Without Evidence: Executing Frances Newton

Another Texas death row case marked by official carelessness, negligence, and intransigence

By Jordan Smith

Unless the Texas Board of Pardons and Paroles and Gov. Rick Perry act to stop it, on Sept. 14 Frances Newton will become only the third woman executed by the state of Texas since 1982, and the first black woman executed since the Civil War.

Unique in that historical sense, in other ways the Frances Newton case is painfully unexceptional. For there is no incontrovertible evidence against Newton, and the paltry evidence that does exist has been completely compromised. Moreover, her story is one more in a long line of Texas death row cases in which the prosecutions were sloppy or dishonest, the defenses incompetent or negligent, and the constitutional guarantee of a fair trial was honored only in name.

As Harris Co. prosecutors tell the story, the now 40-year-old Newton is a cold-blooded killer who murdered her husband and two young children inside the family's apartment outside Houston on April 7, 1987, by shooting each of them, execution-style, in order to collect life insurance. Newton had the opportunity, they argued during her 1988 trial, and a motive – a troubled relationship with her husband, Adrian, and the promise of $100,000 in insurance money from policies she'd recently taken out on his life and on the life of their 21-month-old daughter Farrah. And she had the means, they say: a .25-caliber Raven Arms pistol she had allegedly stolen from a boyfriend's house.

To the state, it is a simple, open-and-shut case, which requires no further review. "Her case has been reviewed by every possible court," Harris Co. Assistant District Attorney Roe Wilson told the Los Angeles Times in November. "She killed her two children and her husband. There is very, very strong evidence of that."

Yet despite Wilson's insistence, Newton's case isn't simple at all – and such "evidence" as there is, is far from strong. "The State's theory is simple, and it is superficially compelling," attorney David Dow, head of the Texas Innocence Network at the University of Houston Law Center, argued in Newton's clemency petition, currently pending before the Board of Pardons and Paroles. "As we will see, however, appearances can be misleading."

From the beginning, Frances Newton has maintained her innocence. She has also offered a plausible alternative theory of the crime – a theory that neither police, prosecutors, nor Newton's own trial attorney, the infamous and now suspended Ronald Mock, have ever investigated. Newton and her defenders contend that Adrian, Farrah, and 7-year-old Alton were likely murdered by someone connected to a drug dealer to whom Adrian owed $1,500. The alternative theory has much to say for it – among other things, it explains the lack of physical evidence connecting Newton to the bloody murders.

Lingering questions about the physical evidence against Newton prompted the Texas Board of Pardons and Paroles (BPP) to recommend, and Gov. Rick Perry to grant, a 120-day reprieve for Newton on Dec. 1, 2004 – the day she was last scheduled for execution. Although Perry said he saw no "evidence of innocence" – legally, an oxymoron – he granted the four-month stay to allow for retesting of evidence contested by Newton's defense, including nitrite residue on the hem of her skirt and gun ballistics evidence.

There are serious questions about the prosecutors' timeline, which would have required Newton somehow to murder her family, clean herself of any and all blood traces and gunshot residue, and drive to her cousin's house – all in less than 30 minutes.

But testing on the skirt proved impossible, because the 1987 tests had destroyed the nitrite particles, and Harris Co. court officials had stored the skirt by sealing it inside a bag together with items of the victims' bloody clothing – thereby rendering it worthless as evidence. The second round of ballistics testing, on the other hand, supposedly confirmed a match between the gun prosecutors say Newton used and the bullets that killed her family. However, that match may be fundamentally undermined – because there is no certain connection between the gun and Newton. According to Dow, it appears that police actually recovered at least two, and perhaps three, .25-caliber Raven Arms pistols during their investigation of the murders – conflicting evidence that neither the police nor the prosecutors ever revealed to Newton's defense. Dow argues that it is virtually impossible to know whether prosecutors have been truthful in claiming that the gun that Newton admits to hiding on April 7, 1987, was the murder weapon. "How many firearms were recovered and investigated in this case and who owned them?" Dow asks in a supplemental petition filed with the BPP on Aug. 25. "How many records have been withheld from Newton's attorneys throughout this case?"

In short, there is now even more doubt about Newton's guilt than there was when she was granted the stay – distressing Newton's many defenders, among them Adrian's parents, two former prison officials, and at least one of the jurors who heard Newton's case. "We never wanted to see Frances get executed," Adrian's parents Tom and Virginia Louis wrote to the BPP on Aug. 25. "When the trial occurred, nobody from the DA's Office ever asked ... our opinion. We were willing to testify on Frances' behalf, but Frances' defense lawyer never approached us," they continued. "We do not wish to suffer the loss of another family member."

