

No. 21-5004

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

BO DANIEL SHAFER

— PETITIONER

(Your Name)

vs.

THE STATE OF TEXAS

— RESPONDENT(S)

FILED

JUN 19 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT
OF TEXAS HOUSTON DIVISION

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BO DANIEL SHAFER #1988007

(Your Name)

TDCJ-CID/ LEWIS UNIT

P.O. BOX 9000

(Address)

WOODVILLE, TEXAS 75990

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. DID THE FEDERAL DISTRICT COURT ERRONEOUSLY CONCLUDE THAT BO SHAFFER'S IAC CLAIM REGARDING HIS TRIAL COUNSEL'S PERFORMANCE DURING VOIR DIRE WAS WITHOUT MERIT?
2. DID THE FEDERAL DISTRICT COURT ERRONEOUSLY CONCLUDE THAT SHAFFER'S IAC CLAIM REGARDING HIS TRIAL COUNSEL'S PERFORMANCE AS TO THE OUTCRY WITNESS IS WITHOUT MERIT?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

SHAFER V STATE, 2007 WL 716402, No.14-15-00372-CR (Tex.App-Houston[14th Dist.] 2017, np pet).

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

HOWARD V STATE, 941 S.W.2d 102,108(Tex.Crim.App.1996)	pg.7,8
MORGIN V ILLINOIS, 504 U.S. 719,729(1992)	pg.8
STRICKLAND V WASHINGTON, 104 S.Ct. 2052 (1984)	pg.8,9

STATUTES AND RULES

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.072	pg.10
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 22, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including 150 days (COVID-19) (date) on June 20, 2021 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1. THE SIXTH AMENDMENT OF THE UNITED STATE'S CONSTITUTION:
EFFECTIVE ASSISTANCE OF COUNSEL.**
- 2. THE FOURTEENTH AMENDMENT OF THE UNITED STATE'S CONSTITUTION:
DUE PROCESS.**

STATEMENT OF THE CASE

Bo Shafer was charged with the offense of continuous sex abuse of a child, to which he'd plead "not guilty" before a jury. (CR-69). After hearing the evidence and arguments of counsel, a jury found Shafer guilty as charged in the indictment. (Tr.vol.12,pg.4). On March 18, 2015, after a hearing on punishment, the jury sentenced Shafer to 26 yrs imprisonment. (CR-26-27);(Tr.vol.13.pg.144-47).

On February 23, 2017, the Fourteenth Court of Appeals affirmed Shafer's conviction in an unpublished opinion. (see) Shafer v. State, 2007 WL 716402, No.14-15-00372-CR (Tex.App-Houston[14th Dist] 2007, no pet). Shafer did not file a petition for discretionary review.

On February 6, 2019, Shafer filed an application for a state writ of habeas corpus challenging his conviction. The Criminal Court of Appeals ultimately denied Shafer's application without a written order based on the findings of fact made by the trial court on May 2, 2018. Shafer filed a Federal habeas corpus writ (2254) with the Southern District of Texas Houston Division on May 8, 2018, it was denied. Shafer filed a notice of appeal with that court for a Certificate of Appealability, which was denied on January 22, 2021.

SUMMARY OF THE RELEVANT FACTS

Bo Shafer along with his wife (Jennifer), attended his daughter's cheerleading recital on May 30, 2014. (Tr.vol.10,pg.176-77). Ashely who is the complainant's mother, agreed to allow Shafer and Jennifer take Hannah with them once the recital was over. (Tr.vol.8,pg.151). The complainant (Hannah) did not go home with her father (Shafer) which lead to a heated argument between Shafer and Ashely. A motion for contempt

of court was filed on the same morning of the cheerleading recital by Shafer. The reason Shafer had filed the motion for contempt of court was because, Ashely repeated violated their custudt order regarding Hannah. (Tr.vol.6,pg.39-42).

Supposely, it was after the cheerleading recital that Hannah made an outcry to her mother (Ashely) while at the Sonic Drive In.(Tr.vol. 6,pg.39-42). Hannah was taken to the hospital as a result of her outcry, so that viginal examination could be done. The emergency room did not find any medicalevidence consistant with Hannah being sexually assaulted.(Tr.vol.6,pg,148). Also, a CPS worker did a cursory exam which affirmed there were no acute injuries.(tr.vol.6,pg.142).

