CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 29 1988
JESSE E. CLARK, CLERK
BY DEPUTY:

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

CARLOS DELUNA	§	
	§	
V.	§	C.A. NO. C-86-234
	§	
O. L. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS OR HIS SUCCESSOR	§	

U.S. COURT OF APPEALS
FILED
JUL 18 1988
GILBERT F. GANUCHEAU
CLERK

88-2613

FIRST AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS AND BRIEF

TO THE HONORABLE HAYDEN W. HEAD, JR., JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION:

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

I.

PRELIMINARY STATEMENT

Petitioner's original Petition was filed October 14, 1986. This Court stayed Petitioner's execution. By Order dated June 13, 1988, this Court dismissed the original

Petition for Habeas Corpus and vacated his stay of execution. Petitioner has filed concurrent with his First Amended Application for Writ of Habeas Corpus and Brief a Motion for Relief from the Order of June 13, 1988, Motion to Allow the Filing of this Amended Writ of Habeas Corpus, and in the alternative, Motion for Certificate of Probable Cause and Notice of Appeal from the Court's Order of June 13, 1988.

Petitioner in this Amended Application for Writ of Habeas Corpus and Brief will refer to the original Application, and adopts that Application with reference to the Court's Order of June 13, 1988.

II.

CUSTODY

Petitioner is confined in Respondent's custody on death row in the Ellis I Unit in the Texas Department of Corrections, Huntsville, Texas, pursuant to the judgment of conviction and a sentence of death out of Nueces County, Texas, in Cause No. 83-CR-149-A in the 28th Judicial District Court of Nueces County, Texas.

III.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 2254.

IV.

PROCEDURAL HISTORY

Petitioner was convicted in Cause No. 83-CR-149-A in the 28th Judicial District Court of Nueces County, Texas, on the 15th day of July, 1983, of the offense of capital murder and the jury sentenced Petitioner to death. Petitioner was represented by court-appointed counsel.

The conviction and sentence were affirmed by the Court of Criminal Appeals of Texas in Cause No. 69,245 in an En Banc Opinion delivered June 4, 1986. Petitioner's court-appointed attorneys did not file a Motion for Rehearing in the Court of Criminal Appeals of Texas, and did not file an Application for Writ of Certoriari to the Supreme Court of the United States. Petitioner's cause was abandoned by his court-appointed attorneys after affirmance by the Court of Criminal Appeals of Texas and Petitioner's first execution date has been set for October 15, 1986.

An Application for Stay of Execution addressed to the United States Supreme Court pending the filing of a Writ of Certoriari was filed October 8, 1986. The Supreme Court overruled and denied the Stay of Execution on October 10, 1986, because the issues presented in the Application for Stay of Execution have not been litigated in the State Court.

Petitioner, on October 8, 1986, filed an original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure, along with an Application for Stay of Execution pending a hearing on the that Writ of Habeas Corpus in the convicting court of the 28th Judicial District, Nueces County, Texas. The Writ of Habeas Corpus raised substantial issues of constitutional dimension that were not litigated in the trial court nor have been raised in any evidentiary hearing prior to the filing of the original Application for Writ of Habeas Corpus. On October 9, 1986, the trial court of the 28th Judicial District Court, Nueces County, Texas, denied Petitioner an evidentiary hearing, his Application for Writ of Habeas Corpus, and his Stay of Execution.

A Motion for Stay of Execution and a request that the 28th Judicial District Court of Nueces County, Texas, be

required to hold an evidentiary hearing on Petitioner's original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure, was filed with the Court of Criminal Appeals for the State of Texas on October 10, 1986. On October 10, 1986, the Court of Criminal Appeals of Texas denied the stay of execution and refused to order the 28th Judicial District Court of Nueces County, Texas, to hold an evidentiary hearing on Petitioner's original Application for Writ of Habeas Corpus.

Petitioner's stay of execution was lifted pursuant to this Court's Order of June 13, 1988. Petitioner, at the time of trial and at each stage of this post conviction proceedings, is indigent and has been represented by court-appointed or volunteer counsel. No new execution date has been set for Petitioner, but Petitioner's counsel has been informed that Petitioner will be brought back to Nueces County the second week of July, 1988, for the purpose of setting a new execution date.

V.

EXHAUSTION OF STATE REMEDIES

Petitioner presents claims on this First Amended Application for Writ of Habeas Corpus that are of constitutional dimension though he has been denied evidentiary hearings by the convicting court, the 28th Judicial District Court, Nueces County, Texas, the Court of Criminal Appeals, and by this Court on his original Application for Writ of Habeas Corpus.

