12/4/89

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

CARLOS DELUNA, *Petitioner*

vs.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*

APPLICATION FOR STAY OF EXECUTION AND APPLICATION FOR STAY OF MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PENDING CERTIORARI

TO THE HONORABLE BYRON R. WHITE, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND JUSTICE FOR THE FIFTH CIRCUIT:

Petitioner, Carlos Deluna, respectfully prays for an order staying the sentence of death currently set for midnight, December 6/7, 1989, and for an order staying the issuance of the mandate of the united States Court of Appeals for the Fifth Circuit, in the above-entitled proceeding, pending the filing of and final action by this Court on a petition for certiorari seeking review of the fifth Circuit's judgment in this case.

The petition for certiorari will seek plenary review of the Fifth Circuit's decision in *Carlos DeLuna v. James A. Lynaugh, Director, Texas Department of Corrections* ____ F.2d ____ (5th

Cir. No. _____ delivered December 4/5, 1989), which affirmed a judgment of the District Court of the United States for the southern district of Texas, Corpus Christi Division, in the case of *Carlos DeLuna v. James A. Lynaugh, Director, Texas Department of Corrections* ____ F.Supp. ____ (S.D.Tex. No. C-89-336 delivered December 2, 1989), which denied the Petitioner's Application for Writ of Habeas Corpus and Application for Stay of Execution. A copy of the Order Denying Petition for Habeas Corpus and for Stay of Execution from the District Court is attached. Petitioner does not yet possess a copy of the opinion of the fifth Circuit, however, Petitioner will forward same to this Honorable court upon receipt of same from the Fifth Circuit.

Petitioner has exhausted all possibilities of securing a stay of execution and stay of the mandate from the Fifth Circuit and the District Court as well as from the Texas Court of Criminal Appeals. Without this stay, the Petitioner will be executed by the Respondent just after midnight on December 6/7, 1989.

(a) Procedural history of this case

The relevant events in this case may be summarized as follows:

Petitioner is confined on Death Row in the Ellis I Unit of the Texas Department of Corrections in Huntsville, Texas, pursuant to a judgment of conviction and sentence of death in Cause No. 83-CR-194-A pursuant to a jury verdict returned July

15, 1983, for the offense of capital murder, and the jury finding the special issues to be true, the Court sentenced Petitioner to death.

The conviction and sentence were automatically appealed pursuant to Texas law to the Texas Court of Criminal Appeals. On June 4, 1986, Petitioner's conviction was affirmed in Cause No. 69,245. See: *DeLuna v. State*, 711 S.W.2d 44 (Tex. Crim. App. 1986).

Petitioner was represented by court-appointed counsel at the trial of the cause, and one of his court-appointed counsel represented him on appeal. The latter abandoned him after affirmance by the Court of Criminal Appeals for the State of Texas and Petitioner's first execution date was set for October 14, 1986.

An Application for Stay of Execution to the United States Supreme Court pending the filing of an Out of Time Writ of Certiorari was filed on October 8, 1986, and denied by the Supreme Court of the United States on October 10, 1986. Simultaneously, on October 8, 1986, an original Application for Writ of Habeas Corpus pursuant to Art. 11.07, TEX. CODE CRIM. PRO., along with an Application for Stay of Execution pending a hearing, was filed in the convicting court, the 28th Judicial District Court, Nueces County, Texas. Petitioner's Application for Writ of Habeas Corpus was denied in an unpublished opinion on

October 9, 1986, without the opportunity for an evidentiary hearing. An Appeal of the denial of an evidentiary hearing and Motion for Stay of Execution were filed with the Texas Court of Criminal Appeals on October 10, 1986, the latter denying the Appeal and the Stay of Execution that same date.

