Court of Criminal Appeals of Texas,
En Banc.
Carlos DeLUNA, Appellant,
v.
The STATE of Texas, Appellee.
No. 69,245.
June 4, 1986.

Defendant was convicted by jury in the 28th Judicial District Court, Nueces County, Wallace C. Moore, Special Judge, of capital murder in connection with robbery. On appeal, the Court of Criminal Appeals, Clinton, J., held that: (1) photograph could be admitted without predicate as to who took it; (2) defendant was not entitled to charge on circumstantial evidence; (3) report of unadjudicated, extraneous offense offered by defendant at sentencing was hearsay; (4) trial court could allow jury to continue deliberations; and (5) juror who previously had knife pulled on her during shoplifting incident was not disabled.
Affirmed.
Teague, J., concurred and filed opinion.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(1) k. In General. Most Cited Cases

Photograph is admissible if it is relevant to material issue and accurately represents subject as of given time.

[2] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 k. Authentication of Documents. Most Cited Cases

Witness who verifies photograph need not be photographer, need not testify as to way photograph was made, and need not have been present when photograph was taken.

[3] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(3) k. Pictures of Accused or Others; Identification Evidence. Most Cited Cases

It was not error to admit photograph of defendant taken at police headquarters on night of arrest, since no relevancy objection was made and officer's testimony established its time, place, and accuracy.

[4] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(15) k. Circumstantial Evidence. Most Cited Cases

Charge on circumstantial evidence is not required where jury is properly instructed on presumption of innocence, State's burden of proof, and requirement that defendant be found guilty beyond reasonable doubt.

[5] KeyCite Notes

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 k. Other Offenses, Charges, or Misconduct. Most Cited Cases
(Formerly 203k357(5), 203k354)

Proof of unadjudicated, extraneous offenses is admissible in punishment phase of capital murder trial, absent showing that defendant is unfairly surprised by such evidence.

[6] KeyCite Notes

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1752 k. Discretion of Court. Most Cited Cases
(Formerly 203k358(1), 203k354)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1751 k. Applicability of Rules of Evidence in General. Most Cited Cases
(Formerly 203k358(1), 203k354)

Trial court has wide discretion in admitting or excluding evidence at punishment phase of capital murder trial, but is still subject to rules of evidence.

[7] KeyCite Notes

350H Sentencing and Punishment

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Report of unadjudicated, extraneous assault could not be offered in capital murder prosecution to prove fact that no prosecutable rape or attempted rape had been committed, since officer making report did not testify and report could not have been used to impeach him.

[8] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k865 Urging or Coercing Agreement
110k865(2) k. Time of Keeping Jury Together. Most Cited Cases

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1155 k. Custody and Conduct of Jury. Most Cited Cases

Length of time for jury deliberation rests in sound discretion of trial court and, absent abuse of discretion, there is no error.

[9] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k864 k. Communications Between Judge and Jury. Most Cited Cases

It was not abuse of discretion for trial court to request jury to continue deliberations on second special issue, since foreman expressed willingness to continue trying to reach verdict and only one juror indicated doubt as to ability to do so.

[10] KeyCite Notes

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(1) k. In General. Most Cited Cases

Juror was not "disabled" by any bias or prejudice resulting from her experience as victim of criminal offense similar to that of which defendant was accused, in light of juror's testimony that she had not been frightened by the experience and that it had not colored her decisions at trial.
***45** James R. Lawrence, Corpus Christi, for appellant.
Grant Jones, Dist. Atty. and Mary F. Klapperich, Asst. Dist. Atty., Corpus Christi, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

CLINTON, Judge.

Appellant was convicted of capital murder. The jury answered both special issues in the affirmative and death was assessed as punishment. Article 37.071, V.A.C.C.P. Appellant raises seven grounds of error. We will affirm.

The evidence showed that during a robbery in Corpus Christi appellant fatally stabbed the clerk of a gas station. He was seen and identified by witnesses before, during, and after the offense. Police conducted a search of the neighborhood into which the robber had reportedly fled and two officers found appellant hiding under a truck parked at a curb. Appellant does not challenge the sufficiency of the evidence.

Only appellant's sixth ground of error pertains to presentation of evidence at the guilt-innocence phase of trial. Appellant contends a photograph of him taken at police headquarters the night of his arrest was improperly admitted into evidence. Defense counsel objected at trial that "the proper predicate hasn't been laid as to who actually took the picture, what time the picture was taken or anything of this nature, ***46** if, in fact, it was taken on February the 4th, 1983 ..."

The photograph was admitted during the testimony of Officer Schauer, who had arrested appellant the night of the robbery and murder. Officer Schauer described appellant as having a glassy, "animal-like stare" at the time of his arrest, a description defense counsel contested on crossexamination on the basis that the officer had not included those words in his offense report. On redirect examination Officer Schauer was shown the photograph of appellant and asked if he recognized it:

"A: Yes, sir.
Q: Who is that a photograph of?
A: It's Carlos, the suspect.
Q: Is that how he looked the night that you arrested him after you took him to the booking desk?
A: Yes.
Q: Does he have that stare that you have described?
A: I think so ...
Q: This is how he looked when you took him to the booking desk that night?
A: He has a kind of a smirk on his face, too.
Q: This was taken at the police department?
A: It was up at the booking desk.
Q: On the 4th day of February, 1983; is that correct?
A: Yes, sir."

[1] [2] [3] At that point the photograph was offered and admitted into evidence. Its admission was not error. A photograph is admissible if it is relevant to a material issue and is an accurate representation of its subject as of a given time. *Roy v. State,* 608 S.W.2d 645, 649 (Tex.Cr.App.1980). Whether the photograph was relevant to any material issue in the trial is questionable, but that was not the basis of appellant's objection at trial, nor of his ground of error now. Officer Schauer's testimony established the time, place, and accuracy of the photograph. There was no need to meet appellant's specific objection that "the proper predicate hasn't been laid as to who actually took the picture ..." The witness who verifies a photograph need not be the photographer, nor need he testify as to the way the photograph was made. *Darden v. State,* 629 S.W.2d 46, 49 (Tex.Cr.App.1982). It is not even necessary that the witness was present when the photograph was taken. *David v. State,* 453 S.W.2d 172, 177-178 (Tex.Cr.App.1970). Appellant's ground of error number six is overruled.

[4] In his seventh ground of error appellant contends the trial court erred in refusing to give a charge on circumstantial evidence. The jury was, however, properly instructed on the presumption of innocence, that the burden of proof was on the State, and on the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. In such a case a charge on circumstantial evidence is no longer required. *Hankins v. State,* 646 S.W.2d 191, 199 (Tex.Cr.App.1983) (Opinion on State's motion for rehearing). Ground of error number seven is overruled.

At the punishment phase of trial the State put on evidence that appellant had committed an unadjudicated, extraneous offense. Appellant's parole officer testified that appellant had been released on parole from the Texas Department of Corrections on May 13, 1982, and had been charged with a new offense on May 15, 1982. Three witnesses, including the complainant, then testified to the facts of that offense. The day after appellant's release a friend of his from T.D.C. was also released on parole. Appellant attended a party at the home of his friend's mother, celebrating this event. According to the witnesses appellant returned to the house later that night after the other guests were gone. He found his friend's mother lying in bed, and he held a pillow over her face. When she struggled he told her to be quiet, threatened to kill her, and hit her several times, breaking three of her ribs and bruising her face. The complainant testified that though appellant lowered his pants while lying atop her, he did not sexually ***47** assault her, but instead left the house after about twenty minutes.

[5] Proof of unadjudicated, extraneous offenses is admissible in the punishment phase of a capital murder trial, absent a showing that the defendant is unfairly surprised by such evidence. *Williams v. State,* 622 S.W.2d 116, 120 (Tex.Cr.App.1981). To prove that appellant was not surprised by this evidence the State offered three pages of an offense report describing the offense. The first page of the report had been initialed by defense counsel and dated some months before trial. The trial court accepted this exhibit outside the jury's presence, for the limited purpose for which the State offered it. Appellant objected that the offense report should be admitted before the jury for all purposes. The trial court overruled the objection on the basis that the offense report was "the clearest kind of hearsay, would not be admissible even by agreement, and hearsay is--has no weight of an evidentiary nature whatsoever."

Appellant now contends, in his ground of error number four, that the exclusion of this evidence was erroneous. He argues that the offense report showed that no rape or attempted rape occurred, only an assault. (In the report the investigating officer concluded, "Upon investigating this complaint it was determined that there was no rape or attempted rape that was prosecutable in this case, however there was a class A assault that could be prosecuted.") Appellant wanted the jury to have this "evidence." In other words, he wanted this out of court statement offered to prove the truth of the matter asserted therein. As the trial court held, this was obvious hearsay. *Ex parte Martinez,* 530 S.W.2d 578, 580 (Tex.Cr.App.1975); 1A Ray, Texas Law of Evidence (3d ed. 1980) § 781. The officer who made the report did not testify concerning the offense, so the report could not have been used to impeach any inconsistent testimony he might have given. Nor did the statement fall within any other exception to the hearsay rule.

[6] [7] A trial court has wide discretion in admitting or excluding evidence at the punishment phase of a capital murder trial. *King v. State,* 657 S.W.2d 109, 111 (Tex. Cr.App.1983). Nevertheless, the rules of evidence still govern the admissibility of evidence. *Id.* The offense report in the instant case constituted inadmissible hearsay and was properly excluded by the trial court. Appellant's ground of error number four is overruled.

Appellant's fifth ground of error complains that the trial court overruled his objection to the charge on punishment. Specifically he objected that the charge did not include definitions of the words "deliberately" and "a probability," as used in Article 37.071(b), supra. In *King v. State,* 553 S.W.2d 105, 107 (Tex.Cr.App.1977), this Court expressly held that these terms need not be defined in the court's charge to the jury. This issue appears to be well settled. *Barefoot v. State,* 596 S.W.2d 875, 887 (Tex.Cr.App.1980); *Russell v. State,* 665 S.W.2d 771, 780 (Tex. Cr.App.1983). [FN1] Ground of error five is overruled.

> FN1. But see this writer's dissenting opinion in *Russell,* supra, at 781. See also *Williams v. State,* 674 S.W.2d 315, 322, n. 6 (Tex. Cr.App.1984).

In his third ground of error appellant asserts that the trial court erred in sending the jury back to deliberate further when it first returned with no answer to special issue number two. Appellant contends the court should instead have assessed a sentence of life imprisonment at that time, pursuant to Article 37.071(e), V.A.C.C.P.

[8] The record is unclear as to the exact amount of time the jury deliberated. After the punishment hearing and some time before lunch, the jury began its deliberations. Some time before dinner the same day, they returned with special issue number one answered in the affirmative, but no answer to the second special issue. The following exchange then took place between the foreman and the trial court:

***48** "THE COURT: Let me ask you, Mr. Morales, as Foreperson, do you think that with further deliberations you could resolve what difficulty you were having with that issue?

JUROR MORALES: I would--Your Honor, I would have to say that we certainly could give it a try.

