# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-40,339-05**

**EX PARTE BRIAN EDWARD DAVIS**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 616522 IN THE 230TH DISTRICT COURT HARRIS COUNTY**

***Per curiam***.

**O R D E R**

We have before us applicant's request that the Court reconsider on our own initiative our denial of his mental retardation claim which he raised in his fourth subsequent application for writ of habeas corpus. *See Ex parte Davis*, No. WR-40,339-05 (Tex. Crim. App. Mar. 29, 2006)(not designated for publication). We decline applicant's request.

In June 1992, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's

conviction and sentence on direct appeal. *Davis v. State*, No. AP-71,513, published in part at 961 S.W.2d 156 (Tex. Crim. App. 1998). Applicant's initial application for a writ of habeas corpus was denied. *Ex parte Davis*, No. WR-40,339-01 (Tex. Crim. App. March 10, 1999)(not designated for publication). Applicant filed three more habeas applications, which were all dismissed for failing to satisfy the requirements for a subsequent writ under section 5 of Article 11.071. *Ex parte Davis*, No. WR-40,339-02 (Tex. Crim. App. Sept. 13, 2000)(not designated for publication); *Ex parte Davis*, No. WR-40,339-03 (Tex. Crim. App. April 29, 2002)(not designated for publication); and *Ex parte Davis*, No. WR-40,339-04 (Tex. Crim. App. May 7, 2002)(not designated for publication).

Applicant filed another application raising a mental retardation claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), which this Court held satisfied the requirements of section 5. After remanding the case to the trial court, this Court denied applicant relief. *Ex parte Davis*, No. WR-40,339-05 (Tex. Crim. App. Mar. 29, 2006)(not designated for publication). On the same day this Court denied relief on applicant's fourth subsequent application, we determined that the nullification instruction claim raised in his fifth subsequent application met the requirements of Article 11.071 § 5, and we remanded the case to the trial court. *Ex parte Davis*, No. WR-40,339-06 (Tex. Crim. App. Mar. 29, 2006)(not designated for publication). The case was ultimately returned to this Court, and this Court dismissed the application. *Ex parte Davis*, Nos. WR-40,339-03 and WR-40,339-06 (Tex. Crim. App. Nov. 18, 2009)(not designated for publication). However, in the same order, this Court

reconsidered the nullification issue raised in applicant's second subsequent writ application, and it filed and set that application. *Id*. The Court then granted relief in a separate opinion and remanded the case to the trial court for a new punishment trial. *Ex parte Davis*, No. AP-76,263 (Tex. Crim. App. Nov. 18, 2009)(not designated for publication).

The trial court held a new punishment trial which resulted in a new death sentence in March 2011. The direct appeal is currently pending in this Court. The statutorily allowed new initial writ application is not yet due. Now, with the direct appeal still pending, applicant has filed a request that this Court reconsider on its own initiative the denial of his mental retardation claim raised in his fourth subsequent writ application because the State used Dr. George Denkowski as its expert and in April 2011, Denkowski entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists, in which his license was "reprimanded."

While this Court has re-opened and reconsidered writ applications in other cases in which Denkowski was employed as the State's expert, this case is clearly distinguishable. *See, e.g., Ex parte Matamoros*, No. WR-50,791-02 (Tex. Crim. App. Dec. 14, 2011)(not designated for publication) and *Ex parte Butler*, No. WR-41,121-02 (Tex. Crim. App. Dec. 14, 2011)(not designated for publication). In this case, applicant has recently received a new punishment trial. Furthermore, the trial was held after the complaint had been filed against Denkowski. Therefore, if the State used Denkowski or any of his previous testimony or evidence at the new trial, applicant could raise that complaint on direct appeal or in his initial

habeas application which he is entitled to file under Article 11.071. Re-opening a writ application attacking the prior sentence is not the appropriate vehicle under these circumstances.

IT IS SO ORDERED THIS THE 22ND DAY OF AUGUST, 2012.

Do Not Publish