstrably wrong, and her death sentence was obtained by relying solely upon this unreliable "scientific" testimony, in violation of the Eighth and Fourteenth Amendments.

The purpose of the Eighth Amendment is to "assure that the State's power to punish is 'exercised within the limits of civilized standards.'" *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)). To achieve that purpose, the Supreme Court has found that the Eighth Amendment requires "the determination that 'death is the appropriate punishment in a specific case'" to meet a standard of reliability. *Lockett v. Ohio*, 438 U.S. 586, 601 (1978)(quoting *Woodson*, 428 U.S. at 304). Put another way, "the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.'" *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v. Florida*, 430 U.S. 349 (1977) (White, J., concurring)).

The application of this principle of reliability in sentencing led the Supreme Court to require resentencing when a death sentence was based in part on evidence of a prior felony conviction that was later reversed. *Johnson*, 486 U.S. at 590. In *Johnson*, the petitioner had

been convicted and sentenced to death by a Mississippi court in 1982. *Id.* at 580. Among the “aggravating factors” offered by the state during the sentencing hearing in support of the death sentence was the defendant’s conviction of a felony in New York in 1963. *Id.* After Johnson’s conviction and sentence were affirmed by the Mississippi Supreme Court, the New York Court of Appeals reversed the 1963 conviction. *Id.* Johnson filed a petition for writ of habeas corpus challenging his sentence on the ground that it was unconstitutionally based on inaccurate evidence. After the Mississippi Supreme Court rejected Johnson’s petition, the Supreme Court reversed. The Court held that it was “apparent that the New York conviction provided no legitimate support for the death sentence imposed on Petitioner.” *Id.* at 585. The Court set aside Johnson’s sentence, finding that because “the jury was allowed to consider evidence that has been revealed to be materially inaccurate,” the sentence did not comport with the Eighth Amendment. *Id.*

In Newton’s trial, as in the others involving the testimony of so-called experts on future dangerousness, the jury was allowed to consider evidence that “has been revealed to be materially inaccurate.” *See id.* The jury was asked to base its punishment determination on a prediction of future danger that was 95% certain to be inaccurate and that has since been shown to be demonstrably inaccurate in her particular case. The Supreme Court’s holding in *Johnson* requires that Newton’s death sentence be set aside because “the jury was allowed to consider evidence that has been revealed to be materially inaccurate.” *Id.*

3.3. Claim # 3: By destroying evidence that would tend to establish Newton’s actual innocence, the State should be barred from going forward with her execution.

When Governor Perry, acting on the recommendation of the Texas Board of Pardons and Parole, granted Newton a 120-day reprieve, he cited the need to perform additional toxicological analysis of the skirt Newton was wearing at the time the murders occurred. At Newton’s trial,

the State put on testimony that nitrites on the skirt resulted from gunpowder residue. It is worth emphasizing that the *only* evidence that the State offered at the trial physically linking Newton to the shootings was the skirt. As indicated, there was no gunpowder residue on Newton's hands, no residue on her sweater, and no blood on her body, her clothes, or in her car. Hence, if the nitrites on the skirt actually resulted from fertilizer, rather than gunpowder, there would have been literally no physical evidence connecting Newton to the crime. Yet the State told the jury that the nitrites came from gunshot residue; consequently, if those nitrites actually came from fertilizer, then Newton's conviction and sentence would be unreliable, because the only physical evidence relied upon by the State to secure the conviction would be revealed to be false.

Newton's motion to perform the additional testing of the skirt was denied. The reason is that the State destroyed and contaminated the evidence, thereby reducing its exculpatory value to nil. Further testing, regardless of the result, could only prove inconclusive.

Newton is not alleging that the State acted in bad faith or with malice when it destroyed the evidence. But the fact that the State's act of destroying exculpatory evidence may have been inadvertent should not permit the State to go forward with the execution of someone who is actually innocent, but who is unable to prove her innocence, as a result of the State's negligence.

