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

CARLOS DeLUNA Petitioner	§	
vs.	§	CIVIL ACTION NO. C-89-336
JAMES A. LYNAUGH, DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§	

RESPONDENT'S MOTION TO DISMISS FOR ABUSE OF THE WRIT AND, ALTERNATIVELY, ANSWER, MOTION FOR SUMMARY JUDGMENT, AND SUPPORTING BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, hereinafter "Respondent," by and through the Attorney General of Texas, and files this **Motion to Dismiss for Abuse of the Writ and, Alternatively, Answer, Motion for Summary Judgment, and Supporting Brief.** In support thereof, Respondent would respectfully show the court the following:

I.

JURISDICTION

This court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

DENIAL

Respondent denies each and every allegation of fact made by Petitioner, hereinafter "DeLuna", except those supported by the record and those specifically admitted herein.

III.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent has lawful and valid custody of DeLuna pursuant to a judgment and sentence of the 28th Judicial District Court of Nueces County, Texas, in Cause No. 83-CR-194-A, styled **The State of Texas v. Carlos DeLuna**. DeLuna was indicted for the February 4, 1983, murder of Wanda Lopez while in the course of committing and attempting to commit robbery, a capital offense. He pleaded not guilty to the indictment and was tried by a jury. Trial began on July 15, 1983, and the jury found DeLuna guilty of capital murder on July 20, 1983. After a separate hearing on punishment, the jury returned affirmative answers to the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1989). Accordingly, DeLuna's punishment was assessed at death by lethal injection. His conviction and sentence were affirmed on direct appeal on June 4, 1986. **DeLuna v. State**, 711 S.W.2d 44 (Tex.Crim.App. 1986).

The trial court scheduled DeLuna's execution to take place before sunrise on October 15, 1986. DeLuna filed a motion for leave to file an out of time petition for writ of certiorari in the Supreme Court, which was denied on October 10, 1986. He then filed a request for stay of execution and an application for writ of habeas corpus in the state convicting court. On October 13, 1986, the Court of Criminal Appeals denied all requested relief. **Ex parte DeLuna**, No. 16,436-01. DeLuna immediately filed a motion for stay of execution and a petition for writ of habeas

corpus in this Court. The Court granted a stay of execution on October 14, 1986. On November 12, 1986, Respondent filed a motion for summary judgment. The Court directed DeLuna to respond to the motion within ten days in an order dated December 15, 1986. After obtaining two extensions of time, DeLuna's response was filed on January 23, 1987. On June 13, 1988, this Court issued its order denying habeas corpus relief. **DeLuna v. Lynaugh**, No. C-86-234 (S.D.Tex. 1988). DeLuna then filed a motion for relief from order pursuant to Fed.R.Civ.P. 60(b) on June 29, 1988, along with an amended petition for writ of habeas corpus. On July 12, 1988, DeLuna sought leave to attach affidavits and other evidentiary material to his amended petition. The Court denied the motion for relief from judgment on July 19, 1988.

After full briefing of the issues, the Court of Appeals for the Fifth Circuit affirmed this Court's denial of relief. **DeLuna v. Lynaugh**, 873 F.2d 757 (5th Cir. 1989). Rehearing was denied on May 26, 1989. The Supreme Court denied the petition for writ of certiorari on October 10, 1989. **DeLuna v. Lynaugh**, ___ U.S. ___, 110 S.Ct. 259 (1989).

On November 2, 1989, the trial court scheduled DeLuna's execution to be carried out before sunrise on December 7, 1989. On the same day, DeLuna filed an application for writ of habeas corpus in the trial court. After reviewing the application, the state's answer, and DeLuna's response, the trial court entered findings of fact and recommended that relief be denied. The Court of Criminal Appeals entered an order denying relief on

November 29, 1989. **Ex parte DeLuna,** Application No. 16,436-02 (Tex.Crim.App. 1989).