On October 14, 1986, Petitioner filed his original Application for Writ Habeas Corpus pursuant to 28 U.S.C. sec. 2254 in the United States District Court for the Southern District of Texas, Corpus Christi Division. Petitioner raised three issues in the original Application for Writ of Habeas Corpus:

(1) That Petitioner's rights had been violated pursuant to the FIFTH, SIXTH, EIGHTH and FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, in that the statutes allowed prosecutorial discretion in determining in a discriminating manner based on the victim's race, in which cases the death penalty would be sought.

(2) That Petitioner was denied effective assistance of counsel pursuant to the SIXTH and FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, in several difference particulars, by court appointed trial counsel.

(3) That Petitioner was denied effective assistance of counsel on appeal by court appointed counsel.

An Order for Stay of Execution was issued by the United States District Court on October 14, 1986.

On November 12, 1986, Respondent filed a Motion for Summary Judgment requesting dismissal of Petitioner's Application for

Writ of Habeas Corpus. On January 25, 1987, Petitioner filed his Response to the Motion for Summary Judgment, further delineating aspects of proof that he intended to present at an evidentiary hearing. On February 3, 1988, Respondent filed a Motion to Expedite the Court's decision. On June 13, 1988, the trial court, without an evidentiary hearing, entered an unpublished Order Dismissing Petitioner's Application for Writ of Habeas Corpus and Vacating the Stay of Execution. On June 29, 1988, Petitioner filed a Motion for Relief from the Order of June 13, 1988, and simultaneously filed its First Amended Writ of Habeas Corpus and Brief in support thereof in which Petitioner (1) abandoned his first point of attack concerning the discriminating application of the death penalty, pursuant to the decision of the Supreme Court of the United States in *McLeskey v. Kemp*, 107 S.Ct. 1756 (1987); (2) further delineated Petitioner/Appellant's allegations of ineffective assistance of counsel at the time of trial and (3) reiterated his claim of ineffective assistance of counsel on appeal. On July 12, 1988, Petitioner filed a Motion to Attach Affidavits along with a number of Affidavits supporting the claim concerning his trial counsel's failure to investigate and present mitigating evidence that was available at the punishment phase of trial. On July 19, 1988, the district court entered an Order Denying Relief from Judgment and Petitioner gave notice of appeal on July 28, 1988. An unpublished panel Opinion of the Court of Appeals for the Fifth Circuit was issued April 26, 1989, affirming the dismissal of the Writ of Habeas Corpus

and Denying Relief from Judgment. A Suggestion for Re-Hearing to the Fifth Circuit was denied May 26, 1989.

An Application to Recall Mandate and to Stay the Setting of an Execution Date Pending Certiorari was filed in the Fifth Circuit, however, that Court has yet to rule on that Application upon the State's assurances that it would not seek to have an execution date set until the case before the Supreme Court was final. Currently no execution date is set in this cause.

On August 24, 1989, a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was filed on Petitioner's behalf. That court, with two justices dissenting, denied the Petitioner's petition in a *per curiam* opinion on October 10, 1989.

On November 2, 1989, the Petitioner was sentenced to die on December 7, 1989. On that same date, the Petitioner filed an Application for Writ of Habeas Corpus with the trial court. On November 22, 1989, the trial judge entered findings of fact and denied the Petitioner a hearing on the unresolved, contested issues of fact presented in the case, and forwarded the writ tot he Texas Court of Criminal Appeals.

On November 27, 1989, Petitioner filed an Application for Stay of Execution in the Texas Court of Criminal Appeals. On November 28, 1989, Petitioner filed his objections to the trial

court's findings of fact.

On November 29, 1989, the Texas Court of Criminal Appeals denied the Petitioner's application for writ of habeas corpus and application for stay of execution without discussion or explanation.

