

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

EX PARTE

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NO. 83-CR-194-A

CARLOS DELUNA

APPLICATION FOR WRIT OF HABEAS CORPUS AND  
BRIEF APPLICATION FOR A STAY OF MANDATE

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CARLOS DELUNA, Petitioner in the above styled and numbered cause, by and through his Attorney, Richard A. Anderson, and files this his Application for Writ of Habeas Corpus and Brief Application for Stay of Mandate, and in support hereof would respectfully show the Court as follows:

I. CUSTODY

Petitioner is confined on Death Row in the Ellis I Unit of the Texas Department of Correction 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. The Court of Criminal Appeals of Texas affirmed the conviction and sentence of the Petitioner in Opinion No. 69,245, an En Banc Decision delivered June 4, 1986. Petitioner's court-appointed attorney on appeal did not file a Motion for Rehearing in the Court of Criminal Appeals of Texas, and did not seek an Application for Writ of Certiorari 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

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of Texas and Petitioner's first execution date has been set for October 15, 1986. On October 7, 1986, Petitioner has filed a Motion for Stay of Execution addressed to Justice Byron White, Associate Justice, United States Supreme Court. As of the date of the filing of this Application for Writ of Habeas Corpus and Request for Stay of Mandate, no decision has been rendered on that Motion for Stay of Execution.

## II. JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to Article 11.07, Texas Code of Criminal Procedure.

## III. PROCEDURAL HISTORY

On July 15, 1983, a jury returned affirmative answers to the issues submitted to them at Petitioner's capital murder trial, and the Judge sentenced Petitioner to death. Petitioner was represented by two court-appointed counsel.

The conviction and sentence were affirmed by the Court of Appeals of Texas on June 4, 1986. No Application for Writ of Certiorari has been made at this time.

Petitioner is scheduled to be executed on October 15, 1986. No previous applications under Article 11.07, Texas Code of Criminal Procedure have been made by Petitioner or advanced on Petitioner's behalf prior to the filing of this petition.

Present counsel has agreed to represent Petitioner as volunteer counsel and Mr. DeLuna has agreed to present counsel's representation in this cause.

#### IV. EXHAUSTION OF STATE REMEDIES

Petitioner has presented none of the claims presented here on direct appeal and no court in Petitioner's case has passed upon Petitioner's contentions in this Application for Writ of Habeas Corpus.

#### V. STATEMENT OF THE CASE

Petitioner was convicted on an indictment that alleged that on the 4th day of February, 1983, while in the course of attempting to commit a robbery of Wanda Lopez, he intentionally caused the death of Wanda Lopez by stabbing her with a knife.

#### VI. STATEMENT OF CLAIMS

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

- (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 Hitchcock v. Wainwright, No. 85-6756, to be argued before this Court on October 15, 1986.

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

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

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

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

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

(5) Trial counsel, all though being advised of numerous witnesses that this 21 year old

Petitioner had to present in mitigation of punishment, failed to put on a single witness at the punishment phase of the trial in mitigation of punishment.

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

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

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

VII.

That as a basis for these claims an evidentiary hearing will be required to provided additional testimony and evidence for the Court's consideration that was not developed at the trial of this cause.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court:

1. Issue a Writ of Habeas Corpus to have Petitioner brought before it to end that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

2. Conduct a hearing at which proof may be offered concerning the allegations of this Petition;

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

4. Grant Petitioner, who is indigent, sufficient funds to secure expert testimony to prove the facts as alleged in this Petition;

5. Grant Petitioner the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in this petition;

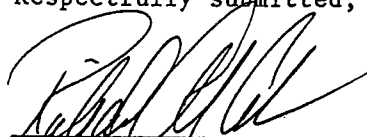
6. Allow Petitioner a period of sixty (60) days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised in

this petition;

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

8. Grant such other relief as may be appropriate.

Respectfully submitted,



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

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 and to Ms. Paula Offenhauser, Assistant Attorney General, Supreme Court Building, Sixth Floor, Austin, Texas, 78711.

SIGNED this the 7<sup>th</sup> day of October, 1986.



RICHARD A. ANDERSON