TRANSCRIPT - CONFERENCE CALL
Carlos DeLuna - December 6, 1989
Rider Scott, Chris Weaver, Bill Zapalac

RS . . . appellate courts or any new legal issues. Absent that, any significant legal issues which you would like us to hear and consider. After you've had that opportunity, I would call on Bill Zapalac on behalf of the Attorney General's office to respond to that, and so that we have an opportunity to thoroughly and fully develop any issues that you would like us to hear at this time in the case of the State v. Carlos DeLuna.

CW Thank you.

RS William, is that all right with you?

BZ Fine, yes sir.

RS Chris -- format all right with you?

CW Fine

RS Good. If you wouldn't mind then, Chris, if you'd go ahead.

CW OK. First of all, I'd like to remind you that we filed this writ in the Corpus Christi state district court. The court made findings of fact, but no conclusions of law. It was forwarded to the Court of Criminal Appeals, which denied our stay without explanation, discussion, etc. The pleadings, we raised legal issues in the pleadings which are substantially identical to those raised Ex parte Harvey Irving, a case where the Court of Criminal Appeals granted a stay and set for submission by September. They have not yet rendered an opinion. As I told Bill before, we know the legal issues were substantially identical because I plagiarized at length from them, so we know they are the exact same legal issues, but we were not given any response by the court save and except the one paragraph we _____ without merit. We are at a loss to understand how the same issues, raised in two different courts, can be treated so disparately.

We then refiled in the federal district court. The federal district court handed down an opinion, essentially holding that Penry only applied to one situation, where mitigating evidence was submitted at trial. That, of course, is not the issue that we are arguing. The issue we are arguing is that in the context of the first writ, which challenged the competency of counsel for failure to investigate and present mitigating evidence. The 5th Circuit held that that was a

tactical decision. As a matter of law, there was no hearing in the first writ ____ successor writ there was no hearing, and the court simply said that, based upon the law as it existed at that time, the failure to investigate was then. The only defensive testimony available in the punishment phase of the capital case, mitigating evidence, was a tactical decision by counsel. Now that counsel, of course, made that tactical decision based upon good faith reliant on an unbroken string of cases in Texas which said that, while you were permitted to present mitigating evidence, the only issue the jury could resolve was a few special issues. Obviously, logically, the mitigating evidence does not go to 2nd special issues. That's the precise point that was recognized in Penry, and the Supreme Court reversed that case, saying that, in the absence of a charge on mitigating evidence, the right to present mitigating evidence is illusory at best.

Now we have a lawyer who, in good faith reliance, that neither investigated nor presented mitigating evidence which did exist and was available. As an aside, I would point out that one of the few exceptions ____ counsel is the failure to investigate and present the testimony. Apparently there is a lower standard for effective representation on a capital case than there is in a DWI.

In any event, we then proceeded to the 5th Circuit. The 5th Circuit, rather than addressing the issues, held that there was no mitigating evidence available. That holding is demonstrably false. First of all, the court said that the demonstrated history of drug and alcohol abuse was irrelevant because it did not substantially impair the defendant's mental capacity. Mitigating does not mean substantial impairment of mental capacity. Mitigating is usually defined in Webster's as simply making less serious. The issue here is whether the jury was given proper instructions, able to properly decide whether death was an appropriate moral response to the facts. We would submit that the 5th Circuit's standard that drug and alcohol abuse history has to substantially impair the defendant's mental capacity is unsupported in any authority that has discussed mitigation previously. We would note the court declared that without citation of any authority. Secondly, the court held that, as a matter of law, that being 21 was not young.

RS I'm sorry--could you repeat that?

CW They held, as a matter of law, that the fact that the defendant was 21 meant that he was not young. I think that's an absurd conclusion. Age is, of course, a relative matter. If you're 14, 21 is a doddering old person. If you are 65, 21 is a callow youth. The jury very well might have, had they been given an opportunity, thought that death was an inappropriate sentence under the facts and circumstances, given the defendant's age. They were never given that

opportunity because they were not given the charge, and they could not be given the charge under the law, and an unbroken string of precedents, both in state and federal court, said you were not entitled to that charge.

Next, the court said that we presented no evidence that the defendant had a low I.Q. What we did present were two doctors' reports. Both said that, based upon their clinical tests, objective tests of the defendant, he had a low I.Q. Both further went on to say that, based on their subjective opinions, his I.Q. was substantially higher. Now, as you're well aware, in Texas, juries resolve all contested issues of fact. And we would submit that those reports created a simple factual dispute. The objective clinical tests showing a low I.Q., compared to the subjective opinion of the doctors that the tests were inaccurate. Upon proper instruction to the jury, they would have been free to believe or disbelieve any, all or part of the testimony.

You will recall also that the defendant testified at the trial. Based upon his demeanor and responses, the jury very well may have decided that the objective, clinical tests were more accurate than the subjective opinion of the doctors, But again, they were not given the opportunity to address this point, because they were never presented the evidence; because the lawyer relied on the state of the law and because, even if they had been given the evidence, it wouldn't have helped because they wouldn't have been entitled to an appropriate charge. It is essentially our position that the defendant's issues have never been addressed by any court.