On November 30, 1989, Petitioner filed his Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas, Corpus Christi Division, along with various memorandum of law and an Application for Stay of Execution. In the writ, the Petitioner raised the following issues:

Petitioner was denied rights of constitutional dimension, as guaranteed under both the United States Constitution and the Constitution of the State of Texas, in the following particulars:

(a) The Texas Death Penalty scheme set forth in TEX. CODE CRIM. PROC. ANN. art. 37.071, and as authoritatively construed by the Texas courts and as applied against the Petitioner, denied him his fundamental constitutional rights under the FIFTH, SIXTH, EIGHTH and FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION, as well as ARTICLE I, SECTIONS 10 and 11 of the TEXAS CONSTITUTION because it did not allow for the effective presentation or consideration of available mitigation evidence concerning the Petitioner's past difficulties with drug and alcohol abuse, his personal background, his youth, or his mental condition.

(b) The Texas Death Penalty scheme set forth in TEX. CODE CRIM. PROC. ANN. art. 37.071, and as authoritatively construed by the Texas courts and as applied against the Petitioner, denied him his fundamental constitutional rights under the FIFTH, SIXTH, EIGHTH and FOURTEENTH

AMENDMENTS to the UNITED STATES CONSTITUTION, as well as ARTICLE I, SECTIONS 10 and 11 of the TEXAS CONSTITUTION because the jury was fundamentally mislead as to the meaning of the word "deliberately" in Special Issue Number One.

(c) The Petitioner was denied his fundamental constitutional rights under the SIXTH, EIGHTH and FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION, as well as ARTICLE I, SECTIONS 10 and 11 of the TEXAS CONSTITUTION when the trial judge, at the Motion for New Trial hearing, refused to permit the Petitioner to discharge his appointed attorneys and represent himself at all further stages of his case.

On Saturday, December 2, 1989, the District Court denied the Petitioner's Application for Writ of Habeas Corpus and his Application for Stay of Execution. A copy of the Order of that Court is attached.

Petitioner filed his Notice of Appeal, Application for Relief from Order and Application for Certificate of Probable Cause with the Trial Court on December 2, 1989. Petitioner was informed that the Application for Certificate of Probable Cause and Application for Relief from Order were denied by the Judge Head on December 4, 1989.

On December 4, 1989, Petitioner filed in the United States Court of Appeals for the Fifth Circuit his Application for Certificate of Probable Cause and his Application for Stay of Execution. Petitioner has been informed that these applications have been denied by the Fifth Circuit and that the judgment of the United States District Court for the Southern District of

Texas, corpus Christi Division, denying the Petitioner's Writ of Habeas Corpus has been affirmed.

(b) Reasons for Granting the Stay

Petitioner, Carlos DeLuna, is presently set to be executed by the State of Texas on December 7, 1989. An Application for Writ of Habeas Corpus was filed in the trial court on November 2, 1989. The Texas Court of Criminal Appeals denied this writ and its associated application for stay of execution on November 29, 1989, discussion of the merits of Petitioner's claims and without holding any evidentiary hearing. Thereafter, the Petitioner has cause to be filed his Application for Writ of Habeas Corpus in the United States District Court for the southern District of Texas, Corpus Christi Division. That application, and its attendent Application for Stay of Execution have been denied by the District Court, again without any hearing on the contested, unresolved issues of fact.

This Court should issue a stay of execution as Mr. DeLuna's case presents questions of extraordinary importance to the administration of the State of Texas' 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 some Court, state or federal 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 the Texas Courts and the lower Federal Courts have abrogated their responsibility to see that Texas capital trials are and were conducted in accordance with the Eighth Amendment, it must now fall to this Honorable Court to 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

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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).

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 prior decisions of the Texas Court of Criminal Appeals which have been submitted but not yet resolved, nor from the decisions of the United States Supreme Court since, as noted infra, these same issues will not have been presented to that Court and are currently pending without any final resolution to guide the lower Courts.

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.

