COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00229-CR

JAMES ALAN HORTON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1404769D

DISSENTING OPINION

In a brief that appellant James Alan Horton filed with this court in October 2016, he argued that provisions within section 133.102 of the local government code were facially unconstitutional because those provisions violated the separation of powers clause of the Texas constitution. *See* Tex. Const. art. II, § 1; Tex. Loc. Gov't Code Ann. § 133.102 (West Supp. 2016). Specifically, appellant challenged the constitutionality of subsections 133.102(e)(1), which

required him to pay a cost related to "abused children's counseling," and 133.102(e)(6), which required him to pay a cost related to "comprehensive rehabilitation." *See* Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (6). Appellant asked us to modify the judgment to delete those costs.

Months later, in *Salinas v. State*, the court of criminal appeals adopted appellant's position, declaring those subsections facially unconstitutional for the precise reasons he had urged. No. PD-0170-16, 2017 WL 915525, at *4–5 (Tex. Crim. App. Mar. 8, 2017). By declaring the subsections facially unconstitutional, the court of criminal appeals signified that there are no circumstances in which those provisions could ever be constitutionally applied. *See id.* at *2; *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1188 (2016).

But under the majority's opinion in this appeal, the *Salinas* decision, as it applies to appellant, represents a hollow victory. The majority's opinion recognizes the facial unconstitutionality of court costs assessed against appellant and requires him to pay them anyway. Because I believe that the trial court's judgment must be modified to delete the costs, I must dissent.[1] *See Bridges v. State*, No. 06-16-00162-CR, 2017 WL 1424811, at *1 (Tex. App.—Texarkana Apr. 19, 2017, no pet. h.) (mem. op., not designated for publication) (applying the

[1]I join the majority's opinion to the extent that it overrules appellant's first and second points. I dissent only to the extent that the opinion does not grant appellant relief after sustaining his third point.

constitutional holding in *Salinas* and modifying a judgment to eliminate the costs under section 133.102 attributable to abused children's counseling and comprehensive rehabilitation).

A facially unconstitutional statute is "stillborn"; it is void from its inception; it is "as if it had never been." *Smith v. State*, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015); *see also Void*, Black's Law Dictionary (10th ed. 2014) (stating that a void act is "of no effect whatsoever"). No rights may be "built up" under such a statute, and such a statute is of "no more force or validity than a piece of blank paper." *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988). Such a statute "amounts to nothing and accomplishes nothing and is no law." *Id.* In other words,

> An act that has been declared unconstitutional is, in legal contemplation, as inoperative as though it had never been passed or written, and it is regarded as invalid, or void, from the date of enactment (not only from the date on which it is judicially declared unconstitutional) and at all times thereafter.

16 C.J.S. *Constitutional Law* § 265 (2017) (footnotes omitted).

The majority's opinion in this appeal does not treat the offending subsections of section 133.102 as "stillborn"; rather, the opinion provides those void subsections with effect and vitality by requiring appellant to pay costs associated with them. In reaching this conclusion, the majority relies on the retroactivity analysis provided by the majority opinion in *Salinas*. *See* 2017 WL 915525, at *5–6. There, the court of criminal appeals described several approaches that courts may take in determining the retroactivity of a judicial

holding. *See id.* Relying on the United States Supreme Court's decision in *Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970 (1967), the court of criminal appeals opted to use a three-pronged balancing approach[2] that applies to a "new construction of a state statute." *Salinas*, 2017 WL 915525, at *6. Weighing the considerations identified in *Stovall*, the court in *Salinas* reached a holding of limited retroactivity:

> We . . . recognize the need to reward parties who persuade a court to overturn an unconstitutional statute, and we conclude that applying the new constitutional rule to the parties in the present case is necessary, but not quite sufficient to satisfy that need. Other defendants have challenged one or both of the fees at issue in petitions for discretionary review before this Court and can be said to have exerted some influence in procuring our current holding. Therefore, we will also apply our constitutional holding in this case to any defendant who has raised the appropriate claim in a petition for discretionary review before the date of this opinion, if that petition is still pending on the date of this opinion and if the claim would otherwise be properly before us on discretionary review. Otherwise, our holding will apply prospectively to trials that end after the date the mandate in the present case issues.

Id. (footnote omitted).

Therefore, the court of criminal appeals recognized the nugatory nature of the offending subsections of section 133.102 for two groups of defendants: (1) those who were fortunate enough—either because they committed crimes earlier or had trials that were speedier—to have been convicted and to have

[2]The court considered "(1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement authorities on the old standards, and (3) the effect a retroactive application of the new standards would have on the administration of justice." *Salinas*, 2017 WL 915525, at *6.

reached the petition for discretionary review stage of litigation before the date of the *Salinas* opinion, and (2) those who are fortunate enough—either because they will be charged with committing crimes later or will have had a slower pace of proceedings—to delay their trials until after the court of criminal appeals's mandate issues. But the court of criminal appeals purported to breathe life into stillborn statutory provisions while leaving out an intermediate group of defendants such as appellant even if those defendants raised a constitutional challenge to section 133.102 before the date of the court's decision.

