**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 94-50143**

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**CHERYL DAVIS,**

**Petitioner-Appellant,**

**VERSUS**

**C. CRAIG, Warden,**

**Respondent-Appellee.**

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Appeal from the United States District Court
for the Western District of Texas

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( W-93-CV-153 )

(July 25, 1995)

Before KING, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:[*]

Petitioner Cheryl Davis appeals from the district court's denial of her application for writ of habeas corpus under 28 U.S.C. § 2254, which challenged her 1990 Texas conviction for attempted capital murder of a police officer. We affirm.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

## RELEVANT FACTS

At 11:00 a.m. on the morning of October 7, 1988, approximately twenty police officers from at least four state and federal law enforcement agencies went to the home of David Mangrum in West, Texas to execute a federal evidentiary search warrant for evidence of narcotics trafficking and manufacture. Earlier that morning the officers met for a briefing and planning session. Officers Wilkerson, Radney, Bennett, Herbert and Arp of the Texas Department of Public Safety, Officer Baier of the Waco Police Department and Officer Watson with the Drug Enforcement Agency were assigned to be the "entry team." Other officers were to be placed around the perimeter to provide cover and backup support. The entry team was given raid jackets and plans were made concerning what weapons the officers would carry, and in what order they would enter the house.

On approach to Mangrum's rural residence, the truck carrying the entry team skidded in loose gravel, nearly colliding with the front porch, and throwing the four officers in the bed of the truck off balance. As they recovered their balance, the officers abandoned the truck and approached the front door screaming "police officers, search warrant." Officer Wilkerson was the first to enter, armed with a 12 gauge shotgun, a 9 mm high powered pistol and a .44 magnum pistol. Officer Wilkerson entered into a living room which was joined to a bedroom by a pair of french doors on the wall to his left. The french door on the left was closed and the french door on the right was open. The glass panes on both doors were painted over, which precluded any view of the room beyond from

the front door. Wilkerson approached the open door and turned in to face the room, observing David Mangrum in what he described as a combat-ready firing position, with legs crossed and both hands steadying a pistol in the direction of the door. Cheryl Davis was observed sitting shoulder to shoulder with Mangrum, also facing the doorway. There were at least four guns on the bed with Mangrum and Davis. At that instant Mangrum shot Wilkerson in the arm with the 9 mm pistol and Wilkerson was forced to retreat to the adjoining kitchen.

Meanwhile, the other officers, who had followed Wilkerson into the residence, observed that he was shot or heard him scream that he was shot and began "laying down fire" into the bedroom through the closed french door to provide cover for Wilkerson and to make their approach to the bedroom possible. Officer Radney, who was second to enter the house behind Wilkerson, fired twice with a shotgun through the closed french door into the bedroom. Officer Bennett, who followed Radney into the house, fired approximately three shots through the closed french door with a 9 mm pistol, one shot at Mangrum's dog, and then six or seven additional shots through the closed french door as he approached the open doorway. Officer Herbert, who entered fourth, fired twice through the closed french doors. Officer Arp, who entered fifth but was already in the house when Wilkerson was shot, fired between five and seven shots through the closed french door. Officer Baier, who was outside the door, heard the shot from the bedroom and stepped inside to fire two shots through the closed french door. Officers

Radney, Bennett and Herbert reached the doorway and assembled into a firing formation.

Officers Radney, Bennett and Herbert all testified that, when they reached the doorway, Mangrum was still in a firing position, aiming the gun at the open doorway. Davis was observed facing away from the officers, on her knees, and leaning slightly forward, holding a "long gun," which was later identified as a loaded shotgun, in her right hand. The stock and barrel of the gun were visible on both sides of her body. As the officers arrived at the door, she pushed up with her left hand and began turning toward the officers with the weapon. The officers responded to the dual threat presented by Mangrum and Davis with more gunfire. Officer Radney shot six additional shots into the bedroom from the open door. Officer Bennett shot twice through the open door, injuring Mangrum. Officer Herbert fired five shots through the open door; at least two of those shots were fired at Davis. At some point Officer Wilkerson also returned from the kitchen and fired a single shot into the bedroom from his shotgun with his left (uninjured) hand. One of the main issues at trial concerned whether Mangrum fired a second shot at the officers during this exchange. Two of the officers testified that they either heard or saw Mangrum fire a second shot, but the physical evidence was conflicting.