Further, the Petitioner was denied his constitutional right to represent himself *pro se* on direct appeal. The Petitioner

demanded this right at his Motion for New Trial proceedings. Thereafter, the trial court affirmatively misrepresented the Petitioner's rights on appeal, and elicited a waiver of that demand through advising the Petitioner that he would be permitted to review the appellate record and file a *pro se* brief of his own in the Texas Court of Criminal Appeals. The Court of Criminal Appeals has consistently denied indigent appellants the right to hybrid representation and has consistently held that where one has appointed counsel, there is no right to review the record of the trial or to file a *pro se*. brief. See, e.g.: *Coleman v. State*, 632 S.W.2d 616, 619 (Tex. Crim. App. 1982); *Thomas v. State*, 605 S.W.2d 290, 293 (Tex. Crim. App. 1980). The Petitioner was in fact not permitted to review the appellate record or to file a *pro se* brief on direct appeal. See Appendix X to Application for Writ of Habeas Corpus. The waiver of an invoked constitutional right relied on by the State in its reply to this Application for Writ of Habeas Corpus was obtained as a direct result of a misrepresentation of the Petitioner's rights on appeal. This is not an "intentional relinquishment or abandonment of a known right or privilege"; the "waiver" at issue will not act to preserve an unconstitutionaly coerced waiver of an invoked constitutional right. As a direct result of the trial court's affirmative misrepresentations, the Petitioner was denied his Sixth Amendment right to self-representation on appeal. See, e.g.: *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938) (courts must indulge every reasonable presumption <u>against</u> waiver

of constitutional rights); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975) (defendant has a constitutional right to refuse appointed counsel and proceed *pro se*); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 122 (1984) (accused has constitutional right to proceed *pro se*).

Because *Penry* has so dramatically changed the capital punishment landscape in this state, and because there is a clear violation of the Petitioner's constitutional right to represent himself on direct appeal, 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 *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 raised in this Writ has been recognized by the United States Supreme Court with its granting of a stay in that case while these issues are fully presented. Can this Honorable Court constitutionally due anything less in this case? 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.

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.

It should also be noted that while the Petitioner is raising the same issues as were fully and thoughtfully addressed by the Florida Courts in the wake of *Hitchcock*, the Texas Courts abjectly refuse to even address the issues presented. Granted the Petitioenr did not present mitigating evidence at his trial. **That is not the issue!** The issue is how we will deal with cases where mitigating evidence existed, but counsel, presented with the then existing absence of any charge to make presentation of the evidence viable were essentially forced to not present mitigating evidence. This Honorable Court recognized in *Penry* that the law had long permitted the introduction of mitigating evidence in

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).

Texas capital cases, however, in the absence of proper instructions telling the jury how to view that evidence, the "right" to present the evidence was illusory at best. No competent counsel would in fact present such evidence where it might be the very evidence that established his future dangerousness as required by TEX. CODE CRIM. PROC. ANN. art. 37.071. See: *Penry*, 492 U.S. at __, 109 S.Ct. at 2949.

Given the state of the law at the time of the Petitioenr's trial, his counsel did the only thing he could do; but that too is not the issue. The issue is simply how will we address those numerious cases where counsel based his tactics at trial on the well established law, a law which has now been determined to be unconstitutional? It would be a miscarriage of justice to sent the Petitioner to his death when his attorney based his trial strategy on good faith reliance on the continuious and uniform rulings of the various state and federal courts at the time of his trial. If would be an even greater miscarriage of justice for him to be sent to his death without any court even bothering to consider or address the issues he's presented. Each court in which this case has been up to now has simply pretended that *Penry* didn't change anything. This is demonstrably absurd, yet no court will even consider the issues being presented; they have burried their collective heads in the sand and continue to cite pre-*Penry* authority in a vain hope that *Penry* will simply go away.

Somehwere, some court should consider the issue actually being presented by the Petitioner! so far, no court has shown any interest in addressing his substantial constitutional claims. Had he been convicted in Florida, it is clear what kind of review he would have gotten. Shall he now die because he had the misfortune to be convicted in Texas instead of Florida?

In addition, there are unresolved, contested issues of fact critical to any resolution of the issues presented in this Writ. First, the Petitioner has claimed that there was evidence of a mitigating nature that was available to be presented at the trial of this cause which was not presented due to the state of the law in Texas at the time of the Petitioner's trial. The State has denied that such evidence existed. The trial record does not reflect what evidence existed which was not presented at the trial.

