11/17/89

No.83-CR-194-A

EX PARTE CARLOS DELUNA	IN THE 28TH JUDICIAL DISTRICT COURT OF NUECES COUNTY, TEXAS

APPELLANT'S OBJECTIONS TO STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Carlos DeLuna, Petitioner in the above-styled and numbered cause, by and through his attorneys of record, R. K. Weaver and Richard A. Anderson, and respectfully objects to the proposed findings of fact and conclusions of law submitted by the State of Texas in this cause, and in support thereof, would respectfully show this Honorable Court as follows:

I.

On November 2, 1989, the Petitioner filed an Application for Writ of Habeas Corpus and Memorandum of Law in Support of Application for Writ of Habeas Corpus. In addition, Petitioner filed an Application for Stay of Execution and Memorandum of Law in Support of Application for State of Execution. Petitioner is currently under sentence to be executed before sunrise on December 7, 1989.

II.

On November 15, 1989, Petitioner received the Respondent's Original Answer to Application for Writ of Habeas Corpus and the

Respondent's Proposed Findings of Fact, Conclusions of Law and Order. Petitioner would specifically object to these proposed findings of fact and conclusions of law for the reasons set forth below:

1. Finding of Fact #5: The objection to the charge made in the Application is precisely the same as that made at trial. The issue of waiver argued by the State was consistent with law at the time of the trial. Nowhere does the State address the effect of the change of law in Penry. As we've pointed out in our Memorandum in Support of Application for Writ of Habeas Corpus previously filed with the Court, where there is a change of law such as we have here, the waiver doctrine will not apply. See: Argument & Authorities in Petitioner's Memorandum of Law on Application for Writ of Habeas Corpus.

2. Finding of Fact #7. The motion referred to in this finding states that counsel had interviewed some unnamed persons and concluded that there was an issue as to the Petitioner's competency and sanity, and requested the Petitioner be examined on these issues. Affidavits attached to Petitioner's Application for Writ of Habeas Corpus establish that the attorney did not interview all potential witnesses. He interviewed a few about the issue of whether there was a legal defense to the offense such as insanity or incompetency; he did not interview them for the issue of mitigation. Record will not support all of finding, or at least inference, that he interviewed potential witnesses. Several affidavits expressly state that the attorney never contacted them. There has been no hearing to contradict the contents of these affidavits, and any such finding would not be supported in the record.

3. Findings of Fact #8 & 9: Both doctors interviewed the Appellant for the purpose of determining if there was a legal defense: insanity or incompetency. Both concluded that he tested out with a low IQ. Both opined that he was faking it, however, such an opinion is inconsistent with their clinical findings and at the most would constitute a fact issue for the jury to resolve upon proper instructions. As fact finders, the jury would have been free to believe or disbelieve any, all, or part of the report. Without proper instructions, however, there was no way the jury could apply the information if they chose to believe it. This is classical Penry material.

4. Finding of Fact #10: this finding is irrelevant. The issue is not whether the Petitioner was insane or incompetent. Such evidence would constitute a defense to the prosecution. The issue presented to this Court is whether the reports contained any facts which might arguably constitute mitigating evidence. The United States Supreme Court, in Penry, specifically held that a low IQ would constitute mitigation evidence. Both reports show that the Petitioner had a low IQ.

5. Finding of Fact #12: Without a hearing on the issue, the Court cannot reach any conclusions as to why counsel did what he did, only what he did at trial. The 5th Circuit, in its opinion on the first writ (appended to that writ), held that as a matter of law, the failure to investigate or present mitigation evidence would have been fruitless due to the state of the law which wouldn't have gotten him a meaningful charge on the issue. It is inconsistent to say that you can fail to investigate and present mitigation evidence since it wouldn't help, and then say that counsel wasn't precluded from a meaningful investigation or presentation of such evidence.

