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

CARLOS DELUNA,	§	
	§	
Petitioner,	§	
	§	
V.	§	CIVIL ACTION NO. _____
	§	
LANE MCCOTTER, Director TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
	§	
	§	
Respondent.	§	

APPLICATION FOR WRIT OF HABEAS CORPUS

AND BRIEF AND APPLICATION FOR STAY OF EXECUTION

TO THE HONORABLE HAYDEN 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 volunteer attorney, Richard A. Anderson, and files this his Application for Writ of Habeas Corpus and Brief and Application for Stay of Execution, and in support hereof would respectfully show the Court as follows:

I.

Petitioner is confined in Respondent's custody on death row in the Ellis I Unit of the Texas Department of Corrections in Huntsville, Texas, pursuant to a judgment of conviction and a sentence of death.

II.

He was convicted in the 28th Judicial District Court of Nueces County, Texas, in a case styled the State of Texas v. Carlos DeLuna, in Cause No. 83-CR-149-A. His case was affirmed by the Court of Criminal Appeals of Texas in Opinion No. 69,245 on June 4, 1986. His execution has been scheduled for October 15, 1986.

III.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C., Section 2254.

IV.

PROCEDURAL HISTORY

Petitioner was convicted in Cause No. 83-CR-149-A

in the 28th Judicial District Court of Nueces County, Texas, on the 15th day of July, 1983, of the offense of capital murder and the jury sentenced Petitioner to death. Petitioner was represented by court-appointed counsel.

The conviction and sentence were affirmed by the Court of Criminal Appeals of Texas in Cause No. 69,245 in an En Banc Opinion delivered June 4, 1986. Petitioner's court-appointed attorneys did not seek a Motion for Rehearing in the Court of Criminal Appeals of Texas, and did not file an Application for Writ of Certoriari to the Supreme Court of the United States. Petitioner's cause was abandoned by his court-appointed attorneys after affirmance by the Court of Criminal Appeals of Texas and Petitioner's first execution date has been set for October 15, 1986.

An Application for Stay of Execution addressed to the United States Supreme Court pending a file of Writ of Certoriari was filed October 8, 1986. The Supreme Court overruled and denied the Stay of Execution on October 10, 1986, because the issues presented in the Application for Stay of Execution have not been litigated in the State Court.

Petitioner on October 8, 1986, filed an original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure, along with an Application

for Stay of Execution pending a hearing on that Writ of Habeas Corpus in the convicting court of the 28th Judicial District, Nueces County, Texas. The Writ of Habeas Corpus raised substantial issues of constitutional dimension that were not litigated in the trial court nor have been raised by any evidentiary hearing prior to the filing of the original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure. On October 9, 1986, the trial court of the 28th Judicial District Court, Nueces County, Texas, denied Petitioner the opportunity of an evidentiary hearing, denied his Application for Writ of Habeas Corpus without hearing, and denied his Stay of Execution.

A Motion for Stay of Execution and a request that the 28th Judicial District Court of Nueces County, Texas, be required to hold an evidentiary hearing on Petitioner's original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure, was filed with the Court of Criminal Appeals for the State of Texas on October 10, 1986. On October 10, 1986, the Court of Criminal Appeals of Texas denied the stay of execution and refused to order the 28th Judicial District Court of Nueces County, Texas, to hold an evidentiary hearing on Petitioner's original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure.

Petitioner, at each stage of the post conviction proceedings is indigent and has been represented by volunteer counsel since his court-appointed attorneys abandoned him after the affirmance of the Court of Criminal Appeals of Texas.

Petitioner execution date is still set for October 15, 1986.

V.

EXHAUSTION OF STATE REMEDIES

Petitoner presents claims on this Application for Writ of Habeas Corpus that are of constitutional dimension that he has been denied evidentiary hearings by the convicting court, the 28th Judicial District Court, Nueces County, Texas, and by the Court of Criminal Appeals of Texas.

VI.

STATEMENT OF THE CASE

Petitioner was indicted for intentionally causing the death of Wanda Lopez by stabbing her with a knife in the course of committing and attempting to commit a robbery on or about February 4, 1983. (Section 19.03, Texas Penal Code).

VII.

CLAIMS PRESENTED FOR REVIEW

(A) Prosecutorial discretion in determining which cases in which to seek the death penalty is discriminatory based upon the race of the victim in violation of the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution and Article 1, Sections 3, 3a, 10, 15, and 19. Petitioner is an hispanic male. The victim of the offense as listed by autopsy records is white female. Evidence will be adduced that will show prosecutions in Nueces County, Texas, in which the decision to seek the death penalty is invoked is based upon the race of the victim to a statistical certainty. The United States Supreme Court has before it a similar issue in McCluskey v. Kemp, No. 84-6811 and Hitchock v. Wainwright, No. 85-6756, to be argued before this Court on October 15, 1986.

