

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FILED

DEC - 2 1989

JESSE E. CLARK, CLERK

CARLOS DELUNA,
Petitioner,

vs.

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

CIVIL ACTION NO. C-89-336

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 this
Honorable Court for relief from the Order dismissing the Petition
for Writ of Habeas Corpus entered December ____, 1989, and for
the reasons stated below would seek relief from this Order and
request a hearing on Petitioner's Application of Writ of Habeas
Corpus filed November 30, 1989. If this Motion for Relief is
denied, Petitioner requests a Certificate of Probable Cause pur-
suant to the provisions of 28 U.S.C. sec. 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
December ____, 1989.

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By [Signature]
Deputy Clerk

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into the instant Motion as if fully set out herein.

II.

In the alternative, and only in the event that this Honorable Court fails to grant relief from its Order of December ___, 1989, it is requested that this Court enter a Certificate of Probable Cause pursuant to the provisions of 28 U.S.C. sec. 2255 and Rule 22 (b) of the Federal Rules of Appellate Procedure. Petitioner would show that he has raised substantial federal issues in his appeal of the District Court's Order both as to the failure of the Court to hold a hearing to permit the Petitioner to establish what mitigating evidence existed at the time of trial but was not presented, as well as why that available mitigation evidence was not presented. These are precisely the same issues as are currently pending on certiorari in the United States Supreme Court in *Selvege v. Lynaugh*, No. 87-6700.

Further, Petitioner has established through his trial record below that he invoked his constitutional right to proceed on direct appeal *pro se*, and 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 review 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. 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 unconstitutionally 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 indulge every reasonable presumption 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 counsel and proceed *pro se*); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 122 (1984) (accused has constitutional right to proceed *pro se*). The trial court, in essence, lied to obtain a waiver, and such waiver cannot be considered a knowing and intelligent waiver of a previously invoked constitutional right. It is inconceivable that a trial judge should be permitted to lie to an indigent defendant

in order to obtain a waiver of his constitutional rights and have no court address this misconduct.

These claims are neither speculative nor frivolous; rather each claim is substantial, supported in the record or the attachments to the Writ of Habeas corpus and are supported by substantial legal precedent. Each of the claims raised in this Writ have merit and represent a substantial federal issue that should be reviewed by the Court of Appeals.

NOTICE OF APPEAL

If the Court denies the above Motion for Relief from its Order of December ___, 1989, the Petitioner herein gives notice of appeal to the United States Court of Appeals for the Fifth Circuit as to the Order and Judgment of the Court entered December ___, 1989.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays for an Order to open the hearing on the issues raised in Paragraph I and if such relief is denied, Petitioner files this Notice of Appeal and Request for Certificate of Probable Cause.

Respectfully submitted,



RICHARD KRISTIN WEAVER
SBN 21010850
404 EXPRESSWAY TOWER - LB35
6116 N. CENTRAL EXPRESSWAY
DALLAS, TEXAS 75206
1(214) 739-6464

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; Ms. Amanda Vockroth, United States Court of Appeals, 500 Camp Street, New Orleans, LA, 70130; and Mr. Christopher Vasil, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543.

SIGNED this 18th day of December, 1989.


R. K. WEAVER

CERTIFICATE OF CONFERENCE

Prior to the filing of this Motion, I had a phone conversation with Mr. William C. Zapalac, Assistant Attorney General, who stated that he would respond to the Motion when filed.


R. K. WEAVER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

DEC 4 1989

Jesse E. Clark, Clerk

By Deputy: *M. Baller*

CARLOS DeLUNA,
Petitioner,

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v.

C.A. NO. C-89-336

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPT. OF CORRECTIONS,
Respondent.

COURT OF APPEALS
FILED

DEC 4 1989

GILBERT E. GANUCHEAU

ORDER

Petitioner has moved for a certificate of probable cause, and has made notice of appeal. Having considered the motion in all respects, the Court finds that it should be granted as follows.

Petitioner is hereby granted a certificate of probable cause to appeal this Court's order of December 2, 1989, denying petitioner's application for writ of habeas corpus and denying his application for stay of execution to the United States Court of Appeals for the Fifth Circuit in New Orleans.

ORDERED this 4 day of December, 1989.

HW Head

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE