filed 11-13-89

NO. 83-CR-194-A

EX PARTE | IN THE 28TH DISTRICT COURT

CARLOS DeLUNA | OF

Applicant | NUECES COUNTY, TEXAS

RESPONDENT'S ORIGINAL ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Respondent, the State of Texas, by and through its District Attorney for Nueces County, Texas files this, its Original Answer in the above-captioned cause, having been served with an application for writ of habeas corpus therein pursuant to the requirements of article 11..07 Section 2 of the Texas Code of Criminal Procedure, and would respectfully show the court the following:

I.

Respondent has lawful and valid custody of Applicant 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. Applicant 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. Trial began on July 15, 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, Applicant'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). Applicant did not seek rehearing.

This court scheduled Applicant's execution to take place before sunrise on October 15, 1986. Applicant then filed a motion for leave to file an out-of-time petition for writ of certiorari, which was denied on October 10, 1986. He next filed a request for stay of execution and an application for writ of habeas corpus in this court. On October 13, 1986, the Court of Criminal Appeals denied all requested relief. Ex parte DeLuna, No. 16,436-01. Applicant 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, the respondent filed a motion for summary judgment, and on January 23, 1987, Applicant filed a response. When no additional pleadings had been filed more than a year later, the respondent filed a motion to expedite on February 3, 1988. Applicant still did not file an amended or supplemental pleading and, on June 13, 1988, the District Court issued its order denying habeas corpus relief. DeLuna v. Lynaugh, C.A. No. C-86-234 (S.D.Tex. 1988). Applicant then filed a motion for relief from 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, Applicant sought leave to attach affidavits and other evidentiary material to his amended petition. The district court denied the motion for relief from judgment on July 19, 1988, but granted a certificate of probable cause to appeal. On appeal, the Court of Appeals for the Fifth Circuit affirmed both the dismissal of the habeas corpus petition and the denial of relief pursuant to Rule 60(b). DeLuna v. Lynaugh, 873 F.2d 757 (5th Cir. 1989). Rehearing was denied on May 26, 1989. The Supreme Court denied his petition for writ of certiorari on October 10, 1989. DeLuna v. Texas, ___ U.S. _____, 110 S.Ct. 259 (1989).

This court rescheduled Applicant's execution on November 2, 1989, ordering that the sentence be carried out before sunrise on December 7, 1989. Applicant filed the instant application for writ of habeas corpus on the same day.

II.

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

III.

APPLICANT'S GROUNDS FOR RELIEF

Applicant presents three grounds for relief in the instant application:

> 1. Article 37.071, Texas Code of Criminal Procedure, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 11 of

the Texas Constitution, as applied in his case, because it did not allow for the effective presentation or consideration of mitigating evidence about his history of drug and alcohol abuse, his personal background, his youth, or his mental condition.

2. Article 37.031 violated the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 11 of the Texas Constitution because the jury was fundamentally misled as to the meaning of "deliberately" in the first punishment issue.

3. Applicant was denied his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 11 of the Texas Constitution when the trial court denied his motion to dismiss his attorneys and proceed pro se at the hearing on the motion for new trial and on appeal.

REPLY TO APPLICANT'S FIRST GROUND FOR RELIEF

Applicant first contends that the Texas capital sentencing statute was applied unconstitutionally in his case, resulting in a death sentence that violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He asserts that because of the difficulties of having mitigating evidence of "drug and alcohol problems, troubled youth and limited mental capacity" considered by the jury under the Texas statute, counsel made a tactical decision not to present such evidence at his trial. Memorandum of Law on Application for Writ of Habeas Corpus 2. His claim relies on the recent Supreme Court decision in Penry v. Lynaugh, _____ U.S. _____, 109 S.Ct. 2934 (1989).

