PD-0478-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO.: PD-0478-19

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

EX PARTE LEONARDO NUNCIO, Appellant

Appeal from Webb County, Texas

PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF ALL JUDGES, PARTIES AND COUNSEL

1. The parties to the trial court's judgment are the State of Texas and the Appellant, Leonardo Nuncio.
2. The matter was heard before and ruled upon by the Honorable Hugo D. Martinez, Judge Presiding, County Court at Law No. 1, Webb County, Texas.
3. Counsel for Appellant at trial and on appeal is Oscar O. Peña, Oscar O. Pena Law, PLLC, 1720 Matamoros St., Laredo, Texas 78040 (mailing: PO Box 1324, Laredo, Texas 78042).
4. Counsel for the State of Texas at trial was Albrecht Riepen, Assistant District Attorney, Webb County District Attorney's Office, 1110 Victoria St., Suite 401, Laredo, Texas 78040.
5. Counsel for the State of Texas on appeal is David Reuthinger, Assistant District Attorney, Webb County District Attorney's Office, 1110 Victoria St., Suite 401, Laredo, Texas 78040.
6. The Fourth Court of Appeals' majority opinion was rendered by Justice Beth Watkins, Justice Patricia O. Alvarez (joining). The dissent-in-part was written by Justice Liza A. Rodriguez.

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IN THE COURT OF CRIMINAL APPEALS
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EX PARTE LEONARDO NUNCIO, Appellant

Appeal from Webb County, Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

Leonardo Nuncio challenges the constitutionality of Texas Penal Code §42.07(a)(1) and (b)(3). He and undersigned counsel petition the Court of Criminal Appeals of Texas to exercise its discretion to review the opinion of the Fourth Court of Appeals and note that the Fourth Court of Appeals generated a dissenting opinion agreeing that the challenged statute was unconstitutionally vague.

A three-Justice panel of the Fourth Court of Appeals issued a (2-1) published opinion: Ex Parte Nuncio, 2019 WL 1547580. The majority opinion of the Fourth Court of Appeals denied Nuncio's challenge to Texas Penal Code 42.07(a)(1) and (b)(3). However, the submission generated a dissent-in-part penned by Justice Liza A. Rodriguez. In it, she held that the relevant portion of Texas Penal Code 42.07 (referred to herein as the "harassment by obscenity statute") is unconstitutionally

vague and cited many of the same factors that were addressed in Kramer v Price, the Fifth Circuit case that struck down §42.07's predecessor statute in 1983.

a. STATEMENT REGARDING ORAL ARGUMENT

ORAL ARGUMENT IS REQUESTED: Leonardo Nuncio, Petitioner, requests oral argument before the Court of Criminal Appeals of Texas because oral argument will assist the Court in deciding the issue presented herein.

First Amendment overbreadth and vagueness arguments are often best expressed by reference to fact scenarios that illustrate the argument and/or counter argument. One cannot predict the aspects of the argument, if any, that will be of interest to the Justices, therefore oral argument will allow all counsel to address arguments and build models in real time, as needed or as requested by the Honorable Justices of the Court of Criminal Appeals of Texas.

b. STATEMENT OF THE CASE

Nature of the case: On May 30, 2017 Nuncio was accused by complaint and information of violating Texas Penal Code § 42.07(c) by doing the following: "with intent to harass, annoy, alarm, abuse, torment, or embarrass [the complainant]" by initiating "communication with the complainant, and in the course of the communication, make an obscene comment,…" The offense was alleged to have occurred on June 15, 2016.

Pre-Trial Habeas Corpus: Nuncio filed a pretrial habeas corpus challenging the statute. A hearing was had on January 9, 2018. The Court heard argument and denied Nuncio relief on the merits.

Court of Appeals: Fourth Court of Appeals, San Antonio, Texas

Parties in the Court of Appeals:	Appellant: Leonardo Nuncio Appellee: The State of Texas, represented by the Webb County District Attorney's Office, Hon. Isidro "Chilo" Alaniz, District Attorney, and Albrecht Riepen, Assistant District Attorney.
Disposition:	On direct appeal, Nuncio contended et.al. that § 42.07(a)(1) and (c), are unconstitutionally vague, and overbroad, and that they violate the First Amendment of the United States Constitution and other protections afforded to him. Nevertheless, the County Court at Law's denial of relief was affirmed in a 2-1 decision finding the statute valid. Justice Beth Watkins authored the Court's opinion. Justice Patricia O. Alvarez joined her. Justice Liza A. Rodriguez dissented. The opinion was designated as "publish."
Status of opinion:	The Fourth Court of Appeals' opinion is designated for publication and cited as follows: Ex Parte Nuncio, --- S.W.3d ----, 2019 WL 1547580. No motion for re-hearing was requested.
Status of Deadline:	The original deadline for filing a petition for discretionary review was May 10, 2019. Nuncio requested more time and the Court of Criminal Appeals granted an extension and set the new deadline for June 10, 2019. This petition is timely filed.

c. STATEMENT OF PROCEDURAL HISTORY[1]

[1] References: In this petition, references to the clerk's record will be as follows: (CR, 1-20). The trial transcripts in the reporter's record will be cited as follows: (RR, 1-12).

The trial court held a hearing and considered arguments and briefing. Nuncio urged the Court to dismiss the complaint and information arguing that the underlying statute is unconstitutional for overbreadth, vagueness and because it is a content-based restriction that violates the First Amendment's protection of speech.

Nuncio's request for dismissal of the indictment was denied on its merits by the County Court at Law Number One, Hon. Hugo D. Martinez presiding; *see* CR p. 164.

Nuncio then filed a timely notice of appeal to the Fourth Court of Appeals. He appealed the denial of relief to the Fourth Court of Appeals, San Antonio, Texas.

The Fourth Court of Appeals voted 2-1 to affirm the denial of relief, however Justice Liza A. Rodriguez wrote a dissent-in-part, holding that the relevant portion of the criminal statute was unconstitutionally vague.

The Fourth Court of Appeals' opinion was rendered on April 10, 2019 and is attached hereto as the Appendix. It is designated for publication.

