ACCEPTED
12-17-00346-CR
TWELFTH COURT OF APPEALS
TYLER, TEXAS
5/8/2018 4:15 PM
Pam Estes
CLERK

No. 12-17-346-CR

In the Court of Appeals for the Twelfth Judicial District Tyler, Texas

EX PARTE JORDAN BARTLETT JONES

On Appeal from the
County Court at Law No. 2, Smith County, Texas

BRIEF OF AMICUS CURIAE THE OFFICE OF THE ATTORNEY GENERAL IN SUPPORT OF THE STATE'S MOTION FOR REHEARING

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

SCOTT A. KELLER
Solicitor General

ANDREW B. DAVIS
Assistant Solicitor General
State Bar No. 24082898
andrew.davis@oag.texas.gov

Counsel for the Office of the
Attorney General

Table of Contents

Page

Index of Authorities iii

Interest of Amicus Curiae v

Introduction 1

Argument 2

I. This Court Read Texas Penal Code § 21.16(b) Too Broadly. 2

II. Section 21.16(b), as Correctly Construed, Is Constitutional Even If This Court Again Applies Strict Scrutiny. 4

III. This Court Applied the Wrong Level of Scrutiny. 7

Prayer 11

Certificate of Service 12

Certificate of Compliance 13

Index of Authorities

Page(s)

Cases

Bartnicki v. Vopper,
532 U.S. 514 (2001) 6, 7, 8, 9

Clark v. Cmty. for Creative Non-Violence,
468 U.S. 288 (1984) 6

Dahlstrom v. Sun-Times Media, LLC,
777 F.3d 937 (7th Cir. 2015) 9

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 7, 8

Ex parte Thompson,
442 S.W.3d 325 (Tex. Crim. App. 2014) 4, 5, 6, 7, 8

Lawrence v. Texas,
539 U.S. 558 (2003) 5, 7, 8

McCullen v. Coakley,
134 S. Ct. 2518 (2014) 10

R.A.V. v. St. Paul,
505 U.S. 377 (1992) 9

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) 8

Renton v. Playtime Theaters,
475 U.S. 41 (1986) 9–10

Seattle Times Co. v. Rhinehart,
467 U.S. 20 (1984) 6

Snyder v. Phelps,
562 U.S. 443 (2011) 7

Turner Broad. Sys. v. F.C.C.,
512 U.S. 622 (1994) 8

Union Pac. Ry. v. Botsford,
141 U.S. 250 (1891) 4

Villarreal v. State,
935 S.W.2d 134 (Tex. Crim. App. 1996) 3

Constitutional Provisions and Statutes

Tex. Const. art. V, § 32 v

Tex. Gov't Code § 402.010 v

Tex. Penal Code
§§ 6.02(b)-(c) 4
§ 6.03(c) 4
§ 21.16(b) 1, 10
§ 21.16(b)(2) 2, 8

Other Authorities

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-51 (2012) 2

Interest of Amicus Curiae

The Office of the Attorney General defends Texas statutes that are challenged under the Constitution of the United States. By requiring parties to notify the Office of the Attorney General of an action challenging the constitutionality of a state statute when the attorney general is not a party to or counsel involved in the litigation, Texas Gov't Code § 402.010 (requiring notice in civil suits); *see also* Tex. Const. art. V, § 32 (permitting notice in criminal cases), the State has explicitly recognized this interest.

No fee has been paid for the preparation of this brief.

To the Honorable Twelfth Court of Appeals:

On April 18, 2018, this Court held Texas's anti-revenge-pornography statute, Tex. Penal Code § 21.16(b), to be facially invalid under the First Amendment because, this Court said, the law applies to anyone who shares private sexual images, even if the person sharing the image had no idea that the image was meant to remain private. But that broad construction of the statute is incorrect, and thus this Court's First Amendment analysis is also incorrect. The plain statutory text makes clear that it criminalizes nonconsensual disclosures of sexual images *only* by those individuals who effectively have a duty to keep the images private because the circumstances under which they created or obtained the images demonstrate the victim's reasonable expectation of privacy. And once given its plain meaning, the statute readily satisfies both strict scrutiny—which this Court applied in its opinion—as well as the lower level of scrutiny that this Court should have applied because the prohibited speech is private speech of purely private concern.

Because this Court did not receive briefing or hear any argument prior to issuing its opinion making clear that the statute does not criminalize innocent disclosers, and because the statute plainly satisfies the First Amendment once properly construed, this Court should grant rehearing and affirm the trial court's denial of habeas corpus relief.