B. Statement of Facts

On the night of February 4, 1983, George Aguirre was visiting his family in Corpus Christi, Texas. At approximately 8:00 p.m., while on his way to do some shopping, he stopped at a Shamrock service station on South Padre Island Drive (SF X 220-21).[1] While filling his van with gasoline, he noticed a man standing by the ice machine drinking a beer and holding an open knife (SF X 222-23). Because of the knife, Aguirre was apprehensive and kept a close watch on the man (SF X 223). The man put the knife in his pocket, approached Aguirre, and asked for a ride to the Casino Club. He offered Aguirre "money or drugs or, you know, whatever I needed, beer, anything" (SF X 225). Aguirre refused because he knew the man had a knife (SF X 226). When Aguirre went in to pay for the gas he told the female attendant that there was a man with a knife outside and he thought he would call the police. The attendant said she was going to call the police, too (SF X 226). As Aguirre left the station, he saw the man going inside (SF X 227). He drove up to the end of the block and turned around; as he passed the station, he saw the man and the attendant struggling inside the station (SF X 227). He stopped at a bowling alley and asked the security guard if he had

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[1] "SF" refers to the statement of facts from DeLuna's trial, followed by the volume and page numbers. "Tr." refers to the transcript of documents from DeLuna's trial.

a way to contact the police in a hurry. When the guard said he would have to call on the telephone like anyone else, Aguirre said "Forget it," and returned to the station. By that time, some one had already summoned the police and they had already arrived. Aguirre told the police what he had seen and gave a description of the man with the knife (SF X 228).

John Arsuaga testified that he and his wife passed the Shamrock station at about 8:00 p.m. on February 4, 1983 on their way to a nightclub. He noticed police cars at the service station and, as he was turning into the parking lot of the club, he saw a man jogging away from the service station (SF X 242-44). He was able to get a good look at the man as he passed in front of his headlights (SF X 244-46). Arsuaga thought there might be a connection between the police cars at the service station and the man running away so he went back and told the police what he had seen (SF X 247).

Kevan Baker stopped for gasoline at the Shamrock station on his way home from work shortly after 8:00 p.m. on February 4, 1983 (SF X 264). While he was putting gas in his car he heard a thump on the window. When he looked up he saw a man and a woman fighting (SF X 267). His first impression was that they were playing, "that was my first impression, boyfriend/girlfriend" (SF 268). He quickly realized that they were not playing and went to the door of the station (SF X 268-69). The man was coming out the door and, as they passed, he said to Baker, "Don't mess with me" (SF X 270). The man then ran off (SF X 270-71). The woman came to the door, said "Help me, help me," and collapsed just

outside the building. She was bleeding profusely (SF X 274). Baker made sure she stayed lying down, then went inside to get some towels to try to stop the bleeding (SF X 275). The police were arriving when he got back outside and he told them what he had seen, including a description of the man who had been fighting with the woman (SF X 275-77).

Jesus Escocheo, Jr., was working the evening shift as a police dispatcher on February 4, 1983. At approximately 8:09 p.m., he received a call from a woman at the Shamrock station of South Padre Island Drive requesting police assistance (SF X 27-8). He responded by dispatching a patrol car (SF X 28). He continued receiving calls from the police after they arrived at the scene, putting out descriptions of the attacker (SF X 32-3), as well as telephone calls from private citizens who reported seeing a man running in the area (SF X 33-4).

Ruben Rivera was a deputy constable on February 4, 1983. He had been out serving papers in a civil case (SF X81-2). While returning, he heard a transmission on the police frequency about an armed robbery involving a shooting (SF X 83). In response to the call, he began searching for the suspect in the neighborhood behind the service station (SF X 85-6). He eventually spotted someone under a pick-up truck. He and a city police officer pulled the person out from under the truck and he was arrested (SF X 87-8).

Corpus Christi police officer Mark David Schauer was one of the officers who responded to the call at the Shamrock station on the night of February 4, 1983 (SF X 111-12). The supervising

officer told him to search the area for the suspect (SF X 113). He soon encountered Constable Rivera who had located a person hiding under a pick-up truck (SF X 115-16). He assisted Rivera in pulling the person from under the truck and placed him under arrest (SF X 120). He identified DeLuna as the person he arrested (SF X 118). He found a wad of bills in DeLuna's front pants pocket, amounting to $149.00 (SF X 121). Officer Schauer then returned to the service station with DeLuna (SF X 127). George Aguirre viewed DeLuna and identified him as the man he had seen with a knife and who went into the station as he was leaving (SF X 229). Kevan Baker also identified DeLuna as the man he had seen fighting with the victim and who ran from the scene as Baker approached the station (SF X 277). John Arsuaga viewed a photo spread at the police station and picked DeLuna's picture out and identified it as the person he had seen running from the Shamrock station (SF X 248).

Pete Gonzales was the manager of the Shamrock station on South Padre Island Drive on February 4, 1983. He was called to the scene by the security company when the silent alarm was set off (SF X 163, 165). When he saw that there had been a robbery, he conducted an audit of the funds in the station and found that $166.86 was missing (SF X 169).

