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9-30-03

Cause No. 19,058-A

STATE OF TEXAS	§	IN THE 159 TH DISTRICT
	§	
V.	§	COURT OF
	§	
DESIREE SHAW	§	ANGELINA COUNTY, TEXAS

AFFIDAVIT OF JOHN R. HEATH, SR.

THE STATE OF TEXAS	§
	§
COUNTY OF NACOGDOCHES	§

BEFORE ME, the undersigned authority, personally appeared JOHN R. HEATH, SR., who was sworn by me and deposed by me:

"My name is John R. Heath, Sr. I am over eighteen years of age, of sound mind, and am not disqualified from making this Affidavit. I have personal knowledge of the facts asserted below and am competent to testify to those facts.

"I have read the petition for Habeas Corpus, along with supporting affidavits, have reviewed, in a general way, without having read every single word of the Statement of Facts, and have reviewed my file.

"I was retained counsel for Desiree Shaw before, during, and after her murder trial which was conducted from December 2, 1996, through December 5, 1996. Her allegations alleging that I rendered ineffective assistance as trial and appellate counsel are often repetitious and somewhat convoluted. I shall attempt to answer the issues raised in an orderly fashion. I was not ill" before, during, or after her trial. There have been times in my career where illness has necessitated the filing of a Motion for Continuance. This was not done in this case because I was not ill. I have a fairly good memory of this case and my recollection is that after the case, that is after the adrenalin rush, I was quite exhausted.

"I have discussed with attorney John Tatum, II, of Lufkin, Texas, who was present from time to time and he advises that his memory is the same as my opinion that I demonstrated no health problems during the trial.

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"This was a case that the ultimate trier of fact was going to face two options. Number one, suicide. Number two, homicide.

"There were two people that could have been in the bedroom when the shooting occurred, the deceased and the defendant, Desiree Shaw. Ms. Shaw contended in multiple statements to law enforcement that she was not present, but was in fact in an adjoining bathroom.

"She quite foolishly continued to meet with officers and the Texas Ranger, each time giving a statement that contained minor inconsistencies. When viewed cumulatively the statements coupled with the conduct of Desiree Shaw, that I will deal with hereinafter, adequately support the reasonable strategy of trying this case without placing the defendant on the stand for cross-examination. I also offer her testimony in the punishment stage which demonstrates that she was not a very compelling witness. And this occurred after the State had their conviction and did not have to use the many statements and other evidence that would have, in my opinion, devastated her case.

"It should be noted that I was brought into this case several weeks after the event. I was in the Federal Courthouse in Angelina County which is across the street from the County Courthouse. Ms. Shaw approached me in a very agitated state and advised that she had just been told after giving another statement that her case was going to be presented to the Grand Jury and an indictment for Murder sought. I took a few minutes to advise her of her fundamental rights and that she should not talk to anyone about any aspect of the case or her relationship with her husband or with anyone else until we could meet in my office.

"This was not Ms. Shaw's first time to retain me to represent her in a criminal matter. She now says that she did not know what she was doing when she pled guilty, in the prior case, but the facts are that she had felony exposure for firing the very same gun that was used and caused the death of her husband. She contends that I cajoled or otherwise pressured her into taking the plea bargain. I did point out that as a registered nurse the compromised misdemeanor was a sure thing and would not jeopardize her nursing license. My recollection is that we consulted with a lawyer in Austin, Texas who specialized in representing professionals and discussed this with Ms. Shaw to assist her in making the ultimate decision.

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"As a board-certified criminal lawyer, who has tried to juries in excess of one-hundred murder cases, including two death penalty trials that went to jury verdict, and as one who has concentrated exclusively on criminal defense for the last twelve to thirteen years I can state unequivocally that every client that has pled guilty has made their own decision to do so. All I ever do is advise them of the positives and the negatives of their case and leave it to them to make the choice.

