IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-76,112

EX PARTE MICHAEL JOSEPH BENNETT, Applicant

**ON AN ORIGINAL APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 43,922-C IN THE 89th DISTRICT COURT
FROM WICHITA COUNTY**

***Per curiam*.**

O P I N I O N

The Applicant has filed an original application for writ of habeas corpus with this Court seeking relief in the form of an out-of-time petition for discretionary review.[1] The Applicant filed a pre-conviction application for writ of habeas corpus with the district court seeking relief from being placed in double jeopardy by a re-trial in this cause. The trial court denied relief, and the

[1] Article 1, Section 12 of the Texas Constitution states that, "The Writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." The authority of the Court of Criminal Appeals to grant and issue original writs of habeas corpus is set out in the Texas Constitution Article 5, subsection (c). This authority is also set out in Article 4.04(1) of the Code of Criminal Procedure.

Applicant appealed the trial court's ruling to the Second Court of Appeals. The Second Court of Appeals affirmed the trial court's denial of Applicant's pre-conviction application for writ of habeas corpus. *Ex parte Bennett*, 245 S.W.3d 616 (Tex. App.–Fort Worth 2008, pet. dism'd).

Applicant contends that his appellate counsel rendered ineffective assistance because counsel failed to timely notify Applicant that his conviction had been affirmed.

Appellate counsel filed an affidavit which is included in the record before this Court. Based on that affidavit, we find that appellate counsel failed to timely notify Applicant that his conviction had been affirmed, and that relief should be granted. *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997). We find, therefore, that Applicant is entitled to the opportunity to file an out-of-time petition for discretionary review of the judgment of the Second Court of Appeals in Cause No. 02-07-00104-CR that affirmed the trial court's denial of his pre-conviction writ in Case No. 43,922-C from the 89th Judicial District Court of Wichita County. Applicant shall file his petition for discretionary review with the Second Court of Appeals within 30 days of the date on which this Court's mandate issues.

Delivered: MARCH 11, 2009
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