THE COURT: What is your thought in the matter? Could you resolve what difficulties you're having and arrive at a verdict, either yes or no on it?

JUROR MORALES: We have exhausted both avenues, sir, and I think that it would be rather difficult to go back in there and try and make a decision, sir."

The court then asked each juror individually if he or she thought they might reach a verdict given more time to deliberate. Each answered affirmatively, except one juror, who said, "I don't think so, Your Honor." Given that large majority of jurors who believed a verdict could be reached, the trial court asked them to continue their deliberations. Some time after a recess for dinner, the jury returned with affirmative answers to both special issues. Upon the defendant's request the jury was polled, and each responded that the answers to the special issues reflected his or her own verdict.

Article 36.31, V.A.C.C.P., provides:

"After the cause is submitted to the jury, it may be discharged when it cannot agree and both parties consent to the discharge; or the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree."

Thus the length of time the jury deliberates rests in the sound discretion of the trial court, and absent an abuse of that discretion there is no error. *Garcia v. State,* 522 S.W.2d 203, 208 (Tex.Cr.App.1975).

In *Williams v. State,* 476 S.W.2d 300, 305 (Tex.Cr.App.1972), the defendant moved for a mistrial after the jury had deliberated for six and a half hours, whereupon the trial court had the jury return to the courtroom and asked if they could reach a verdict. Only one juror indicated they could not. This Court held there was no abuse of discretion in the trial court's instructing the jury to continue its deliberations. In *Andrade v. State,* 700 S.W.2d 585 (Tex.Cr.App.1985), no abuse of discretion was shown when the trial court had the jury continue trying to reach a verdict on special issue number one. The jury had indicated after four and a half hours that they had reached no verdict on that issue, but the trial court overruled the defendant's motion for mistrial. The jury continued deliberating until they retired at 11:00 p.m. They resumed at 9:00 o'clock the following morning and reached unanimity within half an hour. This Court concluded, "Considering the nature of the case, a capital murder, and the time of deliberation, approximately twelve hours, we find no abuse of discretion on the part of the trial court." *Id.,* at 589.

[9] We note that in the instant case when the trial court requested that the jury continue its deliberations the court gave no additional charge and made no comment on either the law or the evidence. See *Muniz v. State,* 573 S.W.2d 792, 794, n. 4 (Tex.Cr.App.1978). Where as here the foreman expressed a willingness to continue trying to reach a verdict, and only one other juror indicated the jury could not, it was not "altogether improbable" that the jury would "agree." Article 36.31, supra. There was no abuse of discretion in the trial court's having the jury continue its deliberations. Ground of error number three is overruled.

Finally, appellant's grounds of error one and two allege the trial court erred in overruling his motion for new trial. A hearing was held on the motion, during which one of the jurors testified. The juror was a clerk in a convenience store, and defense counsel had discovered that during the trial she was the victim of a crime similar to the one of which appellant was accused. Appellant's contention that she was "the victim of the exact same situation" as that ***49** presented at trial is inaccurate, however. [FN2] The juror testified that she had been working at the store at 1:00 a.m. when she accused a "kid," fourteen or fifteen years old, of shoplifting. When he was cornered by the juror and her coworker, the shoplifter removed a jug of wine from his pants and produced a knife, with which he threatened the juror in order to make his escape. The juror characterized this incident as "just a common shoplifting thing" that had no bearing on her deliberations in appellant's trial. She stated unequivocally that she had not been scared by the incident. Most revealing was this exchange

between the trial court and the juror at the hearing:

> FN2. That this contention of appellant's must not be read literally
>
> is obvious. If the juror had been the victim of the "exact same" type of crime as the capital murder with which appellant was charged she would not have been available to testify at the motion for new trial hearing.

"Q: All right. And my question, then, is: Did that situation in any way influence your verdict in the De Luna case?
A: No, sir.
Q: And are you sure of that in your own mind?
A: Yes, sir."
Appellant now contends his motion for new trial should have been granted because the juror was disabled from serving under Article 36.29, V.A.C.C.P., which provides in part:
"... when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict ..."
Appellant relies on *Griffin v. State*, 486 S.W.2d 948, 951 (Tex.Cr.App.1972), which defines "disabled" in this context as "any condition that inhibits the juror from fully and fairly performing the functions of a juror." Appellant contends the juror was disabled under this definition because her experience during trial must have prejudiced her against appellant, who was accused of a similar offense.

[10] In *Carrillo v. State*, 597 S.W.2d 769, 771 (Tex.Cr.App.1980), this Court held that disability of a juror in this context refers only to physical, mental, or emotion impairments, *not* to bias or prejudice. Appellant contends the juror in this case must have been so "mentally impaired" by the bias or prejudice produced by her victimization that she was disabled from serving, citing *Bass v. State*, 622 S.W.2d 101 (Tex.Cr.App.1981). In *Bass* after the jury had been selected but before the attempted capital murder trial began one of the jurors was threatened by a man who entered her bedroom with a knife. This Court reiterated, however, that any bias or prejudice produced by such a situation does not render the juror disabled under Article 36.29, supra. *Id.*, at 106. The mental impairment referred to in *Bass* was that the juror herself testified that she had been so shaken by her experience that she could not concentrate on the case in which she was sitting as a juror. In the instant case, to the contrary, the juror testified that she had not been frightened by the "common shoplifting" incident in her store and that that offense had not colored her decisions at trial. In light of this testimony the trial court did not abuse its discretion in overruling the motion for new trial. Finding no reversible error, we affirm the judgment of the trial court.

TEAGUE, Judge, concurring.
I am compelled to write because of the way the majority opinion disposes of the appellant's seventh ground of error. The majority opinion states the following: "In his seventh ground of error appellant contends the trial court erred in refusing to give a charge on circumstantial evidence. The jury was, however, properly instructed on the presumption on innocence, that the burden of proof was on the State, and on the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. ***50** *In such a case* a charge on circumstantial evidence is no longer required. *Hankins v. State*, 646 S.W.2d 191, 199 (Tex.Cr.App.1983) (Opinion on State's motion for rehearing. Ground of error number seven is overruled." (My emphasis.)
The way I interpret what the majority opinion states is that whether an instruction on circumstantial evidence must be given hinges or is conditioned on whether the jury was instructed on presumption of innocence, on the burden of proof, and instructed that if there was a reasonable doubt the jury should acquit the defendant. If they were, the defendant does not get such an instruction. If they were not, the defendant does get such an instruction.
The majority opinion thus implies that in some cases, as a matter of law, a defendant will be entitled

to receive an instruction on circumstantial evidence. It cites *Hankins v. State, supra*, as its authority for this proposition. *Hankins, supra*, however, did not so expressly limit itself.
In fact, but as I and others, including Judge Clinton, the author of the majority opinion in this cause, correctly pointed out in the concurring and dissenting opinions that were filed in *Hankins, supra*, the then aggressive and assertive majority of this Court held that no longer, as a matter of law, would an accused person ever be entitled to an instruction on circumstantial evidence. I stated the following in the dissenting opinion that I filed in *Hankins, supra*: "In any event, the mighty circumstantial evidence charge in our law is now consigned by the majority opinion to its death and burial in the refuse heap of Texas law, preceded in death only recently by the doctrine of carving. See *Ex parte McWilliams*, 634 S.W.2d 815 (Tex.Cr.App.1982)." (221).
In summary, until *Hankins v. State, supra*, is expressly overruled by this Court, or the Legislature of this State so provides, an accused person in Texas will not ever be entitled, *as a matter of law*, to receive an instruction on circumstantial evidence.
Tex.Cr.App.,1986.
DeLuna v. State
711 S.W.2d 44
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Affirmed.

Teague, J., concurred and filed opinion.

West Headnotes

[1] Criminal Law ⇐438(1)
110k438(1) Most Cited Cases

Photograph is admissible if it is relevant to material issue and accurately represents subject as of given time.

[2] Criminal Law ⇐444
110k444 Most Cited Cases

Witness who verifies photograph need not be photographer, need not testify as to way photograph was made, and need not have been present when photograph was taken.

[3] Criminal Law ⇐438(3)
110k438(3) Most Cited Cases

It was not error to admit photograph of defendant taken at police headquarters on night of arrest, since no relevancy objection was made and officer's testimony established its time, place, and accuracy.

[4] Criminal Law ⇐829(15)
110k829(15) Most Cited Cases

Charge on circumstantial evidence is not required where jury is properly instructed on presumption of innocence, State's burden of proof, and requirement that defendant be found guilty beyond reasonable doubt.

[5] Sentencing and Punishment ⇐1762
350Hk1762 Most Cited Cases
(Formerly 203k357(5), 203k354)

Proof of unadjudicated, extraneous offenses is admissible in punishment phase of capital murder trial, absent showing that defendant is unfairly surprised by such evidence.

[6] Sentencing and Punishment ⇐1752
350Hk1752 Most Cited Cases
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[6] Sentencing and Punishment ⇐1751
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Report of unadjudicated, extraneous assault could not be offered in capital murder prosecution to prove fact that no prosecutable rape or attempted

rape had been committed, since officer making report did not testify and report could not have been used to impeach him.

[8] Criminal Law ⚖865(2)
110k865(2) Most Cited Cases

[8] Criminal Law ⚖1155
110k1155 Most Cited Cases

Length of time for jury deliberation rests in sound discretion of trial court and, absent abuse of discretion, there is no error.

[9] Criminal Law ⚖864
110k864 Most Cited Cases

It was not abuse of discretion for trial court to request jury to continue deliberations on second special issue, since foreman expressed willingness to continue trying to reach verdict and only one juror indicated doubt as to ability to do so.

[10] Jury ⚖97(1)
230k97(1) Most Cited Cases

Juror was not "disabled" by any bias or prejudice resulting from her experience as victim of criminal offense similar to that of which defendant was accused, in light of juror's testimony that she had not been frightened by the experience and that it had not colored her decisions at trial.
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OPINION

CLINTON, Judge.

Appellant was convicted of capital murder. The jury answered both special issues in the affirmative and death was assessed as punishment. Article 37.071, V.A.C.C.P. Appellant raises seven grounds of error. We will affirm.

The evidence showed that during a robbery in Corpus Christi appellant fatally stabbed the clerk of a gas station. He was seen and identified by witnesses before, during, and after the offense. Police conducted a search of the neighborhood into which the robber had reportedly fled and two officers found appellant hiding under a truck parked at a curb. Appellant does not challenge the sufficiency of the evidence.

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The photograph was admitted during the testimony of Officer Schauer, who had arrested appellant the night of the robbery and murder. Officer Schauer described appellant as having a glassy, "animal-like stare" at the time of his arrest, a description defense counsel contested on crossexamination on the basis that the officer had not included those words in his offense report. On redirect examination Officer Schauer was shown the photograph of appellant and asked if he recognized it:

"A: Yes, sir.
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Q: Is that how he looked the night that you arrested him after you took him to the booking desk?
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A: He has a kind of a smirk on his face, too.
Q: This was taken at the police department?
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Q: On the 4th day of February, 1983; is that correct?
A: Yes, sir."

