

11/22

NO. 83-CR-194-A

EX PARTE

IN THE 28TH DISTRICT COURT

CARLOS DeLUNA,

OF

Applicant

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

M I C R O F I L M E D

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.

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. cm 15, 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

By [Signature] Deputy

[Signature]

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