NO. 89-6262

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CARLOS DeLUNA,

Petitioner-Appellant,

v.

**JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**

Respondent-Appellee.

On Appeal From The United States District Court
For The Southern District Of Texas
Corpus Christi Division

**RESPONDENT-APPELLEE'S MOTION TO EXPEDITE THE APPEAL
AND OPPOSITION TO PETITIONER'S
APPLICATION FOR STAY OF EXECUTION**

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent-Appellee, by and through the Attorney General of Texas, and files this **Motion to Expedite the Appeal and Opposition to Petitioner's Application for Stay of Execution.**

III.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent has lawful and valid custody of Petitioner, hereinafter "DeLuna", pursuant to a judgment and sentence of the 28th Judicial District Court of Nueces County, Texas, in Cause No. 83-CR-194-A, styled **The State of Texas v. Carlos DeLuna.** DeLuna was indicted for the February 4, 1983, murder of Wanda Lopez while in the course of committing and attempting to commit robbery, a capital offense. He pleaded not guilty to the indictment and was tried by a jury. Trial began on July 15, 1983, and the jury found DeLuna guilty of capital murder on July 20, 1983. After a separate hearing on punishment, the jury returned affirmative answers to the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1989). Accordingly, DeLuna's punishment was assessed at death by lethal injection. His conviction and sentence were affirmed on direct appeal on June 4, 1986. **DeLuna v. State**, 711 S.W.2d 44 (Tex.Crim.App. 1986).

The trial court scheduled DeLuna's execution to take place before sunrise on October 15, 1986. DeLuna filed a motion for leave to file an out of time petition for writ of certiorari in the Supreme Court, which was denied on October 10, 1986. He then filed a request for stay of execution and an application for writ of habeas corpus in the state convicting court. On October 13, 1986, the Court of Criminal Appeals denied all requested relief. **Ex parte DeLuna**, No. 16,436-01. DeLuna immediately filed a

motion for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Corpus Christi Division. The court granted a stay of execution on October 14, 1986. On November 12, 1986, Respondent filed a motion for summary judgment. The court directed DeLuna to respond to the motion within ten days in an order dated December 15, 1986. After obtaining two extensions of time, DeLuna's response was filed on January 23, 1987. On June 13, 1988, the court issued its order denying habeas corpus relief. **DeLuna v. Lynaugh**, No. C-86-234 (S.D.Tex. 1988). DeLuna then filed a motion for relief from the order pursuant to Fed.R.Civ.P. 60(b) on June 29, 1988, along with an amended petition for writ of habeas corpus. On July 12, 1988, DeLuna sought leave to attach affidavits and other evidentiary material to his amended petition. The court denied the motion for relief from judgment on July 19, 1988.

After full briefing of the issues, this Court affirmed the district court's denial of relief. **DeLuna v. Lynaugh**, 873 F.2d 757 (5th Cir. 1989). Rehearing was denied on May 26, 1989. The Supreme Court denied the petition for writ of certiorari on October 10, 1989. **DeLuna v. Lynaugh**, ___ U.S. ___, 110 S.Ct. 259 (1989).

On November 2, 1989, the trial court scheduled DeLuna's execution to be carried out before sunrise on December 7, 1989. On the same day, DeLuna filed an application for writ of habeas corpus in the trial court. After reviewing the application, the state's answer, and DeLuna's response, the trial court entered

findings of fact and recommended that relief be denied. The Court of Criminal Appeals entered an order denying relief on November 29, 1989. **Ex parte DeLuna**, Application No. 16,436-02 (Tex.Crim.App. 1989). DeLuna filed a second petition for writ of habeas corpus in federal district court, along with an application for stay of execution. On December 2, 1989, the district court dismissed the third ground of the petition pursuant to Rule 9(b) of the Rules Governing §2254 Cases as an abuse of the writ, denied the first two claims on the merits, and denied the request for a stay of execution. On December 4, 1989, the district court granted DeLuna's request for certificate of probable cause to appeal. These proceedings followed.