When the shooting stopped, Mangrum was dead and Davis was seriously injured, with bullet wounds to her right inside elbow, her left shoulder and a single bullet injury affecting both the left side of her jaw and her neck. When Officers Herbert and Baier

entered the bedroom, she was lying face down on the bed, but moving, with her hands and the shotgun underneath her body. Officer Baier, who removed the shotgun from under her body, testified that he had to jerk it, as if she were still clutching the gun.

**PROCEDURAL HISTORY**

Davis was convicted of attempted capital murder of a police officer in the 54th Judicial District of McLennan County, Texas and sentenced to thirty-five years in prison. Her conviction was affirmed on direct appeal and the Texas Court of Criminal Appeals denied her petition for discretionary review without written opinion. Davis v. State, No. 10-90-017-CR (Tex. App.--Waco 1991, writ denied). Davis' single state habeas petition was likewise denied, without an evidentiary hearing or written opinion, in April 1992.

Davis then filed the instant § 2254 habeas corpus petition, claiming that numerous trial errors denied her constitutional right to due process of law and effective assistance of counsel. Specifically, Davis alleged that: (1) her state court indictment was defective for failure to allege an essential element of the offense; (2) that a fatal variance existed between the state court indictment and the proof at trial; (3) that the trial court erroneously refused to instruct on self-defense; (4) that the State's evidence at trial was incredible in that it defied physical laws; (5) that there was insufficient evidence to support her conviction; (6) that the trial court erroneously admitted certain

prejudicial opinion testimony and evidence of narcotics found at the scene of the crime; and (7) that trial counsel's failure to call a forensic expert rendered his assistance constitutionally ineffective. After the Warden moved for summary judgment, a federal magistrate recommended that the motion be granted and that Davis' petition for writ of habeas corpus be denied. Davis filed timely objections. The district court, reviewing *de novo*, adopted the magistrate's findings without a hearing and dismissed Davis' petition. Subsequently, the district court granted a certificate of probable cause and Davis appealed. She is now before this Court *pro se* and *in forma pauperis*, pursuant to 28 U.S.C. § 2253.

We review the district court's grant of summary judgment *de novo*, applying the same standard as did the district court. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988).[1] Having reviewed each of Davis' constitutional claims, we conclude that summary judgment was appropriate and therefore affirm.

**INDICTMENT ISSUES**

The indictment charging Davis with attempted capital murder states that Davis:

> [D]id then and there, with specific intent to commit the offense of Capital Murder of [seven named officers],

[1]In this case there are no state fact findings entitled to a presumption of correctness under § 2254. Therefore, all facts and inferences will be resolved in a light most favorable to Davis, the non-movant. See Valles, 835 F.2d at 127.

> intentionally shoot at [seven named officers], with a deadly weapon, to-wit: a firearm, and the said [seven named officers] were then and there peace officers who were acting in the lawful discharge of an official duty and who the defendant knew were peace officers, which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended.

