IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-87,738-01

EX PARTE WYLIE KYLE MITCHAM, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. 12069JD-HC-1 IN THE 1A DISTRICT COURT OF JASPER COUNTY

NEWELL, J., filed a concurring opinion in which KELLER, P.J., HERVEY AND RICHARDSON, JJ., joined.

Applicant was convicted for violating a law that had previously been held facially unconstitutional by this Court. Everyone on the Court is in agreement that he is entitled to relief. I write separately to address the expressed concern regarding this Court's unanimous decision in *Ex parte Lo*. In the context of a First Amendment overbreadth challenge, determining whether a statute risks sweeping a substantial amount of protected speech is, as the United States Supreme Court has noted, a

"matter of no little difficulty."[1]

But how a statute is interpreted by the State is not part of a proper overbreadth analysis. When the United States Supreme Court considered the federal statute prohibiting visual depictions of animal cruelty, it specifically rejected this approach.[2] In order to avoid a broad reading of the statute at issue (and prevail against an overbreadth challenge), the Government noted that it interpreted the statute to only cover extreme animal cruelty.[3] As Chief Justice Roberts explained, overbreadth analysis does not turn upon the government's interpretation of a statute.

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty. Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6-7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id*., at 6-7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy, of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.[4]

The prosecutorial restraint demonstrated by the cases involving the online solicitation statute is certainly admirable. But it does nothing to inform

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[1] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[2] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

[3] *Id.*

[4] *Id.*

a proper analysis regarding the scope of the online solicitation statute.[5]

Further, citing to cases that applied the statute to unprotected speech focuses on the wrong thing. Overbreadth analysis already allows that a statute that is capable of being applied constitutionally may nevertheless be unconstitutional if it could also be used to criminalize protected speech.[6] A statute may be facially invalid if it prohibits a "substantial" amount of protected speech judged in relation to the statute's plainly legitimate sweep.[7] The State may not justify restrictions on protected speech on the basis that such restrictions are necessary to effectively suppress constitutionally unprotected speech.[8] Yet this is exactly the type of justification sought by focusing solely upon the statutory applications involving unprotected speech. Examples of a statute's plainly legitimate sweep do not tell us how far beyond that legitimate sweep the statute reaches.[9] A challenge to the breadth of a

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[5] Since this Court's decision in *Ex parte Lo*, our Legislature has amended the online solicitation statute to narrow the statute's scope.

[6] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

[7] *Id.*

[8] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

[9] It is also worth mentioning that this standard was not invented by this Court in *Ex parte Lo*. It comes from the United States Supreme Court precedent, which this Court is bound to follow. *See, e.g., State v. Johnson*, 475 S.W.3d 860, 866 (Tex. Crim. App. 2015). If this standard appears too lenient by allowing some unprotected speech to go unpunished, the problem is with the overbreadth doctrine itself, not this Court's decision in *Ex parte Lo*.

statute's reach is not an as-applied challenge.[10]

Finally, it is inconsistent to grant relief upon ineffective assistance rather than set aside the conviction because the statute is unconstitutional. Any theory of ineffective assistance necessarily relies upon treating *Lo* as settled law. Counsel's conduct is deficient because he failed to tell his client that the statute his client was charged under is unconstitutional. Applicant is prejudiced because there is a reasonable probability that he would not have pleaded guilty but for counsel's failure to alert him to the fact that he was being prosecuted under a statute that had been held unconstitutional.[11] If counsel's performance is deficient and Applicant was prejudiced, it is because *Ex parte Lo* is settled law and we are obligated to apply it. The Court properly applies *Ex parte Lo* and sets aside Applicant's conviction.

With these thoughts I join the Court's order granting relief.

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[10] *Stevens*, 559 U.S. at 472–73.

[11] *Lee v. United States*, 137 S.Ct. 1958, 1965 (2017) (holding that prejudice based upon deficient performance during a guilty plea proceeding is determined by the demonstration of a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial).