

NO. \_\_\_\_\_

IN THE  
COURT OF CRIMINAL APPEALS  
IN AUSTIN, TEXAS

EX PARTE  
CARLOS DELUNA

IN THE 28TH JUDICIAL  
DISTRICT COURT OF NUECES  
COUNTY, TEXAS IN CAUSE  
NO. 83-CR-194-A

PETITIONER'S OBJECTIONS TO TRIAL COURT'S  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Carlos DeLuna, Petitioner in the above-styled and numbered cause, by and through his attorneys of record, R. K. Weaver and Richard A. Anderson, and respectfully objects to the proposed findings of fact and conclusions of law submitted by the State of Texas in this cause, and in support thereof, would respectfully show this Honorable Court as follows:

I.

On November 2, 1989, the Petitioner filed an Application for Writ of Habeas Corpus and Memorandum of Law in Support of Application for Writ of Habeas Corpus. In addition, Petitioner filed an Application for Stay of Execution and Memorandum of Law in Support of Application for State of Execution. Petitioner is currently under sentence to be executed before sunrise on December 7, 1989.

APPELLANT'S OBJECTIONS TO PROPOSED FINDINGS - PAGE 1 COURT OF CRIMINAL APPEALS

**RECEIVED IN**

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Thomas Lowe, Clerk

## II.

On November 22, 1989, Petitioner received the Trial Court's Findings of Fact. No Conclusions of Law were made. Petitioner would specifically object to these proposed findings of fact and conclusions of law for the reasons set forth below:

1. Findings of Fact #7 & 8: Both doctors interviewed the Appellant for the purpose of determining if there was a legal defense: insanity or incompetency. Both concluded that he clinically tested out with a low IQ. Both opined that he was faking it, however, such an opinion is inconsistent with their clinical findings and at the most would constitute a fact issue for the jury to resolve upon proper instructions. As fact finders, the jury would have been free to believe or disbelieve any, all, or part of the report. Without proper instructions, however, there was no way the jury could apply the information if they chose to believe it. This is classical Penry material.

2. Findings of Fact #11 & 12. This finding is not supported in the trial record. While the judge did advise the Petitioner of the dangers of self-representation, the Petitioner continued to insist on self-representation. The Appellant stated his express desire to represent himself, but acquiesced in having Mr. Lawrence assist in the representation. See pages 45-46, 48 of record of Motion for New Trial hearing (attached as Appendix A). Further, the Court, in an effort to get the Petitioner to agree to permit appointment of Mr. Lawrence on appeal misinforms the Petitioner that if he will permit Mr. Lawrence to represent him, he [the Petitioner] will have the right to read the record and file his own brief. See record at page 48 (attached as Appendix A) This of course is hybrid representation and is not the law in Texas. See, e.g.: *Rudd v. State*, 572 S.W.2d 718 (Tex. Crim. App. 1979); *Landers v. State*, 550 S.W.2d 272 (Tex. Crim. App. 1976). If the Petitioner did agree to accept Mr. Lawrence, it was on the basis that Mr. Landers would assist the Petitioner in reviewing and presenting a *pro se* brief on appeal and that he would get to review the record and file his own brief. That, of course, didn't happen. This finding of fact takes the agreement out of context and ignores the fact that the judge misrepresented the law in order to coerce the Petitioner into agreeing to the appointment. Further, Petitioner was not permitted to review the record and file

his own pro se brief. Being confined in jail, and being represented by Mr. Lawrence, Petitioner had no reasonable means of enforcing his expectations of pro se representation.

Where the court affirmatively misrepresents the Petitioner's rights to pro se representation in an effort to obtain a waiver of his demand to appear on appeal pro se, the State cannot logically argue that the Petitioner intelligently waived his demand to proceed pro se. The Trial Court's Findings of Fact with regard to this issue are incomplete, out of context and misrepresent the true state of the alleged acceptance of counsel on appeal after asserting the right to proceed pro se.

3. Finding of Fact #14. The Petitioner, in his Application for Writ of Habeas Corpus, expressly states that there was mitigating evidence available at the time of the trial; the State, in its response, asserts that there was no mitigating evidence available at the time of the trial. The Petitioner asserts that at all times he desired to represent himself on appeal, to review the appellate record and to file a pro se brief on appeal. The State asserts that the Petitioner did not desire to represent himself on appeal. These are controverted, previously unresolved questions of fact which this Honorable Court must resolve. See: TEX. CODE CRIM. PROC. ANN. art. 11.07 (2)(c). If the Court determines that there are controverted, unresolved fact issues, then this Honorable Court must set the case for a hearing on these issues. TEX. CODE CRIM. PROC. ANN. art. 11.07 (2)(d).

### III.

The Findings of Fact either totally ignore the attachments to the Petitioner's Application for Writ of Habeas Corpus or misrepresent their contents. While the Court addresses a portion of the doctor's reports, it ignores the remainder of the report, specifically, it ignores the mitigating portion of the report. Further, the Court ignores the offense reports, Appendicies V and W which show a history of drug and alcohol related arrests. Finally, it ignores the affidavits contained in Appendicies C through U which show friends and realitives who were ready and

able to present further mitigating evidence.

Additionally, the Court's finding concerning waiver of the right to proceed *pro se* on appeal take portions of the record out of context and ignore the erroneous assurances given by the trial judge to the Petitioner in order to obtain the alleged waiver of his demand to proceed *pro se*. Further, those findings ignore the fact that the Petitioner was not in fact afforded an opportunity to review the appellate record and file his own *pro se* brief on direct appeal.

The Findings of Fact totally fail to address the underlying issues presented by Appellant in his application for Writ of Habeas Corpus, namely: whether mitigating evidence existed at the time of the Petitioner's trial, and if so, why that evidence was not presented at the Petitioner's trial, and further, how the United States Supreme Court's opinion in Penry vs. Lynaugh will be applied to cases which were tried before that Court determined that the Texas death penalty scheme was unconstitutional where there was mitigation evidence. This Writ presents new and difficult issues which have not yet been decided by any Court in Texas; the trial court has failed to make any Conclusions of Law concerning the issues presented by the Petitioner in his Writ of Habeas Corpus. It is respectfully submitted that the Court has a duty to address the issues actually presented in the Petitioner's Application for Writ of Habeas Corpus, namely: whether mitigation

evidence existed at the time of the Petitioner's trial, and if so, why that evidence was not presented at the trial, and further, how to apply Penry in a case tried before Penry was decided. The Findings of Fact should be addressed to answering this question. It is respectfully submitted that the Memorandum of Law filed in support of the Petitioner's Application for Writ of Habeas Corpus adequately addresses this issue and any Findings of Fact should track that memorandum, or at a minimum, explain why the authority cited by Petitioner will not apply.

#### IV.

There are unresolved, contested issues of fact, namely: whether there was mitigation evidence which was available at the time of trial but which was not presented; why that mitigation evidence was not presented at trial; whether the Petitioner desired to represent himself on appeal *pro se*; whether he waived the demand to represent himself on appeal *pro se*; whether any such waiver was as a result of the misrepresentations concerning the appellate process made by the then trial judge; what, if any, expectations the Petitioner had concerning being provided with a copy of the appellate record, and opportunity to review that record, and to file a *pro se* brief; whether those expectations were in fact met; whether the waiver at issue was a knowing and intelligent waiver of an asserted constitutional right or a constitutionally invalid waiver elicited by an intentional misrepresentation of the law and the Petitioner's appellate

rights by the trial judge.

These issues are surely disputed by the Petitioner and the State. They cannot be resolved by reference to the trial record; the trial record reflects what happened at trial, not what was available to be presented but was reserved, why some evidence did not get presented in the trial court, and what in fact transpired concerning the Petitioner's demand for the opportunity to review the appellate record and file a *pro se* brief on direct appeal to this Honorable Court. The existence or nonexistence of these facts would directly effect the legality of the Petitioner's current confinement. TEX. CODE CRIM. PROC. ANN. art. 11.07 (2)(c) & (d) place a duty on the Court to set this case for a hearing, to elicit testimony or other evidence on these unresloved, contested issues of fact, and to make findings of fact relating to these factual disputes. Further, the trial court has the duty to make conclusions of law concerning the legal issues presented by the Petitioner.

**PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** the Petitioner respectfully prays that the proposed Findings of Fact be rejected, that this case be remanded to the trial court with instructions to set the case for a hearing on the unresolved, contested issues of fact presented in the Petitioner's Application for Writ of Habeas Corpus and the State's Response thereto, and after said hearing, that the Court make responsive

Findings of Fact and Conclusions of Law to be forwarded, along with a complete record, to the Court of Criminal Appeals.

Respectfully submitted,



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

*OF COUNSEL:*

RICHARD ALAN ANDERSON  
SBN 01207700  
ONE QUADRANGLE TOWER  
2828 ROUTH STREET  
SUITE 850  
DALLAS, TEXAS 75201  
1(214) 871-1133

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 on November 24, 1989.

SIGNED this the 17th day of November, 1989.

A handwritten signature in black ink, appearing to read 'R. K. Weaver', written over a horizontal line.

R. K. WEAVER

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NO. 83-CR-194-A

THE STATE OF TEXAS           X       IN THE DISTRICT COURT  
VS.                               X       28TH JUDICIAL DISTRICT  
CARLOS DE LUNA                X       NUECES COUNTY, TEXAS

STATEMENT OF FACTS

HEARING ON MOTION FOR NEW TRIAL

BEFORE:                   HON. WALLACE C. MOORE  
                              Sitting for the  
                              28th District Court  
                              Nueces County Courthouse  
                              Corpus Christi, Texas 78401

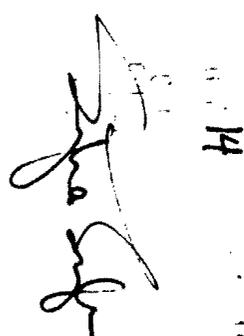
JUDGE PRESIDING

APPEARANCES:   Nueces County District Attorney's Office  
                              Nueces County Courthouse  
                              Corpus Christi, Texas 78401

BY:   STEVE SCHIWETZ

COUNSEL FOR THE STATE

MR. JAMES R. LAWRENCE  
Attorney at Law  
P. O. Box 8365  
Corpus Christi, Texas



-and-

MR. HECTOR DePENA, JR.  
Attorney at Law  
2933 Norton Street, Suite 207  
Corpus Christi, Texas 78415

COUNSEL FOR THE DEFENDANT

**FILED IN**  
**COURT OF CRIMINAL APPEALS**

FEB 9 1984

Thomas Lowe, Clerk

ORIGINAL

VOLUME XIV OF  
SIXTEEN VOLUMES

1 accept it.

2 Mr. Lawrence, are you willing to accept?

3 MR. LAWRENCE: If it's a straight appeal  
4 where I have the right to be the lead on it, yes, Your  
5 Honor. And then after I submit my brief, he can write  
6 his pro se, yes, sir.

7 THE COURT: And I'm certain you would work  
8 with him through the entire appellate process.

9 MR. LAWRENCE: I have with other clients. I  
10 see no problem here.

11 THE COURT: Is there any objection -- do you  
12 have any objection to that, Mr. De Luna? And you will  
13 still be given a right, you know, to read the record  
14 and file your own brief, if you don't like the one Mr.  
15 Lawrence does. But let him do that first and you read  
16 his and if you don't like it, then you file your own.

17 THE DEFENDANT: Also, I have filed a motion,  
18 sir, in the court about getting transcripts. Has it  
19 been denied or granted?

20 THE COURT: No, of course it's granted.

21 THE DEFENDANT: It's automatically granted.

22 THE COURT: Certainly.

23 THE DEFENDANT: I will go ahead and accept Mr.  
24 Lawrence, then.

25 THE COURT: I would appreciate it. All right.

1           THE COURT: You have asked in your motion that  
2 I appoint a man named Jimmy Hernandez to represent you.  
3 That's overruled.

4           THE DEFENDANT: Oh, no, sir, I didn't --

5           THE COURT: I know you were just copying  
6 Hernandez's brief that he filed in the El Paso court.  
7 I understand that. But that's what your -- your prayer  
8 closes with in that motion.

9           THE DEFENDANT: Okay.

10          THE COURT: And you see, a lawyer wouldn't  
11 have done that, see? Jimmy Hernandez was a prisoner.

12          THE DEFENDANT: Yes, I know that.

13          THE COURT: And you have asked that I appoint  
14 him just because --

15          THE DEFENDANT: No, sir, I made a mistake  
16 because I told Mr. Lawrence that --

17          THE COURT: That's what I'm saying. If you  
18 have a lawyer that makes a mistake, you see, then you  
19 can claim ineffective assistance of counsel. If you  
20 make a mistake representing yourself, that goes out the  
21 window. You don't get that right.

22          THE DEFENDANT: Yes, sir, I know that.

23          THE COURT: You're giving it up. So will you  
24 please, for me, do this for yourself, accept Mr.  
25 Lawrence. I haven't asked him if he's willing to

1           THE DEFENDANT:  Sir, if you notice this --  
2 this thing Mr. DePena has filed is for Court-appointed  
3 co-counsel, which is Mr. Lawrence, also for -- appointed  
4 for psychiatric exam, psychiatric evaluation.

5           THE COURT:  Yes.

6           THE DEFENDANT:  That's the only motion I've  
7 seen from Mr. --

8           THE COURT:  Don't you think that was a very  
9 important motion to file at that step in the proceed-  
10 ings?

11          THE DEFENDANT:  No, sir.  I don't feel Mr.  
12 DePena has --

13          THE COURT:  Well, no, the point is if -- if  
14 you're not satisfied with either attorney, I will re-  
15 lieve them of any further responsibility in this case,  
16 but I'm begging you to please accept either these  
17 gentlemen or one of them or someone else to help you on  
18 appeal.  And it would be my advice, if you wish to take  
19 it, that you do select a lawyer who tried the case,  
20 because he is familiar with it.  It adds a continuity  
21 to his entire trial tactic.

22          THE DEFENDANT:  The only way, sir, I will take  
23 a lawyer is if -- if he is just there to assist me if  
24 I need assistance, that's the only way I'll take one or  
25 not.  I don't want one.

1 on appeal for you? And are you -- and would -- and  
2 would you accept Mr. Lawrence as your attorney on  
3 appeal?

4 THE DEFENDANT: Well, --

5 THE COURT: I'm not forcing you, now, to take  
6 any lawyer, but you need one very, very badly. You're  
7 in a very severe circumstance now, a death penalty has  
8 been --

9 THE DEFENDANT: Is there any way, sir, I can  
10 try to defend myself and have Mr. Lawrence there at the  
11 time if I need help, assistance for him to help me?

12 THE COURT: Yes. But I would rather give him  
13 the lead in it and let you assist him in the matter,  
14 and you can look through all of these records, you have  
15 a right to it, and the record, the complete record that  
16 this Court Reporter made during the entire trial, you  
17 have a right to read that, and if you're not satisfied  
18 with the brief that Mr. Lawrence files, you have a  
19 right to file a pro se brief, a brief of your own, you  
20 see. I am not denying you any rights, but I'm begging  
21 you to please let a lawyer do it and work with him on  
22 it. Would you be agreeable to that? I don't want you  
23 to represent yourself on appeal because you won't be  
24 fairly represented. Would you be agreeable to doing  
25 that?

1 Hector DePena, Jr. If you can see -- you see in the  
2 files there this is the first motion he's filed in the  
3 thing since he's been my attorney.

4 THE COURT: No, that's not true.

5 THE DEFENDANT: Why don't you check on it, sir.

6 THE COURT: I have.

7 THE DEFENDANT: And you see more motions Mr.  
8 DePena has filed?

9 THE COURT: You bet I have.

10 THE DEFENDANT: Is there any way I can see  
11 them, sir?

12 THE COURT: Certainly. Just leaf through  
13 there and look at the motions that have been filed in  
14 the case.

15 Let me simply ask you this since you have  
16 made that -- that query concerning Mr. DePena. Are  
17 you satisfied with the other counsel in this matter?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Would it be agreeable with you  
20 that I leave him on the case, then, appoint him to rep-  
21 resent you on appeal and you could work together on it?

22 THE DEFENDANT: Yes, sir. It would.

23 THE COURT: All right. From what I have ex-  
24 plained to you this morning, does that -- does that,  
25 then, change your mind as to some effective assistance

1 THE DEFENDANT: No, sir.

2 THE COURT: What is your financial status?  
3 How much money do you have? Do you have any money or  
4 ready assets of any kind or property that can be con-  
5 verted into money?

6 THE DEFENDANT: No, but I got a -- I've got  
7 family that might be able to do that.

8 THE COURT: Is there any question now that  
9 you are entitled, as a matter of law, to not only  
10 counsel, but effective counsel? If you can't do these  
11 things that I'm outlining to you, that you have a right  
12 to have a lawyer represent you and I will be happy to  
13 appoint one for you, keep these gentlemen on the case.  
14 Because, first of all, they have tried the case.  
15 They remember the testimony and the evidence that this  
16 Court Reporter was writing down. They made any number  
17 of objections during the trial. They know where to go  
18 back now to pick up those errors, if there were errors,  
19 and my rulings on their admissibility. And they are  
20 thoroughly familiar with the case.

21 THE DEFENDANT: If I might say something, sir.  
22 Mr. James Lawrence has -- he's done a good job, he's  
23 represented me all right.

24 THE COURT: Yes, he has.

25 THE DEFENDANT: But I cannot say that for

1 prison and got out and came here and began working in  
2 construction.

3 THE COURT: What does your family consist of,  
4 Mr. De Luna?

5 THE DEFENDANT: Sir?

6 THE COURT: What does your family consist of?  
7 Mother, father, wife, children, what?

8 THE DEFENDANT: I don't understand what you're  
9 saying.

10 THE COURT: No, what -- do you have a family?

11 THE DEFENDANT: Oh, I've got a family, yes,  
12 sir.

13 THE COURT: What is it?

14 THE DEFENDANT: What are they?

15 THE COURT: Yes.

16 MR. DePENA: What do they consist of?  
17 Brother, sister --

18 THE DEFENDANT: Brother, sister.

19 THE COURT: Mother and father?

20 THE DEFENDANT: Yes, sir.

21 MR. DePENA: Mother?

22 THE COURT: Mother, father?

23 THE DEFENDANT: (Witness nods head affirma-  
24 tively.)

25 THE COURT: Okay. Ever in the military?

1 THE COURT: Or do you have any questions con-  
2 cerning any of it?

3 THE DEFENDANT: No, I ain't got no questions  
4 concerning that.

5 THE COURT: Do you read and write the English  
6 language?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Have you ever been a patient in a  
9 mental hospital or treated psychiatrically for mental  
10 illness?

11 THE DEFENDANT: No, sir.

12 THE COURT: How have you been employed since  
13 you left school?

14 THE DEFENDANT: Well, a lot of different jobs  
15 mostly, you know. Do you want to know what kind of job  
16 or something like that?

17 THE COURT: Yeah.

18 THE DEFENDANT: Since I left school?

19 THE COURT: Uh-huh. Generally, -- well, in  
20 what field did you work?

21 THE DEFENDANT: Well, at one time I was an  
22 assistant manager of Whataburger on Weber Road, on  
23 Weber, in Corpus. Then after that I went to Dallas,  
24 where I was an assistant manager also at Whataburger  
25 there. Then from there I got in trouble and went to

1 evidence and you don't know the rules of evidence, and  
2 wouldn't know an error if you saw it in the record, and  
3 you could not point it out to the Court of Criminal  
4 Appeals and point it out as an error and state a reason  
5 for it. You couldn't cite any cases for your position  
6 in the matter, and if you don't recognize an error,  
7 then you pass it, unless it's fundamental.

8           And, of course, on appeal now, if you repre-  
9 sent yourself on appeal, you are precluding yourself  
10 from later depending upon effective assistance of  
11 counsel, which you're entitled to as a matter of Con-  
12 stitutional rights, and you could not represent your-  
13 self and then later claim that, well, you were in-  
14 effective, so you give up that right, in the first  
15 place, all right?

16           And in the same sense, you're giving up the  
17 guarantee of effective assistance of counsel because  
18 that's essential to a fair trial and that also applies  
19 to the appellate process. Now, do you understand what  
20 I have told you with reference to your right to effect-  
21 ive assistance of counsel?