Nuncio did not file a motion for rehearing before the Fourth Court of Appeals and instead requested an extension of time to file his petition for discretionary review.

d. GROUND FOR DISCRETIONARY REVIEW

1. Justice Rodriguez's dissent contains the same criticisms of the challenged statute that were addressed in 1983 by the U.S. Fifth Circuit Court of Appeals in Kramer v. Price. Kramer v. Price struck down the previous version of Penal

Code § 42.07. The defects described in Justice Rodriguez's dissent and in Kramer v. Price have not been resolved.

2. The Fourth Court of Appeals' decision, and the text of the challenged statute depart from accepted social norms and common understandings of the meaning of the word "harassment." The Fourth Court's majority opinion, and the challenged statute, risk the criminalization of conduct that would not generally be considered 'criminal' by people of ordinary intelligence. Further, because of this disconnect between common sense and the text of the statute, the challenged statute chills emotional speech, hyperbolic speech, metaphor, sharply critical speech and sexual overtures; TRAP § 66.3 (f).

3. Texas Courts' attempts to construe § 42.07 have led to baffling decisions that show no discernible logic or pattern that can be followed. The resulting authorities constitute a case by case evaluation of whether the subject speech makes reference to an "ultimate sex act." As a result of this lack of clear guidance, the statute is overly broad and chills too much speech.

4. The Court of Appeals should settle this important question because the statute unconstitutionally delegates prosecutorial decision-making and because the potential chilling effect is broad, TRAP § 66.3(b).

5. "Community standards" as set out in Miller v California, (and incorporated by § 42.07) are not relevant, correct, or workable in the era of the internet when community is no longer defined by geography, so much as shared interests and economic access to resources. Further, the Miller v. California standard does not adequately value emotional speech.

e. ARGUMENT AND AUTHORITY

The Fourth Court of Appeals of Texas should exercise its discretion to review this matter pursuant to Texas Rules of Appellate Procedure § 66.3 (a)(b)(c)(d)(e) and (f) for the following reasons:

1. The Penal Statute under Challenge

The challenged provisions of the Texas Penal Code are contained in Penal Code § 42.07. Together they read as follows:

> "Texas Penal Code § 42.07 entitled "Harassment"
>
> **(a)** A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> **(1)** Initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;
> …
> **(b)** In this section:
> …
> **(2)** "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function."

2. **Justice Rodriguez's dissent contains the same criticisms of the challenged statute that were addressed in 1983 by the U.S. Fifth Circuit Court of Appeals in Kramer v. Price.**

There has been a disagreement between the Justices of The Fourth Court of Appeals on a material question of law that is necessary to the Court's decision. The disagreement is expressed in Justice Rodriguez's dissenting opinion. She finds the relevant criminal statute unconstitutionally vague, whereas Justice Watkins and Alvarez did not; TRAP § 66.3(e).

The Court of Appeals has decided an important question of both federal and state law in a way that conflicts with an authoritative decision which found the challenged statute's predecessor unconstitutional; *see* Kramer v. Price, 712 F.2d

174 (5th Cir. 1983). Although this is not a Court of Criminal Appeals opinion of a U.S. Supreme Court decision as mentioned in TRAP 66.3(c), it is still relevant as Justice Rodriguez's dissenting opinion reflects the same unresolved concerns held by the U.S. Fifth Circuit Court of Appeals expressed when the predecessor to § 42.07 statute was struck down as unconstitutional in Kramer v Price. At that time, the Fifth Circuit stated: "the Texas courts have refused to construe the statute to indicate whose sensibilities must be offended…."

As pointed out by Justice Rodriguez in her dissenting opinion, the challenged provisions lack an explicit nexus between the intent of the accused and the person who hears or reads the communication. The statute does not require the target of the intent to actually perceive the conduct in real time, or arguably, perceive it at all because the statute does not prohibit a bystander from filing a complaint on his/her own behalf. The Fourth Court of Appeals' opinion states that:

1. "the provisions challenged by Nuncio plainly proscribes the conduct of initiating a communication and therein making specific obscene remarks with the intent *to emotionally harm the person to whom the communication is made*."
2. "[the challenged subsection] merely prohibit communication of unprotected obscenities intended to harm the person to whom they are directed."

3. "to sustain a prosecution, it is clear a person must engage in obscene communication with a particular person with the intent that the particular person feel harassed, annoyed…"

The Court of Appeals provided no citation to case law for these three assertions—instead it construed the statute itself.

Nuncio argues that this construction is incorrect. It requires that language be implied into the statute: i.e. actor initiates communication with the target of the actor's intent.

But, if the legislature meant the narrowing language to be implied into 42.07(a) then it wouldn't have needed to include explicit target-narrowing language in the other subsections of Penal Code 42.07, such as (a)(2) "alarm the person receiving the threat" and (a)(3) "alarm the person receiving the report". Those sections which *do* use "another" are unlike 42.07 because they are narrowed by the electronic/telephone communication.

The statute does not make clear whether the word "another" in (a), is meant to be the victim, or whether someone else can report the crime on behalf of a victim although not actually the target or actually alarmed, annoyed, abused, tormented, harassed, or embarrassed.

The law's inherent vagueness encourages an unconstitutional level of delegation of decision making and control over the characterization of the conduct

as a crime to the complaining witness. The degree to which the power to influence arrest and/or prosecution is placed in the hands of the complaining witness is unconstitutional and inconsistent with a system of law required to be uniformly enforced.

In Kramer v. Price, the Fifth Circuit stated: "[b]y failing to provide reasonably clear guidelines, § 42.07 gives officials unbounded discretion to apply the law selectively and subjects the exercise of the right to speech to an unascertainable standard. Accordingly, we hold that the Texas harassment statute is unconstitutional on its face for vagueness."

In striking down the statute, the Fifth Circuit added:

> "The absence of a determinate standard gives police officers, prosecutors, and the triers of fact unfettered discretion to apply the law, and thus there is a danger of arbitrary and discriminatory enforcement… the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. … the more important aspect of vagueness doctrine `is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a criminal statute may permit `a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' *Citing* Kolender v. Lawson, 461 U.S. 352 (1983).

