IN THE UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

NO. 89-6262

CARLOS DELUNA,
Petitioner/Appellant,

vs.

JAMES A. LYNAUGH, Director,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent/Appellee.

On Appeal from Writ of Habeas Corpus for the United States District Court for the Southern District of Texas, Corpus Christi Division, DC No. 89-_____

MEMORANDUM OF LAW ON APPLICATION FOR STAY OF EXECUTION

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW Carlos DeLuna, Petitioner/Appellant in the above-styled and numbered cause, by and through his attorneys of record, R. K. Weaver and Richard A. Anderson, and in support of his heretofore filed Application for Stay of Execution, files this his Memorandum of Law, and along with the argument and authorities set forth more fully in Petitioner's Application for Writ of Habeas Corpus and Memorandum of Law in Support of his Application for Writ of Habeas Corpus, respectfully prays that

this Honorable Court enter an order staying the execution of the sentence of death imposed upon him and scheduled to be carried out before sunrise on December 7, 1989, pending the final disposition of the present appellate proceedings concerning the denial of an Application for a Writ of Habeas Corpus pending in this Court, and until further order of this Court.

I.

Petitioner, Carlos DeLuna, is presently set to be executed by the State of Texas on December 7, 1989. An Application for Writ of Habeas Corpus was filed in the trial court on November 2, 1989. The Texas Court of Criminal Appeals denied this writ and its associated application for stay of execution on November 29, 1989, discussion of the merits of Petitioner's claims and without holding any evidentiary hearing. Thereafter, the Petitioner has cause to be filed his Application for Writ of Habeas Corpus in the United States District Court for the southern District of Texas, Corpus Christi Division. That application, and its attendent Application for Stay of Execution have been denied by the District Court.

This Court should issue a stay of execution as Mr. DeLuna's case presents questions of extraordinary importance to the administration of the State of Texas' capital punishment scheme. In addition to the issue presented in the petition concerning the jury being fundamentally misled as to the meaning of the

important word "deliberate" in Special Issue One, this case presents a compelling *Penry v. Lynaugh*, 57 ___ U.S. ___, U.S.L.W. 4958 (June 26, 1989) claim. As Texas Courts have yet to announce how they intend to apply this significant and far-reaching decision, a stay of execution is clearly warranted. Carlos DeLuna should not go to his death until some Court, state or federal evolves it's post-*Penry* jurisprudence.

It is not hyperbole to say that the Supreme Court's decision in *Penry v. Lynaugh* is the most important decision concerning the Texas death penalty statute since *Jurek v. Texas*, 428 U.S. 262 (1976). *Penry* represents an abrupt shift from bedrock principles announced by Texas Courts prior to *Jurek* and to which those courts have adhered ever since.[1] *Penry* declares that a wide variety of evidence typically offered by Texas capital defendants seeking to avoid sentences of death cannot be afforded mitigating effect in the absence of instructions in addition to those on the special issues. As this Court has the initial responsibility to see that Texas capital trials are and were conducted in accordance with the Eighth Amendment, it must now carefully review cases coming before it, and develop a new jurisprudence consistent with *Penry*.

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1. See Ex parte Granviel, 561 S.W.2d 503 (Tex.Cr.App. 1978); Adams v. State, 577 S.W.2d 717 (Tex.Cr.App. 1979), rev'd on other grounds sub non., Adams v. Texas, 448 U.S. 38 (1980); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App. 1980); Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App. 1984); Cordova v. State, 733 S.W.2d 175 (Tex.Cr.App. 1987); Burns v. State, 761 S.W.2d 353 (Tex.Cr.App. 1988).

It is impossible, however, for this Court to thoughtfully consider the many ramifications of *Penry* in cases such as Petitioner's in the limited time before Mr. DeLuna will be executed. In the absence of a stay of execution, the Court has but a few days to ponder the numerous questions arising in *Penry's* wake. This Honorable Court will not even have any guidance from prior decisions of this Honorable Court which have been submitted to the Texas Court of Criminal Appeals but not yet resolved, nor from the decisions of the United States Supreme Court since, as noted infra, these same issues will not have been presented to that Court and are currently pending without any final resolution to guide this Court.