In addition, the Petitioner has claimed that he was denied the opportunity to represent himself on appeal *pro se*. The State has denied that the Petitioner sought to represent himself and has claimed that he waived that right. As pointed out in the previously, the alleged waiver was elicited from the Petitioner through the affirmative misrepresentation of the trial court concerning the Petitioner's right to hybrid representation on appeal. See (trial record excerpt attached as Appendix Y to Application for Writ of Habeas Corpus at page 45, *ll* 9 through

20; page 46, *ll* 22-25; page 48, *ll* 5-6, *ll* 11-24).

Further, the Petitioner was not afforded an opportunity to review the appellate record or to present his own *pro se* brief. (See Appendix X to Application for Writ of Habeas Corpus). The record does not reflect the Petitioner's expectations concerning this misrepresentation of his appellate rights made by the trial judge, nor does it reflect the reasons for his inability to obtain the appellate record or to present a *pro se* brief before this Honorable Court on direct appeal. This is an unresolved contested issue of fact which requires a hearing.

It is respectfully submitted that the Petitioner has established all of the requisites for the issuance of a stay in this case found in 28 U.S.C. sec. 2101(f). Specifically, there is a "reasonable possibility" that four Justices will consider the certiorari issues sufficiently meritorious to grant certiorari. Petitioner would note that the Writ of Habeas Corpus raises several different issues, including issues identical to those raised in *Selvege v. Lynaugh*, No. 87-6700. The United States Supreme Court has granted certiorari in that case and will further address the application of that Court's earlier holding in *Penry v. Lynaugh*, No. 87-6177 to cases tried before the decision in *Penry* was handed down. The instant appeal from the denial of the Writ of Habeas Corpus pending in this case invokes the same issues as were raised in *Selvege* and the holding in

Penry as the basis for the relief requested.

Since the decision of the Fifth Circuit continues to reject this Honorable Court's holding in *Penry*, and, to the contrary, continues to pretend that *Penry* did not effect the jurisprudence of the State of Texas, it is respectfully submitted that the Petitioner has established a "fair prospect" that a majority of the Court will conclude that the decision below on the merits was erroneous. This Court has already done so in *Selvege v. Lynaugh* which raises the same legal issues.

That the Petitioner will be irreparably harmed is evident. Without this stay, the Petitioner will be executed at midnight, December 6/7, 1989.

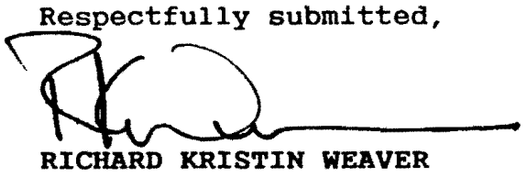
Further, the balance of the equities clearly supports the granting of this stay. The State will not be harmed if the Petitioner is not executed immediately.

(c) Conclusion

For the foregoing reasons, Petitioner respectfully prays for an order staying his execution set for midnight, December 6/7, 1989, and further, for a stay of the mandate of the United States Court of Appeals for the Fifth Circuit pending completion of

certiorari proceedings before this Court.

Respectfully submitted,



RICHARD KRISTIN WEAVER
SBN 21010850
404 EXPRESSWAY TOWER - LB35
6116 N. CENTRAL EXPRESSWAY
DALLAS, TEXAS 75206
1(214) 739-6464

CERTIFICATE OF SERVICE

A copy of this Motion has been forwarded to Mr. William C. Zapalac, Assistant Attorney General, Enforcement Division, 200 W. 14th Street, Supreme Court Building, Sixth Floor, Austin, Texas 78711.

SIGNED this 4th day of December, 1989.