"As part of the investigation and trial preparation, I subpoenaed the Record Custodian of Rusk State Hospital to bring documents relating to the evaluation and treatment of Jerry Hilburn among other things, in these records, were the following:

"'Saturday I did feel like being suicidal' as he [Jerry Hilburn] alleges that his primary care giver/fiancé/girlfriend [Ms. Shaw] was walking arm and arm with another man at Wal-Mart." (Social Assessment, p 1: Jerry Hilburn: 10/5/96: Jerry Gibson, LSW, CW III)

"Received call from Desiree Shaw - patient's 'girlfriend' according to patient, his home health nurse only according to Ms. Shaw. She [Ms. Shaw] says patient called her and threatened to kill her, [Staff] advised Ms. Shaw not to accept further collect calls if she doesn't wish to speak with patient, [Ms. Shaw] came to Unit to speak with patient and review paper work from admit, which patient was too agitated to review during admit process." (Progress Notes: 11/3/1996: Jerry Hilburn)

"The patient admits to having a sense of vulnerability, and he has been rather immature in perpetuating relationships with girlfriends. His sister, present for this interview, stated that she felt there was a significant risk that the patient would immediately attempt to reunite with her [Ms. Shaw] after discharge; however, the patient firmly denies this..." (Psychiatric Evaluation - admission/screening: 11/4/1996: Robert Bouchat, M.D.)

"He readily admitted to having been overcome with grief when hearing about his girlfriend's legal situation..." (Psychiatric Evaluation - admission/screening: Mental Status: 11/4/1996: Robert Bouchat, M.D.)

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"I employed as an expert/investigator Gerald Piechocki (see Exhibit A-1). I am unable to locate his Curricula Vita, but my recollection is that he had a Bachelor of Science degree in some area of Criminal Justice. He possessed a Master of Science from the University of London in forensic science and had many years of criminal investigation experience. He went to the scene, interviewed witnesses, and assisted in preparation for the cross-examination of the State's expert.

"A tactical decision was made by me not to put on an expert. The science was against us and my judgment was to stop before we opened doors that could have brought great harm to the defendant's case. As to the allegation that the Diboll police dictated the initial statement 'without explaining that it was voluntary, while petitioner was in shock-like state, and could not write without cues and prompting,' was probably true but did not constitute custodial interrogation. This is especially true in light of the fact that Ms. Shaw met with law enforcement on several subsequent occasions and gave additional statements (see Exhibit A-2 and read the yellow highlighted words starting on page 52).

"Defense counsel is accused of having failed to interview any of the State's witnesses. I personally, along with my investigator, interviewed the Ranger, the lead Detectives who did the crime scene investigation, obtained copies of all photographs taken by law enforcement in this case and obtained a copy of the VCR tape upon which the crime scene was video taped. I obtained all of the DPS scientific reports, the autopsy report, and offense reports, all of these were obtained well in advance of trial and many discussions were had with Ms. Shaw, myself, and the investigator. I can find no notes nor do I have any recollection of Ms. Shaw ever saying anything about drugs or medication that her husband was taking during the pertinent time period surrounding his death.

"This 'Johnny come lately' idea runs absolutely counter to her post death insistence that Mr. Shaw was happy and in a great state of mind when he returned home Saturday night. Ms. Shaw, a Registered Nurse, contends "evidence was withheld that decedent was taking a 'steady dose' of hydrocodone while drinking alcohol," this is not supported by the DPS drug screen, or anything that Ms. Shaw told me at any time prior to the Jury Verdict.

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"As to the issue of indigency, this was not an issue until after the conviction. Her family and friends were not willing to support the appeal. I assisted Ms. Shaw in bringing her financial status to the attention of the Court, and, after a hearing, succeeded in getting the Statement of Facts partially paid for after the Trial Judge determined that she had interest in personal property.

"I was present, in the Courtroom, during every aspect of this trial but because of a prior setting I was not present for the Voir Dire in the preceding case. However, I had an employee, a non-lawyer, present to listen for responses from some of the venire persons.

"Ms. Shaw alleges that I said, 'the whole trial was a game between the assistant prosecutor and that she was just a pawn in the game.' Under no circumstances, in this case or any other, have I ever thought of or articulated such a view. A murder trial is anything but a game.