[1][2][3] At that point the photograph was offered and admitted into evidence. Its admission was not

error. A photograph is admissible if it is relevant to a material issue and is an accurate representation of its subject as of a given time. *Roy v. State,* 608 S.W.2d 645, 649 (Tex.Cr.App.1980). Whether the photograph was relevant to any material issue in the trial is questionable, but that was not the basis of appellant's objection at trial, nor of his ground of error now. Officer Schauer's testimony established the time, place, and accuracy of the photograph. There was no need to meet appellant's specific objection that "the proper predicate hasn't been laid as to who actually took the picture ..." The witness who verifies a photograph need not be the photographer, nor need he testify as to the way the photograph was made. *Darden v. State,* 629 S.W.2d 46, 49 (Tex.Cr.App.1982). It is not even necessary that the witness was present when the photograph was taken. *David v. State,* 453 S.W.2d 172, 177-178 (Tex.Cr.App.1970). Appellant's ground of error number six is overruled.

[4] In his seventh ground of error appellant contends the trial court erred in refusing to give a charge on circumstantial evidence. The jury was, however, properly instructed on the presumption of innocence, that the burden of proof was on the State, and on the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. In such a case a charge on circumstantial evidence is no longer required. *Hankins v. State,* 646 S.W.2d 191, 199 (Tex.Cr.App.1983) (Opinion on State's motion for rehearing). Ground of error number seven is overruled.

At the punishment phase of trial the State put on evidence that appellant had committed an unadjudicated, extraneous offense. Appellant's parole officer testified that appellant had been released on parole from the Texas Department of Corrections on May 13, 1982, and had been charged with a new offense on May 15, 1982. Three witnesses, including the complainant, then testified to the facts of that offense. The day after appellant's release a friend of his from T.D.C. was also released on parole. Appellant attended a party at the home of his friend's mother, celebrating this event. According to the witnesses appellant returned to the house later that night after the other guests were gone. He found his friend's mother lying in bed, and he held a pillow over her face. When she struggled he told her to be quiet, threatened to kill her, and hit her several times, breaking three of her ribs and bruising her face. The complainant testified that though appellant lowered his pants while lying atop her, he did not sexually *47 assault her, but instead left the house after about twenty minutes.

[5] Proof of unadjudicated, extraneous offenses is admissible in the punishment phase of a capital murder trial, absent a showing that the defendant is unfairly surprised by such evidence. *Williams v. State,* 622 S.W.2d 116, 120 (Tex.Cr.App.1981). To prove that appellant was not surprised by this evidence the State offered three pages of an offense report describing the offense. The first page of the report had been initialed by defense counsel and dated some months before trial. The trial court accepted this exhibit outside the jury's presence, for the limited purpose for which the State offered it. Appellant objected that the offense report should be admitted before the jury for all purposes. The trial court overruled the objection on the basis that the offense report was "the clearest kind of hearsay, would not be admissible even by agreement, and hearsay is--has no weight of an evidentiary nature whatsoever."

Appellant now contends, in his ground of error number four, that the exclusion of this evidence was erroneous. He argues that the offense report showed that no rape or attempted rape occurred, only an assault. (In the report the investigating officer concluded, "Upon investigating this complaint it was determined that there was no rape or attempted rape that was prosecutable in this case, however there was a class A assault that could be prosecuted.") Appellant wanted the jury to have this "evidence." In other words, he wanted this out of court statement offered to prove the truth of the matter asserted therein. As the trial court held, this was obvious hearsay. *Ex parte Martinez,* 530 S.W.2d 578, 580 (Tex.Cr.App.1975); 1A Ray, Texas Law of Evidence (3d ed. 1980) § 781. The officer who made the report did not testify concerning the offense, so the report could not have been used to impeach any inconsistent testimony he might have given. Nor did the statement fall within any other exception to the hearsay rule.

[6][7] A trial court has wide discretion in admitting or excluding evidence at the punishment phase of a capital murder trial. *King v. State,* 657 S.W.2d 109, 111 (Tex.Cr.App.1983). Nevertheless, the rules of

evidence still govern the admissibility of evidence. *Id.* The offense report in the instant case constituted inadmissible hearsay and was properly excluded by the trial court. Appellant's ground of error number four is overruled.

Appellant's fifth ground of error complains that the trial court overruled his objection to the charge on punishment. Specifically he objected that the charge did not include definitions of the words "deliberately" and "a probability," as used in Article 37.071(b), supra. In *King v. State,* 553 S.W.2d 105, 107 (Tex.Cr.App.1977), this Court expressly held that these terms need not be defined in the court's charge to the jury. This issue appears to be well settled. *Barefoot v. State,* 596 S.W.2d 875, 887 (Tex.Cr.App.1980); *Russell v. State,* 665 S.W.2d 771, 780 (Tex.Cr.App.1983). [FN1] Ground of error five is overruled.

> FN1. But see this writer's dissenting opinion in *Russell,* supra, at 781. See also *Williams v. State,* 674 S.W.2d 315, 322, n. 6 (Tex.Cr.App.1984).

In his third ground of error appellant asserts that the trial court erred in sending the jury back to deliberate further when it first returned with no answer to special issue number two. Appellant contends the court should instead have assessed a sentence of life imprisonment at that time, pursuant to Article 37.071(e), V.A.C.C.P.

[8] The record is unclear as to the exact amount of time the jury deliberated. After the punishment hearing and some time before lunch, the jury began its deliberations. Some time before dinner the same day, they returned with special issue number one answered in the affirmative, but no answer to the second special issue. The following exchange then took place between the foreman and the trial court:

> ***48** "THE COURT: Let me ask you, Mr. Morales, as Foreperson, do you think that with further deliberations you could resolve what difficulty you were having with that issue?
> JUROR MORALES: I would--Your Honor, I would have to say that we certainly could give it a try.
> THE COURT: What is your thought in the matter? Could you resolve what difficulties you're having and arrive at a verdict, either yes or no on it?
> JUROR MORALES: We have exhausted both avenues, sir, and I think that it would be rather difficult to go back in there and try and make a decision, sir."

The court then asked each juror individually if he or she thought they might reach a verdict given more time to deliberate. Each answered affirmatively, except one juror, who said, "I don't think so, Your Honor." Given that large majority of jurors who believed a verdict could be reached, the trial court asked them to continue their deliberations. Some time after a recess for dinner, the jury returned with affirmative answers to both special issues. Upon the defendant's request the jury was polled, and each responded that the answers to the special issues reflected his or her own verdict.

Article 36.31, V.A.C.C.P., provides:

> "After the cause is submitted to the jury, it may be discharged when it cannot agree and both parties consent to the discharge; or the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree."

Thus the length of time the jury deliberates rests in the sound discretion of the trial court, and absent an abuse of that discretion there is no error. *Garcia v. State,* 522 S.W.2d 203, 208 (Tex.Cr.App.1975).

In *Williams v. State,* 476 S.W.2d 300, 305 (Tex.Cr.App.1972), the defendant moved for a mistrial after the jury had deliberated for six and a half hours, whereupon the trial court had the jury return to the courtroom and asked if they could reach a verdict. Only one juror indicated they could not. This Court held there was no abuse of discretion in the trial court's instructing the jury to continue its deliberations. In *Andrade v. State,* 700 S.W.2d 585 (Tex.Cr.App.1985), no abuse of discretion was shown when the trial court had the jury continue trying to reach a verdict on special issue number one. The jury had indicated after four and a half hours that they had reached no verdict on that issue, but the trial court overruled the defendant's motion for mistrial. The jury continued deliberating until they retired at 11:00 p.m. They resumed at 9:00 o'clock the following morning and reached unanimity within half an hour. This Court concluded, "Considering the nature of the case, a

capital murder, and the time of deliberation, approximately twelve hours, we find no abuse of discretion on the part of the trial court." *Id.*, at 589.

[9] We note that in the instant case when the trial court requested that the jury continue its deliberations the court gave no additional charge and made no comment on either the law or the evidence. See *Muniz v. State,* 573 S.W.2d 792, 794, n. 4 (Tex.Cr.App.1978). Where as here the foreman expressed a willingness to continue trying to reach a verdict, and only one other juror indicated the jury could not, it was not "altogether improbable" that the jury would "agree." Article 36.31, supra. There was no abuse of discretion in the trial court's having the jury continue its deliberations. Ground of error number three is overruled.

Finally, appellant's grounds of error one and two allege the trial court erred in overruling his motion for new trial. A hearing was held on the motion, during which one of the jurors testified. The juror was a clerk in a convenience store, and defense counsel had discovered that during the trial she was the victim of a crime similar to the one of which appellant was accused. Appellant's contention that she was "the victim of the exact same situation" as that ***49** presented at trial is inaccurate, however. [FN2] The juror testified that she had been working at the store at 1:00 a.m. when she accused a "kid," fourteen or fifteen years old, of shoplifting. When he was cornered by the juror and her coworker, the shoplifter removed a jug of wine from his pants and produced a knife, with which he threatened the juror in order to make his escape. The juror characterized this incident as "just a common shoplifting thing" that had no bearing on her deliberations in appellant's trial. She stated unequivocally that she had not been scared by the incident. Most revealing was this exchange between the trial court and the juror at the hearing:

> "Q: All right. And my question, then, is: Did that situation in any way influence your verdict in the De Luna case?
> A: No, sir.
> Q: And are you sure of that in your own mind?
> A: Yes, sir."

FN2. That this contention of appellant's must not be read literally is obvious. If the juror had been the victim of the "exact same" type of crime as the capital murder with which appellant was charged she would not have been available to testify at the motion for new trial hearing.

Appellant now contends his motion for new trial should have been granted because the juror was disabled from serving under Article 36.29, V.A.C.C.P., which provides in part:

> "... when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict ..."

Appellant relies on *Griffin v. State,* 486 S.W.2d 948, 951 (Tex.Cr.App.1972), which defines "disabled" in this context as "any condition that inhibits the juror from fully and fairly performing the functions of a juror." Appellant contends the juror was disabled under this definition because her experience during trial must have prejudiced her against appellant, who was accused of a similar offense.

[10] In *Carrillo v. State,* 597 S.W.2d 769, 771 (Tex.Cr.App.1980), this Court held that disability of a juror in this context refers only to physical, mental, or emotion impairments, *not* to bias or prejudice. Appellant contends the juror in this case must have been so "mentally impaired" by the bias or prejudice produced by her victimization that she was disabled from serving, citing *Bass v. State,* 622 S.W.2d 101 (Tex.Cr.App.1981). In *Bass* after the jury had been selected but before the attempted capital murder trial began one of the jurors was threatened by a man who entered her bedroom with a knife. This Court reiterated, however, that any bias or prejudice produced by such a situation does not render the juror disabled under Article 36.29, supra. *Id.,* at 106. The mental impairment referred to in *Bass* was that the juror herself testified that she had been so shaken by her experience that she could not concentrate on the case in which she was sitting as a juror. In the instant case, to the contrary, the juror testified that she had not been frightened by the "common shoplifting" incident in her store and that that offense had not colored her decisions at trial. In light of this testimony the trial court did not abuse its discretion in overruling the motion for new trial.

