11-30-94

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CARLOS DELUNA,
Petitioner,

vs.

JAMES A. LYNAUGH, Director,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

CIVIL ACTION NO. _____

MEMORANDUM OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE HADEN W. HEAD, JR., JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION:

COMES NOW Carlos DeLuna, Petitioner in the above-styled and numbered cause, by and through his attorney, R. K. Weaver, and files this his Memorandum of Law in support of his heretofore filed Application for Writ of Habeas Corpus, and in support thereof, would respectfully show this Honorable Court as follows:

A.

PENRY

At trial, the Petitioner objected to the Court's proposed charge for failing to provide for consideration of mitigation evidence. (T, 66). In addition, Petitioner objected to the Court's charge on punishment seeking a definition of "deliberately" that would allow the consideration of such evidence. (T, 66). The trial court likewise denied this

request. (T, 66).

The jury answered Special Issues Nos. 1 and 2 against Appellant, mandating a death sentence. (T, 69).

The Petitioner presented some limited mitigation testimony. Other mitigation testimony was available (see, e.g. Appendices B through W delineating Petitioner's drug and alcohol problems, troubled youth and limited mental capacity), however, in light of the inherent problems of presenting such testimony without proper instructions to guide the jury's deliberations, trial counsel made a tactical decision not to present such testimony. See: Opinion of Fifth Circuit in *DeLuna v. Lynaugh*, Appendix A.

On June 26, 1989, the United States Supreme Court decided *Penry v. Lynaugh*, __ U.S. __ [Crim. L. Rptr. 3188] (1989) (hereinafter referred to as *Penry*). The jury in this case decided only that Appellant had deliberately caused the death of Tammy Davis and that Appellant was likely to commit criminal acts of violence in the future. Although the jury was permitted to hear Appellant's mitigating evidence, any of the evidence not relevant to those two special issues could logically carry no weight to the jury's deliberation and decision, and in fact, could be considered aggravating evidence that supported the Government's proof on the special issues. Thus, the jury was precluded by the sentencing scheme from applying any mitigating evidence not relevant to the two special issues. To conform the

sentencing procedure with the federal constitutional requirement that mitigation be considered, the trial court either should have sua sponte instructed the jury how to use Appellant's mitigating evidence or, more appropriately, included an additional special issue that would have permitted the jury to assess a life sentence if it believed that this was the appropriate "moral response" to the mitigating evidence.

In a slightly different context, the Supreme Court has accepted Petitioner's position in *Penry*. Although *Penry* complained only about the absence of sufficient jury instructions, the Court's analysis compels the conclusion that had the issue been presented, the Court would have held Article 37.071, Texas Code of Criminal Procedure, unconstitutional as applied.

Citing *Lockett v. Ohio*, 438 U.S. 586 (1978) (hereinafter referred to as *Lockett*) and *Eddings v. Oklahoma*, 456 U.S. 104 (1982) (hereinafter referred to as *Eddings*), Penry argued that his death sentence violated the Eighth Amendment because, in light of the jury's instructions given, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background, which he offered as the basis for a life sentence. Penry contended that when such mitigating evidence is presented, the trial court must provide jury instructions that make it possible for the jury to give

effect to the mitigating evidence in determining whether the defendant should be sentenced to death.

The Supreme Court first observed that in *Lockett*, a plurality held that Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". 438 U.S. at 604. In *Eddings*, the majority reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death. The Court held that "just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider as a matter of law, any relevant mitigating evidence." 455 U.S. at 113-114.

The Court recognized that the facial validity of the Texas Death Penalty Statute was upheld in *Jurek v. Texas*, 428 U.S. 262 (1976) on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence that a defendant might present. Penry contended that those assurances were not fulfilled in his case because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence.

The Court acknowledged that the jury considered only the narrow special issues and was never instructed that it could consider Penry's mental retardation and abusive childhood as mitigating evidence and that is could give mitigating effect to that evidence in imposing sentence. *Eddings* made clear that it was not sufficient to allow the Defendant to present mitigating evidence, as a sentencer must also be able to consider and give effect to that evidence.

Building upon the concurring opinion in *Franklin v. Lynaugh*, 487 U.S. ____, 101 L.Ed.2d 155 (1988) (hereinafter referred to as *Franklin*), the Supreme Court held that Penry's mitigating evidence of mental retardation and childhood abuse was relevant to his moral culpability beyond the scope of the special issues, and the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate sentence. In the absence of special instructions, if a juror were to believe that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted, that juror would be unable to give effect to the conclusion if he believed that Penry committed the crime "deliberately". Moreover, the special issue on future dangerousness did not provide a vehicle for the jury to give mitigating affect to Penry's mental retardation and prior abuse, as the evidence diminished Penry's blameworthiness for the crime

while indicating that there was a probability he would be dangerous in the future.

The Supreme Court concluded that in order to insure reliability in the determination that death is the appropriate punishment in a specific case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. In the absence of instructions informing the jury that it could consider and give effect to Penry's mitigating evidence by declining to impose the death penalty, the Court concluded that the jury was not provided with a vehicle for expressing his "reasoned moral response" to that evidence in rendering its sentencing decision. The Court remanded the case for resentencing so as not to "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry*, supra, 45 Crim.L.Rptr. at 3195.