ARGUMENT

I. This Court Read Texas Penal Code § 21.16(b) Too Broadly.

Texas Penal Code § 21.16(b) is a narrow statute that punishes a limited set of persons who harm others by intentionally disclosing exceedingly private, sexual images of them without their consent. This Court, however, read the statute broadly to apply to persons who disclose an image but have "no reason to know" that the person depicted had an expectation of privacy. Slip op. at 7. That misreads the statutory text.

Section 21.16(b) specifically provides that disclosing visual material of a person's intimate parts or of a person engaged in sexual conduct is criminal *only* if: "th[at] visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private." Tex. Penal Code § 21.16(b)(2). This provision accordingly criminalizes disclosure when the material was either (a) "*obtained* . . . under circumstances in which the depicted person had a reasonable expectation" of privacy, or (b) "*created* under circumstances in which the depicted person had a reasonable expectation" of privacy. *Id.* (emphasis added); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-51 (2012) (stating that "postpositive modifiers" apply to disjunctive elements and providing examples).

This means that it is not sufficient to look simply at whether, as a general matter, the person depicted had a reasonable expectation that the images would remain private. If that were so, the element would read: "(b) A person commits an offense if . . . (2) the person depicted had a reasonable expectation that the visual material

would remain private." The language, however, is not so simple. Subsection (b)(2) instead requires the fact-finder to proceed in two steps. First, determine the circumstances under which the accused obtained or created the images. Second, determine "*under* [*those*] *circumstances*" (a) whether the depicted person subjectively intended to keep the visual material private and (b) whether this intention, if it exists, was objectively reasonable. *Cf. Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996) (interpreting "reasonable expectation" of privacy in the context of searches and seizures to have subjective and objective components). If the depicted person had both a subjective and objectively reasonable expectation of privacy under the relevant circumstances, then the accused—who is, by definition, a participant in those circumstances—had a duty to respect that expectation and keep the images private. If not, then not.

Accordingly, Section 21.16(b) does not in fact reach nearly as far as this Court said it does. To take this Court's example, *see* slip op. at 7, if Adam takes nude photographs of Barbara, promising to keep them private, and then discloses them to his friend Charlie without comment, Adam satisfies Section 21.16(b)(2), but Charlie does not. Adam created the photographs under circumstances in which Barbara had an obvious subjective and objective expectation of privacy—after all, she told him not to share the photographs—so he has a duty to keep them private. But Charlie received the photographs from Adam without comment. Under those circumstances, where Charlie has no idea about the origins of the photographs, Barbara lacks any objectively reasonable expectation that they will remain private, and so

Charlie has no duty to keep them private. The law simply does not criminalize disclosures by individuals who have no reason to believe that visual material was, and was meant to remain, private.[1]

II. Section 21.16(b), as Correctly Construed, Is Constitutional Even If This Court Again Applies Strict Scrutiny.

Although this Court should reconsider the appropriate level of scrutiny to apply, *see infra* at III, Section 21.16(b) as correctly construed satisfies even strict scrutiny because it "is narrowly drawn to serve a compelling government interest." *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014).

That the State has a compelling interest in preventing the substantial harms caused by the nonconsensual public disclosure of sexually explicit material should be beyond doubt. Over a century ago, the Supreme Court recognized that "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one . . . to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass." *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 252 (1891). Modern precedents echo this by recognizing the importance of privacy

[1] Section 21.16(b)(2) does not specifically include a mens rea requirement, and none is necessary to prevent criminalizing innocent actions because a person who intentionally discloses visual material will know the circumstances under which he obtained or created that material, and so has the opportunity to assess whether the person depicted in the material has a reasonable expectation of privacy. But to the extent this Court disagrees, it should "employ a reasonable narrowing construction," *Ex parte Thompson*, 442 S.W.3d 325, 339 (Tex. Crim. App. 2014), and hold that a person disclosing visual material must either know that the depicted person has an expectation of privacy, or "consciously disregard[] a substantial and unjustifiable risk" that she has an expectation of privacy. Tex. Penal Code § 6.03(c) (defining recklessness); *see id.* §§ 6.02(b)-(c) (where a provision "does not prescribe a culpable mental state," and the statutory text does dispense with that element, at least recklessness is required).

with regard to sexual matters and exposure of intimate areas. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Ex parte Thompson*, 442 S.W.3d at 348 ("[S]ubstantial privacy interests are invaded in an intolerable manner when a person is photographed . . . with respect to an area of the person that is not exposed to the general public, such as up a skirt."). Indeed, given the devastating harm—including lost employment, depression, and even suicide—that comes from the invasions of privacy that Section 21.16(b) is designed to combat, it is difficult to imagine a more compelling privacy interest.

