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

CARLOS DeLUNA, Petitioner	§	
V.	§	CIVIL ACTION NO. C-86-234
O. L. McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§	

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES O. L. McCotter, Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this his Motion for Summary Judgment. In support thereof, Respondent would show the Court the following:

I.

JURISDICTION

This Court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

DENIAL

Respondent denies each and every allegation of fact made by Petitioner except those supported by the record and those specifically admitted herein.

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III.

STATEMENT OF THE CASE

The state has lawful and valid custody of 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 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 which found him guilty of capital murder on July 20, 1983. After a separate hearing on punishment, the jury returned affirmative answers to the special issues submitted in accordance with Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1986). Accordingly, DeLuna's punishment was assessed at death by lethal injection.

DeLuna's conviction and sentence were affirmed on direct appeal. DeLuna v. State, 711 S.W.2d 44 (Tex.Crim.App. 1986). DeLuna did not seek a rehearing in the Court of Criminal Appeals.

The trial court scheduled DeLuna's execution to take place before sunrise on October 15, 1986. DeLuna filed a motion for stay of execution pending the filing of a motion for leave to file an out-of-time petition for writ of certiorari that was denied by the United States Supreme Court on October 10, 1986. DeLuna then filed an application for writ of habeas corpus in the state convicting court. The application was denied on October 13, 1986 by the Texas Court of Criminal Appeals. Ex parte DeLuna, Application No. 16,436-01. DeLuna immediately filed a petition for writ of habeas corpus in this Court, along with a

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motion for stay of execution. Because of the exigencies of time and the impossibility of the court's reviewing the record and addressing the issues raised in the petition, the court granted the stay of execution.

IV.

PETITIONER'S ALLEGATIONS

The state understands DeLuna's allegations to be as follows:

1. The application of the death penalty is discriminatory in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments because it is disproportionately imposed on persons whose victims are white.

2. DeLuna received ineffective assistance of counsel at trial because:

   a. counsel visited with him only twice prior to trial;

   b. counsel failed to investigate DeLuna's history of substance abuse to determine whether it might be used in mitigation of punishment;

   c. counsel failed to thoroughly investigate an alternative hypothesis that someone other than DeLuna committed the offense, although given the name and location of the supposed other assailant;

   d. counsel did not use voice-identification technology to determine if the voice of the assailant on a tape recording of the incident was DeLuna;

   e. counsel put on no witnesses at the punishment stage of the trial, although given the names of numerous witnesses who were available;

   f. counsel did not take steps to preserve the testimony of a critically ill witness whose testimony was crucial on the issue of whether someone else committed the offense;

g. counsel instructed DeLuna not to cooperate with court-appointed psychologists and psychiatrists for fear that evidence would be used against him at trial, with the result that the experts did not have knowledge of his history of substance abuse, which might have produced evidence in mitigation of punishment.

3. DeLuna was denied effective assistance of counsel on appeal because the appellate brief was inadequate to effectively present the ground of error available.

V.

EXHAUSTION OF STATE REMEDIES

DeLuna raised these identical issues in his state application for habeas corpus relief, which the Court of Criminal Appeals denied. Thus, he has adequately exhausted his state remedies, as required by 28 U.S.C. §2254(b), (c).

VI.

STATE COURT RECORDS

The records of DeLuna's trial, appeal, and state habeas corpus proceedings are available and will be supplied to the court when they have been reproduced and certified.

VII.

MOTION TO DISMISS

1. DeLuna's contention that the death penalty is discrimitorily applied does not state a claim for relief.

DeLuna first alleges that prosecutorial discretion results in a discriminatory application of the death penalty against defendants who kill white victims. He claims that evidence can be produced at an evidentiary hearing 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." He relies on the granting of writs of certiorari in McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985), cert. granted, ____U.S.____, 106 S.Ct. 3331 (1986), and Hitchcock v. Wainwright, 777 F.2d 628 (11th Cir. 1985), cert. granted, ____U.S.____, 106 S.Ct. 2888 (1986), to support his claim that such discrimination is an unconstitutional application of the death penalty. His contention is without merit.