R. K. WEAVER

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

CARLOS DeLUNA, Petitioner,	§	
V.	§	C.A. NO. C-89-336
JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPT. OF CORRECTIONS, Respondent.	§	

ORDER DENYING PETITIONS FOR HABEAS CORPUS AND FOR STAY OF EXECUTION

Petitioner's applications for a writ of habeas corpus and a stay of execution are denied. 28 U.S.C. § 2254. The Court has considered petitioner's arguments in this second petition filed in federal court and has determined that no relief is warranted.

PROCEDURAL HISTORY

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. A jury was impaneled on July 13, 1983, and the trial began afterwards. 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 referred the petition and state court records to the Court of Criminal Appeals. 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).

Petitioner filed this, his second writ of habeas corpus in this Court, on November 30, 1989. Respondent answered and moved for dismissal based upon abuse of the writ. The Court, in accordance with Hawkins v. Lynaugh, 862

F.2d 482 (5th Cir.), petition for cert. filed, 109 S.Ct. 569 (1989), held a hearing by telephone conference call on December 2, 1989, in which to allow petitioner's attorney an opportunity to respond to respondent's motion to dismiss for abuse of the writ process.

STATEMENT OF FACTS

Testimony at the state court trial showed that during a robbery of a Shamrock gas station on South Padre Island Drive in Corpus Christi, DeLuna fatally stabbed the clerk, Wanda Lopez. He was seen and identified by witnesses before, during, and after the offense. Police apprehended DeLuna after they conducted a search of a nearby neighborhood and found DeLuna hiding underneath a parked truck. State v. DeLuna, 711 S.W.2d at 45.

Petitioner presented no evidence during the punishment phase of the trial (Statement of Facts, Vol. XII at 50).

DISCUSSION

Petitioner raises three issues in his petition for writ of habeas corpus:

1. The Texas capital-sentencing statute as applied in this case denied petitioner 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 this case denied petitioner 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. Petitioner 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.

The parties are in agreement that DeLuna has exhausted his state court remedies.

ABUSE OF WRIT

Pending is respondent's motion to dismiss for abuse of the writ procedure because petitioner failed to raise this challenge in his first petition for writ of habeas corpus filed with this Court. Rule 9(b) of the Rules Governing § 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 written petition constituted an abuse of the writ.

The writ of habeas corpus will be dismissed for abuse of the writ if petitioner files one petition, then files a subsequent petition in which he makes an argument that he withheld from the earlier petition without legal excuse. Hamilton v. McCotter, 772 F.2d 171,176 (5th Cir. 1986), reh'g denied, 777 F.2d 701. Legal excuse can exist

if, after the first petition, the basis for the newly asserted claim arises because the law changes or the petitioner becomes aware or chargeable with knowledge of facts which make the new claim viable. Id.

Although petitioner argues that the recent Supreme Court case of Penry v. Lynaugh, 109 S.Ct. 2934), cert. denied, 109 S.Ct. 1576 (1989), constitutes a change in the law which now makes at least petitioner's first and second claims viable, the Supreme Court and Fifth Circuit have held otherwise. Id. at 2946; King v. Lynaugh, 868 F.2d 1400, 1402-03 (5th Cir. 1989). In King v. Lynaugh, the Fifth Circuit held that the Penry claims are not "recently found legal theor[ies] not knowable by competent trial counsel." Id. Thus, petitioner's first and second grounds for writ of habeas corpus may be dismissed for abuse of the writ.

Petitioner's third contention, that he was denied the right to represent himself at the motion for new trial and on appeal, should be dismissed on grounds of abuse of the writ. There is no legal excuse for this late submission of this ground. First, the law on which petitioner relies existed at the time of his first petition. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975); Thomas v. State, 605 S.W.2d 290 (Tex. Crim. App. 1980); Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Second, the petitioner was aware of the facts of this pro se

representation contention during his direct appeal and during consideration of the first habeas proceeding before this Court.

