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COURT OF CRIMINAL APPEALS
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No. PD-1371-13

TO THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

EX PARTE
RONALD THOMPSON

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO
NO. 04-13-00127-CR

RESPONDENT'S BRIEF

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Respondent concurs with the "Identity of Parties and Counsel" as described in Petitioner's Brief on the Merits.

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STATEMENT OF THE CASE

Respondent concurs with the "Statement of the Case" as described in Petitioner's Brief on the Merits with one additional point. In declaring the entirety of Penal Code Section 21.15(b)(1) to be unconstitutionally overbroad, since the Fourth Court of Appeals based its holding on the speech content and overbreath issues, it did not reach the issue of vagueness which Respondent raised in pretrial writ of habeas corpus at the Trial Court and on appeal.

STATEMENT REGARDING ORAL ARGUMENT

Respondent concurs with the "Statement Regarding Oral Argument" as described in Petitioner's Brief on the Merits and would likewise request oral argument.

ISSUES PRESENTED

Whether the "improper photography" statute, Section 21.15(b)(1) of the Texas Penal Code, is facially unconstitutional in violation of First Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment and Article 1 Section 8 of the Texas Constitution.

Respondent concurs with the five "Issues Presented" as described in Petitioner's Brief on the Merits to the extent that they relate to the "Grounds for Review" outlined in the Petitioner's Petition for Discretionary Review and to the extent that this Honorable Court has granted review.

STATEMENT OF THE FACTS

Respondent concurs with the "Statement of the Facts and Procedural History" as described in Petitioner's Brief on the Merits with these additions: In declaring Penal Code Section 21.15(b)(1) unconstitutional, the Fourth Court of Appeals held that (1) the improper photography statute regulated protected speech under the First Amendment, (2) the improper photography statute regulated protected speech in a content-neutral manner, and was therefore subject to intermediate scrutiny, and (3) under the intermediate scrutiny standard, the improper photography statute was facially overbroad in violation of the First Amendment. Based on this holding, the Fourth Court of Appeals did not reach the issue of vagueness as raised in on appeal.

SUMMARY OF ARGUMENT

The Fourth Court of Appeals was correct to strike down Penal Code Section 21.15(b)(1) as unconstitutionally overbroad. Penal Code Section 21.15(b)(1) is unconstitutionally void on its face and is vague and overbroad. The statute violates the First Amendment of the United States Constitution as applied to the States through the 14th Amendment, as well as Article I § 8 of the Texas Constitution. The Petitioner's arguments are unfounded for the following reasons:

1. ***The First Amendment is implicated***: The statute impermissibly regulates speech. The Petitioner's notion that the statute simply regulates "the non-expressive act of making a visual recording coupled with the photographer's specific intent" is illogical and misguided. The statute not only restrict individual's right to photography, a form of speech protected by the First Amendment, but also restricts a persons thoughts. Inherent in the statues construction is the prohibition of making a visual recording for someone else's sexual gratification. The intentional act of arousing the desire of another is intrinsically expressive and communicative. The statue prohibits an actor's First Amendment protected right to receive the public expressions of others as well. The expressive conduct prohibited by the statute does not invade the substantial privacy interest of others because said individuals do not have such a right to privacy in a public place.

2. ***Overbreadth challenge***: The statute is overbroad because it restricts a substantial amount of constitutionally protected conduct and the type of intent that it regulates is not inherently exempt from First Amendment protections. Assuming the Petitioner's argument that the statute is a content neutral regulation of time, place, and manner expressive conduct, the statute is void on its face because it fails intermediate scrutiny. It fails intermediate scrutiny because there is no governmental interest in protecting persons from "privacy invasions" who have no right to privacy regarding their outward appearance in public. Furthermore, the statute is not narrowly tailored because it has a substantial impact on free speech where there is no careful delineation of criminal contact, but rather anyone who takes or publishes a photograph of a non-consenting person is at risk of violating the law. The statute is virtually unbound in its potential application and constitutes a substantial restriction unprotected conduct.

ARGUMENT

1. The Improper Photography statue implicates the First Amendment because it is an impermissible regulation of protected speech.

The offense of Improper Photography or Visual Recording as defined in Texas Penal Code Section 21.15(b)(1) is unconstitutionally void on its face; it is vague and overbroad, and it violates the First Amendment of the United States Constitution as applied to the States through the 14th Amendment, as well as Article I § 8 of the Texas Constitution.

The Improper Photography statute makes it a criminal act to photograph or otherwise electronically record, broadcast or transmit the visual image of any individual not in a bathroom or dressing room, without their consent, if that image is taken with intent to arouse or gratify *anyone*'s sexual desire.

Section 21.15(b)(2) criminalizes the same conduct but adds the provision that the photographed subject be located in a bathroom or private dressing room and adds the requirement of intent to invade the subject's privacy. That required intent to invade privacy is not present in 21.15 (b)(1). The presence of the location qualifier and intent element in subsection 21.15(b)(2) creates a troubling contrast with 21.15(b)(1), which criminalizes capturing an expressive image of anyone, anywhere, if there is not consent given and the photographer who photographs with "intent to arouse or gratify the sexual desire of any person." 21.15 (b)(1).

a. Petitioners claim of lack of standing

The Petitioner alleges that the Respondent had no standing to challenge the entirety of the improper photography statue. The Petitioner bases this on his assertion that the Respondent has simply been charged with violating 21.15(b)(1) by means of *recording* subjects and is not alleged to have *transmitted* or *broadcasted* recorded images. Petitioner claims that the lower court exceeded its prerogative invalidating the whole subsection and takes the position that the lower court's analysis relies on the *transmits* and *broadcasts* provisions of the subsection.

This argument is without merit, as the Petitioner cites no relevant case law supporting its position. This Court's decision in case *State v. Scott*, cited by the Petitioner does not stand for that proposition. *State v. Scott*, 322 S.W.3d 662, 668 (Tex. Crim. App. 2010). Rather *Scott* stands for the proposition that a defendant cannot challenge the constitutionality of a statutory subsection for which he was not charged. Scott challenged at least two different subsections of the statute. In the present case, the Respondent only challenges one subsection, 21.15(b)(1). As such, this one subsection prohibits photography, videotaping, electronically recording, electronically broadcasting, and electronic transmitting. All methods of proving the commission of the offense are contained within that one subsection challenged by Respondent. The lower court struck down only this subsection.

Nothing in the legislative history evidences an intent to treat any of these methods of proof differently. Additionally, each of these manners of proof requires the same basic act. To treat these methods of proof differently for the purposes of preserving a portion of the statute would lead to an absurd result.

Furthermore, and more directly, *recording* an image is always done to capture an event that the recorder "thought" was important. (For example, for the purpose of arousing or gratifying his or someone else's sexual desire.) This is why it is an expressive and/or communicative act. The same is true for *transmissions* or *broadcasts* of recorded images. Images are *transmitted* or *broadcasted* for expressive and/or communicative reasons. Without the *recording* of an image, there is nothing to *broadcast* or *transmit*.

Finally, in *State v. Barbernell*, this Court held that certain aspects of a statute constitute mere differences of evidentiary proof and do not implicate alternative manner and means of committing the offense. 257 S.W.3d 248 (Tex. Crim. App. 2008) (we held the definitions "set for alternative means by which the state may *prove* intoxication, rather than alternative means of *committing* the offense.").The statute at issue here addresses photography, videography, and other electronic recording methods; it also addresses recording, broadcasting, or transmitting in the same subsection of the statute. These are mere evidentiary variations which would not necessarily require descriptive averment from the Petitioner in an indictment.

In light of this, reliance upon the severability doctrine for the purpose of upholding the statute as a whole and invalidating as little as possible is inopposite. No matter which evidentiary route the state chooses the First Amendment is still offended.

b. Petitioner's simplistic understanding of speech

With a straight face, the Petitioner argues, "photography is essentially nothing more than making a chemical or electronic record of an arrangement of refractive electromagnetic radiation (light) at a given period of time." Petitioners brief at 11. If you would follow the Petitioner's overly simplistic argument, *speech* is nothing more than the pulmonary pressure which creates vibration of the vocal chords causing pressure waves of air to vibrate out of the larynx and into the space surrounding a human body; *publishing a newspaper* is nothing more then stamping liquid dyes on flattened and moistened cellulose pulp; *painting a masterpiece* is nothing more than spreading color pigmented oils on a plain woven fabric; and the *Internet* is just a series of tubes, *et cetera, et cetera*. The one thing the petitioner forgets, ever so ironically, is the role that the mind plays in these activities.