Further, this "finding" says that the record affirmatively establishes that mitigation evidence did not exist. That is not true. The appellate record is silent as to whether mitigation evidence exists. The attachments to our writ shows that the Petitioner had a history of drug and alcohol related arrests; was of low IQ, and had other problems. The attachments affirmatively establish some mitigation evidence was available; without proper charges, however, presentation of such evidence was fruitless, and in fact would help the State meet its then existing burden of proof.

Any finding of fact that no mitigation evidence existed at the time of the trial would be false and unsupportable. The State is attempting to subsume the issues presented in this Writ without actually addressing any of them. The issue presented is what effect the Penry decision will have on cases tried before Penry. Maybe it was a tactical decision not to investigate or present mitigation evidence without some instruction to properly apply the evidence. But who can say what counsel would do now that the law has changed. The issue is not what he did then, but what could he do now if given another chance. What he did then was a function of the law then. The law has changed. The State's response and the proposed findings and conclusions totally fail to address this fact in any manner.

6. Finding of Fact #13. This is not true. There are offense reports showing a history of drug and alcohol abuse; medical

reports showing a low IQ; family and friends who were available to place the accused's total life in proper context. All of this is evidence that the United States Supreme Court has expressly held is mitigating in nature. A finding that there was no available mitigation evidence would be contrary to the record and the affidavits and other materials presented by Petitioner in his Application for Writ of Habeas Corpus.

7. Finding of Fact #14: This finding confuses the issue of mental disease or defect which would constitute a defense with mitigation. The issue is not did he have a defense to the charge, but did he have a history of drug and alcohol problems that the jury should have heard about and considered under proper instructions. The attachments to the Petitioner's Application for Writ of Habeas Corpus establish this history. This is precisely the type of material that the United States Supreme Court held must be presented under proper instructions in order that the jury may make a reasoned judgment as to the accused's moral culpability. The state of the law at the time of Petitioner's trial effectively prohibited presentation of this available testimony.

8. Finding of Fact #15: This finding is not supported by the affidavits.

9. Finding of Fact #16: this finding is not supported by the reports presented by Petitioner. Both establish that based upon clinical tests, the defendant had a low IQ. Both also opined that he was faking it, but this would have been a fact question for the jury, acting as a fact finder, to resolve upon proper instructions from the court.

10. Finding of Fact #17: There was some testimony from the defendant and his father at trial that is arguably mitigating. Besides, the issue is not what was presented at trial, rather it is what was available and not presented due to the state of the law at the time of the Petitioner's trial. This finding assumes, arguendo, that Penry will not have retroactive application, a finding that is not supported in traditional legal analysis. See: Memorandum of Law in Support of Application for Writ of Habeas Corpus previously filed in this cause for argument & authorities on this issue.

11. Findings of Fact #20 & 21. This finding is not supported in the trial record. While the judge did advise the Petitioner of the dangers of self-representation, the Petitioner continued to insist on self-representation. The Appellant stated his express desire to represent himself, but

acquiesced in having Mr. Lawrence assist in the representation. See page 46 of record of Motion for New Trial hearing (attached as Appendix A). Further, the Court, in an effort to get the Petitioner to agree to permit appointment of Mr. Lawrence on appeal misinforms the Petitioner that if he will permit Mr. Lawrence to represent him, he [the Petitioner] will have the right to read the record and file his own brief. See record at page 48 (attached as Appendix A) This of course is hybrid representation and is not the law in Texas. If the Appellant did agree to accept Mr. Lawrence, it was on the basis of assisting him and that he would get to review the record and file his own brief. That, of course, didn't happen. The State's answer takes the agreement out of context and ignores the fact that the judge misrepresented the law in order to coerce the Petitioner into agreeing to the appointment. Petitioner was not permitted to review the record and file his own *pro se* brief. Being confined in jail, and being represented by Mr. Lawrence, Petitioner had no reasonable means of enforcing his expectations of *pro se* representation.

