



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

November 29, 2005

Desiree Ann Shaw  
TDCJ No. 769352  
Gatesville Unit  
1401 State School Road  
Gatesville, Texas 76599

Re: *Shaw v. Dretke*, No. 9:05cv32

Dear Mr. Shaw:

Enclosed is a copy of Respondent's Response to Court Order in the above-referenced cause which was electronically filed with the Court.

Sincerely,

TOMMY L. SKAGGS  
Assistant Attorney General  
Postconviction Litigation Division  
(512) 936-1400

TLS/br  
Encls.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

DESIREE ANN SHAW,	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 9:05cv32
	§	U.S. Magistrate Judge Judith K. Guthrie
DOUG DRETKE, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

**RESPONDENT'S RESPONSE TO COURT ORDER**

On October 26, 2005, this Court has entered an order requesting a response to Petitioner Desiree Ann Shaw's ("Shaw") assertion that she is entitled to equitable tolling of the limitations period under 28 U.S.C. § 2244(d) because she was unable to obtain records and other evidence she needed for filing her state application for writ of habeas corpus. Shaw's request for equitable tolling should be denied.

The Fifth Circuit has explained,

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir.1998). Equitable tolling will be granted in "rare and exceptional circumstances," *id.* at 811, and will not be granted if the applicant failed to diligently pursue his rights, *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir.2000). "Equitable tolling applies principally when the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999). "[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing." *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir.1999).

*Larry v. Dretke*, 361 F.3d 890, 896-97 (5th Cir. 2004).

Here, as explained in the Director's answer, the instant petition was filed more than five years after the one-year limitations period expired and more than eighteen months after Shaw's first application for state writ of habeas corpus was denied in July 2003. If Shaw truly needed records to file an application for state writ of habeas corpus, she obviously had those records by the time she

actually filed her first application for state writ of habeas corpus and can offer no equitable reason why she did not immediately file her federal habeas petition after her first state writ was denied.

Further, there is nothing extraordinary about the claims Shaw has raised in the instant petition. Rather, the claims presented are garden-variety ineffective assistance of counsel claims.

Moreover, various federal courts in this State have found that a claim of a denial of access to the state court record is not grounds for statutory or equitable tolling. *See, e.g., Hughes v. Cockrell*, 2003 WL 21510812, \*5 (N.D. Tex. Mar 31, 2003) (unpublished); *Medford v. Cockrell*, 2001 WL 1658150, \*1 (N.D. Tex Dec 21, 2001) (unpublished); *Earls v. Johnson*, 2001 WL 238099, \*2 (N.D. Tex. Mar 5, 2001) (unpublished). In addition, it has been the law in this Circuit for decades “that a federal prisoner is not entitled to obtain copies of court records at the Government’s expense to search for possible defects merely because he is indigent.” *Campbell v. United States*, 538 F.2d 692, 693 (5th Cir. 1976). The same rule has been applied to state prisoners filing for federal habeas corpus relief. *Bonner v. Henderson*, 517 F.2d 135, 136 (5th Cir. 1975).

Finally, this Court’s prior findings that no constitutional impediment prevented Shaw from timely seeking habeas relief and that Shaw has not shown that she could not have discovered the factual predicate of her claim until a later time, *see* Order, Oct. 26, 2005, at p.4, compel rejection of Shaw’s assertion of entitlement to equitable tolling based on the alleged unavailability of evidence.

For the above reasons, as well as those urged in the Director’s previously filed answer, the Director respectfully requests that the federal petition be dismissed as time-barred.

Respectfully submitted,

GREG ABBOTT  
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ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

A true and correct copy of the above and foregoing has been served by placing it in the United States mail, postage prepaid, on this the 29th day of November, 2005, addressed to:

Desiree Ann Shaw  
FDCJ No. 769352  
Gatesville Unit  
1401 State School Road  
Gatesville, Texas 76599

/s/ TOMMY L. SKAGGS  
Assistant Attorney General



IN THE UNITED STATES DISTRICT COURT  
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v.	§	Civil Action No. 9:05cv32
	§	U.S. Magistrate Judge Judith K. Guthrie
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Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

**RESPONDENT’S ANSWER WITH BRIEF IN SUPPORT**

Petitioner Desiree Ann Shaw (“Shaw”) was convicted and sentenced to thirty-two years imprisonment by a Texas state court for murder. She now seeks habeas corpus relief in this Court pursuant to 28 U.S.C. § 2254, which provides the Court with jurisdiction over this action. The petition should be dismissed as time barred. Respondent Doug Dretke (“the Director”) also denies all of Shaw’s assertions of fact except those supported by the record or specifically admitted herein.

**STATEMENT OF THE CASE**

The Director has lawful custody of Shaw pursuant to a judgment and sentence of the 159th District Court of Angelina County, Texas, in cause number 19,058. Transcript (Clerk’s Record) (“Tr”) at 128-29. Shaw was charged in this cause with murder, to which she entered a plea of not guilty to a jury. Tr 2, 4. On December 5, 1996, the jury found Shaw guilty of murder and, thereafter, assessed punishment at thirty-two years imprisonment. Tr 3, 163, 123.

