

CAUSE NO. 19,058-A / C.C.A. No. 53448-02

EX PARTE DESIREE SHAW

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IN THE DISTRICT COURT

159TH JUDICIAL DISTRICT

ANGELINA COUNTY, TEXAS

C.C.A. No. 53448-02

AFFIDAVIT OF MALCOLM P. LAVERGNE

STATE OF TEXAS

COUNTY OF HARRIS

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BEFORE ME, the undersigned authority, personally appeared MALCOLM P. LAVERGNE, who was sworn by me and deposed as follows:

1. My name is Malcolm P. LaVergne. I am over the age of eighteen years, and I have never been convicted of a felony. I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, except where noted upon information and belief, and I swear that the following facts are true:
2. From January 1995 through August 1997, I attended Stephen F. Austin State University ("Stephen F. Austin") in Nacogdoches, Texas.
3. In August 1997, I graduated from Stephen F. Austin. I received a Bachelor of Arts degree, *summa cum laude*, with majors in Political Science and English. I was awarded the Highest Ranking Senior Award for the August 1997 class.
4. From August 1997 through May 2000, I attended Cornell Law School ("Cornell") in Ithaca, New York. In May 2000, I graduated from Cornell. I received a

Doctorate of Law.

5. In July 2000, I took and passed the New York Bar Exam. I am licensed to practice law in the State of New York.
6. From August 2000 through July 2002, I worked from the New York Court of Appeals - the highest appellate state court in New York - in the capacity of a judicial clerkship.
7. In July 2001, I took and passed the Texas Bar Exam. I am licensed to practice law in the State of Texas.
8. From August 2002 through present, I have been in private practice in Houston, Texas. I practice primarily in commercial and corporate litigation, in addition to appellate practice.
9. I have virtually no personal or professional relationships with anyone in the legal or judicial community of Angelina and Nacogdoches County, or East Texas in general.
10. During early Fall or late summer of 1996, I was contacted by the head of the Political Science Department at Stephen F. Austin regarding an opportunity to work for John Heath on a capital murder case in Angelina County. John Heath was a defense attorney who had contacted the department head seeking assistance. My participation would be part of a special course where I would receive college credit.
11. I met with John Heath regarding the opportunity to work on the capital murder case. Mr. Heath explained that I would work in the capacity of an academic intern

doing legal research, in addition to performing any other tasks necessary to defend the case. I accepted John Heath's offer, and I began working on the capital murder case.

12. John Heath expressed that he was very pleased with my work in the capital murder case. Mr. Heath invited me to attend hearings in the capital murder case.
13. In addition to working on the capital murder case, John Heath subsequently invited me to attend hearings and trials in other cases. I accepted the opportunity to attend and assist in other cases.
14. One of the cases that I was involved in outside of the capital murder case was another case in Angelina County involving an indictment for murder. Desiree Shaw, John Heath's client, was the defendant.
15. From the time the grand jury indicted Desiree Shaw through the trial in December 1996, I was extensively involved in the case. Mr. Heath authorized me to make copies for my personal working file, and also assigned me to develop a strategy of the case based on the facts and evidence. I attended the trial and assisted John Heath.
16. Since 1997, I have had virtually no contact with John Heath and Desiree Shaw. I have been contacted intermittently during this time by family members or supporters of Ms. Shaw regarding the status of her case.
17. Within the past few months, I have received correspondence from Desiree Shaw, Danny Burns (Ms. Shaw's present attorney), and friends and supporters of Ms. Shaw regarding a pending habeas petition.

