IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0578-16

EX PARTE ADAM WAYNE INGRAM, Appellant

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

ALCALA, J., filed a concurring opinion in which NEWELL, J., joined.

CONCURRING OPINION

I concur in this Court's judgment that upholds the judgment of the court of appeals. I, however, do not join this Court's majority opinion for two reasons. First, I do not agree with the portion of the majority opinion's analysis as to the non-cognizability of some of the claims in the pretrial habeas application filed by Adam Wayne Ingram, appellant. Unlike this Court's majority opinion that determines that a portion of appellant's claims are non-cognizable "anti-defensive issues," I would decide all of his claims on the merits. Second,

as to the merits of those claims, I would sustain appellant's complaint that the online solicitation of a minor statute, as a whole, is unconstitutionally vague, but I would delete the portions of the offending subsection that render the statute unconstitutional, and, as narrowly constructed, I would uphold the constitutionality of the statute. I, therefore, concur only in this Court's judgment.

I. Facial Challenge is Cognizable in Pretrial Habeas Application

I conclude that appellant's facial challenge is cognizable in a pretrial habeas application. Appellant's indictment is premised on the online solicitation of a minor statute, which, at the time of his conduct, described the offense in subsection (c) by stating, "A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person." TEX. PENAL CODE § 33.021(c) (West 2010). The statute defined "minor" as "(A) an individual who represents himself or herself to be younger than 17 years of age; or (B) an individual whom the actor believes to be younger than 17 years of age." *Id*. § 33.021(a)(1)(A), (B). Subsection (d) in the statute stated, "It is not a defense to prosecution under Subsection (c) that: . . . (2) the actor did not intend for the meeting to occur; or (3) the actor was engaged in a fantasy at the time of commission of the offense."

Id. § 33.021(d).[1]

This Court holds that subsection (d) is an "anti-defensive issue" that is dependent on the evidence introduced at trial and thus is not subject to a facial challenge or eligible for pretrial habeas review. To my knowledge, this Court has never used the term "anti-defensive issue" before today. I do not believe that the term "anti-defensive issue" is an appropriate description of subsection (d). It is true that subsection (d) is not a defense because it does not begin with the phrase, "It is a defense to prosecution . . . ."[2] Rather, I conclude that subsection (d) is more appropriately understood as either establishing the elements of the offense or providing for a definition of the elements of the offense. In any event, because the provisions in subsection (d) serve to clarify the scope of the statute and arguably broaden the statute's coverage to reach conduct that might not otherwise plainly be encompassed within its reach, I would hold that appellant's facial challenge to this subsection is properly considered in a pretrial habeas application.

Subsection (d)'s phrasing that certain facts are "not a defense to prosecution" means that there will be criminal liability for certain types of conduct regardless of whether the "actor did not intend for the meeting to occur" and regardless of whether the "actor was

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[1] Subsection (d)(1) additionally provides that it is not a defense to prosecution under subsection (c) that the meeting did not actually occur. TEX. PENAL CODE § 33.021(d)(1) (West 2010). Appellant does not challenge the constitutionality of that portion of subsection (d), and thus it is not implicated in this appeal.

[2] Section 2.03 of the Texas Penal Code states, "(a) A defense to prosecution for an offense in this code is so labeled by the phrase: 'It is a defense to prosecution . . . .'" TEX. PENAL CODE § 2.03.

engaged in a fantasy at the time of the commission of the offense." *Id*. This phrasing is not factually dependent on the evidence that is introduced at trial. Rather, in all cases in which the statute is used to accuse someone of online solicitation of a minor, that person may be convicted under the statute regardless of whether he actually intended for the meeting to occur or was engaged in fantasy at the time of the activity. Given this, I do not view subsection (d) as a mere anti-defensive issue that comes into play only when certain evidence is introduced at trial, as this Court suggests. I conclude that this subsection operates more like a definition for the word "solicits" that appears in subsection (c), or like an element of the offense in that it serves to clarify the intent element in subsection (c) by specifying that an actor can still intend that a minor will engage in sexual activity even if he does not intend for the meeting to actually occur or was engaged in fantasy. For this reason, unlike this Court's majority opinion, I would hold that appellant's challenge to subsection (d) is cognizable in a pretrial habeas application under the rationale that it is a facial challenge to the statute or, at the very least, more like a facial challenge than it is like an as-applied challenge. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) ("Pretrial habeas can be used to bring a facial challenge to the constitutionality of the statute that defines the offense[.]").

II. The Deletion of the Offending Subsections Makes Statute Constitutional

Given that appellant's complaint is cognizable for pretrial habeas review, I would address his complaint on its merits. I agree with him that the inclusion of the offending

subsections renders the statute unconstitutionally vague because the statute criminalizes the intent to solicit the child for sexual activity but then, in contradiction, it permits a conviction when there is no actual intent to meet a child. The inclusion of the offending subsections renders the statute internally inconsistent. Nonetheless, I would uphold the statute by applying a narrowing construction that deletes the offending subsections.

The court of appeals held that, under its precedent in *Ex parte Zavala*, the complained of subsections are not contradictory with the elements of the offense in subsection (c), and thus it determined that the statute was not unconstitutionally vague. *Ex parte Zavala*, 421 S.W.3d 227, 231-32 (Tex. App.—San Antonio 2013, pet. ref'd). The court of appeals explained that, in *Zavala,* it had held that the crime of solicitation was completed at the time of the request or solicitation so that it was immaterial whether the meeting had actually occurred or whether the solicitor intended that the meeting would not occur. *See id*. I disagree with this assessment of the statute.

"[A] statute is void for vagueness if its prohibitions are not clearly defined." *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006). A penal statute must define the criminal offense with adequate definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement. *Id*. Taking subsection (c) in isolation from subsection (d), the statute clearly prohibits the knowing solicitation of "a minor to meet another person, including the actor," with the intent that the minor will engage in sexual activity. TEX. PENAL CODE § 33.021(c)

(West 2010). That provision becomes vague, however, with the inclusion of subsection (d)(2), which provides for criminal liability even when "the actor did not intend for the meeting to occur." *Id.* § 33.021(d)(2). I conclude that the inclusion of subsection (d)(2) appears to create an internally inconsistent intent element because an actor cannot, at the same time, knowingly solicit a minor to meet with the intent of causing the minor to engage in sexual activity while concurrently not having any actual intent for the meeting to occur. *Id*. Similarly, I conclude that the provision in subsection (d)(3) renders the statute internally inconsistent because an actor cannot, at the same time, knowingly solicit a minor with the intent to meet for sexual activity while concurrently not having any actual intent to meet because he was engaged in a fantasy at the time of the solicitation. *Id*. § 33.021(d)(3). I would hold that, when subsections (d)(2) and (d)(3) are considered along with subsection (c), ordinary people would not understand what is prohibited given the internal contradictions in the statute as a whole, and that this would likely permit arbitrary and discriminatory enforcement of this offense. *See Holcombe*, 187 S.W.3d at 499.

This Court's majority opinion accurately notes that courts may employ a reasonable narrowing construction that permits a statute to be upheld over a constitutional challenge, and I agree with that concept as it would apply here. Here, because the offending subsections are in an entirely separate section from the description of the elements of the offense of online solicitation of a minor, I conclude that the Legislature intended to criminalize a defendant's knowing intent to meet a child, and thus it is proper to apply a narrowing construction that

deletes subsections (d)(2) and (d)(3). With that reformation, I would uphold the constitutionality of the statute so that subsection (c) alone describes the offense of online solicitation of a minor under the intent-to-meet provision.

III. Conclusion

I would treat the statutory requirements in subsection (d) as constituting an element or definition of the offense and would consider the merits of appellant's challenge to that subsection as a facial challenge that is cognizable on pretrial habeas. I, however, would also hold that subsection (d) may be severed from the statute in such a way as to make subsection (c) conform with the requirements of the federal Constitution. For these reasons, I concur in this Court's judgment affirming the judgment of the court of appeals.

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