A Bloody Crime

In the months before the murders, Frances and Adrian Newton were having marital problems. They were each involved in extramarital relationships, and Adrian was using drugs. In an Aug. 30 Gatesville prison interview, Newton told me that in addition to smoking marijuana, Adrian had developed a cocaine habit. "He had told me he was using cocaine, but I'd never seen that, but I saw the effects of it," she recalled. "He was home later, he was irritable, less responsible."
But she and Adrian had been together since she was a girl, and she was determined to work things out. That was on her mind on the afternoon of April 7, 1987, when she and Adrian sat down and talked. "We had decided that we were going to get through this together," she said. Adrian insisted that he wasn't using anymore, so when they were done talking and Adrian went into the living room "to watch TV ... I decided to be nosy and see if he was being honest," she recalled. Quietly, she opened the cabinet where he kept his stash.

"That's when I found the gun," she said. Newton said she immediately recalled a conversation she'd heard earlier that day, between Adrian and his brother, Sterling, who'd been staying with the family. "I couldn't hear real close, but it sounded like they'd been in some trouble," she said. "I thought I'd better take [the gun] out of there because I didn't want it to be in the house ... I didn't want him to get into any trouble." She removed the gun, placed it in a duffel bag and took it with her when she left the apartment around 6pm to run some errands, she says.

Newton says it was the last time she saw her family alive.

At 7 p.m., after a couple of errands, Newton arrived at her cousin Sondra Nelms' house,

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whose case is resolved by an unpublished opinion did not have it determined according to established precedents, but by the personal preferences of the judges involved. Those preferences are likely to be different than those of a defendant from a different social and economic place in society than the judges.

The Supreme Court recognized in *Hutto v. Davis*, 454 U.S. 370 (1982). that judicial anarchy is the result of lower courts choosing which precedents they want to follow. The Court stated, "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." (375)

The danger posed to a defendant by an unpublished opinion's non-citability is compounded by the fact that few people other than lawyers have ready access to unpublished opinions. Whatever check on judicial lawlessness that may exist from the public notice of a precedentially contrary opinion is, therefore, effectively eliminated. The injustice embodied in the non-cited opinion is not buried in legal books sitting on dusty shelves – it is as if the opinion never existed in the first place – other than its effect on the hapless appellant victimized by it.

In an uncommon display of judicial courage, an Eighth Circuit three judge panel ruled in *Anastasoff* that the circuit rule on the non-citability of an unpublished opinion is unconstitutional. The panel declared the non-citability rule "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decision will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional." All of the federal circuits and most, if not all, of the states have rules resembling the one declared unconstitutional in *Anastasoff*.

Third, a case resolved by an unpublished decision typically receives little or no personal attention from the judges involved. The judges only invest the minimal amount of time and energy necessary to process the final order or decision that is prepared, and that may in fact have been determined to be the appropriate resolution by the judge's support staff. In such cases the judge functions as more of an administrative bureaucrat removed from dealing with a case's details. That is in sharp contrast to what is traditionally thought of as a judge's hands-on role in all aspects of deciding a case. This routine hands-off role by judges raises serious Constitutional issues about the administration of justice in this country, because unseen and unknown bureaucratic functionaries are surreptitiously making judicial decisions that affect litigants and the public without any constitutional authority to do so, and without the litigants or the public being informed of their shadow participation as de facto judges.

Fourth, the quality of unpublished decisions is of significantly lower quality than published decisions. As Professors Richman and Reynolds noted, "The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference." There has been fourteen additional years for the quality of unpublished decisions to deteriorate since Fourth Circuit Chief Judge Markey described them in 1989 as "junk" opinions.

The serious deficiencies inherent in unpublished decisions are indicative of the presumption that exists in every case resolved by an unpublished opinion that consideration of the defendant's issues was given short shrift. Implicit in that presumption is that the decision may have, in fact, been incorrectly decided. In a criminal case it means the possibility that an innocent person was victimized by a wrongful affirmation and forced to suffer an unjust punishment, up to and including execution.

Part 6 will be in the next issue of *Justice:Denied*. **To order** the complete 27,000 word article, mail $10 (check or money order with a request for **- Vol. 30, No. 4, Symposium Issue** to:
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where the two chatted and decided to return to Newton's apartment. As Newton backed out of the drive, she saw the duffel on the back seat and realized she needed to hide it. With Nelms watching, Newton retrieved the bag and walked next door into a burned and abandoned house owned by her parents, and there (as both women later confirmed), she left the bag.

