

DeLuna Tape #229

DeLuna Tape #229 02:20:55

JSL: So it's February 28th, 2005. We're in the home of Professor Kristen Weaver. Kris, if you could tell us something about yourself, say your name and a little bit about your career.

DeLuna Tape #229 02:21:17

Kristen Weaver: I'm Kris Weaver. I'm an attorney in sole practice here in Dallas. Graduated from the University of Texas as an undergraduate in the early seventies. Went into the military, navy, for a few years. Came back to law school at Texas. Graduated Texas, I guess December of '78. While going there I clerked for the Texas attorney general's office in the enforcement division. For those who are not familiar with the Texas attorney general's office, 99 percent of them do civil work. The enforcement division, which was the only division that did any criminal work. The capital murder cases were done by one attorney, Anita Ashton, and one clerk, me. We represented the state of Texas in federal and direct appeals and writs. When I graduated, I became the second attorney at the attorney general's office doing it. I think there are twenty-some of them now doing it. So I started my career doing capital cases.

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KW: When my wife graduated, she got a job with the phone company,

which made more money than both of us could make working for the attorney general. So we went to Saint Louis for a few years, where I was with a small general-practice firm doing mostly criminal law. When I got tired of St. Louis I moved back to Dallas to do work for Henry Wade, the D.A., who was D.A. for thirty-six or -seven years here. Did that for a few years, then I went out in sole practice and I've been in sole practice ever since. Board-certified in criminal law by the Texas board of legal specialization, have been for over 20 years. That's about it.

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JSL: Great. Are you getting that noise from there?

RP: It's not, it's ok.

DeLuna Tape #229 02:23:15

JSL: Would you just start from the beginning and tell us about your involvement with the Carlos DeLuna case. What you remember about it and how you took it through.

DeLuna Tape #229 02:23:27

KW: Ok. In the mid to late eighties, I was one of a group five or six Dallas lawyers who did capital appeals primarily. Another one of those attorneys was Richard Allen Anderson. Richard called me and said that there was some people in his office who were looking for someone to work on a capital writ out of the Gulf

Coast area, Corpus area, and that he didn't want to do it, and that it was a successor writ. I told him I didn't want to do it either, but he persuaded me to at least talk to the people.

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KW: Rose Rhoton and Brad Rhoton came to my office. We discussed the situation. I encouraged them to not even do this, because I was absolutely sure it would not succeed. But they felt, for the family's sake, that they needed to do everything that was possible. So I agreed to represent him. This was a successor writ, and, as you know, with successor writs there is very, very little that can be legitimately raised. I went down and talked to him, briefly, in T.D.C. Went down to talk to a bunch of clients there, and he was one of them. Primarily addressing the status of his case: where he was, what was involved, what we could do, what we could not do, what the chances of success -- if any -- were, etcetera. I then prepared the documents and filed them. We got into federal district court. The judge did not want to have a hearing on the issue at all. We ended up doing a telephone hearing, conference. It was very late in the day, there was already a death sentence. In Texas, the governor sets a death sentence, and that starts the clock. So by the time I got in to this, there was already a death sentence set.

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KW: The judge denied relief. I took an appeal to the Fifth Circuit, they denied relief. I filed an writ of cert, they refused it. I then talked to Rider Scott, who was the governor's assistant in charge of clemency, executive clemency. I'd known Rider for years in the D.A.'s office and in Dallas. He was a personal friend. And he gave me 45 minutes to tell him everything I could think of as to why they should grant the one-time stay. He then went back and talked to the governor, and about 45 minutes later called me and said there would be no stay. We ran out of options at that point. Nobody had any ideas as to what could be raised, or where to go, or what could be said that would do any changes. And so Carlos was executed. He's the only capital client I've ever had that was executed, so I was very distressed. That's the general outline.

DeLuna Tape #229 02:27:28

JSL: You took this case over at the successive stage because the lawyer who had handled it in the post-conviction stage up to that point had the appropriate policy that he didn't want to go into another stage. Could you explain that to us?