Appellant maintains that Article 37.071 is unconstitutional as applied because the jury had no vehicle outside the special issues to consider and give effect to Appellant's mitigating evidence by imposing a life sentence. The narrow special issues precluded meaningful consideration of Appellant's proffer of this evidence.

The substantial mitigating evidence introduced on behalf of Petitioner, both as to past history and the circumstances of the

crime itself, either actually presented or available to be presented, clearly had no bearing on either the deliberateness issue or Special Issue No. 2 concerning dangerousness in the future. It is precisely for this reason that a convicted capital murderer, despite some positive traits, should be segregated in prison away from the rest of society. Nonetheless, Petitioner's jury had no vehicle to give effect to the mitigating evidence because of the constraints imposed by the special issues.

Penry will obviously compel Texas courts to reconsider its analysis in death penalty cases. It rings hollow to provide a defendant with a constitutional right to present all mitigating evidence that would support a life sentence, yet limit the jury to consideration of two, or occasionally three, narrow special issues. In that regard, a case such as *Burns v. State*, 761 S.W.2d 353 (Tex.Crim.App. 1988) (hereinafter referred to as *Burns*) makes no sense unless this Court reconsiders the constitutionality of Article 37.071, Texas Code of Criminal Procedure. In *Burns*, the trial court excluded testimony of the defendant's mother that the defendant's parents had been separated for a few years during his childhood and that the defendant worked at three jobs after he finished school. Recognizing that the mitigating impact of this evidence "would not appear to be compelling in the abstract", the Court nonetheless reversed the conviction, suggesting that evidence of a troubled childhood and gainful employment "would surely prove

informative to a jury engaged in the necessarily speculative enterprise of assessing his ability to coexist peacefully in society." *Burns*, supra, at 358.

The analysis in *Burns*, is at best, wishful thinking. Evidence of a defendant's troubled childhood or ability to maintain employment does not logically relate to future dangerousness. It is, at the most, evidence from which it could be argued that a jury should extend mercy, but it would not make Burns or any other defendant less dangerous in the future. Arguing that this evidence is logically relevant to the absence of future dangerousness is like trying to drive the proverbial round peg into a square hole. It will not fit, and would be summarily rejected by any jury with intellectual integrity.

The Supreme Court's response in *Penry* is but a starting point to the inevitable demise of the Texas Death Penalty Statute as presently written and applied. The Supreme Court appears not to fully understand the Texas Death Penalty Scheme. Prospective jurors are interrogated at length during voir dire examination on their ability to be intellectually honest and return answers to the special issues based on the evidence rather than on a personal feeling as to whether an accused should live or die. Challenges for cause are consistently granted and upheld on appeal where a venireman indicates that he would answer a special issue so as to result in a life sentence even if he believed that the evidence supported an affirmative finding. Unfortunately,

the underpinnings of *Penry* appears to rest on the concept of jury nullification. The Supreme Court apparently believes that a trial court can instruct a jury on how to consider the defendant's mitigating evidence (a clearly impermissible comment on the weight of evidence under Texas law) and then tell the jury that a negative answer may be given to a special issue if the jury does not believe that the death sentence is a "reasoned moral response" to a defendant's mitigating evidence.

This Court has recently held that an accused does not even have the right to argue against imposition of a death penalty at the punishment stage. In *Rogers v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 69,598 delivered May 5, 1989), that Court reasserted that it is meaningless to insist upon the right to criticize the death penalty in final argument, elaborating as follows:

> "Surely, an accused is not entitled to urge that jurors do something which, if they had indicated a willingness to do during jury selection, would have made them challengable for cause...In short, a jury may not answer that the accused didn't act deliberately or that he won't be dangerous in the future just because capital punishment isn't a general deterrent to crime. A jury is not at liberty to answer any of the three special issues in the negative based in whole or part upon argument Appellant wanted to make in this case. Accordingly, there is no basis for concluding that he is entitled to make it."

It is impossible to square *Rogers* with *Penry*. It is

intellectually dishonest to provide the type of instructions suggested in *Penry* on the premise that the jury will use those instructions to nullify the special issues. The vice in the Texas Death Penalty Scheme is that the special issues are too narrow and do not reach mitigating evidence such as that offered by Appellant. The only solution is for the legislature, in light of *Penry*, to amend the statute both to broaden the issues and include a special issue which allows the jury to extend mercy by imposing a life sentence regardless of the aggravating factors involved in the case.

This issue is ultimately destined to be resolved by the Supreme Court unless this Court recognizes now the constitutional defects in the Texas statute and comes to grips with the inadequacies of the death penalty scheme.

Because the Texas Capital Sentencing Procedures, as applied in this case, fail to provide the jury with a vehicle to express its "reasoned moral response" to Appellant's mitigating evidence, the Eighth Amendment to the United States Constitution and Article I, Section 13, Texas State Constitution, were violated. For these reasons, the instant judgment of death should be set aside and the cause remanded to the trial court with instructions to provide the Appellant with a new trial.