This unequal treatment of defendants—opening the doors for some of them to enjoy relief from a facially unconstitutional statute and closing the doors for others—raises concerns of due process, due course of law, equal protection, and equal access to courts. *See* U.S. Const. amends. V, XIV; Tex. Const. art. I, § 19; *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."); *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) ("The only right that the federal constitution confers to criminal defendants in the context of an appeal is that, if a state provides an appeal by statute, it must provide access to the appellate courts in a way that does not violate the Equal Protection Clause of the Fourteenth Amendment.").

Furthermore, the court of criminal appeals's reliance on the *Stovall* balancing test as a means of carefully selecting which defendants will continue to be burdened by a lifeless, facially unconstitutional statute was misplaced. *Stovall* concerned the retroactivity of prior Supreme Court decisions relating to the unconstitutional admission of tainted identification evidence. 388 U.S. at 294, 87 S. Ct. at 1968. In other words, *Stovall* addressed the retroactivity of a court-fashioned constitutional rule. *See id.* The Court did not purport to apply its three-pronged test to considering the retroactivity of a decision that declares a statute facially unconstitutional. *See id.* Nor could it.[3] As explained by the dissenting opinion in the court of criminal appeals's *Ex parte Fournier* decision, "retroactivity" in the circumstance of a facially unconstitutional statute is a misnomer:

> Given [the] general rule . . . that an unconstitutional statute is inoperable "from its inception[,]" . . . it may seem redundant or even pointless to engage in an analysis of retroactivity of the judicial decision that declared the statute to be unconstitutional. After all, it was not the judicial decision that nullified the statute; the statute was stillborn. *Any analysis of retroactivity would surely result in a conclusion that the judicial opinion recognizing the facial unconstitutionality of a penal statute should be applied retroactively.* Thus, any time a penal statute is declared facially unconstitutional—

[3]Furthermore, I note that after the decision in *Stovall*, the Supreme Court issued an opinion that limited *Stovall*'s application, and in that decision, the Court stated that a "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 713 (1987); *see also Taylor v. State*, 10 S.W.3d 673, 678 (Tex. Crim. App. 2000) (recognizing that in *Griffith*, the Supreme Court "repudiated the *Stovall* doctrine of retroactivity and its underlying rationale").

> at least in the usual sense that it is invalid under some constitutional principle *in all of its applications*—it would make sense to hold the opinion declaring the facial unconstitutionality of the penal provision to apply to any and every individual ever convicted under that provision, in the future and in the past.

473 S.W.3d 789, 801 (Tex. Crim. App. 2015) (Yeary, J., dissenting) (emphasis added).[4] Or as explained by the Illinois Supreme Court,

> A constitutionally repugnant enactment suddenly cuts off rights that are guaranteed to every citizen . . . and instantaneously perverts the duties owed to those citizens. To hold that a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right. This would clearly offend all sense of due process under both the Federal and State Constitutions.

People v. Gersch, 553 N.E.2d 281, 287 (Ill. 1990).

Given these considerations, the retroactivity analysis in *Salinas* following the declaration in that opinion that provisions of section 133.102 are facially unconstitutional was unnecessary and inappropriate. Although the court held that retroactivity principles are "implicated if the holding of a court announces a

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[4]The dissenting opinion in *Fournier* ultimately reasoned that a statute that is overbroad is not void from its inception and that a decision declaring a statute overbroad—as opposed to facially unconstitutional in all applications—should be applied prospectively. 473 S.W.3d at 802–04 (Yeary, J., dissenting). The majority opinion in *Fournier* did not disagree with the dissenting opinion's explanation of the effect that a facially unconstitutional statute has on retroactivity concerns. *See id.* at 790–96.

Presiding Judge Keller joined Judge Yeary's dissenting opinion in *Fournier* (therefore indicating her agreement with these principles) but authored the majority opinion in *Salinas* that applied a retroactivity analysis to a facially unconstitutional statute.

'new' rule"—*Salinas*, 2017 WL 915525, at *5—the effect of the constitutional holding in that case was not to announce a "new" rule but instead was to recognize and declare the ineffectual, void nature of the challenged provisions within section 133.102 from the date of the statute's enactment.

In sum, the effect of the holding regarding retroactivity in *Salinas*, as well as the effect of the majority's decision in this appeal, is on one hand recognizing and declaring that the assailed provisions of section 133.102 are facially unconstitutional because those provisions are infirm "*in all . . . applications*" while on the other hand continuing to *apply* those provisions to defendants like appellant. *See id.* at *2 (emphasis added). The unmistakable result is that defendants convicted both earlier and later than those in the first step of appellate review, without regard to preservation of error, are entitled to relief. Because such a decision rests on inconsistent reasoning and violates principles of due process, due course of law, equal protection, and equal access to courts, I dissent.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

MEIER, J., joins.

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