Precedents in the Fifth Circuit make it clear that relief is not available to a habeas corpus petitioner on this ground. In Prejean v. Maggio, 765 F.2d 482, 486 (5th Cir. 1985), the court stated:

> To create a fact issue warranting an evidentiary hearing, a statistical proffer must be "so strong that the results would permit no other inference but that they are the product of racially discriminatory intent or purpose." Smith v. Balkcom, 671 F.2d 858, 859, modifying 660 F.2d 573 (5th Cir.), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). Prejean's tender does not meet this standard.
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> Smith v. Balkcom, id., and Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), remain the touchstone of out analysis. In both Smith and Spinellink, we said the proof must establish specific acts evidencing intentional or purposeful discrimination "against the petitioner" on the basis of race. Id. at 614 n.40, quoted in Smith, 660 F.2d at 585 (emphasis supplied in Smith).

In addition, the Fifth Circuit has recently reaffirmed this position, quoting the above language from Prejean. Wicker v. McCotter, 798 F.2d 155, 157 (5th Cir.), cert. denied, ____U.S.____, ____S.Ct.____, 55 U.S.L.W. 3175 (August 25, 1986); Berry v. Phelps, 795 F.2d 504, 506 (5th Cir.), stay of execution

granted, ____U.S.____, ____S.C.____, 55 U.S.L.W. 3114 (August 6, 1986).

DeLuna has utterly failed to make any statistical proffer that would warrant the granting of an evidentiary hearing. Instead, he has simply alleged that such evidence will be forthcoming at an evidentiary hearing and requests that the court grant him one. This is insufficient and does not entitle DeLuna to relief.

The Fifth Circuit has also addressed the question of whether the grant of certiorari in McClesky and Hitchcock has any effect on the law of this circuit. The conclusion has been that

> the grant of certiorari in Hitchcock and McClesky is insufficient per se to raise in this case the requisite to a certificate of probable cause: that the petitioner presents an issue that jurists of reason would consider debatable on the evidence proferred to us, but the fact that the Court has agreed to consider these cases does not alter the authority of our prior decisions.

Wicker v. McCotter, 798 F.2d at 158 (footnote omitted). The clear precedents of the Fifth Circuit remain in effect and require that relief be denied.

Finally, DeLuna does not have standing even to make the argument that the death penalty is disproportionately applied to persons who kill white victims. It appears from her last name that the victim in this case, Wanda Lopez, was Hispanic. DeLuna has offered nothing that would cast doubt on the victim's race and, thus, cannot claim that he has been the victim of discrimination in the application of the death penalty.

2. DeLuna's conclusory allegations supporting his claim of ineffective assistance of counsel at trial are inadequate to entitle him to relief and do not warrant the granting of an evidentiary hearing.

DeLuna next contends that his attorneys rendered ineffective assistance before and during his trial. In support of his contention, he cites several instances of alleged deficient performance by his court-appointed attorneys, James Lawrence and Hector DePena, Jr. In particular, he asserts that lead counsel met with him only two times prior to trial; counsel failed to determine whether DeLuna's history of substance abuse constituted evidence in mitigation of punishment; counsel failed to thoroughly investigate the possibility of someone other than DeLuna as the preparator of the crime; counsel did not do a voice-analysis on the tape recording of the robbery-murder to determine if the voice was that of DeLuna; counsel did not call available witnesses at the punishment phase of the trial; counsel did not preserve the testimony of an ill witness who had crucial testimony that someone other than DeLuna committed the crime; and counsel advised DeLuna not to cooperate with the psychiatrists and psychologist appointed by the court to examine him, with the result that the experts' opinions did not reflect the mitigating evidence of DeLuna's history of substance abuse. These allegations do not entitle DeLuna to relief.

A state prisoner claiming in federal habeas corpus proceedings that he was denied the effective assistance of counsel must make a two-prong showing. First, he must demonstrate that counsel's performance was deficient and

unreasonable when judged by objective standards. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065 (1984). Second, he must show that the defense was prejudiced by counsel's deficient performance. Id. at 694, 104 S.Ct. at 2067. Prejudice is shown by demonstrating that there is a reasonable probability that, but for counsel's performance, the result of the proceedings would have been different. Id. at 694, 104 S.Ct. 2068.

Relief is not available when a petitioner makes conclusory allegations in support of his claims. Mattheson v. King, 751 F.2d 1432, 1448 (5th Cir. 1985); Celestine v. Blackburn, 750 F.2d 353, 385 (5th Cir.), cert. denied, ____U.S.____, 105 S.Ct. 32 (1984). In order for a reviewing court fairly in inquire into an attorney's performance, the petitioner must point to specific deficiencies in counsel's handling of the case. Knighton v. Maggio, 740 F.2d 1344, 1349 (5th Cir. 1984). DeLuna has failed in several instances to allege these specific deficiencies.