Where the court affirmatively misrepresents the Petitioner's rights to *pro se* representation in an effort to obtain a waiver of his demand to appear on appeal *pro se*, the State cannot logically argue that the Petitioner intelligently waived his demand to proceed *pro se*.

12. Finding of Fact #23. Petitioner disagrees with this finding. First, the record as it currently stands establishes only what trial counsel did; it does not establish why trial counsel failed to present the available mitigation evidence. Secondly, while the record affirmatively establishes that the Petitioner demanded to proceed *pro se* on appeal, it also establishes that he was coerced into accepting an unacceptable appointment based upon the trial court's misrepresentation of the law. A hearing is needed to establish the exact events that surrounded the appellate process, what the Petitioner reasonably expected in light of the assertions of the trial judge, and what subsequently transpired.

The Petitioner, in his Application for Writ of Habeas Corpus, expressly states that there was mitigating evidence available at the time of the trial; the State, in its response, asserts that there was no mitigating evidence available at the time of the trial. The Petitioner asserts that at all times he desired to represent himself on appeal, to review the appellate record and to file a *pro se* brief on appeal. The State asserts that the Petitioner did not desire to represent himself on appeal. These are controverted,

previously unresolved questions of fact which this Honorable court must resolve. See: TEX. CODE CRIM. PROC. ANN. art. 11.07 (2)(c). If the Court determines that there are controverted, unresolved fact issues, then this Honorable Court must set the case for a hearing on these issues. TEX. CODE CRIM. PROC. ANN. art. 11.07 (2)(d).

13. Conclusion of Law #1: Not the law. The Petitioner has extensively briefed this issue in his previously filed Memorandum of Law in Support of Application of Writ of Habeas Corpus. This proposed finding assumes the very issues presented in this Writ without any analysis or argument.

14. Conclusion of Law #2: The Fifth Circuit held in the preceding writ that as a matter of law it would not have helped to investigate or present the evidence based upon the law at the time of the trial. Further, this is not a conclusion of law, rather it is a finding of fact, and further, it is a finding of fact that is in conflict with the proffers contained in the Petitioner's Application for Writ of Habeas Corpus.

15. Conclusion of Law #3: This conclusion is in direct conflict with Penry. See: Argument and Authorities in Petitioner's Memorandum of Law in support of Application for Writ of Habeas Corpus.

16. Conclusion of Law #4: There was some limited mitigation evidence presented at trial by defendant and his father. The charge given did not address this evidence as required by Penry.

17. Conclusion of Law #5: This is not a conclusion of law, rather it is an opinion fact concerning why counsel might have acted the way he did at trial. It certainly is one logical rationale for failing to present mitigation evidence given the state of the law at the time of the trial, however, it does not necessarily reflect what would have happened if he was entitled to a Penry charge.

Again, the record will support only what counsel did at trial, not why he acted as he did. any finding as to why counsel failed to investigate or present available mitigation evidence is wholly speculative and is not supported in the record of this cause.

18. Conclusion of Law #6: This is not a conclusion of law, rather it is a finding of fact, and a finding that is not supported in the record. The record will not support any conclusion that the Appellant lacked the ability to represent himself on appeal. The Court went to

unconscionable lengths to get him to accept appointed counsel, including affirmatively misrepresenting the law. The record totally fails to support any conclusion that the Petitioner was incapable of representing himself *pro se* on appeal.

19. Conclusion of Law #7: This is not a conclusion of law, rather it is a finding of fact, and a finding that is not supported in the trial record. Appellant never withdrew his request to represent himself, rather he agreed to the appointment of standby counsel to assist him in filing his own brief.

20. Conclusion of Law #8. Petitioner has adequately established that his conviction was improperly obtained. This Honorable Court should recommend to the Texas Court of Criminal Appeals that the requested relief be granted in all things.

III.