It is the same issue that's raised in Selvage v. Lynaugh, a case where the Supreme Court granted stay and granted cert. But, more importantly, it's exactly the same issue that was raised in Florida in the Hawkins case. And the point there is that the courts in Florida recognize that lawyers, acting in good faith, relying on the existing law, cannot be held responsible for failure to do things which wouldn't have helped. For, importantly, the defendant cannot be put to death in the context of a case where his lawyer was lulled into not presenting available evidence or making proper objections because of a continued body of law that said that it wouldn't have done him any good in the first place.

What we have is a situation where the defendant, had he been convicted in Florida, would have gotten released. But he's been convicted in Texas and apparently will not get released unless the Governor acts. If the death penalty is not to be applied in an arbitrary and capricious manner, it must be applied uniformly and consistently. It is inappropriate for people raising the same issues, the same legal issues, to be treated in a different manner. That is what we submit is happening here. We submit that this defendant has raised a substantial issue as to the constitutionality of the statute

and its application in his case, which has not really been addressed by any court. They have simply ignored or avoided the issues. That is the substance of our argument, Rider.

RS All right. Bill?

BZ OK. First of all, I would just say that all of these issues have been presented and have been articulated in the fashion that Chris has gone through them in his pleadings before the state and the federal courts. The issues have been presented to the courts in the way that he's phrasing them now, and they've been rejected. And I think that's significant. If nothing else, it indicates that granting a reprieve and allowing further litigation would produce no different result.

Second thing, with respect to his issues being identical to the issues that are raised in Irvin and Selvage, while he cites much of the same language, relies on many of the same cases, a crucial distinction is that there was mitigating evidence introduced in both Irvin's trial and in Selvage's trial. And what the courts are saying is that, if you introduce no evidence, then you have no right to make an as applied challenge to the statute because, as applied to you, you can't claim the statute did not allow for consideration of mitigating evidence that wasn't introduced.

As far as the issues that were resolved in the first petition, Chris is right. There was no hearing held on the allegation of ineffective assistance to counsel. All the courts who considered those claims were able to determine that Mr. DeLuna had not made a showing that would overcome the presumption that counsel had made reasonable tactical decisions in deciding not to investigate and not to present certain evidence. And my reading of the 5th Circuit opinion in the case is not that counsel did not or was reasonable in not investigating and presenting certain mitigating evidence, because he knew that it couldn't be considered, but rather counsel was reasonable in doing this, because the evidence that DeLuna was saying at that time should not have been introduced, would not have been mitigating, would not have had, would not have convinced the jury that his moral responsibility for his crime was in any way lessened.

As far as the litigation in the second petition that began on November 2nd with the filing of the state habeas application, the courts have had the pleadings in their hands and have had ample time to review those. As I said, the exact arguments that Chris is making now were made in each of those pleadings. The courts have considered them, and the courts have rejected those claims. And there's nothing to indicate that they would reach any different conclusion if a reprieve were granted and another round of litigation ensued. And I think that a reprieve would be inappropriate under these circumstances.

RS Chris, let me ask you. This was tried, I believe, in July of 1983. Could you tell me briefly the qualifications of the trial counsel representing Mr. DeLuna at that time?

CW He was licensed by the state of Texas.

RS My records reflect, in a review of the judgment, that there was a James Lawrence and a Hector De Pena, Jr.

CW Correct.

RS And what about Mr. Lawrence and Mr. DePena?

CW The only thing we've been able to find out about them is that they were licensed in the state of Texas.

RS OK. Bill?

CW And accepted appointment out of the Nueces County court.

RS OK. Bill, do you have any additional information?

BZ Just from my dealing up here with, I have run across Mr. Lawrence's name as representing a number of criminal defendants. I have had experience with him representing a habeas corpus petitioner in a non-capital case, and have found him to do a thorough and very good job. I understand that Mr. De Pena is now, I forget which, he's on the bench in one of the courts in Nueces County. And I have no other experience with him, but that has been what I've been, the knowledge that I've gained from just personal experience with him.

CW Rider, if I may make just one aside on this, perhaps this will help you gauge competency of the counsel. In a case where guilt was clear and obvious, they made no effort to investigate or present anything at the punishment phase of the trial. They chose instead to rely on their oral advocacy skills, rather than to present the jury with any facts of testimony which might have mitigated. Then, on appeal to the Court of Criminal Appeals, Mr. De Pena was no longer on the case, Mr. Lawrence was. He wrote a 26 page brief in a capital case. I think 6 or 7 pages total of that brief involved any issues that were other than the formal parts, statement of case, etc. After it was affirmed, he abandoned his client and did not seek a writ of certiorari to the Supreme Court on direct appeal. For whatever that does for you, for his experience, competency, etc., you are an experienced litigator, consider that in the context of how you would expect a client of yours to be treated.

RS Any response, Bill?

