# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. PD-0880-16**

**RONALD EDGAR LEE, JR., Appellant**

**v.**

**THE STATE OF TEXAS**

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS TAYLOR COUNTY**

**YEARY, J., filed a concurring opinion in which KELLER, P.J., joined.**

## CONCURRING OPINION

The Court essentially holds that a defendant charged with the offense of Continuous Sexual Abuse of a Child under Section 21.02 of the Texas Penal Code cannot be convicted if he has committed only two instances of sexual abuse of a child (separated in time by at least 30 days) and one of those instances occurred in a different state. The reason given by the Court resides in the definition of "act of sexual abuse" contained in Section 21.02(c): "any act that *is a violation* of one or more of the following penal laws[,]" followed by a list

of offenses as defined by various other Texas Penal Code provisions. TEX. PENAL CODE § 21.02(c) (emphasis added). From this definition, the Court simply declares that, "[b]ecause 'act of sexual abuse' requires an act that 'is a violation' of Texas law, Appellant's act in New Jersey may not be considered one of the predicate offenses necessary for a conviction under Section 21.02." Majority Opinion at 5. I agree with this and join the Court's opinion.

It might be possible, I suppose, to read the statutory definition more expansively than the Court does today. We could read it to include a contingency: "any act that is a violation of one of the following penal laws, or that *would* be a violation of one of these penal laws if it were to be committed in this state." Some states have enacted enhancement provisions that expressly incorporate this contingency, allowing for greater punishment upon proof of prior convictions from other states for conduct that, *e.g.*, "if committed in this state would be" an offense. GA. CODE ANN. § 17-10-7(b)(2) (West 2015).[1] Certain provisions in Texas statutory law explicitly provide for the use of a prior offense from another state for the purpose of enhancing punishment or boosting the classification of a subsequent offense; the prior offense must be one that "was committed under the laws of" that other state and the penal provision from that state must "contain[] elements that are substantially similar to the elements of" a Texas offense. TEX. PENAL CODE §§ 12.42(c)(2)(B)(v), 12.42(c)(3)(B)(ii),

[1] *See also* NEV. REV. STAT. ANN. § 200.366(4)(b) (West 2015); ME. REV. STAT. ANN. tit. 17-A, § 1252, 4-B (2016); VT. STAT. ANN. tit. 13, § 3253(a)(4) (West 2017).

12.42(c)(4)(B), 12.42(g)(2).[2] There is no such language in Section 21.02(c).

Should we read such a contingency into the statute in the absence of comparably explicit legislative language? Without addressing it directly, the Court seems to regard the lack of such explicit language as a definitive indication that out-of-state instances of sexual abuse of a child cannot serve to establish the "continuous" element of the instant offense. I am less sure that, by omitting the language of contingency, the statute necessarily dispenses with it. There may be some wiggle room in the statutory language—what does "is a violation of" mean?—that would justify resort to extratextual factors to resolve the ambiguity.[3] *See Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (when statutory language is plain, the plain language controls, but when statutory language is ambiguous, courts may resort to extratextual indicia of legislative intent). But even if the statutory language is

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[2] Some other states also have similar provisions in their sex offender registration statutes that recognize offenses from sister states so long as the underlying conduct, "if committed in this state, would constitute" an offense there. *E.g.*, WYO. STAT. ANN. § 7-19-301(a)(iv) (West 2017); IOWA CODE ANN. § 692A.101, 30(e) (West 2014); OHIO REV. CODE ANN. § 2950.99 (West 2011). Under our own sex offender registration statute, a "sexually violent offense" may include "an offense under the laws of another state . . . if the offense contains elements that are substantially similar to the elements of an offense" under certain Texas Penal Code provisions. TEX. CODE CRIM. PROC. art. 62.001(5). Thus, while the standard in Texas is different, the legislative intent that *some* out-of-state convictions qualify is unmistakable.

[3] Black's primarily defines "violation" to mean "[a]n infraction or breach of the law[.]" BLACK'S LAW DICTIONARY at 1800 (10th ed. 2014). Appellant argues that there can be no "violation" of any of the enumerated Texas laws for an act that occurs wholly beyond the territorial jurisdiction of Texas. *See* TEX. PENAL CODE § 1.04(a)(1) (Texas has jurisdiction over an offense when, among other things, "either the conduct or a result that is an element of the offense occurs inside this state"). Perhaps that position begs the question whether, to constitute a "violation" of Texas law for purposes of Section 21.02(c), an offense occurring wholly outside of Texas must nevertheless be actionable in Texas. Appellant does not deny that what he was accused of doing in New Jersey would have been a "violation" of Texas law had it occurred here.

ambiguous, I have found no meaningful extratextual indicia of legislative intent to convince me that the Legislature meant to include out-of-state incidents of abuse within the parameters of the statute. If, by giving Appellant the benefit of the doubt under this state of affairs, we have misjudged the Legislature's intent, then the fix is easy enough: Add the language of contingency that appears in other statutes in Texas, and in the statutes of other states, that plainly embraces the use of out-of-state offenses for various purposes, setting out the conditions under which they may be invoked. *See Prudholm v. State*, 333 S.W.3d 590, 599-600 (Tex. Crim. App. 2011) (construing what it means to say that an out-of-state offense contains "substantially similar elements" to those of a Texas penal provision for purposes of enhancement under Section 12.42(c)(2) of the Penal Code); *Crabtree v. State*, 389 S.W.3d 820, 825 (Tex. Crim. App. 2012) (observing that the Texas sex offender registration statute categorizes a conviction from another state as a "reportable conviction" when the offense as defined by that other state "contain[s] elements that are substantially similar to elements" of certain Texas offenses).

With these qualifying remarks, I join the Court's opinion.

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