



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-82,867-01

EX PARTE DAVID RAY LEA, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 52758-A IN THE 239TH DISTRICT COURT
FROM BRAZORIA COUNTY**

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

I dissented when the Court granted post-conviction habeas corpus relief on the grounds that Applicant was convicted under a statute that was later declared to be unconstitutionally overbroad, namely, Texas' improper photography statute. *Ex parte David Ray Lea*, No. WR-82,867-02, 2016 WL 1383928 (Tex. Crim. App. Apr. 6, 2016) (not designated for publication) (Yeary, J., dissenting). *See also Ex parte Chang*, 485 S.W.3d 918 (Tex. Crim. App. 2016) (Yeary, J., dissenting). I did not believe that an applicant should be able to obtain retroactive post-conviction collateral relief based upon an overbroad statute unless he can show that the statute was unconstitutional as applied to his own conduct. *See Ex parte Fournier*, 473 S.W.3d 789, 805 (Tex. Crim. App. 2015) (Yeary, J., dissenting) (“[W]e should limit post-conviction relief to those applicants who can establish that their

conduct did not fall within the plainly legitimate sweep of the overbroad statute.”). I believe the argument I made in my dissenting opinion in *Ex parte Fournier*, while addressing a different statute—Texas’ Online Solicitation of a Minor statute—should also apply to Applicant in this case. Therefore, I dissented to retroactively invalidating his improper photography conviction for the reasons stated in my dissenting opinion in *Fournier. Lea*, 2016 WL 1383928, at *1 (Yeary, J., dissenting); *Chang*, 485 S.W.3d at 918.

Now the Court takes the incrementally greater step of also granting post-conviction habeas corpus relief in a revocation proceeding in which the conviction it has previously set aside—for the offense of improper photography—was used as a basis to revoke an earlier conviction for child pornography. But that earlier conviction had also become final by the time this Court declared, in *Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014), that the statute was unconstitutional. For the reasons I expressed in *Fournier*, I would not have granted retroactive collateral relief on the underlying conviction for improper photography. By even greater force of logic, we should not grant retroactive collateral habeas corpus relief to set aside an otherwise valid revocation simply because the conviction that provoked the revocation was based on a statute that was later declared to be unconstitutionally overbroad.

I respectfully dissent.

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