Dr. Joseph Rupp, the Nueces County Medical Examiner, conducted the autopsy on the victim. He discovered a stab wound in the chest that penetrated into the chest cavity and lung (SF X 209-10). As a result of the wound, blood amounting to

approximately two liters had filled the chest cavity and caused the victim's death (SF X 210-11).

DeLuna testified in his own behalf. He stated that he had been let off work early on February 4, 1983, because of bad weather and had gone to cash his check (SF XI 412-13). Later in the evening his stepfather took him to a skating rink, where he was supposed to meet some friends (SF XI 415). His friends did not show up, but he saw some other people he knew, including Mary Ann Perales (SF XI 416). He also met another friend, Carlos Hernandez and later went with him looking for a mutual friend (SF XI 416-17). Before they left to look for the friend, DeLuna called his stepfather to come pick him up. It was about 8:00 p.m. at that time (SF XI 417-18). Later he and Hernandez went to a bar near the Shamrock station on South Padre Island Drive. DeLuna went inside and Hernandez said he had to buy something at the service station and would meet DeLuna in a few minutes (SF XI 419-20). When Hernandez did not return, DeLuna went outside and saw Hernandez inside the service station wrestling with the attendant (SF XI 421). When he heard police sirens approaching, DeLuna ran, fearing he would get into trouble because he was currently on parole (SF XI 421-22). He hid under a pick-up truck and was arrested a little later by the police (SF XI 422). He described Hernandez as looking similar to himself (SF XI 422-23).

On cross-examination, he identified Mary Ann Perales and stated that she looked the same way she had on the night of February 4, when he saw her at the skating rink (SF XI 430-31). In rebuttal, Ms. Perales testified that on the night of February

4, 1983, she had been seven months pregnant, had been at a baby shower, had not been to the skating rink, and had not seen DeLuna (SF XI 451-52).

At the punishment phase of trial, the state called three peace officers to testify that DeLuna's reputation in the community for being a peaceful and law-abiding citizen was bad (SF XII 2-7). DeLuna's former parole officer also testified that DeLuna had been paroled form prison once on May 13, 1982, and again on January 13, 1983 (SF XII 9). Juanita Garcia testified that in the early morning hours of May 15, 1982, she had been awakened by someone in her room. The person put a pillow over her face and beat her when she struggled, breaking three ribs (SF XII 43-44). He then attempted to rape her (SF XII 45). She identified the person as DeLuna, whom she knew because he was a friend of her son's (SF XII 45). The state also introduced evidence of DeLuna's past convictions for unauthorized use of a motor vehicle and attempted rape (SF XII 5). DeLuna did not offer any evidence at the punishment phase of trial.

IV.

PETITIONER'S ALLEGATIONS

DeLuna makes the following allegations in support of his application for writ of habeas corpus:

1. The Texas capital-sentencing statute as applied in his case denied him his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by precluding the introduction and consideration of available mitigation evidence about his past difficulties with drug and alcohol abuse, his personal background, his youth, and his mental condition.

2. The Texas capital-sentencing statute as applied in his case denied him his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the jury was fundamentally misled as to the meaning of the term "deliberately" in the first punishment issue.

3. He was denied his rights under the Sixth, Eighth, and Fourteenth Amendments when he was denied the right to represent himself at the hearing on the motion for new trial and on appeal.

V.

EXHAUSTION

As he has posed his claims in the application, DeLuna has exhausted his available state court remedies.

VI.

STATE COURT RECORDS

The records from DeLuna's trial, appeal, and first state habeas corpus action have been provided to the Court in connection with his first federal petition. Respondent respectfully requests that the Court transfer those records to this cause. A certified copy of the proceedings in his second state habeas action is being provided with the state's response.

VII.

NOTION TO DISMISS FOR ABUSE OF THE WRIT

In his current petition for writ of habeas corpus, DeLuna raises two constitutional challenges to the Texas capital-sentencing statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1989), as well as an allegation that he was denied his constitutional right to self-representation in post-trial proceedings and on appeal. In his first petition filed in this

Court on or about October 13, 1986, DeLuna raised the following challenges to the validity of his conviction:

1. The death penalty in Texas is carried out in a racially discriminatory manner;

2. His attorneys rendered ineffective assistance at trial; and

3. His attorney on appeal was ineffective.

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court states in pertinent part:

> A second or successive petition may be dismissed if . . . new or different grounds are alleged, [if] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This provision applies with equal force to capital murder petitioners under sentence of death. E.g. **Johnson v. Lynaugh**, 821 F.2d 224 (5th Cir.), **stay denied**, ___ U.S. ___, 107 S.Ct. 3248 (1987); **Berry v. Phelps**, 819 F.2d 511 (5th Cir.), **stay denied**, ___ U.S. ___, 107 S.Ct. 3179 (1987). In fact, the Supreme Court has explicitly stressed its applicability:

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been brought years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate--even in capital cases--this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Powell, J., joined by Burger, C.J., Blackmun, Rehnquist and O'Connor, JJ., concurring).[2]

It has consistently been held in the Fifth Circuit that the appropriate standard against which to determine abuse of the writ is not whether a petitioner intended to bypass an issue at the time of the earlier petition, but "whether he withheld it without legal excuse when he filed his earlier petition." **Hamilton v. McCotter**, 772 F.2d 171, 176 (5th Cir. 1985), quoting **Jones v. Estelle**, 722 F.2d 159, 163 (5th Cir. 1983) (en banc), cert. denied sub nom. **Jones v. McKaskle**, 466 U.S. 976 (1984). Legal excuse may exist if, after the previous proceeding, there is a change in the law that makes the claim viable or the petitioner becomes aware or chargeable with knowledge of the asserted facts on which the new claim is based. **Hamilton v. McCotter**, 772 F.2d at 176. Where a petitioner has been represented by competent counsel in a prior habeas proceeding, he is held to possess

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[2]Once the respondent pleads abuse of the writ, the petitioner normally must be given at least 10 days in which to explain his failure to raise the new grounds in a prior petition. **Urdy v. McCotter**, 773 F.2d 652, 656 (5th Cir. 1985). The Fifth Circuit has recognized that the 10-day requirement is inappropriate in a case where a death-sentenced inmate has an imminent execution date and files a successive petition at the last minute. In such instances, "the petitioner should immediately be given an opportunity to respond to the state's claim of writ abuse, either in writing or in oral argument, if time permits." **Hawkins v. Lynaugh**, 862 F.2d 482, 486 (5th Cir. 1988). Thus, if the Court deems it necessary, DeLuna can be given the immediate opportunity to explain why dismissal for abuse of the writ is not appropriate.

knowledge of potential grounds for relief that is chargeable to counsel. Moore v. Butler, 819 F.2d 517, 519 (5th Cir. 1987).

DeLuna has been represented by competent counsel at trial, on direct appeal and in prior habeas actions. His attorney in his prior state habeas corpus proceedings and in his prior petition in federal court is listed as "of counsel" in his current petition. There is no legitimate reason why, if he believed that the Texas capital sentencing statute was constitutionally infirm because it did not mandate instruction on consideration of mitigating evidence or did not allow the jury to consider evidence of his background and mental condition, he did not raise such claims in his earlier federal petition. Indeed, by citing Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978), DeLuna acknowledges that the legal basis for his current claims was available at the time of his earlier writ. Even more, while his first habeas corpus petition was pending in this Court, the Supreme Court granted certiorari in Franklin v. Lynaugh, 823 F.2d 98 (5th Cir.), cert. granted, ___ U.S. ___, 108 S.Ct. 221 (1987), which challenged the validity of the Texas capital-sentencing scheme where the jury was not instructed on consideration of mitigating evidence. If he perceived that he was precluded from introducing and his jury was precluded from considering his mitigating circumstances due to the narrowness of the Texas statute, an adequate legal basis existed under Lockett and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982), at the time of the earlier federal petition. See Bell v. Lynaugh,

858 F.2d 978, 982 (5th Cir. 1988), cert. denied, ___ U.S. ___, 110 S.Ct. 223 (1989).

Further, DeLuna was clearly aware of the existence of the factual basis for his Penry claims, if such a factual basis exists at all. If evidence of his alleged drug and alcohol abuse and his claimed low intelligence even exists, as DeLuna belatedly claims, he certainly had knowledge of that evidence at the time he filed his first habeas petition. Moreover, knowledge of the legal significance of these alleged "facts" is imputed to DeLuna because he was represented by competent counsel in his prior habeas proceedings. Hamilton v. McCotter, 772 F.2d 171, 178-79 (5th Cir. 1985). Hence, because both the factual and legal bases for DeLuna's Penry claims existed at the time of the prior writ, his failure to earlier present the claims constitutes an impermissible abuse of the writ.

In addition, DeLuna cannot claim that he was unaware of the possibility of raising a claim that the Texas statute was applied unconstitutionally in his case because the jury was "misled" as to the meaning of "deliberately" in the first punishment issue. At trial, his attorney objected to the court's punishment charge for not defining the term (Tr. 66). Thus, his failure to make this claim in his first petition constitutes an intolerable abuse of the writ.

