IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-88,046-01

EX PARTE JOSEPH LEVELS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-11-205209-A IN THE 147TH DISTRICT COURT
FROM TRAVIS COUNTY

YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEASLER, J., joined.

DISSENTING OPINION

The Court today grants Applicant post-conviction relief on the ground that his conviction was improperly enhanced by the use of a state jail felony for a habitual offender. Majority Opinion at 2. I believe the Court grants relief prematurely.

In *Ex parte Clay*, I explained that the law is unsettled as to whether an illegal sentence based on an improper-enhancement claim may be raised for the first time in a post-conviction writ. No. WR-87,763-01, 2018 WL 635864, at *2 (Tex. Crim. App. Jan. 31, 2018) ("It appears that the principle that an 'illegal sentence' may be raised 'at any time,' regardless of whether there was a contemporaneous objection lodged at trial, does not apply with respect

to improper-enhancement claims—or at least not *all* (and maybe not even *most*) improper-enhancement claims."). That question still remains unresolved today.[1]

In this case, the specific enhancement Applicant complains of was invalid prior to his conviction and the enhancement's invalidity was apparent on the face of the indictment. Applicant raises the additional claim that his counsel was constitutionally ineffective for failing to object to the enhancement and the incorrect punishment range. Applicant may well be entitled to relief, in my view, because his counsel failed to object. But there is no response from Applicant's counsel and no explanation for why an objection was not made at trial. Therefore, I would remand the case to afford counsel the opportunity to respond and not grant relief without first resolving the substantive question of law. Because the Court does not, I respectfully dissent.

FILED: February 28, 2018
DO NOT PUBLISH

[1] *See Ex parte Pue*, No. WR-85,447-01, slip op. at 3 n.7 (Tex. Crim. App. Feb. 28, 2018) (explaining, in a case granting relief on the ground that a foreign conviction was not final and could not as a matter of law be used as an enhancement, that "simply labeling a claim as one asserting an 'illegal' or 'void' sentence does not automatically make it cognizable in an application for writ of habeas corpus").