The First Amendment protects more than mere speech, it also protects pictures, films, paintings, drawings, and engravings. *Kaplan v. California* 413 U.S. 115, 119-20 (1973). To the extent that this Petitioner would divorce the mechanism of expression from the expressive content itself invites a dangerous precedent bordering on prior restraint.

Petitioner goes on to suggest that based on this logic, a facial challenge would never be appropriate in a First Amendment challenge. This is incorrect and the Petitioner cites no case law for the proposition.

Of course, the authorities relied upon by the Petitioner do not stand for this proposition in the slightest. The Supreme Court of the United States has long held that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Implicit even in the Supreme Court's most extreme example of unprotected speech – child pornography – is the maxim that the threshold for expression is *de minimis*:

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described.

New York v. Ferber, 458 U.S. 747, 764 (1982). Thus, even child pornography is expressive; it is just simply a type of expression so co-dependent upon depraved criminal behavior as to justify a content based restriction. *See Id* at 765 n. 18 (recognizing photographic depictions of adult nudity as expression) (citing

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)). The improper photography statute implicates far more important forms of expressive conduct.

In all instances, save the completely inadvertent snapping of a shutter, the act of photography carries an inherently expressive purpose. The law cannot separate the photographic act from the expressive intent behind the photograph in order to engineer a constitutionally acceptable statute. In fact, this is not what the improper photography statute is contemplating. The statute does not simply require the "mere act of photography." It couples with that act of photography, the intent to arouse or gratify the sexual desire of the person taking the photograph or, anyone else. Inherent in the statute is a sexually expressive and/or communicative act. Namely the statute prohibits photographing, videotaping, electronically recording, broadcasting or transmitting an image for the purpose of that person or another person's sexual gratification. The prohibition is against photographing an image to sexually arouse someone else or receiving an image to arouse oneself. Here is the most basic principle that the petitioner completely fails to understand: Arousing someone else sexually is expressive and communicative.

The only case that the Petitioner could cite for its peculiar proposition is misleading and unrelated at best. The Petitioner miss cites a footnote from a New Jersey federal district court opinion where a whistleblower filed a Section 1983 civil rights law suit against police who arrested her on a state "stalking" charges

when she took a photographs of officers engaged in improper activity. While she was denied relief on other grounds, in uncontroling dicta from that footnote, the district court stated that "[a]n ***argument*** can be made that the act of photography in the abstract is not sufficiently expressive or communicative." In the Petitioner's brief that is the argument that is made, however it is not based on case law or basic logic.

c. Improper photography statue prohibits not only the expressive act of photography, but also the individual actor's right to receive the public expressions of others.

From the primacy of the common law to the modern age, the law defines criminal behavior principally as that conduct combining a guilty mind with a lawfully prohibited act or omission. 4 W. Blackstone Commentaries 21 ("[A]n unwarrantable act without a vicious will is no crime at all") *and* Tex. Penal Code § 6.01(a) (the voluntary act requirement). These principles are intuitive – one should not be held criminally liable for musing upon a sexual thought while walking down the street. *Roth v. United States,* 354 U.S. 476, 509 (1959) ("Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said 'music'; 18 said 'pictures'; 29 said 'dancing'; 40 said 'drama'; 95 said 'books'; and 218 said 'man.'"). Nevertheless, the State insists that it is the existence of a

criminal intent coupled with the subject's lack of consent that render this statute constitutionally permissible.

The "lack of consent" element is, of course, a red herring. An individual can walk about all day taking note of beautiful or attractive people without their consent and never commit a crime. While rude, he would even be allowed to take an inappropriately long glance at an attractive person, or even alert his compatriots' attention to the object of his desire. He must engage in the additional overt act of stalking (threating) that person or attempting to follow that person into a private place (trespass) to ogle them, or engaging in the assaultive act of lifting up a skirt before his conduct can offend the State. The necessary companion to the phrase "without that person's consent" is "in a place where that person would have a right to object." Without the inclusion of the latter phrase, the former is utterly meaningless.