This Court has not addressed whether the State's inadvertent destruction of potentially exculpatory evidence constitutes a due process violation.²⁵ However, the courts of appeals of

²⁵ The issue presented is different from an issue under *Brady*. Under *Brady v. Maryland*, 373 U.S. 83 (1963), a state's suppression of exculpatory evidence violates due process if the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. *Id.*, 373 U.S. at 87. To prevail on a *Brady* claim, a party must establish suppression of evidence that was favorable and material. *See, e.g., Moore v. Illinois*, 408 U.S. 786, 794-96 (1972). To prove a due process violation, a party must show there is a reasonable chance that, had the state disclosed the evidence to the defense, the result of the proceeding would have been different. *See United States v. Bagley*, 473 U.S. 667 (1985).

this State are divided on the issue. This Court should therefore resolve the conflict, and hold, at least in the context of an inmate under a sentence of death, that due process is violated whenever the State destroys potentially exculpatory evidence that it has relied upon in obtaining a conviction, even if that destruction is inadvertent or non-malicious.

In *State v. Rudd*, 871 S.W.2d 530 (Tex. App. – Dallas, 1994), the Dallas Court of Appeals held that the federal standard enunciated by the U.S. Supreme Court pertaining to exculpatory evidence also applies in Texas, such that an inmate alleging the inadvertent destruction of potentially exculpatory evidence could not prevail without establishing malice or bad faith. *See Rudd*, 871 S.W.2d at 532-33; *see also Pace v. State*, 1995 WL 81345 (Tex. App. – Dallas 1995) (both relying on *California v. Trombetta*, 467 U.S. 479, 488 (1984) (finding a limited duty on states to preserve evidence); and *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that establishing a due process violation for destruction of potentially useful evidence requires showing of bad faith)). The Dallas Court of Appeals, along with several other courts of appeals, concluded that the federal standard and the standard under the Texas Constitution are identical, meaning that an inmate in Newton’s position would be required to establish bad faith.²⁶

In contrast, the Waco Court of Appeals found that the Texas Constitution provides greater protection than the federal Constitution with respect to the inadvertent destruction of potentially exculpatory evidence. In *Pena v. State* (unreported), no. 10-03-00109-CR (April 27, 2005),²⁷ the Tenth Court of Appeals observed that at least eleven states have rejected, in whole or in part, the applicability of the *Youngblood* bad-faith standard to the inadvertent destruction of

²⁶ Accord, *Gardner v. State*, 745 S.W.2d 955, 958 (Tex. App. – Austin, 1988); *Gamboa v. State*, 774 S.W.2d 111, 112 (Tex. App. – Fort Worth, 1989); *Barre v. State*, 826 S.W.2d 722, 725 (Tex. App. – Houston [14th Dist.] 1992).

²⁷ The opinion is available at <http://www.10thcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=6405>.

exculpatory evidence.²⁸ The overwhelmingly dominant rule is that an inmate need not establish bad faith or malice in order to raise a due process claim when the state destroys potentially exculpatory evidence. Finding this majority rule to be persuasive, the *Pena* Court held that “under the due course clause of the Texas Constitution the State has a duty to preserve evidence that has apparent exculpatory value, encompassing both exculpatory evidence and evidence that is potentially useful to the defense.” *Id.* The Court of Appeals suggested that a balancing test be used when the State destroys exculpatory evidence, even if inadvertently, and that a remedy be fashioned based on the significance of the evidence.

This Court has not addressed whether the State’s inadvertent destruction of potentially exculpatory evidence constitutes a due process violation.²⁹ Newton therefore requests that this Court set this issue for submission and hold that when an inmate establishes the destruction of potentially exculpatory evidence, it is not necessary to prove bad faith on the part of the State in order to be entitled to relief under the Texas Constitution. Alternatively, Newton requests that this Court recognize that, in the limited context of death penalty cases, a death-sentenced inmate

²⁸ See *Ex Parte Gingo*, 605 So.2d 1237, 1241 (Ala. 1992) (adopting *Youngblood* with a “Stevens” exception: no showing of bad faith required if the loss or destruction of the evidence is so critical to the defense as to make a criminal trial fundamentally unfair); *Thorne v. Dept. of Public Safety*, 774 P.2d 1326, 1330-31 (Alaska 1989) (balancing test); *State v. Morales*, 657 A.2d 585, 591-92 (Conn. 1995) (balancing test); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1990) (three-part balancing test); *State v. Matafeo*, 787 P.2d 671, 673 (Haw. 1990) (adopting *Youngblood* with a “Stevens” exception); *Williams v. State*, 50 P.3d 1116, 1126 (2002) (defendant must prove bad faith or undue prejudice); *State v. Chouinard*, 634 P.2d 680, 683 (N.M. 1981) (three-part test); *State v. Barnett*, 543 N.W.2d 774, 777-778 (N.D. 1996) (adopting *Youngblood* with a “Stevens” exception and an exception if there is a “systemic disregard” of the State’s duty to preserve evidence); 966 P.2d 1200, 1204 (1998); *State v. Cheeseboro*, 552 S.E.2d 300, 307 (S.C. 2001) (adopting *Youngblood* with an exception if the defendant cannot obtain other evidence of comparable value); *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999) (adopting the “Delaware” test); *State v. Gibney*, 825 A.2d 32, 42-43 (Vt. 2003) (adopting the “Delaware” test); *State v. Osakalumi*, 461 S.E.2d 504, 512 (W. Va. 1999) (adopting the “Delaware” test).