Finding no reversible error, we affirm the judgment of the trial court.

TEAGUE, Judge, concurring.

I am compelled to write because of the way the majority opinion disposes of the appellant's seventh ground of error. The majority opinion states the following: "In his seventh ground of error appellant contends the trial court erred in refusing to give a charge on circumstantial evidence. The jury was, however, properly instructed on the presumption on innocence, that the burden of proof was on the State, and on the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. ***50** *In such a case* a charge on circumstantial evidence is no longer required. *Hankins v. State,* 646 S.W.2d 191, 199 (Tex.Cr.App.1983) (Opinion on State's motion for rehearing. Ground of error number seven is overruled." (My emphasis.)

The way I interpret what the majority opinion states is that whether an instruction on circumstantial evidence must be given hinges or is conditioned on whether the jury was instructed on presumption of innocence, on the burden of proof, and instructed that if there was a reasonable doubt the jury should acquit the defendant. If they were, the defendant does not get such an instruction. If they were not, the defendant does get such an instruction.

The majority opinion thus implies that in some cases, as a matter of law, a defendant will be entitled to receive an instruction on circumstantial evidence. It cites *Hankins v. State,* supra, as its authority for this proposition. *Hankins,* supra, however, did not so expressly limit itself.

In fact, but as I and others, including Judge Clinton, the author of the majority opinion in this cause, correctly pointed out in the concurring and dissenting opinions that were filed in *Hankins,* supra , the then aggressive and assertive majority of this Court held that no longer, as a matter of law, would an accused person ever be entitled to an instruction on circumstantial evidence. I stated the following in the dissenting opinion that I filed in *Hankins,* supra: "In any event, the mighty circumstantial evidence charge in our law is now consigned by the majority opinion to its death and burial in the refuse heap of Texas law, preceded in death only recently by the doctrine of carving. See *Ex parte McWilliams,* 634 S.W.2d 815 (Tex.Cr.App.1982)." (221).

In summary, until *Hankins v. State,* supra, is expressly overruled by this Court, or the Legislature of this State so provides, an accused person in Texas will not ever be entitled, *as a matter of law,* to receive an instruction on circumstantial evidence.

711 S.W.2d 44

END OF DOCUMENT

NO. 83-CR-194A

EX PARTE

CARLOS DELUNA

IN THE DISTRICT COURT

28TH JUDICIAL DISTRICT

NUECES COUNTY, TEXAS

ORDER

The Court finds that Petitioner's Writ of Habeas Corpus does not present any controverted or previously unresolved facts material to the legality of the applicant's confinement.

The Clerk is therefore ORDERED to immediately transmit to the Court of Criminal Appeals in Austin, Texas, a copy of Petitioner's Application, the State's Answer, and a copy of this Order.

Signed on this 9th day of October, 1986.

Walt Durham, Jr.
JUDGE PRESIDING

I, the Clerk of the 28th District Court of Nueces County, Texas do hereby certify that the above Order was entered on the 9th day of October, 1986.

GIVEN UNDER MY HAND AND SEAL OF OFFICE.

By: Nettie M. Wagner
DEPUTY DISTRICT CLERK
NUECES COUNTY, TEXAS

O R D E R

On this the 9th day of October, 1986, came on to be heard the Defendant'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 Application can be made~~) (DENIED, to which action the defendant/petitioner excepts).

Signed this 9th day of October, 1986.

Walter Dunham, Jr.

JUDGE PRESIDING,
28TH JUDICIAL DISTRICT COURT
NUECES COUNTY, TEXAS

NO. 16,436-01

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EX PARTE CARLOS DeLUNA -- MOTION FOR STAY OF EXECUTION AND APPLICATION FOR POST CONVICTION WRIT OF HABEAS CORPUS PURSUANT TO ARTICLE 11.07, V.A.C.C.P.

From NUECES County

ORDER ON PETITIONER'S MOTION FOR STAY OF EXECUTION AND APPLICATION FOR WRIT OF HABEAS CORPUS

On this day came to be considered by the Court of Criminal Appeals the Motion for Stay of Execution presented by the applicant, Carlos DeLuna, in which he requests this Court to stay his execution which has been scheduled to be carried out before sunrise on October 15, 1986; and also came on to be considered by the Court of Criminal Appeals the application for post conviction writ of habeas corpus which was filed by applicant in the 28th Judicial District Court of Nueces County pursuant to Article 11.07, V.A.C.C.P., and a copy of which application for writ of habeas corpus was presented to this Court along with the application for stay of execution.

The Honorable Walter Dunham Jr., Judge of the said 28th Judicial District Court, entered an order on October 9, 1986, on the application for writ of habeas corpus filed in the trial court finding no controverted, previously unresolved facts material to this cause, and recommending that all relief be denied.

This Court is of the opinion that said motion for stay of execution should be denied and that all relief requested in said application for writ of habeas corpus, which is returnable to this Court under Article 11.07, V.A.C.C.P., should be denied.

FILMED

Therefore, it is the order of the Court of Criminal Appeals that said motion for stay of execution be, and it is hereby, in all things denied; and that all relief requested in said application for writ of habeas corpus be, and it is hereby, in all things denied.

IT IS SO ORDERED this 13th day of October 1986.

Per Curiam

Oct 13/1986

NO. 16,436-01

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EX PARTE CARLOS DeLUNA -- MOTION FOR STAY OF EXECUTION AND APPLICATION FOR POST CONVICTION WRIT OF HABEAS CORPUS PURSUANT TO ARTICLE 11.07, V.A.C.C.P.

From NUECES County

ORDER ON PETITIONER'S MOTION FOR STAY OF EXECUTION AND APPLICATION FOR WRIT OF HABEAS CORPUS

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The Honorable Walter Dunham Jr., Judge of the said 28th Judicial District Court, entered an order on October 9, 1986, on the application for writ of habeas corpus filed in the trial court finding no controverted, previously unresolved facts material to this cause, and recommending that all relief be denied.

This Court is of the opinion that said motion for stay of execution should be denied and that all relief requested in said application for writ of habeas corpus, which is returnable to this Court under Article 11.07, V.A.C.C.P., should be denied.

Therefore, it is the order of the Court of Criminal Appeals that said motion for stay of execution be, and it is hereby, in all things denied; and that all relief requested in said application for writ of habeas corpus be, and it is hereby, in all things denied.

IT IS SO ORDERED this 13th day of October 1986.

Per Curiam

CLERK, U.S. DISTRICT COU
SOUTHERN DISTRICT OF TEX
FILED
4:50 P.M.
JUN 13 1988
JESSE E. CLARK, CLERK
BY DEPUTY: M. Bolus

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

CARLOS DeLUNA §
§
V. § C.A. NO. C-86-234
§
O. L. McCOTTER, DIRECTOR, §
TEXAS DEPT. OF CORRECTIONS §

JUDGMENT DISMISSING WRIT OF HABEAS CORPUS

A final judgment is rendered in favor of Respondent, denying Petitioner the relief sought by his application for writ of habeas corpus. The stay of execution is lifted.

ORDERED this 13 day of June, 1988.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

Jun 13 1988

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

CARLOS DeLUNA	§	
	§	
V.	§	C.A. NO. C-86-234
	§	
O. L. McCOTTER, DIRECTOR, TEXAS DEPT. OF CORRECTIONS	§	

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS; ORDER VACATING STAY OF EXECUTION

This Court has reviewed the state court records, as well as the pleadings of both parties. The facts of this case were accurately summarized by the Texas Court of Criminal Appeals as follows:

> The evidence showed that during a robbery in Corpus Christi appellant fatally stabbed the clerk of a gas station. He was seen and identified by witnesses before, during, and after the offense. Police conducted a search of the neighborhood into which the robber had reportedly fled and two officers found appellant hiding under a truck parked at a curb.

DeLuna v. State, 711 S.W.2d 44, 45 (Tex. Crim. App. 1986).

The Petitioner's first argument is that the State of Texas applies the death penalty statute in a racially discriminatory manner, and thus his death sentence is invalid. The Petitioner is an Hispanic and the victim, according to the autopsy report, was white. The Petitioner bases his claim of discrimination on statistics which indicate that a capital murder defendant is more likely to receive the death penalty if the victim is white than if the

victim is black or Hispanic. Assuming the accuracy of the statistics and of the autopsy report, Petitioner has nonetheless failed to present a claim which entitles him to relief. Petitioner has not alleged facts specific to his own case that would support an inference that racial considerations played a part in his sentence. See McLeskey v. Kemp, 107 S.Ct. 1756 (1987). Nor may this Court infer purposeful discrimination in Petitioner's case from statistical data. Id.

Petitioner's other allegations all raise ineffective assistance of counsel at various stages of his state trial. These allegations, (A) - (G), D.E. #17, pp. 8-13, must meet the two-prong standard set forth in Strickland v. Washington, 104 S.Ct. 2052, 2064-2066 (1984). Petitioner must show that his defense was prejudiced by his counsel's deficient performance.

DeLuna presents seven allegations of ineffective assistance at trial and seeks a "reasonable amount of time" to review the record to see if allegations of ineffective assistance on appeal can be made. DeLuna's seven allegations are as follows:

(A) and (F). Although Petitioner was arrested in February 1983, his two counsel did not visit him until May 1983 and June 1983. A total of five additional visits were made by counsel between June and the July trial date. Petitioner contends this "lack of contact" was critical to

his defense because his mother, whose testimony would have shown Petitioner was not the assailant but that Petitioner was on the telephone watching the assault, died before trial and counsel failed to preserve her testimony.

Contentions (A) and (F) have no merit. The pretrial hearing transcript of June 20, 1983 (TR. Vol. III, pp. 2-6), shows that Petitioner's attorneys were aware of Mrs. Avalos' potential testimony and of her illness and that her doctor, when contacted on June 20, told the attorneys' investigator that Mrs. Avalos was on the road to recovery and would be able to testify in five days but that he preferred a three-week wait. It was not unreasonable under these circumstances to fail to preserve her testimony.

Even if Mrs. Avalos had testified in person, or by deposition or other means, as Petitioner contends (a matter of speculation), her testimony would have contradicted Petitioner's own testimony at trial. Petitioner testified that a phone call to his stepfather and his mother was made around 8 p.m. from the Circle K Store at Kostoryz and McArdle Streets (TR. Vol. XI, p. 417) and that he then went with Carlos Hernandez (the supposed true assailant) to the house of an acquaintance who was not home (Id., p. 418) and that Hernandez and Petitioner then went to a bar, Wolfey's, for some beer but that Petitioner waited ten minutes inside Wolfey's for Hernandez, who had gone to the Shamrock station. When Hernandez did not return, Petitioner went outside, saw

Hernandez struggling with a woman in the Shamrock station, and ran because he heard police sirens and didn't want to be implicated. Petitioner mentioned no other phone call. (Id., pp. 418-421). Petitioner cannot argue that the decision not to use his mother's testimony was unreasonable and he can show no prejudice from the lack of her testimony. Petitioner has alleged no other prejudice which would have been avoided by additional jail visits.