18. Danny Burns forwarded me a substantial portion of the record for the habeas petition, which includes numerous affidavits. I have reviewed the petition and the accompanying record. I have also located and reviewed documents that I had in 1996 relating to this matter.
19. I have also reviewed the affidavit of John R. Heath, Sr., sworn to on March 31, 2003. John R. Heath, Sr. is the same John Heath that has previously been referenced in this affidavit.
20. The personal knowledge available to me is focused toward that part of the habeas petition requesting that a writ be granted on the grounds that Desiree Shaw claims the State withheld evidence favorable to her and that Ms. Shaw received ineffective assistance of counsel in this particular case.
21. I agree with John Heath's affidavit to the extent that he believes many of the affidavits contained in the record are irrelevant to any analysis whether a writ should be granted and a new trial ordered. Many of the affidavits are character affidavits from people averring that they have known Desiree Shaw for a number of years, her character, and that she could not have committed the crime which she was convicted.
22. Experience from even a lay viewpoint indicates that there are situations where a person who has a lengthy, proven criminal record of violence, is accused of a violent crime in which circumstantial evidence might hint at guilt, but the facts later conclusively prove that the person did not commit the crime. Also, situations exist where a person with no criminal record, a reputation for being

kind and generous within the community, is accused of an atrocious crime that no one believes the person would commit, but the person either admits to the crime or is conclusively proven to be the one who committed it.

23. I also agree with John Heath, in contrast to arguments and affidavits contained within the record I reviewed, that investigative work was done in this case prior to trial by Mr. Heath, myself, and Gerald Picchocki (a forensic expert/investigator). Any statements made that investigative work was not done in this case is inaccurate.
24. I must take issue with many of John Heath's statements made in his affidavit against his former client Desiree Shaw, and confirm other allegations or statements made by affidavits or arguments in the record I reviewed for the habeas petition.
25. John Heath states that Desiree Shaw's allegations "alleging that I rendered ineffective assistance as trial and appellate counsel are often repetitious and somewhat convoluted." Mr. Heath may have overlooked that fact that Ms. Shaw, who has no formal legal training, indicated in the record that she is doing much of the work related to the habeas petition on her own. In my experience as a judicial clerk in New York, pro se petitioners will often submit briefs that do not comport with the quality of professional legal standards. Part of my job was to search through pro se petitioner's briefs in detail to determine what the heart of their arguments really were. Many pro se petitioners, while not possessing exceptional legal skills, often make sound legal arguments.

26. John Heath states that "I was not 'ill' before, during, or after [Desiree Shaw's] trial." Mr. Heath, in fact, was ill at one point shortly before the trial. I do not remember what condition Mr. Heath had, but he was unable to leave his home. Mr. Heath called me and asked that I pick up a doctor's note. The doctor's note was necessary to present to the state district judge in Nacogdoches County at the time in order to relieve Mr. Heath from appearing at a scheduled hearing in another case. I picked up the doctor's note from Mr. Heath's doctor and delivered it to Mr. Heath's home. My observation was that Mr. Heath was in poor health at that time.
27. Mr. Heath also states that Desiree Shaw "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 . . . adequately support the reasonable strategy of trying this case without placing the defendant on the stand for cross-examination."
28. I would agree with John Heath from a professional viewpoint that any person involved in this type of situation, regardless of whether or not the person has been deemed a suspect, should consult a lawyer prior to making any statement to governmental agency, or anyone else. I fail to comprehend, however, how a lawyer referring to his former client Desiree Shaw's actions as "quite foolishly" in an affidavit is relevant to any cause regarding this habeas petition.
29. A lawyer owes certain duties to his or her client representation, and those duties do not stop after termination of the representation. Ms. Shaw has repeatedly and

consistently maintained her innocence before, during, and after trial. Therefore, nothing from Ms. Shaw's layperson's perspective would be foolish when she voluntarily agreed to meet with police to explain the circumstances surrounding her husband's death when she has consistently professed innocence.

30. The notion of Desiree Shaw not testifying never seriously came up before trial, and never arose during the trial. In fact, the only way Ms. Shaw was not expected to testify was if the defense would have moved for and obtained a directed verdict after the close of the State's case. John Heath and I prepared Ms. Shaw for trial testimony, including anticipated questions she might receive on cross-examination which would have easily clarified the "minor inconsistencies" Mr. Heath refers to in his affidavit.
31. Mr. Heath expressed to me, and I agreed, that Ms. Shaw would have made a very effective and compelling witness. After I received formal legal training, I will note that Mr. Heath also overlooks in his affidavit the fact that a criminal defendant's right to testify belongs exclusively to the defendant, which Mr. Heath did not inform Ms. Shaw before he unilaterally decided not to present a case. The decision whether to testify should have been made solely by Ms. Shaw, and she was willing and expected to testify.
32. After the close of the State's case, John Heath either forgot or overlooked asking the Court for a directed verdict and obtaining a ruling before unilaterally resting without presenting a case. This omission should be reflected in the transcript.

