IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0618-16

EX PARTE CLINTON DAVID BECK, Appellant

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD COURT OF APPEALS
COMAL COUNTY**

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I agree that Appellant in this case should not be heard to complain about the facial constitutionality of the statute under which he was convicted for the first time in a post-conviction habeas corpus proceeding such as is provided in Article 11.072. TEX. CODE CRIM. PROC. art. 11.072. I reach that conclusion for a markedly different reason than the Court does today, however, and I disagree with the precedent upon which the Court relies. I write separately to explain how I nevertheless reach the same bottom line as the Court.

The Court relies principally upon our holding in *Karenev v. State*, 281 S.W.3d 428 (Tex. Crim. App. 2009). There, the Court held that a facial challenge to the constitutionality of a statute falls within the category of rights, as described in the seminal case of *Marin v.*

State, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993), that may be lost by simple inaction at the trial court level. *Karenev*, 281 S.W.3d at 434. The Court now affirms that, under *Karenev*, because Appellant did not object—at the time he entered his plea of guilty—that the penal provision under which he had been charged was unconstitutional on its face, he may not make that *Marin*-category-three complaint now, for the first time, in a post-conviction proceeding. Majority Opinion at 12-14. There is an exception to the *Karenev* rule, as the Court later identified in *Smith v. State*, 463 S.W.3d 890 (Tex. Crim. App. 2015): An appellant may raise a claim that the statute under which he was prosecuted is facially unconstitutional for the first time in post-conviction proceedings, but only after an authoritative court has already declared that statute to be facially unconstitutional. *Id*. at 896. The Court today concludes that Appellant's claim does not fit within the *Smith* exception. I would not go that route.

In my separate opinion in *Smith*, I described my dissatisfaction with the state of the law in this area in the following terms:

> I believe that whether a particular claim falls within one *Marin* category or another should not be made to depend upon when that claim is recognized to be valid. Instead, it should simply depend upon the nature of the claim itself—does it seek to vindicate an interest that is so indispensable to the correct operation of the criminal justice system that its enforcement is not even optional with the parties. *Marin*, 851 S.W.2d at 280. For essentially the reasons that Judge Cochran developed in her concurring opinion in *Karenev*, I would hold that an appellant's claim that his conviction and punishment cannot stand because they are based upon a facially unconstitutional penal provision is patently a *Marin*-category-one type of claim *from its inception*, regardless of whether it has yet been recognized and validated by an appellate court. Such a claim may be raised for the first time, and should be addressed on the merits,

> on appeal. * * * If the nature of the claim is such that it truly falls within the first category of *Marin*, it may be vindicated for the first time on collateral attack, in post-conviction habeas corpus proceedings. *Ex parte Moss*, 446 S.W.3d 786, 788-89 (Tex. Crim. App. 2014).

463 S.W.3d at 899 n.3 (Yeary, J., concurring and dissenting). In my view, then, a claim that a penal statute is unconstitutional on its face ought to *ordinarily* be cognizable even when raised for the first time in post-conviction habeas corpus proceedings.

But not invariably. As I have also expressed in separate opinions in other cases, I do not think this rule should necessarily apply to provide retroactive post-conviction habeas corpus relief automatically to an applicant whose only challenge to the penal provision under which he was prosecuted is that it is unconstitutionally overbroad. I have said that, before granting post-conviction habeas relief to such an applicant, I would require him to demonstrate that the statute was unconstitutional as it applied to his own conduct. *Ex parte Fournier*, 473 S.W.3d 789, 800-805 (Tex. Crim. App. 2015) (Yeary, J., dissenting); *Ex parte Chang*, 485 S.W.3d 918, 918-19 (Tex. Crim. App. 2016) (Yeary, J., dissenting); *Ex parte Shay*, 507 S.W.3d 731, 738-40 (Tex. Crim. App. 2016) (Yeary, J., dissenting). Appellant in this case pled guilty in 2010, several years before the Court declared the on-line-solicitation-of-a-minor statute to be unconstitutionally overbroad in *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). And we have *yet* to declare the specific statute under which Appellant pled guilty—the improper-relationship-with-a-student statute—to be similarly unconstitutionally overbroad (and, indeed, as the Court points out, we may *never* do so). Appellant makes no argument that his own conduct does *not* fall within the *legitimate* sweep

of the statute, even assuming for the sake of argument that it is substantially overbroad. Under these circumstances, I would not apply the holding in *Lo* retroactively to grant Appellant post-conviction relief.

In short, a claim that a penal statute is facially unconstitutional, in every conceivable application, is a claim that ought to be cognizable in any initial post-conviction application for writ of habeas corpus, notwithstanding our holding in *Karenev*. But a claim that a penal statute *often* operates in a way that impinges on First Amendment rights, though it may have *some* legitimate sweep, should not be available in post-conviction proceedings unless and until the habeas applicant can establish that his own First Amendment rights were violated. Appellant has made no such showing here.

On that basis, I concur in the Court's judgment affirming the judgment of the court of appeals. But I cannot join the Court's opinion.

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