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IN THE
COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS,
AUSTIN, TEXAS

CARLOS DELUNA,
PETITIONER
VS.

THE STATE OF TEXAS,
RESPONDENT

On Appeal From Denial of Writ of Habeas Corpus
From the 28th Judicial District Court,
Nueces County, Texas

MOTION FOR STAY OF EXECUTION

THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS, STATE
OF TEXAS:

CARLOS DELUNA prays that an order be entered
staying the execution of his death sentence scheduled to be
carried out for a time before sunrise on the 15th day of

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October, 1986, pending a hearing on an Application for Writ of Habeas Corpus filed October 8, 1986, in the 28th Judicial District Court of Nueces County, Texas, and denied October 9, 1986, without hearing. In support, the Petitioner would show:

I.

CARLOS DELUNA was convicted of capital murder and sentenced to death by a Texas jury on the 15th day of July, 1983, in the 28th Judicial District Court of Nueces County, Texas, in Cause No. 83-CR-149-A.

II.

The Court of Criminal Appeals of Texas affirmed the conviction and sentence of the Petitioner in Cause No. 69,245 in an En Banc Opinion delivered June 4, 1986. A copy of that Opinion is attached to this Motion as Appendix A. Petitioner's court-appointed attorney on appeal did not file a Motion for Rehearing in the Court of Criminal Appeals of Texas, and did not seek an Application for Writ of Certiorari 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 Certiorari was filed on October 8, 1986. The Supreme Court will be meeting to determine this issue on October 10, 1986, but it is anticipated that the stay will be denied because the issues to be presented have not been litigated in State Court.

III.

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 hearing on that Writ of Habeas Corpus. The Writ of Habeas Corpus raises substantial issues as pointed out below that are of constitutional dimension that were not litigated in the trial court at the time of the original trial, was not raised upon appeal to the Court of Criminal Appeals of Texas, and no evidentiary hearing has been granted in any court to determine the validity of these issues. That on October 9, 1986, the trial court in the 28th Judicial District Court, Nueces County, Texas, denied Petitioner the opportunity of an evidentiary hearing, denied his Application for Writ of Habeas Corpus without hearing, and denied the Stay of Execution.

IV.

Absent the granting of a Stay of Execution by this Court, Petitioner will be executed by lethal injection on the 15th day of October, 1986, before he has had an opportunity to present to this Court the substantial constitutional issues in his case, which include:

- (A) Prosecutorial discretion in determining which cases in which to seek the death penalty is discriminatory based upon the race of the victim in violation of the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution and Article 1, Sections 3, 3a, 10, 15, and 19. Petitioner is an hispanic male. The victim of the offense as listed by autopsy records is white female. Evidence will be adduced that will show prosecutions in Nueces County, Texas, in which the decision to seek the death penalty is invoked is based upon the race of the victim to a statistical certainty. The United States Supreme Court has before it a similar issue in McCluskey v. Kemp, No. 84-6811 and Hitchcock v. Wainwright, No. 85-6756, to be argued before this Court on October 15, 1986.

(B) Petitioner was denied effective assistance of counsel at trial in violation of his rights under the Sixth and Fourteenth Amendments, United States Constitution, Article 1, Section 3, 3a, 10, 15, and 19. Petitioner will show in evidence adduced that he was denied effective assistance of counsel under the standards of Strickland v. Washington, 466 U.S. 1105, 104 Sup.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 organicity as a result of substance abuse to mitigate punishment.

(3) Counsel at trial failed to thoroughly investigate an alternative hypothesis concerning an assailant other than Petitioner even when provided with a name and location of the assailant and information concerning similarities between Petitioner's appearance and the alternative assailant.

(4) Trial counsel failed to adequately investigate an alternative assailant and to use technology such as spectroscopic voice identification techniques on a tape recording of the actual assault and offense to determine whether or not the voice on the tape was that of the Petitioner or another assailant.

(5) Trial counsel, all though being advised of numerous witnesses that this 21 year old

Petitioner had to present in mitigation of punishment, failed to put on a single witness at the punishment phase of the trial in mitigation of punishment.

(6) Trial counsel failed to preserve the testimony of Petitioner's most important witness although they had been advised that the witness was hospitalized, was near death, and that the testimony of the witness was absolutely critical to the defensive hypothesis of an alternative assailant.

(7) Trial counsel instructed Petitioner not to cooperate with court-appointed psychologist and psychiatrists for fear that the evidence would be used against Petitioner. Petitioner would show in this respect that Petitioner's lengthy history of substance abuse, if made known to the psychiatrist and psychologist appointed by the Court to evaluate Petitioner would have produced evidence in mitigation of punishment.

(C) Petitioner was denied effective assistance of counsel on the appeal of his conviction in violation of his rights under the Sixth and Fourteen Amendments, United States Constitution, and Article 1, Sections 3, 3a, 10, 15, and 19. Petitioner will show that even if the standards of Strickland v. Washington, 466 U.S. 1105, 104 Sup.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 effectively present to the Court of Criminal Appeals of Texas all the issues that were present at Petitioner's trial.

V.

A stay of execution is not requested for purpose of delay. No legitimate state end would be served by proceeding with the execution by lethal injection before the Petitioner has an opportunity to have the constitutional challenges to his conviction and sentence of death reviewed by this Court after an appropriate evidentiary hearing. That further, there exists no method by which Petitioner could have adequately presented his claim raising these issues by direct appeal to this Court and the only method by which he can establish the evidence necessary to support these issues is by ordering the trial court to hold an evidentiary hearing on original Application for Writ of Habeas Corpus under Article 11.07, Texas Code of Criminal Procedure.

The Petitioner respectfully requests an order staying his execution pending further order of this Court.

Respectfully submitted,

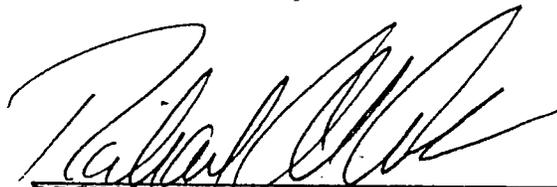


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CERTIFICATE OF SERVICE

A copy of this Motion has been forwarded to Mr. John Grant Jones, District Attorney of Nueces County, Texas, 901 Leopard, Corpus Christi, Texas, 78401 and to Ms. Paula Offenhauser, Assistant Attorney General, Supreme Court Building, Sixth Floor, Austin, Texas, 78711.

SIGNED this the 9th day of October, 1986.



RICHARD A. ANDERSON