"Ms. Shaw further alleges that I failed to have a firm command of the facts and law pertaining to her case. In answer, I submit the entire statement of facts. The record does not support these allegations.

"Ms. Shaw suggests that in the absence of ineffective assistance of counsel she would have presented evidence favorable to the defense of actual innocence and changed the outcome of the trial. I spent many hours in preparation for the trial of this case. One of the children in her affidavit speaks of talking to me and one of my associates. I assume that the associate was the retained investigator/forensic expert. When I have the resources to hire an investigator in any given case I have the investigator present in talking to potential witnesses, or have the investigator conduct the interview. The State had evidence both direct and circumstantial which suggested a "relationship" between Ms. Shaw and Jerry Hilburn. She now contends that he was forced to say things detrimental to her that she was being stalked, but the State had information on the stalking, and failed to disclose it. The fact is that the State did disclose evidence of questionable contacts between Ms. Shaw and Mr. Hilburn, one being a motel receipt. In the late afternoon of the first day of the guilt/innocence stage of the trial, I was returning to the Courtroom during a break when I observed the local TV crew pointing their camera through a glass window and filming inside the Courtroom. To my utter amazement, Ms. Shaw and Mr. Hilburn were standing inside the bar at defense counsel's table holding each other in a romantic embrace. I had repeatedly warned Ms. Shaw to stay away from Mr. Hilburn.

"Ms. Shaw has submitted numerous affidavits from people who had nothing to offer by way of direct knowledge of the disputed issues but were essentially character witnesses. Had we opened the door to character, much harmful evidence would have come into this case.

"Ms. Shaw says that I failed to file a Motion to Quash the Indictment. The indictment, on its face, properly alleged the offense of murder.

"Ms. Shaw further alleges that due to illness I could not remember the 1993 case. Not only was I her retained counsel in the 1993 case, but based upon a 404(b) Request, received a response from the State.

"Ms. Shaw further states that her children were 'forced to sign statements about the 1996 events, and that they volunteered to provide defense counsel with affidavits.' I was never told that the children wished to change their testimony and in view of the fact that Ms. Shaw pled no contest to a lesser charge seriously undermines this 'new information.'

"I have known Judge Gerald Goodwin for over thirty years both in his capacity as an elected District Attorney and later as District Judge. He has never, in either capacity, suggested that I call, or that I not call a witness. Ms. Shaw says that Judge Goodwin told me not to allow Christi, her daughter, to testify because according to the Judge, 'everything is not butterflies and roses with Christi and her mom...' this never happened in my presence.

"Ms. Shaw alleges that the State failed to disclose that Royce's gun had a recall notice. I am not certain of the source, however, I found, in my file, a copy of the recall notice. I am unable, at this time, to locate the document. But, if it is deemed relevant I am certain that I can retrieve said document.

"Ms. Shaw alleges that my cross-examination of the State's Expert was ineffective because I was without benefit of an expert. This is not true, I had a well-qualified expert, both by education and by experience, to assist.

"Ms. Shaw, myself, my staff, and the case investigator, carefully went through line by line, page by page, the voluminous paperwork relating to her home healthcare employment the time she was assigned to Jerry Hilburn and time-lined the contacts with Mr. Hilburn that the State intended to offer to prove-up an improper relationship.

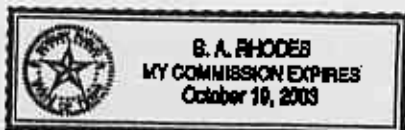
"As a general response to Ms. Shaw's many allegations I wish to offer as an opinion that when taken as a whole based upon the transcript, the Statement of Facts, and appellate briefs that while I may not have provided perfect counsel, however I did provide representation that far exceeded the standard for effective counsel. Should the Court deem it appropriate to grant a hearing with sworn testimony I will be pleased to appear and testify under oath and more fully and completely develop the facts that support the reasonableness and appropriateness of the defense strategy."


FURTHER, AFFIANT SAYETH NOT.



JOHN R. HEATH, SR.

SWORN TO AND SUBSCRIBED BEFORE ME on this the 31st day of March, 2003.





NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

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