Finally, with respect to his allegation that he was denied his right to self-representation, DeLuna can show no reasonable excuse for omitting the claim in his first petition. The legal basis of his allegation Faretta v. California, 422 U.S. 806, 95

S.Ct. 2525 (1975), was decided eight years before his trial. Indeed, at the hearing on his motion to relieve his attorneys, DeLuna referred to Faretta and numerous other cases dealing with the right of a criminal defendant to represent himself (see, e.g., SF XVI 3-4). Further, DeLuna was present in court and argued the merits of his motion and certainly was aware of the factual basis for raising the claim. His waiting until this successive petition to make this allegation constitutes a clear abuse of the writ.

VIII.

ANSWER, MOTION FOR SUMMARY JUDGMENT, AND SUPPORTING BRIEF

A. Because DeLuna failed to present any mitigating evidence at his trial and failed to request special instructions on the consideration of mitigating evidence, his Penry claim is not properly before the Court.

Initially, it must be noted that DeLuna presented no mitigating evidence at trial.[3] Clearly, if no mitigating evidence is brought before the jury, a defendant cannot demonstrate that the jury was precluded from considering it under the Texas punishment issues, and DeLuna does not attempt to do so here. McCoy v. Lynaugh, 874 F.2d 954, 966 (5th Cir.), stay denied, ___ U.S. ___,

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[3]Although DeLuna contends that there was some mitigating evidence offered at trial, he fails to identify what that evidence was, and none is discernible from the record. The thrust of his argument before this Court is that there was evidence with mitigating value available that was not introduced because the Texas statute precluded the jury from considering its mitigating aspects.

109 S.Ct. 2114 (1989). Further, although he filed a written objection to the trial court's charge to the jury at the punishment phase of trial because they did not contain an instruction on consideration of mitigating evidence (Tr. 66), he expressly waived that objection in open court (8F XII 51). In Penry, the Supreme Court made clear that special instructions on mitigating evidence are required only when such evidence is presented and an instruction is requested:

> Citing Lockett and Eddings, Penry argues that he was sentenced to death in violation of the Eighth Amendment because, in light of the jury 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 sentence less than death. Penry thus seeks a rule that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death.

___ U.S. at ___, 109 S.Ct. at 2945 (emphasis added).

> The rule Penry seeks - that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed - is not a "new rule" under Teague [v. Lane, ___ U.S. ___, 109 S.Ct. 1060 (1989),] because it is dictated by Eddings and Lockett.

Id. at ___, 109 S.Ct. at 2947 (emphasis added). No mitigating evidence having been introduced and no request for special instruction having been made, DeLuna may not rely on the holding in Penry as a basis for relief.

To require an objection to preserve a Penry claim is consistent with the precedent of the Fifth Circuit. In Jones v. Butler, 864 F.2d 348, 368-70 (5th Cir.) (on rehearing), cert. denied, ___ U.S. ___, 109 S.Ct. 2090 (1989), the court found that a trial objection was required to preserve for federal habeas review a claim of error under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). In Jones, the court noted that a Batson determination was a factual one to be made by the trial judge at the time of trial, and such a determination cannot adequately be made years after trial, and that improper prosecutorial exercise of a peremptory challenge can be immediately remedied at the time of trial by seating the juror. Finally, the court noted that the opinion in Batson presupposed that an objection would be promptly made at the time of trial. Jones, 864 F.2d at 369-70. Likewise, in this case an objection to the charge or a specially requested charge is necessary to inform the trial judge that a defendant perceives and wishes to urge to the jury that his evidence possesses mitigating value beyond the scope of the special issues. Indeed, it defies logic to require a trial judge to divine some possible mitigating value of evidence without the input of the party that offered the evidence and who, presumably, knows what mitigating effect he wishes the jury to consider. Moreover, as in Batson, the Court in Penry analyzed the claim in light of the requested instructions and acknowledged that special instructions at the time of trial would cure any constitutional error.

Finally, principles of equity do not require DeLuna to benefit from the rule in Penry. DeLuna, who did not introduce

mitigating evidence at trial, or urge at trial that any of his evidence possessed mitigating value beyond the scope of the special issues and attempt to offer the jury a vehicle for the consideration of his evidence, is not similarly situated to those who did. **Jones**, 864 F.2d at 370; **accord Thomas v. Moore**, 866 F.2d 803, 805 (5th Cir.), **cert. denied**, ___ U.S. ___, 110 S.Ct. 124 (1989). Hence, DeLuna's Penry claim is not properly before the Court.

