



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-77,940-01

EX PARTE TOMAS RAUL GALLO

**ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE
NO. 940093 IN THE 182nd JUDICIAL DISTRICT COURT
HARRIS COUNTY**

Per Curiam. PRICE, J., filed a concurring statement in which JOHNSON, J., joined.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Article 11.071 of the Texas Code of Criminal Procedure.

Applicant was convicted of the offense of capital murder in February 2004. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. The conviction was affirmed on direct appeal. *Gallo v. State*, 239 S.W.3d 757 (Tex. Crim.

App. 2007).

Applicant presents thirty-eight allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court adopted the State's proposed findings of fact and conclusions of law recommending that the relief sought be denied.

A jury determined the issue of mental retardation at Applicant's trial in 2004. Dr. George Carl Denkowski testified as an expert witness for the State on the issue of mental retardation. In his first habeas allegation, Applicant asserts that Denkowski "could not conclude that Applicant was not mentally retarded without rejecting the accepted clinical mental health definitions of mental retardation and the accepted techniques used to classify under those clinical mental health definitions of mental retardation." Applicant asserts that, as a result, he "was denied a fair trial, as well as being denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." On direct appeal, we rejected Applicant's challenge to the sufficiency of the evidence to support the jury's answer to the mental retardation special issue. *See Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984)(holding that we need not address habeas claims that were raised and rejected on direct appeal); *see also Ex parte Reynoso*, 257 S.W.3d 715, 723 (Tex. Crim. App. 2008).

In April 2011, subsequent to the filing of the instant habeas application, Denkowski entered into a Settlement Agreement with the Texas State Board of

Examiners of Psychologists, in which his license was “reprimanded.” Pursuant to this Settlement Agreement, Denkowski agreed to not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings. The trial court, in its findings and conclusions, has evaluated the merits of Applicant’s first habeas allegation in light of the Denkowski Settlement Agreement.¹ We have reviewed the record and the trial court’s findings of fact and conclusions of law. Based upon the trial court’s findings and conclusions (with the exception of findings #51 and #53) and our own review, we deny relief on Applicant’s first habeas allegation.

This Court has reviewed the record with respect to the remaining allegations made by Applicant. We adopt the trial judge’s findings and conclusions pertaining to Applicant’s remaining allegations, except for finding #136. Based upon the trial court’s findings and conclusions and our own review, we deny relief on the remaining allegations.

IT IS SO ORDERED THIS THE 9TH DAY OF JANUARY , 2013.

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¹ Applicant has filed a “Suggestion to Remand Cause for Trial Court to Render Initial Findings,” asking this Court to remand this cause to the trial court to reconsider its findings and conclusions in light of the Denkowski Settlement Agreement. However, the trial court has *sua sponte* taken the Denkowski Settlement Agreement into account in its review of Applicant’s claim. Thus, we decline Applicant’s suggestion to remand this cause to the trial court.