B. Statement of Facts

On the night of February 4, 1983, George Aguirre was visiting his family in Corpus Christi, Texas. At approximately 8:00 p.m., while on his way to do some shopping, he stopped at a Shamrock service station on South Padre Island Drive (SF X 220-21).[1] While filling his van with gasoline, he noticed a man standing by the ice machine drinking a beer and holding an open knife (SF X 222-23). Because of the knife, Aguirre was apprehensive and kept a close watch on the man (SF X 223). The man put the knife in his pocket, approached Aguirre, and asked for a ride to the Casino Club. He offered Aguirre "money or drugs or, you

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[1]"SF" refers to the statement of facts from DeLuna's trial, followed by the volume and page numbers. "Tr." refers to the transcript of documents from DeLuna's trial.

know, whatever I needed, beer, anything" (SF X 225). Aguirre refused because he knew the man had a knife (SF X 226). When Aguirre went in to pay for the gas he told the female attendant that there was a man with a knife outside and he thought he would call the police. The attendant said she was going to call the police, too (SF X 226). As Aguirre left the station, he saw the man going inside (SF X 227). He drove up to the end of the block and turned around; as he passed the station, he saw the man and the attendant struggling inside the station (SF X 227). He stopped at a bowling alley and asked the security guard if he had a way to contact the police in a hurry. When the guard said he would have to call on the telephone like anyone else, Aguirre said "Forget it," and returned to the station. By that time, some one had already summoned the police and they had already arrived. Aguirre told the police what he had seen and gave a description of the man with the knife (SF X 228).

John Arsuaga testified that he and his wife passed the Shamrock station at about 8:00 p.m. on February 4, 1983 on their way to a nightclub. He noticed police cars at the service station and, as he was turning into the parking lot of the club, he saw a man jogging away from the service station (SF X 242-44). He was able to get a good look at the man as he passed in front of his headlights (SF X 244-46). Arsuaga thought there might be a connection between the police cars at the service station and the man running away so he went back and told the police what he had seen (SF X 247).

Kevan Baker stopped for gasoline at the Shamrock station on his way home from work shortly after 8:00 p.m. on February 4, 1983 (SF X 264). While he was putting gas in his car he heard a thump on the window. When he looked up he saw a man and a woman fighting (SF X 267). His first impression was that they were playing, "that was my first impression, boyfriend/girlfriend" (SF 268). He quickly realized that they were not playing and went to the door of the station (SF X 268-69). The man was coming out the door and, as they passed, he said to Baker, "Don't mess with me" (SF X 270). The man then ran off (SF X 270-71). The woman came to the door, said "Help me, help me," and collapsed just outside the building. She was bleeding profusely (SF X 274). Baker made sure she stayed lying down, then went inside to get some towels to try to stop the bleeding (SF X 275). The police were arriving when he got back outside and he told them what he had seen, including a description of the man who had been fighting with the woman (SF X 275-77).

Jesus Escocheo, Jr., was working the evening shift as a police dispatcher on February 4, 1983. At approximately 8:09 p.m., he received a call from a woman at the Shamrock station on South Padre Island Drive requesting police assistance (SF X 27-8). He responded by dispatching a patrol car (SF X 28). He continued receiving calls from the police after they arrived at the scene, putting out descriptions of the attacker (SF X 32-3), as well as telephone calls from private citizens who reported seeing a man running in the area (SF X 33-4).

Ruben Rivera was a deputy constable on February 4, 1983. He had been out serving papers in a civil case (SF X81-2). While returning, he heard a transmission on the police frequency about an armed robbery involving a shooting (SF X 83). In response to the call, he began searching for the suspect in the neighborhood behind the service station (SF X 85-6). He eventually spotted someone under a pick-up truck. He and a city police officer pulled the person out from under the truck and he was arrested (SF X 87-8).

Corpus Christi police officer Mark David Schauer was one of the officers who responded to the call at the Shamrock station on the night of February 4, 1983 (SF X 111-12). The supervising officer told him to search the area for the suspect (SF X 113). He soon encountered Constable Rivera who had located a person hiding under a pick-up truck (SF X 115-16). He assisted Rivera in pulling the person from under the truck and placed him under arrest (SF X 120). He identified DeLuna as the person he arrested (SF X 118). He found a wad of bills in DeLuna's front pants pocket, amounting to $149.00 (SF X 121). Officer Schauer then returned to the service station with DeLuna (SF X 127). George Aguirre viewed DeLuna and identified him as the man he had seen with a knife and who went into the station as he was leaving (SF X 229). Kevan Baker also identified DeLuna as the man he had seen fighting with the victim and who ran from the scene as Baker approached the station (SF X 277). John Arsuaga viewed a photo spread at the police station, picked DeLuna's picture out, and

identified it as being of the person he had seen running from the Shamrock station (SF X 248).