B. DeLuna has failed to demonstrate, even at this time, the existence of any "mitigating" evidence that lessened his moral culpability.

In Penry, a majority of the Supreme Court held that the jury had been unconstitutionally precluded from giving mitigating effect to evidence of Penry's mental retardation and history of being abused as a child in answering the special issues set out in Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1989). The Court determined that such evidence, even though relevant to the issues the jury had to answer, had relevance to Penry's moral culpability beyond the scope of the issues that the jury could not express unless it was specifically instructed to do so. In addition, the Court held that Penry's retardation and childhood abuse were relevant to the future dangerousness issue only as aggravating factors. Id. at ___, 109 S.Ct. at 2949 (emphasis in original). The unalterable condition of mental retardation, which might be found to reduce Penry's moral culpability in committing capital murder, was also shown to limit Penry's ability to learn from his mistakes. Id. Thus, the evidence supported

an affirmative answer to the second special issue, and that issue did not provide a vehicle for a reasonable juror to give mitigating effect to Penry's evidence.

Assuming that DeLuna is entitled to benefit from the holding in **Penry** by bringing in evidence that was never put before the jury, the evidence he now advances, to the extent that it even exists and has mitigating value, could be adequately considered by the jury in answering the two special issues.

1. Alcohol and Drug Abuse

DeLuna first contends that he had a history of alcohol and drug abuse but that such evidence could not have been considered to be mitigating by the jury. In support of his claim, he proffers several offense reports showing his arrest as a juvenile for intoxication and for sniffing glue. He makes no attempt to explain how this evidence, in the form he presents it, in any way lessened his moral culpability, i.e., how it is mitigating. He does not attempt to show that, as a result of these experiences, he suffered any impairment in his thinking processes or any reduced impulse control that made him less responsible for his actions. In fact the reports of the psychologist and psychiatrist who examined DeLuna prior to trial found no evidence of any kind of mental impairment or hallucinations. **See** Petition, Appendices B, C. In discussing DeLuna's claim in his first petition that counsel was ineffective for not presenting this evidence, the Court stated "revelation of a history of substance abuse . . . could as easily have swayed the jury in favor of the death sentence as in favor of life imprisonment, there being no

evidence of substance abuse having anything to do with Petitioner's behavior on the night of the murder." DeLuna v. Lynaugh, No. C-86-234, Order Dismissing Petition for Writ of Habeas Corpus at 5. It is ludicrous to suggest that the jury cannot consider the mitigating aspects of his evidence when DeLuna cannot even demonstrate that the evidence has any mitigating value.

2. Low Intelligence

DeLuna next asserts that there was evidence available that he was of low intelligence but that the jury could not have given mitigating effect to this aspect of his character in making its punishment decision. To support this claim, he has attached the reports of a psychiatric and a psychological evaluation conducted on him prior to trial. See Petition, Appendices B, C. The results of the testing did show that DeLuna had a borderline I.Q. of approximately 72. Both of the examiners concluded, however, that DeLuna was malingering and faking his responses in order to appear less intelligent than he is. Dr. Plaisted, the psychologist, stated that the results "are a gross understatement" of DeLuna's intellectual abilitites. In addition, DeLuna testified at trial and gave no indication of suffering from any mental impairment.[4] Similarly, he did not exhibit any signs of diminished mental capacity during his discussions with the court at

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[4]Interestingly, both examiners reported that DeLuna repeatedly stated that he could not remember very many details about his life or about the murder. During his testimony, DeLuna exhibited no such memory lapses.

the hearing on his motion for new trial, when he initially asked to be allowed to represent himself. Further, the affidavit of his sister Rebecca Marquez, attached to the petition as Appendix K, indicates that DeLuna has completed high school and college level courses since arriving at TDC. DeLuna has utterly failed to support his contention that he had available mitigating evidence of his low intelligence.

3. Youth

DeLuna also contends that evidence of his youth -- he was 21 at the time of the murder -- could not properly be considered by the jury at the punishment phase of the trial. He makes only the barest of conclusory allegations that this is so, without any attempt to demonstrate that the jury was precluded from considering evidence. For this reason alone, habeas corpus relief is not warranted. **Mayo v. Lynaugh**, 883 F.2d 358 (5th Cir. 1989) (on rehearing).

Moreover, DeLuna cannot claim that his youth has mitigating value beyond the scope of the special issues. At trial, he presented no psychological characteristics of his adolescence and their effects on his perceptions and behavior, nor does he present any such characteristics and effects to this Court. Further, unlike Penry, he makes no attempt to relate these factors to his own situation. Penry introduced evidence that he has a low IQ and supplemented this with testimony about how his low intelligence affected his behavior and ability to adapt to society's norms. DeLuna has not propounded one iota of evidence to

show that he suffered from any of the cognitive and behavioral limitations that certain adolescents possess.

DeLuna's jury was not apprised of the "disabilities" which may affect some adolescents. With respect to the factor of youth, his jury was thus presented with nothing more than that he was twenty-one years old at the time he committed the offense. The bald fact of youth had mitigating relevance to the future dangerousness inquiry of special issue number two, **see Jurek v. State**, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975). The jury was presented with no evidence, however, that could rationally yield the conclusion that DeLuna bore a diminished moral culpability when he committed the capital offense.

Moreover, a jury could draw on its common experience and perceive the full mitigating effect of DeLuna's youth. It is commonly understood that, when compared with adults, adolescents generally have a limited ability to control impulsive behavior, evaluate the future consequences of their conduct and appreciate the possibility and finality of death. This kind of evidence is particularly relevant to the first punishment issue -- whether the defendant acted deliberately and with the reasonable expectation that death would result. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1). DeLuna was free to present evidence and argue that his youth reduced his moral culpability because he acted impulsively, not reflectively, and because he did not reasonably expect that death would result from his actions. The jury could give full mitigating effect to this evidence in answering the first punishment issue. DeLuna makes no attempt to argue that

this evidence had any relevance beyond the scope of the first issue.

Additionally, perhaps the most compelling mitigating aspect of youth is its transitory nature. In contrast to the true disability of mental retardation, adolescence is a temporary condition, and any limitations attributable to adolescence necessarily will end. Hence, were a juror convinced that DeLuna's moral culpability was somehow reduced because his crime was in some way attributable to the "disabilities" of his youth, he necessarily would have reached the logical conclusion that DeLuna would cease to act violently when he outgrew his "disabilities." Thus, in addition to the fact that the characteristics associated with youth can be given their full mitigating effect in evaluating DeLuna's blameworthiness for his crime through answering the first special issue, all of the mitigating qualities associated with adolescence are squarely addressed by the future dangerousness questions and can be given full mitigating effect under Texas' capital sentencing procedures.

Nor can DeLuna portray youth as a "two-edged sword" that reduces his moral culpability for his actions but at the same time supports a death sentence. The Supreme Court in **Penry** found evidence of Penry's mental retardation to be such a "two-edged sword" because, although it reduced his moral culpability, the evidence showed that his condition rendered him unable to learn from his mistakes, and thus made an affirmative answer to the second issue more likely. Society clearly would not view youth in such a fashion, given its transitory nature.

The jury's affirmative response to the deliberateness and future dangerousness inquiries demonstrates that not one juror was persuaded, even to the point of entertaining a reasonable doubt, as to the existence of a mitigating nexus between DeLuna's youth and his commission of capital murder or any character trait that would call for a sentence less than death. The sentencer determines the degree of weight to accord to punishment phase evidence. **Eddings v. Oklahoma**, 455 U.S. at 114-15, 102 S.Ct. at 877; **see also Brock v. McCotter**, 781 F.2d 1152, 1158 (5th Cir.), **cert. denied**, 476 U.S. 1153, 106 S.Ct. 2259 (1986) (where no reasonable juror would consider defendant's age of 25 as mitigating jury consideration of the evidence may properly be excluded). Here, the jury's affirmative response to special issue number two constitutes a plain rejection of the mitigating inferences which could be drawn from DeLuna's evidence. Any assertion by DeLuna that his jury nonetheless might have found that adolescence diminished his personal culpability to such a degree that a death sentence would be an inappropriate punishment is patently unreasonable.

4. Personal Background

Finally, DeLuna contends that numerous friends and relatives were available to testify that he was a kind and loving person. Again he asserts in conclusory terms that the jury could not have considered and given mitigating expression to this evidence during the punishment phase of trial. His mere conclusory statements do not warrant habeas relief. **Mayo v. Lynaugh**, 883 F.2d at 359.

Moreover, such evidence is highly relevant to, and can be fully considered by the jury in answering, the second punishment issue. Evidence that the defendant has been kind to others, has shown generosity, and has exhibited feelings of affection demonstrate the defendant's humanity. People who regularly and consistently display such traits can be expected to act the same way in the future and, hence, not constitute a danger to society. A juror who was persuaded that DeLuna would behave in conformity with these positive characteristics would necessarily have a reasonable doubt about his being a future danger and could answer the second issue in the negative. DeLuna identifies no other relevance to the jury's sentencing concerns that the evidence possesses. Thus, he is not entitled to relief on this basis.