The State's proposed Findings of Fact and Conclusions of Law either totally ignore the attachments to the Petitioner's Application for Writ of Habeas Corpus or misrepresent their contents. Further, the State's proposed arguments concerning waiver of the right to proceed *pro se* on appeal take portions of the record out of context and ignore the erroneous assurances given by the trial judge to the Petitioner in order to obtain the alleged waiver of his demand to proceed *pro se*.

Further, the proposed Findings of Fact and Conclusions of Law presented by the Respondent totally fail to address the underlying issues presented by Appellant in his application for Writ of Habeas Corpus, namely: how the United States Supreme court's opinion in Penry vs. Lynaugh will be applied to cases which were tried before that Court determined that the Texas

death penalty scheme was unconstitutional where there was mitigation evidence. This Writ presents new and difficult issues which have not yet been decided by any Court in Texas; the proposed response recites the old law which was substantially changed by Penry. It is respectfully submitted that this Honorable Court has a duty to address the issues actually presented in the Petitioner's Application for Writ of Habeas Corpus, namely: how to apply Penry in a case tried before Penry was decided. the findings of fact and conclusions of law should be addressed to answering this question. It is respectfully submitted that the Memorandum of Law filed in support of the Petitioner's Application for Writ of Habeas Corpus adequately addresses this issue and any proposed findings of Fact and Conclusions of Law should track that memorandum, or at a minimum, explain why the authority cited by Petitioner will not apply.

IV.

There are unresolved, contested issues of fact, namely: whether there was mitigation evidence which was available at the time of trial but which was not presented; why that mitigation evidence was not presented at trial; whether the Petitioner desired to represent himself on appeal *pro se*; whether he waived the demand to represent himself on appeal *pro se*; whether any such waiver was as a result of the misrepresentations concerning the appellate process made by the then trial judge; what, if any, expectations the Petitioner had concerning being provided with a

copy of the appellate record, and opportunity to review that record, and to file a *pro se* brief; whether those expectations were in fact met. The issues are surely disputed by the Petitioner and the State. They cannot be resolved by reference to the trial record. The existence or nonexistence of these facts would directly effect the legality of the Petitioner's current confinement. TEX. CODE CRIM. PROC. ANN. art. 11.07 (2)(c) & (d) place a duty on the Court to set this case for a hearing and to make findings of fact relating to these factual disputes.

V.

Further, in preparing the documents to be sent to the Texas Court of Criminal Appeals, Petitioner believes that all pleadings, including the Memorandum of Law in Support of the Application for Writ of Habeas Corpus, the Application for Stay of Execution, and the Memorandum of Law in Support of Stay of Execution should also be included. Additionally, the instant Objections to the Proposed Findings of Fact and Conclusions of Law should also be included.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Petitioner respectfully prays that the proposed Findings of Fact and Conclusions of Law submitted by the State be rejected, that this case be set for a hearing on the unresolved, contested issues of fact presented in the Petitioner's Application for Writ of Habeas Corpus and the State's Response thereto, and after said hearing,

that the Court make responsive Findings of Fact and Conclusions of Law to be forwarded, along with a complete record, to the Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Motion has been forwarded to Mr. John Grant Jones, District Attorney of Nueces County, Texas, 901 Leopard, Corpus Christi, Texas, 78401, by fax.

SIGNED this the 17th day of November, 1989.

R. K. WEAVER

APPENDIX A

104,141

NO. 83-CR-194-A

THE STATE OF TEXAS	I	IN THE DISTRICT COURT
VS.	I	28TH JUDICIAL DISTRICT
CARLOS DE LUNA	I	NUECES COUNTY, TEXAS

STATEMENT OF FACTS

HEARING ON MOTION FOR NEW TRIAL

BEFORE: HON. WALLACE C. MOORE
Sitting for the
28th District Court
Nueces County Courthouse
Corpus Christi, Texas 78401

JUDGE PRESIDING

APPEARANCES: Nueces County District Attorney's Office
Nueces County Courthouse
Corpus Christi, Texas 78401

BY: STEVE SCHIWETZ

COUNSEL FOR THE STATE

MR. JAMES R. LAWRENCE
Attorney at Law
P. O. Box 8365
Corpus Christi, Texas

-and-

MR. HECTOR DePENA, JR.
Attorney at Law
2933 Norton Street, Suite 207
Corpus Christi, Texas 78415

COUNSEL FOR THE DEFENDANT

ORIGINAL

VOLUME ONE OF
SIXTEEN VOLUMES

Q The 22nd.

