

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

NO. WR-55,161-02

EX PARTE ERIC DEWAYNE CATHEY

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. 713189
IN THE 176TH JUDICIAL DISTRICT COURT
HARRIS COUNTY

***Per Curiam*; Keller, P.J., and Meyers, Keasler and Hervey, JJ., would dismiss the application pursuant to Article 11.071, § 5.**

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5, and a motion for stay of execution.

In March 1997, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Cathey v. State*, 992 S.W.2d 460 (Tex. Crim. App. 1999). Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court on March 15, 1999. This Court denied applicant relief. *Ex parte Cathey*, No. WR-55,161-01 (Tex Crim. App. Apr. 2, 2003)(not designated for publication). Applicant's subsequent application was received in this Court on November 17, 2008.

Applicant presents two allegations in his application. In his first claim, applicant asserts that his execution would violate the United States Supreme Court's opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth Amendment prohibits the execution of the mentally retarded. In his second claim, applicant asserts that his execution would violate his due process rights unless he is afforded

a full and fair hearing on his claim of mental retardation with access to the tools necessary to establish his claim.

We have reviewed the application and find that the allegations satisfy the requirements of Article 11.071 § 5. Accordingly, we grant applicant's motion to stay his execution and remand the application to the trial court for a live hearing on applicant's claims. As a part of its factual inquiry, the trial court shall receive and evaluate evidence concerning:

- (1) the scientific validity and reliability of the "Flynn effect";
- (2) whether clinical practitioners who are ordinarily called upon to diagnose mental retardation for purposes outside of the criminal justice system use and apply the "Flynn effect" to I.Q. test results when making their particularized diagnoses of mental retardation;
- (3) whether the application of the "Flynn effect" to individual test results is generally accepted scientific procedure in the pertinent professional community outside of the criminal justice system; and
- (4) the known or potential "error rate" of the "Flynn effect" as it applies to a specific I.Q. test result.

IT IS SO ORDERED THIS THE 18TH DAY OF NOVEMBER, 2008.