DeLuna Tape #229 02:27:45

KW: Yeah. Most of those of us who were doing capital cases in Texas took the attitude that if you did the direct appeals you didn't do the writs. If you did the original writ, you didn't do

successor writes. Essentially this was based upon a philosophy that we've shot our wad. We've done everything we can think of, we've tried everything we know. It didn't work, so it's time to get someone else to look at it, if only to challenge our competency. We took the position that if you did the trial you shouldn't do the appeal, because trial lawyers are looking for vindication rather than success. If you did the direct appeal, you shouldn't do the writ, because they can always challenge incompetency of counsel on appeal, etcetera. That was just sort of the given mindset of those of us doing capital cases in those days.

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JSL: And the Rhoton family, the sister of Carlos DeLuna, had hired Richard Anderson to represent them. Can you tell us about his reputation in the Dallas community as a capital defense lawyer?

DeLuna Tape #229 02:28:55

KW: Richard Allen Anderson is, perhaps, the brightest, most capable capital defense lawyer in the state of Texas. He is incredibly intelligent, hardworking, inventive. I've had the pleasure of working with him on half a dozen capital cases, co-counsel. He is, simply, one of the best.

DeLuna Tape #229 02:29:29

JSL: So when the family went to him they were, the Rhotons, they

were looking for some good representation?

DeLuna Tape #229 02:29:36

KW: They were looking for the best they could get, yeah.

DeLuna Tape #229 02:29:41

JSL: And when you told them when they came to you that they needed to think really carefully about whether they really wanted to go forward with this, can you explain why you gave them that advice?

DeLuna Tape #229 02:29:55

KW: In Texas, in the eighties, the chances of getting a capital conviction reversed were, quite literally, statistically, less than winning the lottery. It just didn't happen. This is the state where the court of criminal appeals concluded that there was nothing ineffective when a lawyer slept through a capital trial, there was nothing ineffective when the judge slept through a capital trial. As one judge said in Texas, there are two kinds of error, waived and harmless. I have seen them, in one capital case, quite literally overturn a hundred and fifty years of case law, and then turn it over to the appellate, creating an impossible standard. Texas judges are elected in partisan elected, and none of them got elected on a campaign of "I'm going to reverse capital convictions." They have an agenda, and the agenda is to affirm.

DeLuna Tape #229 02:31:07

KW: Our experience was that, absent federal intervention, the state courts weren't going to help you. As far as the federal courts were concerned, we were in the Fifth Circuit, which has got to be the most conservative circuit in the nation when it comes to capital cases. They don't reverse them unless the Supreme Court orders them to. So it's very, very unlikely that you would get any relief, particularly at the successor writ level, where all of the really good issues -- arguable, viable things -- have already been raised and lost. So coming up with something new that was cognizable on a writ was tantamount to impossible.

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JSL: So, in effect, you told the family that, if they were going to spend money on this, that money was not likely to generate a favorable outcome. Why do you think they decided to pursue?

DeLuna Tape #229 02:32:07

KW: My position on it, quite simply, was that you can't buy success at this level. Just because you're hiring good lawyers and spending money doesn't mean you're going to win. In fact, you'll probably lose. I was told by the family, specifically, that they just would feel more comfortable, if he was going to be executed, if they could know that they had done everything possible, and feel comfortable that they didn't forget something. That was apparently their attitude.

DeLuna Tape #229 02:32:38

JSL: You were mentioning the courts, and you told an anecdote that I thought would be worth talking about. When this one was to be argued, and it came up in the Fifth Circuit. You told me you'd had some oral surgery, and thought, perhaps, that might be a basis for getting a . . .

DeLuna Tape #229 02:32:54

KW: This was in district court, federal district court, when the judge had set . . . He didn't want to have a hearing. I had just had oral surgery. I was trying not only to get a hearing but a continuance. Anything to get it past this day, to get it past the death date, would mean they'd have to re-set it and we'd have some more time to think of something or do something. The answer was, quite simply, no. The fact that I'd had oral surgery the day before the judge had decided to have this hearing was completely irrelevant, as far as he was concerned. So I didn't get to take the drugs. I had to proceed accordingly, in pain. They didn't particularly care. It wasn't their pain.

DeLuna Tape #229 02:33:46

JSL: Why would a court do that? What was its reason why it wouldn't accommodate you in that case?

DeLuna Tape #229 02:33:52

KW: I have no personal knowledge as to why the judge did that. I

assume he thought this was a waste of time, effort, and energy to begin with, and that he had every intention of overruling anything I said, so why bother?