(B) and (E). Petitioner contends that his attorneys failed to call witnesses to testify at the punishment stage or to investigate Petitioner's history of substance abuse for possible use at the punishment stage, for mitigation purposes. Petitioner contends each of nine named witnesses "had information concerning Petitioner's prior substance abuse and borderline intellectual capacity," and that three of these witnesses "also had information concerning Petitioner's contact with his mother on the night of the offense and the proceedings that took place after that." No affidavits were presented stating what any of these witnesses would have testified to. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). "Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (citations omitted).

Petitioner's attorneys' decision to rely solely on jury argument in the punishment phase of the trial was not unreasonable, given the facts of the case, viewed as of the time of the trial. Strickland v. Washington, 104 S.Ct. at 2066. As Respondent points out, revelation of a history of substance abuse (for which there is no evidence but only the Petitioner's assertions) could as easily have swayed the jury in favor of the death sentence as in favor of life imprisonment, there being no evidence of substance abuse having anything to do with Petitioner's behavior on the night of the murder. The jury had already heard from eye witnesses who identified Petitioner as the killer of Wanda Lopez, they had heard the Petitioner lie on the stand (TR. Vol. XI, pp. 416 and 451), and they had been told of Petitioner's bad reputation in the community and of his attack on and attempted rape of a friend's mother (TR. Vol. XII). It is doubtful that the jury would have favorably considered any evidence of substance abuse. The Court notes there was no indication that substance abuse played any role in the attempted rape, nor does Petitioner make any specific claims regarding the effects of substance abuse on his reputation or his behavior. It appears likely that Petitioner's counsel did not want to open the door for additional unfavorable evidence the prosecutor might have presented. Knighton v. Maggio, 740 F.2d 1344, 1346 (5th Cir. 1984).

Petitioner's assertion of borderline intelligence falls under the same guidelines. The only evidence is the

Petitioner's assertion. The Petitioner was examined by at least one psychiatrist prior to trial and was apparently found competent to stand trial. (TR. Vol. II, p. 18). (The psychiatrist's report was not included in the records filed with this Court.) As in Knighton v. Maggio, counsel for Petitioner made the strategic decision to plead for Petitioner's life instead of putting on witnesses.

(C). Petitioner contends his attorneys failed to thoroughly investigate Petitioner's alternative assailant/ Carlos Hernandez claim. Petitioner also contends his attorneys should have sought a new trial when a Carlos Hernandez was arrested in July 1983, on another charge.

Effective counsel has a duty to conduct a reasonable amount of pretrial investigation. Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985). What is "reasonable" must be assessed under all the circumstances, applying a heavy measure of deference to counsel's judgment. Id. In the present case, Petitioner testified that his attorneys obtained mug shots of persons named Carlos Hernandez to show to Petitioner, but Petitioner was unable to identify any of the photographs (TR. Vol. XI, p. 433). Furthermore, the police compared fingerprints found at the crime scene with the fingerprints of persons named Carlos Hernandez in their files but were unable to obtain a match (TR. Vol. XI, p. 458). The record reflects that Petitioner's attorneys made an effort to locate Carlos Hernandez.

Petitioner has not alleged any additional specific information which he gave to his attorneys at the pretrial stage which would have aided them in finding Carlos Hernandez. Petitioner has not alleged any specific acts which his attorneys failed to do. One claiming ineffective assistance of counsel must identify specific omissions by his attorneys, general statements and conclusionary charges will not suffice. Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984).

Petitioner does allege that a man named Carlos Hernandez was arrested for an unrelated murder after the conclusion of Petitioner's trial, and that Petitioner brought this fact to the attention of his attorneys. Petitioner claims that his attorneys made no investigation of the arrested suspect to determine if there could be grounds for a new trial. Even if this Court assumes that Petitioner's attorneys reasonably should have followed up on the Carlos Hernandez arrest, Petitioner can show no prejudice as a result of their failure to do so. In order to show prejudice, Petitioner must at least suggest what exculpatory evidence the additional investigation would have uncovered. United States v. Lewis, 786 F.2d 1278 (5th Cir. 1986). It is not reasonable to believe that the location of Petitioner's "Carlos Hernandez" would undermine the confidence in the outcome of the trial. Petitioner's testimony would obviously carry little weight. Two eyewitnesses identified Petitioner as the murderer, one of which had a face-to-face encounter

with Petitioner only moments after the crime. Two more witnesses saw Petitioner fleeing from the scene moments after the murder, and Police found Petitioner a short time later hiding under a car in the neighborhood behind the gas station. In view of the cumulative eyewitness testimony and other circumstantial evidence, it is not reasonable to believe that the location of "Carlos Hernandez" would have affected the outcome of the trial. Given the fact that Petitioner lied about his other alibi witness, Mary Ann Perales, there is substantial doubt that Carlos Hernandez even existed.

(D). Wanda Lopez was on the telephone talking to a police dispatcher when Petitioner attacked her. The struggle was recorded. Petitioner contends his attorneys should have used available technology to determine whether a voice on the police dispatch cassette tape was his or someone else's. For the reasons stated in (C), voice identification analysis would probably have had little effect in the face of the eyewitness testimony implicating the Petitioner. Furthermore, it is not clear to the Court which words on the cassette tape Petitioner would have analyzed. Based on the transcript of the portion of the cassette tape played to the jury (TR. Vol. XI, pp. 381-85), there were no words spoken by the assailant. It is also reasonable to assume that Petitioner's attorneys would not want to call much attention to the cassette tape, given the probable emotional effect on the jury.

(G). Petitioner's final claim is that his counsel advised him not to cooperate with the court-appointed psychiatrist and that as a result there was no "true diagnosis showing a lengthy history of substance abuse and organicity that would have produced evidence in mitigation of punishment." For the reasons stated in (D) and (E) above, the prejudice claimed by Petitioner is speculative. Respondent correctly points out that the advice of Petitioner's counsel was sound since statements made to a psychiatrist could in fact have been used against Petitioner, Estelle v. Smith, 101 S.Ct. 1866 (1981), and that the advice may have been strategic as well, to prevent adverse testimony by the psychiatrist at the punishment phase.

Petitioner's reply to Respondent's motion for summary judgment furnishes no evidentiary basis to justify a hearing. Significant time has been allowed for Petitioner to substantiate his claims and no substantiation has been forthcoming. Additionally, Petitioner has not developed beyond conclusion his allegations of ineffective counsel on appeal.

Under the foregoing circumstances, no hearing is merited. Petitioner's writ of habeas corpus is denied and the agreed stay of execution is lifted.

ORDERED this 13 day of June, 1988.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

873 F.2d 757
(Cite as: 873 F.2d 757)

H

United States Court of Appeals,
Fifth Circuit.

Carlos DeLUNA, Petitioner-Appellant,
v.
James A. LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellee.

No. 88-2613.

April 26, 1989.

Defendant convicted of capital murder of gasoline station attendant during course of committing robbery petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas at Corpus Christi, Hayden W. Head, Jr., J., denied petition. On consolidated appeal from denial of petition and from denial of motion for relief from judgment, the Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) petitioner's trial counsel was not ineffective for strategic decision to make strong statement as plea for life sentence rather than putting defendant's family and friends on the stand at punishment phase to offer mitigating testimony; (2) petitioner was not entitled to oral hearing on habeas claims; and (3) petitioner lacked standing to raise issue of whether state of Texas had constitutional obligation to appoint counsel in habeas cases.

Affirmed.

West Headnotes

[1] Criminal Law ⇐641.13(7)
110k641.13(7) Most Cited Cases

Trial counsel in capital murder prosecution was not ineffective for strategic decision to make strong statement as plea for life sentence rather than calling defendant's family members and friends at punishment phase of trial to offer mitigating testimony emphasizing defendant's youth, intelligence level, and substance abuse; jury might have reacted unfavorably to their testimony when it had full knowledge of brutal crime and defendant's prior felonious record. U.S.C.A. Const.Amends. 6, 14.

[2] Habeas Corpus ⇐746
197k746 Most Cited Cases

Habeas petitioner was not entitled to oral hearing before court with respect to his claims related to adequacy of representation by counsel at punishment stage of trial; attorneys' activities were clearly before court and petitioner did not raise the fact issue as to what occurred or propose putting on any evidence to establish that attorneys' effectiveness did not reach required norms. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 6, 14.

[3] Constitutional Law ⇐42.1(3)
92k42.1(3) Most Cited Cases

Habeas petitioner who received representation by appointed counsel through trial and direct appeal to Texas Court of Criminal Appeals and who had volunteer counsel in state and federal habeas proceedings lacked standing to raise issue of whether state of Texas was constitutionally obligated to supply counsel in habeas case. 28 U.S.C.A. § 2254.

***757** Richard Anderson, Dallas, Tex., for petitioner-appellant.

Wm. C. Zapalac, Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Texas (CA-C-86-234).

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

***758** JERRE S. WILLIAMS, Circuit Judge:

Appellant, Carlos DeLuna, was convicted of capital murder of a gasoline station clerk during the course of committing a robbery. In a separate punishment proceeding he was sentenced to death. He was convicted in July 1983, and his conviction and sentence were affirmed on direct appeal in the state court. *DeLuna v. State,* 711 S.W.2d 44 (Tx.Crim.App.1986). Execution date was set for October 15, 1986. The Supreme Court of the United States denied leave to file an out-of-time petition for writ of certiorari on October 10, 1986. Appellant then filed an application for writ of habeas corpus and a stay of execution in the Texas trial and appellate courts. The Court of Criminal Appeals denied all requested relief October 13, 1986. A petition for writ of habeas corpus, 28 U.S.C. § 2254, and a motion for stay of execution were filed in the United States District Court, and the district court granted a stay.

After various pleadings and delays at the request of appellant's counsel, the district court issued an order denying habeas corpus relief on June 13, 1988, and cancelling the stay of execution. The district court later denied a motion for relief from judgment under Fed.R.Civ.P. 60(b) on July 19, 1988. Appellant has appealed both from the denial of the habeas corpus petition and the denial of the motion for relief from judgment.

The Attorney General of Texas informed this Court that it would not ask that a new execution date be set until after the appeals were heard in this Court. The State filed a motion for an expedited appeal; it was denied. Briefing was completed around the first of this year. The Court has taken the time since then to give this capital case thorough serious consideration.

The claims asserted on appeal all revolve around the issue of the adequacy of representation by counsel at the punishment stage of the trial as it arises under the Sixth and Fourteenth Amendments of the United States Constitution. We make our own enumeration of those issues to accomplish a clearer focus upon the precise claims advanced on behalf of appellant:

1. Appointed counsel representing appellant at trial were inadequate in presenting evidence in mitigation at the punishment phase of the trial.
2. Appellant was constitutionally entitled to an oral hearing before the court on his petition for habeas corpus.
3. Effective assistance of counsel was denied because the State of Texas has no procedure for supplying counsel in habeas corpus cases involving the death penalty.

Adequate representation by counsel.