Davis claims that her state court indictment is fatally defective for failure to allege an essential element of the offense of attempted capital murder.[2] The intent to cause death, Davis argues, which encompasses both the required culpability and the required result of the crime alleged, is not sufficiently charged by the allegation that she had the "specific intent to commit the offense of Capital Murder." See Hamling v. United States, 94 S. Ct. 2887, 2907 (1974) (indictment is sufficient if it alleges facts necessary to prove the offense, bar a second prosecution for the same conduct, and give the defendant notice of the charged offense); see also TEX. CODE CRIM. PROC. art. 21.03 (Vernon 1989) (indictment must include everything that is required to be proven). Davis also maintains that she is entitled to relief because there was a material variance between the act alleged in the indictment

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[2]Texas Penal Code §19.02(b)(1) defines murder as follows: "[a] person commits an offense if he intentionally or knowingly causes the death of an individual." Texas Penal Code §19.03(a) defines capital murder as follows:

> A person commits an offense if he commits murder as defined under Section 19.02(b)(1) of this code and: (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman.

Texas Penal Code §15.01(a) defines attempt as follows:

> A person commits an offense if, with the specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

and the subsequent proof at trial. The indictment alleges that Davis fired upon the officers, whereas at trial there was no such proof and she was convicted instead as a party to Mangrum's attempted offense. The Warden responds that both issues are beyond the scope of federal habeas review in this case. We agree.

Federal habeas corpus relief based on a prisoner's challenge to her indictment is not appropriate unless the indictment was so defective that the convicting court had no jurisdiction. Williams v. Collins, 16 F.3d 626, 637 (5th Cir.), cert. denied, 115 S. Ct. 42 (1994); Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985); Liner v. Phelps, 731 F.2d 1201, 1203 (5th Cir. 1984); Branch v. Estelle, 631 F.2d 1229, 1233 (5th Cir. 1980). This Court must give "due deference to the state court's interpretation of its own law that a defect of substance in an indictment does not deprive a state trial court of jurisdiction." McKay v. Collins, 12 F.3d 66, 69 (5th Cir.), reh'g granted on other grounds, 12 F.3d 70 (5th Cir.), cert. denied sub nom., Williams v. Scott, 115 S. Ct. 157 (1994). Texas courts have held that failure to include an essential element of the offense charged does not deprive a trial court of jurisdiction. Id. (citing Struder v. State, 799 S.W.2d 263 (Tex. Crim. App. 1990); see also State v. Oliver, 808 S.W.2d 492, 493-94 (Tex. Crim. App. 1991); Rodriguez v. State, 799 S.W.2d 301, 302-03 (Tex. Crim. App. 1990) (an indictment that fails to allege an essential element is nevertheless sufficient to confer jurisdiction). Moreover, once the state's highest court has reviewed the indictment and found it sufficient to vest

jurisdiction, further review by the federal habeas court is precluded. Alexander, 775 F.2d at 598; Liner, 731 F.2d at 1203; see also McKay, 12 F.3d at 68-69. By denying Davis relief on habeas corpus, the Texas Court of Criminal Appeals has necessarily, though not expressly, held that Davis' indictment is sufficient to vest the Texas trial court with jurisdiction. See id. at 68-69; Alexander, 775 F.2d at 599. Thus, federal habeas review of Davis' claims related to the adequacy of her indictment is precluded.

**SELF-DEFENSE INSTRUCTION**

Davis claims that the trial court's refusal to give an instruction on self-defense violated her constitutional right to due process of law. The trial court's refusal to issue the requested instruction was not error unless there was evidence from which a reasonable jury could have found in Davis' favor on the theory of self defense. Mathews v. United States, 108 S. Ct. 883, 887 (1988). Further, to prove constitutional error cognizable under § 2254, Davis must also demonstrate that the instruction rendered her trial fundamentally unfair in violation of the Due Process clause. Henderson v. Kibbe, 97 S. Ct. 1730, 1737 (1977). Finally, Davis' burden is even heavier in this case because she challenges the trial court's refusal to give a requested instruction, rather than any misstatement of the law. Id. at 1737 (omission or incomplete instruction less likely to be prejudicial than misstatement of law).

Under Texas law a person is justified in using force against another when she reasonably believes that force is immediately

necessary to protect herself from another's use of unlawful force. TEX. PENAL CODE §9.31(a) (Vernon 1994). The use of force to resist an arrest or search is justified only if, before the actor offers any resistance, the peace officer uses or attempts to use greater force than is necessary. TEX. PENAL CODE § 9.31(c)(Vernon 1994).