To achieve this compelling interest, the Legislature drew a narrow law that prohibits only exceedingly harmful invasions of privacy. If the disclosure is not visual material of the most intimate kind—depictions of another person's intimate parts exposed or engaged in sexual conduct, there is no violation; if the disclosure does not reveal the identity of the depicted person, there is no violation; if the disclosure is consensual, there is no violation; if the disclosure does not cause harm, there is no violation; and, most importantly, if the disclosure is not made by someone who obtained or created the image under circumstances in which the depicted person had a reasonable expectation of privacy, there is no violation. This means that if two persons, each without effective consent, disclose the same image and create the same harm, but one of them obtained the image under circumstances in which the depicted person had an expectation of privacy (say, a hacker who steals the image from the victim's phone), while the other obtained it under circumstances in which the victim did *not* have an expectation of privacy (say, a person who sees the image on a public website that does not indicate the source of the image), only the former has violated

the statute. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (concluding that a protective order allowing a party to "disseminate the identical information covered by the . . . order as long as the information [wa]s gained through means independent of the court's processes" did not offend the First Amendment).

By limiting Section 21.16(b) to only those situations where there is a harmful and nonconsensual invasion of privacy, moreover, the Legislature left "open ample alternative channels," *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), for the disclosure of sexually explicit visual material. No person risks prosecution under Section 21.16(b) simply by sharing an explicit image, and every person remains able to share explicit images consistent with the First Amendment. All Section 21.16(b) does is ensure that those who obtain or create sexual images under circumstances in which the depicted person has an expectation of privacy are subject to criminal liability if they betray that expectation by disclosing those images to the public—an assurance that actually *encourages* private speech. *See Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) ("[T]he fear of public disclosure of private conversations might well have a chilling effect on private speech.").

Section 21.16(b) was the least restrictive means for the State to achieve its compelling interest in protecting the privacy of every Texan citizen, and is consistent with the First Amendment.[2]

---

[2] Assuming that a law sufficiently tailored to satisfy strict scrutiny on a facial challenge could nevertheless be overbroad, Section 21.16(b) is not. Because the State may constitutionally prohibit nonconsensual disclosures of sexual images of purely private concern, the only *possibly* unconstitutional application of Section 21.16(b) will be if the disclosures constitute speech of public concern. But that rare and difficult-to-envision hypothetical does not, by a long stretch, render the statute facially invalid. *See Ex parte Thompson*, 442 S.W.3d at 349-50 (overbreadth is "strong medicine"

III. This Court Applied the Wrong Level of Scrutiny.

Applying strict scrutiny to Section 21.16(b) is contrary to established precedent because Section 21.16(b) is content-neutral, not, as this Court previously held, content-based. This Court should therefore grant rehearing to clarify that a lower level of scrutiny applies, or at minimum, to hold that, because Section 21.16(b) satisfies even strict scrutiny, this Court need not decide what level of scrutiny applies.

A. The Supreme Court has repeatedly recognized that "not all speech is of equal First Amendment importance, [ ] and where matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (cleaned up). That is because a law limiting speech on matters of purely private significance "is no threat to the free and robust debate of public issues"—the core concern of the First Amendment. *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (opinion of Powell, J.)). Accordingly, whether "speech is of public or private concern" may often be dispositive because it determines the level of protection the First Amendment affords. *Id.* at 451.

And the diminished protection afforded to speech without any public value is further lessened where that speech runs up against substantial privacy concerns. "Privacy of communication is an important interest," *Bartnicki*, 532 U.S. at 532, that is protected by the Constitution, *see Lawrence*, 539 U.S. at 564-67 (describing privacy interests protected by Due Process Clause.). *See also Ex parte Thompson*, 442 S.W.3d at 348. That is why *Bartnicki* explicitly limited its holding that the First Amendment

---

that applies only the statute "prohibit[s] a substantial amount of protected expression"). If that hypothetical results in an attempted prosecution, the accused may bring an as-applied challenge.

protects the publication of wiretapped private conversations to circumstances where the discloser is *innocent* and the conversation is on a "matter[] of *public importance*." *Bartnicki*, 532 U.S. at 525, 534 (emphasis added); *id.* at 535-36 (Breyer, J., concurring) ("I agree with [the Court's] narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully . . . and (2) the information publicized involved a matter of unusual public concern.").