The women arrived at the apartment around 8pm, and didn't immediately realize that anything was wrong. Newton thought Adrian was napping – until she saw the blood. "As Frances walked around the couch and saw his upper torso, she immediately screamed and bolted to the children's bedroom," Nelms said in an affidavit. "Frances began to frantically scream uncontrollably. I could not calm her down enough to elicit the apartment's address."

Newton says she was shocked and dazed, but gave police as much information as possible – including the fact that she'd just removed a gun from the house. She told police about Adrian's drug habit, and that he owed some money to a dealer – which Adrian's brother, Terrence, corroborated, telling police he knew where the dealer lived. Police never pursued the lead. "To your knowledge, was the alleged drug dealer ever interviewed by anyone in connection with this case?" Newton's attorney asked Sheriff's Officer Frank Pratt at trial. "No," Pratt replied.

A bullet remained lodged in Adrian's head, meaning that the blood and brain matter would have blown back onto the gun and shooter – confirmed by a trail of blood found in the hallway. Police found no trace of residual nitrites (gunshot residue) on Newton's hands, nor on the long sleeves of the sweater she was wearing. They collected the clothing she'd worn that day. There was no blood, nor any trace of blood, on any of the items.

Which Gun?

The next day, April 8, according to trial records, police supposedly confirmed that the gun they had retrieved from Newton's duffel bag in the abandoned building – at her direction – matched the murder bullets. Yet Newton was not arrested until more than two weeks later. Newton says that Harris Co. Sheriff's Sgt. J.J. Freeze told her that police had actually recovered two guns; in a sworn affidavit, Newton's father Bee Henry Nelms says Freeze told him the same thing and added that Newton would "eventually be released." Nonetheless, Newton was arrested two weeks later – after she filed a claim on Adrian and Farrah's life insurance policies – and charged with the capital murder of her 21-month-old daughter.

The state's primary evidence against her was elementary: Newton had filed for insurance benefits, and the Department of Public Safety forensic technicians had detected nitrite traces near the hem of Newton's long skirt – although they couldn't say with certainty that the nitrites were not her father's garden fertilizer transferred earlier that day from the hands of her toddler daughter. For physical evidence, the state relied primarily on the supposed ballistics match to the gun Newton had hidden.

Yet in court Freeze was somewhat vague: "I believe we talked about two pistols," he testified. "I know of one for sure, and there was mention of a second one that Ms. Newton had purchased earlier."

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ton somehow to murder her family, clean herself of any and all blood traces and gunshot residue, and drive to her cousin's house – all in less than 30 minutes. And since her 1988 conviction, the question of a second gun has haunted Newton's case. The ballistics evidence was increasingly suspect in any case because of the recent history of the Houston PD crime lab, which has been repeatedly charged with incompetent, shoddy work, resulting in a number of exonerations and the wholesale discrediting of the lab, which remains under investigation. The lab's clouded reputation was one factor that prompted Gov. Perry to accept the BPP's recommendation to grant Newton a reprieve last winter.

Although subsequent testing supposedly confirmed the ballistics match, the search for the second gun continued. And in June, Dow argued in Newton's clemency petition, the truth finally began to leak out, and from the most unlikely place: the Harris Co. District Attorney's Office. During a brief videotaped interview with a Dutch reporter, Assistant DA Roe Wilson inadvertently confirmed the existence of a second gun. "Police recovered a gun from the apartment that belonged to the husband," Wilson acknowledged. "[It] had not been fired, it had not been involved in the offense, " she continued. "It was simply a gun [Adrian] had there; so there is no second-gun theory."

Wilson and her boss, DA Chuck Rosenthal, quickly retracted her admission. Wilson told the *Houston Chronicle* that she'd simply "misspoken," and Rosenthal accused Dow of fabricating the idea of a second gun "out of whole cloth." "I'm very clear," Rosenthal told *The New York Times*. "One gun was recovered in the case." On Aug. 24, the Court of Criminal Appeals agreed, dismissing Newton's most recent appeal. "The evidence in this case was more than sufficient to establish [Newton's] guilt," Judge Cathy Cochran wrote. "The various details that [Newton] suggests her trial counsel should have investigated in greater detail do not detract ... from the single crucial piece of evidence that concerns her: she disposed of the murder weapon immediately after the killing."