State Law Prior to Penry v. Lynaugh Virtually Precluded any Instruction on Mitigating Circumstances

Prior to the announcement of the Supreme Court's decision in

Penry v. Lynaugh, 57 U.S.L.W. 4958 (June 26, 1989), numerous decisions from the Supreme Court and this Court foreclosed completely a capital defendant's effort to secure instructions on mitigation. The settled law, until Penry, uniformly and repeatedly held that any and all mitigating evidence could receive adequate consideration through the jury's consideration of the three special issues set out in the Texas capital statute. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Supreme Court gave facial approval to the statute, but in doing so took note of the statute's potential for precluding the jury's consideration of mitigating circumstances. The Supreme Court noted that the Court of Criminal Appeals had concluded that much mitigating evidence could be considered pursuant to the jury's consideration of the future dangerousness statutory question, quoting a passage from this Court's decision in *Jurek*:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant has a significant criminal record. It could consider the range and severity of his prior criminal conduct. It would further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. 522 S.W.2d at 939-940."

428 U.S. at 272-273. This convinced the Supreme Court that the statute's potential for precluding the jury's consideration of mitigating circumstances could be avoided, since Texas law

allowed "a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." 428 U.S. at 272. Thus, "Texas law [allows] . . . the jury [to] be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Id. at 273.

Again in *Lockett v. Ohio,* 438 U.S. 586 (1978), the Court reiterated its view that, because of the Texas Court's broad interpretation of the future dangerousness question, the Texas statute did not operate "to prevent the sentencer from considering any aspect of his offense as an independently mitigating factor." 438 U.S. at 607.

Even though *Jurek* and *Lockett* seemed to preclude any challenge to the Texas statute based upon the statute's constriction of the sentencer's consideration of mitigating circumstances, such challenges were nevertheless brought to this Court in a number of cases. In *Ex parte Granviel,* 561 S.W.2d 503 (Tex.Cr.App. 1978), the petitioner argued that the statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. The Court rejected this claim, concluding "the jury in answering the special issues may properly consider all the evidence adduced during both the guilt and punishment phases of the trial." Id.

In *Adams v. State*, 577 S.W.2d 717 (Tex.Cr.App. 1979), *rev'd. on other grounds sub nom., Adams v. Texas*, 448 U.S. 38 (1980), the appellant "argue[d] that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence . . . that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. This claim was rejected. And in *Quinones v. State*, 592 S.W.2d 933 (Tex.Cr.App. 1980), the appellant argued that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947. Again, the Court soundly rejected this claim. It held:

> The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required. (emphasis added).

Since *Quinones*, the Texas Court of Criminal Appeals has repeatedly upheld the refusal of trial courts to provide for instructions on mitigating circumstances. See: *Stewart v. State*, 686 S.W.2d 118, 121 (Tex.Cr.App. 1984) ("[f]urther, we held in *Quinones v. State*, supra, that no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence"); *Cordova v. State*,

733 S.W.2d 175, 189-190 (Tex.Cr.App. 1987)("[u]nder our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues. . . .Although the issue has been presented in many different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations"); *Burns v. State*, 761 S.W.2d 353, 358 (Tex.Cr.App. 1988) (*Quinones* itself teaches that '[t]he jury can readily grasp the logical relevance of mitigating evidence to the [special] issues of whether there is a probability of future criminal acts of violence.' [Footnote omitted.] Thus, we presume the jury will understand the significance of evidence proffered in mitigating, and will give such evidence mitigating weight, at its discretion, in resolving special issues").

The settled law since *Jurek* could not have been clearer. Regardless of the nature or type of mitigating evidence introduced at a capital trial in Texas, no instruction on mitigation would be provided to the jury. If the jury was to utilize such evidence during its deliberations, it could do so only within the consideration of the special issues.

This regime posed substantial problems for the capital

sentencing process in Texas. Often, mitigating evidence offered by capital defendants in Texas, and throughout the United States, evokes complex life stories, hard lives made still more difficult by mental illness, mental retardation, abusive childhoods, or other vagaries brought about by poverty or family turmoil. Or the evidence can show a promising life torn apart by casual drug use that becomes habitual and highly destructive. In states where juries are instructed on mitigating circumstances, such evidence often produces a powerful, mercy-invoking portrait, one that leads juries to reject society's ultimate sanction, even when it also feels the offender could commit violent acts in the future.

Without instructions on mitigation, however, this same evidence, instead of lessening a juror's impulse to vote for death, can actually work in the State's favor. Mental deficit evidence will often present a capital defendant as less able to control his impulses than an offender not so afflicted. The same can be said for abusive childhood and drug addition evidence.

The presentation of such evidence under the *Jurek - Quinones* scheme accordingly would often work against a capital defendant's right to have aspects of his character considered as <u>mitigating</u>, and the Eighth Amendment's mandate that capital defendants receive an individualized assessment on the appropriateness of death. For this reason, capital defendants found themselves

confronted with a "Hobson's choice." They could present evidence of mental illness or abusive upbringing, and see it work to their disadvantage, or they could proceed without placing any such mercy-invoking evidence before the jury. For this reason, in many cases, capital defendants, not wanting to become "the deluded instrument of [their] own execution," *Estelle v. Smith*, 451 U.S. 454, 462 (1981), placed little humanizing evidence before the jury.

Penry has Overturned This Court's Longstanding and Oft-Expressed Judgment that the Texas Capital Sentencing Scheme Invariably Permits the Constitutionally Necessary Consideration of Mitigating Evidence

As we have explained, Texas Courts have always held that the Texas capital sentencing scheme permits the constitutionally necessary consideration of mitigating evidence. From its decision in *Jurek* to the present, this Court has held that any relevant mitigating evidence can be considered in relation to at least one of the special issues. Even when the Court has been presented with claims that in some cases the special issues have precluded the presentation or consideration of mitigating evidence -- either because the evidence was irrelevant to the special issues or because it was relevant only as an aggravating factor -- the Court has never varied in its analysis. It has steadfastly refused to require supplemental instructions in such cases, and it has refused to acknowledge that the Texas scheme can in such cases preclude the consideration of mitigating

evidence.

