PROCEDURAL HISTORY

Petitioner Ms. Desiree Shaw was indicted as follows: "... Desiree Shaw, hereinafter styled Defendant, on or about the 11th day of August, 1996, and before the presentment of this indictment, in the county and state aforesaid, did then and there intentionally and knowingly cause the death of an individual, Royce Shaw, by shooting him with a deadly weapon, to wit: a firearm against the peace and dignity of the state." (R.,Vol. II, p.7) Petitioner plead not guilty. (R., Vol. II, p. 7) After a full trial by jury, Petitioner was found guilty of the offense of murder as charged in the indictment. (R.,Vol. IV, p. 479) The jury assessed 32 years confinement in the Texas Department of Criminal Justice Institutional Division. (R.,Vol. V, p.58)

Petitioner has appealed this conviction to the Second Court of Appeals. The Second Court of Appeals affirmed the Convictions on February 4, 1999. A timely Motion for Rehearing was filed but denied on March 11, 1999. A timely filed Petition for Discretionary Review was filed on May 12, 1999. The Texas Court of Criminal Appeals denied the Petition for Discretionary Review on September 8, 1999.

STATEMENT OF THE CASE

On August 11, 1996, at or around 7:10 a.m., a 911 call was received and the Diboll police were dispatched to the Defendant's residence. (R.,Vol. II, p.18) Officer White found the Defendant in the bedroom of her home standing over Mr. Shaw with a towel in her

left hand holding it on his chin or throat area. (R.,Vol. II, p.19) The Defendant was holding a phone in the other hand. (R.,Vol. II, p.19) Officer White found Mr. Shaw in his bed without a pulse and with a pistol wrapped in a pair of underwear in the bed next to his body. (R.,Vol. II, p.20) There was a large pool of blood under his right arm. (R.,Vol. II, p.20) Officer White testified that he heard the Defendant screaming for someone to get an airway started on her husband. (R.,Vol. II, p.43)

Officer Matthews took the Defendant into her living room and then later across the street to a neighbor's house. (R.,Vol. II, p.55) At the neighbor's house, the Defendant told Officer Matthews, in a voluntary statement, that she had felt ill and that she went to take a shower. (R.,Vol. II, p. 55) She said she was in the shower when she heard a loud noise. (R.,Vol. II, p.55) The Defendant stated that it was thundering at the time and it sounded like a tree hit the house. (R.,Vol. II, p.59) In the dark, she asked Royce, her husband what was wrong, what was that noise. (R.,Vol. II, p. 59) She noticed that his nose was bleeding and took her towel off her hair to clean his nose. (R.,Vol. II, p.59) While she was trying to talk to him, she noticed that his arm and chest was all wet. (R.,Vol. II, p.59) She said she screamed help and for the kids to leave the house. (R.,Vol. II, p. 59) She said she called 911 for an ambulance and applied pressure to his neck. (R.,Vol. II, p.60) The Defendant stated that when she turned the

lamp on, she saw that the neck was swollen and a gun was by his side. (R.,Vol. II, p.60) She said he was clammy and did not answer her. (R., Vol. II, p.60)

Dr. Bruce performed the autopsy on the deceased, Mr. Shaw. (R.,Vol. II, p.133) Dr. Bruce found a gunshot wound in the upper neck region and further noted that it was a contact wound, that the gun was touching the skin at the time of the wound. (R.,Vol. II, p.133 & p.136) There was severe damage to the upper spinal cord where it goes into the brain and some injury to the base of the brain itself. (R.,Vol. II, p.137) The bullet was recovered in the region of the upper spinal cord near the base of the brain. (R.,Vol. II, p.137) The bullet caused complete paralysis and death within minutes. (R.,Vol. II, p. 137 & 138) Dr. Bruce stated that based on his education, training and experience, the wound was consistent with both a suicide and homicide. (R.,Vol. II, p.141) Dr. Bruce testified that the wound could be caused by either a homicide or suicide. (R.,Vol. II, P.141)

Mr. Ivan Wilson from the Texas Department of Public Safety Crime Lab testified that both Mr. Shaw and the Defendant, Mrs. Shaw tested negative for gunshot residue. (R.,Vol. II, p.152) Mr. Michael John Prodan, a supervisor with the California Department of Justice Bureau of Investigation, the lead agent for the violent crime profiling unit, testified that the crime scene was altered or

staged by an individual to make it look like it was something other than a homicide. (R., Vol. II, p. 179)

The jury found Appellant guilty of the offense of murder and assessed punishment to 32 years confinement. (R., Vol. V, p. 58) But for the following errors, Appellant would argue it is reasonable to believe that she would have been acquitted.