DeLuna Tape #229 02:34:13

JSL: At the time that this case came to you, and in the posture it came to you, tell us about the relevance of innocence or guilt, how that played into the issues at that time.

DeLuna Tape #229 02:34:24

KW: In Texas, it wasn't until 1994, I think, in State Ex Rail Johnny Holms, D.A. down in Houston, that the Texas courts decided that actual innocence was cognizable in a capital case. It was two years later where they said it applied in incarceration situations. They did so because the Supreme Court had recently handed down an opinion expressly stating that due process dictated that you couldn't execute the innocents. Up until that point, raising actual innocence was irrelevant in the courts because they simply said, if you're innocent that's a matter for executive clemency. It is not a matter for the court system to be involved in. It was a waste of paper to raise actual innocence. I would comment, in this particular case, I had no reason to believe he was innocent. Indeed, no one was suggesting that he was innocent at that time. The question was not innocence, the question was did he get a fair trial, is there a problem with the statute, is

death appropriate under the circumstances. Those were the questions we were concentrating on, not innocence, because nobody believed he was innocent.

DeLuna Tape #229 02:35:52

JSL: Did you have a policy at that point on how you handled your capital clients, about whether you discussed with them guilt or innocence at that point?

DeLuna Tape #229 02:36:01

KW: It depends on where I was. If it was a trial, we discussed innocence. If it was appeal, we discussed the trial. If it was a writ, we discussed issues that were cognizable in a writ, issues of constitutional magnitude that affected the integrity of the fact-finding process or the sentence. It did no good to talk about innocence in a writ or a successor writ because I couldn't raise it. So why go into it? There are enough problems as it is. So at that time, we never bothered to discuss it. In addition, in my years of experience, I have never had a guilty client, if you ask them. They're all innocent. Invariably, they claim innocence, and invariably, they cannot give you any evidence that supports that. It's kind of a waste of time. Most of the lawyers I know from that period, we wouldn't go into that because it's just wasting our energy.

DeLuna Tape #229 02:37:04

JSL: What do you know about the Corpus Christi of the time when Carlos was raised up -- the educational structure there and what was available to a young Hispanic man?

DeLuna Tape #229 02:37:20

KW: I actually went to elementary school in Corpus at one point. My dad was in the navy, and we got transferred there. I had started school in the British West Indies at an Anglican boys' school, and then we went to Corpus for a year or so, then we went to Rhode Island, then we came back to Corpus. I slept through all both years that I was there in elementary school because they were just babysitting. And I was in an Anglo school, there were no Hispanics in school. The way they solved the integration problem was that they declared there was no segregation in Corpus because Hispanics were white. *Ergo*, you could put all the Hispanics in one school and all the Anglos in another school and there was no segregation. The schools I was in were pretty poor. I would suspect that his were even worse.

DeLuna Tape #229 02:38:17

JSL: What was your assessment of -- you say that you met with Carlos DeLuna and had a conversation or two with him. Could you describe him for us and your view of his mental state?

DeLuna Tape #229 02:38:36

KW: He understood where he was, what was going on, what his

situation was. I would have said he was probably low-normal I.Q., but nothing to suggest that he was- (*phone rings*)

RP: I'm sorry, you'll have to start that over.

JSL: Sorry about that. Just tell me about Carlos DeLuna.

DeLuna Tape #229 02:39:00

KW: I had one conversation with him in person, one by phone. I would say he was low-normal I.Q. There was no suggestion that he was retarded, or that he didn't understand where he was, or wasn't oriented to time or place or anything of that nature. (*phone rings*) Can't live without them.

DeLuna Tape #229 02:39:37

KW: He was pleasant, inoffensive. Nothing particularly stands out.

DeLuna Tape #229 02:39:46

JSL: When we spoke you pointed out to me that your father had a learning condition. You had said something about that in the context of Carlos DeLuna.

DeLuna Tape #229 02:39:55

KW: Yeah, my Dad had dyslexia, which we did not discover until my sister went to medical school. In conversations with him, and in correspondence with him, it occurred to me that he might have been dyslexic. But even though my dad is dyslexic, he can also take a watch apart and put it back together without an instruction

manual. It doesn't make him incompetent or anything but it could explain some of his problems in school. God knows Corpus in those days was not looking for that. No one was, really, in those days. So if he had that kind of learning disability, the kind of thing that schools now would take extra time, effort, and energy to help with, nobody would have done that there.

DeLuna Tape #229 02:41:00

JSL: If you would just briefly describe the legal issues, one or two legal issues you had in the case, your sense of the strength of them and how the courts dealt with them.

DeLuna Tape #229 02:41:14

KW: There were two major points we were trying to work on in those days. Penury had just come down and we, at that time, believed perhaps it would be a mechanism for getting people relief. So everybody who was working this level, in the capital cases, we were all raising penury issues, essentially. Trying to find out, was it going to be retroactive? What kind of burden was going to be placed on people? Could we manage to craft a legal argument about penury given the fact that nobody had raised it at the trial court, which turned out to be a bit of a problem. That was the primary, I think that was the main point I tried to raise. The second one is the definition of *deliberately*. In Texas, you have to knowingly, intentionally cause the death of an individual while

committing one of the laundry list of aggravating crimes, robbery, murder (*phone rings*).

DeLuna Tape #229 02:42:24

KW: In Texas, for it to be a capital murder, you had to knowingly, intentionally cause the death of an individual while committing one of the laundry list of crimes -- murder, robbery, rape, pillage, plunger, whatever.

DeLuna Tape #229 02:42:38

KW: And that got you guilty. We have a bifurcated system where we do the guilt stage, then, if you're found guilty, we go to the punishment stage. The Texas statute required that, if you were found guilty, before you could get a death penalty, the state had to prove that you acted deliberately in causing the death and that you were going to be a threat of criminal violence in the future if you weren't given the death. The second one, the threat of criminal violence, the courts took the position that included violence towards people, property, anything that constitutes a crime was sufficient, and that the mere facts of your case were sufficient to support a finding on the future dangers. It's difficult to conceive of someone who could commit a capital murder who could not reasonably be perceived to be a threat for future dangers. So we were putting our focus on the problem of *deliberately*. *Intentionally* means, in Texas, that you intended a

particular, specific result. *Knowingly* means you knew that result would occur, even if you didn't want it to occur, you knew by your actions it would occur. So if you were knowingly or intentionally causing the death, you were guilty.

DeLuna Tape #229 02:44:03

KW: The courts further said that, in order to get the death penalty, you had to act deliberately, and it was our position *deliberately* had to mean more than *intentionally* or *knowingly*. Otherwise, why bother? Standard rules of code construction suggest that you cannot craft a statute that has no force or effect. It had to mean something, something more or different than *intentionally* or *deliberately*. The law in Texas was that terms did not have to be defined to the jury if they were used in a normal and customary, standard way, unless they were statutorily defined. *Deliberately* was not statutorily defined. We were asking the courts, the trial courts, to define *deliberately*, because it had to mean something other than *intentionally* or *knowingly*. Indeed, in two cases here in Dallas, we actually got the judges to let us do a jury questionnaire, where we asked the jurors to define *deliberately*, specifically. What do you think it means? The court of criminal appeals said it didn't need to be defined because everybody knew what it meant, and it meant something other than *intentionally* or *knowingly*. Out of 360-odd

jurors in one case, not one of them understood the meaning of the definition of *deliberately* the way the court of criminal appeals said everyone knew it. So a lot of us were trying to make this point.

DeLuna Tape #229 02:45:32

KW: The court of criminal appeals was uninterested in the point, but we were hoping some federal court would look at it and see that, if you look at the *Oxford English Dictionary*, the first definition of *deliberately* is *intentionally*. So presumably that's the majority view of the world. As an aside, the other problem with that is we also threw in a bunch of other definitions, such as *probability*. There's a *probability* of future dangerousness? The overwhelming majority of the jurors said that means *might have, could have, possible*. You can imagine what that does to the burden of proof if *probable* is suddenly reduced to *possible*. Couldn't get that defined, either. We were looking . . . Everybody that was working together up here in Dallas, the four or five of us that did capital cases aggressively, were looking for a vehicle to try to get some federal judge somewhere to look at this and see if the failure to tell jurors what *deliberately* meant could affect the burden of proof, essentially. I took the position that it negated the burden of proof without a definition. The state just didn't have to prove anything. So that's another

issue I raised.