DeLuna's contention that his attorneys failed to thoroughly investigate the possibility that someone other than DeLuna committed the offense is a conclusory statement with no factual basis of support. He does not identify who the alleged other assailant might have been, nor does he indicate what evidence existed that might have implicated someone else. The contention is simply speculation and does not show deficient performance on the part of his attorneys.

Similarly, DeLuna's claims that his attorneys failed to call available witnesses at the punishment stage of the trial, and

failed to preserve the testimony of a sick witness who could have testified that someone else committed the crime are non-specific and do not merit relief. DeLuna does not identify the witnesses who supposedly were available to testify on his behalf nor does he indicate what their testimony would have been. In a case where a petitioner had named available witnesses who were not called by his attorney, the Fifth Circuit, in denying relief, stated that

> complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative.

United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, ____U.S.____, 104 S.Ct. 3534 (1984). An even clearer case is presented where the petitioner does not name the witnesses. DeLuna's "general statements and conclusory charges will not suffice" to prove ineffectiveness of his attorneys. Knighton v. Maggio, 740 F.2d at 1349.

DeLuna's remaining four allegations of ineffective assistance, although more specific, do not show either deficient performance or prejudice to his case. Assuming, arguendo, that his assertion that lead counsel met with him only twice before trial is true, DeLuna has not shown prejudice. Brevity of consultation alone cannot support a claim of ineffective assistance of counsel. Avery v. Procunier, 750 F.2d 444, 447 (5th Cir. 1985); Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984). DeLuna has not alleged what facts beneficial to his case would have come to light if counsel had met with him on more

occasions. In fact, in his other allegations, he asserts that counsel had the names of potential witnesses and the name of the other person who might have committed the crime. Without a showing of prejudice, DeLuna is not entitled to relief.

Likewise, DeLuna's claim that counsel should have conducted a voice analysis on the tape recording of the incident to determine whether the assailant's voice was DeLuna's does not merit relief. He has advanced no facts that would suggest that the voice was that of anyone except DeLuna. A decision not to investigate in certain areas must be assessed for reasonableness in all of the surrounding circumstances, applying a heavy measure of deference to counsel's judgments. Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066. In light of the fact that DeLuna was identified by eyewitnesses as the perpetrator of the offense (SF X 224, 229-30, 250, 278-79), there is no apparent likelihood that the voice on the tape was not DeLuna's. Counsel's decision has not been shown to be either unreasonable or prejudicial.

DeLuna's contention that counsel was remiss in not developing his history of substance abuse as possible mitigating evidence is similarly insufficient to show ineffective representation. First of all, DeLuna does not point to any evidence that he was under the influence of drugs or alcohol on the night of the offense. Without proof that a defendant was using an intoxicating substance during the commission of the crime, a history of substance abuse is of little help as a mitigating factor. Second, the decision not to present his client's history of misusing drugs was a sound strategic choice

by counsel. The prosecution easily could have seized on the argument and turned it around so that the jury would view it as an attempt by the defendant to avoid accepting responsibility for his actions. See Knighton v. Maggio, 740 F.2d at 1350 (counsel's decision not to call character witnesses at punishment phase of capital murder trial was reasonable because calling the witnesses would have allowed prosecutor to "hammer home" defendant's prior to drug problems).

Finally, counsel's advice to his client that he should not cooperate with the court-appointed psychologist and psychiatrists so that nothing elicited during the interviews could be used against him at trial was not unreasonable. It is undisputed that anything said in the examinations by the doctors could have been used against DeLuna at trial if he was properly warned before the interviews took place. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981). Counsel's advice prevented the state from using expert opinion at the punishment phase of the trial. Moreover, DeLuna's assertion that, if he had cooperated with the doctors and revealed his history of substance abuse, the reports would have contained mitigating evidence is pure speculation. Nothing in the record or in DeLuna's petition supports the conclusion that in the expert's opinions substance abuse would constitute evidence that DeLuna was not as culpable for his crime. Moreover, If DeLuna had cooperated with the doctors, their reports could as well have been even more damaging on his propensity to commit future acts of violence. Finally, even if the doctors treated DeLuna's substance abuse as a mitigating

factor, there is nothing to indicate that the jury would have done the same. As previously noted, the jury could have felt that DeLuna was using the excuse of his past misdeeds to avoid punishment for this crime. DeLuna has not shown that there is a reasonable probability that, but for counsel's advice not to cooperate, the jury would have answered "No" to one of the special issues so that he would have received a sentence of life imprisonment rather than death. Strickland v. Washington, 466 U.S. at 688, 104 S.Ct. at 2067.

