



TEXAS
DEPARTMENT
OF CORRECTIONS

James A. Lynaugh, Director

P.O. Box 99 • Huntsville, Texas 77340 • (409) 295-6371

Oscar Soliz
District Clerk
Nueces County Courthouse
901 Leopard Street
Corpus Christi, TX 78401

Re: Carlos DeLuna, TDC #744

Dear Mr. Soliz:

Enclosed is the Return by the Director of the Texas Department of Criminal Justice, Institutional Division of the Death Warrant pertaining to Carlos DeLuna, that was issued in the 28th Judicial District Court of Nueces County, Texas, November 11, 1989. Also enclosed is the Director's Certificate with his statement of compliance with the command of the Warrant. The Certificate also indicates disposition of the remains as required by Article 43.23 of the Texas Code of Criminal Procedure.

An acknowledgement of receipt of the Warrant and Certificate would be appreciated.

Thank you for your assistance in this matter.

Yours truly,

A handwritten signature in cursive script, appearing to read "J. Kirk Brown".

J. KIRK BROWN
General Counsel

JKB:cm
Enclosures

cc: Governor Bill Clements
Mr. James Lynaugh
Attorney General Jim Mattox
Warden Billy Ware
Court of Criminal Appeals

IN THE 28TH JUDICIAL DISTRICT COURT
FOR NUECES COUNTY, TEXAS

EX PARTE

NO. 83-CR-194-A

CARLOS DELUNA

APPLICATION FOR STAY OF EXECUTION

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 moves the Court to enter an order staying the execution of the sentence of death imposed upon him and scheduled to be carried out before sunrise on December 7, 1989, pending the final disposition of the present proceedings for a Writ of Habeas Corpus pending in this cause, and until further order of this Court.

This Application is based upon the Petition for Writ of Habeas Corpus by a Person in State Custody filed November 2, 1989, and the Memorandum of Law in support of Petitioner's Application for Writ of Habeas Corpus. Petitioner would note that the Writ of Habeas Corpus raises several different issues, including issues identical to those raised in *Ex parte Harvey Earvin*, No. 15,021-03. That cause is currently pending before the Texas Court of Criminal Appeals (submitted on oral argument and briefs on September 13, 1989). A stay of execution was granted in that

APPLICATION STAY OF EXECUTION - PAGE 1

cause until such time as the issues presented therein are finally **resolved. In addition, the United States Supreme Court has granted certiorari in Selvege v. Lynaugh, No. 87-6700. This case will further address the application of that Court's earlier holding in Penry v. Lynaugh, No. 87-6177. The instant Writ of Habeas Corpus pending in this case invokes the holding in Penry as the basis for the relief requested.**

Respectfully submitted,

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OF COUNSEL:

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CERTIFICATE OF SERVICE

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

SIGNED this the 2nd day of November, 1989.

R. K. WEAVER

IN THE 28TH JUDICIAL DISTRICT COURT
FOR NUECES COUNTY, TEXAS

EX PARTE

NO. 83-CR-194-A

CARLOS DELUNA

ORDER

On this the 22 day of November, 1989, came on to be heard the Defendant/Petitioner's Application for Stay of Execution, and the same is hereby ~~(GRANTED until such time as a full and final determination of the Writ of Habeas Corpus is finally disposed of)~~ ⁹⁰ (DENIED, to which action the Defendant/Petitioner excepts).

SIGNED this the 22 day of November, 1989.



THE HON. ERIC BROWN
JUDGE PRESIDING
28TH JUDICIAL DISTRICT COURT
NUECES COUNTY, TEXAS

IN THE 28TH JUDICIAL DISTRICT COURT
FOR NUECES COUNTY, TEXAS

FILED

NOV 2 1989

OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By Deputy

NO. 83-CR-194-A

EX PARTE

CARLOS DELUNA

MEMORANDUM OF LAW ON APPLICATION FOR STAY OF EXECUTION

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 in support of his heretofore filed Application for Stay of Execution, files this his Memorandum of Law, and along with the argument and authorities set forth more fully in Petitioner's Application for Writ of Habeas Corpus and Memorandum of Law in Support of his Application for Writ of Habeas Corpus, respectfully prays that this Honorable Court enter an order staying the execution of the sentence of death imposed upon him and scheduled to be carried out before sunrise on December 7, 1989, pending the final disposition of the present proceedings for a Writ of Habeas Corpus pending in this cause, and until further order of this Court.

I.

Petitioner, Carlos DeLuna, is presently set to be executed by the State of Texas on December 7, 1989. This Court must issue a stay of execution as Mr. DeLuna's case presents questions of

MEMORANDUM OF LAW ON APPLICATION STAY OF EXECUTION - PAGE 1

extraordinary importance to the administration of this State's capital punishment scheme. In addition to the issue presented in the petition concerning the jury being fundamentally misled as to the meaning of the important word "deliberate" in Special Issue One, this case presents a compelling *Penry v. Lynaugh*, 57 ___ U.S. ___, U.S.L.W. 4958 (June 26, 1989) claim. As Texas Courts have yet to announce how they intend to apply this significant and far-reaching decision, a stay of execution is clearly warranted. Carlos DeLuna should not go to his death until the Court evolves it's post-*Penry* jurisprudence.