DeLuna Tape #229 02:46:47

KW: I vaguely recall a I raised third issue, but I frankly don't recall what it was. It's twenty years ago, I don't remember what else I raised. Those are the two biggies.

DeLuna Tape #229 02:46:58

JSL: Tell me your thoughts about the time that it took this particular case, the Carlos DeLuna case, to get through court.

DeLuna Tape #229 02:47:05

KW: It was an unusually quick one. Buffalo Chambers was a case I was involved in. He was charged, tried, convicted, given the death penalty, got a reversal by a federal judge, charged again, tried, and I came along and did the appeal on that one. We got it reversed on Smith error. He was again tried, and convicted, and given the death penalty, we got it reversed on Batson error. Now he was tried a fourth time, I had nothing with this one, it's on appeal again, on the writ.

DeLuna Tape #229 02:47:40

KW: It wasn't uncommon in that period of shifting law for the cases to take a very long time to go through, because the Supreme Court was seriously looking at issues like the Smith issues, the Batson issues, the penury issues. So we were getting this kind of second and third chances by virtue of new law. For some reason

Carlos was not particularly successful. His went through rather quickly. Several of the issues that were raised at various stages of his case and rejected were later acknowledged and other people got off on them. He had the misfortune of being at the wrong time, before the courts would really acknowledge it.

DeLuna Tape #229 02:48:25

KW: Penury is a classic example. The Supreme Court reverses penury, and the Texas court of criminal appeals says it doesn't apply to penury. It took two remands from the Supreme Court before he got any relief at all. They just weren't interested.

DeLuna Tape #229 02:48:53

JSL: If you could, describe as you remember them the last hours in this case.

DeLuna Tape #229 02:49:00

KW: The last hours of this case. I did not actually go to Huntsville for the execution. I was busy trying to convince Rider to convince the governor to give him some sort of clemency. Basically it was a flurry of filings and denials, then more filings and more denials. And finally, when we'd run out of everything else, phone calls to Rider trying to explain all of the different reasons I thought he shouldn't be executed, and then waiting for Rider to call back. That was basically the process.

DeLuna Tape #229 02:49:41

JSL: What was Carlos DeLuna's emotion or mental state?

DeLuna Tape #229 02:49:47

KW: I talked to him on the phone briefly to tell him it had all been turned down. He thanked me and that was it. No emotion, no outburst. Just, "You did the best you could, thank you." Very matter-of-fact. The family was also very matter-of-fact. I was also, obviously, talking to all them, mostly Rose. She knew going in this was the probably result, and I think they were prepared for it.

DeLuna Tape #229 02:50:16

JSL: Any last reflections on the case?

DeLuna Tape #229 02:50:22

KW: As I said, it's the only capital case I've ever been involved in where the guy got executed. All the others I've been involved in, at some level or another we got some kind of relief, somewhere, somehow. Or they're still pending. I have no reason to believe he wasn't guilty of the murder. I think he got what was a typical capital trial in Texas of the day, where there wasn't much emphasis on anything except getting him convicted and getting a death sentence. I have no reason to believe anybody was acting in bad faith anywhere along the line. I think he fell through the crack. If he'd been a little earlier or a little later in the process, he probably would have gotten some relief.

But, like Buffalo Chambers, I have no reason to believe they wouldn't simply have retried him again and gotten another death penalty. The problem with these cases are you can get them reversed but you can't get them acquitted, by the nature of the process.

DeLuna Tape #229 02:51:32

KW: We have death-qualified juries. As long as we have death-qualified juries -- that is, the only people that can be on the jury are those who are in favor of the death penalty -- and semi-horrendous facts, we're going to get death penalties if it's allowed. That's the nature of the process in Texas.

DeLuna Tape #229 02:51:53

JSL: I don't know if you're aware it, but Carlos DeLuna was offered two pleas during this trial and he declined to take them.

DeLuna Tape #229 02:52:04

KW: No, I wasn't aware of that, but I have had clients refuse to take plea bargains. It just breaks your heart, but that happens.
(camera zooms out) Wasn't aware of that.

DeLuna Tape #229 02:52:20

JSL: We weren't aware of it, either. It was not in the record.

KW: Poor Carlos, I know. He was just a guy who was-

(end of tape and end of interview)