[1] The core of this allegation is that appellant's counsel did not put on the witness stand relatives and friends who would have "begged for his life" and who would have testified that he was kind and loving to his family members. In addition, he asserts that such mitigating testimony should have included emphasis upon his "youth", his "low level of intelligence", and his "substance abuse".

The decision not to claim his youth, intelligence level, and substance abuse was the kind of decision properly left to counsel. His age was the full adult age of 21 at the time he committed the offense. This age is in the background of evidence showing that at the age of 18 he had been convicted of unauthorized use of a motor vehicle and attempted rape, and sentenced to three years in prison. The day after he was released on parole he attempted to rape the mother of a friend. For this offense his parole was revoked. He had been released from penitentiary only six weeks before the current offense was committed.

The allegation of a low level of intelligence is not supported by any evidence of any kind. The only evidence available as to his intellectual level was a showing by the State that he had been examined by a psychiatrist and found competent, and that he had successfully taken high school academic courses while he was in prison. The claim of "substance abuse" is not supported by any proffered evidence.

***759** An attempt to emphasize any of these three alleged claims might well have resulted in backfire, destroying any attempt to try to convince the jury that a life sentence was appropriate. There remains only the issue, therefore, as to whether failure to put family and friends on the stand establishes inadequate representation by counsel.

In *Strickland v. Washington* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court held that "[t]he bench mark for judging any claim of ineffectiveness must be

whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The Supreme Court established a two-prong test for determining the effectiveness of counsel's performance:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. at 2064.

In determining the deficiency of counsel's conduct, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness as informed by prevailing professional standards. 466 U.S. at 688, 104 S.Ct. at 2065. This assessment of attorney performance requires that conduct be evaluated from counsel's perspective at the time of occurrence. "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689, 104 S.Ct. at 2065. Because of the difficulties of such an evaluation, the Supreme Court has directed us to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (citations omitted); *see also Knighton v. Maggio,* 740 F.2d 1344, 1350 (5th Cir.1984), *cert. denied,* 469 U.S. 924, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984).

Then, second, as is stated in the extensive quotation from *Strickland* above, mere error by counsel, however, even if professionally unreasonable, does not justify setting aside the judgment of a criminal proceeding if the error had no adverse impact on the defense. Thus, to assert successfully a claim of ineffectiveness, the defendant must also affirmatively prove prejudice.

The district court concluded that the decision of trial counsel simply to make a strong statement as a plea for a life sentence was an acceptable trial strategy. We agree that this was a reasonable decision of defense counsel because in a case such as this witnesses claiming considerations of dubious merit may well cause the jury to react unfavorably when it has full knowledge of the brutal crime and the criminal's prior felonious record. Under these circumstances, we cannot conclude that the district court was in error in finding that the attorneys representing appellant acted at least at the level of reasonable professional standards. Placing such witnesses on the stand opened the opportunity for cross-examination which could have resulted in a further dramatization of the heinous crime and the prior criminal record.

Since we have concluded that there is no showing that appellant's counsel at the punishment stage of the trial fell below accepted standards of competence and conduct, it is unnecessary to inquire into the second objective issue as to whether any prejudice was shown. We simply state ***760** that the district court in its memorandum order also found no showing of prejudice.

The conclusion that trial counsel met acceptable professional standards also constitutes a determination that the district court was not in error in denying DeLuna's motion for relief from the order pursuant to Fed.R.Civ.P. 60(b). That motion was filed together with an amended petition for writ of habeas corpus which undertook to name the names of family members and friends who would testify and to supply affidavits from them as to appellant's personal conduct with them. This claim was made, but without details and affidavits, in the first habeas corpus application which was before the court. We find no abuse of discretion in the failure to grant the Rule 60(b) motion and the proffer of the amended habeas corpus petition which actually added no new contention. The separate appeal from this denial of the motion must result in affirmance of the decision of the district court.

Right to an Oral Hearing.

[2] A second issue raised by appellant is the failure to grant an oral hearing with respect to his habeas corpus petition. As the discussion of the evidence set out above reveals, there was nothing to hear. The activities of the attorneys at the punishment phase of the trial were clearly before the court, and appellant did not raise a fact issue as to what occurred. Appellant did not propose putting on any evidence to establish that the attorneys' effectiveness did not reach required norms. The appellant stood on the factual record of what happened, and the district court considered it fully. Since no dispute as to the facts was raised, appellant did not meet the required burden of undertaking to prove facts which would entitle him to relief. *Willie v. Maggio,* 737 F.2d 1372 (5th Cir.1984).

The entire matter of the right to a hearing, even in a capital case, was recently presented in this Court's opinion in *Byrne v. Butler,* 845 F.2d 501, 512 (5th Cir.1988), *cert. denied,* 487 U.S. 1242, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988). In that opinion we concluded:

> [I]f the record is clearly adequate to fairly dispose of the claims of inadequate representation, further inquiry is unnecessary, *Baldwin v. Maggio,* 704 F.2d 1325, 1339 (5th Cir.1983), *cert. denied,* 467 U.S. 1220, 104 S.Ct. 2669, 81 L.Ed.2d 374 (1984); *see also Joseph v. Butler,* 838 F.2d 786, 788 (5th Cir.1988).

Just as in the case before us, the Court considered the record in *Byrne v. Butler* and concluded "... that Byrne's claims may be resolved without recourse to an evidentiary hearing." *Id.*

Constitutional Obligation to Supply Counsel.

[3] Finally, appellant claims a violation of the Constitution because the State of Texas has not set up specific procedures for the supplying of counsel once the direct appeal of a conviction to the Court of Criminal Appeals has been decided. This contention was not made to the state courts and thus there has been no exhaustion of state remedies. In addition, this claim was not presented to the district court and is not properly before us for consideration. *Profitt v. Waldron,* 831 F.2d 1245, 1250 (5th Cir.1987). We have held, however, that where a question has not been earlier raised and is a question solely of law we may consider it because of the possibility that it may "be resurrected in a new petition,...." *Long v. McCotter,* 792 F.2d 1338, 1345 (5th Cir.1986). We simply state, therefore, that the law is clearly established that there is no constitutional right to appointed counsel in collateral proceedings such as a habeas corpus petition. *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987). Appellant received representation by appointed counsel through his trial and his direct appeal to the Texas Court of Criminal Appeals. He has had volunteer counsel in his state and federal habeas corpus petitions. Certainly no prejudice has been shown in his case. He has no standing, therefore, to raise the issue. His assertion is no more than a general policy claim that guaranteed legal assistance should be supplied in habeas corpus proceedings. Such is not the law.

***761** We deny both the appeal from the denial of the petition for habeas corpus under 28 U.S.C. § 2254 and from the denial of the motion for relief from judgment under Fed.R.Civ.P. 60(b).

CONSOLIDATED APPEALS AFFIRMED.

873 F.2d 757

END OF DOCUMENT

Westlaw Attached Printing Summary Report for LIEBMAN, JAMES S 549194

Date/Time of Request:	Friday, July 02, 2004 15:20:00 Central
Client Identifier:	JAMES LIEBMAN
Database:	CTA
Citation Text:	890 F.2d 720
Lines:	383
Documents:	1
Images:	0

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-2613

CARLOS DELUNA

Petitioner-Appellant

versus

JAMES A. LYNAUGH, Director
Texas Department of Corrections,

Respondent-Appellee.

Appeals from the United States District Court for the Southern District of Texas

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Before POLITZ, WILLIAMS and JONES, Circuit Judges.

B Y T H E C O U R T *

IT IS ORDERED that the motion of appellant to recall the mandate and stay the setting of an execution date pending the filing and disposition of a petition for writ of certiorari is DENIED.

*Decided by a quorum, 23 U.S.C. 546(d).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 10, 1989

Mr. William C. Zapalac
Asst. Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Re: Carlos DeLuna,
v. James A. Lynaugh, Director, Texas Department of Corrections
No. 89-5442

Dear Mr. Zapalac:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice Brennan and Justice Marshall dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Very truly yours,

Joseph F. Spaniol, Jr.

Joseph F. Spaniol, Jr., Clerk

FILED
OCT 27 1989
OSCAR SOLIZ, CLERK

NO. 83-CR-194-A

EX PARTE

CARLOS DeLUNA,

Applicant

IN THE 28TH DISTRICT COURT

OF

NUECES COUNTY, TEXAS

FINDINGS OF FACT AND ORDER

Having considered the Applicant's writ, the Respondent's Original Answer, and the official court records, the trial court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Applicant, Carlos DeLuna, was charged by indictment in Cause No. 83-CR-194-A for the felony offense of capital murder.

2. Applicant was convicted by a jury in Cause No. 83-CR-194-A for the offense of capital murder and, after the jury affirmatively answered the special issues, the trial court assessed punishment at death by lethal injection.

3. Applicant's conviction and sentence were affirmed on direct appeal by the Court of Criminal appeals in an opinion delivered on June 4, 1986. DeLuna v. State, 711 S.W.2d 44 (Tex.Crim.App. 1986).

4. At trial, Applicant filed three written objections to the court's punishment charge, two objecting to the failure to include definitions of the terms "deliberately" and "probability" on the ground that they do not have commonly understood meanings, and the third objecting to the

failure to instruct the jury to consider mitigating evidence (Tr. 66).

5. Hector DePena, Jr. was appointed to represent Applicant on February 17, 1983 (Tr. 3), and James Lawrence was appointed as co-counsel on April 15, 1983 (Tr. 17).

6. Applicant was examined on May 19, 1983, by Dr. Joel Kutnick, M.D., who concluded that Applicant was malingering during the evaluation to conceal his true mental abilities. Dr. Kutnick also concluded that Applicant was legally competent to stand trial at the time (Appendix C to Application for Writ of Habeas Corpus).

7. On June 15, 1983, Dr. James R. Plaisted, Ph.D., conducted a psychological evaluation of Applicant, and concluded that Applicant was malingering and attempting to appear to be suffering from a psychotic process. Dr. Plaisted determined that Applicant's intellectual capacity was at least borderline and was probably grossly understated by the testing due to Applicant's lack of cooperation. He found no evidence of neurotic or psychotic processes (Appendix B to Application for Writ of Habeas Corpus).

8. No evidence was presented at trial concerning Applicant's alleged history of drug and alcohol abuse, troubled youth, or limited mental capacity.

9. In a previous collateral attack on his conviction, Applicant alleged that counsel were ineffective for failing, inter alia, to investigate and introduce the mitigating evidence referred to in No. 11, supra, and relief was

denied. See Ex parte DeLuna, No. 16,436-01 (Tex.Crim.App. October 13, 1986). A similar claim was also rejected in federal habeas corpus. DeLuna v. Lynaugh, 873 F.2d 757 (5th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 259 (1989). He does not make any allegation of ineffective assistance of counsel in the instant application.

10. At the hearing on this motion for new trial, Applicant requested that his attorneys be dismissed and that he be allowed to represent himself at the hearing and on appeal (R. XIV:2).