(B) Petitioner was denied effective assistance of counsel at trial in violation of his rights

under the Sixth and Fourteenth Amendments, United States Constitution, Article 1, Section 3, 3a, 10, 15, and 19. Petitioner will show in evidence adduced that he was denied effective assistance of counsel under the standards of Strickland v. Washington, 466 U.S. 1105, 104 Sup.Ct. 2052, 80 L.Ed.2d 674 (1984) in the following particulars:

(1) Lead counsel at trial only saw and talked to Petitioner twice prior to his trial for this offense.

(2) Trial counsel failed to follow up information and investigate thoroughly Petitioner's lengthy history of substance abuse to determine if there was sufficient organicity as a result of substance abuse to mitigate punishment.

(3) Counsel at trial failed to thoroughly investigate an alternative hypothesis concerning an assailant other than Petitioner even when provided with a name and location of the assailant and information concerning similarities between Petitioner's appearance and the alternative assailant.

(4) Trial counsel failed to adequately investigate an alternative assailant and to use technology such as spectroscopic voice identification techniques on a tape recording of the actual assault and offense to determine whether or not the voice on the tape was that of the Petitioner or another assailant.

(5) Trial counsel, all though being advised of numerous witnesses that this 21 year old Petitioner had to present in mitigation of punishment, failed to put on a single witness at the punishment phase of the trial in mitigation of punishment.

(6) Trial counsel failed to preserve the testimony of Petitioner's most important witness although they had been advised that the witness was hospitalized, was near death, and that the testimony of the witness was absolutely critical to the defensive hypothesis of an alternative assailant.

(7) Trial counsel instructed Petitioner not to cooperate with court-appointed psychologist and psychiatrists for fear that the evidence would be used against Petitioner. Petitioner would show in this respect that Petitioner's lengthy history of substance abuse, if made known to the psychiatrist and psychologist appointed by the Court to evaluate Petitioner would have produced evidence in mitigation of punishment.

(C) Petitioner was denied effective assistance of counsel on the appeal of his conviction in violation of his rights under the Sixth and Fourteen Amendments, United States Constitution, and Article 1, Sections 3, 3a, 10, 15, and 19. Petitioner will show that even if the standards of Strickland v. Washington, 466 U.S. 1105, 104 Sup.Ct. 2052, 80 L.Ed.2d 674 (1984), apply to the determination of whether or not counsel was effective on the appeal of Petitioner's cause, Petitioner will show that counsel's brief on appeal, consisting of seventeen pages, was wholly inadequate and insufficient to effectively present to the Court of Criminal

Appeals of Texas all the issues that were present at Petitioner's trial.

VIII.

BRIEF STATEMENT OF THE LAW

THE STATE OF TEXAS APPLIES THE DEATH PENALTY STATUTE IN AN ARBITRARY AND DISCRETIONARY MANNER IN THAT THE DEATH PENALTY IS SOUGHT IN A DISPROPORTIONATE NUMBER OF CASES WHERE THE VICTIM IS CAUCASION AND IS NOT SOUGHT IN A DISPROPORTIONATE NUMBER OF CASES WHERE THE VICTIM IS BLACK OR MEXICAN-AMERICAN.

Recent studies of the death penalty practice by Texas prosecutors shows that of the 389 capital murder cases filed in the State of Texas where the victim was black or Mexican-American, only 2.3% resulted in a death sentence, whereas in 1501 capital cases filed in which the victim is caucasion, 10.7% resulted in the death penalty.

Petitioner also submits that an analysis of the capital cases filed which involved a black victim will show a disproportionate number of cases which were filed as capital murder cases but which were not tried as capital cases. For example, statistics for Dallas County, Texas show that in all 56 potential capital cases filed in which the victim

was black, none were tried as captial cases, and few were indicted as captial cases.

Furman v. Georgia, 408 U.S. 238 (172) clearly established the constitutional rule that any statutory scheme providing for the death penalty may not be applied in an arbitrary and capricious manner.

One of the core purposes of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Strauder v. West Virginia, 100 U.S. 303, 307-308, 310 (1880); Palmore v. Sidoti, ____ U.S. ___, 104 S.Ct. 1879, 1881-1882 (1984). In Palmore, the Supreme Court reviewed a state court judgment divesting a caucasion natural mother of the custody of her infant child because of her remarriage to a person of a different race. Chief Justice Burger wrote the unanimous opinion of the Court, stating:

> Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.