Davis contends she was entitled to a self-defense instruction because she received a shotgun wound to the neck and jaw while she was facing the officers and before she had taken any action to arm herself. The record does not support her claim. Officers Radney, Bennett and Herbert all testified that Davis was facing away from them at the time they reached the doorway. Although Wilkerson testified that he returned from the kitchen and fired a single shot into the bedroom, the record does not support the inference that this occurred before the other three officers reached the open door to the bedroom. Indeed, it appears from the record that the three officers reached the doorway and began shooting almost immediately after Wilkerson was shot and while he was still in the kitchen changing his weapon from the right hand to the left. Wilkerson testified that, when he returned from the kitchen, he saw Mangrum being shot by one of the other officers.

The only witness to testify concerning Davis' wounds was Dr. Covington.[3] Covington did testify that the location of the bullet lodged in the left side of Davis' neck indicated that she was facing her attacker when the shot was fired. However, he also

[3]Dr. Covington treated Davis' wounds to the shoulder and elbow. His testimony concerning the wound to her jaw and neck was based on his recollection of her medical record.

testified that her wounds could be consistent with the officers' testimony about Davis' position as demonstrated by the prosecutor, provided that her head was turned toward the doorway. Beyond this inconsistency, which was resolved at trial, Davis' counsel did not further develop the theory of self-defense by questioning either the ballistics expert or the physics professor, both of whom were called by the defense and both of whom testified about bullet trajectory and other physical evidence related to the issue of whether Mangrum fired a second shot.

The record does not support Davis' claim that she received a shotgun blast to the face before she reached for the shotgun. There is no other evidence that would support the finding that the officers engaged in unlawful force. Because the evidence was insufficient as a matter of law to allow Davis to prevail on a theory of self-defense, the trial court did not err by failing to give that instruction and the district court properly granted summary judgment on that claim.

For similar reasons, Davis' claim that the evidence defies physical laws is equally unavailing. As demonstrated by the prosecutor at trial, Covington's testimony that Davis' head was facing her attackers and the officers testimony about her posture while turning with the gun were not mutually inconsistent. A mere conflict in testimony does not make one version of events impossible and the trier of fact was entitled to accept Dr. Covington's assessment that Davis' wounds were consistent with the officers' testimony.

**SUFFICIENCY OF THE EVIDENCE**

Davis contends that the evidence was insufficient to support her conviction as a party to David Mangrum's attempt on Officer Wilkerson's life.[4] A prisoner is entitled to § 2254 relief on a challenge to the sufficiency of the evidence used to convict her if, based upon the evidence adduced at trial, and viewing the evidence in the light most favorable to the prosecution, no reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979); Valles v. Lynaugh, 835 F.2d 126, 128 (5th Cir. 1988).

Because Davis was convicted as a party to David Mangrum's conduct, the State was required to prove both (1) that Mangrum committed attempted capital murder, and (2) that Davis, acting with the intent to promote or assist Mangrum's offense, encouraged, directed, aided or attempted to aid his attempt on Officer Wilkerson's life. Tex. Penal Code 7.02(a)(2) ("a person is criminally responsible for the offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense"). The State satisfied its burden to prove each element of Mangrum's offense beyond a reasonable doubt. A person commits attempted

[4]Before submission, the prosecution elected to submit only the issue of whether Davis was party to Mangrum's attempt on Officer Wilkerson's life. Offenses against the other officers were not submitted to the jury.