Pete Gonzales was the manager of the Shamrock station on South Padre Island Drive on February 4, 1983. He was called to the scene by the security company when the silent alarm was set off (SF X 163, 165). When he saw that there had been a robbery, he conducted an audit of the funds in the station and found that $166.86 was missing (SF X 169).

Dr. Joseph Rupp, the Nueces County Medical Examiner, conducted the autopsy on the victim. He discovered a stab wound in the chest that penetrated into the chest cavity and lung (SF X 209-10). As a result of the wound, blood amounting to approximately two liters had filled the chest cavity and caused the victim's death (SF X 210-11).

DeLuna testified in his own behalf. He stated that he had been let off work early on February 4, 1983, because of bad weather and had gone to cash his check (SF XI 412-13). Later in the evening his stepfather took him to a skating rink, where he was supposed to meet some friends (SF XI 415). His friends did not show up, but he saw some other people he knew, including Mary Ann Perales (SF XI 416). He also met another friend, Carlos Hernandez, and later went with him looking for a mutual friend (SF XI 416-17). Before they left to look for the friend, DeLuna called his stepfather to come pick him up. It was about 8:00 p.m. at that time (SF XI 417-18). Later he and Hernandez went to a bar near the Shamrock station on South Padre Island Drive. DeLuna went inside and Hernandez said he had to buy something at

the service station and would meet DeLuna in a few minutes (SF XI 419-20). When Hernandez did not return, DeLuna went outside and saw Hernandez inside the service station wrestling with the attendant (SF XI 421). When he heard police sirens approaching, DeLuna ran, fearing he would get into trouble because he was currently on parole (SF XI 421-22). He hid under a pick-up truck and was arrested a little later by the police (SF XI 422). He described Hernandez as looking similar to himself (SF XI 422-23).

On cross-examination, he identified Mary Ann Perales and stated that she looked the same way she had on the night of February 4, when he saw her at the skating rink (SF XI 430-31). In rebuttal, Ms. Perales testified that on the night of February 4, 1983, she had been seven months pregnant, had been at a baby shower, had not been to the skating rink, and had not seen DeLuna (SF XI 451-52).

At the punishment phase of trial, the state called three peace officers to testify that DeLuna's reputation in the community for being a peaceful and law-abiding citizen was bad (SF XII 2-7). DeLuna's former parole officer also testified that DeLuna had been paroled form prison once on May 13, 1982, and again on January 13, 1983 (SF XII 9). Juanita Garcia testified that in the early morning hours of May 15, 1982, she had been awakened by someone in her room. The person put a pillow over her face and beat her when she struggled, breaking three ribs (SF XII 43-44). He then attempted to rape her (SF XII 45). She identified the person as DeLuna, whom she knew because he was a friend of her son's (SF XII 45). The state also introduced evidence of

DeLuna's past convictions for unauthorized use of a motor vehicle and attempted rape (SF XII 5). DeLuna did not offer any evidence at the punishment phase of trial.

II.

RESPONDENT'S OPPOSITION TO PETITIONER'S APPLICATION FOR STAY OF EXECUTION.

A. The Applicable Standard

The granting of a certificate of probable cause to appeal indicates the district court's belief that DeLuna has made a substantial showing of a denial of a federal right. **Barefoot v. Estelle**, 463 U.S. 880, 103 S.Ct. 3383 (1983); **Bass v. McCotter**, 784 F.2d 658, 659 (5th Cir.), **cert. denied**, 475 U.S. 1072, 106 S.Ct. 1390 (1986). When a certificate of probable cause is granted by the district court, the "petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a court of appeals, **where necessary to prevent the case from becoming moot by the petitioner's execution**, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal." **Barefoot v. Estelle**, 463 U.S. at 893, 103 S.Ct. at 3395 (emphasis added). This Court's Rules require that a stay be granted when the district court grants a certificate of probable cause; however, where review of the ruling convinces the Court that the certificate was granted in error, it should refuse to issue such a certificate. **Johnson v. Cabana**, 81 F.2d 333, 344 (5th Cir. 1987).

