

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. Cronin, 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. Cronig, 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 unchallengeable, 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";