NO. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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On Appeal From the United States District Court,
Southern District of Texas, Corpus Christi Division,
the Honorable Hayden Head, Jr., Judge Presiding

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APPLICATION AND BRIEF IN SUPPORT

OF STAY OF EXECUTION

TO THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT:

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 and Brief in Support of a Stay of Execution, and in support hereof would respectfully show the Court as follows:

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 13, 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.

On October 13, 1986, Petitioner filed an Application for Writ of Habeas Corpus and an Application for Stay of Execution in the United States District Court for the Southern District of Texas, Corpus Christi division, pursuant to the precepts of 28 U.S.C., Section 2254. On October 13, 1986, that Court, without holding an evidentiary hearing, denied the Writ of Habeas Corpus and denied the Application for Stay of Execution.

Petitioner, at each stage of the post conviction proceedings in 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 deter-

mine 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

(A) **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 ground 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 consti-

tutional 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.

(B) THE STATE OF TEXAS HAS DENIED PETITIONER EQUAL PROTECTION OF THE LAW BY PROVIDING COURT APPOINTED ATTORNEYS TO THE INDIGENT PETITIONER WHOSE STANDARD OF PERFORMANCE FALLS BELOW THE MINIMUM REQUIREMENTS OF BEING EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH TRIAL AND ON APPEAL.

The standards by which trial counsel, and arguably counsel on appeal, must be measured, was set out in Strickland v. Washington, 466 U.S. 1105, 104 Sup.Ct. 2052, 80 L.Ed.2d 674 (1984) in which a two prong test was established for any individual attacking the effectiveness of counsel in that the individual must show (a) counsel's assistance was not reasonable effective and (b) but for counsel's error there is a reasonable probability the outcome would have been different.

In this cause Petitioner denied from the start that he was not the individual involved in the offense and in

fact gave his attorneys the name of the individual who he thought was involved in the offense. That individual was later arrested on another offense, but his attorneys at the trial stage, motion for new trial stage, and during the appellate stage and after failed to follow up on the information given by the Petitioner as to the potential of an alternate assailant. Further, there is a tape recording of a transmission which included Petitioner, the voice of the assailant which was never analyzed and compared with the voice prints of Petitioner to determine whether or not Petitioner was actually the assailant. Petitioner, who was 21 years old at the time, also gave a long list of individuals who would be available to testify for Petitioner in mitigation of punishment at the penalty phase of the trial, and no witnesses were called on Petitioner's behalf. The trial attorneys were alsp presented with much evidence concerning Petitioner's substance abuse, including psychological profiles, and none of that evidence was given to the jury at the penalty phase of the trial in mitigation of punishment.

Additionally, there were several issues of appellate procedure that involved grounds of error constitutional dimension, including errors at the jury selection phase of the trial that appear to present issues under Witherspoon v. Illinois, 391 U.S. 510, 88 Sup.Ct. 1770, 20

L.Ed.2d 776 (1968) as modified by Wainwright v. Witt, 469 U.S. _____, 105 Sup.Ct. 844, 83 L.Ed.2d 841 (1985) and Lockhart v. McCree, ___ U.S., _____, 106 Sup.Ct. 1778, ___ L.Ed.2d ___ (1986).

No evidentiary hearing at either the state level or the federal level has been held to determine whether or not these errors and ommissions of trial on appellate counsel are of the standard that if found to be true would be of such a nature that a different result would have occurred but for those errors and ommissions. However, in a situation in which no mitigation punishment was given to the jury at the penalty phase of the trial to guide their decision making on this 21 year old Petitioner and the failure of the appellate counsel to adequately present issues for review other than that which was preserved in his 17 page brief to the Court of Criminal Appeals of Texas in appealing his conviction cannot on its face be presumed to be error of such a harmless nature without a further inquiry and evidentiary hearing to determine the appropriateness of counsels' actions and the effect that it may have had on the verdict.

PRAYER

It is respectfully requested that this Court grant Petitioner's Stay of Execution until such time as an eviden-

tiary hearing can be held to substantiate Petitioner's claims as set out above.

Respectfully submitted,

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Bar No. 01207700

ATTORNEY FOR PETITIONER

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 13th day of October, 1986.

RICHARD A. ANDERSON