In deciding whether to issue a stay of execution, the court must consider:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Byrne v. Butler, 847 F.2d 1135, 1137 (5th Cir.), **cert. denied**, ___ U.S. ___, 108 S.Ct. 2918 (1988). As stated in **Brogdon v. Butler**, 824 F.2d 338, 340 (5th Cir. 1987), "[i]n a capital case, 'while the movant need not always show the probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities (i.e. the other three factors) weighs in favor of granting the stay.'" This is DeLuna's second habeas petition in federal court, and this panel is already familiar with the record. Because there is time to consider the merits of his appeal before his scheduled execution date, the Court should do so without granting a stay of execution. **Bass v. McCotter, 784 F.2d at 659.**

1. DeLuna's second petition constitutes an abuse of the writ.

The district court correctly dismissed as an abuse of the writ DeLuna's claim that he had been denied the right to represent himself on appeal. This is DeLuna's second federal petition for habeas corpus relief. He was represented by competent counsel at trial, on appeal, in his state habeas corpus actions, and in his previous federal habeas petition. His claim that the

trial court impermissibly denied his right to represent himself on appeal is based on **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525 (1975), decided eleven years before he filed his previous petition. DeLuna personally argued at the hearing on his motion for new trial that he should be allowed to represent himself, citing to relevant Supreme Court and Texas Court of Criminal Appeals cases. If he believed that the trial court had infringed on his right to act **pro se**, there is no legitimate reason that he did not assert the claim in his prior petition. Moreover, during the conference call with the district court, in which he was allowed to explain his failure to raise these claims in his first petition, DeLuna's attorney stated that DeLuna had written to prior habeas counsel asking that the claim be raised. Nowhere, however, is there any indication that DeLuna complained that the issue was not raised during the twenty months the petition was pending in the district court. Because he could provide no legal justification for failing to raise the claim in his first petition, DeLuna's **Faretta** claim was correctly dismissed as an abuse of the writ. DeLuna's claim fails to show the substantial denial of a federal right, nor does it present a serious legal issue justifying the granting of a stay of execution.

The district court declined to find abuse of the writ as to DeLuna's challenges to the constitutionality of the Texas capital-sentencing statute based on **Penry v. Lynaugh**, ___ U.S. ___, 109 S.Ct. 2934 (1989). It acknowledged that the Supreme Court held that **Penry** does not constitute a change in the law that made the claim viable only after DeLuna's first petition was

dismissed, **Id.** at ___, 109 S.Ct. at 2946, and that this Court has held that claims based on **Penry** were known to counsel well before the time that DeLuna's first petition was decided. **King v. Lynaugh**, 868 F.2d 1400, 1402-03 (5th Cir. 1989). Nonetheless, the court below felt that the better course was to address the merits to allow further development of the law. Respondent submits that DeLuna's first and second claims should also be dismissed for abuse of the writ.

There can be no doubt that the legal basis for DeLuna's challenges to the constitutionality of the Texas capital-sentencing statute existed at the time he filed his first federal petition, inasmuch as the claims are based on the holding in **Lockett v. Ohio**, 438 U.S. 536, 98 S.Ct. 2954 (1978), decided eight years before he filed his first federal petition. At the very least, the granting of certiorari in **Franklin v. Lynaugh** while DeLuna's previous petition was pending in the district court made the claims apparent, and he could have amended his petition to include these allegations. His assertion that the claim was not available until the Supreme Court's decision in **Penry** is disingenuous given that Court's clear statement that **Penry** was based on **Lockett** and **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869 (1982). To the extent that any factual support exists for the mitigating evidence he contends the jury was precluded from considering, that evidence was available at the time he filed his first petition. DeLuna has failed to demonstrate any legally sufficient reason for withholding these claims

from his first petition, and dismissal for abuse of the writ is appropriate.