Penry v. Lynaugh flatly holds that in these respects the Texas Court of Criminal Appeals' judgment has been wrong. As a result, the Court must now acknowledge that the Texas capital sentencing scheme can preclude the constitutionally necessary consideration of mitigating evidence in particular cases, and it must now review each case, through a new analytical framework.

In holding that the evidence of Johnny Paul Penry's mental retardation and childhood abuse could not be considered as a mitigating factor under the instructions given in his case, the Supreme Court recognized that the special issues which guide the jury's sentencing discretion in Texas may not always allow for full consideration of mitigating evidence. They failed to do so in Penry's case because they allowed his mental retardation and his childhood abuse to be taken into consideration only as an aggravating factor, not as a mitigating factor.

As the Court explained, "a rational juror at the penalty phase of the trial" could have found Penry's mental retardation and his childhood abuse to be a mitigating factor. *Penry v. Lynaugh*, 57 U.S.L.W. at 4963. "Because Penry was mentally retarded ... and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, [a rational] juror could ... conclude that Penry was less morally

'culpable than defendants who have no such excuse' ...." Id. However, without additional instructions -- none of which were given in Penry's case -- the special issues did not allow that juror to give effect to her view that Penry was less culpable and thus not deserving of death.

The first special issue, whether Penry acted "deliberately," did not call for consideration of Penry's mental retardation and childhood abuse, even assuming that the jurors "understood 'deliberately' to mean something more than that Penry was guilty of 'intentionally' committing murder ...." 57 U.S.L.W. at 4963. Even though a rational juror could have concluded that Penry's retardation and abuse called for a sentence less than death, that same juror "could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detention." Id. Having a lessened ability to control one's impulses or to evaluate the consequences of one's behavior does not logically diminish one's ability to act deliberately. Only if an additional instruction were given, "defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability," Id., would the first special issue require the jury to consider, and provide it a means of giving effect to, Penry's mitigating evidence. In the absence of this additional instruction, Penry's mitigating evidence was irrelevant to the first special issue.

The second special issue, whether Penry was likely to pose a danger in the future, did call for consideration of his mental retardation and child abuse -- but only as an aggravating factor. 57 U.S.L.W. at 4963. One of the features of Penry's retardation, his inability to learn from his mistakes, was relevant to the future dangerousness inquiry. However, it was "relevant only as an aggravating factor because it suggest[ed] a 'yes' answer to the question of future dangerousness." Id. (emphasis in original). Thus, while this issue did provide a means for the jury to give consideration to Penry's mitigating evidence, it "did not provide a vehicle for the jury to give mitigating effect to [his] evidence of mental retardation and his childhood abuse." Id. at 4964.

Like the first special issue, the third special issue, whether the homicide was an unreasonable response to provocation by the victim, did not call for consideration of Penry's mitigating evidence. The evidence was that the killing was not committed in response to any provocation by the victim. Id. at 4964. Thus, Penry's mental retardation -- which might have been considered in gauging the "unreasonableness" of any response to provocation -- was irrelevant to this inquiry. Id.

In sum, *Penry* requires that Texas Courts conduct a new analytical inquiry in each death case. The mitigating evidence proffered by the defense must first be analyzed in relation to

each special issue to determine whether it is relevant to any of the issues. If any aspect of the mitigating evidence is irrelevant to the special issues, i.e., if it tends to support neither a "yes" nor a "no" answer to any special issue, the Court must find that the defendant has been sentenced to death in violation of the Eighth Amendment's requirement of an individualized determination of his sentence, unless there has been an additional instruction explaining how the jury can consider the mitigating evidence in relation to one or more special issues. If on the other hand the mitigating evidence is relevant to one or more issues, the Court must determine whether it is relevant as an aggravating factor or as a mitigating factor. If it is relevant as an aggravating factor, tending in any way to support a "yes" answer to a special issue, but a rational juror could also find that it weighs in favor of a sentence less than death, the Court must find that the defendant has been sentenced to death in violation of the Eighth Amendment.

Accordingly, in light of *Penry*, the Court can no longer be confident in the assumption that all mitigating evidence is appropriately considered and given effect through the special issues. Without supplemental instructions, the Texas capital sentencing scheme can and does preclude the constitutionally necessary consideration of substantial areas of mitigating evidence.

Under Governing Rules of State Law, the Failure of Capital Defendants to Seek Specific Instructions on Mitigation, and/or to Present Mitigating Evidence at Trial, does not Foreclose the Assertion of Lockett Claims in Habeas Corpus in Light of Penry v. Lynaugh

It has long been the law in Texas that "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right has not been recognized." *Ex parte Chambers*, 688 S.W.2d 483, 486 (Tex.Cr.App. 1986)(Campbell, J. concurring). [1] This rule applies with particular force where "the new principle relied upon overruled considerable Court of Criminal Appeals case law, or was, in fact, quite novel and an objection based upon it would have been futile." *Chitwood v. State*, 703 S.W.2d 360, 362 (Tex.App.- Dallas, 1986).