3. DeLuna has failed to show that he was denied effective assistance of counsel on appeal.

DeLuna's last claim is that counsel on appeal rendered ineffective assistance in that his brief was inadequate to effectively present the trial errors to the appellate court. His allegation, again, is wholly conclusory and does not entitle him to relief.

A convicted defendant is entitled to effective assistance of counsel on a first appeal as of right. Evitts v. Lacey, ____U.S.____, 105 S.Ct. 830, 834 (1985); Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985). Effectiveness on appeal is measured by the same standard as at trial, i.e., the Strickland v. Washington two-prong test. Wicker v. McCotter, 783 F.2d 487, 497 (5th Cir), cert. denied, ____U.S.____, 106 S.Ct. 3310 (1986). On appeal, prejudice is shown by demonstrating that there is a reasonable probability that, but for counsel's errors, the outcome of the appeal would have been different. Lockhart v. McCotter, 782 F.2d 1275, 1283 (1986). DeLuna's petition is wholly inadequate to meet this standard.

In his petition, DeLuna asserts, without elaboration, that his attorney's brief was inadequate to effectively present the issues to the Court of Criminal Appeals. He does not state what inadequacies existed in the brief, nor how the arguments could have been presented more effectively. Further, the opinion of the Court of Criminal Appeals demonstrates that the court well understood the arguments. Assuming, arguendo, that the brief was not as well written as it might have been, DeLuna has failed to show that the appellate court did not fully consider them and decide them correctly.

If DeLuna is arguing that appellate counsel did not brief every issue on appeal that might have been raised, his claim is still not deserving of relief. He has not identified what additional arguments counsel might have presented and, of course, he has not shown that the outcome of the appeal would have been different if other arguments had been made. His conclusory, general allegations do not provide a basis for granting habeas corpus relief.

4. DeLuna is not entitled to an evidentiary hearing on his claims.

DeLuna contends that he will develop the proof at an evidentiary hearing to support his claims. However, to be entitled to a federal evidentiary hearing, the burden is on the petitioner to allege facts which, if proved, would entitle him to relief. Taylor v. Maggio, 727 F.2d 341, 347 (5th Cir.), cert. denied, 465 U.S. 1075, 104 S.Ct. 1432 (1984); Rutledge v. Wainwright, 625 F.2d 1200, 1205 (5th Cir. 1980), cert. denied, 450 U.S. 1033, 101 S.Ct. 1746 (1981). No hearing is required

where the petitioner makes only conclusory allegations. Mattheson v. King, 751 F.2d at 1448; Celestine v. Blackburn, 750 F.2d at 358. DeLuna has made no statistical proffer on his first claim that would entitle him to a hearing in this Court. His allegations of ineffectiveness of counsel are mere conclusory assertions without factual support. He has failed to show that any of counsel's actions, either at trial or on appeal, were unreasonable and unprofessional. Likewise, he has not demonstrated the required prejudice to his case resulting from counsel's alleged errors. Under these circumstances, there is no necessity for an evidentiary hearing.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that relief be denied, this cause be dismissed, and the stay of execution be vacated.

Respectfully submitted,

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Executive Assistant Attorney
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ATTORNEYS FOR RESPONDENT

NOTICE OF SUBMISSION

TO: Mr. Richard Anderson, Attorney for Petitioner, you are hereby notified that the undersigned attorney for Respondent will bring the foregoing Motion before the Court on the 1st day of December, 1986, or as soon thereafter as the business of the Court will permit.

William C. Zapalac
WILLIAM C. ZAPALAC
Assistant Attorney General

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's for Summary Judgment has been served by placing same in the United States Mail, postage prepaid, on this the ~~10th day of~~ November, 1986, addressed to: Mr. Richard Anderson, 3333 Lee Parkway, Suite 930, Dallas, Texas 75219.

William C. Zapalac
WILLIAM C. ZAPALAC
Assistant Attorney General

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

CARLOS DeLUNA, Petitioner	§	
V.	§	CIVIL ACTION NO. C-86-234
O. L. McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§	

O R D E R

Be it remembered that on this _____ day of _____, 1986, came on to be heard Respondent's Motion for Summary Judgment, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby ORDERED, ADJUDGED and DECREED that Respondent's Motion for Summary Judgment be, and it is hereby GRANTED.

SIGNED and ENTERED on this the _____ day of _____, 1986, at _____, Texas.

_____
UNITED STATES DISTRICT JUDGE

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