It is not hyperbole to say that the Supreme Court's decision in *Penry v. Lynaugh* is the most important decision concerning the Texas death penalty statute since *Jurek v. Texas*, 428 U.S. 262 (1976). *Penry* represents an abrupt shift from bedrock principles announced by Texas Courts prior to *Jurek* and to which those courts have adhered ever since.¹ *Penry* declares that a wide variety of evidence typically offered by Texas capital defendants seeking to avoid sentences of death cannot be afforded mitigating effect in the absence of instructions in addition to those on the special issues. As this Court has the initial responsibility to see that Texas capital trials are and were conducted in accordance with the Eighth Amendment, it must now

1. See *Ex parte Granviel*, 561 S.W.2d 503 (Tex.Cr.App. 1978); *Adams v. State*, 577 S.W.2d 717 (Tex.Cr.App. 1979). rev'd on other grounds sub non., *Adams v. Texas*, 448 U.S. 38 (1980); *Quinones v. State*, 592 S.W.2d 933 (Tex.Cr.App. 1980); *Stewart v. State*, 686 S.W.2d 118 (Tex.Cr.App. 1984); *Cordova v. State*, 733 S.W.2d 175 (Tex.Cr.App. 1987); *Burns v. State*, 761 S.W.2d 353 (Tex.Cr.App. 1988).

carefully review cases coming before it, and develop a new jurisprudence consistent with *Penry*.

It is impossible, however, for this Court to thoughtfully consider the many ramifications of *Penry* in cases such as Petitioner's in the limited time before Mr. DeLuna will be executed. In the absence of a stay of execution, the Court has but a few days to ponder the numerous questions arising in *Penry's* wake. This Honorable Court will not even have any guidance from decisions of the Texas Court of Criminal Appeals or the United States Supreme Court since, as noted *infra*, these same issues have been presented to those Courts and are currently pending without any final resolution to guide this Court.

In the Application for Writ of Habeas Corpus and attached affidavits and other documents, as well as in the Memorandum of Law in Support of his Application for Writ of Habeas Corpus, Mr. DeLuna demonstrates a plain and straightforward violation of *Penry*. Yet these papers have been written in haste, and cannot and do not convey the many reasons why Mr. DeLuna is entitled to have this claim reviewed on its merits by this Court, and why he is entitled to a new trial. Only a full hearing and an opportunity to present the evidence alluded to in these pleadings, as well as a full and reasonable briefing schedule to permit proper development of Petitioner's arguments will adequately protect his constitutional rights.

II.

Because Penry has so dramatically changed the capital punishment landscape in this state, the only just course for the Court to take is to: (1) issue a stay of execution in this case, (2) set briefing schedules for Petitioner and the State, and (3) set this case for hearing(s) to elicit available mitigation testimony and to hear argument in this case.

In addition, it should be noted that Petitioner has raised factual and legal issues identical with those presented in *Ex parte Harvey Earvin*, No. 15,021-03, a capital case where the Texas Court of Criminal Appeals has granted the petitioner a stay and has set the case for submission on briefs and oral argument on September 13, 1989. A decision in that case is not expected before Spring, 1990. In addition, the same issues were raised in *Selvege v. Lynaugh*, No. 87-6700, a case where the United States Supreme Court granted petitioner a stay and granted the petitioner's Application for Writ of Certiorari to address these same issues. That case is expected to be submitted to the Court sometime next spring. The importance of the issues presented by Petitioner in this Writ has been recognized by the United States Supreme Court and the Texas Court of Criminal Appeals with their granting of stays in these two cases while these issues are fully presented. Can this Honorable Court constitutionally due anything less? Petitioner submits that its duty to grant this stay is clear.

For this Court to follow any course other than to grant the requested stay of execution could well lead to irreparable harm to Petitioner. It will provide little solace to Petitioner's family to learn in six months that he in fact was executed in clear violation of the Eighth Amendment, if Mr. DeLuna is executed on November 7, 1989. The State of Texas, in light of *Penry*, *Ex parte Earvin*, and *Selvege v. Lynaugh*, can make no showing that any valid state interest will be violated should this case be stayed until the post-*Penry* jurisprudence evolves.

III.

Other states, faced with Supreme Court decisions which dictated abrupt changes in the application of their death statutes, have seen to it that no further executions were carried out until the effects of the new decision were carefully and thoroughly thought through. For instance, in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Supreme Court decided that Florida's longstanding penalty trial instructions precluded the jury from considering and giving effect to various kinds of mitigating evidence. Thereafter, the Florida Supreme Court resolved that every case that might be effected by *Hitchcock* be resolved given plenary review, regardless of whether the claim had been raised previously.² And in a significant number of

2. See e.g., *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987) (stay of execution granted, relief granted in light of change of law after plenary review); *Thompson v. Dugger*, 515 So.2d 173 (Fla. 1987) (same).

cases, that court determined that *Hitchcock* required a new sentencing hearing.³

As did the Florida Supreme Court in the wake of *Hitchcock*, this Court must not allow any capital defendant presenting a *Penry* claim to go to his death in the absence of plenary review of the claim. Summary and episodic review, under the pressures of a warrant, and in the absence of any briefing, serves no legitimate interest. As Petitioner presents a compelling claim under *Penry*, the Court should enter a stay of execution, set the case for hearing, set a briefing schedule, and hear argument on the important questions presented in this petition.

Respectfully submitted,



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3. See *Hall v. State*, 541 So.2d 1125 (Fla. 1989); *Alvord v. Dugger*, 541 So.2d 598 (Fla. 1989); *Cooper v. State*, 526 So. 2d 900 (Fla. 1988); *Combs v. Dugger*, 525 So.2d 853 (Fla. 1988); *Zeigler v. Dugger*, 524 So.2d 419 (Fla. 1988).

CERTIFICATE OF SERVICE

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

SIGNED this the 2nd day of November, 1989.


R. K. WEAVER