The defects described in Kramer have not been resolved by the present-day version of § 42.07. The majority opinion rendered by the Fourth Court of Appeals does not reconcile the defects that resulted in the striking of 42.07's predecessor statute in Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) by the Fifth Circuit Court of Appeals. The Fourth Court of Appeals' decision therefore is in apparent conflict with relevant federal jurisprudence; TRAP § 66.3(c).

Furthermore, the challenged provisions do not make clear who has to find the comment or description patently offensive. Also, the challenged provisions do not contain any standard or guidance to employ regarding the use of unconventional forms of language such as obscene metaphors or hyperbole or gossip or rumormongering.

3. **The Fourth Court of Appeals' decision, and the text of the challenged statute depart from accepted social norms and common understandings of the meaning of the word harassment. The Fourth Court's decision and the challenged statute risk the criminalization of conduct that would not generally be considered 'criminal' by people of ordinary intelligence. Further, because of this disconnect between common sense and the text of the statute, the challenged statute chills emotional speech, hyperbolic speech, metaphor, sharply critical speech and sexual overtures; TRAP 66.3(f).**

The Fourth Court of Appeals has dramatically departed from social norms that often inform judicial proceedings. Such a disconnect between the common understanding of 'harassment' and the conduct prohibited by Penal Code § 42.07

calls for an exercise of the Court's supervisory powers and discretionary review pursuant to TRAP § 66.3(f).

Although the statute threatens to criminalize conduct that, according to most social norms, would not be considered harassment, it does nothing to address the more distinctive features of harassment as that term is generally understood by "persons of ordinary intelligence," i.e. notice (that the communication is unwelcome), repetition, context, the relationship between the actor and victim, persistence and continuity of action over time.

The challenged provisions impermissibly apply to too many social situations that would not be considered 'harassment' or 'criminal' under prevailing social norms. Legislature would make Texas citizens safer by drafting a new statute that focuses not so much on the type of speech, but on the continuity of action, context, notice, and/or persistence. The relevant subsections of the harassment by obscenity statute are so vague that everyday conduct not usually considered to be criminal by prevailing social norms can be criminalized while other forms of clearly criminal verbal harassment are not prohibited.

The challenged provisions do not consider any of the real-world contexts that make harassment… feel like harassment. It does not incorporate circumstances like (1) repetition (2) pursuit (3) continuation of purpose and/or (4) persistence after notice.

The Fourth Court of Appeals' majority opinion has misconstrued the statute (TRAP § 66.3(d)), and it has so far departed from social norms and the understandings of the "person of ordinary intelligence," that the issue calls for an exercise of the Court's supervisory powers; TRAP § 66.3(f).

4. **Texas Courts' attempts to construe § 42.07 have led to baffling decisions that show no discernible logic or pattern that can be followed. The resulting authorities constitute a case by case evaluation of whether the subject speech makes reference to an "ultimate sex act". As a result of this lack of clear guidance, the statute is overly broad and chills too much speech.**

Furthermore, the courts have struggled to formulate a clear definition of what (b)(3)'s "ultimate sex act" means. The attempts at defining "ultimate sex act" do not guide the person of ordinary intelligence by explaining what the prohibited communication is; instead they carve exceptions. Case by case explanations of what is not illegal is not an acceptable substitute for fair notice.

In Pettijohn v State, 782 S.W.2d 866 (1989), the Texas Court of Criminal Appeals reviewed a case involving an accusation against a writer of a letter, Pettijohn, which alleged that the victim was "making sexual advances to little boys and molesting little children."

The Court of Criminal Appeals held that the legislature intended the phrase "ultimate sex act" as used in § 42.07 to mean "something more than the general allegation of sexual activity" and that, "as a matter of law, that the letter [upon which

the indictment and prosecution were based] did not contain an obscene comment as contemplated by § 42.07 because the phrases "making sexual advances to little boys" and "molesting little children", while offensive, do not describe ultimate sex acts."

The court engaged in statutory construction, stating:

> "Thus, we conclude the legislature intended the phrase "ultimate sex act" as used within the context of the harassment statute to mean something more than the general allegation of sexual activity contained in the information in the case at hand. We hold… the phrases "making sexual advances to little boys" and "molesting little children", while offensive, do not describe ultimate sex acts." Pettijohn v. State, 782 S.W.2d 866 (Tex. Crim. App. 1989).

The year following Pettijohn, the Court of Criminal Appeals was again called upon to interpret the meaning of "ultimate sex act" in Lefevers v. State. The Court of Criminal Appeals held that the defendant's conduct of telling the victim "I want to feel your breasts," was not encompassed by the (b)(3) definition of "ultimate sex act". The Court explained: "[a]s used in § 42.07, the phrase "ultimate sex act" includes "sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function." Lefevers v. State, 20 S.W.3d 707 (Tex. Crim. App. 2000).

Both Lefevers and Pettijohn attempt to construe "ultimate sex act" by exclusion rather than description. They do not guide the person of ordinary intelligence by explaining what the prohibited communication is; instead they carve

exceptions after a person has already been arrested, prosecuted, convicted and pursued an appeal.

The guidance provided by these cases still leaves the issue to be resolved on a case-by-case basis by looking at the words and deciding that certain phrases like "I wanna grab your breasts" and "he molests children" do not describe an ultimate sex act, but other phrases like: "your husband enjoys fucking me more than he enjoys fucking you" (*see* Jasper v State, 2014 WL 265699 (Tex. App. Houston [1st Dist] 2014)) does describe an ultimate sex act.

This kind of hair-splitting cannot in good conscience be said to constitute "fair notice" for people of ordinary intelligence. "Because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence… an attempt to charge people with notice of First Amendment case law would undoubtedly serve to chill free expression." Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996).

Even if every citizen of average intelligence were required to read Lefevers and Pettijohn, it would still be difficult to draw any meaningful conclusions. Relegating First Amendment issues to a "case-by-case adjudication" creates a vagueness problem; *see* Long v. State, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996);

Furthermore, the application of "esjudem generis" as contemplated by Lefevers, ignores the fact that the specific words of the statute do not lend themselves

to esjudem generis construction and further, it ignores the statute's grammar and tips the relevant subsections into a grammatical death spiral. This too calls for an exercise of the Court's supervisory powers; TRAP 66.3(b) and (f).