This claim is not properly preserved for review, contrary to his assertion. In order to preserve this claim,

counsel must have objected at the time of trial to the procedures of which he now complains. The record reflects that counsel filed written objections to the court's punishment charge prior to the time the charge was read to the jury (Tr. 66).[1] The third paragraph objected that the charge did not instruct the jury to consider evidence of mitigating circumstances and that this violated the holdings of Gregg v. Georgia, 428 U.S. 153 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978). Counsel specifically withdrew this objection, however, when making his objections on the record (R. XII:51). Failure to properly preserve a claim for review, either by objecting to the charge or by requesting special instructions, results in a waiver of that claim. Tex. Code Crim. Proc. Ann. arts. 36.14, 36.15; Fierro v. State, 706 S.W.2d 310, 318 (Tex.Crim.App. 1986) (failure to object to the charge or request special instructions concerning mitigating evidence presents nothing for review); see also Fierro v. Lynaugh, 879 F.2d 1276, 1281-82 (5th Cir.), reh'g denied, _____ F.2d _____ (5th Cir. October 18, 1989) (upholding procedural bar imposed by state court due to absence of showing of good cause for not objecting at the time of trial).

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[1] "Tr." refers to the transcript of documents from Applicant's trial. "R" refers to the record, followed by volume and page numbers.

Alternatively, even were the claim not barred, Applicant's reliance on Penry is misplaced. The holding in Penry was explicitly predicated on the fact that the defendant in that case had presented evidence of his mental retardation and history of child abuse. _____ U.S. at _____, _____, _____, 109 S.Ct. at 2944, 2945, 2947. Applicant presented no mitigating evidence at either the guilt-innocence or punishment phase of his trial.[2] Thus, he has failed to demonstrate how his jury was precluded from considering mitigating evidence offered as the basis for a sentence less than death. See Penry, _____ U.S. at _____, 109 S.Ct. at 2952; cf. Lockett, supra, and Eddings v. Oklahoma, 455 U.S. 104 (1982).

Applicant concedes that no evidence was presented at trial concerning his purported drug and alcohol problems, troubled youth, and limited mental capacity. He does not allege that counsel was ineffective for failing to present this type of evidence, inasmuch as his previous claim of attorney ineffectiveness on this basis has already been rejected. DeLuna v. Lynaugh, 873 F.2d 757 (5th Cir.), cert. denied, _____ U.S. _____, 110 S.Ct. 259 (1989). It is the

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[2] In his Memorandum of Law, Applicant contends that "some limited mitigation testimony" was presented. Memorandum at 2. He does not specify what this evidence was nor is any discernible from the record. In his Memorandum, Applicant limits his discussion of mitigating evidence to that which was available but not introduced, i.e., his alleged drug and alcohol problems, troubled youth, and limited mental capacity.

height of disingenuousness for him to claim now that counsel made a tactical decision not to present such evidence because he perceived inherent problems with the Texas statute. Moreover, there is no support in the record for Applicant's assertion that this was the reason for counsel's decision. The opinion of the United States Court of Appeals for the Fifth Circuit, on which he relies, expressly found that his allegations of low intelligence were refuted by other substantial evidence, that there was no evidence of his substance abuse that would have reduced his moral culpability for his crime, and that counsel reasonable decided not to offer the pleas of family members to spare Applicant's life "because in a case such as this witnesses claiming considerations of dubious merit may well cause the jury to react unfavorable when it has full knowledge of the brutal crime and the criminal's prior felonious record." Id. at 759. Applicant's first ground for relief is without merit.

REPLY TO APPLICANT'S SECOND GROUND FOR RELIEF

Applicant in his second ground for relief asserts that the jury was fundamentally misled as to the meaning of the term "deliberately" in the first punishment issue. He again relies on the statement in Penry that, in the absence of a definition of "deliberately" that "would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability," there was no assurance

that the jury gave effect to his mitigating evidence. _____ U.S. at _____, 109 S.Ct. at 2949.

This claim, too, has not been properly preserved for review. Applicant's objection to the charge at the time of trial was that it did not contain a definition of "deliberate, which is not a term of common meaning and understanding" (Tr. 66). Applicant did not contend that the failure to define the term prevented the jury from considering mitigating evidence introduced in support of a sentence less than death. Because his objection at trial did not comport with the claim he is now raising, the claim is waive.