IX.

DeLUNA WAS NOT UNCONSTITUTIONALLY DENIED HIS RIGHT TO SELF-REPRESENTATION

As his last claim for relief, DeLuna asserts that he was denied the right to represent himself, despite his request to do so, at the hearing on his motion for new trial and on appeal. The record reflects that at the hearing on the Motion for New Trial on September 9, 1983, DeLuna filed a motion styled "Motion to Disqualify Counsels and for Appellant to Proceed By Himself as Counsel" (Tr. 98). After discussing the motion with DeLuna, the court denied the motion (SF XIV 11). At the conclusion of the hearing on the motion for new trial, DeLuna re-urged his motion. The court questioned DeLuna at some length about his background and understanding of the law and legal process (SF XIV 38-43),

and DeLuna then stated that he was merely dissatisfied with one of the two attorneys representing him (SF XIV 43). The court then explained that it would appoint the other attorney, James Lawrence, to represent him on appeal and that DeLuna could review the brief filed and prepare one of his own if he was dissatisfied with his attorney's (SF XIV 44-5). DeLuna agreed to this arrangement (SF XIV 48).

A criminal defendant may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). In order to do so, however, his waiver must be knowing, intelligent, and voluntary. The record must reflect that the defendant understands the dangers and disadvantages of self-representation before the waiver is effective. Id.

In this case the record reflects that DeLuna asserted the right to represent himself by reading from a motion that was prepared by someone other than himself (See Tr. 98-102). The motion itself did not address the dangers of self-representation, but merely recited the holdings of cases dealing with the right. During its colloquy with DeLuna, the court pointed out that DeLuna had erroneously requested that another inmate be appointed to represent him, an error that resulted from his simply copying the motion (SF XIV 47). DeLuna gave no indication during the discussion of being aware of the difficulties of pro se representation. Moreover, the sole basis for DeLuna's motion was that one of his two attorneys was unacceptable; he was entirely satisfied with Lawrence's representation and was willing to continue with him as counsel (SF XIV 44). Finally, after the court

impressed upon him the difficulties that would be encountered in his efforts to represent himself on appeal, DeLuna unqualifiedly stated that he would agree to have Lawrence represent him on appeal (SF XIV 48). DeLuna clearly withdrew his waiver of counsel once he understood the dangers of representing himself. Thus, there was no error in the court's denying his motion to represent himself.

X.

OPPOSITION TO REQUEST FOR STAY OF EXECUTION AND CERTIFICATE OF PROBABLE CAUSE

The standard for granting a certificate of probable cause under Fed.R.App.P. 22(b) is whether there has been a substantial showing of a denial of a federal right. **Barefoot v. Estelle**, 463 U.S. 880, 103 S.Ct. 3383 (1983); **Rault v. Butler**, 826 F.2d 299, 302 (5th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 13 (1987). In deciding whether to issue a stay of execution, the court must consider:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Id. As stated in **Brogdon**, "[i]n a capital case, 'while the movant need not always show the probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities (i.e. the other three factors) weighs in favor of granting the stay.'" **Id.** DeLuna plainly cannot meet this standard.

As the foregoing demonstrates, DeLuna has failed to show the substantial denial of a federal right. He clearly has abused the writ and can demonstrate no excuse justifying his abuse. He has not demonstrated that he was in any way precluded from presenting mitigating evidence to the jury at his trial, nor has he shown that the jury could not have given full mitigating effect to the evidence he now claims was available at the time of trial. Further, the facts fail to bear out his claim that he was denied his right to self-representation on appeal. Thus, there is no likelihood of his succeeding on the merits of his claims on appeal. Although the denial of a stay will make his execution likely, he has not shown that he has a legitimate challenge to the state's valid conviction and sentence. On the other hand, granting a stay where none is warranted will prevent the state from carrying out its lawful judgment, and the unjustified granting of a stay of execution can in no way serve the public interest.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that this petition be dismissed for abuse of the writ or, in the alternative, that it be denied on the merits, and that the application for stay of execution be denied, and that a certificate of probable cause be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Motion to Dismiss for Abuse of the Writ and Alternatively, Answer, Motion for Summary Judgment, and Supporting Brief has been served by placing the same in Federal Express, on this the 30th day of November, 1989, addressed to: Mr. R. K. Weaver, 6116 N. Central Expressway, Suite 404, LB 35, Dallas, Texas 75206.

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