



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-70,152-03**

**EX PARTE GERONIMO GUTIERREZ, Applicant**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS IN  
CAUSE NO. 2001-CR-1577 IN THE 227<sup>TH</sup> JUDICIAL DISTRICT COURT  
BEXAR COUNTY**

*Per curiam.* SLAUGHTER, J., dissented. YEARY, J., did not participate.

### O P I N I O N

This is a subsequent application for a writ of habeas corpus in a capital case filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.<sup>1</sup>

Applicant was convicted of capital murder and sentenced to death in April 2002. We affirmed his conviction and sentence on direct appeal. *Gutierrez v. State*, No. AP-74,341 (Tex. Crim. App. April 21, 2004)(not designated for publication).

In March 2004, Applicant filed his initial post-conviction application for a writ of

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<sup>1</sup> Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

habeas corpus in which he raised ten claims, including a claim that he is intellectually disabled, and therefore, ineligible for execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002). This Court denied relief on the claims raised in his initial application. *Ex parte Gutierrez*, No. WR-70,152-01 (Tex. Crim. App. October 1, 2008)(not designated for publication). In February 2011, Applicant filed his first subsequent writ application, in which he again raised an *Atkins* claim. This Court dismissed the first subsequent writ application as an abuse of the writ without considering the merits of the claims. *Ex parte Gutierrez*, No. WR-70,152-02 (Tex. Crim. App. October 23, 2013)(not designated for publication).

Applicant unsuccessfully pursued habeas relief in federal district court. *Gutierrez v. Davis*, No. 5:09-CV-543 (W.D. Tex. July 29, 2016). The United States Supreme Court later issued *Moore v. Texas*, 137 S. Ct. 1039 (2017), in which it concluded that some of the standards in our caselaw did not comport with the Eighth Amendment's requirements regarding an intellectual disability determination. Applicant then sought an abeyance in the Fifth Circuit in order to return to state court for review of his *Atkins* claim. The Fifth Circuit granted Applicant's motion to stay the proceedings. *Gutierrez v. Davis*, No. 16-70028 (5<sup>th</sup> Cir. August 30, 2017).

The instant subsequent writ application, which Applicant filed with the district clerk in 2018, presents a single claim that Applicant's "death sentence is a violation of the Eighth and Fourteenth Amendments because he is intellectually disabled." On September 11, 2019, we concluded that Applicant satisfied the requirements of Article 11.071, §

5(a)(1), and we remanded this application to the habeas court “to consider all of the evidence in light of the *Moore v. Texas* opinion and make a new recommendation to this Court on the issue of intellectual disability.”

The parties thereafter jointly submitted to the habeas court proposed findings of fact and conclusions of law “in which counsel for [Applicant] and the District Attorney’s Office agree[d] that [Applicant] is intellectually disabled and should be granted relief.” On March 23, 2020, the habeas judge signed the proposed findings, concluded that Applicant “established by a preponderance of the evidence that he is intellectually disabled,” and recommended that relief be granted.

Having reviewed the record in this case, we determine that Applicant has met his burden to show that he satisfies the diagnostic criteria for intellectual disability. However, we do not adopt the habeas court’s findings of fact and conclusions of law. Relief is granted on Applicant’s intellectual disability claim. We reform Applicant’s sentence of death to a sentence of life imprisonment.<sup>2</sup>

Delivered: November 25, 2020  
Do not publish

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<sup>2</sup> At the time of Applicant’s offense, the only available alternative punishment for capital murder was life in prison with the possibility of parole after the actual time served equals forty years. In 2005, the Legislature amended Article 37.071 to provide that a life-sentenced capital defendant would no longer be eligible for parole. See *Estrada v. State*, 313 S.W.3d 274, 281 n.3 (Tex. Crim. App. 2010)(citing Art. 37.071 § 2(g); Acts 2005, 79th Leg., R.S., ch. 787, §§ 7, 8, 9, page 2706 (SB 60), eff. September 1, 2005).