_____ U.S. _____, 104 S.Ct. at 1882.

The Court noted that the Constitution cannot control racial prejudice "but neither can it tolerate them." Id., at 1882.

Petitioner contends that the racial discrimination demonstrated in the application of the death penalty statutes is similar in law to racial discrimination used to keep minorities from serving on grand or petit juries. In Vasquez v. Hillery, U.S._____, 106 S.Ct. 617 (1986), the Supreme Court sustained the reversal of a California murder conviction because of the use of racial discrimination in the selection of the grand jury. The majority opinion of Mr. Justice Marshall noted that since 1880, the Court has repeatedly rejected all arguments that a conviction may stand when based upon racial discrimination in the selection of the grand jury. Such a harsh result is needed because "intentional discrimination in the selection of a grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent." Vasquez v. Hillery, _____ U.S. _____, 106 S.Ct. at 623.

In Rose v. Mitchell, 443 U.S. 545 (1979), federal habeas corpus was held to be a proper vehicle to raise a claim of racial discrimination in the grand jury, even if there is no taint or error at the trial resulting in the conviction.

In the present case, the complaint is against a racially motivated practice in the selection of cases that

will be tried as capital cases. In effect, this conviction and most of the other capital convictions in the State of Texas are based upon racial discrimination in the selection of which cases will be capital solely because of the race of the victim. If the victim is caucasion, then 10% of all possible capital cases involving caucasions will become capital cases. If the victim is black or Mexican-American, then less than 3% of those cases will become capital cases. Petitioner moves that the harsh result of declaring the Texas death penalty practice unconstitutional is required because the use of intentional discrimination to select the proper case to be tried as a capital case is a grave constitutional trespass, possible only under the color of state authority, and wholly within the power of the State to prevent.

Petitioner would request an evidentiary hearing to introduce documentary evidence and testimony to prove the allegations in this section.

CONCLUSION

WHEREFORE, Petitioner prays that this Court:

(1) Issue a Writ of Habeas Corpus to have Petitioner brought before it to the end that

he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

(2) Conduct a hearing in which proof may be offered concerning the allegations of this petition;

(3) Permit Petitioner, who is indigent, to proceed without prepayment of costs or fees;

(4) Grant Petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in this peitition;

(5) Grant Petitioner the authority to gain subpoenas in forma pauperis for witnesses and documents to prove the facts as alleged in this petition;

(6) Allow Petitioner a period of sixty (60) days. Shall commence after the completion of any hearing in this Court in which a brief of issues of law may be raised by this petition;

(7) Immediately stay Petitioner's execution pending final disposition of this petition; and

(8) Grant such other and further relief as may be appropriate.

Respectfully submitted,

RICHARD A. ANDERSON
Bank of Dallas Building, LB#3
3333 Lee Parkway, Suite 930
Dallas, Texas 75219
214/559-4384
Bar No. 01207700

CERTIFICATE OF SERVICE

A copy of this Motion has been forwarded to Ms. Paula Offenhauser, Assistant Attorney General, Supreme Court Building, Sixth Floor, Austin, Texas, 78711.

SIGNED this the 10th day of October, 1986.

RICHARD A. ANDERSON

CERTIFICATE OF CONFERENCE

I spoke with Paula Offenhauser, Assistant Attorney General, and she will file a response to this Writ and Application for Stay of Execution.

RICHARD A. ANDERSON

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

CARLOS DELUNA,	§	
	§	
Petitioner,	§	
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V.	§	CIVIL ACTION NO. _____
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LANE MCCOTTER, Director TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
	§	
Respondent.	§	

A F F I D A V I T

STATE OF TEXAS §
§
COUNTY OF DALLAS §

CARLOS DELUNA is the Petitioner in this cause and has stated to me that all the facts stated herein are true and correct. Because of time limitations, counsel has not been able to get an affidavit signed, but will do so as soon as possible pursuant to mailing limitations.

RICHARD A. ANDERSON

SUBSCRIBED AND SWORN TO BEFORE ME by the said Richard A. Anderson on this the 10th day of October, 1986, which witness my offical seal.

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
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LANE MCCOTTER, Director TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
	§	
	§	
Respondent.	§	

APPLICATION FOR STAY OF EXECUTION

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

Petitioner respectfully moves this Court to enter an order staying the execution of the sentence of death opposed on him and scheduled to be carried out before sunrise on October 15, 1986, pending the final disposition of the present proceeding for a Writ of Habeas Corpus, and until further order of the Court.

