NO.

EX PARTE	§	IN THE 28th DISTRICT COURT
	§	
CARLOS DeLUNA,	§	OF
	§	
Applicant	§	NUECES COUNTY, TEXAS

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, 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. Applicant expressly waived his objection that charge did not contain an instruction on consideration of mitigating evidence (R. XII:51). Thus, Applicant's objections to the charge at trial are not the same as those he makes in this application.

6. 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).

7. DePena interviewed family members and friends and was informed that Applicant had displayed symptoms of possible mental disorders; accordingly, he requested that Applicant be examined by a psychiatrist (Tr. 18-19).

8. 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).

9. 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).

10. None of the tests disclosed any signs of organic mental impairment, nor did they uncover evidence of impairment arising from any type of substance abuse. Applicant has presented no competent evidence of any sort that the evaluations of Drs. Kutnick and Plaisted were inaccurate, nor has he presented any evidence that he suffers from any form of mental impairment or disability.

11. No evidence was presented at trial concerning Applicant's alleged history of drug and alcohol abuse, troubled youth, or limited mental capacity.

12. Nothing in the record supports Applicant's assertion that counsel felt precluded by the Texas capital sentencing statute from introducing the kind of evidence referred to in No. 11; rather, the record affirmatively demonstrates that such evidence did not exist.

13. Applicant has presented nothing in his habeas corpus application to support his contentions that there was at the time of trial mitigating evidence of the kinds listed in No. 11, supra.

14. In particular, Applicant's juvenile arrest records for paint sniffing do not show any impairment of mental capacity that would have reduced Applicant's personal moral culpability for his crime, and the mental testing performed prior to trial failed to detect any such impairment. There is no evidence that Applicant was under the influence of any intoxicants at the time of the murder that would have reduced his culpability for his crime.

15. Further, the affidavits from friends and family members attached to the application for writ of habeas corpus reveal that Applicant's childhood and teenage years were generally happy, and that he was surrounded by loving relatives and friends. They do not depict the "troubled youth" he now asserts he experienced.

16. The evidence from the mental examinations and the affidavits attached to the application demonstrate that Applicant has at least average, and probably much better, mental ability.

17. Applicant identifies no evidence offered in mitigation of punishment at the time of trial that the jury could not adequately address without special instructions in answering the punishment issues.

18. 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.

19. At the hearing on the 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).

20. 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.

21. 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). No claim is made that Applicant was not provided a copy of counsel's brief or given an opportunity to file a pro se brief.

22. Applicant did not file a pro se brief on appeal.

23. No hearing is needed inasmuch as Applicant raises only legal issues that can be resolved from the record.

CONCLUSIONS OF LAW

1. Applicant's failure to object to the Texas capital sentencing statute on the grounds now urged bars consideration of his claim that the statute precludes consideration of mitigating evidence unless the jury is specially instructed. **Fierro v. State**, 706 S.W.2d 310, 318 (Tex.Crim.App. 1986); **see also Fierro v. Lynaugh**, 879 F.2d 1276, 1281-82 (5th Cir. 1989). **See also Ex parte Paster**, No. 15,995-03 (Tex.Crim.App. September 19, 1989).

2. Alternatively, even if review of Applicant's claim were not procedurally barred, Applicant has not produced any evidence that counsel would have felt precluded from investigating or

introducing if it had in any way reduced his personal moral culpability for his crime.

3. The Texas death-penalty scheme did not unconstitutionally preclude the presentation of evidence of a history of alcohol and drug abuse, troubled youth, or low mental capacity if such evidence had existed.

4. Applicant in this writ application makes no allegation supported by the record that the mitigating value, if any, of the evidence presented to the jury in his case was not fully encompassed in the Texas capital sentencing statute; thus, the application raises no issue under **Penry v. Lynaugh**, ___ U.S. ___, 109 S.Ct. 2934 (1989).

5. Counsel reasonably refrained from calling friends and relatives to testify at the punishment phase of trial about Applicant's good character. Such testimony, as reflected in the affidavits attached to the application, is wholly at odds with all of the other testimony about Applicant and ignores the facts of his previous convictions. Cross-examination of the witnesses would have permitted the state to emphasize again the brutal facts of the crime and Applicant's prior record. Counsel could have reasonably concluded that any mitigating aspect of the testimony did not lessen Applicant's personal moral culpability for his crime such that a juror would have felt that a life sentence was more appropriate than the death penalty.

6. The trial court was not bound to accept any waiver of the right to counsel and assertion of the right to self-representation made by Applicant when it was shown that

Applicant lacked the understanding necessary to handle his appeal, and did not appreciate the dangers of acting pro se. Johnson v. State, 760 S.W.2d 277, 278-79 (Tex.Crim. App. 1988).

7. To the extent that his initial request could be considered a waiver of his right to counsel, Applicant withdrew that waiver when he recognized the dangers to his case in his proposed course and agreed to accept the appointment of James Lawrence to represent him on appeal.

8. Applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that all requested relief be denied.

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 _____ day of November, 1989.

ERIC G. BROWN
28th District Court
Nueces County, Texas