capital murder if, acting intentionally or knowingly, he attempts to cause the death of an individual who the offender knows is a peace officer, when that officer is acting in the lawful discharge of an official duty. See TEX. PENAL CODE § 19.02(b)(1) (defining murder); § 19.03(a)(1) (defining capital offenses) (Vernon 1994). Attempt is defined as an act, taken with the specific intent to commit the offense, which tends but fails to effect commission of the offense. TEX. PENAL CODE § 15.01(a). Mangrum shot and wounded Officer Wilkerson, while he was executing a valid evidentiary search warrant. See Godsey v. State, 719 S.W.2d 578, 580-84 (Tex. Crim. App. 1986) (en banc) (deliberately pointing gun at police officer sufficient to demonstrate intent to kill and an act amounting to more than mere preparation to commit the offense of attempted murder, although offender never fired a shot because his actions were terminated by officer gunfire). Despite a noisy arrival and numerous announcements that police officers were entering the residence, Mangrum had the time and presence of mind to secure a deadly weapon and assume a combat position for firing before Wilkerson, who was wearing a conspicuous police raid jacket, entered the open doorway to the bedroom. We conclude that any juror could have reasonably found every element of Mangrum's offense beyond a reasonable doubt.

Although the issue is closer, the State also satisfied its burden to prove that Davis acted with the intent to assist Mangrum's offense and that she acted to aid or attempted to aid that offense. Participation in an offense may be inferred from the

circumstances and need not be shown by direct evidence. Beardsley v. State, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987). Although presence at the scene of the crime alone is not sufficient to prove liability as a party to the offense, it is a factor that may be considered along with other evidence. Id.; Barron v. State, 566 S.W.2d 929, 932 (Tex. Crim. App. 1978). In determining whether Davis was criminally responsible for Mangrum's conduct, the jury was entitled to look at events occurring before, during and after the offense. Cornejo v. State, 871 S.W.2d 752, 755-56 (Tex. App. Houston [1st Dist.] 1993, pet. ref'd).

The evidence showed that when the entry team officers arrived at Mangrum's house, their truck skidded in the gravel and almost hit the house. As the officers disembarked the truck, they began announcing the identity and their purpose. Each of the officers was wearing a raid jacket that identified them as police officers. Between the time the officers arrived and the time that Wilkerson entered the open doorway to the bedroom, Mangrum had time to arm himself with a 9 mm pistol and assume a combat-ready firing position. There were at least three other guns on the bed in which both Mangrum and Davis were sitting shoulder to shoulder when Officer Wilkerson stepped into the open doorway. Almost immediately after Mangrum shot Wilkerson, Davis is seen holding a loaded double-barrel shotgun and turning towards the doorway where four officers were standing. She did not cease her movement until she was stopped by police gunfire. After the gunfire stopped, Davis is seen still clutching the shotgun beneath her body. Davis

was not a stranger to the house. Although it was disputed whether she was living in the house when the warrant was executed, it was undisputed that had lived there with Mangrum as recently as the year before the offense.

Davis claims that the spontaneous nature in which the search warrant was executed made it impossible for her to have formed the intent to aid Mangrum in his offense. However, intent to promote or assist another's offense can be inferred from evidence of an implicit agreement formulated contemporaneous with the offense or by conduct suggesting a common design to execute the offense. See, e.g., Curtis v. State, 573 S.W.2d 219, 222 (Tex. Crim. App. 1978) (implicit contemporaneous agreement demonstrated by fact defendant joined in the fray with the knowledge that his co-defendant intended to beat up the victim). Davis also argues that reaching for a gun is not an act sufficient to support the inference that she aided or attempted to aid Mangrum's offense of attempted capital murder. Davis did more than reach for the gun. The undisputed evidence was that she was holding the loaded double-barrel shotgun in a position to fire and attempting to turn on the officers waiting in the doorway. At that point Davis posed an equal or even greater threat to the officers clustered in the doorway, which divided the officers' attention and served to aid Mangrum's offense. Davis decided on that course of action in spite of the fact that police officers, clearly identified with raid jackets bearing the word "POLICE" in large block letters, were standing in the open doorway to the bedroom in broad daylight

returning fire on Mangrum. We can think of no more expedient way to assist a would-be murderer than by picking up a gun and attempting to shoot at his adversaries. The context of Davis' conduct demands the conclusion that she intended to assist and acted to aid Mangrum's attempt on Wilkerson's life.[5] Because there is no fact issue related to Davis' claim that the evidence used to convict her as a party to Mangrum's offense was insufficient, summary judgment was proper as to this claim.

