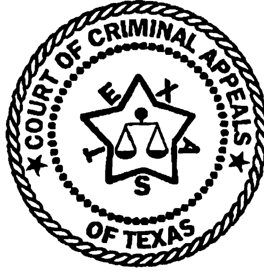

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0755-13

ELISA MERRILL WILSON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS FORT BEND COUNTY

KELLER, P.J., filed a concurring opinion in which JOHNSON, J., joined.

In *Scott v. State*, this Court upheld the telephone harassment statute, holding that the statute does not implicate the First Amendment.[1] Two of the reasons given in support of upholding the statute have been abandoned by the Court today. The Court in *Scott* interpreted the term "repeated" to mean that the telephone calls at issue must be in close enough temporal proximity "to be properly termed a single episode."[2] Today, the Court says that "repeated" simply means that "one telephone call will not suffice." The Court in *Scott* also contended that, "in the usual case, persons whose

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[1] 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

[2] *Id.* at 669 n. 12.

conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake."[3] Today, the Court says that the facially legitimate purpose of the call does not negate the prohibited intent or manner of the call.

I cannot quarrel with the Court's holdings; I anticipated both in my dissent in *Scott*.[4] But I do not share the Court's optimism that it will be "exceedingly rare that the State will be able to sufficiently prove that the defendant made [two telephone] communications with the intent to annoy, harass, alarm, abuse, torment, or embarrass another."

At the time *Scott* was decided, I said that "[t]he mischief this statute can create is enormous,"[5] and the present case has only reinforced that conclusion. The message the telephone harassment statute provides to the public is, "If you have any disagreements with your neighbor, and you have called her on the telephone once, do not ever call her on the telephone again, or you will be exposed to criminal liability." Even worse, because the statute is not limited to calls made to someone's home phone or even to a personal phone, the "only one phone call" rule applies to any phone conversation, anywhere—including a phone call made to a public official at his government office. In light of the Court's abandonment of some of the rationales in *Scott*, we ought to, when the issue is raised again, re-evaluate our holding in that case. Because the continuing viability of *Scott* is not currently before us, and because the Court correctly applies the statute to the facts in this case, I

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[3] *Id.* at 670.

[4] *Id.* at 673 (criticizing the Court's definition of "repeated"), 676-77 ("nothing in the statute limits its application to those occasions when the actor's sole intent is to inflict emotional distress") (Keller, P.J., dissenting).

[5] *Id.* at 676.

concur in the Court's judgment.

Filed: September 17, 2014
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