VI.

STATEMENT OF THE CASE

Petitioner was indicted for intentionally causing the death of Wanda Lopez by stabbing her with a knife in the course of committing and attempting to commit a robbery on or about February 4, 1983. (Section 19.03, Texas Penal Code).

VII.

CLAIMS PRESENTED FOR REVIEW

(A) Petitioner, pursuant to the Supreme Court's decision in McLeskey v. Kemp, 107 S.Ct. 1756 (1987) has no choice but to abandon his claim of a statistical analysis

showing prosecutorial discretion in determining in which cases the death penalty is sought based upon the race of the victim.

(B) Petitioner was denied effective assistance of counsel at trial in violation of his rights under the Sixth and Fourteenth Amendments, United States Constitution, see Strickland v. Washington, 466 U.S. 1105, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in the following particulars:

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

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

(3) Counsel at trial although being advised of numerous witnesses that this twenty-one (21) year old Petitioner had to present in mitigation of punishment, failed to put on a single witness at the punishment phase of trial. Petitioner in this regard would show that he had given trial counsel the names of the following witnesses to present in mitigation of punishment:

(a) Maria Arrendondo - sister;
(b) Rose Barley - sister;
(c) Daniel Conejo - brother;
(d) Maria Conejo - sister-in-law;
(e) Mr. Perez - English teacher- Tom Brown Junior High School;
(f) Belinda Pena - niece;
(g) Diana Pena - niece.

The failure of trial counsel to call these witnesses in mitigation of punishment could in

all probability have impacted upon the jury's answer to Special Issue No. 2 for the reason that the jury failed to address and answer that issue in their original verdict (see Appendix A).

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

VIII.

BRIEF STATEMENT OF THE LAW

PETITIONER WAS PREJUDICIALLY DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL.

At trial, the defense rested without presenting any evidence at the punishment phase (R.XII, 50). Both the Petitioner and the Petitioner's step-father testified at the guilt/innocence phase of the trial (R.XI, 402-407; 410-438), but only in regard to those facts surrounding the offense and not in regard to background information on Petitioner. Although Petitioner was only twenty-one (21) years old at the time of the offense, no testimony was put on to show that Petitioner even had a caring relative to testify and beg for his life. Further, no testimony, psychological or otherwise, was offered to show the mitigating impacts of Petitioner's age for the jury's consideration of the ultimate penalty. No hearing has been held in any court at any stage to test whether or not the failure to present mitigating evidence was strategic on the lawyer's part, or merely negligent.

In Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986) a similar factual situtation occurred. First, the Federal District Court found that the State record was insufficient to permit a determination of whether counsel's decision not to present mitigation evidence was strategic or negligent, and held an evidentiary hearing, which the circuit Court held to be proper.[1] The opinion then stated:

> Thomas' lawyer made little effort to investigate possible sources of mitigation evidence. Although Thomas' mother, who was to be the main witness at the penalty phase was interviewed, she was not present, for reasons not apparent from the record. No attempt was made to obtain possible mitigation testimony from other family members or individuals who knew Thomas from school, work, or the neighborhood. The lawyer testified that he made little effort to produce mitigating evidence, because Thomas had stated he did not want to take the stand and did not "want anyone to cry for him."
>
> Although a capital defendant's stated desire not to use character witnesses and refusal to testify limits the scope of required investigation, Mitchell v. Kemp, 762 F.2d 886, 889-90 (11th Cir. 1985), the statements of defendant here do not support such a waiver. The record supports the District Court's decision that counsel's failure to investigate and present mitigating evidence fell below an objective standard of reasonable, under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.E.2d 674 (1984).

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[1]On the theory that ineffective counsel is a mixed question of law and fact not entitled to a 28 U.S.C. §

In Thomas, evidence of the petitioner's childhood was held to have been available and could have been used in mitigation. The circuit court then concluded:

> None of this evidence was presented to the jury at the sentencing phase as mitigating evidence. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

In Streetman v. Lynaugh, 812 F.2d 950 (5th Cir. 1987), a similar decision was reached where the circuit court held that the district court should have held an evidentiary hearing upon allegations that trial counsel had not adequately prepared, by failing to discover and present evidence on the admissibility of petitioner's statements. In

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2254(d) presumption of correctness, citing Solomon v. Kemp, 735 F.2d 395, 401 (11th Cir. 1984) and Code v. Montgomery, 724 F.2d 1316 (11th Cir. 1984).

the present case, there was not evidence presented on mitigation although such witnesses were available and known to counsel.