**EVIDENTIARY ISSUES**

**Officers' Testimony**

Davis contends that the introduction of certain statements by Officers Radney and Herbert deprived her of due process. Officer Radney testified that Davis (identified in the question as the person with the "long gun") was "attempting to aid David Mangrum." Officer Herbert was asked what would have happened if the officers had not shot Davis. He responded:

> The length of the barrel of a shotgun is short, and being a double-barrel shotgun, that shotgun would have covered

[5]Davis also argues that she cannot be liable as a party to Mangrum's offense because she did not reach for the gun until after he had fired on the officers, relying on Ortiz v. State, 577 S.W.2d 246 (Tex. Crim. App. 1979) for the proposition that a defendant cannot be party to an offense that is complete when the defendant renders aid. Ortiz stands only for the proposition that mere presence at the crime scene is insufficient to render a party liable for the criminal offense of another. The undisputed testimony at trial was that Mangrum continued to aim the pistol at the officers who were present in the open doorway. Davis, meanwhile, had secured a loaded shotgun and was turning towards the officers with the weapon. Therefore, Mangrum's offense was not complete until after Davis had armed herself. E.g., Godsey, 719 S.W.2d at 580-84 (pointing loaded gun is an act that amounts to more than mere preparation for the offense of attempted murder).

> a lot of the doorway, and probably would have got at least two of us.

Davis argues that because her guilt as a party depended upon whether she intended to aid Mangrum, that Radney essentially testified as to her guilt. Davis objects to Officer Herbert's testimony as being unduly prejudicial and as impermissibly characterizing her present state of mind.

Because the Texas Court of Criminal Appeals summarily denied both Davis' petition for direct review and Davis' single state habeas petition without issuing findings of fact or a written opinion, the Texas Court of Appeals issued the last reasoned opinion by a state court. See Goodwin v. Collins, 910 F.2d 185 (5th Cir. 1990), cert. denied, 501 U.S. 1253 (1991). That court held that Davis had waived these claims by failing to object to similar testimony at trial, some of which was elicited by Davis' own counsel. For example, before Officer Radney ever testified, Davis trial counsel asked Wilkerson whether he had observed Davis attempting to aid Mangrum. Later, after his objection to Officer Radney's testimony was overruled, trial counsel asked Officer Bennett the same question.

When the last state court to consider the claim expressly and unambiguously bases its denial of relief on a state procedural default, federal habeas review is precluded absent a showing of cause for and actual prejudice resulting from the default. E.g., Goodwin, 910 F.2d at 186-87. Davis has made no such showing, either in the district court or on appeal. Davis' objections to testimony by Officer Radney and Officer Herbert have been

procedurally defaulted and are not subject to further review and the district court properly granted summary judgment as to those claims.

**Narcotics Evidence**

Davis objects to admission of controlled substances retrieved from Mangrum's house. After the shoot-out, the search warrant was executed and law enforcement recovered three plastic bags containing small amounts of marijuana (14.83 grams and seeds), a metal box containing 4.63 grams of methamphetamine, a bag containing 23.74 grams of amphetamine, a bag containing 6.10 grams of amphetamine, a bag containing 5.03 grams of amphetamine, a syringe filled with liquid containing amphetamine and miscellaneous items of drug paraphernalia from the bed occupied by Davis and Mangrum. Officers also seized three pounds and six ounces of phenylacetone in liquid form from the barn and 4.95 grams of phenylacetone from the kitchen. Phenylacetone is a precursor chemical in methamphetamine production.