A I guess, uh-huh. Another week. But I didn't quit because of that. I quit because of the fact that my manager and I could not get along together. I requested another transfer to another store and they wouldn't do it.

MR. DePENA: All right, I have no further questions. Pass the witness.

THE COURT: All right, thank you very much, Mrs. Jimenez. You may step down, and I'm sorry, again, for inconveniencing you like this. And I hope you appreciate the importance of your service as a juror and your testimony in here today.

THE WITNESS: Yes, sir.

THE COURT: Thank you. Thank you very much.

All right. The motion is overruled.

MR. LAWRENCE: Note our exception.

THE COURT: All right. Now, what is your situation with reference to the Defendant representing himself again, you know? I have not gone through the full admonishment as I would ordinarily --

MR. LAWRENCE: Well, it's my understanding --

THE COURT: -- because the trial is over, I

mean, you know.

MR. LAWRENCE: I realize that, Your Honor, and in the interim, since we have been here this morning and here early this afternoon, and talking to Mr. De Luna, he has, in effect, told me that he wants to reurge his motion and to represent himself on appeal. And we have discussed this and he continuously -- continues to believe that that's what he wants to do, and that he expresses the fact that he has more time available to him to do the research and to do this appeal. I would point out to the Court that certain errors or what we deem errors have been brought forth and I particularly feel that -- that as an attorney, I think I could do something personally with these points of error, and I hope if he wants to represent himself, he follows up on these points and any other thing that he may get in the transcript, but he has been made aware of this, Your Honor.

THE COURT: All right. Excuse me for just one second.

At this time there was a brief recess, after which time the following pro-

THE COURT: Just in an over-abundance -- you may have your seat. -- an over-abundance of caution, I'm going through the -- the whole nine yards of the

formal admonition and instructions to a person representing himself. And while most of these have to do with representation on the trial on its merits, I don't know of any case dealing with the appellate process and a defendant who is unlearned in the law and doesn't know anything about the time frame within when he is required to work and all of these things, but insofar as these admonitions go and do pertain to the appellate process, I just simply wish to, first of all, advise him that I think he is making a mistake; that he is not prepared and his decision to represent himself is not informed or intelligent; and the same rules that apply to an attorney representing you, Mr. De Luna, apply to you, whether you know those rules or not, you see, and you don't know those rules and you will receive no special favors or assistance from -- from me in doing that. I will treat you like any other lawyer, and you must file your briefs and -- and any objections to the record on time and you will have to comply with all the relevant rules of procedure and law in carrying out the appeal.

I'm just going down the check list and see which ones I think pertain to the appellate process. One, certainly in reading the record and checking it for errors, you will be expected to know the rules of

evidence and you don't know the [illegible] wouldn't know an error if you saw it in the record, and you could not point it out to the Court of Criminal Appeals and point it out as an error and state a reason for it. You couldn't cite any cases for your position in the matter, and if you don't recognize an error, then you pass it, unless it's fundamental.

And, of course, on appeal now, if you represent yourself on appeal, you are precluding yourself from later depending upon effective assistance of counsel, which you're entitled to as a matter of Constitutional rights, and you could not represent yourself and then later claim that, well, you were ineffective, so you give up that right, in the first place, all right?