Contrary to the State's submission, the lower court's reliance on *Stanley v. Georgia* is incredibly instructive on this issue. The First Amendment does not merely protect the right to express, but also the right to receive expressions, information, and ideas. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to ***receive*** information and ideas, regardless of their social worth, is fundamental to our free society") (emphasis added) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). At the very core of the First Amendment's protections, a person is entitled

to his visual sensations as he progresses through his day, particularly when those perceptions are made in public:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.

Id (quoting *Olmstead v. United States*, 277 U.S. 438 (1928). It stands to reason that if a person is entitled to observe and perceive the expressive conduct of others in the public – their behavior, their choice of clothing or lack thereof, their statements – that he is also entitled to "receive" those public observations as well by means of photographing, recording, transmitting or broadcasting them. Thus, even if this Court does not agree that the act of photographing or recording an individual in public is an expressive act, it cannot be argued that such conduct is not a method of "receiving" the public expressions of others. The Petitioner's position would be to punish those who receive such information with their mind in the proverbial gutter; such a stance is undoubtedly the stuff of Orwellian "thought-crime" rather than the reasonable advancement of an important governmental interest.

d. The expressive conduct prohibited by the statute does not invade the substantial privacy interest of others because said individuals do not have such right to privacy in their outward appearance in a public place as contend by the Petitioner.

There is no authority for the proposition that a person has an inviolate expectation of privacy in public places. To the contrary, a person standing in public is "exposed to public view, speech, hearing, and touch." *United States v. Santana,* 427 U.S. 38, 42 (1976). Private citizens, like law enforcement, are not required to "shield their eyes" as they walk about in public. *California v. Ciraolo,* 476 U.S. 207, 213 (1986) ("[T]he mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.")

The Petitioner takes the position that Section 21.15(b)(1) is not a regulation of speech or expression but rather the regulation of the intent of the photographer. Petitioner cites *Scott v. State* and the Fourteenth Court of Appeals opinion in *Ex Parte Nyabwa* extensively when claiming that the improper photography statute regulates a person's intent to create a visual record and not the contents of the record itself. 332 S.W.3d 662 (Tex. Crim. App. 2010); 366 S.W.3d 719 (Tex. App. – Houston [14th Dist.] 2011, pet ref'd). This logic is wrong.

The statute addressed in *Scott* was distinguishable from the improper photography statue. In *Scott,* the Court held that the *Harassment* statute did not violate the First Amendment because it was directed only at persons with "specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress". 332 S.W.3d at 670. The Court held that the statute regulated "noncommunicative" conduct because it did not include "an intent to engage in the legitimate communication of ideas, opinions, or information." *Id.*

Texas Penal Code Section 21.15(b)(1), however, regulates protected speech as opposed to "noncommunicative" conduct.

While people in public may have a right to privacy with regard to things that they are keeping private such as their underwear or clothes and genitals they do not have a right to privacy to things that they exposed to the public. While the government may have an important interest in protecting citizens from covert photography that may invade their expectation of privacy. That expectation of privacy is limited to those things which they intend to keep private such as their undergarments or genitals which are covered by clothing. This statute does nothing further that interest. It does nothing to further that interest because it concerns itself with the photography and recording of the images that people present to the world. It concerns itself with the photography of people who are fully clothed or people

who have chosen to be partially closed or not close it all in a public place. Furthermore, the statute does nothing to delineate between photography or recording that is done covertly or openly. It only requires that the recording be done without the consent of the person being recorded. If said person is in a public place then they have inherently already consented.

2. The statute does not effectively advance a governmental interest and adversely affects a substantial amount of constitutionally protected speech.

Assuming the Petitioner's arguendo that the statute is a content neutral regulation of time, place, and manner expressive conduct, the statute is void on its face because it fails intermediate scrutiny. It fails intermediate scrutiny since there is no governmental interest in protecting persons from "privacy invasions" who have no right to privacy in public. Furthermore, the statute is not narrowly tailored because it has a substantial impact on free speech where there is no careful delineation of criminal contact, but rather anyone who takes or publishes a photograph of a non-consenting person is at risk of violating the law. The statute is virtually unbound in its potential application and constitutes a substantial restriction unprotected conduct.