Ultimately, Shafer was charged and indicted on October 20,2014, for the offense of continuoussexual assault of a child. the indictment allege that on March 1,2014, Shafer committed aggravated sexual assault of the complainant (Hannah). (CR-69).

At trial, the defense presented the jury with the following evidenceto show that Shafer was innocent of the allege charges that were brought against him: Dr. Wheeler was an obstetrician/ gynecology who was an expert for the defense. Dr. Wheeler reviewed all of Hannah's medical records and found "not one" shred of medical evidence to support the allege allegations in this case. (Tr.vol.9,pg.118). Besides Dr. Wheeler, the defense called 10 friends and family members who testified about Shafer's good character and trustworthiness with children. For example, Ricky George , is a regèstered nurse and cousin of Shafer, who testified that he did not believe Shafer had committed the crime or offense. (Tr.vol.10,pg.19). There were no other evidence that came out over the course of the trial to establish Shafer's guilt. Shafer's trial counsel was able to show that Hannah's mother was a dishonest woman.

Also, that Ashely had threaten to kill Shafer prior to the incident. Ashely was resentful towards Shafer, because he had sent her mother to prison for theft of his check book.(Tr.vol.8,pg.151). Shafer took the stand in his own defense and testified that Ashely sent him a text message at 6:50pm on the night of the recital. The text message said that she knew what he had done to Hannah.(Tr.vol.6,pg.106-107). Through the testimony of Shafer it was revealed that the cheerleading recital had ended between the time of 7:00/7:30 which mean, Hannah could not have made her outcry at the Sonis Drive In.(Tr.vol.10,pg.180-181).

The state presented the testimony of Hannah during the innocent and guilt phase of trial. She basically testified that she did not know , the things her father had done were bad to her.(Tr.vol.6,pg.53). Shafer wanted to bring evidence before the jury that Hannah had been expose tp porngraphy as well as, found naked under another girl who lived next door, but the state filed a motion to In Limine which the court had granted. And because the motion was granted, Shafer was not able to mention anything about the encounter Hannah had with the girl next door or about the porngraphy.(Tr.vol.10,pg.151-152). This made it difficult the sexual conduct that she alleged.(Tr.vol.2,pg.16).

There were evidence in this case that the jury did not get to hear which would have clearly showed that Shafer was not guilty of this crime. For instance, the outcry was not made at the Sonic Drive In, because the GPS placed Hannah and her mother at the cheerleading recital. Also, there were Shafer's work time sheets that place him at him at work during the times Hannah claim she was exually assaulted.

Unfortunately, the jury found Shafer guilty and assessed punishment at 26 years in TDCJ-Institutional Division.(CR-26).

REASONS FOR GRANTING THE PETITION

This writ of certiorari should be granted for the following reasons:

1. THE FEDERAL DISTRICT COURT ERRONEOUSLY CONCLUDED THAT BO SHAFER'S IAC CLAIM REGARDING HIS TRIAL COUNSEL'S PERFORMANCE DURING VOIR DIRE WAS WITHOUT MERIT.

First, the State and the Federal Habeas Court in this case fail to entertain Bo Shafer's motion for evidentiary hearing which made the Habeas record incomplete, because trial counsel did not answer to the IAC claims that were brought against him. At the bare minimum, the Federal District Court should have ordered trial counsel to answer the allegations by affidavit. Rather, the Federal District Court based its conclusion on an assumption. It's uncertain whether trial counsel's omission was apart of some trial strategy without hearing from trial counsel himself.

Bo Shafer's trial counsel had an obligated duty to question these prospective jurors who did not believe that a child can be easily influenced in making up allegations of sexual abuse. The Court in *Howard* held: "a defendant requires the guiding hand of counsel at every step of the proceeding". (see) *Howard v State*, 941 S.W.2d 102,108 (Tex.Crim. App.1996).

Nonetheless, Bo Shafer's counsel fail to provide him with the necessary guiding hand that was needed jury selection, because venire members 14,16,17 and 23 had all became jurors without being questioned if they could set aside their tendency to believe a child would not lie about being sexually abused and judge Bo shafer's case on its own facts.

Those venire members had favored the prosecution before the trial had began. Bo Shafer's defense at trial was that the complainant's mother had pressured her to make up false allegations that her father (Bo Shafer) had sexually assaulted her. (see) (Doc.18, pg.6).