In the Application for Writ of Habeas Corpus and attached affidavits and other documents, as well as in the Memorandum of Law in Support of his Application for Writ of Habeas Corpus, Mr. DeLuna demonstrates a plain and straightforward violation of *Penry*. Yet these papers have been written in haste, and cannot and do not convey the many reasons why Mr. DeLuna is entitled to have this claim reviewed on its merits by this Court, and why he is entitled to a new trial. Only a full hearing and an opportunity to present the evidence alluded to in these pleadings, as well as a full and reasonable briefing schedule to permit proper development of Petitioner's arguments will adequately protect his constitutional rights.

Further, the Petitieonr was denied his constitutional right to represent himself *pro se* on direct appeal. The Petitioner demanded this right at his Motion for New Trial proceedings. Thereafter, the trial court affirmatively misrepresented the Petitioner's rights on appeal, and elicited a waiver of that demand through advising the Petitioner that he would be permitted to review the appellate record and file a *pro se* brief of his own in the Texas Court of Criminal Appeals. The Court of Criminal Appeals has consistently denied indigent appellants the right to hybrid representation and has consistently held that where one has appointed counsel, there is no right to reivew the record of the trial or to file a *pro se*. brief. See, e.g.: *Coleman v. State*, 632 S.W.2d 616, 619 (Tex. Crim. App. 1982); *Thomas v. State*, 605 S.W.2d 290, 293 (Tex. Crim. App. 1980). The Petitioner was in fact not permitted to review the appellate record or to file a *pro se* brief on direct appeal. See Appendix X to Application for Writ of Habeas Corpus. The waiver of an invoked constitutional right relied on by the State in its reply to this Application for Writ of Habeas Corpus was obtained as a direct result of a misrepresentation of the Petitioner's rights on appeal. This is not an "intentional relinquishment or abandonment of a known right or privilege"; the "waiver" at issue will not act to preserve an unconstitutionaly coerced waiver of an invoked constitutional right. As a direct result of the trial court's affirmative misrepresentations, the Petitioner was denied his Sixth Amendment right to self-representation on appeal. See,

e.g.: *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938) (courts must indluge every reasonable presumtion against waiver of constitutional rights); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975) (defendant has a constitutional right to refuse appointed counsle and proceed *pro se*); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 122 (1984) (accused has constitutional right to proceed *pro se*).

II.

Because *Penry* has so dramatically changed the capital punishment landscape in this state, and because there is a clear violation of the Petitioner's constitutional right to represent himself on direct appeal, the only just course for the Court to take is to: (1) issue a stay of execution in this case, (2) set briefing schedules for Petitioner and the State, and (3) set this case for hearing(s) to elicit available mitigation testimony and to hear argument in this case.

In addition, it should be noted that Petitioner has raised factual and legal issues identical with those presented in *Ex parte Harvey Earvin*, No. 15,021-03, a capital case where the the Texas Court of Criminal Appeals has granted the petitioner a stay and has set the case for submission on briefs and oral argument on September 13, 1989. A decision in that case is not expected before Spring, 1990. In addition, the same issues were raised in *Selvege v. Lynaugh*, No. 87-6700, a case where the

United States Supreme Court granted petitioner a stay and granted the petitioner's Application for Writ of Certiorari to address these same issues. That case is expected to be submitted to the Court sometime next spring. The importance of the issues presented by Petitioner in this Writ has been recognized by the United States Supreme Court and the Texas Court of Criminal Appeals with their granting of stays in these two cases while these issues are fully presented. Can this Honorable Court constitutionally due anything less in this case? Petitioner submits that its duty to grant this stay is clear.

For this Court to follow any course other than to grant the requested stay of execution could well lead to irreparable harm to Petitioner. It will provide little solace to Petitioner's family to learn in six months that he in fact was executed in clear violation of the Eighth Amendment, if Mr. DeLuna is executed on November 7, 1989. The State of Texas, in light of *Penry*, *Ex parte Earvin*, and *Selvege v. Lynaugh*, can make no showing that any valid state interest will be violated should this case be stayed until the post-*Penry* jurisprudence evolves.

