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| STATE OF TEXAS | ‡ | IN THE DISTRICT COURT |
| VS. | ‡ | 28TH JUDICIAL DISTRICT |
| CARLOS DE LUNA | ‡ | NUECES COUNTY, TEXAS |

DEFENDANT'S MOTION TO QUASH INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Carlos DeLuna, Defendant in the above styled and numbered cause by and through his attorneys of record and files this Motion to Quash Indictment or alternatively to exclude the punishment of death as a possible sentence, and in support of said Motion would respectfully show the Court the following:

I.

The indictment endeavors to allege the offense of capital murder pursuant to Art. 19.03 (a)(2) P.C. However, the indictment is fatally defective in that it fails to properly allege an offense against the laws of the State of Texas by virtue of its failure to allege the death penalty provisions of capital murder as set forth in Art. 37.071(b)(1)(2)(3) V.A.C.C.P. Specifically, the indictment fails to appraise the Defendant that the State of Texas intends to present evidence as to the following issues:

- (1) That the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) That there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society;
- (3) That the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

II.

The omission of the foregoing allegations in the indictment expressly violates Art. 21.03 V.A.C.C.P., which provides as follows: "Everything should be stated in an indictment which is necessary to be proved."

FILED

JUN -1 1983

OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
Marta M. Deque Deputy

M I C R O F I L M E D

The sentencing procedures related to capital murder offenses as set forth in Art. 37.071 V.A.C.C.P. are mandatory if the State is seeking the sentence of death or life imprisonment for the offense of capital murder. The facts underlying the statutory special issues provided in Art. 37.071 V.A.C.C.P. must be proved by the State beyond a reasonable doubt, no less that all descriptive averments presently set forth in the indictment.

Inasmuch as "everything. . . necessary to be proved" is not set forth in the indictment the same should be quashed in its entirety.

III.

Pleading in the alternative, and not waiving the foregoing contentions, the Defendant submits that inasmuch as the penalty of death cannot be legally imposed in the absence of the issues provided in Art. 37.071 V.A.C.C.P. the only possible punishment is life imprisonment. The Defendant submits that such mandatory punishment is constitutionally infirm in that mandatory punishment is arbitrary, capricious, and eliminates individual consideration of sentences, there is present a violation of Art. 1, Sec. 10 & 19 of the Texas State Constitution and the Fourteenth Amendment to the United States Constitution.

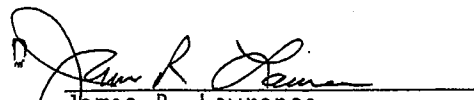
IV.

The failure of the indictment to plead the matters set forth in Art. 37.071 V.A.C.C.P. is a violation of Art. 1, Sec. 10 & 19 of the Texas State Constitution and the Fourteenth Amendment to the United States Constitution, as well as Art. 1.05 V.A.C.C.P.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that the indictment be quashed in its entirety and that this prosecution be ordered dismissed; alternatively, that Defendant prays that the penalty of death be excluded as a possible punishment in this matter, and for such other relief to which the Defendant may show himself justly entitled.

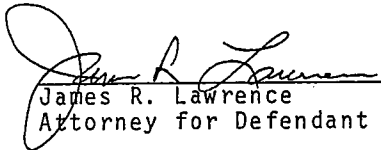
Respectfully submitted,

M I C R O F I L M E D


James R. Lawrence
Attorney for Defendant
Bar No. 12047000
P.O. Box 8365
Corpus Christi, Tx 78412


CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of June, 1983, a true and correct copy of the above and foregoing Motion was personally served on the Assistant District Attorney of Nueces County, Texas.


James R. Lawrence
Attorney for Defendant

ORDER

On this day came on to be heard the foregoing Motion and the Motion is in all things ~~(DENIED)~~ (DENIED to which action of the Court the Defendant excepts).


JUDGE PRESIDING