Trial counsel deprived Bo Shafer of an adequate voir dire in order to identify those venire members who were unqualified to be jurors. (see) **Morgan v. Illinois**, 504 U.S. 719, 729 (1992). Gauging trial counsel's performance according to what was said in **Morgan**, it's clear to see that counsel's performance was deficient for not using his peremptory strikes or challenge for cause those who were willing to believe the complainant would not lie about being sexually abused.

The **Strickland**'s test was demonstrated by Bo Shafer in both his state and federal writ of habeas corpus. In the process showed the Habeas Courts how his trial counsel's performance was deficient. Moreover, Bo Shafer showed how that deficient performance had prejudiced him during jury selection. (see) **State memorandum in support of 11.07 Habeas Corpus writ**, pg.6).

The recommendation that was made was incorrect, because Bo Shafer's IAC claim is not without merit as the Habeas judge concluded. (see) (**magistrate judge's recommendation**, pg.6-9).

Thus, the presumption of correctness that is owed to the state Habeas Court's findings of fact should not apply in this case, because the Habeas record is incomplete since it does not possess an answer from trial counsel as to his reasoning behind failing to strike those venire members who favored the prosecution.

Therefore, this Honorable Court should issue a writ of certiorari on the basis that Bo Shafer has shown a denial of ineffective assistance of counsel.

2. THE FEDERAL DISTRICT COURT ERRONEOUSLY CONCLUDED THAT
SHAFTER'S IAC CLAIM REGARDING HIS TRIAL COUNSEL'S PER-
FORMANCE AS TO THE OUTCRY WITNESS WAS OUT MERIT.

As the previous issue, the State and Federal Habeas Court in this case fail to entertain Bo Shafer's motion for evidentiary hearing which made the Habeas record incomplete, because trial counsel did not answer to the IAC claims that were brought against him. At the bare minimum, the Federal District Court should have ordered trial counsel to answer the allegations by affidavit. Rather, the Federal District Court based its conclusion on an assumption. It's uncertain whether trial counsel's omission was apart of some trial strategy decision without hearing from trial counsel himself.

The outcry evidence in this case was inadmissible, since it did not meet the requirements of the Texas Code of Criminal Procedures Article 38.072. Ineffective counsel was shown by Bo Shafer in accordance to the two prong test that is found in *Strickland v Washington*, 104 S.Ct. 2052 (1984). (see) Memorandum in support of Bo Shafer's State Habeas Corpus writ, pg.6-9). The presumption of correctness should not have applied to the State findings of fact, because the Habeas record was in complete in regards to trial counsel's answer concerning this IAC Claim. Trial counsel never got the opportunity to explain why he did not object to the state using this inadmissible outcry evidence.

According to the magistrate judge; he basically agreed with Bo Shafer that trial counsel's performance was deficient for failing to object to the outcry testimony in this case, (see)(Magistrate judge's recommendation, pg.10). however, the magistrate judge does not believe that Bo shafer was able to meet the second prong of the Strickland's

test by showing perjudice. Because trial counsel fail to object to the inadmissible outcry evidence, it prejudice Bo Shafer's defense. The State was allowed to use the inadmissible outcry testimony from the compainant's mother in order to bolster the complainant's testimony during trial. And as a result, Bo Shafer's defense was prejudiced, especially since Bo Shafer's defense was that the mother of the complainant pressed her to make up false allegations that Bo Shafer had sexually assaulted her. The complainant's credibility was vital to the prosecution in obtaining a conviction against Bo Shafer. The evidence in this case was basically nothing more than, "he say she say" that came down to credibilty. Nevertheless, the assessment made by the magistrate judge regarding the second prong of the Strickland's test was unreasonable. Clearly, Bo Shafer's was prejudiced by the State using the complainant's mother's outcry testimony. The impact of a mother's testimony about her daughter being sexually abused is powerful and this evidence alone is enough to move a jury mentally and emotionally. The prejudice in this case was overwhelming to the point that Bo Shafer did not receive a fair trial. Obviously the magistrate judge got it wrong, because trial counsel's deficient performance allowed the State to use a powerful piece of evidence against his client.

Thus, had trial counsel made the necessary objection, ,then the trial court would have committed error by admitting an outcry testimony that did not meet the requirements of Texas Code of Criminal Procedures Article 38.072.

Therefore, Bo Shafer request this Honorable Court to grant this writ of certiorari on the basis that the Federal District Court was wrong in concluding that Bo Shafer did not show prejúdice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bo Daniel Shafar

Date: 6/19/2021