11. The court advised Applicant of the dangers of representing himself on appeal and inquired into his age, education, backgrounds, and understanding of the appellate process. It also informed Applicant that he would be expected to conform to the rules that governed attorneys (R. XIV:38-43). After this discussion, the court determined that Applicant was simply dissatisfied with one of his attorneys, Hector DePena, but was fully satisfied with the representation of his other lawyer, James Lawrence, and that Applicant had little, if any, understanding of the dangers and disadvantages of representing himself.

12. Applicant fully agreed to accept the appointment of James Lawrence to represent him on appeal, with the understanding that he could prepare and file a brief of his own if he was not satisfied with counsel's (R. XIV:44).

13. Applicant did not file a pro se brief on appeal.

14. No hearing is needed inasmuch as Applicant raises only legal issues that can be resolved from the record.

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in Cause No. 83-CR-194-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. Applicant's petition for post-conviction writ of habeas corpus in Cause No. 83-CR-194-A;

2. Respondent's answer to the application;

3. the instant order;

4. any Proposed Findings of Fact and Conclusions of Law submitted either by Applicant or Respondent;

5. the indictment, judgment, sentence, and docket sheet in Cause No. 83-CR-194-A.

THE CLERK IS FURTHER ORDERED to send a copy of this order to the attorney for Respondent, to Applicant, and to Applicant's attorney: Mr. R. K. Weaver, 404 Expressway Tower -- LB 35, 6115 N. Central Expressway, Dallas, Texas 75206.

Signed this 22 day of November, 1989.

ERIC G. BROWN
28TH DISTRICT COURT
NUECES COUNTY, TEXAS

STATE OF TEXAS
COUNTY OF NUECES

I, OSCAR SOLIZ, DISTRICT CLERK OF NUECES COUNTY, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record in Vol. CM15, Page _____ Criminal Minutes of the 28 District Court on file in my office.
Witness my official hand and seal of office,
this 11.22.89

OSCAR SOLIZ, DISTRICT CLERK
Nueces County, Texas

1/22/89

NO. 83-CR-194-A

EX PARTE

CARLOS DeLUNA,

Applicant

IN THE 28TH DISTRICT COURT

OF

NUECES COUNTY, TEXAS

FINDINGS OF FACT AND ORDER

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2. Applicant was convicted by a jury in Cause No. 83-CR-194-A for the offense of capital murder and, after the jury affirmatively answered the special issues, the trial court assessed punishment at death by lethal injection.

3. Applicant's conviction and sentence were affirmed on direct appeal by the Court of Criminal appeals in an opinion delivered on June 4, 1986. DeLuna v. State, 711 S.W.2d 44 (Tex.Crim.App. 1986).

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8. No evidence was presented at trial concerning Applicant's alleged history of drug and alcohol abuse, troubled youth, or limited mental capacity.

9. In a previous collateral attack on his conviction, Applicant alleged that counsel were ineffective for failing, inter alia, to investigate and introduce the mitigating evidence referred to in No. 11, supra, and relief was

denied. See Ex parte DeLuna, No. 16,436-01 (Tex.Crim.App. October 13, 1986). A similar claim was also rejected in federal habeas corpus. DeLuna v. Lynaugh, 873 F.2d 757 (5th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 259 (1989). He does not make any allegation of ineffective assistance of counsel in the instant application.

10. At the hearing on this motion for new trial, Applicant requested that his attorneys be dismissed and that he be allowed to represent himself at the hearing and on appeal (R. XIV:2).

11. The court advised Applicant of the dangers of representing himself on appeal and inquired into his age, education, backgrounds, and understanding of the appellate process. It also informed Applicant that he would be expected to conform to the rules that governed attorneys (R. XIV:38-43). After this discussion, the court determined that Applicant was simply dissatisfied with one of his attorneys, Hector DePena, but was fully satisfied with the representation of his other lawyer, James Lawrence, and that Applicant had little, if any, understanding of the dangers and disadvantages of representing himself.

12. Applicant fully agreed to accept the appointment of James Lawrence to represent him on appeal, with the understanding that he could prepare and file a brief of his own if he was not satisfied with counsel's (R. XIV:44).

13. Applicant did not file a pro se brief on appeal.

14. No hearing is needed inasmuch as Applicant raises only legal issues that can be resolved from the record.

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in Cause No. 83-CR-194-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. Applicant's petition for post-conviction writ of habeas corpus in Cause No. 83-CR-194-A;

2. Respondent's answer to the application;

3. the instant order;

4. any Proposed Findings of Fact and Conclusions of Law submitted either by Applicant or Respondent;

5. the indictment, judgment, sentence, and docket sheet in Cause No. 83-CR-194-A.

THE CLERK IS FURTHER ORDERED to send a copy of this order to the attorney for Respondent, to Applicant, and to Applicant's attorney: Mr. R. K. Weaver, 404 Expressway Tower -- LB 35, 6115 N. Central Expressway, Dallas, Texas 75206.

Signed this 22 day of November, 1989.

STATE OF TEXAS
COUNTY OF NUECES

I, OSCAR SOLIZ, DISTRICT CLERK OF NUECES COUNTY, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record in Vol. CM15, Page _____ Criminal Minutes of the 28 District Court on file in my office.
Witness my official hand and seal of office,
this 11-22-89

OSCAR SOLIZ, DISTRICT CLERK
Nueces County, Texas

ERIC G. BROWN
28TH DISTRICT COURT
NUECES COUNTY, TEXAS

EX PARTE CARLOS DE LUNA

WRIT NO. 16,436-02

Habeas Corpus Application from NUECES County

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
Do Not Publish

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, petitioner 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 are denied on their merits, and DeLuna's challenge to denial of his rights of self-representation are 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. §

ORDER

Petitioner has moved for a certificate of probable cause, and has made notice of appeal. Having considered the motion in all respects, the Court finds that it should be granted as follows.

Petitioner is hereby granted a certificate of probable cause to appeal this Court's order of December 2, 1989, denying petitioner's application for writ of habeas corpus and denying his application for stay of execution to the United States Court of Appeals for the Fifth Circuit in New Orleans.

ORDERED this 4 day of December, 1989.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-6262

CARLOS DeLUNA,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(December 5, 1989)

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellant, Carlos DeLuna, was convicted of capital murder and sentenced to death by lethal injection. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and the sentence. *See, DeLuna v. State*, 711 S.W.2d 44 (Tex. Crim. App. 1986).

In a prior habeas corpus proceeding, this Court considered appellant's claims (1) that he received inadequate assistance of counsel at trial, (2) that he was entitled to an oral hearing before the court on his habeas

are without merit, DeLuna's requests for a stay of execution and for habeas corpus relief are denied.

APPLICATION FOR HABEAS CORPUS DENIED.

STAY OF EXECUTION DENIED.

Carlos DeLUNA, Petitioner–Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections, Respondent–Appellee.

No. 89–6262.

United States Court of Appeals, Fifth Circuit.

Dec. 5, 1989.

After defendant's capital murder conviction and death sentence was affirmed on direct appeal by the Texas Court of Criminal Appeals, 711 S.W.2d 44, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., denied petition, and the Court of Appeals, 873 F.2d 757, affirmed. After defendant's execution was rescheduled in state court, defendant petitioned for second writ of habeas corpus. The District Court denied petition, and defendant appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) defendant was not entitled to jury instruction on effect of mitigating evidence; (2) defendant was not entitled to instruction on meaning of "deliberately" as used in special issue at sentencing; and (3) claim that defendant was denied right to represent himself on appeal was properly dismissed as abuse of writ.

Relief denied.

1. Homicide ⇐311

Defendant charged with capital murder entitled to jury instruction on mitigating evidence, where defendant failed to introduce mitigating evidence at trial and to request instruction on mitigation. Vernon's Ann.Texas C.C.P. art. 37.071.

2. Homicide ⇐311, 357(4)

Evidence concerning defendant's borderline mental capacity and age at time of crime was not mitigating evidence that entitled defendant to mitigating evidence instruction in capital murder prosecution; two different examiners concluded that defendant was malingering, and defendant was 21 years old when crime was committed. Vernon's Ann.Texas C.C.P. art. 37.071.

3. Homicide ⇐311

Defendant charged with capital murder was not entitled to instruction on meaning of "deliberately" as used in special issue at sentencing, where defendant failed to produce any evidence of mental retardation which could have had any impact upon his ability to act deliberately. Vernon's Ann.Texas C.C.P. art. 37.071.

4. Habeas Corpus ⇐898(1)

Petitioner's claim that he was denied right to represent himself on appeal was properly dismissed as abuse of writ, where petitioner presented no excuse for failing to assert claim in prior habeas proceeding. 28 U.S.C.A. § 2254.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellant, Carlos DeLuna, was convicted of capital murder and sentenced to death by lethal injection. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and the sentence. *See, DeLuna v. State*, 711 S.W.2d 44 (Tex.Crim. App.1986).

In a prior habeas corpus proceeding, this Court considered appellant's claims (1) that he received inadequate assistance of counsel at trial, (2) that he was entitled to an oral hearing before the court on his habeas claim, and (3) that he was denied effective assistance of counsel on appeal. *DeLuna v. Lynaugh*, 873 F.2d 757 (5th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 259, 107 L.Ed.2d 208 (1989). The Court determined that these claims were not meritorious and upheld the district court's denial of the application for writ of habeas corpus. *Id.*

After the Supreme Court refused appellant's petition for writ of certiorari, the state trial court, on November 2, 1989, rescheduled the execution for December 7, 1989. Appellant then filed another application for writ of habeas corpus in the state court. The trial court entered findings of fact and referred the matter to the Court of Criminal Appeals. The Court of Criminal Appeals denied appellant's requested relief.

Appellant next filed this current petition as a second application for writ of habeas corpus in federal district court. The district court denied the request in a thorough and well-reasoned order. The court granted a certificate of probable cause to appeal. 28 U.S.C. § 2253.

After careful consideration, we concur in the district judge's findings and conclusions. His order is attached for further reference. In addition, we add our own supplementary conclusions by way of emphasis. Appellant asserts the following three claims as alternate grounds for his relief.

(1) The Texas death penalty statute, Tex. Code Crim.Proc.Ann. art. 37.071, as applied to appellant, denied him his constitutional rights because it did not allow for the effective presentation or consideration of mitigation evidence concerning appellant's past difficulties with drug and alcohol abuse, his personal background, his youth, or his mental condition;

(2) The Texas death penalty statute, as applied to appellant, denied him his constitutional rights because the jury was fundamentally misled as to the meaning of "deliberately" in Special Issue Number One; and

(3) Appellant was denied his constitutional right to discharge his appointed trial attorneys and represent himself on appeal.

The State of Texas responds that each of these claims should be dismissed for abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

I. Mitigation Instruction

[1] Appellant argues that under *Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), he was entitled to a jury instruction on the effect of his mitigating evidence. It is clear from the record, however, that appellant introduced no mitigating evidence at trial. In our prior habeas consideration, we concluded that it was a reasonable tactical decision of appellant and his counsel not to submit evidence in mitigation because such evidence would have opened the door to the introduction in evidence of a prior criminal record of appellant which otherwise was not before the jury. *See, DeLuna v. Lynaugh*, 873 F.2d 757, 759–60 (5th Cir.1989). Further, appellant did not request a jury instruction on mitigation. Because he failed to introduce mitigating evidence and to request an instruction on mitigation, appellant's case does not come within the requirements announced in *Penry v. Lynaugh*, 109 S.Ct. 2934.