22           THE DEFENDANT: Yes, sir.

23           THE COURT: And do you understand what I have  
24 told you concerning all I have said up to now?

25           THE DEFENDANT: Yes, sir.

1 formal admonition and instructions to the Defendant on  
2 representing himself. And while most of these have to  
3 do with representation on the trial on its merits, I  
4 don't know of any case dealing with the appellate  
5 process and a defendant who is unlearned in the law and  
6 doesn't know anything about the time frame within when  
7 he is required to work and all of these things, but  
8 insofar as these admonitions go and do pertain to the  
9 appellate process, I just simply wish to, first of all,  
10 advise him that I think he is making a mistake; that  
11 he is not prepared and his decision to represent him-  
12 self is not informed or intelligent; and the same rules  
13 that apply to an attorney representing you, Mr. De Luna,  
14 apply to you, whether you know those rules or not, you  
15 see, and you don't know those rules and you will receive  
16 no special favors or assistance from -- from me in  
17 doing that. I will treat you like any other lawyer,  
18 and you must file your briefs and -- and any objections  
19 to the record on time and you will have to comply with  
20 all the relevant rules of procedure and law in carry-  
21 ing out the appeal.

22 I'm just going down the check list and see  
23 which ones I think pertain to the appellate process.  
24 One, certainly in reading the record and checking it  
25 for errors, you will be expected to know the rules of

1 mean, you know.

2 MR. LAWRENCE: I realize that, Your Honor, and  
3 in the interim, since we have been here this morning  
4 and here early this afternoon, and talking to Mr.  
5 De Luna, he has, in effect, told me that he wants to  
6 reurge his motion and to represent himself on appeal.  
7 And we have discussed this and he continuously -- con-  
8 tinues to believe that that's what he wants to do, and  
9 that he expresses the fact that he has more time avail-  
10 able to him to do the research and to do this appeal.  
11 I would point out to the Court that certain errors or  
12 what we deem errors have been brought forth and I par-  
13 ticularly feel that -- that as an attorney, I think I  
14 could do something personally with these points of  
15 error, and I hope if he wants to represent himself, he  
16 follows up on these points and any other thing that he  
17 may get in the transcript, but he has been made aware  
18 of this, Your Honor.

19 THE COURT: All right. Excuse me for just one  
20 second.

21 (At this time there was a brief recess,  
22 after which time the following pro-  
23 ceedings were had:)

23 THE COURT: Just in an over-abundance -- you  
24 may have your seat. -- an over-abundance of caution,  
25 I'm going through the -- the whole nine yards of the

APPENDIX B

NO. 83-CR-194-A

EX PARTE  
CARLOS DeLUNA,  
Applicant

IN THE 28TH DISTRICT COURT  
OF  
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

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  
OSCAR SOLIZ, DISTRICT CLERK OF NUECES COUNTY  
I 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  
record in Vol. CM 15, Page          Criminal Minutes of  
No. 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  
*[Signature]*

*[Signature]*  
ERIC G. BROWN  
28TH DISTRICT COURT  
NUECES COUNTY, TEXAS

**RICHARD KRISTIN WEAVER**  
ATTORNEY AT LAW  
BOARD CERTIFIED - CRIMINAL LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

*For Your Information*

6116 N. CENTRAL EXPRESSWAY  
SUITE 404, LB 85  
DALLAS, TEXAS 75206

OFFICE (214) 739-6464  
HOME (214) 823-8159

November 24, 1989

The Hon. Thomas Lowe  
Clerk, Texas Court of  
Criminal Appeals  
P. O. Box 12308  
Capital Station  
Austin, Texas 78711

Re: Ex parte Carlos DeLuna

Mr. Lowe:

Enclosed herein please find the original plus ten (10) copies of the Petitioner's Objections to Trial Court's Findings of Fact and Conclusions of Law. These documents are tendered for filing in the Court of Criminal Appeals. Please bring this matter to the attention of the Court immediately. The Petitioner is currently sentenced to be executed on December 7, 1989.

Very truly yours,

**COPY**

R. K. Weaver

KW:ps  
enclosures

cc: The Hon. Grant Jones  
District Attorney  
Nueces County Courthouse  
901 Leopard Street  
Corpus Christi, Texas 78401

The Hon. Amanda K. Vockroth  
Deputy Clerk  
United States Court of Appeals  
600 Camp Street  
New Orleans, LA 70130