

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

EX PARTE DESIREE SHAW

§ 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.

44. For example, in Texas a person is considered criminally "drunk" from a legal perspective if their blood-alcohol content is 0.08 percent or higher. Therefore, it is quite possible to describe a person as not being "drunk" if their blood-alcohol content is 0.07 or lower. The fact that a person is not "drunk," however, does not necessarily mean that alcohol is not present in their system. Several years ago, the legal limit in Texas was 0.10, so just a few years ago a person could be classified as not "drunk" if his or her blood-alcohol level was 0.09.
45. Likewise, two people can be "drunk," but one person can have a blood-alcohol level of 0.08, and another person can have a blood-alcohol of 0.2, which is extreme intoxication. In sum, simply placing qualitative values on scientific data in complex matters like this is of very little value.
46. Therefore, it is quite possible that, while Royce and Desiree Shaw both tested "negative" under whatever gunshot residue test was conducted, Royce's quantitative gunshot residue value would have been significantly higher, and Desiree's quantitative value would have been zero, thus precluding a theory that she could have fired a weapon on the date of the incident.
47. The fact that there might not have been a lot of gunshot residue on Royce Shaw's hands is consistent with the fact that the shell did not eject from the chamber, where a lot of gunshot residue is released in semi-automatic weapons. This was discussed prior to trial.
48. Also, there was no control or source/sampling method from the atomic absorption kit used to conduct the gunshot residue tests.

49. The trial transcript will reflect that Mr. Heath did not explain these significant distinctions in cross-examining the State's witnesses. This is consistent with the defense's trial strategy was that Gerald Piechocki would testify for the defense and explain all of the flaws in the State's theory based on a detailed analysis of the forensic evidence. As noted above, Mr. Heath unilaterally decided not to present a defense immediately after the State's rested its direct case, which also included not giving Desiree Shaw the informed choice of not testifying in her defense.
50. Gerald Piechocki would also have discounted the notion that the gun was "wrapped," another qualitative word used at every opportunity by the State as though it were a birthday present. Mr. Piechocki, in combination with Desiree Shaw's testimony, would have explained the entanglement of the gun given that:
- (1) Ms. Shaw and Royce Shaw had sexual intercourse on the night in question, requiring Mr. Shaw to get a new pair of underwear when one of their children, I believe their youngest son, came into the room later to sleep with them for awhile;
 - (2) numerous Emergency Medical Technicians arriving in their personal vehicles, in addition to other law enforcement officials, were in the room prior to the location being secured in addition to other law enforcement officials; and
 - (3) Desiree readily admits that she attempted to assist and resuscitate her husband after the fatal incident.
51. The State also did not disclose the results of the latent fingerprint tests, which could have precluded Desiree Shaw from firing the weapon on the date of the incident. The trial transcript will reflect that John Heath noted this omission of

- the fingerprint evidence at the very least during the defense's closing arguments.
52. If the fingerprint results were not consistent with Desiree Shaw's hands, then this exculpatory evidence should have been presented to the defense and certainly could have made a difference in the outcome of this case.
53. John Heath's statement that he and Gerald Piechocki interviewed Texas Ranger Don Morris, the Diboll Police investigators, and collected all available and relevant information prior to trial is to some extent accurate.
54. John Heath, Gerald Piechocki and I went to the Angelina County District Attorney's office one night prior to trial in order to look at physical evidence. Lieutenant Charlie Harris and Texas Ranger Don Morris were present. This was the first time information was revealed that the fired shell had not ejected from the chamber of the handgun that caused Royce Shaw's death.
55. After the State discovered that the defense had retained Gerald Piechocki as an expert, and in particular the questions Mr. Piechocki asked during the visit to the District Attorney's office which revealed significant problems with the State's forensic evidence and theory of the case, the State then produced Michael Prodan as an expert. Michael Prodan lives in California.
56. John Heath believed and openly stated that the evidence was firmly on the defense's side. If he held a contrary viewpoint, he never made such a statement to me or Desiree Shaw in my presence prior to unilaterally decided not to present a case for the defense. John Heath publicly confirmed that when he spoke to reporters following the trial. The December 6, 1996 edition of *The Lufkin Daily*

News reported that "Heath argued there was a lack of evidence to prove Ms. Shaw's guilt beyond a reasonable doubt, considering much of the evidence pointed toward suicide." A true and correct copy of portions of the December 6, 1996 article of *The Lufkin Daily News* is attached as Exhibit A.

57. The December 6, 1996 edition of *The Lufkin Daily News* also directly quotes John Heath as saying "I guarantee you there was nothing there - nothing, nothing, nothing - that proved a homicide" (Ex. A.)
58. I do not remember Desiree Shaw mentioning specific medication to me that her husband was taking, but she did mention to John Heath in my presence that Royce Shaw had recently had some type of surgery and had been recently taking medication that aided in his recovery.
59. Statements in the record and arguments have been made that John Heath viewed this case as political in nature, with a young assistant district attorney, David Wilson, who was trying to make a name for himself against a well-respected, high-profile, criminal defense attorney. Mr. Heath states that "[u]nder no circumstances, in this case or any other, have I ever thought of or articulated such a view." I can confirm that, on more than one occasion, Mr. Heath expressed such a view regarding this case.
60. During the relevant time of this trial, and currently, I acknowledge that John Heath enjoys a reputation as one of the prominent criminal defense attorneys in parts of East Texas. In 1996, he was one of the only attorneys in East Texas qualified to handle capital murder cases.

61. John Heath stated to me that this case was originally passed upon Clyde Herrington - the Angelina County District Attorney, and a man for whom Mr. Heath appeared to have a great deal of respect - who refused to try the case because of the weakness of the evidence.
62. John Heath stated to me and others in my presence that, after Clyde Herrington refused to prosecute the case, David Wilson, a younger Angelina County Assistant District Attorney, agreed to take the case in an effort to make a name for himself against an attorney of Mr. Heath's stature. Mr. Heath stated to me that Mr. Wilson's father was a prominent attorney, and that this case would be a step toward reaching the level that Mr. Wilson's father had achieved.
63. John Heath expressed the view that he did not have much respect for David Wilson given Mr. Wilson's youth, inexperience, and Mr. Heath's view at the time that the case lacked merit. Mr. Heath also did not like Mr. Wilson's pre-trial tactics. On more than one occasion, Mr. Heath was quite agitated by Mr. Wilson's pre-trial tactics.
64. For example, although it was within David Wilson's right not to allow the defense to review witness statements prior to a witness's testimony, he ultimately acquiesced to the defense's request to view the statements prior to trial, but only to make notes. John Heath then sent me to review the witness statements, and I took a tape recorder with me. The time Mr. Wilson set up to review the statements, however, did not adequately allow for me to review all the statements and take notes, and this was obvious once I looked at the volume of statements.

So I simply began to read the witness statements into the tape recorder verbatim to make up for the limited time.

65. When Mr. Wilson came by and saw what I was doing, he threatened to shut the review process down. I called Mr. Heath, who became irate at Mr. Wilson. Eventually, we called a local attorney's secretary who assisted me in getting all the witness statements reviewed.
66. At trial, David Wilson was, in contrast to John Heath's viewpoint, very much a competent litigator and trial attorney. Mr. Wilson had a firm command of the facts of the case as he saw them in his favor, had good presence in the courtroom, developed a positive rapport with jurors (including making a self-deprecating joke when he had problems operating the videotape player at one point), presented witnesses that characterized the facts in his favor accordingly, and generally appeared extremely organized and had a plan to present the case in the State's favor and take the case where he wanted it to go.
67. At trial, John Heath still appeared to underestimate the younger and less-experienced David Wilson.
68. David Wilson also was able to get in hearsay statements from witnesses that Royce Shaw, the declarant, made statements indicating that he would be filing for divorce soon, over John Heath's objection. Mr. Heath did not research or ask me to research this hearsay issue prior to trial. Although the defense knew that the State intended to introduce these statements prior to trial, Mr. Heath simply stated to me and Desiree Shaw that there was no way the statements would come in at

trial. Mr. Heath appeared stunned when the trial judge allowed the testimony in after Mr. Wilson effectively argued his point based on an annotated case from an evidentiary handbook.