As we have shown above, *Penry v. Lynaugh* announces new law which "overrule[s] considerable Court of Criminal Appeals case law." Because the settled law of Texas, and the practice of other states where new Eighth Amendment rules have been announced, provide that such new law claims be reviewed on their merits, this Court must hold that *Penry* claims raised for the first time on direct appeal or in post-conviction proceedings receive plenary merits review.

The Court of Criminal Appeals has already confronted a

1. See also Cuevas v. State, 641 S.W.2d 558 (Tex.Cr.App. 1982); Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976); Ex parte Casarez, 508 S.W.2d 620 (Tex.Cr.App. 1974); Ex parte Sanders, 588 S.W.2d 383 (Tex.Cr.App. 1979); Ex parte Taylor, 484 S.W.2d 748 (Tex.Cr.App. 1972).

similar, though less compelling, situation where an intervening Supreme Court decision overruled long-established law in *Estelle v. Smith*, 451 U.S. 454 (1981).[2] For years, prior to *Smith*, that Court had held that state psychiatric interviews of capital defendants, and later psychiatric testimony at trial on future dangerousness, implicated neither the Fifth nor Sixth Amendment.[3] The Court adhered to this view even after the federal district court in *Smith* held that such practices violated the Fifth and Sixth Amendments.[4]

Shortly after the Supreme Court announced its decision in *Estelle v. Smith*, the Court recognized that *Smith* constituted a significant change in the law,[5] and began to entertain these

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2.(cont.)procedural protections guaranteed by the Fifth and Sixth Amendments in the context of the capital sentencing process. Such violations do not always result in a distortion of the fairness of the sentencing process, and on occasion, can be harmless. See Satterwhite v. Texas, 100 L.Ed.2d 284 (1988); Smith v. Murray, 477 U.S. 527 (1986). Penry, on the other hand, addresses substantive Eighth Amendment concerns which will always implicate the very fairness of the capital sentencing process.

3. See Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976); Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976).

4. The Court conceded as much in Thompson v. State, 621 S.W.2d 624, 626 (Tex.Cr.App. 1981)("Furthermore, the State points to our express refusal in Muniz v. State, 573 S.W.2d 792 (Tex.Cr.App. 1978), to follow the federal district court ruling in Smith v. Estelle, 445 F.Supp. 647 (N.D.Texas 1977) holding to the contrary as a matter of federal constitutional law.")

5. In Field v. State, 627 S.W.2d 714 (Tex.Cr.App. 1982), Justice McCormick described the effect of Smith upon the Texas law:

> Both holdings in Estelle v. Smith changed the law in Texas. This Court had for years rejected claims on these bases. Never before had it been held that a court-appointed mental health expert must warn a defendant of his right to remain silent and that evidence adduced in the psychiatric interview could be used against him. Never before had it been held that the defendant (sic) attorney could receive notice before a psychiatric interview on the dangerousness issue could be held. In fact, in numerous

claims on their merits, irrespective of whether defense counsel noted a timely objection at trial or raised the claim on direct appeal. In *Ex parte Demouchette*, 633 S.W.2d 679 (Tex.Cr.App. 1982), a capital defendant sought habeas relief in light of *Smith*. Demouchette had not raised an objection to the state's psychiatric witness at trial or on direct appeal.[6] Concluding that *Smith* constituted law unavailable to Demouchette previously, the Court entertained the merits and ordered full habeas relief.[7]

The Court of Criminal Appeals has not deviated from this path since. In case after case, the Court has ignored capital defendants' failure to timely assert *Smith* claims, and has considered the merits of these claims. *See: Ex parte Woods*, 745 S.W.2d 21 (Tex.Cr.App. 1988)(trial counsel voiced general objection at 1976 trial, claim not raised on direct appeal; court reviewed claim on its merits on post-conviction proceedings); *Powell v. State*, 742 S.W.2d 353 (Tex.Cr.App. 1987) (majority

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5. (CONT.) cases this Court rejected the contentions that the proceedings used in Estelle v. Smith violated a defendant's rights.

627 S.W.2d at 723-24 (McCormick, J. concurring).

6. See Demouchette v. State, 591 S.W.2d 488 (Tex.Cr.App. 1977).

7. Shortly thereafter, the Court took the same action in Ex parte English, 642 S.W.2d 482 (Tex.Cr.App. 1982). Like Demouchette, English had raised no objection at trial to the introduction of the state's psychiatric evidence on his future dangerousness, nor had he raised the issue on direct appeal. English v. State, 592 S.W.2d 949 (Tex.Cr.App. 1980). The Court later vacated this relief in light of an order of commutation issued by the governor.

reached defaulted *Smith* claim on its merits);[8] *Ex parte Chambers*, supra (no objection raised at trial on direct appeal; full relief granted in post-conviction proceedings). The Fifth Circuit has expressly acknowledged this defendant's policy and has overlooked defaults in cases not remedied in Texas Courts. *See: Muniz v. Pocunier*, 760 F.2d 588 (5th Cir.).