This Court held a hearing by telephone conference call to give petitioner an opportunity to show cause why he should not have his cause dismissed for abuse of the writ. Petitioner's counsel in this habeas proceeding explained the failure to advance this pro se representation error during the first habeas proceeding as being a mistake on the part of the first habeas attorney. In essence, present counsel argues the first habeas attorney did not appreciate and understand the facts and viability of this argument. Because of this mistake, this argument was not advanced.

The Court denies respondent's motion to dismiss with respect to the Penry claims, but grants it with respect to the attorney claims. Even though the mitigation issues with respect to the Texas death penalty statute have been well known among the Bar, King v. Lynaugh, 868 F.2d at 1403, the Court believes that the better discretion is to address this matter on the merits to allow a full development of the law, if further development is needed.

NO INSTRUCTION ON MITIGATION

For his first issue, petitioner relies upon Penry v. Lynaugh, supra, to establish that the death penalty statute does "not allow for the effective introduction or

consideration of available mitigating evidence concerning the petitioner's past difficulties with drug and alcohol abuse ...." Penry makes no such holding as to either the introduction or consideration of mitigating evidence. Penry's lesson is that the Texas death penalty scheme is constitutional, Jurek v. State, 428 U.S. 262, 96 S.Ct. 2950 (1976), and may be applied, provided the jury is given adequate instructions to consider the effect of mitigating evidence in answering the statutory questions of the Texas death penalty scheme. Penry recognizes that the death penalty statute had passed constitutional muster in Jurek v. State, supra, but that when certain types of mitigating evidence was presented, the jury should be instructed on how to consider that evidence if an instruction is requested. In this case, petitioner presented no mitigating evidence and, indeed, withdrew his request for an instruction on mitigation.

It has already been held in response to petitioner's first petition for writ of habeas corpus that the failure to present such evidence was a tactical decision made by competent trial counsel. DeLuna v. Lynaugh, 873 F.2d at 759-60.

NO DEFINITION OF DELIBERATELY

For his second issue, potitioner complains that the jury was not given instructions defining the term

"deliberately" in Special Issue No. One. In Penry, the failure of an instruction to define "deliberately" reversed Penry's conviction because evidence of the mitigating effects of his mental retardation could not be adequately considered without an instruction on the meaning of "deliberately." Penry submitted mitigating evidence to the jury, but DeLuna did not. Because there is no evidence upon which the jury could be confused as to meaning of "deliberately," it is not error to fail to define it to the jury. For the foregoing reasons, Penry does not invalidate the application of the Texas death penalty statute to the petitioner.

Accordingly, DeLuna's challenge to the constitutionality of the Texas death penalty statute as set forth in his first and second issues is denied on the merits, and DeLuna's challenge to denial of his rights of self-representation is dismissed for abuse of the writ. Petitioner's requests for a stay of execution and for habeas corpus relief are denied.

ORDERED this 2nd day of December, 1989.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

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

CARLOS DeLUNA, Petitioner,	§	
V.	§	C.A. NO. C-89-336
JAMES A. LYNAUGH, DIRECTOR TEXAS DEPT. OF CORRECTIONS, Respondent.	§	

JUDGMENT

For the reasons set forth in its opinion, it is the judgment of the Court that petitioner is denied all relief requested in his application for stay of execution.

ORDERED this 2nd day of December, 1989.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

EX PARTE CARLOS DE LUNA

Habeas Corpus Application
from NUECES County

WRIT NO. 16,436-02

O R D E R

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

Applicant was convicted of the offense of capital murder on July 20, 1983. After the jury answered the special issues submitted under Art. 37.071, V.A.C.C.P., in the affirmative, punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. DeLuna v. State, 711 S.W.2d 44 (Tex.Crim.App. 1986).

In the instant cause, applicant presents three allegations challenging the validity of his conviction. This Court has reviewed the record with respect to the allegations. We find such allegations are without merit.

The relief sought is denied.

IT IS SO ORDERED THIS THE 29TH DAY OF NOVEMBER, 1989.

PER CURIAM

En banc
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