



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-87,258-01

Ex parte JUSLET JOSEPH, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. W-71461-01-B-WR IN THE 181ST DISTRICT COURT
FROM POTTER COUNTY**

KELLER, P.J., filed a dissenting opinion in which YEARY, J., joined.

The Court grants an out-of-time appeal because Applicant was abandoned by appellate counsel. But Applicant waived his right to appeal (and his right to file a motion for new trial). In *Ex parte Crow*, we explained that, to prevail on an ineffective assistance claim based on the deprivation of the right to file a petition for discretionary review (PDR), the defendant must show that counsel's conduct caused the deprivation.¹ To show that counsel caused the deprivation, the defendant must show (1) that he was entitled to be in the appellate process, and (2) he would have timely filed a PDR (but for counsel's deficient performance).² I would hold that the first requirement

¹ 180 S.W.3d 135, 138 (Tex. Crim. App. 2005).

² *Id.*

JOSEPH DISSENT — 2

applies to appeals as well: To show that he was deprived of an appeal, Applicant needed to show that he was entitled to an appeal. Because Applicant waived appeal, and nothing suggests that the waiver was involuntary, he was not entitled to an appeal, and thus, counsel's conduct, deficient as it was, did not deprive Applicant of an appeal.

For this reason, I would not grant Applicant an out-of-time appeal but would consider his other claims for relief. I respectfully dissent.

Filed: May 9, 2018

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