And in the same sense, you're giving up the guarantee of effective assistance of counsel because that's essential to a fair trial and that also applies to the appellate process. Now, do you understand what I have told you with reference to your right to effective assistance of counsel?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand what I have told you concerning all I have said up to now?

THE DEFENDANT: Yes, sir.

THE COURT: Or do you have any questions concerning any of it?

THE DEFENDANT: No, I ain't got no questions concerning that.

THE COURT: Do you read and write the English language?

THE DEFENDANT: Yes, sir.

THE COURT: Have you ever been a patient in a mental hospital or treated psychiatrically for mental illness?

THE DEFENDANT: No, sir.

THE COURT: How have you been employed since you left school?

THE DEFENDANT: Well, a lot of different jobs mostly, you know. Do you want to know what kind of job or something like that?

THE COURT: Yeah.

THE DEFENDANT: Since I left school?

THE COURT: Uh-huh. Generally, -- well, in what field did you work?

THE DEFENDANT: Well, at one time I was an assistant manager of Whataburger on Weber Road, on Weber, in Corpus. Then after that I went to Dallas, where I was an assistant manager also at Whataburger there. Then from there I got in trouble and went to

prison and got out and came here and began working in construction.

THE COURT: What does your family consist of, Mr. De Luna?

THE DEFENDANT: Sir?

THE COURT: What does your family consist of? Mother, father, wife, children, what?

THE DEFENDANT: I don't understand what you're saying.

THE COURT: No, what -- do you have a family?

THE DEFENDANT: Oh, I've got a family, yes, sir.

THE COURT: What is it?

THE DEFENDANT: What are they?

THE COURT: Yes.

MR. DePENA: What do they consist of? Brother, sister --

THE DEFENDANT: Brother, sister.

THE COURT: Mother and father?

THE DEFENDANT: Yes, sir.

MR. DePENA: Mother?

THE COURT: Mother, father?

THE DEFENDANT: (Witness nods head affirmatively.)

THE COURT: Okay. Ever in the military?

THE DEFENDANT: No, sir.

THE COURT: What is your financial status? How much money do you have? Do you have any money or ready assets of any kind or property that can be converted into money?

THE DEFENDANT: No, but I got a -- I've got family that might be able to do that.

THE COURT: Is there any question now that you are entitled, as a matter of law, to not only counsel, but effective counsel? If you can't do these things that I'm outlining to you, that you have a right to have a lawyer represent you and I will be happy to appoint one for you, keep these gentlemen on the case. Because, first of all, they have tried the case. They remember the testimony and the evidence that this Court Reporter was writing down. They made any number of objections during the trial. They know where to go back now to pick up those errors, if there were errors, and my rulings on their admissibility. And they are thoroughly familiar with the case.

THE DEFENDANT: If I might say something, sir. Mr. James Lawrence has -- he's done a good job, he's represented me all right.

THE COURT: Yes, he has.

THE DEFENDANT: But I cannot say that for

Hector DePena, Jr. If you can see -- you see in the files there this is the first motion he's filed in the thing since he's been my attorney.

THE COURT: No, that's not true.

THE DEFENDANT: Why don't you check on it, sir.

THE COURT: I have.

THE DEFENDANT: And you see more motions Mr. DePena has filed?

THE COURT: You bet I have.

THE DEFENDANT: Is there any way I can see them, sir?

THE COURT: Certainly. Just leaf through there and look at the motions that have been filed in the case.

Let me simply ask you this since you have made that -- that query concerning Mr. DePena. Are you satisfied with the other counsel in this matter?

THE DEFENDANT: Yes, sir.

THE COURT: Would it be agreeable with you that I leave him on the case, then, appoint him to represent you on appeal and you could work together on it?

THE DEFENDANT: Yes, sir. It would.

THE COURT: All right. From what I have explained to you this morning, does that -- does that, then, change your mind as to some effective assistance

on appeal for you? And are you -- and would -- and would you accept Mr. Lawrence as your attorney on appeal?