Under the Texas dealth penalty law, the constitutional mitigation requirements fall under the second of the three (3) issues submitted to the jury on punishment, i.e., the probability of future acts of misconduct. A history of non-violent behavior during an accused's formative years obviously should have been submitted. Counsel is held, minimally, to some duty to investigate Petitioner's background, and this duty should not be limited to attempting to contact one (1) relative and then, in effect, terminating the inquiry, because trial counsel understood Petitioner's background was "not that great". Here, as in Thomas, the jury was given no information to help them in making the individual determination contemplated by Gregg v. Georgia, 428 U.S. 153 (1976).

The Supreme Court has repeatedly insisted that unfettered consideration of mitigation evidence is an essential aspect of the process by which the States adjudicate the appropriateness of putting a person to death. See, e.g., Sumner v. Shuman, ____ U.S. _____, (1987), slip op. at 12; Eddings v. Oklahoma, 455 U.S. 104, 112 (1982);

Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Accordingly, the Court has not permitted a State to insulate the capital sentencer from considerations favorable to the defendant. The reliability of the process depends upon the sentencer's consideration of both tangibles and intangibles, see, Caldwell v. Mississippi, 472 U.S. 320, 330 (1985), in evaluating the individual character of the defendant and his acts. In light of the importance that the Court has placed upon the role of mitigating evidence in capital sentencing decisions, one cannot believe that Strickland was intended to permit a defendant to be sentenced to death solely on the basis of the State's evidence, when a powerful defense easily could have been marshalled on his behalf. Any reasonable standard of professionalism governing the conduct of a capital defense must impose upon the attorney, at a minimum, the obligation to explore the aspects of his client's character that might persuade the sentencer to spare his life. Without even this effort by the defense, the adversarial process breaks down.

See, also, Wilson v. Butler, ____ F.2d _____ (No. 86-3537, March 24, 1987), where it was held that the District court should have held an evidentiary hearing on the issue of ineffectiveness of the petitioner's counsel at

the sentencing phase of his capital murder trial. In Wilson, the petitioner claimed that his lawyer failed to investigate and present mitigating evidence.

The failure to present mitigating evidence is the type of Sixth Amendment violation that is not subject to a harmless error analysis. See Satterwhite v. Texas, ___ U.S. _____ (No. 86-6284, decided May 31, 1988). See, also, Franklin v. Texas, ____ U.S. _____ (1988) (decided June 22, 1988). It certainly could not be viewed as harmless error in this case in light of the fact that the jury originally returned a verdict at the punishment phase of the trial in which no answer was provided for Special Issue No. 2 and the jury members indicated that they were hung in their attempt to reach a unanimous verdict to the answer of Special Issue No. 2 concerning future dangerousness (see Appendix). Only after several more hours of deliberation was a unanimous verdict reached on this critical issue.

The evidence of trial counsel's ineffectiveness has not been presented to the Texas courts. That evidence will show a violation of the Strickland standard and should result in a granting of this Writ or, at least, an evidentiary hearing to more fully develop the record on the issue.

IX.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court:

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

(2) Conduct a hearing in which proof may be offered concerning the allegations of this amended petition;

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

(4) Grant Petitioner the authority to gain subpoenaes in forma pauperis for witnesses and documents to prove the facts as alleged in this petition;

(5) Immediately stay Petitioner's execution pending final disposition of this amended petition; and

(6) Grant such other and further relief as may be appropriate.

Respectfully submitted,

by: _____

RICHARD A. ANDERSON
Attorney at Law
3333 Lee Parkway, Suite 930
Dallas, Texas 75219
214/559-4384
Bar No. 01207700

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing First Amended Application for Writ of Habeas Corpus and Brief has been forwarded to Mr. William C. Zapalac, Assistant Attorney General, 200 W. 14th, Supreme Court Building, Sixth Floor, Austin, Texas, 78711; Mr. Richard Windhorse, Fifth Circuit, Court of Appeals, 500 Camp Street, New Orleans, Louisiana, 70130, and Mr. Christopher

Vasil, United States Supreme Court, One First Street, North East, Washington, D.C., 20543.

SIGNED this the 28 day of June, 1988.

Richard A. Anderson
by: Kent E. Jones
RICHARD A. ANDERSON

CERTIFICATE OF CONFERENCE

Prior to the filing of this First Amended Application for Writ of Habeas Corpus and Brief, I had a phone conversation with Mr. William C. Zapalac, Assistant Attorney General, who stated that he would respond to the Application when filed.