2. DeLuna has not presented a valid claim based on Penry v. Lynaugh

Even addressing the merits of DeLuna's claims, he cannot show that he raises a serious legal issue and that the equities of the other factors involved weigh in favor of granting a stay. The district court correctly concluded that DeLuna cannot rely on the holding in **Penry v. Lynaugh**, ___ U.S. ___, 109 S.Ct. 2934 (1989), in challenging the Texas capital-sentencing statute. As the court below noted, the plain language of **Penry** requires both that evidence be introduced whose mitigating aspects have relevance to the sentencing determination beyond the scope of the special issues, and that the defendant request an instruction to the jury on consideration of mitigating evidence. ___ U.S. at ___, ___, 109 S.Ct. at 2945, 2947. This Court has also decided that unless the defendant introduces evidence in mitigation of punishment, he cannot complain of the application of the statute in his case. **McCoy v. Lynaugh**, 874 F.2d 954, 966 (5th Cir.), **stay denied**, ___ U.S. ___, 109 S.Ct. 2114 (1989). DeLuna has identified no evidence that was introduced at trial that had mitigating value that the jury was precluded from considering in answering the punishment issues, nor can he. At the guilt-innocence phase of the trial, DeLuna only introduced evidence of alibi, and such evidence cannot possibly demonstrate a reduced culpability for his crime. It is undisputed that at the punishment phase he introduced no evidence, and none of the

state's punishment evidence can even remotely be considered mitigating. Thus, although DeLuna objected at trial that the court's charge at the punishment phase did not include a definition of "deliberately" in the first special issue, there was no evidence presented upon which the jury could have been confused as to the meaning of the term. Consequently, no definition was necessary. **Penry**, ___ U.S. at ___, 109 S.Ct. at 2948-49. In addition, the record clearly reflects that, although DeLuna at one time filed an objection to the court's punishment charge on the ground that it did not contain an instruction on consideration of mitigating evidence, that objection was withdrawn and not urged, undoubtedly because no mitigating evidence was introduced (SF XII 51; **cf.** Tr. 66). In rejecting DeLuna's **Penry** claim, the district court correctly applied the law, and DeLuna can demonstrate no substantial denial of a federal right nor a likelihood of success on the merits that would entitle him to a stay of execution.

3. Even were Penry applicable to DeLuna's case, he has failed to demonstrate the existence of any evidence at this time that lessened his moral culpability that the jury was unable to consider under the Texas special issues.

DeLuna contends that he had a history of alcohol and substance abuse, that he was of low intelligence, and that friends and relatives could have testified about his good character and kind nature. He argues that this evidence, along with the evidence of his youthful age of twenty-one at the time of the murder, had mitigating value that the jury could not consider in answering the punishment questions. The record supports neither

the contention that such evidence exists nor that the jury could not fully address any mitigating value it had in answering the punishment issues.

DeLuna wholly failed to demonstrate that any evidence of alcohol and substance abuse lessened his moral culpability for his crime. There was no evidence at trial that DeLuna was intoxicated at the time of the murder, and nothing that he has proffered in these proceedings even indicates, much less proves, that any history of substance abuse resulted in a mental impairment that reduced DeLuna's responsibility for his actions. Indeed, other evidence submitted with his habeas corpus petition, including the reports of the psychiatrist and psychologist who evaluated him before trial, showed that DeLuna did not suffer from any diminished mental capacity or reduced impulse control. Thus, the record rebuts DeLuna's allegation that there was evidence of his history of substance abuse that had mitigating value.

The record likewise fails to support DeLuna's contention that he was of low intelligence. The only evidence of this was the finding of the psychologist who administered an IQ test during his pre trial evaluation of DeLuna, which showed an IQ of 72. The psychologist stated that DeLuna was obviously faking his responses in an effort to appear less intelligent than he was. Far from merely expressing an opinion about DeLuna's malingering, the psychologist documented in his report instances of DeLuna's intentional deception and lack of cooperation. In addition, DeLuna testified at trial and presented argument at the hearing on his motion for new trial, and in both instances displayed no

signs of serious lack of intelligence. Furthermore, the affidavit of one of his sisters, submitted in support of his habeas corpus petition, indicated that he had completed high school and college courses since arriving at TDC, directly refuting his assertion of low intelligence.