[2] Appellant also is not within the *Penry* rule because of the kind of mitigating evidence appellant now claims he would have offered. Penry produced considerable mitigating evidence of his mental retardation and abused background. Appellant, on the other hand, suggests that, given a mitigation instruction, he would have offered evidence of "his past difficulties with drug and alcohol abuse, his personal background, his youth, and his mental condition." It is significant, however, that appellant makes no claim that he was abused as a child or that his alcohol and drug use significantly reduced his mental capacities. In addition, appellant has not shown any evidence of mental retardation. Instead, the psychological reports prepared for trial indicate that appellant registered at worst borderline mental capacity. Two different examiners concluded that appellant was malingering. As to youth, appellant was 21 when the crime was committed. We must conclude that appellant has made no showing of mitigating evidence that could even arguably bring him within the *Penry* rule.

II. "Deliberately" Instruction

[3] Appellant argues that under *Penry*, he was entitled to an instruction on the meaning of "deliberately" as "deliberately" was used in the first special issue. The Court in *Penry* ruled that it was error to fail to define "deliberately" because without such a definition, the jury could not adequately consider *Penry*'s mitigating evidence of the incapaciting effect of his mental retardation. Again, appellant has not produced at any time any evidence of mental retardation which could have had any impact upon his ability to act deliberately. We conclude therefore that this is not a case requiring protection of an accused who might be unable to act deliberately.

III. Self-representation

[4] Appellant's final claim is that he was denied the right to represent himself on appeal. The district court dismissed this claim for abuse of the writ because appellant presented no excuse for his failure to assert this claim in his earlier proceeding. The law as to such a claim was established well before the first habeas petition. Any such claim had to be made at that earlier time. We agree that this conclusion was correct.

IV. Conclusion

We have given full serious consideration to each of appellant's claims. Because we conclude that these claims are without merit, DeLuna's requests for a stay of execution and for habeas corpus relief are denied.

APPLICATION FOR HABEAS CORPUS DENIED.

STAY OF EXECUTION DENIED.

EXHIBIT A

In the United States District Court

for the Southern District of Texas

Corpus Christi Division

C.A. NO. C–89–336

Carlos DeLuna, Petitioner,

v.

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 [— L.Ed.2d ——] (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*, [— U.S. ——, 109 S.Ct. 569, 102 L.Ed.2d 593] (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.

EXHIBIT A—Continued

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*, [— U.S. —,] 109 S.Ct. 2934 [106 L.Ed.2d 256 (1989)], *cert. denied*, [— U.S. —] 109 S.Ct. 1576 [103 L.Ed.2d 942] (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.* [109 S.Ct.] 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 [45 L.Ed.2d 562] (1975); *Thomas v. State*, 605 S.W.2d 290 (Tex.Crim.App.1980); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 [83 L.Ed.2d 821] (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.

EXHIBIT A—Continued

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 [49 L.Ed.2d 929] (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, petitioner 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.

(s)H.W. Head, Jr.
Hayden W. Head, Jr.
United States District Judge

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.

(s)H.W. Head, Jr.
Hayden W. Head, Jr.
United States District Judge.

890 F.2d 720
(Cite as: 890 F.2d 720)

H

United States Court of Appeals,
Fifth Circuit.

Carlos DeLUNA, Petitioner-Appellant,
v.
James A. LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellee.

No. 89-6262.

Dec. 5, 1989.
As Corrected Jan. 12, 1990.

After defendant's capital murder conviction and death sentence was affirmed on direct appeal by the Texas Court of Criminal Appeals, 711 S.W.2d 44, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., denied petition, and the Court of Appeals, 873 F.2d 757, affirmed. After defendant's execution was rescheduled in state court, defendant petitioned for second writ of habeas corpus. The District Court denied petition, and defendant appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) defendant was not entitled to jury instruction on effect of mitigating evidence; (2) defendant was not entitled to instruction on meaning of "deliberately" as used in special issue at sentencing; and (3) claim that defendant was denied right to represent himself on appeal was properly dismissed as abuse of writ.

Relief denied.

evidence, where defendant failed to introduce mitigating evidence at trial and to request instruction on mitigation. Vernon's Ann.Texas C.C.P. art. 37.071.

[2] Sentencing and Punishment ⇐1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

[2] Sentencing and Punishment ⇐1713
350Hk1713 Most Cited Cases
(Formerly 203k357(4))

[2] Sentencing and Punishment ⇐1714
350Hk1714 Most Cited Cases
(Formerly 203k357(4))

Evidence concerning defendant's borderline mental capacity and age at time of crime was not mitigating evidence that entitled defendant to mitigating evidence instruction in capital murder prosecution; two different examiners concluded that defendant was malingering, and defendant was 21 years old when crime was committed. Vernon's Ann.Texas C.C.P. art. 37.071.

[3] Sentencing and Punishment ⇐1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

Defendant charged with capital murder was not entitled to instruction on meaning of "deliberately" as used in special issue at sentencing, where defendant failed to produce any evidence of mental retardation which could have had any impact upon his ability to act deliberately. Vernon's Ann.Texas C.C.P. art. 37.071.

[4] Habeas Corpus ⇐898(1)
197k898(1) Most Cited Cases

890 F.2d 720
(Cite as: 890 F.2d 720)

petitioner-appellant.

William C. Zapalac, Asst. Atty. Gen., Enforcement Div., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellant, Carlos DeLuna, was convicted of capital murder and sentenced to death by lethal injection. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and the sentence. *See, DeLuna v. State,* 711 S.W.2d 44 (Tex.Crim.App.1986).

In a prior habeas corpus proceeding, this Court considered appellant's claims (1) that he received inadequate assistance of counsel at trial, (2) that he was entitled to an oral hearing before the court on his habeas claim, and (3) that he was denied effective assistance of counsel on appeal. *DeLuna v. Lynaugh,* 873 F.2d 757 (5th Cir.1989), *cert. denied,* 493 U.S. 900, 110 S.Ct. 259, 107 L.Ed.2d 208 (1989). The Court determined that these claims were not meritorious and upheld the district court's denial of the application for writ of habeas corpus. *Id.*

After the Supreme Court refused appellant's petition for writ of certiorari, the state trial court, on November 2, 1989, rescheduled the execution for December 7, 1989. Appellant then filed another application for writ of habeas corpus in the state court. The trial court entered findings of fact and referred the matter to the Court of Criminal

 Appeals

After careful consideration, we concur in the district judge's findings and conclusions. His order is attached for further reference. In addition, we add our own supplementary conclusions by way of emphasis. Appellant asserts the following three claims as alternate grounds for his relief.

(1) The Texas death penalty statute, Tex.Code Crim.Proc.Ann. art. 37.071, as applied to appellant, denied him his constitutional rights because it did not allow for the effective presentation or consideration of mitigation evidence concerning appellant's past difficulties with drug and alcohol abuse, his personal background, his youth, or his mental condition;

(2) The Texas death penalty statute, as applied to appellant, denied him his constitutional rights because the jury was fundamentally misled as to the meaning of "deliberately" in Special Issue Number One; and

(3) Appellant was denied his constitutional right to discharge his appointed trial attorneys and represent himself on appeal.

The State of Texas responds that each of these claims should be dismissed for abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

I. Mitigation Instruction

[1] Appellant argues that under *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), he was entitled to a jury instruction on the effect of his mitigating evidence. It is clear from the record, however, that appellant introduced no mitigating evidence at trial. In our prior habeas consideration, we concluded that it was a reasonable tactical decision of appellant and his counsel not to submit evidence in mitigation because such evidence would have opened the door to the introduction in evidence of a prior criminal

[2] Appellant also is not within the *Penry* rule because of the kind and quantum of mitigating evidence appellant now claims he would have offered. Penry produced considerable mitigating evidence of his mental retardation and abused background. Appellant, on the other hand, suggests that, given a mitigation instruction, he would have offered evidence of "his past difficulties with drug and alcohol abuse, his personal background, his youth, and his mental condition." It is significant, however, that appellant makes no claim that he was abused as a child or that his alcohol and drug use significantly reduced his mental capacities. In addition, appellant has not shown any evidence of mental retardation. Instead, the psychological reports prepared for trial indicate that appellant registered at worst borderline mental capacity. Two different examiners concluded that appellant was malingering. As to youth, appellant was 21 when the crime was committed. We must conclude that appellant has made no showing of mitigating evidence that could even arguably bring him within the *Penry* rule.

II. "Deliberately" Instruction

[3] Appellant argues that under *Penry,* he was entitled to an instruction on the meaning of "deliberately" as "deliberately" was used in the first special issue. The Court in *Penry* ruled that it was error to fail to define "deliberately" because without such a definition, the jury could not adequately consider *Penry* 's mitigating evidence of the incapaciting effect of his mental ***723** retardation. Again, appellant has not produced at any time any evidence of mental retardation which could have had any impact upon his ability to act deliberately. We conclude therefore that this is not a case requiring protection of an accused who might be unable to act deliberately.

III. Self-representation

IV. Conclusion

We have given full serious consideration to each of appellant's claims. Because we conclude that these claims are without merit, DeLuna's requests for a stay of execution and for habeas corpus relief are denied.

APPLICATION FOR HABEAS CORPUS DENIED.

STAY OF EXECUTION DENIED.

APPENDIX

In the United States District Court
for the Southern District of Texas
Corpus Christi Division
C.A. NO. C-89-336
Carlos DeLuna, Petitioner,
v.
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 [illegible] afterwards. The jury found DeLuna guilty of

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 ***724** 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,* 493 U.S. 900, 110 S.Ct. 259 [107 L.Ed.2d 208] (1989).

On November 2, 1989, the trial court scheduled DeLuna's execution to be carried out before sunrise on November 16, 1989. DeLuna filed a motion for stay of execution and application for writ of habeas corpus in the state convicting court. On November 15, 1989, the Court of Criminal Appeals denied all requested relief. *Ex parte DeLuna,* 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,* [--- U.S. ----, 109 S.Ct. 569, 102 L.Ed.2d 593] (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

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 ***725** 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,* [492 U.S. 302,] 109 S.Ct. 2934 [106 L.Ed.2d 256 (1989)], *cert. denied,* [--- U.S. ----] 109 S.Ct. 1576 [103 L.Ed.2d 942] (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.* [109 S.Ct.] 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 95 S.Ct. 2525 [45 L.Ed.2d 562] (1975); *Thomas v. State,* 605 S.W.2d 290 (Tex.Crim.App.1980); *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830 [83 L.Ed.2d 821] (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

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, petitioner 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.

(s) H.W. Head, Jr.

Hayden W. Head, Jr.

(s) H.W. Head, Jr.

Hayden W. Head, Jr.

United States District Judge.

890 F.2d 720

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