Additionally, the Fourth Court of Appeals' opinion states that "Nuncio's numerous hypotheticals… are insufficient," to show that the statute's reach may extend into protected speech. It cites State v Johnson, 475 S.W.3d 860, (Tex. Crim. App. 2015),(fanciful hypotheticals are insufficient). Nuncio argues that the hypotheticals are not fanciful, they are elemental in the context of emotional, sexual and highly critical speech.

5. The Court of Appeals should settle this important question because the statute unconstitutionally delegates prosecutorial decision-making and because the potential chilling effect is broad, TRAP 66.3(b).

The Fourth Court of Appeals published its opinion. Arguably, this evinces its belief that the issues and holdings will serve as guidance for Texas practitioners and Judges and that it will aid the understanding of §42.07, but also many other statutes that involve the criminalization of speech. The decision to publish its opinion supports the appropriateness of the Court of Criminal Appeals exercise of its discretionary review. The constitutionality of Penal Code § 42.07 is an important issue that has not yet been settled by the Court of Criminal Appeals. The Court of Criminal Appeals should resolve these issues for several reasons: the Fourth Court's opinion is published, the opinion contains a strongly-worded

dissent finding the statute unconstitutional, and because the opinion does not reconcile the same defects that resulted in the predecessor statute being struck down in 1983; see Kramer v. Price, 712 F.2d 174 (5th Cir. 1983)); TRAP 66.3(b).

Also, the outcome of this decision could chill speech in many different contexts. The Court of Criminal Appeals should settle this disagreement and provide guidance for citizens, lawyers, police, and prosecutors so that they might avoid disparate application of the statute as cautioned by Justice Rodriguez's dissent-in-part, "[s]uch vagueness gives law enforcement too much discretion…".

This issue is jurisprudentially important because of its potential effect on many citizens of the State of Texas. The potential scenarios invoked by Nuncio are not fanciful. The dissenting opinion stated that "there are too many commonplace scenarios in which a "person of ordinary intelligence" would not have fair notice of what conduct the statute prohibits until *after* an arrest is made," (emphasis in original). Furthermore, the jurisprudential guidance provided by the Court's exercise of discretion in this case is relevant to many other statutes that regulate or prohibit other categories of speech.

6. **"Community standards" as set out in Miller v California (and incorporated by § 42.07) are not relevant, correct, or workable in the era of the internet when community is no longer defined by geography, so much as shared interests and economic access to resources. Further, the Miller v. California standard does not adequately value emotional speech.**

The three-prong test established in Miller v. California provides the standard for determining whether material is obscene. The trier of fact considers:

> (a) whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest,
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
> Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973)

It is unclear and vague whether Miller v. California's "community standard" prong is incorporated into § 42.07(b)(3). However, the more interesting question is: whether it should be? If the purpose of the statute is to protect individual people from harassment, then what policy does the incorporation of a "community standard" serve? Obscenity standards are designed to protect society—not the individual. It makes no sense for harassment to be measured by the sensibilities of the community, instead of the victim.

The Miller v. California standard is no longer valid, accurate, and/or an effective test for distinguishing obscenity from protected speech. As such, the Court should strike down the Miller v. California based portions of Penal Code § 42.07, specifically subsection (b)(3). The U.S. Supreme Court's Miller v. California standard of obscenity creates a blind spot when it comes to heated emotional speech. Miller v. California and its progeny fail to place any value on emotional speech as a

form of self-actualization and/or catharsis. If one were to have a smaller vocabulary than another—for reasons of circumstance, health, economics, education, etc. than one may be more likely to resort to colorful language and metaphor to express the same thoughts that others might express more eloquently.

There is value associated with the release of negative energy in the form of verbal obscenities; a value that is ignored by the Miller v. California three-pronged test; value that has nothing to do with literature, art, politics, or science, but one that has weight, nevertheless. To ignore the potential healing value of a well-timed, obscenity-laden diatribe is to ignore the human condition. The Miller v. California standard does not accommodate the cathartic value of emotional speech, the hyperbole of sharp criticism, or the awkward clumsiness of well-intended sexual overtures.

f. **Prayer for Relief**

WHEREFORE, PREMISES CONSIDERED, Leonardo Nuncio and undersigned counsel pray that the Court of Criminal Appeals grant discretionary review, find that the Appellate Court and/or the Trial Court erred, decide the questions of law raised herein, and dismiss and/or set aside the indictment as requested by Nuncio. Nuncio also prays for general relief and/or any relief to which the Court of Criminal Appeals finds that he is entitled or that he has requested herein.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that one true and correct electronic copy of this document was delivered to all counsel as required by the applicable rules of procedure, either via, hand delivery, U.S. First Class Mail and/or certified mail, facsimile transmission, and/or email transmission sent from Oscar O. Peña Law, PLLC on June 10, 2019.
By: /s/ Oscar O. Peña_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i)(2)(D), if applicable, because it contains 4432 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1). This number was calculated using the "word count" feature of Microsoft Word.

/s/ Oscar O. Peña

APPENDIX: Memorandum Opinion

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-18-00127-CR

EX PARTE Leonardo **NUNCIO**

From the County Court at Law No. 1, Webb County, Texas
Trial Court No. 2017 CVJ 002365-C1
Honorable Hugo Martinez, Judge Presiding

Opinion by: Beth Watkins, Justice
Dissenting Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: April 10, 2019

AFFIRMED

Authorities charged appellant Leonardo Nuncio with violating section 42.07(a)(1) of the Texas Penal Code, i.e., the harassment statute. Nuncio filed a pretrial application for writ of habeas corpus in which he contended sections 42.07(a)(1) and (b)(3) of the harassment statute were unconstitutionally overbroad and vague. The trial court denied his application. On appeal, Nuncio contends the trial court erred in denying his application.[1] We affirm the trial court's order denying Nuncio's application for writ of habeas corpus.

[1] In his application, Nuncio challenged the statutory provisions as both facially unconstitutional and unconstitutional as applied. On appeal, however, Nuncio argues only the facial unconstitutionality of the provisions.