²⁹ In *Thomas v. State*, 841 S.W.2d 399, 402 n. 5 (Tex. Crim. App. 1994), this Court, in dicta, suggested that the *Youngblood* bad-faith standard should apply to the destruction of potentially exculpatory evidence. It is clear that this statement was mere dicta. See *Young v. State*, 826 S.W.2d 141, 144 n. 5 (Tex. Crim. App. 1991). Further, and in any event, the heightened reliability requirement in capital cases may require a different result where the challenge is brought by an inmate under a sentence of death.

may not be executed when the State destroys potentially exculpatory evidence, even if it does so inadvertently.

This Court has previously recognized that death penalty cases call for heightened reliability; what is adequate in noncapital cases is not necessarily adequate where death is at stake. *See, e.g., Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998). Indeed, in *Jones* this Court recognized that the meaning of Due Process in a death penalty proceeding differs from the meaning of Due Process in a noncapital proceeding precisely because of the heightened reliability requirement. *Id.*, 982 S.W.2d at 396. Hence, even if this Court is not inclined to embrace the approach of a majority of jurisdictions, and the approach adopted by the Waco Court of Appeals in *Pena*, this Court should nonetheless hold, in view of the heightened reliability requirement of the Eighth and Fourteenth Amendments, that whenever the State destroys potentially exculpatory evidence, even if that destruction is inadvertent or merely negligent, the death-sentenced inmate is entitled to have a reviewing court assume that the evidence would in fact establish what the inmate asserts that it would.

The State's case against Newton comprised three elements: that Newton went out and purchased life insurance, intending to kill her family and recover the proceeds; that Newton had access to the murder weapon; and that nitrites on Newton's skirt proved that she had fired it. As we now know, the State was wrong about motive; there are questions surrounding the number of guns the authorities recovered; and there is doubt as to the source of the nitrites. Without any one of the three elements that formed its case, no reasonable jury would have convicted Newton. Because the State destroyed a critical piece of evidence upon which it relied in obtaining a conviction, this Court should assume that the nitrites on the skirt were not in fact from gunpowder, and therefore hold that Newton's conviction is unreliable.

Conclusion and Prayer for Relief.

In this Application, Newton has presented three independent claims. Two of them (the second and third) were previously unavailable. Further, two of them (the first and second) warrant relief under Texas law regardless of whether they were previously unavailable, because they relate to the fact that Newton is actually innocent, and that she is also innocent of the death penalty. Newton therefore requests that this Court conclude that one or more of the claims presented in this Application satisfies article 11.071 § 5 of the Texas Code of Criminal Procedure.

Newton further requests that this Court stay her execution, currently scheduled for September 14, 2005, and either grant relief based on one or more of the claims presented in this Application, or set one or more issues for submission before this Court, or direct the trial court to hold an evidentiary hearing, if this Court concludes that any of the claims presented in this Application requires a fuller evidentiary record.

Respectfully submitted,

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Counsel for Frances Elaine Newton

STATE OF TEXAS §
§
HARRIS COUNTY §

Verification

BEFORE ME, the undersigned authority, on this day personally appeared Jared Tyler, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.
2. I am the duly authorized attorney for Frances Elaine Newton, having the authority to prepare and to verify Ms. Newton's Application for Postconviction Writ of Habeas Corpus.
3. I have prepared and have read the foregoing Application for Postconviction Writ of Habeas Corpus, and I believe all allegations in it to be true.

Jared Tyler

SUBSCRIBED AND SWORN TO BEFORE ME on July 27, 2005.

Notary Public, State of Texas

Certificate of Service

I certify that a copy of the foregoing Application for Postconviction Writ of Habeas Corpus and Motion for Stay of Execution has been served on the following counsel by personal delivery on this 28th day of July 2005.

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Assistant District Attorney
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