



# **IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

**NO. WR-88,227-01**

**EX PARTE COLTON ALAN LESTER, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
CAUSE NO. 23,538-A IN THE 258TH DISTRICT COURT  
FROM POLK COUNTY**

**YEARY, J., filed a concurring opinion.**

## **CONCURRING OPINION**

Today, the Court grants post-conviction habeas corpus relief to an applicant who was convicted of attempted online solicitation of a minor after the statute was declared unconstitutionally overbroad. *See* Majority Opinion (granting habeas relief based upon *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013)). I agree with the Court's decision to grant Applicant the relief he seeks, but I would grant relief only on Applicant's ineffective assistance of counsel claim.

This case presents the same issue that I addressed in my concurring opinion in *Ex parte Mitcham*, No. WR-87,738-01, 2018 WL 847655, at \*1 (Tex. Crim. App. Feb. 14, 2018) (Yeary, J., concurring). In *Mitcham*, and in this case, both the alleged offense date and the conviction occurred after this Court handed down its decision in *Ex parte Lo. Id.*<sup>1</sup> Just as in this case, Mitcham claimed not only that his conviction should be vacated in light of *Lo*, but also that his counsel was ineffective for allowing him to plead guilty to an unconstitutionally overbroad statute in the first place. *Id.* The Court granted Mitcham post-conviction relief on the basis that *Lo* had declared Section 33.021(b) unconstitutionally overbroad. *Id.* I disagreed with the Court’s decision to grant relief on that basis, arguing that the applicant should first demonstrate that the statute was applied unconstitutionally in his case. *Id.* at \*1 n.1 (basing this conclusion on the reasoning I set forth in my dissenting opinion in *Ex parte Fournier*, 473 S.W.3d 789, 800–805 (Tex. Crim. App. 2015) (Yeary, J., dissenting)). I further opined that *Lo* may have been improperly decided and suggested that the Court ought to reconsider that decision at a later time. *Mitcham*, 2018 WL 847655, at \*1. Nonetheless, I concurred with the result because the applicant demonstrated that his counsel was ineffective for permitting him to plead guilty to a statute after it had been declared unconstitutionally overbroad. *Id.*

I would grant the applicant here the post-conviction relief he seeks for the same

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<sup>1</sup> *Ex parte Lo* was decided on October 30, 2013. The offense in this case allegedly occurred on April 27, 2014 and Applicant was charged by information on August 26, 2014.

reason. Although I have since advocated that it is time for this Court to reconsider *Lo*,<sup>2</sup> the fact remains that “[a] defendant may not properly be charged or convicted under a statute after the statute has been declared facially unconstitutional.” *Id.* (citing *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988)). Applicant’s counsel failed to raise the issue and allowed Applicant to plead guilty anyway. *Id.* Under these circumstances, I agree with Applicant that his counsel was constitutionally ineffective and concur in the Court’s decision to grant relief.

DELIVERED: April 11, 2018  
DO NOT PUBLISH

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<sup>2</sup> *Ex parte Chavez*, No. WR-87,785-01, 2018 WL 1109534 (Tex. Crim. App. Feb. 28, 2018) (Yeary, J., dissenting) (“Once again, the Court today grants post-conviction relief to an applicant whose conduct, as I see, fails to even remotely constitute protected speech. . . . Today, I believe that the Court should reconsider *Ex parte Lo* and determine whether the case was decided correctly.”).