BACKGROUND

According to the complaint prepared by an investigator from the Laredo Police Department ("LPD"), he met with the complainant at her residence. The complainant told the investigator she met with Nuncio for a job interview. The complainant stated that during the two-hour interview Nuncio stared at her breasts and "made several rude comments." Nuncio allegedly asked the complainant if she liked to "party" and asked "what have you and your boyfriend done (sexually)." He also asked if her breasts were "Ds or double Ds" and told the complainant she was "hot." Nuncio went on to ask the complainant to text her boyfriend "so you all can do a quickie in the back (of [the restaurant])." Nuncio also told the complainant she "can't be a virgin" and work for him.

When the LPD investigator asked to meet with Nuncio, Nuncio refused and stated his intent to sue the complainant's mother for comments she allegedly made on social media about her daughter's encounter with Nuncio. The District Attorney's Office subsequently approved an arrest warrant for Nuncio, and a sworn complaint alleged Nuncio, "with intent to harass, annoy, alarm, abuse, torment, or embarrass [the complainant], ... initiate [sic] communication with the complainant, and in the course of the communication, make [sic] an obscene comment, to-wit: making comments about her breasts, asking about her sexual history, and/or telling [her] she could not be a virgin and work for him."

In response to the charge, Nuncio filed an application for writ of habeas corpus, challenging the constitutionality of the harassment statute under which he was charged. After the trial court denied his application, Nuncio timely perfected this appeal.

ANALYSIS

In his first two appellate issues, Nuncio challenges the facial constitutionality of sections 42.07(a)(1) and (b)(3) of the Texas Penal Code, arguing the provisions are overbroad and vague.

Section 42.07(a) provides that a person commits the offense of harassment if "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person ... initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]" TEX. PENAL CODE ANN. § 42.07(a)(1). "Obscene" is specifically defined as "a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function." *Id.* § 42.07(b)(3). Nuncio argues the challenged provisions are overbroad because they invade the area of protected speech and are vague in that they deprive a person of adequate notice of the prohibited activity and give law enforcement authorities too much discretion with regard to enforcement. As for his third issue, Nuncio suggests this court should overturn the Supreme Court's opinion in *Miller v. California*, arguing its definition of obscenity is outdated.

Standard of Review

A defendant may file a pretrial application for writ of habeas corpus to raise a facial challenge to the constitutionality of the statute under which the defendant is charged. *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014); *Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2103, pet. ref'd). An appellate court generally reviews a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse of discretion standard. *Ex parte Thompson*, 414 S.W.3d 872, 876 (Tex. App.—San Antonio 2013), *aff'd*, 442 S.W.3d at 330. However, when the trial court's ruling is based purely on an application of law, such as the constitutionality of a statute, we review the ruling de novo. *Id.*; *see Ex Parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013), *abrogated in part on other grounds*, TEX. CONST. art. V, § 32; *Lebo v. State*, 474 S.W.3d 405 (Tex. App.—San Antonio 2015, pet. ref'd).

When presented with a challenge to the constitutionality of a statute, an appellate court usually presumes the statute is valid and the Legislature has not acted arbitrarily or unreasonably.

Lo, 424 S.W.3d at 14–15. With respect to constitutional provisions other than the First Amendment, a facial challenge to the constitutionality of a statute succeeds only if it is shown the statute is unconstitutional in all of its applications. *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015). However, if the statute in question restricts and punishes speech based on its content, the usual presumption of constitutionality does not apply. *Lo*, 424 S.W.3d at 15. Content-based restrictions are presumptively invalid, and the State has the burden to rebut the presumption. *Id.* A court uses strict scrutiny in its review of a content-based statute. *Thompson*, 442 S.W.3d at 344–45; *Lo*, 424 S.W.3d at 15–16.

Overbreadth

Nuncio contends sections 42.07(a)(1) and (b)(3) are unconstitutionally overbroad, violating the First and Fourteenth Amendments of the United States Constitution and Article I, section eight of the Texas Constitution.[2] *See* U.S. CONST. amends. I, XIV; TEX. CONST. art. I, § 8. When, as here, a party challenges a statute as both overbroad and vague, we must first consider the overbreadth challenged. *See Ex parte Maddison*, 518 S.W.3d 630, 636 (Tex. App.—Waco 2017, pet. ref'd) (citing *Ex parte Flores*, 483 S.W.3d 632, 643 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)).

A statute may be challenged as overbroad, in violation of the First Amendment — and Article I, section 10 — if, in addition to proscribing activity that may be constitutionally forbidden,

[2] Nuncio also contends the challenged provisions violate Article I, section 10 of the Texas Constitution. This provision concerns the rights of defendants in criminal prosecutions. It provides that in all criminal prosecutions, the accused has the right to: (1) a speedy public trial by an impartial jury; (2) demand the nature and cause of the accusation against him; (3) refuse to incriminate himself; (4) be heard by himself, counsel, or both; (5) confront the witnesses against him; (6) produce and have evidence admitted; and (7) indictment by a grand jury except under certain circumstances. TEX. CONST. art. I, §10. Nuncio provides no argument or authority challenging sections 42.07(a)(1) and (b)(3) with regard to these constitutional protections. Rather, his argument is limited to a challenge that the statutory provisions are overbroad under the First Amendment of the United States Constitution and article I, section 8 of the Texas Constitution. *See* U.S. CONST. amend. I; TEX. CONST. art. I, § 8. Accordingly, we do not consider his overbreadth argument as a challenge under article I, section 10 of the Texas Constitution.

it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment. *See Scott v. State*, 322 S.W.3d 662, 665 n.2 (Tex. Crim. App. 2010), *abrogated in part on other grounds*, *Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). However, the overbreadth doctrine "is strong medicine that is used sparingly and only as a last resort." *Johnson*, 475 S.W.3d at 865. To qualify as unconstitutionally overbroad, "the statute must prohibit a substantial amount of *protected* expression and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'" *Id.* (emphasis added) (quoting *United States v. Stevens*, 559 U.S. 460, 485 (2010) (Alito, J., dissenting)). Laws restricting the exercise of rights under the First Amendment are facially overbroad only if the impermissible applications of the law are real and substantial when judged in relation to the statute's legitimate sweep. *Maddison*, 518 S.W.3d at 636. We must uphold a challenged statute if we can ascertain a reasonable construction that renders it constitutional. *Id.*; *Flores*, 483 S.W.3d at 643.