69. John Heath objected to the hearsay testimony at trial, but judging from the Court of Appeals decision which affirmed Desiree Shaw's conviction, Mr. Heath did not appear to raise that issue as a point of error on appeal. I have attached a true and correct copy of the Westlaw version of the Court of Appeals decision as Exhibit B.
70. John Heath also did not analytically attack the conclusory assertions of the State's expert witness, Michael Prodan, that the scene was "altered" or "staged" by methodically challenging every piece of evidence that Mr. Prodan used in making his conclusions. The Court of Appeals found Mr. Prodan's testimony and reasoning behind his conclusions as "circuitous." (Ex. B.)
71. Mr. Heath expressed to me that the jury would not believe Mr. Prodan because he came all the way from California, and the jury would figure out that if David Wilson had to look all the way to California for someone to say what Wilson wanted them to say, then the expert's opinions would not be believable. The trial transcript should reflect that Mr. Heath mockingly told Mr. Prodan to have a safe trip back to California at the end of cross-examination.
72. Regarding allegations that John Heath neglected his duty in picking a jury, the "employee, a non-lawyer, present to listen for responses of the venire persons" is Mr. Heath's younger brother. In no way was Mr. Heath's younger brother

competent or qualified to play a major role in the selection of jurors given the magnitude of this trial.

73. John Heath's assertion that the State would have presented evidence that Desiree Shaw had an "inappropriate" relationship with a patient that, in his view, would have "devastated" Ms. Shaw's case as justification for not placing her on the stand for cross-examination is also inaccurate.
74. As noted above, John Heath's position was that the State's evidence was extremely weak, circumstantial, and lacking in merit. Also, as noted above, Desiree Shaw's right to testify belonged exclusively to her; and Mr. Heath could not unilaterally make that decision for her, which he did and impliedly concedes this fact in his affidavit.
75. The December 5, 1996 edition of *The Lufkin Daily News* noted that "Desiree Shaw's defense attorney Wednesday rested his case about one minute after the prosecution rested its case against the Diboll woman, who is charged with murder in connection with the shooting death of her husband." (emphasis added). A true and correct copy of portions of the December 5, 1996 edition of *The Lufkin Daily News* is attached as Exhibit C.
76. The timing noted in the December 5 edition of *The Lufkin Daily News* coincides with several affidavits and arguments that, after the State rested its direct case, John Heath ushered Desiree Shaw and others to the public seating area of the courtroom, stated that the defense should rest now, and went back to the defense table and rested without presenting a defense.

77. John Heath never expressed the view before or during trial that Desiree Shaw would not have been a good witness. In fact, Ms. Shaw was prepared to testify at trial, and Mr. Heath believed that she would make an effective witness in explaining to the jurors exactly what happened. The general consensus from Mr. Heath and the defense's perspective overall was that Ms. Shaw was intelligent and would hold up well on cross-examination.
78. In addition, the defense had an insight on what Ms. Shaw's cross-examination would be like because of the interview Texas Ranger Don Morris conducted with Desiree Shaw, where he confronted her with what would become the State's theory of the case.
79. If John Heath did not believe Desiree Shaw would have made a good witness, then he owed her a duty to inform her of that. If Ms. Shaw decided to testify in spite of advice to the contrary, then Mr. Heath had to respect that decision or attempt to withdraw from the case.
80. Regarding the "inappropriate" relationship that John Heath devotes a substantial part of his affidavit, or alleged "affair" as described in other statements, between Desiree Shaw and her patient Jerry Hilburn, Mr. Heath again makes statements and assertions that, as discussed below, are simply inaccurate.
81. Jerry Hilburn attempted suicide prior to the events related to this trial. Mr. Hilburn placed a shotgun to his face, pulled the trigger, and literally blew his face off and survived.