Davis claims that admission of the narcotics evidence was unfairly prejudicial and tended to characterize her as a drug addict. Texas generally allows evidence of an extraneous offense when relevant to show the context or "res gestae" of an arrest. E.g., Wilkerson v. State, 736 S.W.2d 656, 659-661 (Tex. Crim. App. 1987); Albrecht v. State, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). Davis concedes that the circumstances of an individuals's arrest are usually admissible against them, but maintains that the rule is not broad enough to allow introduction of the narcotics

evidence in her case because there was not a sufficient connection between the narcotics and the charged offense of attempted capital murder. We disagree.

The police officers went to the house that day to execute a search warrant for narcotics. Large quantities of narcotics were found on the bed and in close proximity to Davis on or around the bed. E.g., Archer v. State, 607 S.W.2d 539, (Tex. Crim. App. 1981) (evidence of narcotics found on person of defendant charged with unlawful possession of firearm properly admitted). In addition, both Texas and federal law provide for the admission of evidence of other crimes or wrongs to show motive. See TEX. R. CRIM. EVID. 404(B); FED. R. EVID. 404(b). We conclude that evidence of the narcotics and paraphernalia seized at Mangrum's residence was admissible as probative on the issue of Davis' motive for attempting to shoot at the officers and because it established the context in which the offense occurred. Because the evidence was properly admitted, summary judgment was properly granted on Davis' claims related to the introduction of narcotics evidence.

**INEFFECTIVE ASSISTANCE**

To succeed on an ineffectiveness claim, Davis must demonstrate both deficient performance and prejudice to her defense. Strickland v. Washington, 466 U.S. 668, 690-94 (1984). Counsel's performance is constitutionally deficient if it falls outside the range of professionally competent assistance. Id. To demonstrate prejudice, a defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Id.

Davis argues that trial counsel was deficient because reasonably competent counsel would have moved for appointment of a forensics expert to support her claim that she was shot before she had taken any action to arm herself. That testimony, Davis argues, would demonstrate that the officers were using excessive force, which would have entitled her to an instruction on self-defense, which would in turn have changed the result of the trial.

Ineffective assistance claims that are based on counsel's failure to call a witness are viewed with caution, particularly when, as here, the only evidence of how the witness would have testified comes from the defendant. See Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987); United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The presentation of witnesses is inherently an area that implicates the exercise of sound trial strategy and speculation as to how the uncalled witness would have testified makes such claims uncertain. Cockrell, 720 F.2d at 1427. We have typically required, therefore, that a habeas petitioner demonstrate, by affidavits or otherwise, not only that the un-called forensic expert would have expressed an opinion in her favor but also that the expert would have been available to testify at trial. See, e.g., Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985) (citing Boyd v. Estelle, 661 F.2d 388, 390 (5th

Cir. 1981)). Davis has not raised a genuine issue of fact on either point.

In addition Davis failed to present any evidence capable of overcoming the strong presumption that counsel's decision not to call an additional witness was the result of a considered and sound trial strategy. See Strickland, 104 S. Ct. at 2065. To the contrary, Davis' counsel called a ballistics expert as well as a physics professor, who both testified at length about bullet trajectory on the issue of whether Mangrum fired a second shot from the bedroom. Neither of these witnesses was asked a single question about the source or timing of Davis' wounds.

Finally, Davis is unable to demonstrate prejudice. She claims that a forensic expert could have established that she must have been shot before she picked up the shotgun. Any such testimony would have been cumulative to Dr. Covington's testimony that Davis was probably shot while facing her attackers. See Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988) (counsel's failure to call witness whose testimony would have been cumulative did not amount to ineffective assistance). Davis' claim of ineffective assistance is conclusory. She has not raised any genuine issue of fact which would support the required findings of deficient performance and prejudice and summary judgment was properly granted as to that claim.

For the foregoing reasons, the district court is AFFIRMED.