The Texas Court of Criminal Appeals has also applied its change in law rule realistically in assessing whether trial counsel should have raised an objection, or made a more specific one. For instance, in *Hartfield v. State*, 645 S.W.2d 463 (Tex.Cr.App. 1980), trial counsel made only a general objection to the excusal of a juror on *Witherspoon* grounds. After the Supreme Court announced *Adams v. Texas*, 448 U.S. 38 (1980), counsel raised the claim on direct appeal. The State urged this Court to conclude the claim was defaulted because of the absence of an adequate objection. The Court rejected the state's argument and found merit in the claim. Responding to the state's argument, the Court concluded:

> . . . at the time Hlozk was excused, Sec. 12.31(b) was considered constitutional even to the extent that it

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8. In a dissenting opinion, Justice Onion recalled why the defaulted claim should be entertained on its merits:

> Where a defect of constitutional magnitude has not been established at the time of a trial, the failure of counsel to object does not constitute waiver. [Citation omitted.] This is now part of our state procedural default rule dealing with preservation of constitutional error.

1742 S.W.2d.

> allowed exclusion of prospective jurors on a broader ground than Witherspoon, supra, and consequently, there was no reason for appellant's counsel to strenuously attempt to preserve this error. We find that appellant did not waive this error.

645 S.W.2d at 441. Similarly, in *Cuevas v. State*, 641 S.W.2d 558 (Tex.Cr.App. 1982), the Court excused trial counsel's failure to object to a juror exclusion prior to *Adams*. The Court concluded that "at the time of this trial our case law made it abundantly clear that an objection to a Sec. 12.31(b) exclusion on *Witherspoon* grounds would be futile."[9]

It is accordingly abundantly clear that because *Penry* amounts to such a substantial development in the law, one that overturns Texas Courts' precedent as certainly as did *Estelle v. Smith*, "a [capital] defendant has not waived his right to assert a [*Penry*] violation by failing to object at trial [or raise the issue in later proceedings]."

Permitting capital defendants to raise *Penry* claims, irrespective of any failure to raise a claim previously, would be fully consistent with the practice adopted in other states in the wake of a major Eighth Amendment decision having substantial impact on the operation of the capital statute.

In Florida, for example, after *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Florida Supreme Court permitted death-sentenced

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9. In Ex parte Bravo, 702 S.W.2d 189 (Tex.Cr.App. 1982), the Court excused counsel's failure to raise an Adams claim on direct appeal, finding the failure due to counsel not having the benefit of the Adams decision. 702 S.W.2d at 193.

prisoners to raise *Hitchcock* claims -- on direct appeal, in original post-conviction proceedings, and in successor proceedings -- notwithstanding their failure to raise the claims previously. Like *Penry*, in *Hitchcock* the Supreme Court decided that Florida's longstanding penalty trial instructions precluded the jury from considering and giving effect to various kinds of mitigating evidence. Although the holding in *Hitchcock*, was no more a "new rule of law" than the holding in *Penry*, see, *Penry v. Lynaugh*, 57 U.S.L.W. at 4961-62 (deciding that, for purposes of retroactivity, it was not announcing a new rule of constitutional law), from the perspective of the Florida Supreme Court, *Hitchcock* was a very significant change in law, for it overturned that court's longstanding judgment that the Florida instructions properly allowed for the consideration of mitigating evidence. *See: Downs v. Dugger*, 514 So.2d 1069, 1071 (Fla. 1987) ("*Hitchcock* rejected a prior line of cases issued by this Court, which had held that the mere opportunity to present nonstatutory mitigating evidence was sufficient to meet *Lockett* requirements"). Because *Hitchcock* was a significant change in law in relation to the Florida Supreme Court's previous decisions, the Florida Court allowed defendants to raise *Hitchcock* claims in successor state post-conviction proceedings that would otherwise have been procedurally barred because they were not raised at trial or because they were raised at trial and were decided on the direct appeal (before Hitchcock). *See, e.g., Hall v. State,*

541 So.2d 1125, 1126 (Fla. 1989); Alvord v. Dugger, 541 So.2d 598 (Fla. 1989); *Cooper v. State*, 526 So.2d 900 (Fla. 1988); *Combs v. Dugger*, 525 So.2d 853 (Fla. 1988); *Zeigler v. State*, 524 So.2d 419 (Fla. 1988); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Thompson v. Dugger*, 515 So.2d 173 (Fla. 1987).

In addition, the Florida Supreme Court recognized that its pre-*Hitchcock* line of decisions could have had the effect as well of "effectively preclud[ing] defense counsel from investigating, developing, and presenting non-statutory mitigating circumstances." *Hall v. State*, 541 So.2d at 1126. See also: *DeLuna v. Lunaugh*, Appendix A to Application for Writ of Habeas Corpus. For this reason, it also forgave another kind of default: the trial lawyer's decision not to introduce nonstatutory mitigating evidence, based on the belief -- derived from the Florida Supreme Court's pre-*Hitchcock* decisions -- that non-statutory mitigating circumstances could not properly be considered by the sentencing jury and judge. Thus, in light of *Hall*, Florida now permits capital defendants to argue both that the instructions in their trials precluded the full consideration of the non-statutory mitigating evidence that was presented, and that the state of the law precluded the presentation of additional non-statutory mitigating evidence, as *Hitchcock* error. Given the striking parallel between Florida and Texas in these

respects, this Court should reach the same conclusion.[10]