Availability of Habeas Relief

The Sixth Amendment right to present a defense is as old as the Constitution itself. **Washington v. Texas**, 388 U.S. 14 (1967) reiterated the right to present a defense.

POINT OF ERROR NUMBER ONE. PETITIONER IS BEING ILLEGALLY RESTRAINED OF HER LIBERTY FOR THE REASON THAT SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE CASE. (Entire Record)

POINT OF ERROR NUMBER TWO. THE PETITIONER DESIREE SHAW IS ACTUALLY INNOCENT OF THE CRIME OF MURDER OF HER HUSBAND AND BUT FOR THE ERRORS OF HER DEFENSE COUNSEL IN NOT ADEQUATELY INVESTIGATING THE CASE AND THE FAILURE TO DISCLOSE EXCULPATORY EVIDENCE BY THE STATE, SHE WOULD HAVE BEEN ACQUITTED. (Entire Record)

LAW

An attorney has an obligation to investigate the facts and law involved in a case in order to be effective. **Strickland v. Washington**, 104 S.Ct. 2052 (1984)

Counsel has an obligation to investigate a defendant's case in order properly to decide what strategy he will follow in the case. **Butler v. State**, 716 S.W.2d 48 (Tex.Crim.App., 1986); **Milburn v. State**, 15 S.W.3d 267 (Tex.Ct.App.--Houston [14th], 2000). The failure of counsel adequately to investigate the facts, law, and possible defenses and the State's response to defenses invokes the protections of the United States Constitution and the right to due process and the effective assistance of counsel. **Moore v. Johnson**, 194 F.3d 586 (5th Cir., 1999; on remand from Supreme Court); **Bryant v. Scott**, 28 F.3d 1411 (5th Cir., 1994). Even a guilty plea is necessary for a remand to determine if the failure of counsel to investigate adequately rendered the petitioner's plea invalid for accepting counsel's advise to plea guilty. **Woodard v. Collins**, 898 F.2d 1027 (5th Cir., 1990) A failure to investigate mitigating evidence can also result in a finding of ineffective assistance of counsel. **Lockett v. Anderson**, 230 F.3d 695 (5th Cir., 2000)

The most fundamental rights of an accused must be protected by competent counsel, effectively advancing the claims and benefits of the client. The Supreme Court has held that "the touchstone of an

ineffective assistance claim is the fairness of the adversary proceeding." **Lockhart v. Fretwell**, 113 S. Ct. 838, 843 (1993); **Nix v. Whiteside**, 475 U.S. 157, 175 (1986). The "defendant has no entitlement to the luck of a lawless decisionmaker." **Strickland**, 466 U.S. at 695. The focus of an inquiry into effective assistance of counsel has to be on whether counsel's errors "so upset the adversarial balance between defense and prosecution" that "the result of the proceeding was fundamentally unfair or unreliable." **Lockhart**, 113 S. Ct. at 842. To prove ineffective assistance, a defendant must show that 1) counsel's performance was professionally deficient, and 2) he suffered prejudice, i.e., that "counsel's errors were so serious as to deprive [him] of a fair trial." Id. (quoting **Strickland**, 466 U.S. at 687).

In **United States v. Cronic**, 466 U.S. 648 (1984), the Supreme Court held that there are some circumstances where the absence, actions, or inactions of counsel compromise the very reliability of the trial process. In such circumstances prejudice to the applicant is presumed because the defendant's sixth amendment right to counsel is actually or constructively denied. Id. The Sixth Amendment does not require counsel to invent a defense or act in an unethical manner. **Haynes v. Burl Cain**, ___ F.3d ___, 2001, WL 1388301, 5th Cir., Nov. 27, 2001. It does, however, require counsel to put the prosecution's case to the test through vigorous partisan advocacy. Id. The Sixth Amendment right to effective assistance of counsel derives from the defendant's fundamental right to a fair

trial, a goal best achieved by ensuring that the process involves vigorous partisan advocacy by both sides. **United States v. Cronic**, 466 U.S. 648, 655 (1984) (quoting **Herring v. New York**, 422 U.S. 853 (1975)).