This Motion is based upon the Petition for Writ of Habeas Corpus by a person in State custody filed contemporaneously herewith, and the memorandum of law in support of Petitioner's Application for Stay of Execution.

As additional grounds, Petitioner would show that his first ground of error is an identical issue as raised in McCluskey v. Kemp, No. 84-6811 and Hitchock v. Wainwright, No. 85-6756, to be argued before the Supreme Court of the United States on October 15, 1986. Until the Supreme Court acts upon this ground, the Application for Stay should be granted.

Respectfully submitted,

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Dallas, Texas 75219
214/559-4384
Bar No. 01207700

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SIGNED this the 10th day of October, 1986.

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CERTIFICATE OF CONFERENCE

I spoke with Paula Hoffenhauser, Assistant Attorney General for the State of Texas, and she will file a response.

RICHARD A. ANDERSON

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

CARLOS DELUNA,	§	
	§	
Petitioner,	§	
	§	
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	§	
LANE MCCOTTER, Director TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
Respondent.	§	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S APPLICATION FOR A STAY OF EXECUTION

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

Comes now CARLOS DELUNA, Petitioner herein, by and through his attorney of record, Richard A. Anderson, and presents the following memorandum of law in support of his requested stay of execution.

This is a habeas corpus petition in a death penalty cases. A stay of execution is legally authorized and should be granted to permit the Petitioner to have a full and adequate hearing in the Texas Court of Criminal Appeals and in this Court before he is executed. Clearly, "there would be a miscarriage of justice if the irremediable act of execu-

tion is taken, "Modesto v. Nelson, 296 F.Supp. 1375, 1376-1377 (N.D. Cal. 1969), before a petitioner's challenge to his conviction and sentence of death can be fairly heard and "finally adjudicated," Hill v. Nelson, 272 F.Supp. 790, 795 (N.D. Cal. 1967).

This Court has jurisdiction and is authorized by statute and an abundance of authority to stay Petitioner's imminent execution. State remedies have been exhausted. Since substantial federal constitutional questions are presented in the habeas corpus petition, a stay is plainly warranted.

I.

JURISDICTION OF THE COURT TO CONSIDER THE PETITION AND TO STAY PETITIONER'S EXECUTION

By this petition for a writ of habeas corpus, the Petitioner asserts that his conviction and sentence of death violate the Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States. Those contentions are within the jurisdiction conferred upon this Court by 28 U.S.C. Sec. 2241(c)(3). See Fay v. Noia, 372 U.S. 391, 399-426 (1963); and see, e.g., Sheppard v. Maxwell, 384 U.S. 384 U.S. 333 (1966); Maxwell v. Bishop, 398 U.S. 262 (1970). The Court's power to stay petitioner's execution is

expressly conferred by 28 U.S.C. Sec. 221; and stays of execution have been regularly granted by federal habeas corpus courts to death-sentence state prisoners pending disposition of their federal constitutional claims. E.g., Whitney v. Wainwright, 339 F.2d, 275, 276 (5th Cir. 1964); Clarke v. Grimes, 374 F.2d 550, 553 (5th Cir. 1967).

II.

EXHAUSTION OF STATE REMEDIES

Petitioner has exhausted his state remedies. Counsel has sought a stay of execution from the 28th Judicial District Court, Nueces County, Texas, informing the court of the grounds of error alleged,. However, the trial court has denied the request as has the Texas Court of Criminal Appeals is an order dated October 10, 1986.

III.

APPROPRIATENESS OF A STAY OF EXECUTION

Petitioner is a condemned state prisoner presenting federal constitutional grievances against his conviction and death sentence. He is not in a position to brief his federal contentions definitively at ths stage, because some of them will require an evidentiary hearing and his schedule

date of execution is less than one week away. However, the contentions as set forth in his federal habeas corpus petition, also filed today, are plainly substantial and is the first time the petitioner has sought federal court review of these contentions. Therefore, they warrant a stay of execution pending a full and complete hearing. See: Adderly v. Wainwright, 272 F.Supp. 530, 532-533 (M.D. Fla. 1967).

WHEREFORE, Petitioner prays that this motion to stay the execution be granted.

Respectfully submitted,

RICHARD A. ANDERSON
Bank of Dallas Building, LB#3
3333 Lee Parkway, Suite 930
Dallas, Texas 75219
214/559-4384
Bar No. 01207700

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SIGNED this the 10th day of October, 1986.

RICHARD A. ANDERSON