BZ We could go back and forth all night. I know that Mr. Lawrence raised 7 issues, I believe it was 7 issues, that were addressed by the Court of Criminal Appeals in their opinion affirming it. They were serious and reasonable issues, and I think that, based on the record that he had to work with, that counsel did what was necessary. Not that we need to get back into relitigating whether he was effective or not.

CW I can't relitigate whether he was effective, but I think the problem, the essence of our position is, even if we assume he acted in an appropriate manner, he was mislead by his detriment, by relying on a statute which we have now determined is, in fact, unconstitutional in this regard.

BZ But there's nothing in the record that indicates that that was the reason that he did not present any of his mitigating evidence. The record, what the courts have said, is that the evidence as it has been presented to the courts now, would not have been deemed mitigating by a jury, would not have reduced the moral culpability of Mr. DeLuna.

CW And, if I may, one final response to that, is the 5th Circuit is now saying that we're gonna sit in the place of a jury. We're gonna decide what's mitigating as a matter of law. That is not a matter of law. What is or is not mitigating is for a jury to resolve, based on proper instructions. For the 5th Circuit to say that they believe the evidence is not mitigating is totally irrelevant. We don't try cases to justices of the court of appeals. We try them to juries in Nueces County, in this case. Now, their opinion that this is not mitigating is quite simply absurd.

BZ I think that what the opinion says is that the evidence that has been brought forward in the habeas petition simply does not establish anything that would reduce the culpability of this defendant, that would make a death sentence inappropriate.

CW I agree with that. That is exactly what the sentence says. And my position quite simply is that it's a ridiculous conclusion, and I think . . . because they are now saying that they're gonna put themselves in the place of the jury, and they'll decide what is or isn't mitigating, etc. No other place, dealing with what is or is not mitigating evidence, has the court ever said, "this is the laundry list; this evidence is mitigating; that evidence isn't." That's not for an appellate court to resolve. What is for the appellate court to resolve is, did he get the charge. And, had he got the charge, then it's up to the jury to make the reasoned, moral judgement. The argument that the appellate court should make a reasoned, moral judgment and substitute their judgment for the jury's judgment, was rejected in the proportionality of the review cases. What we've got is the 5th Circuit going back and substituting their judgment. But that whole argument

was rejected in the proportionality review ____. It is up to the jury, upon proper instructions, to make this decision, and the 5th Circuit's opinion to the effect that they find it not mitigating is not relevant, not the issue we've raised, and it's simply inappropriate and in conflict with the vast body of law.

RS I appreciate the spirited exchange here, and the ability of both sides to articulate the law. And I would just point out that, in preparation for reviewing both of your comments this evening, that we have reviewed the original opinion by the Court of Criminal Appeals, which was authored by Sam Houston Clinton, with the concurring opinion by Marvin Teague. We have looked at the writ of habeas corpus, which was filed earlier, and that would have been in the Southern District, Corpus Christi Division. We have also reviewed the habeas petition before the 5th Circuit, and then the denial of the stay, I believe that's correct, this evening by the Supreme Court, some time around 4:00 o'clock on a 7 - 2 vote, is that correct?

CW That's correct.

RS I'd also want to say at this juncture, that I do not know the trial counsel, but I certainly know the appellate counsel in this case, both Chris Weaver and Richard Anderson, who I personally know to be extremely skilled, very articulate and knowledgeable of the law. And I would say that, Chris, you've done an excellent job of articulating the point, and, Bill, also, in responding on behalf of the state of Texas.

The position that it leaves this office in, and the position of the Governor, is to make sure that the litigants have a fair opportunity to articulate and to present the issues that you have both decided in a fair court of law, whether that is a district court, the 5th Circuit or, the ultimate arbiter, the Supreme Court. What we look for, and what the Governor has instructed me to look for are issues which have not had a fair opportunity for litigation and discussion.

I have listened to it this evening, and I will tell you this. That earlier this evening, I have briefed the Governor fully on this issue. Not only about the facts underlying the offense in 1983, but also the appellate process, as well as the state review. And reviewed with him the major legal issues involved and the one specifically, Chris, that you have talked about in terms of review, and whether or not there is a Penry issue. And whether the charge should be raised, even in the absence of testimony at the trial level. Based on all of that, the Governor has indicated that he will not substitute his opinion for that of the appellate courts of this country. And that, at this time, I have been empowered by the Governor to tell you that he would deny the reprieve based on the information that you have presented to me at this

juncture during the evening.

I thank both of you for visiting with us this evening. I will be here throughout the evening. I will take further phone calls, if necessary. If you want to communicate with us, I think, Bill, you will be there at the Attorney General's office, will you?

BZ Yes, I sure will.

RS I will be here. Chris, I thank you for the professional manner and the arguments that you have set forth. They are very well articulated, very well reasoned. But, at this time, we find that there are no new issues of fact or law that have not had an opportunity to be resolved in the appellate courts or the trial courts, and we would deny the reprieve at this time.

CW I thank you for taking the time and the courtesy of listening to us. We do appreciate that.

RS Thank you, gentlemen. Goodnight.

ALL Thank you, good night, thank you, etc.

END OF TAPE