The State argues the provisions challenged by Nuncio are not unconstitutionally overbroad because under a reasonable construction, they do not prohibit expression protected by the First Amendment. More specifically, the State contends the statute does not implicate the First Amendment because it proscribes the use of obscenity — unprotected speech — for purposes of harassment. In other words, the State argues the harassment statute's "plain legitimate sweep" is to protect a victim from obscene communications intended to harass, annoy, alarm, abuse, torment, or embarrass. *See* TEX. PENAL CODE §§ 42.07(a)(1), (b)(3). Thus, because the only speech or communications prohibited by sections 42.07(a)(1) and (b)(3) are those that are obscene and intended to injure another, and obscenity is defined in subsection (b)(3) more narrowly than by the Supreme Court in *Miller v. California*, the provisions do not criminalize conduct protected by the First Amendment and are not overbroad.

To determine whether the State is correct, we must first determine the protection afforded by the free-speech guarantee of the First Amendment and then determine the meaning of the challenged statutory provision. *See Scott*, 322 S.W.3d at 668. The First Amendment, as applicable to the states through the Fourteenth Amendment, prohibits laws that abridge freedom of speech. U.S. CONST. amends. I, XIV. Article I, section 10 of the Texas Constitution provides similar protections.[3] TEX. CONST. art. I, § 10. The constitutional guarantee of free speech generally protects the free communication and receipt of ideas, opinions, and information. *Scott*, 322 S.W.3d at 668 (citing *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). However, the First Amendment has never been treated as an absolute. *Miller v. California*, 413 U.S. 15, 23 (1973); *Scott*, 322 S.W.3d at 668. As the Supreme Court recognized *United States v. Stevens*, States may proscribe certain categories of speech without violation of First Amendment protections. 559 U.S. 460, 468–69 (2010) (recognizing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct not constitutionally protected); *see Cohen v. California*, 403 U.S. 15, 20 (1971) (recognizing States are free to ban obscenity, fighting words, and intrusion into substantial privacy interests of others). Thus, "[o]therwise proscribable conduct does not become protected by the First Amendment simply because the conduct happens to involve the written or spoken word." *State v. Stubbs*, 502

[3] The only cases in which courts have held the Texas Constitution creates a higher standard have involved prior restraints in the form of court orders prohibiting or restricting speech. *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434–35 (Tex. 1998); *see San Antonio Express-News v. Roman*, 861 S.W.2d 265, 267–68 (Tex. App.—San Antonio 1993, orig. proceeding). This is not a prior restraint case. Moreover, when neither party argues the Texas Constitution offers greater protection, we treat the state and federal free exercise guarantees as co-extensive. *State v. Valerie Saxion, Inc.*, 450 S.W.3d 602, 613 (Tex. App.—Fort Worth 2014, no pet.) (citing *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649–50 (Tex. 2007)); *see generally Luquis v. State*, 72 S.W.3d 355, 364–65 (Tex. Crim. App. 2002) (relying on Texas Supreme Court decision when addressing matter of state constitutional law). Nuncio has not argued article I, section 8 of the Texas Constitution provides greater protection than that provided by the First Amendment of the United States Constitution. Thus, we treat the protections provided under both constitutions as co-extensive. *See Valerie Saxion, Inc.*, 450 S.W.3d at 613.

S.W.3d 218, 226 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)).

Having set forth the protection provided by the First Amendment, we consider the plain meaning of the acts proscribed by sections 42.07(a)(1) and (b)(3) to determine what they encompass. *See Scott*, 322 S.W.3d at 668; *Maddison*, 518 S.W.3d at 636. Under the principles of statutory construction, we must construe a statute according to the plain meaning of its language, unless the language is ambiguous or the interpretation would lead to absurd results the legislature could not have intended. *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2013, pet. ref'd). In determining the plain meaning of a statute, we read the words and phrases in context, construing them according to rules of grammar and common usage. *Zavala*, 421 S.W.3d at 231 (citing TEX. GOV'T CODE ANN. § 311.011(a)). However, words that have acquired a technical or particular meaning, whether by legislative definition or otherwise, must be construed accordingly. *Maddison*, 518 S.W.3d at 636–37 (citing TEX. GOV'T CODE § 311.011(b)).

As set out above, section 42.07(a) provides that a person commits the offense of harassment if "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person ... initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]" TEX. PENAL CODE § 42.07(a)(1). "Obscene" is specifically defined as "a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function." *Id.* § 42.07(b)(3). We hold sections 42.07(a)(1) and (b)(3) are not ambiguous.

As for section 42.07(a)(1), the text first requires the actor to have the specific intent to inflict harm on the victim in the form of one of the six listed types of emotional distress. *Id.* § 42.07(a)(1); *see Scott*, 322 S.W.3d at 669. It then requires the alleged perpetrator to initiate a

communication during which he makes obscene comments or suggestions. TEX. PENAL CODE § 42.07(a)(1). Section 42.07(b)(3) defines the term "obscene," using a narrower definition than the *Miller* prohibition against the use of "patently offensive" descriptions of "sexual conduct," limiting the term "obscene" to a description of an "ultimate sex act" involving genital or anal contact, or an excretory function. *Id.* § 42.07(b)(3); *see Miller*, 413 U.S. at 24. The definition of obscenity, as recognized by the court of criminal appeals, provides "a meaning readily comprehended by the average person." *Lefevers v. State*, 20 S.W.3d 707, 712 (Tex. Crim. App. 2000). Thus, the provisions challenged by Nuncio plainly proscribes the conduct of initiating a communication and therein making specific obscene remarks with the intent to emotionally harm the person to whom the communication is made. TEX. PENAL CODE § 42.07(a)(1). Based on our construction, the proscribed conduct most certainly involves speech. The question is whether the conduct is entitled to First Amendment protection. *See Maddison*, 518 S.W.3d at 637.