Counsel cannot claim that decisions to present or not present evidence was a result of trial strategy when the "strategic" decisions are made without an adequate investigation into the facts and law controlling plausible defensive theories. SEE: **Moore v. Johnson**, 194 F.3d 586 (5th Cir., 1999) The Fifth Circuit pointed out in **United States v. Drones**, 218 F.3d 496 (5th Cir., 2000) that in investigating an ineffective assistance of counsel claim on the basis of a failure to investigate, the court should look to the degree of the investigation actually undertaken (in Ms. Shaw's case, practically none); strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengable, but strategic choices made with less than an adequate investigation are to be given deferential treatment. **Drones**, at 500. In **Milburn v. State**, 15 S.W.3d 267 (Tex.Ct.App.--Houston [14th], 2000), the Houston Court of Appeals noted that a failure to contact any of a mere 20 potentially favorable witnesses or to present any mitigating evidence amounted to ineffective assistance of counsel. In Ms. Shaw's case there were more witnesses and the favorable evidence was even more extreme.

FACTS

In this particular case, the State presented several scenarios of testimony which damned Petitioner and which could have been shown not to be true. The opening statement in this case by the Defense shows the total lack of preparation for the trial. An opening statement is a recitation of what facts the Defense hopes to illicit from the witness stand and exhibits to show the Defendant's innocence or at least cast some doubt upon the claim of her guilt. I have never read an opening statement so ineffectual, unsure, halting, and senseless. Mr. Heath did not have even a sufficient grasp of the facts and the defense to make an intelligible opening statement.

Further, the trial attorney in this case failed adequately to investigate the potential witnesses in the case, either the State's witnesses or those for the defense. The Petitioner and her mother gave the defense attorney Mr. John Heath a number of witnesses who could help to prove her innocence. (Affidavit of Desiree Shaw, Exhibit A; Affidavit of Nelda Joyce Godwin, the mother, Exhibit B). The witnesses were both character and fact witnesses.

At one point in the trial Officer Gary White testified that he checked the bathroom tub and it was dry. (Trial Record, Vol. 2 of 5, p. 73, 81-83; and Exhibit HH) The available testimony of the maid, Esperanza Maldonado, would have refuted this testimony and showed that the officer either lied, or more likely was mistaken in his perceptions. (Affidavit of Esperanza Maldonado, Exhibit D) Ms. Maldonado would have testified that the tub had a leak and drip

and there was always water around the drain and, therefore, the hair in the drain had to be wet. (Affidavit of Esperanza Maldonado, Exhibit D) This testimony would have totally refuted the attempt by the State to paint Petitioner Shaw's explanation of where she was when Royce shot himself, accidentally or not.

As for the testimony of officers that Ms. Shaw appeared to be calm and contained, the testimony of Ms. Kathryn Barrett refuted this testimony. Ms. Barrett was one of the persons that Desiree Shaw had first called that morning when she found her husband shot. (Affidavit of Kathryn Barrett, Exhibit E) Ms. Barret was willing to testify to having talked with Petitioner Shaw on the phone on the morning of the accident or suicide and that on the morning of August 11, 1996, she and her husband were getting out of the bed when the phone rang. Desiree was crying so severely that Ms. Barrett could hardly understand her. Petitioner Shaw wanted Ms. Barrett to find Ms. Shaw's brother Johnny. To document this call, Ms. Barrett attached her long distance phone bill for July and August of 1996. (Affidavit of Katheryn Barrett, attached phone bill; Exhibit E) Petitioner Shaw said her husband Royce had just had an accident. Although Ms. Barrett tried to get Ms. Shaw to tell Ms. Barrett what had happened, Ms. Shaw was too distressed and upset to say any thing except that Royce had an accident. When Ms. Barrett asked her if someone else was there that Ms. Barrett could talk with who was more rational at the time, Ms. Shaw handed the phone to a lady who identified herself as a neighbor. The neighbor told Ms. Barrett that Royce had shot himself and he was dead. Ms.