III.

Other states, faced with Supreme Court decisions which dictated abrupt changes in the application of their death statutes, have seen to it that no further executions were carried out until the effects of the new decision were carefully and thoroughly thought through. For instance, in *Hitchcock v.*

Dugger, 481 U.S. 393 (1987), the Supreme Court decided that Florida's longstanding penalty trial instructions precluded the jury from considering and giving effect to various kinds of mitigating evidence. Thereafter, the Florida Supreme Court resolved that every case that might be effected by *Hitchcock* be resolved given plenary review, regardless of whether the claim had been raised previously.[2] And in a significant number of cases, that court determined that *Hitchcock* required a new sentencing hearing.[3]

As did the Florida Supreme Court in the wake of *Hitchcock*, this Court must not allow any capital defendant presenting a *Penry* claim to go to his death in the absence of plenary review of the claim. Summary and episodic review, under the pressures of a warrant, and in the absence of any briefing, serves no legitimate interest. As Petitioner presents a compelling claim under *Penry*, the Court should enter a stay of execution, set the case for hearing, set a briefing schedule, and hear argument on the important questions presented in this petition.

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2. See e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(stay of execution granted, relief granted in light of change of law after plenary review); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987)(same).

3. See Hall v. State, 541 So.2d 1125 (Fla. 1989); Alvord v. Dugger, 541 So.2d 598 (Fla. 1989); Cooper v. State, 526 So. 2d 900 (Fla. 1988); Combs v. Dugger, 525 So.2d 853 (Fla. 1988); Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988).

IV.

In addtition, there are unresolved, contested issues of fact critical to any resolution of the issues presented in this Writ. First, the Petitioner has claimed that there was evidence of a mitigating nature that was available to be presented at the trial of this cause which was not presented due to the state of the law in Texas at the time of the Petitioner's trial. The State has denied that such evidence existed. The trial record does not reflect what evidence existed which was not presented at the trial.

In addition, the Petitioner has claimed that he was denied the opportunity to represent himself on appeal *pro se*. The State has denied that the Petitioner sought to represent himself and has claimed that he waived that right. As pointed out in the previously, the alleged waiver was elicited from the Petitioner through the affirmative misrepresentation of the trial court concerning the Petitioner's right to hybrid representation on appeal. See (trial record excerpt attached as Appendix Y to Application for Writ of Habeas Corpus at page 45, *ll* 9 through 20; page 46, *ll* 22-25; page 48, *ll* 5-6, *ll* 11-24).

Further, the Petitioner was not afforded an opportunity to review the appellate record or to present his own *pro se* brief. (See Appendix X to Application for Writ of Habeas Corpus). The record does not reflect the Petitioner's expectations concerning this misrepresentation of his appellate rights made by the trial

judge, nor does it reflect the reasons for his inability to obtain the appellate record or to present a *pro se* brief before this Honorable Court on direct appeal. This is an unresolved contested issue of fact which requires a hearing.

The Texas courts have failed to provide the Petitioner with a hearing to present this evidence, even though such a hearing is expressly required by TEX. CODE CRIM. PROC. ANN. art. 11.07 (2) (c) & (d). The instant executinon date should be stayed so that the Petitioner can have an opportunity to fully present these compelling legal and factual issues to this honorable Court.

Respectfully submitted,

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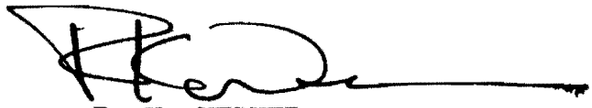
CERTIFICATE OF SERVICE

A copy of this Motion has been forwarded to Mr. William C. Zapalac, Assistant Attorney General, Enforcement Division, 200 W. 14th Street, Supreme Court Building, Sixth Floor, Austin, Texas 78711 and to Mr. Christopher Vasil, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543.

SIGNED this 1st day of December, 1989.



R. K. WEAVER