Dow and his University of Houston law students persisted, and late last month may have succeeded. In August, Harris Co. investigators provided testimony that police may have recovered at least two identical .25-caliber Raven Arms pistols. In separate affidavits, two police investigators recall tracing firearms recovered in connection with the murders. Officer Frank Pratt told one of Dow's students that he was assigned a gun found in the abandoned house, which he traced to a purchase by Newton's boyfriend's cousin at a local Montgomery Ward. He also discovered, he told student Frances Zeon, that the purchaser had also bought a "second, identical gun"; but he didn't follow up on the second gun, because "he felt there was no need to do so." Pratt said he'd written up a report on the gun – a report Newton's attorneys have never seen.

However, Newton's attorneys do have a police report written by Detective M. Parinello, who reported he had traced yet another firearm recovered in connection with the case to a purchase from Rebel Distributors in Humble, Texas, which he said also ended up with Newton's boyfriend. "The question arises: what recovered firearm was ... Pratt investigating?" asks the clemency petition. "Counsel does not have access to the Harris Co. Sheriff's Department's records in this case. A request made directly to that institution for all records in connection to its investigation of this offense was rejected."

From all this conflicting yet incomplete gun evidence, it seems reasonable to surmise that there is no way to know which gun was in fact the murder weapon, or which gun was delivered for ballistics tests in 1987 or this year. Since the prosecution relied so heavily on a weapon that Newton herself had delivered to them, the new evidence discovered by her attorneys completely undermines her conviction.

At press time, Harris Co. Sheriff's Office spokesman Lt. John Martin was not able to reach Parinello or Pratt for comment but said that a captain who worked the Newton case had said there was only one gun recovered during the investigation. Harris Co. DA Chuck Rosenthal reiterated that, "as far as I know" there was only one gun recovered in the case. However, he said that even if investigators had recovered multiple firearms, and even if each were the same brand and caliber, the fact remains that the weapon investigators recovered from the abandoned house, which was immediately "tagged" and "tested," matched the bullets recovered from the victims. "Let's say, for conjecture's sake, that you ran down 50 or 100 guns, all associated with the case," he said. "The fact [is] that only one fired the bullets and that we know where that gun came from."

Lack of Effective Criminal Defense

As in many Texas capital cases, a large part of the problem with Newton's appeals is that her court-appointed trial attorney, Ron Mock, never actually investigated her case. If he had, perhaps he would've followed up the drug dealer lead or Freeze's reported comments about a second gun. Newton and her parents implored the trial judge to allow her to change attorneys, and Mock admitted to the judge that he hadn't talked to any prosecution witnesses, nor had he subpoenaed any defense witness. The judge granted the motion to remove Mock but he declined a continuance, leaving Newton little choice but to go to trial with Mock. "It was stunning," she told me. "[Mock gets on the stand and] says, 'I don't know anything,' and for the judge to just dismiss it ... it was stunning." Mock has since been brought before the State Bar's disciplinary board at least five times on various charges of professional misconduct, for which he has been fined and sometimes suspended; he is currently suspended from practicing law until late 2007.

The Harris Co. prosecutors' defense of the conviction has also worn thin, especially given Roe Wilson's supposed "misstatement" about the second gun. To Newton's mother, Jewel Nelms, Wilson's admission is no mistake. "I've known all the time that there was a second gun," she told Houston's KPFT radio last month. "So I want to say again, to Roe Wilson, I thank you ... very much for letting us know, indeed, that there's somebody down there that knows about the second gun and was willing to talk about it – even though I know it wasn't her intention to do it."

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but one of hundreds of convictions to came under scrutiny because of doubts about the methods and quality of handling crime scene evidence by the Houston PD.

"The HPD Crime Lab has produced evidence instrumental in convicting thousands of people," explained Bob Wicoff, Sutton's attorney. For some, the lab's shoddy work may have helped prosecutors send innocent people to prison or to death row. "Josiah has served 4-1/2 years in prison for nothing," said Wicoff.

In mid-2003, Sutton was released from prison after the retesting of the DNA positively excluded him as a suspect in the assault. The Texas Board of Pardons and Paroles then pondered Sutton's case for 11 months before finally recommending a pardon. In May 2004, Texas Governor Rick Ferry granted Sutton a pardon on the basis of his innocence. His story does not end there. Although he is now free, Sutton is a convicted rapist with a governor's pardon in his pocket. Under Texas law, a pardon does not erase a conviction from a person's record; only a new trial and a verdict of acquittal can

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