Barrett also documented that she would have been a good, willing, and available character witness for Ms. Shaw, if she had been contacted. She stated in her affidavit that "I do not feel that she is the type of person who could hurt anyone."

Although Petitioner Shaw gave him her name, the defense attorney, John Heath never contacted her nor did anyone from his office. (Affidavit of Kathryn Barrett, Exhibit E) John Heath did not investigate the case or talk to any potential witnesses. Ms. Barrett believes had he investigated the case and talked to her and others, that he would have been able properly to defend Petitioner Desiree Shaw rather than put on no defense at all, not even a valid cross-examination. (Affidavit of Kathryn Barrett, Exhibit E)

Another area where the testimony and investigation was deficient was in regards to the medical examiner's testimony. The State had failed (See Brady Point of Error) to reveal to the Defense the laboratory report on the vitreous blood/alcohol sample. The State's expert, Dr. James Bruce, had testified that the blood/alcohol level of .01, even when combined with the drug Vicodin. (Trial Transcript, R., Vol. 2, p. 139) The State's Expert told the jury that there were no drugs present in the body. (Trial Transcript, R., Vol. 2, p. 139) The negative urine and blood screen was misleading to both the witness and the jury. This testimony was false and fundamentally damaging to the jury in that the proper tests were not done to conclusively establish as fact that there were no drugs in the body at the time of death.

Dr. Stanley J. Broskey, a Forensic Scientist, states in his

letter that "Vicodin, a.k.a. Hydrocodone Bitartate, is well known to dull a person's thinking processes and cause one to commit suicide or have inadvertently caused an accident with a firearm." (See Letter of Dr. Stanley J. Broskey, Exhibit "YY") Further, Dr. Broskey states that this fact can easily be found in the Physicians' Desk Reference book. (See Letter of Dr. Stanley J. Broskey, Exhibit "YY")

As to the state's testimony regarding the blood alcohol level, Dr. Broskey states that the level was probably much higher. (See Letter of Dr. Stanley J. Broskey, Exhibit "YY") Dr. Broskey states that ethyl alcohol, being a volatile chemical, can evaporate under certain circumstances so that Mr. Shaw's real blood alcohol level would have been higher if properly tested. (See Letter of Dr. Stanley J. Broskey, Exhibit "YY") The vitreous fluid level was 0.06. The higher alcohol content of the eye fluid would be more indicative of the actual blood/alcohol level at the time of death and would have been significant in the actions or reactions of the deceased Royce Shaw. (See Affidavit of Desiree Shaw., p. 7, Exhibit A) As Ms. Shaw points out, unless specifically requested by the submitted entity, the blood screen does not test for the drug Hydrocodone or Vicodin. (Affidavit of Desiree Shaw, Exhibit A, p. 7) Mr. John Heath never talked with Ms. Shaw about the holes in the State's case.

Ms. Shaw also offered advice that refuted the idea that she was calm and collected. Her affidavit shows that "I was removed from the area, I was restrained in the living room area and I never

saw my husband or the scene again that night. At about 7:30 to 7:40 a fireman I knew told me that there was nothing they could do for my husband. I just collapsed and the police took me next door. I was still in shock when about 10 minutes later the police started questioning me about what happened. I could not think; I could not articulate. The police had to help me put together a statement. Officer Matthews told me what to write. While all this was happening, I had my baby in my lap; Eddie Royce Shaw, Jr., and my pastor was present telling Eddie Jr., that his father was dead. My pastor, Buster Griggs heard the police do this. There were a lot of volunteers, police, neighbors, friends and family going in and out of the house." (Affidavit of Desiree Shaw, Exhibit A) No one contacted Reverend Griggs.