33. John Heath also states that "[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." This is inaccurate.
34. John Heath repeatedly expressed the view before, during, and after trial to Desiree Shaw that he had never seen a case like this where the evidence was utterly lacking in proof of the crime alleged. If Mr. Heath's viewpoint was that the science was against Desiree Shaw, in contrast to the generally accepted viewpoint of the defense team at that time, then he certainly did not express this viewpoint to her before he unilaterally decided not to present a defense.
35. John Heath did not fully comprehend the complex forensic issues involved in this case. The transcript will reflect when Mr. Heath noted to Lieutenant Charlie Harris on the stand that this was not an ordinary murder case involving a bar room shooting or something to that effect. The transcript will also reflect testimony from Diboll Police Department Lieutenant Charlie Harris that he sought the help of Texas Ranger Don Morris -- an extremely competent and shrewd law enforcement official -- because of the extreme complexity of the case.
36. Only after Texas Ranger Don Morris got involved in the case several days after the incident did an original, authentic document about the bathtub being dry appear in print. All other documents cannot properly be authenticated as being made on the date of the incident. Mr. Heath noted this fact when cross-examining Lieutenant Harris and the trial transcript will reflect that no one obtained evidence

on the date of the incident that the bathtub was dry.

37. John Heath initially asked me interview Gerald Piechocki, who would eventually be the defense's expert/investigator. I met Mr. Piechocki and gave him copies of Desiree Shaw's file. After he reviewed the file, he expressed serious problems with the scientific reports, spoliation of evidence at the scene, and the State's theory of the case. Mr. Piechocki also noted that a psychological autopsy had not been done to determine Royce Shaw's mental health prior to his death. Mr. Piechocki then discussed the matter with Mr. Heath, and Mr. Heath subsequently retained Mr. Piechocki.
38. Gerald Piechocki has a Bachelor of Science in Law Enforcement from Southwest Texas State University and a Master of Forensic Science from George Washington University in Washington, D.C. He also completed Fellowship Training at the Armed Forces Institute of Technology in Forensic Medicine. Mr. Piechocki joined the United States Air Force, where he served as a Special Agent for the Air Force Office of Special Investigations as a forensic specialist. Mr. Piechocki was also employed by the Cook County Medical Examiner's Office in Illinois, where he conducted hundreds of death investigations.
39. Before and during trial, Gerald Piechocki explained to John Heath the weaknesses of the State's theory in detail, backed by his analysis of the facts and interpretation of the scientific data, and that the death was consistent with suicide. Mr. Piechocki also noted that the State had not provided fingerprint evidence that could have proved outcome determinative in this case.

40. When confronted with the issue that the decedent Royce Shaw was happy immediately preceding the incident, Mr. Piechocki explained the concept which has a specific term or phrase that I cannot recall and cannot find in the notes I have available- that many suicide victims are often very happy or seemingly at peace immediately preceding the suicidal event because they have been suffering internally, but they have finally made a decision and are at peace. The transcript will reflect that Mr. Heath mentioned this term during his cross-examination of the State's expert of Michael Prodan, and Mr. Prodan acknowledged the term.
41. During my assistance of John Heath in this matter, I noticed that I repeatedly had to explain key parts of the State's theory based on the forensic evidence, and why they were severely flawed and could not hold up. Mr. Heath readily conceded that science was not his strong point.
42. Part of the State's theory of the case, which was introduced at trial and known to the defense before trial based on Texas Ranger Don Morris's examination of Ms. Shaw, was that the results from the gunshot residue test came back negative as to both Royce Shaw and Desiree Shaw. Ms. Shaw voluntarily submitted to a gunshot residue test at the time of the incident.
43. Based on reviewing the gunshot residue results with Gerald Piechocki, the only thing the State planned to rely on was the qualitative value of the word "negative." Negative, in a forensic scientific context, generally means nothing. Quantitative values are what was important.