THE DEFENDANT: Well, --

THE COURT: I'm not forcing you, now, to take any lawyer, but you need one very, very badly. You're in a very severe circumstance now, a death penalty has been --

THE DEFENDANT: Is there any way, sir, I can try to defend myself and have Mr. Lawrence there at the time if I need help, assistance for him to help me?

THE COURT: Yes. But I would rather give him the lead in it and let you assist him in the matter, and you can look through all of these records, you have a right to it, and the record, the complete record that this Court Reporter made during the entire trial, you have a right to read that, and if you're not satisfied with the brief that Mr. Lawrence files, you have a right to file a pro se brief, a brief of your own, you see. I am not denying you any rights, but I'm begging you to please let a lawyer do it and work with him on it. Would you be agreeable to that? I don't want you to represent yourself on appeal because you won't be fairly represented. Would you be agreeable to doing that?

THE DEFENDANT: Sir, if you notice this -- this thing Mr. DePena has filed is for Court-appointed co-counsel, which is Mr. Lawrence, also for -- appointed for psychiatric exam, psychiatric evaluation.

THE COURT: Yes.

THE DEFENDANT: That's the only motion I've seen from Mr. --

THE COURT: Don't you think that was a very important motion to file at that step in the proceedings?

THE DEFENDANT: No, sir. I don't feel Mr. DePena has --

THE COURT: Well, no, the point is if -- if you're not satisfied with either attorney, I will relieve them of any further responsibility in this case, but I'm begging you to please accept either these gentlemen or one of them or someone else to help you on appeal. And it would be my advice, if you wish to take it, that you do select a lawyer who tried the case, because he is familiar with it. It adds a continuity to his entire trial tactic.

THE DEFENDANT: The only way, sir, I will take a lawyer is if -- if he is just there to assist me if I need assistance, that's the only way I'll take one or not. I don't want one.

THE COURT: You have asked in your motion that I appoint a man named Jimmy Hernandez to represent you. That's overruled.

THE DEFENDANT: Oh, no, sir, I didn't --

THE COURT: I know you were just copying Hernandez's brief that he filed in the El Paso court. I understand that. But that's what your -- your prayer closes with in that motion.

THE DEFENDANT: Okay.

THE COURT: And you see, a lawyer wouldn't have done that, see? Jimmy Hernandez was a prisoner.

THE DEFENDANT: Yes, I know that.

THE COURT: And you have asked that I appoint him just because --

THE DEFENDANT: No, sir, I made a mistake because I told Mr. Lawrence that --

THE COURT: That's what I'm saying. If you have a lawyer that makes a mistake, you see, then you can claim ineffective assistance of counsel. If you make a mistake representing yourself, that goes out the window. You don't get that right.

THE DEFENDANT: Yes, sir, I know that.

THE COURT: You're giving it up. So will you please, for me, do this for yourself, accept Mr. Lawrence. I haven't asked him if he's willing to

accept it.

Mr. Lawrence, are you willing to accept?

MR. LAWRENCE: If it's a straight appeal where I have the right to be the lead on it, yes, Your Honor. And then after I submit my brief, he can write his pro se, yes, sir.

THE COURT: And I'm certain you would work with him through the entire appellate process.

MR. LAWRENCE: I have with other clients. I see no problem here.

THE COURT: Is there any objection -- do you have any objection to that, Mr. De Luna? And you will still be given a right, you know, to read the record and file your own brief, if you don't like the one Mr. Lawrence does. But let him do that first and you read his and if you don't like it, then you file your own.

THE DEFENDANT: Also, I have filed a motion, sir, in the court about getting transcripts. Has it been denied or granted?

THE COURT: No, of course it's granted.

THE DEFENDANT: It's automatically granted.

THE COURT: Certainly.

THE DEFENDANT: I will go ahead and accept Mr. Lawrence, then.

THE COURT: I would appreciate it. All right.