Generally, in order to further show the complete lack of preparation and investigation of this case by the Defendant's attorney, the petitioner has attached an additional twenty four (24) affidavits from various individuals with personal knowledge of the incident or critical facts that would relate to the incident. Each one of the individuals clearly state in their affidavit that no one contacted them prior to or during the trial of this cause. As a result, the Jury failed to hear critical information regarding the circumstances regarding this case. (See Affidavit of Deborah Cook, attached as Exhibit "J"; Affidavit of Garthie Mathews Burnett, attached as Exhibit "K"; Affidavit of Lonnie Burges, attached as Exhibit "L"; Affidavit of Loney V. Burges, attached as Exhibit "M"; Affidavit of Linda Burges, attached as Exhibit "N";

Affidavit of Guesna Kirkland Burges, attached as Exhibit "O"; Affidavit of Daniel W. Burges, attached as Exhibit "P"; Affidavit of Mary Bowers, attached as Exhibit "Q"; Affidavit of Doyle Burges, attached as Exhibit "R"; Affidavit of Wayne Barrett, attached as Exhibit "S"; Affidavit of Joy Lee Basey, attached as Exhibit "T"; Affidavit of Norban Gene Godwin, attached as Exhibit "U"; Affidavit of Caylan Richardson, attached as Exhibit "V"; Affidavit of Rickie L. Mosely, attached as Exhibit "W"; Affidavit of Leesa Susanne Rice, attached as Exhibit "X"; Affidavit of Candace Lee Richardson, attached as Exhibit "Y"; Affidavit of Debra L. Sumrall, attached as Exhibit "Z"; Affidavit of Irene E. Wilkinson, attached as Exhibit "AA"; Affidavit of Sharon Weaver, attached as Exhibit "BB"; Affidavit of Johnny D. Weaver, attached as Exhibit "CC"; Affidavit of Merle Weaver, attached as Exhibit "DD"; Affidavit of Emmi Ryan Weaver, attached as Exhibit "EE"; Affidavit of Charli Weaver, attached as Exhibit "FF"; Affidavit of Billy W. Weaver, attached as Exhibit "GG".)

At the very least, the jury was unable to consider the Defendant's reputation and character in the community as a care giver and mother when the jury assessed the punishment of the Defendant. The Defendant's attorney failed to provide critical evidence and/or information that would have led to a substantially different result. The Jury was deprived of critical information that had a direct bearing on their decision, resulting in an improper verdict in this matter.

Further, the Defendant's attorney did not investigate or talk to this individual prior to trial. The Defendant's attorney missed a critical opportunity to reveal to the jury that the allegations made by Mr. Hilburn at that time was false. The Defense attorney would have known had he bothered to ask and could have called this man to the stand to explain or to make these allegations in front of the Jury so that the credibility could be weighed by the finders of fact. This opportunity was denied the Defendant, a critical error.

The Affidavit of Christi Roberts, the oldest daughter of Desiree Shaw, the Defendant, states that Mr. Heath failed to defend against any of the allegations made regarding her mother having an unprofessional relationship with one of her patients, specifically, Mr. Hilburn. She states that Mr. Heath never even bothered to defend her, Ms. Shaw, in any form. (Affidavit of Christi G. Roberts, attached as Exhibit "H".)

Christi Roberts states in her affidavit that there was a large amount of information that she had personal knowledge of that she could have testified to in the trial but she was never contacted by the Defendant's attorney. (See Affidavit Exhibit "H".) Ms. Roberts states that she knew that Royce, the deceased, was recovering from a recent surgery. She had called him Friday night since she knew he was depressed. She talked to him that night and asked him if he was o.k. He stated that he was just reminiscing by looking through some old pictures. She invited him over to her house for homemade ice cream, his favorite. He refused and said

maybe some other time. The witness states that he sounded depressed and "down in the dumps" This was the last time she talked to him.

This information was not made available to the jury since the attorney failed to interview this critical witness, the Defendant's own daughter. The Jury had a right to know the depressed state the deceased was in on Friday night with his death occurring early Sunday morning. This testimony would have been critical to establishing or at least raising reasonable doubt by showing that deceased was depressed and could be in the state of mind to kill oneself. The Defendant's attorney made no effort to show that the deceased had the capability to cause his own death. Without the testimony regarding the state of mind of the deceased, the Jury clearly missed a large piece of the puzzle necessary to properly determine the facts of this case. The daughter states in her affidavit that her mother had a great relationship with her husband. (See Affidavit Exhibit "H".) This is not consistent with the relationship established by the State before the Jury. This was a critical witness with critical knowledge. The failure of the Defendant's attorney to investigate these facts was a fatal error to this case.