As noted above, the State has authority to regulate and proscribe certain categories of speech because those categories are not protected by the First Amendment. *See Stevens*, 559 U.S. at 668–69; *Cohen*, 403 U.S. at 20. One of those categories is obscenity. *See generally Miller*, 413 U.S. at 214 (holding obscenity is not protected by the First Amendment). The challenged statutory provisions are not susceptible of application to communicative conduct that is protected by the First Amendment, i.e., they do not implicate the free-speech guarantee, because by their plain text they are directed only at persons who, with intent to emotionally harm another, make obscene remarks. *See* TEX. PENAL CODE § 42.07(a)(1), (b)(3). There is nothing in the statutory provisions to suggest they are broad enough to suppress protected speech. *See id.* Nuncio's numerous hypotheticals suggesting applications of the statute that might reach protected speech are insufficient to establish overbreadth. *See Johnson*, 475 S.W.3d at 865 (holding challenged statute must prohibit substantial amount of protected expression and danger of unconstitutional

application cannot be based on fanciful hypotheticals). Accordingly, we hold sections 42.07(a)(1) and (b)(3) are not constitutionally overbroad as they do not prohibit a substantial amount of protected speech, but merely prohibit communication of unprotected obscenities intended to harm the person to whom they are directed. A person whose conduct violates sections 42.07(a)(1) and (b)(3) is not engaging in a legitimate communication of ideas, opinions, or information, but has only the intent to inflict emotional distress for its own sake. *See Scott*, 322 S.W.3d at 670.

Vagueness

Nuncio also challenges sections 42.07(a)(1) and (b)(3) based on vagueness. He argues the provisions are unconstitutionally vague in that they fail to provide adequate notice of the prohibited conduct and encourage arbitrary and capricious prosecution. Nuncio contends, based generally on the statute's use of "another," that a person of ordinary intelligence cannot determine who is the victim, leaving law enforcement authorities with unfettered discretion to decide under what circumstances to enforce the provision. Nuncio seems to suggest the challenged provisions are so vague that prosecution is possible — and wholly within the discretion of law enforcement authorities — when the prohibited communication is overheard by random persons. Nuncio argues that due to vagueness, the statutory provisions violate his due process rights under the Fifth and Fourteenth Amendments, his right to know the nature of the accusation against him under Article 1, section 10 of the Texas Constitution, and his due course of law rights under Article 1, section 19 of the Texas Constitution. *See* U.S. CONST. amends. V, XIV; TEX. CONST. arts. I, §§ 10, 19.

A statute is unconstitutionally vague and violative of due process if it fails to provide a person of ordinary intelligence fair notice of what the statute prohibits or authorizes or encourages seriously discriminatory enforcement. *Maddison*, 518 S.W.3d at 639–40 (quoting *Ex parte Bradshaw*, 501 S.W.3d 665, 677–78 (Tex. App.—Dallas, 2016, pet. ref'd) (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)). In other words, a statute is unconstitutionally vague if

persons of common intelligence must guess at its meaning and differ about its proper application. *Maddison*, 518 S.W.3d at 639–40. All criminal laws must give fair notice about what activity is made criminal. *Bradshaw*, 501 S.W.3d at 67 (citing *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989) (en banc)). However, courts do not require that statutes be mathematically precise; rather, statutes need only provide fair warning in light of common understanding and practices. *Ex parte Paxton*, 493 S.W.3d 292, 305 (Tex. App.—Dallas 2016, pet. ref'd) (en banc). A statute is not unconstitutionally vague simply because the words or terms used are not specifically defined. *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018). Rather, words or phrases within a statute must be read in the context in which they are used. *Id.* Statutory provisions satisfy vagueness requirements if they "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* (quoting *Jordan v. De George*, 341 U.S. 223, 231–32 (1951)).

When a statute does not implicate free speech under the First Amendment, a person challenging that statute for vagueness must establish it was unduly vague as applied to his own conduct. *Wagner*, 539 S.W.3d at 314; *Scott*, 322 S.W.3d at 670–71. If First Amendment rights are implicated, the statute in question must also be sufficiently definite to avoid chilling protected speech or expression, and a challenger may complain of vagueness of the statute as it may be applied to others. *Wagner*, 539 S.W.3d at 314; *Scott*, 322 S.W.3d at 670–71. As we explained in our analysis of Nuncio's overbreadth challenge, sections 42.07(a)(1) and (b)(3) do not infringe upon any constitutionally protected speech or conduct. Accordingly, we decline to adopt the more stringent vagueness standard that would apply to a statute that "abuts upon sensitive areas of First Amendment freedoms." *Wagner*, 539 S.W.3d at 315.

Applying the plain language of sections 42.07(a)(1) and (b)(3) to this particular case, we hold the challenged provisions are not unconstitutionally vague. We conclude a person of ordinary

intelligence would recognize the provisions at issue prohibit a person from starting a communication with a person and during the course of the communication, making obscene comments, requests, or suggestions in an effort to emotionally harm the person to whom the comments, requests, or suggestions are made. The provisions are more than adequate to allow those of ordinary intelligence to recognize the term "another," as used in the statute, is a reference to the victim, that is, the person with whom the alleged perpetrator was communicating and intending to emotionally harm. Likewise, the provisions do not authorize or encourage discriminatory enforcement, but permit enforcement only when obscene comments or remarks are directed by the perpetrator to a particular victim with intent to harm. *See Maddison*, 518 S.W.3d at 639–40.

Moreover, even if the First Amendment is implicated, the statutory provisions cannot be interpreted to suggest that obscene comments made and heard in the hypothetical ether are prohibited. Rather, to sustain a prosecution, it is clear a person must engage in obscene communication with a particular person with the intent that the particular person feel harassed, annoyed, alarmed, abused, tormented, or embarrassed. Accordingly, we hold sections 42.07(a)(1) and (b)(3) are not unconstitutionally vague.

Request to Overturn Miller v. California

In 1974, the Supreme Court set out a test for obscenity in *Miller v. California*. 413 U.S. at 24. The Court held material is obscene when: (1) an average person applying contemporary community standards would find that when taken as a whole, the material appeals to the prurient interest; (2) the material describes or depicts, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) the material, when taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* Nuncio contends this standard is no longer "valid, accurate, and/or an effective test for distinguishing obscenity from protected speech"

in the Internet era and asks that we reject it in our evaluation of his challenges to the constitutionality of sections 42.07(a)(1) and (b)(3).