A similar result was reached in Maryland after the decision in *Mills v. Maryland*, 100 L.Ed.2d 384 (1988). There, the Supreme Court found that the standard jury instruction and jury form used at the penalty phase of the trial could have been understood by jurors to require unanimity before any mitigating factor could be considered by any juror and concluded that the instruction and form violated the Eighth Amendment. In its wake, the Maryland courts have vacated a number of capital sentences, regardless of whether the *Mills* claim had been adequately preserved and presented. For instance, in *Colvin v. State*, 472 A.2d 953 (Md. 1984), the capital defendant raised a number of challenges to his capital sentence, but omitted any *Mills* claim. After *Mills*, the state court again considered the case in post-conviction proceedings. The state court found that *Mills* "imposes upon State proceedings a procedural or substantive standard not theretofore recognized which ... is intended to be applied retroactively and would thereby affect the validity of the petitioner's conviction or sentence." *State v. Colvin*, 548 A.2d 506, 518 (Md. 1988). The court granted penalty relief after concluding that the *Mills* analysis affects "the very integrity of

10. The Arizona Supreme Court chartered a similar course in the wake of its decision in State v. Watson, 586 P.2d 1253 (Ariz. 1978), that the Arizona statute unconstitutionally precluded the consideration of non-statutory mitigating circumstances. Recognizing that defense counsel, "relying on the limitations on mitigating factors imposed [by the Arizona death penalty statute]," could have decided that it was improper to present evidence of non-statutory mitigating circumstances, the Arizona Court forgave this "default" and granted relief because of the effect of the statute. State v. Evans, 584 P.2d 1149, 1153 (Ariz. 1978).

the factfinding process" with respect to finding an absence of mitigating factors. Id. [11]

B.

DEFINITION OF DELIBERATELY

Prior to the reading of the Court's charge on punishment to the jury, Petitioner objected to the failure of the court's charge to define the term "deliberately". (T, 66).

Petitioner sought to have a definition of deliberately submitted to the jury so that the jury could give affect to mitigating evidence offered on Petitioner's behalf [see Claim No. One, supra].

This Court has held in the past that there is a difference between "deliberately" as set out in Special Issue No. One and "intentional" which is the requisite culpable mental state for a finding of guilt of the offense of capital murder. *Heckert v. State*, 612 S.W.2d 549 (Tex.Crim.App. 1981).

> "In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court of the United States concluded that the submission of the issues provided by Art. 37.071, supra, constitutionally guided the jury's determination of the punishment issues. In *Granviel v. State*, 552 S.W.2d 107

11. Relief was also ordered in Jones v. State, 549 A.2d 17 (Md. 1988). Jones raised no Mills claim at trial but raised the claim on direct appeal. Jones v. State, 530 A.2d 743 (Md. 1987). The appeals court entertained the claim on its merits but denied relief. It was on remand from the Supreme Court that relief was ordered.

(Tex.Cr.App.), it was stated that the requirement that a defendant's conduct be committed deliberately does not mean that it must be a premeditated act. We have held that because the term deliberately has not been specifically defined by statute, it is to be taken and understood in its usual acceptation in common language. *Esquivel v. State*, 595 S.W.2d 516 (Tex.Cr.App.); *King v. State*, 553 S.W.2d 105 (Tex.Cr.App.). Cases which have reviewed the sufficiency of the evidence relative to the issue of deliberateness, see: *Ex parte Alexander*, 608 S.W.2d 928 (Tex.Cr.App.); *Villareal v. State*, 576 S.W.2d 51 (Tex.Cr.App.); *Bodde v. State*, 568 S.W.2d 344 (Tex.Cr.App.); Granviel v. State, supra; *Smith v. State*, 540 S.W.2d 693 (Tex.Cr.App.).

The presumption is that in enacting a statute, the Legislature intends the entire statute to be effective. *Morter v. State*, 551 S.W.2d 715 (Tex.Cr.App.); *Lovell v. State*, 525 S.W.2d 511 (Tex.Cr.App.). Moreover, it must be presumed that the Legislature did not intend to do a useless thing in the enactment of a statute. *Brown v. Memorial Villages Water Auth.*, 361 S.W.2d 453 (Tex.Civ.App. - Houston 1962, writ ref. n.r.e.).

If the Court were to adopt appellant's argument that deliberately and intentionally or knowingly were linguistic equivalents, it would render Art. 37.071(b)(1), supra, a nullity. Under such a holding, Art. 37.071(b)(1), supra, would be a useless thing in that a finding of intentionally or knowing murder would be irreconcilable with a finding that the defendant's conduct was not committed deliberately. We will presume that the Legislature would not have enacted Art. 37.071(b)(1), supra, had it intended for a finding of deliberateness to be based upon the same standard as that of intentional or knowing." *Heckert*, supra at 552.

The Court of Criminal Appeals has further held that "de-

liberately" is the thought process which embraces more than a will to engage in conduct and activates the intentional conduct. As this Court noted in *Fearance v. State*, 620 S.W.2d 557 (Tex. Crim. App. 1981):

> The person who engages in certain conduct deliberately has upon consideration said to himself, "Lets do it." Still conduct committed "deliberately" need not be "premeditated". As explained in Black's Law Dictionary (Fourth Rev. Ed. 1968) at 1343:
>
> "Premeditation differs essentially from will which constitutes the crime; because it supposes, besides an actual will, a deliberation and a continued persistence." [Emphasis in original].

Id. at 584 n.6.

Essentially, then, that Court has determined that "deliberately", as used in this statute, means more than "intentionally". If an act is done "deliberately" it was done, "perforce, intentionally." Id. at 584. "Deliberately", thus, includes a degree of consideration not found in intentionally. See also: *Granviel v. State*, supra at 125. See also: *Gardner v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 69,235 delivered March 25, 1987).