The Defense attorney's failure to investigate and prepare his case is further demonstrated in the affidavit of Roger Wayne Burges. (Affidavit of Roger Wayne Burges, attached as Exhibit "I".) He states that before trial he contacted Mr. Heath and gave him his phone number and offered to help and offered to make themselves

available to him to provide any information they could. They, as all the others, were never contacted. Mr. Burges further states that he asked Mr. Heath who he intended to call as witnesses at the trial. Mr. Heath's response was "Dr. Shelton first then several others". (See Affidavit Exhibit "I".) However, at the trial, Mr. Heath did not present any evidence or witnesses, he merely rested after the State presented its' case. Mr. Burges states that after the guilty verdict, they asked the Defendant if her lawyer was going to call character witnesses during the sentencing phase. She told them that "yes, he said he was". Mr. Burges states that he was in shock when Mr. Heath didn't even call one character witness. Mr. Burges states that the courtroom was full of people that really knew her, cared and loved her and they came there ready and willing to help. Mr. Burges was very disturbed. Mr. Burges further states that Mr. Heath had been ill and seemed overwhelmed. (See Affidavit Exhibit "I".) Clearly no defense was provided. No investigation or other preparation was ever done.

Finally, the Defendant's attorney failed to adequately review the record in preparing the appeal of this matter. This becomes clear when reviewing the state's closing argument. The prosecutor stated to the jury "Another reason witnesses might not be called and weren't called in this case is because there is testimony and evidence that was, the Judge ruled not to be brought before you." (R., Vol. 2, p. 453, and Exhibit "ZZ") Mr. John Heath objected as improper argument. (R., Vol. 2, p. 453, and Exhibit "ZZ") The Judge had counsel approach the bench and an off the record

discussion was had. (R., Vol. 2, p. 453 and Exhibit "ZZ") After the discussion, Mr. Heath went on the record with his objection. (R., Vol. 2, p. 453, and Exhibit "ZZ") The Judge sustained the objection and instructed the jurors to disregard the last statement. (R., Vol. 2, p. 454, and Exhibit "ZZ") Mr. Heath requested a mistrial and it was denied. (R., Vol. 2, p. 454, and Exhibit "ZZ") This fundamental error was never addressed in the appeal of this case. Had this error been addressed, a different result would have likely been achieved during the appellant review of this trial. The Defendant lacked effective assistance of counsel during her appeal. This is a major error that should have been pointed out to the Court.

Clearly, Ms. Shaw was not properly represented either at trial or during her appeals.

ARGUMENTS

Fundamental error is present and has been shown as required by the cases cited above. If the defendant's attorney had properly investigated this case by contacting at least some of the material witnesses to this incident, a proper defense may have been provided to at least meet the minimal requirements established by case law. However as shown by the attached affidavits, the defense attorney critically failed to investigate this case or he would have at least contacted a few or even one of these people.

If some of these individuals had been allowed to testify, the Jury would have had the knowledge that the State's theories of this case were indeed wrong. At the very least, the finders of fact would have been able to evaluate whether the information they were given was credible. If at least one of the material witnesses had been contacted and the at least one fact attested to in the attached affidavit had been provided to the Jury, reasonable doubt would have been established. The error committed in this trial by the failure of this attorney to fulfill his obligation resulted in a trial that upset the adversarial balance between defense and prosecution and as such the result of the proceeding was fundamentally unfair or unreliable as prohibited by **Lockhart**.

The attorney's failure to do any investigation resulted in a lack of a proper defense for this defendant which created in an improper verdict that cannot stand. This defendant is legally entitled to a new trial with a proper defense as required by the protections of the United States Constitution, the right to due process and the effective assistance of counsel. **Strickland v. Washington** requires the verdict in this case to be reversed and proper trial be had for this defendant. Further, the attorney's failure to adequately review the record in order to bring forth the errors made during trial to the Courts of Appeal, shows the clear lack of a proper defense accorded to the defendant. The representation provided the defendant clearly falls below that required by the United States Constitution. The Defendant was

denied her right to due process and the effective assistance of counsel as established by the above case law.