Richard A. Anderson
by: Kent E. Jones
RICHARD A. ANDERSON

A F F I D A V I T

STATE OF TEXAS §
§
COUNTY OF _____ §

BEFORE ME, the undersigned authority, personally appeared CARLOS DELUNA, who stated that he is the Petitioner in this First Amended Application for Writ of Habeas Corpus and that he has read the facts contained in this Application for Writ of Habeas Corpus, including the facts that he provided information to his attorneys at the time of trial of individuals who would testify in mitigation of punishment, and they are in all things true and correct.

_____
CARLOS DELUNA

SUBSCRIBED AND SWORN to on this the ____ day of _____, 1988.

_____
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

_____
Print or Type Name of Notary

_____
Commission Expires

A F F I D A V I T

STATE OF TEXAS §
§
COUNTY OF DALLAS §

CARLOS DELUNA is a Petitioner in this cause and has provided facts and information to Richard A. Anderson.

BEFORE ME, the undersigned authority, personally appeared KEITH E. JAGMIN, who state as follows:

"I am an associate of Richard A. Anderson, who is out of State at the time of the filing of this First Amended Application for Writ of Habeas Corpus, and he is has stated to me that a copy of this Amended Application for Writ of Habeas Corpus has been mailed to Carlos Deluna and will signed and notarized as soon as possible pursuant to mailing limitations."

KEITH E. JAGMIN

SUBSCRIBED AND SWORN to on this the 28 day of June, 1988.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

Cindy A Viana
Print or Type Name of Notary

5-20-92
Commission Expires

as a possibility, should any further information be found.

THE COURT: All right. I think you have stated as of this date, I believe we did it yesterday morning.

MR. DePENA: Yesterday, yes.

THE COURT: This is the 21st; it would have been the morning of the 20th, prior to the time that the jury received the Charge on guilt.

MR. DePENA: Okay.

THE COURT: Or innocence.

MR. DePENA: Thank you, Your Honor.

THE COURT: Certainly.

(At this time Court was again in recess pending the deliberations of the jury, until such time as the jury was returned to the jury room and the following proceedings were had in the presence and hearing of the jury, before the Court and with counsel for the State, counsel for the Defendant, and the Defendant present:)

THE COURT: Mr. Morales, would you give the -- your verdict sheet and the Charge to the Bailiff, please.

JUROR MORALES: Do you want the rest of the information that was requested and also -- everything else? Okay. That's complete.

THE COURT: The jury has answered Special

Issue No. 1: Yes. And the jury has not answered and left blank Special Issue No. 2.

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: All right. Mr. Gonzales, what is your thought in the matter?

JUROR GONZALES: We might.

THE COURT: Mr. Rasmusson?

JUROR RASMUSSON: Possible.

THE COURT: Mrs. Dahlman?

JUROR DAHLMAN: We might.

THE COURT: Mr. Vickers?

JUROR VICKERS: It's possible, sir.

THE COURT: Mr. Perez?

JUROR PEREZ: I think we could.

THE COURT: Mr. Botelho?

JUROR BOTELHO: Possibility.

THE COURT: Mrs. Gavlik?

JUROR GAVLIK: Possible.

THE COURT: Mrs. Jimenez?

JUROR JIMENEZ: I think we could.

THE COURT: Ms. Kurtz?

JUROR KURTZ: I don't think so, Your Honor.

THE COURT: Mrs. Bradley?

JUROR BRADLEY: It's possible, Your Honor.

THE COURT: Mr. Abernathy?

JUROR ABERNATHY: It's possible.

THE COURT: All right. In view of that answer, then, let me ask you to continue your deliberations. What would you like to do at this time? Would you like to be taken to dinner, or would you like dinner brought in to you?

JUROR MORALES: Prefer to go out, Your Honor.

THE COURT: All right. Those arrangements will be made, and just as quickly as we can, and I will stay here with you as long as you want to work tonight.