The Court of Criminal Appeals has repeatedly held that a trial court need not define the word "deliberately" in the charge to the jury on punishment. *Demouchette v. State*, 731 S.W.2d 75 (Tex. Crim. App. 1986); *McGee v. State*, ___ S.W.2d ___ (Tex.

Crim. App. No. 69,324 delivered February 15, 1989). Such ruling of that Court, as applied to this Petitioner, must be re-examined in light of *Penry v. Lynaugh*, ___ U.S. ___, 45 Cr.L.Rptr. 3188 (1989).

Justice O'Conner, writing in *Penry*, stated:

> "In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give affect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. Without such a special instruction, a juror who believed that Penry's retardation and background diminished his moral culpability and made the imposition of the death penalty unwarranted would be unable to give affect to that conclusion if the juror also believed that Penry committed the crime "deliberately". Thus we cannot be sure that the jury's answer to the first special issue reflected a "reasoned moral response" to Penry's mitigating evidence."

Penry v. Lynaugh, 45 Cr.L. Rptr. 3188 at 3193 (1989).

The failure of the trial court to define "deliberately" under Special Issue No. One in a manner that allowed the jury to give affect to their consideration of mitigating evidence is a violation of Petitioner's rights under the Eighth Amendment, United States Constitution, Article I, Section 13, Texas State Constitution, and requires reversal in this cause.

C.

SELF-REPRESENTATION

After the trial, but before the New Trial hearing, the Petitioner sought to discharge his appointed attorneys and proceed representing himself. (T, 98-102; Hearing on Motion for New Trial, 2-11). That motion was denied. (H, 11).

Thereafter, the trial court conducted an inquiry into the Petitioner's understanding of his rights and abilities to represent himself. (H, 38-48). Petitioner continued to assert his constitutional right to self-representation. (H, 46).

In an effort to convince the Petitioner to permit the Court to appoint counsel to represent the Petitioner on appeal, the trial judge advised the Petitioner that even if counsel were appointed, the Petitioner would still have the "right" to review the appellate record and to present a *pro se* brief raising any points that he wished to present. (H, 48). Only then did the Petitioner agree to the appointment of counsel on appeal.

It is by now well established that an accused has the right to discharge his counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 526 (1975). See also: *Johnson v. State*, 760 S.W.2d 277 (Tex. Crim. App. 1988); *Clark v. State*, 717 S.W.2d 910 (Tex. Crim. App. 1986); *Burton v. State*, 634 S.W.2d 692 (Tex. Crim. App. 1982); *Geeslin v. State*, 600 S.W.2d 309, 313-314 (Tex. Crim. App. 1980).

The trial judge initially denied the Petitioner's demand on the basis that the above-cited cases dealt solely with representation at trial, apparently contending that one does not have any right to represent oneself after a conviction in post-conviction proceedings. There is no authority for this distinction. The right to representation at trial is predicated upon the same constitutional provisions as the right to representation of counsel on appeal. See, e.g.: *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The right to waive such counsel and proceed *pro se* is identical at either stage of the proceedings.

Thereafter, apparently having second thoughts concerning the Petitioner's right to invoke his constitutional right to self-representation, the court conducted an inquiry into the Petitioner's ability to represent himself. The results of that inquiry make it clear that the Petitioner could constitutionally represent himself on appeal.

No content with permitting the Petitioner to proceed *pro se*, the trial court then affirmatively misrepresented the Petitioner's rights on appeal, and elicited a waiver of that demand through advising the Petitioner that he would be permitted to review the appellate record and file a *pro se* brief of his own in the Texas Court of Criminal Appeals. The Court of Criminal

Appeals has consistently denied indigent appellants the right to hybrid representation and has consistently held that where one has appointed counsel, there is no right to review the record of the trial or to file a *pro se.* brief. See, e.g.: *Coleman v. State,* 632 S.W.2d 616, 619 (Tex. Crim. App. 1982); *Thomas v. State,* 605 S.W.2d 290, 293 (Tex. Crim. App. 1980). The Petitioner was in fact not permitted to review the appellate record or to file a *pro se* brief on direct appeal. The waiver of an invoked constitutional right relied on by the State in its reply to this Application for Writ of Habeas Corpus was obtained as a direct result of a misrepresentation of the Petitioner's rights on appeal. This is not an "intentional relinquishment or abandonment of a known right or privilege"; the "waiver" at issue will not act to preserve an unconstitutionally coerced waiver of an invoked constitutional right. As a direct result of the trial court's affirmative misrepresentations, the Petitioner was denied his Sixth Amendment right to self-representation on appeal. See, e.g.: *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1938) (courts must indulge every reasonable presumption <u>against</u> waiver of constitutional rights); *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525 (1975) (defendant has a constitutional right to refuse appointed counsel and proceed *pro se*); *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 122 (1984) (accused has constitutional right to proceed *pro se*).

When the trial judge refused to permit the Petitioner to

CERTIFICATE OF SERVICE

A copy of this Motion has been forwarded to Mr. William C. Zapalac, Assistant Attorney General, Enforcement Division, 200 W. 14th Street, Supreme Court Building, Sixth Floor, Austin, Texas 78711.

SIGNED this 30th day of November, 1989.

R. K. WEAVER