POINT OF ERROR NUMBER THREE. THE PETITIONER DESIREE SHAW WAS DEPRIVED OF DUE PROCESS OF LAW WHEN THE STATE FAILED TO GIVE HER DEFENSE ATTORNEY VALUABLE EXCULPATORY EVIDENCE THAT THE BLOOD ALCOHOL LEVEL WAS ACTUALLY .06 AT OR NEAR THE TIME OF DEATH AS MORE ACCURATELY REFLECTED BY THE VITREOUS FLUID TEST AND NOT THE .01 BLOOD TEST REFERRED TO BY THE STATE.

LAW

The State has an affirmative obligation to disclose impeaching, exculpatory, or mitigating evidence. See **Kyles v. Whitley**, 115 S. Ct. 1555 (1995); **Brady v. Maryland**, 373 U.S. 83 (1963). As for exculpatory evidence, the test as noted in **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) is (1) the prosecutor suppressed evidence either intentionally or negligently; (2) the evidence was favorable to the defendant; (3) the evidence was material to either guilt or punishment. In this case, the State clearly failed to disclose that the Petitioner had been granted shock probation. The State had the information and either intentionally or negligently failed to disclose this fact to the defense. The negligence or lack of diligence of the defense in the case is irrelevant to the issue. The State violated the due process clause of the Fourteenth Amendment by failing to disclose the medical records and

information contained within the file dealing with the .06 vitreous alcohol content on the Deceased in this case. Kyles v. Whitley, 115 S. Ct. 1555 (1995); Brady v. Maryland, 373 U.S. 83 (1963). The right to relief is not contingent upon the diligence of defense counsel. See: Kyles v. Whitley, 115 S. Ct. 1555 (1995); Brady v. Maryland, 373 U.S. 83 (1963).

Every citizen accused of a criminal act is entitled to the due process of the law. **CONSTITUTION OF THE UNITED STATES OF AMERICA, Fifth, Sixth, and Fourteenth Amendments; TEXAS CONSTITUTION, Article I, §§ 10, and 19.** The State has an obligation imposed by law not to suppress exculpatory evidence even negligently or inadvertently. Means v. State, 429 SW2d 490 (Tex.Crim.App., 1968); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) **In addition, the State cannot by their actions deprive an Accused of a material witness.** Stokes v. State, **125 SW2d 311 (Tex. Crim.App.,** 1939) A defendant has a due process right to secure the witnesses necessary to present his defense and the State is under an obligation to assist in obtaining that testimony. Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d, 87 S.Ct. 1920 (1967) A defendant has a Sixth Amendment right under the federal Constitution to have compulsory process for obtaining witnesses in his favor. Stokes v. State, 125 SW2d 311 (Tex. Crim.App., 1939); Washington v. State, supra; United States v. Henricksen, 564 F.2d

197 (5th Cir., 1977). A trial court has an inherent authority to effectuate a defendant's compulsory process rights by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense. United States v. Herman, 589 F.2d 1191 (3rd Cir., 1978), cert. den., 441 U.S. 913; **United States v. Bachelor**, 611 F.2d 443 (3rd Cir., 1979,); **In Re Grand Jury Impaneled February 14, 1978**, 603 F.2d 469 (3rd Cir., 1979); Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir., 1980)

In an application for a writ of habeas corpus in which the applicant asserts that newly discovered or previously unavailable evidence demonstrates her actual innocence of the original offense, the burden is on the applicant to show by clear and convincing evidence that no reasonable juror would have convicted her in light of the new evidence. Citing **Ex Parte Elizondo**, 947 S.W.2d 209. Thus the trial judge's job is not to review the jury's verdict but to decide whether the newly discovered evidence would have convinced the jury of the applicant's innocence. **State v. Nkwocha**, 31 S.W.3d 817 (Tex.Ct. App.--Dallas, 2000). The State's failure to disclose a blood splatter expert's report supporting defense theory that deceased committed suicide warranted a new trial on the murder charge. **Ex Parte Mowbray**, 943 S.W.2d 461 at 466 (Tex.Crim.App., 1997). Even collateral evidence, which is probative

of a defense is admissible to show actual innocence. In **Finley v. Johnson**, 243 F.3d 215 (5th Cir., 2001), the Fifth Circuit held:

> "We conclude that a showing of facts which are highly probative of an affirmative defense which if accepted by a jury would result in the defendant's acquittal constitutes a sufficient showing of actual innocence to exempt a Brady claim from the bar of procedural default.
>
> The question then becomes whether Finley has made such a showing. We believe that he has. At trial, Finley claimed his conduct was not culpable because it was immediately necessary to protect Towery's wife and daughter. The prosecutor responded to his claim with the following argument:
>
> > `You must find that it was immediately necessary for Jay Finley to do what he did. It wasn't immediate. There is no such defense, he's got no defense, and he's guilty. How in the world was this child in immediate danger or Martha Towery in immediate danger when they were miles away and Louis Towery had no means of

transportation? No way. That's right. No way in the world.'

Yet the same prosecutor had represented to the court, only two days after the alleged kidnaping, that Towery must be restrained from contact with his wife and daughter because he had committed violence against them and there was a clear and present danger of more violence which would cause `immediate and irreparable injury, loss, and damage.' The supporting affidavit of Martha Towery stated that her daughter Erika was `scared to death' of Towery and feared that he would continue to molest her if he were allow3ed to remain in the house.

If the jury had heard this evidence, there is a least a reasonable probability that they would have rejected the prosecutor's argument that there was `no way in the world' that Towery's wife and daughter were in any immediate danger the day Finley abducted him and took him to the police station. Under these circumstances, we hold that Finley has made out a sufficient showing of actual innocence to satisfy the fundamental

miscarriage of justice exception for his procedurally defaulted Brady claim." Supra at 221-222.

FACTS

In this case the State presented the testimony of Dr. James Bruce, a physician specializing in pathology. (R., Vol. 2, p. 132, Marked as Exhibit JJ, and made a part hereof by reference) He testified that the Blood alcohol level was .01 grams per 1200 milliters and that amount would not have significantly impacted the decedent's mental processes or his physical processes. (p. 139) Ms. Shaw, long after the trial was over and in a civil suit was provided evidence of the blood alcohol level from the eye fluid which showed a level of .06, which when mixed with the medication the Deceased was taking, would have made a significant impact on his reasoning, actions and thinking. (Affidavit of Desiree Shaw, Exhibit A, p. 7). Dr. Stanley J. Broshey, a Forensic Scientist, states in his letter that "Vicodin, a.k.a. Hydrocodone Bitartate, is well known to dull a person's thinking processes and cause one to commit suicide or have inadvertently caused an accident with a firearm." (See Letter of Dr. Stanley J. Broskey, Exhibit ZZ) Dr. Broskey states that this fact can easily be found in the Physicians' Desk Reference book. (See Letter of Dr. Stanley J. Broskey, Exhibit ZZ)

As to the state's testimony regarding the blood alcohol level, Dr. Broskey states that the level was probably much higher. (See Letter of Dr. Stanley J. Broskey, Exhibit ZZ) Dr. Broskey states

that ethyl alcohol, being a volatile chemical, can evaporate under certain circumstances so that Mr. Shaw's real blood alcohol level would have been higher. (See Letter of Dr. Stanley J. Broskey, Exhibit ZZ)

ARGUMENT

It is clear, that with all the testimony that was available to the defense, if it had been investigated or the witnesses interviewed, that this piece of evidence would have probably caused a reasonable jury to acquit Ms. Shaw. The State's failure to disclose this information, when combined with the State's eliciting testimony which was patently false and misleading in light of this test further hampered the defense. The exculpatory evidence secreted in this case is even more harmful than that found sufficient to warrant reversal in **Finley v. Johnson**, 243 F.3d 215 (5th Cir., 2001). The combination of the alcohol and the Vicodin perscription would have created a severe mood swing and made one much more careless than the actions of a perfectly sober person.