Shaw’s conviction was affirmed by the Ninth Court of Appeals of Texas on March 11, 1998. *Shaw v. State*, No. 09-97-021-CR, slip op. (Tex.App.–Beaumont 1998). The Texas Court of Criminal Appeals refused Shaw’s petition for discretionary review on June 24, 1998. *Shaw v. State*, P.D.R. No. 0603-98. Shaw has filed three applications for state writ of habeas corpus challenging this conviction. The first application was filed, pro se, on August 30, 2001, and denied by the Court of Criminal Appeals on July 2, 2003. *Ex parte Shaw*, Application No. 53,448-02 at cover, Clerk’s

Record I dated October 22, 2002 at 8, and Clerk's Record III dated April 21, 2003 at 5.<sup>1</sup> Shaw's second application for state writ of habeas corpus was filed on November 17, 2003, and dismissed by the Court of Criminal Appeals as a statutory abuse of the writ on January 21, 2004. *Ex parte Shaw*, Application No. 53,448-03 at cover, 1-2. Shaw's third application for state writ of habeas corpus was filed on August 5, 2004, and dismissed by the Court of Criminal Appeals as a statutory abuse of the writ on November 24, 2004. *Ex parte Shaw*, Application No. 53,448-04 at cover, 4. The instant proceeding followed on January 21, 2005.

Records of Shaw's trial, appeal, and state habeas corpus proceedings will be forwarded to the Court under separate cover.

### **PETITIONER'S ALLEGATIONS**

The Director understands Shaw to allege that trial counsel was ineffective for (1) failing to present a defense, (2) failing to move for a verdict of acquittal, (3) failing to adequately investigate, (4) failing to adequately advise Shaw on her right to testify, and (5) failing to exploit errors made by the police in their investigation.

### **EXHAUSTION/PROCEDURAL DEFAULT**

Shaw presented claims (1) and (3) in her pro se first application for state writ of habeas corpus. *Ex parte Shaw*, Application No. 53,448-02, Clerk's Record III dated April 21, 2003, at 12, 52, and Clerk's Record I dated October 22, 2002 at 15, 55. Shaw also presented claims (1) and (3) in her first application for state writ of habeas corpus filed by counsel. *Ex parte Shaw*, Application No. 53,448-02 at 17-32 (Clerk's Record II dated October 22, 2002). Shaw presented claims (1) and (3) again in her second application for state writ of habeas corpus. *Ex parte Shaw*, Application No. 53,448-03 at 7. Finally, Shaw presented claims (1) and (3) again in her third application for state writ of habeas corpus. *Ex parte Shaw*, Application No. 53,448-04 at 9. The remainder of the claims were not presented to the state courts. Pending consideration of the below time bar defense, the

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<sup>1</sup> Through counsel, Shaw filed an amended application for state writ of habeas corpus on January 2, 2002. See *Ex parte Shaw*, Application No. 53,448-02 at 8 (Clerk's Record II dated October 22, 2002)

habeas corpus were all filed well after the limitations period expired, they did not toll the limitations period.

The record does not reflect that any unconstitutional “State action” impeded Shaw from filing for federal habeas corpus relief prior to the end of the limitations period. Nor do the claims presented concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review. Further, the record does not reflect that Shaw was unable to have exercised reasonable diligence and discovered the factual predicate of her claims until a date subsequent to the limitations period. Indeed, she can make no such showing as her claims concern events that transpired, or failed to transpire, at her trial.

Finally, Shaw has not alleged sufficient facts that could support a finding that equitable tolling applies. The Fifth Circuit recently explained,

“The doctrine of equitable tolling preserves a plaintiff’s claims when strict application of the statute of limitations would be inequitable.” *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir.1998). Equitable tolling will be granted in “rare and exceptional circumstances,” *id.* at 811, and will not be granted if the applicant failed to diligently pursue his rights, *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir.2000). “Equitable tolling applies principally when the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.” *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999). “[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing.” *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir.1999).

*Larry*, 361 F.3d at 896-97. Here, all Shaw had to do to receive review of her claims was to simply timely, and properly, submit her application for state writ of habeas corpus and the instant petition. Indeed, by waiting almost three years after her conviction became final to file her first application for state writ of habeas corpus, it cannot be said that Shaw was diligent in pursuing relief.

For all the above and foregoing reasons, this petition is barred by limitations.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas



Director reserves the right to argue the exhaustion defense as well as the related procedural default defense to any exhausted or unexhausted claims.

#### ANSWER

Shaw filed the instant petition on January 21, 2005. Accordingly, Shaw's petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA provides that:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (West 2000).

Here, Shaw's conviction became final on September 22, 1998, at the expiration of the time for her to timely for certiorari review from the refusal of her petition for discretionary review. *Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003). Shaw thus had until September 22, 1999, to file the instant petition or toll the limitations period. As Shaw's applications for state writ of

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ATTORNEYS FOR RESPONDENT

### CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been served by placing it in the United States mail, postage prepaid, on this the 3rd day of June, 2005, addressed to:

Desiree Ann Shaw  
TDCJ No. 769352  
Gatesville Unit  
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Gatesville, Texas 76599

/s/ TOMMY L. SKAGGS  
Assistant Attorney General