Since *Miller* was decided, the Texas Court of Criminal Appeals has continuously applied its test for obscenity in addressing allegations of unconstitutionality in numerous contexts. *See, e.g., Lo*, 424 S.W.3d at 21 (recognizing *Miller* defines obscenity); *Lefevers*, 20 S.W.3d at 709 (recognizing Texas Legislature drafted harassment statute "with an eye toward the constitutional definition of obscenity" as set out in *Miller*); *Davis v. State*, 658 S.W.2d 572, 578 (Tex. Crim. App. 1983) (en banc) (holding that *Miller* sets forth "the test the States of the Union must follow when they seek to regulate or control obscenity"); *West v. State*, 514 S.W.2d 433, 442 (Tex. Crim. App. 1974) (op. on reh'g) (applying *Miller* in determining constitutionality of Texas obscenity statute). As an intermediate appellate court, we are bound by pronouncements of the court of criminal appeals. *State v. Nelson*, 530 S.W.3d 186, 190 (Tex. App.—Waco 2016, no pet.) (citing *Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.—Fort Worth 2003, pet. ref'd)); *De Leon v. State*, 373 S.W.3d 644, 650 n.3 (Tex. App.—San Antonio 2012, pet. ref'd). Accordingly, we may not — as Nuncio suggests — overturn *Miller's* definition of obscenity. *See Nelson*, 530 S.W.3d at 190; *De Leon*, 373 S.W.3d at 650 n.3.

CONCLUSION

Based on the foregoing analysis, we hold sections 42.07(a)(1) and (b)(3) of the Texas Penal Code are neither unconstitutionally overbroad nor vague. We further hold we are precluded from overturning *Miller*, which has been adopted and applied by the court of criminal appeals since it was decided in 1974. Accordingly we overrule Nuncio's issues and affirm the trial court's order denying his application for writ of habeas corpus.

Beth Watkins, Justice

Publish

Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-18-00127-CR

EX PARTE Leonardo **NUNCIO**

From the County Court at Law No. 1, Webb County, Texas
Trial Court No. 2017 CVJ 002365-C1
Honorable Hugo Martinez, Judge Presiding

Opinion by: Beth Watkins, Justice
Dissenting Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: April 10, 2019

I agree with and join in the portion of the majority's opinion overruling Nuncio's argument that sections 42.07(a)(1) and (b)(3) of the Texas Penal Code are unconstitutionally overbroad. The statute's "plain legitimate sweep" is limited to protecting a victim from "obscene" communications intended to harass, annoy, alarm, abuse, torment, or embarrass. As articulated by the majority, obscenity is not protected speech and the statute is not overbroad in violation of the First Amendment.[1]

I respectfully disagree, however, with the majority's holding that the statute is not unconstitutionally vague. I would hold that under the current language of the statute, there are too many commonplace scenarios in which "a person of ordinary intelligence" would not have fair

[1] I agree with the majority that we are bound by the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973), and are precluded from overturning *Miller*.

notice of what conduct the statute prohibits until *after* an arrest is made. *See Wagner v. State*, 539 S.W.3d 298, 313 (Tex. Crim. App. 2018) (to comply with due process, a criminal statute must provide a person of ordinary intelligence with fair notice of the prohibited conduct). "A statute satisfies vagueness requirements if the statutory language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Id.* at 314 (quoting *Jordan v. De George*, 341 U.S. 223, 231-32 (1951)). Under the current statutory language, everyday conduct which is not usually considered criminal under general social norms could be criminalized without adequate notice. For example, a solicitous social communication between two people in a bar could include obscene comments or requests intended to embarrass or harass the other, or heated arguments between significant others could include obscene comments intended to annoy, torment, or embarrass the other. Both examples constitute conduct that could be considered criminal under section 42.07(a)(1) as drafted. As in *Long v. State*, where the court held that the "stalking" provision of the 1993 harassment statute was unconstitutionally vague on its face, the current statute continues to suffer from the same issues of impermissible vagueness. *See Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996).

In addition, as argued by Nuncio, section 42.07(a)(1) fails to clearly identify the victim of the intended harassment. Unlike subsections (a)(2) and (a)(3), which identify the harassment victim as "the person receiving" the threat or the false report, subsection (a)(1) does not specify who is the victim of the intended harassment by obscenity. *Cf.* TEX. PENAL CODE ANN. § 42.07(a)(1) with *id.* § 42.07 (a)(2), (a)(3). Thus, the reach of subsection (a)(1) is not limited to "the person receiving" an obscene communication made with intent to harass the recipient, but could be extended to a situation in which the defendant makes an obscene comment to one person but his intent is to harass a different person, i.e., "another." Such vagueness gives law enforcement

too much discretion with respect to enforcement of the statute and thus violates due process. *See Wagner*, 539 S.W.3d at 313.

In order to satisfy due process, section 42.07(a)(1) needs more specificity to place a "person of ordinary intelligence" on fair notice of what conduct could be construed as a violation of the statute. I would therefore hold that the harassment by obscenity statute is unconstitutionally vague in all of its applications, *i.e.*, on its face. *See id.* at 314 ("In the context of a challenge to a statute that does not regulate protected speech, a court should uphold a vagueness challenge only if the statute is impermissibly vague in all of its applications."). Accordingly, I would grant Nuncio's pretrial application for writ of habeas corpus because the statute under which he was charged is void for vagueness. *See Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2013, pet. ref'd).

For these reasons, I respectfully dissent.

Liza A. Rodriguez, Justice

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Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-18-00127-CR

EX PARTE Leonardo **NUNCIO**

From the County Court at Law No. 1, Webb County, Texas
Trial Court No. 2017 CVJ 002365-C1
Honorable Hugo Martinez, Judge Presiding

BEFORE JUSTICE ALVAREZ, JUSTICE WATKINS, AND JUSTICE RODRIGUEZ

In accordance with this court's opinion of this date, the trial court's order is AFFIRMED.

SIGNED April 10, 2019.

Beth Watkins, Justice