Even were the claim properly preserved Applicant is not entitled to relief. As the passage from Penry quoted above indicates, the concern expressed by the Supreme Court was that, without a definition of "deliberately", the jury might not be able to give effect to Penry's mitigating evidence of mental retardation and child abuse. Applicant points to no mitigating evidence he introduced that the jury could not consider without a special definition of "deliberately" in answering the punishment issues.[3] Consequently, his case does not fit within the scope of Penry's holding, and he is not entitled to relief on this basis.

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[3]Applicant does not explain how the jury was "misled" as to the meaning of "deliberately", when no definition was given in the court's charge.

REPLY TO APPLICANT'S THIRD GROUND FOR RELIEF

Finally, Applicant contends that the trial court denied him his right to self-representation at the hearing on his motion for new trial and on appeal, in violation of the Sixth, Eighth, and Fourteenth Amendments, and similar provisions of the Texas Constitution. The record reflects that at the hearing on the Motion for New Trial on September 9, 1983, Applicant filed a motion styled "Motion to Disqualify Counsels and for Appellant to Proceed By Himself as Counsel" (Tr. 98). After discussing the motion with Applicant, the court denied the motion (R. XIV:11). At the conclusion of the hearing on the motion for new trial, Applicant re-urged his motion. The court questioned Applicant at some length about his background and understanding of the law and legal process (R. XIV: 38-43), and Applicant then stated that he was merely dissatisfied with one of the two attorneys representing him (R. XIV:43). The court then explained that it would appoint the other attorney, James Lawrence, to represent him on appeal and that Applicant could review the brief filed and prepare one of his own if he was dissatisfied with his attorney's (R. XIV:44-5). Applicant agreed to this arrangement (R. XIV:48).

A criminal defendant may waive the right to counsel and proceed pro se. Faretta v. California, 422 U.S. 806 (1975); Johnson v. State, 676 S.W.2d 416 (Tex.Crim.App. 1984). In order to do so, however, his waiver must be knowing,

intelligent, and voluntary. Campbell v. State, 606 S.W.2d 862 (Tex.Crim.App. 1980). The record must reflect that the defendant understands the dangers and disadvantages of self-representation before the waiver is effective. Id.

In this case the record reflects that Applicant asserted the right to represent himself by reading from a motion that was prepared by someone other than himself (See Tr. 98-102). The motion itself did not address the dangers of self-representation, but merely recited the holdings of cases dealing with the right. During its colloquy with Applicant, the court pointed out that Applicant had erroneously requested that another inmate be appointed to represent him, an error that resulted from his simply copying the motion (R. XIV:47). Applicant gave no indication during the discussion of being aware of the difficulties of pro se representation. Moreover, the sole basis for Applicant's motion was that one of his two attorneys was unacceptable; he was entirely satisfied with Lawrence's representation and was willing to continue with him as counsel (R. XIV:44). Finally, after the court impressed upon him the difficulties that would be encountered in his efforts to represent himself on appeal, Applicant unqualifiedly stated that he would agree to have Lawrence represent him on appeal (R. XIV:48). Applicant clearly withdrew his waiver of counsel once he understood the dangers of representing himself. Thus, there was no

error in the court's denying his motion to represent himself.

III.

Applicant raises questions of law and fact which can be resolved by the Court of Criminal Appeals upon review of official court records and without the need for an evidentiary hearing.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that all relief for which Applicant prays be denied.

Respectfully submitted,

GRANT JONES
DISTRICT ATTORNEY
SBN 10917000

CERTIFICATE OF SERVICE

A copy of this answer has been mailed to Mr. R.K. Weaver 404 Expressway Tower -- LB35, 6116 N. Central Expressway Dallas, Texas 75206, attorney for petitioner.

GRANT JONES
DISTRICT ATTORNEY
901 Leopard #205
Corpus Christi, TX 78401
(512) 888-0410