

In the Court of Criminal Appeals of Texas

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Ex parte Frances Elaine Newton,)	
)	Cause No. WR-47,025-03
Applicant.)	
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Response to Respondent's Motion to Dismiss

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Applicant Frances Newton filed her subsequent application for writ of habeas corpus with this Court on July 28, 2005. Since that time, Applicant has learned of new information which prevents this Court from dismissing Newton’s subsequent application and which requires authorization to proceed on subsequent proceedings in the district court.

- 1. The State violated *Brady v. Maryland*, 373 US 83 (1963), and *Napue v. Illinois*, 360 US 264 (1959), by failing to disclose that it recovered a weapon at the scene of the crime and by sponsoring false testimony during Applicant’s capital murder trial.**

In Newton’s subsequent application for writ of habeas corpus, she alleged that the State may have collected a second gun in the course of its investigation of the murders of Adrian Newton, Alton Newton, and Farrah Newton. Counsel representing respondent has now confirmed in an interview with a journalist that there was in fact a second gun recovered from the scene of the crime. The fact of this recovery was never revealed to defense counsel or in any subsequent proceedings. Respondent’s Motion to Dismiss filed with this Court in response to Newton’s subsequent application raising the allegation of a second recovered weapon does not even disclose the fact. This fact was solely within the State’s knowledge since the time of the offense, and its failure to disclose this favorable evidence to Newton’s defense counsel at any stage of the proceedings violates Applicant’s due process rights under *Brady v. Maryland*, 373 US 83 (1963). Moreover, the State represented at trial that only one firearm was recovered, and

this false testimony violates *Napue v. Illinois*, 360 US 264 (1959). Very little information is currently known about the second recovered weapon. Subsequent proceedings in the district court, including discovery, are necessary to determine a description of the firearm that was recovered, whether the two firearms could have been mistakenly switched, and what impact the disclosure of the recovery of such a second weapon at the crime scene would have had on the jury. In short, this Court must authorize Newton to proceed on her subsequent application in the district court to resolve whether or not the State violated Newton's due process rights by failing to disclose the fact that the State recovered a second weapon during its investigation.

On June 10, 2005, counsel for Respondent made a statement on videotape to a journalist that "the police recovered a gun from the apartment that belonged to the husband."¹ Applicant does not know what kind of gun was recovered.² Records indicate, however, that Applicant's husband, Adrian Newton, at one time purchased at least one .25 Raven Arms, the exact caliber and manufacturer of the firearm that the State alleged Applicant used to commit the instant offense. It is not known what happened to that firearm.³ The recovery of a weapon at the crime scene, the caliber and manufacturer of which is identical to the alleged murder weapon, is favorable evidence to Applicant that was never disclosed. In fact, Newton's attorney at trial attempted to establish the recovery of a second weapon to cast doubt on the State's theory that the weapon Newton placed in an abandoned house was in fact the murder weapon.

¹ Although the statement was made before Applicant filed her subsequent application, undersigned counsel did not become aware the statement was made until August 4, 2005. Counsel for Applicant is in possession of a copy of the videotape.

² Counsel for Respondent states that the weapon was Adrian Newton's gun, that it was not fired, and that it was not involved in the offense. Those conclusions, however, are not the State's conclusions to draw. They are questions that are supposed to be resolved by the jury during the trial.

³ Applicant currently assumes that the second gun recovered at the crime scene is this weapon.

During deputy sheriff Michael L. Talton’s testimony, the defense objected with respect to his identification of the weapon. Talton was the officer who discovered the blue bag in the abandoned house with a weapon inside it. When shown State’s Exhibit 48 – a .25 Raven Arms – Talton testified on voir dire that he did not touch the gun, did not mark the gun, and that State’s Exhibit 48 – a .25 Raven Arms – was “similar to” the gun he recovered. S.F. Vol. 33:286. The defense objected on the basis that the officer could not testify that it was the same gun he recovered and gave to another officer on the night of the offense. *Id.* at 286-87.