While the legislature's intent may well have been to protect the public from the non-expressive trespasses, assaults, or threats that are the criminal tropes of "up-skirt" and "peeping tom" photography, the language at issue utterly fails to

achieve that interest. *United States v. O'Brien*, 391 U.S. 367, 376 (1963) (applying the four-factor content-neutral over breadth analysis in the event of an act containing both "speech" and "non-speech" elements). Instead, the statute at issue penalizes the expressive act itself purely on its intent rather than the nature of the expressive act. Thus the statute fails to delineate between the photographer who lifts a woman's skirt to photograph her underwear, thus assaulting her, and the candid street photographer capturing an image of a girl in a skirt walking down the street. The poor wording of the statute telegraphs two essential reasons why the law must fail under the *O'Brien* calculus. First, as discussed *supra,* it does not advance the interests the State actually has a right or a duty to protect. Second, it captures a wide array of protected speech in its net. A myriad of examples rise to the surface when addressing the question of whether this statute affects a substantial amount of protected speech. The street photographer, the entertainment reporter, patrons of the arts, attendees to a parade or pep-rally, even the harmless eccentric are all at risk of incarceration under the plain reading of this statute.

The present state of the law would leave the discernment between the true peeping tom and the legitimately expressive photograph to the discretion of law enforcement. Such a stop-gap measure cannot afford adequate protection to protected speech. *Houston v. Hill,* 482 U.S. 451, 465 (1987) ("'This ordinance, as construed . . . confers on police a virtually unrestrained power to arrest and charge

persons with a violation.'") (quoting *Lewis v. City of New Orleans*, 415 U.S. 130 (1974)). Similarly, as was the case with *Hill*, many of the more egregious examples of conduct charged under Section 21.15(b)(1) are preempted by other penal code provisions. Assault, harassment, stalking, trespass, *et cetera,* all proscribe the varying acts typically necessary to achieve a compromising angle on a photographic subject without implicating the expressive actions of the photographer. *Ex parte Lo*, No. PD-1560-12, 2013 Tex. Crim. App. LEXIS 1594 at *19 – 20 (Tex. Crim. App. 2013) (noting other criminal statutes that proscribe conduct covered by the online solicitation of a minor statute); *Hill*, 482 U.S. at 460. Thus, the prohibition on photographic action does not further advance the governmental interests at play.

The test for whether a statute unlawfully prohibits a substantial amount of protected speech is adduced by balancing the deterring effect the law might have on constitutionally protected expression against the harm of invalidating a law targeting criminally anti-social conduct. *United States v. Williams*, 553 U.S. 285, 292 (2008). As discussed above, subsection (b)(1) of the improper photography statute is mostly superfluous in light of other penal code provisions, and thus minimal harm would arise from its abolition. A properly tailored statute should address those few criminally anti-social actions left unchecked by other penal code provisions. Instead, the statute at issue criminalizes any photograph taken with a

sexual motive and without the subject's consent in *any conceivable location* other than a restroom or dressing room. As has been stressed throughout, acts meeting this description likely occur within the territorial jurisdiction of the State of Texas many thousands of times a day. In light of this Court's decision in *Ex parte Lo*, the breadth of the net cast by the statute could be curtailed easily within constitutional limits if the intent element were modified. *Lo*, 2013 LEXIS 1594 at *31 (lamenting the inadequacies of the "with the intent to arouse or gratify the sexual desire of any person). As it presently stands, the number of otherwise lawful photographs with human beings as subjects that could fall under the purview of this statute depending upon whether or not a police officer, prosecutor, or jurist believed the photo to have a sexual motive is unfathomably large.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Respondent prays that for the above mentioned reasons, this Honorable Court affirm the decision of the Fourth Court of Appeals striking down Penal Code Section 21.15(b)(1) as unconstitutionally overbroad, and set aside the indictment in the above-numbered and entitled cause and for such other relief that this Honorable Court deems just and right. Or, alternatively, that this Honorable Court remand to the Fourth Court of Appeals to determine the issue of vagueness.

Respectfully submitted,

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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) because it contains 4942 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Donald H. Flanary, III
Donald H. Flanary, III

CERTIFICATE OF SERVICE

This is to certify that on March 5, 2014 a true and correct copy of the above and foregoing document was served on S. Patrick Ballantyne the District Attorney's Office, Bexar County, Texas, by U.S. Mail and electronic mail to sballantyne@bexar.org.

/s/ Donald H. Flanary, III
Donald H. Flanary, III