(At which time the jury retired to the jury room to continue deliberating their verdict, during which deliberations a recess was taken for the evening meal, after which time deliberations continued until they were concluded, and the following proceedings were had outside the presence and hearing of the jury,

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 29 1988
JESSE E. CLARK, CLERK
BY DEPUTY: R. Stivers

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

CARLOS DELUNA	§	
	§	
V.	§	C.A. NO. C-86-234
	§	
O. L. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS OR HIS SUCCESSOR	§	

MOTION FOR RELIEF FROM ORDER, MOTION FOR CERTIFICATE OF PROBABLE CAUSE, AND NOTICE OF APPEAL

TO THE HONORABLE HAYDEN W. HEAD, JR., JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION:

Comes now CARLOS DELUNA, Petitioner herein, and moves the Court from relief from the Order dismissing the Petition for Writ of Habeas Corpus and Order Vacating Stay of Execution filed June 13, 1988, and for the reasons stated below would seek relief from this Order and request a hearing on Petitioner's First Amended Application for Writ of Habeas Corpus filed this date. If this Motion for Relief is denied, Petitioner requests a Certificate of Probable Cause pursuant to the provisions of 28 U.S.C. § 2255 and Rule 22(b) of the Federal Rules of Appellate Procedure and herein gives notice of appeal to the United States Court of

Appeals for the Fifth Circuit as to this Court's Opinion, Order and Judgment of June 13, 1988, and that a denial of this Motion for Relief to consider his First Amended Application for Writ of Habeas Corpus.

I.

MOTION FOR RELIEF

Introduction.

Petitioner this date has filed an Amended Application for Writ of Habeas Corpus pursuant to 18 U.S.C. § 2254 that sets out in particularity Petitioner's claims of ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments, United States Constitution, and in particular the failure of Petitioner's counsel to present mitigating evidence although such evidence and witnesses were available at the time of trial. A copy of that Amended Application for Writ of Habeas Corpus is attached to this Motion for Relief and incorporated herein as if fully set out.

No hearing on Petitioner's claims of ineffective assistance of counsel has ever been held in the State trial court or in this Honorable Court and the failure of trial counsel to discover and present mitigating evidence during

the punishment phase calls for this Court to either hold a hearing on its own behalf or submit the case to a Magistrate for a hearing on Petitioner's claims of ineffective assistance of counsel.

II.

In the alternative, and only in the event this Court fails to grant relief from its Order of June 13, 1988, it is requested that this Court enter a Certificate of Probable Cause pursuant to the provisions of 28 U.S.C. § 2255 and Rule 22(b) of the Federal Rules of Appellate Procedure. Petitioner would show that he has raised a substantial federal issue in his appeal of the District Court's Order concerning this Court's failure to hold a hearing to determine the correctness of Petitioner's allegations of ineffective assistance of counsel at the time of trial and the failure to put on mitigating evidence for this twenty-one (21) year old Petitioner when such evidence was known and available to trial counsel. Such failure to put on such mitigating evidence was a Sixth and Fourteenth Amendments violation that is violative of Petitioner's rights beyond any harmless error analysis. Satterwhite v. Texas, ___ U.S. ____ (No. 86-6284, decided May 31, 1988). See, also, Franklin v. Texas, _____ U.S. _____ (1988) (decided June 22, 1988).

The claim of ineffective assistance of counsel was neither speculative nor frivolous; rather, such claim has merit and represents a substantial federal issue that should be reviewed by the Court of Appeals.

III.

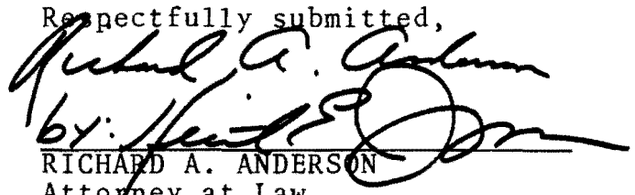
NOTICE OF APPEAL

If the Court denies a Motion for Relief from its Order of June 13, 1988, and the Court further fails to allow the filing of Petitioner's First Amended Writ of Habeas Corpus, Petitioner herein gives notice of appeal to the United States Court of Appeals for the Fifth Circuit, both as to the denial of the Rule 60 request to reopen and consider Petitioner's Amended Application for Writ of Habeas Corpus and to the Judgment of the Court entered on June 13, 1988.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays for an Order to open the hearing on the issues raised in Paragraph I and if such request is denied, Petitioner files

this notice of appeal and request for Certificate of Probable Cause.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

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I hereby certify that a true and correct copy of the foregoing Motion has been forwarded to Mr. William C. Zapalac, Assistant Attorney General, 200 W. 14th, Supreme Court Building, Sixth Floor, Austin, Texas, 78711; Mr. Richard Windhorse, Fifth Circuit, Court of Appeals, 500 Camp Street, New Orleans, Louisiana, 70130, and Mr. Christopher