The State itself even elicited testimony that only one weapon had been recovered. The prosecution asked an investigating detective for the Harris County Sheriff’s Office, Michael Parinello, “As far as you know there is only one pistol that was recovered in this case?” Parinello answered “yes.” If two weapons were recovered, the State had an obligation to refrain from eliciting this misrepresentation or at a minimum to correct it. On cross-examination, Newton’s defense counsel renewed question about the recovery of a second weapon:

- Q. But you said there is only one gun in this case?
A. That we have in our possession.
Q. Well, to be fair to you, okay, do you have personal knowledge – and I’m not talking about only at the time that you were talking to these ATF folks, but up to and through today – do you have knowledge of more than one gun being associated with this case at all?
A. Not being involved in the case; no, sir.
Q. Was there more than one gun found or ever investigated?
A. To my knowledge, only one gun was found.

Q. So if there was another gun, you have known about it?
A. Yes, sir.
Q. So you know of no other gun turned over to Charlie Anderson at HPD to test?
A. To my knowledge, no, sir.
Q. No other gun found or associated with this case?
A. No, sir.

S.F. Vol. 34:473-74. Newton's trial attorney questioned Detective J.J. Freeze, a supervisor of investigating officers, about the existence of a second gun as well:

Q. And at some time during this conversation [with Ms. Newton] you started talking about a pistol?

A. Yes, sir.

Q. How many pistols, if you remember, sir, or if you are aware of, were there ever associated with this cause of action?

A. I believe we talked about two pistols.

Q. How many pistols do you know to be associated with this offense?

A. I know –

MR MAGLIOLO: Object to it because it is what is associated, I mean, evidence in this offense, someone just happen to mention there was another pistol, or they owned a pistol, what does he mean by the associate, be cleared.

THE COURT: Objection is overruled. You may proceed.

Q. (Mr. Mock) How many pistols do you know to be associated with this case?

A. I know one for sure and there was mention of a second one that Ms. Newton had purchased earlier.

Q. Was that second pistol ever in your custody?

A. No, sir, not that I am aware of.

Q. So you never have seen, never have had in your possession or custody that second alleged pistol?

A. Not that I am aware of.

S.F. Vol. 34:491-93. Finally, defense counsel for Applicant asked Charlie Anderson, the State's ballistics examiner, how many guns were brought to him with regard to the offense and how many guns he examined.⁴ S.F. Vol. 35:726.

The failure of the State to reveal that a potentially identical weapon to the one it alleged was the murder weapon was recovered at the crime scene prejudiced Newton. Newton's trial

⁴ The exchange between Ron Mock and Charlie Anderson was as follows:

Q. Mr. Anderson, how many guns were you brought with regard to this offense?

A. One.

Q. You never looked at another gun about this case?

A. No.

S.F. Vol. 35:726.

counsel's attempts to establish the recovery of a second weapon indicate the importance it placed on that fact. Moreover, given the entirely circumstantial nature of the case, the jury would undoubtedly have found it highly relevant to its decision-making to know that two .25 Raven Arms were recovered during the investigation of the offense on the same night.⁵ With this knowledge, the defense could have argued that the ballistics examination could not be definitive or that the guns may have been mixed up along the way.⁶

Conclusion

Applicant alleged in her subsequent habeas application that a second gun may have been recovered. Counsel for Respondent has now made a statement that the State did indeed recover a second weapon, which is likely identical in material respects to the weapon that Applicant had control over on the night Adrian, Alton, and Farrah were killed. That such a weapon was recovered at the crime scene is favorable evidence to Applicant, which could not have been discovered earlier, because the information was in the sole control of the State. Moreover, if a second weapon was in fact recovered from the apartment, the State's representations at trial that only weapon was recovered in the investigation of this offense is false. This Court should therefore issue an order staying Applicant's execution and authorize Applicant to proceed in the district court on the claims raised in her subsequent application for writ of habeas corpus, including whether the State violated *Brady v. Maryland* by failing to disclose to defense counsel

⁵ This assumes the second weapon was recovered on the night of the offense because it was recovered from the crime scene itself.

⁶ Undersigned counsel was able to obtain some offense reports created by the Harris County Sheriff's Office during its investigation of the offense, but counsel did not receive those reports through that agency and does not know if what he received represents all records created by the Sheriff's Office. In response to a public information act request, the Harris County Sheriff's Office withheld all reports with the exception the initial incident report. In no law enforcement record possessed by counsel is there a reference to the recovery of a second weapon.

at trial the recovery of a second weapon from the scene of the crime and whether the State violated *Napue v. Illinois* by sponsoring false testimony at the trial.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing pleading has been served on the following counsel by personal delivery on this 10th day of August 2005.

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