Because the State's revenge pornography law undoubtedly applies only to speech of purely *private* concern, *see Dun & Bradstreet*, 472 U.S. at 762 (information about a particular individual's "credit report concerns no public issue"), in which the depicted person had an expectation of privacy, Tex. Penal Code § 21.16(b)(2), the law is, *at most*, subject to intermediate scrutiny. Any higher level of scrutiny incorrectly protects this speech at the same level as public speech on a public concern.

That courts and juries must "look at the content of the speech in question to decide if the speaker violated the law," *Ex parte Thompson*, 442 S.W.3d at 345, does not require this Court to apply heightened scrutiny. A law is content-based and subject to strict scrutiny only when it "distinguishes 'favored speech from disfavored speech on the basis of the ideas or views expressed.'" *Id.* (quoting *Turner Broad. Sys. v. F.C.C.,* 512 U.S. 622, 643 (1994); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). Whether courts and juries must "look at the content" of the speech is a good proxy for determining whether the law distinguishes between favored and disfavored speech—but it is not perfect.

This is a case in point. Although Section 21.16(b) applies only to sexually explicit content, it is content-neutral because "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue"—private speech of purely private concern—receives lesser First Amendment protection. *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992). Just as a State may "prohibit only that obscenity which is the most patently offensive in its prurience," *id.* at 388 (emphasis omitted), it can limit laws protecting private speech of private concern to the *most* private speech (images in which a person has an expectation of privacy) on the *most* private concern (images of a person's intimate parts exposed or engaged in sexual conduct) without raising the level of protection afforded to those general categories of less-protected speech.

More than that, Section 21.16(b) is content-neutral because it singles out speech "by virtue of the source, rather than the subject matter." *Bartnicki*, 532 U.S. at 526; *see also Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949 (7th Cir. 2015) (holding that law prohibiting publication of personal information obtained from motor vehicle records was content-neutral). Although Section 21.16(b) applies only to sexually explicit visual material, it permits disclosure of that very same material if it is obtained or created in a way that does not give rise to a reasonable expectation of privacy. Because the law's focus is the source of the information, not its subject matter, it is content-neutral and not subject to strict scrutiny.

B. Section 21.16(b) is also content-neutral because it is aimed at the "secondary effects" of disclosing material that depicts an *identifiable* person's intimate parts exposed or engaged in sexual conduct. *Renton v. Playtime Theaters*, 475 U.S. 41, 47

(1986). In *Renton*, the Supreme Court upheld a law that treated "theaters that specialize in adult films differently from other kinds of theaters," *id.*, because even though that law applied only to certain speech content, it was justified without reference to that content. Specifically, it was justified by the desire to prevent adverse effects such as crime, lowered property values, and deterioration of residential neighborhoods. *Id.*; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (holding that law prohibiting standing near abortion facilities was content-neutral).

The same is true here. Even though Section 21.16(b) applies only to specific speech content, it specifically targets the serious and irreparable harms caused when a person discloses intimate visual images of another person without consent. It does not simply ban the disclosure of sexually explicit images—it bans only those disclosures that "reveal[] the identity of the depicted person," cause that person "harm," and violate the depicted person's reasonable expectation of privacy. Tex. Penal Law § 21.16(b). These limiting elements demonstrate that the law's target is not the content of the speech, but the negative consequences of violating a depicted person's reasonable privacy interests without his or her consent.

Prayer

The Court should grant rehearing and affirm the trial court's order denying Jones's Application for Writ of Habeas Corpus.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Scott A. Keller
Solicitor General

/s/ Andrew B. Davis
Andrew B. Davis
Assistant Solicitor General
State Bar No. 24082898
andrew.davis@oag.texas.gov

Counsel for the Office of the Attorney General

Certificate of Service

On May 8, 2018, a true and correct copy of the foregoing was electronically filed and served on the following counsel of record:

Kevin Hayes
Michael J. West
Smith County District Attorney
4th Floor, Courthouse
100 North Broadway
Tyler, Texas 75702
mwest@smith-county.com

Mark W. Bennett
Bennett & Bennett
917 Franklin Street
Fourth Floor
Houston, Texas 77002
MB@ivi3.com

Stacey M. Soule
State Prosecuting Attorney
John R. Messinger
Assistant State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov

/s/ Andrew B. Davis
Andrew B. Davis

Certificate of Compliance

Microsoft Word reports that this brief contains 2,844 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Andrew B. Davis
Andrew B. Davis