With regard to DeLuna's allegations that his youth and personal background had mitigating value beyond the scope of the punishment questions, the claims are merely conclusory and do not warrant the granting of relief. **Mayo v. Lynaugh**, 883 F.2d 358 (5th Cir. 1989) (on rehearing). DeLuna simply asserted that such evidence could not be considered by the jury to be mitigating, but failed to make any showing that the jury could not consider and give effect to the aspects of such evidence that would support a sentence less than death. It is clear that DeLuna can make no such showing because the mitigating value of the evidence he referred to is fully encompassed within the special issues.

Youth, as a mitigating factor, is fully addressed by both of the punishment issues. Here, the jury was aware that DeLuna was twenty-one years old at the time of the murder. It is commonly understood that, when compared with adults, youths may possess a limited ability to control impulsive behavior, evaluate the future consequences of their conduct and appreciate the possibility and finality of death.[2] To the extent that a jury would

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[2]Although these and other examples of "disabilities" of youth as compared to adults can possess mitigating value, they (Footnote Continued)

consider a twenty-one year old a youth, **but see Brock v. McCotter**, 781 F.2d 1152, 1158 (5th Cir.), **cert. denied**, 476 U.S. 1153, 106 S.Ct. 2259 (1986) (no reasonable juror would consider age of twenty-five to be mitigating), it could give full mitigating effect to his age in answering the special issues. Youth is particularly relevant to the first punishment issue -- whether the defendant acted deliberately and with the reasonable expectation that death would result. DeLuna was free to present evidence and argue that his youth reduced his moral culpability because he acted impulsively, not reflectively, and because he did not reasonably expect that death would result from his actions. The jury could give full mitigating effect to this evidence in answering the first punishment issue. DeLuna made, and still makes, no attempt to argue that this evidence had any relevance beyond the scope of the first issue.

Additionally, perhaps the most compelling mitigating aspect of youth is its transitory nature. In contrast to the true disability of mental retardation as presented in **Penry**, youth is a temporary condition, and any limitations attributable to youth necessarily will end. Hence, were a juror convinced that DeLuna's moral culpability was somehow reduced because his crime

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(Footnote Continued)
are by no means uniform among adolescents and young people. DeLuna has offered nothing in these proceedings to demonstrate that he possessed any of the mitigating attributes of youth. Even assuming, **arguendo**, that DeLuna, as a twenty-one year old, did possess these qualities, it is apparent that they could be given full mitigating effect by his jury in answering the punishment issues.

was in some way attributable to the "disabilities" of his youth, he necessarily would have reached the logical conclusion that DeLuna would cease to act violently when he outgrew his "disabilities." In addition, therefore, to the fact that the characteristics associated with youth can be given their full mitigating effect in evaluating DeLuna's blameworthiness for his crime by answering the first special issue, all of the mitigating qualities associated with youth are squarely addressed by the future dangerousness question and can be given full mitigating effect under Texas' capital sentencing procedures.

DeLuna's attempt to portray youth as a "two-edged sword" that reduces his moral culpability for his actions but at the same time supports a death sentence is also unavailing. The Supreme Court in **Penry** found evidence of Penry's mental retardation to be such a "two-edged sword" because, although it reduced his moral culpability, the evidence showed that his condition rendered him unable to learn from his mistakes, and thus made an affirmative answer to the second issue more likely. As the district court noted, society clearly would not view youth in such a fashion, given its transitory nature.

Finally, DeLuna's assertion that evidence that he had positive character traits could not be considered under the special issues is conclusory and undeserving of relief. His mere characterization of such evidence as "classic **Penry** evidence" fails to demonstrate that it has any mitigating value beyond the scope of the special issues. The mitigating effect of this kind of evidence is squarely addressed by the inquiry into the defendant's

future dangerousness. Evidence that the defendant has been kind to others, has shown generosity, and has exhibited feelings of affection, demonstrates the defendant's humanity. They indicate that the person has the ability to be rehabilitated so that their violent acts will not be repeated. People who regularly and consistently display such traits can be expected to act the same way in the future and, hence, not constitute a danger to society. Thus, a juror who was persuaded that DeLuna would behave in conformity with these positive characteristics would necessarily have a reasonable doubt about his being a future danger and could answer the second issue in the negative. DeLuna's failure to identify any other relevance to the jury's sentencing concerns that the evidence possesses is tantamount to an acknowledgment that none exists. DeLuna's challenge to the Texas capital-sentencing statute is devoid of merit and does not meet the standard for granting either a certificate of probable cause or a stay of execution.

4. DeLuna validly withdrew his assertion of the right to represent himself on appeal.

DeLuna's final claim for relief is that he was denied his right to represent himself on appeal, although he asserted the right when he requested that his attorneys be relieved and he be allowed to act **pro se**. The district court dismissed this claim as an abuse of the writ. Even were the Court to address the merits, the claim is squarely refuted by the record.

The Sixth Amendment guarantees a criminal defendant the right to represent himself. **Faretta v. California**, 433 U.S. 806,

95 S.Ct. 2525 (1975). Before accepting a waiver of the right to counsel, however, the court must assure itself that the waiver is made knowingly and intelligently. **Id.** at 835, 95 S.Ct. at 2541; **United States v. Martin**, 790 F.2d 1215, 1218 (5th Cir. 1986). The proper inquiry is "to evaluate the circumstances of each case as well as the background of the defendant." **Wiggins v. Procunier**, 753 F.2d 1318, 1320 (5th Cir. 1985).

Here, DeLuna filed a motion to be allowed to represent himself on appeal, initially expressing dissatisfaction with the services of his two court-appointed attorneys and asking that they be dismissed from his case. Although he made a lengthy argument in support of the motion, citing to both United States Supreme Court and Texas Court of Criminal Appeals cases, the trial court noted that he was reading from a document that had been prepared by someone else (SF XIV 5-6, 47). Moreover, DeLuna admitted that he was displeased with the representation of only one of his attorneys but that he was satisfied with the services of the other one, James Lawrence (SF XIV 43). The court questioned DeLuna at some length about his understanding of the law and legal process, as well as his background and education, and informed him that he would be required to follow the rules of procedure and substantive law just like an attorney, even though he clearly did not know those rules (SF XIV 38-43). The court repeatedly admonished DeLuna that representing himself in such an important matter was a dangerous and unwise undertaking (SF XIV 40, 43, 47). Nonetheless, the court stressed that it was not forcing DeLuna to accept a lawyer, but was merely trying to be

certain that his decision was a fully informed one (SF XIV 45). Once apprised of the dangers of representing himself and the benefits of having an attorney, DeLuna stated that he would accept Lawrence as his attorney (SF XIV 48).

On this record, it cannot be seriously argued that there was a violation of DeLuna's right to self-representation. The colloquy between the trial court and DeLuna made it clear that DeLuna's initial decision to waive counsel on appeal was not a knowing and intelligent one. DeLuna himself was convinced that having an attorney was advantageous and agreed to Lawrence's appointment. There is no showing in the record of coercion or overbearing on the court's part, but rather the required examination into the basis for DeLuna's action. Because this claim is foreclosed by the record, DeLuna cannot show the substantial denial of a federal right nor the entitlement to a stay of execution.

CONCLUSION

Although the granting of a certificate of probable cause by the district court requires that this Court address DeLuna's claims, a stay of execution is necessary only to prevent review of the case to become moot by his execution. **Barefoot v. Estelle**, 463 U.S. at 893, 103 S.Ct. at 3395. In this case no stay of execution is necessary where the Court has adequate time to review the issues before the scheduled execution date. DeLuna's second habeas petition is subject to dismissal for abuse of the writ. Even were the Court to review the merits of the **Penry** claim, DeLuna is not entitled to relief as a matter of law.

Because DeLuna has failed to show that there is a serious legal question involved, or that the balancing of the other factors involved justifies the granting of a stay of execution, this Court should review the case on an expedited basis, deny habeas corpus relief, deny a certificate of probable cause, and deny a stay of execution.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, William C. Zapalac, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent-Appellee's Motion to Expedite the Appeal and Opposition to Application for Stay of Execution has been served by faxing the same, on this the 4th day of December, 1989, to: R. K. Weaver at (214) 739-6538.

William C. Zapalac

WILLIAM C. ZAPALAC
Assistant Attorney General