To the Court of Criminal Appeals of Texas

No. PD-0469-19

Ex parte Nathan Sanders

Petitioner / Appellant

Nathan Sanders's

Petition for Discretionary Review

Challenging the Constitutionality of Section

42.07(a)(7) of the Texas Penal Code

On Petition for Discretionary Review from the Seventh

Court of Appeals; Cause No. 07-18-00335-CR

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6 June 2019

Mr. Sanders Requests Oral Argument

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Statement Regarding Oral Argument

This petition presents a First Amendment issue that has been litigated in the intermediate courts of appeal and is ripe for review, since it is of wide-ranging consequence. The Amarillo Court of Appeals' opinion is contrary to the precedent of this court and of the United States Supreme Court. Mr. Sanders requests oral argument.

Identities of Parties and of Counsel

The trial judge was Hon. Mark J. Hocker of the County Court at Law No. 1 of Lubbock County, Texas. The parties to the order appealed from are Nathan Sanders and the State of Texas.

Mr. Sanders was represented before the trial court by Russell "Rusty" Gunter, 1213 Avenue K, Lubbock, Texas 79401 and Mark Bennett, 917 Franklin Street, Fourth Floor, Houston, Texas 77002. He was represented on appeal to the Seventh Court of Appeals in Amarillo by Mr. Gunter and Mr. Bennett. He is represented before this Court by Mr. Bennett and Lane A. Haygood, 522 N. Grant Avenue, Odessa, Texas 79761.

The State of Texas was represented in the trial court by Mr. Eric Van Pelt, assistant criminal district attorney, PO Box 10536, Lubbock, Texas 79408. The State is represented on appeal by Ms. Cassie Nesbitt and Mr. Jeffrey S. Ford, assistant criminal district attorneys.

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. PD-0469-19

EX PARTE	FROM THE SEVENTH COURT
NATHAN SANDERS	OF APPEALS AT AMARILLO

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW CHALLENGING THE CONSTITUTIONALITY OF SECTION 42.07(A)(7) OF THE TEXAS PENAL CODE

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Petitioner Nathan Sanders, by and through his counsel of record, Mark William Bennett and Lane A. Haygood, petitions for discretionary review.

STATEMENT OF THE CASE

This is a First Amendment challenge to a content-based restriction on speech, section 42.07(a)(7) of the Texas Penal Code. The Seventh Court of Appeals held that repeated electronic communications, made with "intent to inflict emotional distress for its own sake" are not protected speech because they invade the substantial privacy interests of the victim in an essentially intolerable manner, and overruled Mr.

Sanders's facial challenge to the constitutionality of Texas Penal Code § 42.07(a)(7).

Procedural History

The State charged Mr. Sanders with harassment under section 42.07(a)(7) of the Texas Penal Code on September 23, 2015 (C.R. 13). On June 13, 2018, Mr. Sanders filed his application for a writ of habeas corpus and motion to quash information under art. 11.09 of the Texas Code of Criminal Procedure, challenging the complaint and information filed against him as an unlawful on the grounds that section 42.07(a)(7) is facially overbroad and vague, in violation of the First Amendment to the United States Constitution (C.R. 34-46).

The trial court denied the application for a writ of habeas corpus on August 20, 2018 (C.R. 94-95). Mr. Sanders gave notice of appeal on September 7, 2018 (C.R. 96-97). On April 8, 2019, the Seventh Court of Appeals issued an unpublished memorandum opinion (Tab A). Chief Justice Quinn concurred in the result, but wrote in a footnote that he shared Presiding Judge Keller's reservations concerning *Scott v. State*, 322 S.W.3d 622, 669-70 (Tex. Crim. App. 2010) and its continued correctness (Tab A, page 11).

Ground for Review

Petitioner presents a single ground for review:

> Texas Penal Code section 42.07(a)(7) is a content-based restriction that restricts a real and substantial amount of speech as protected by the First Amendment; speech which invades privacy interests of the listener has never been held by the United States Supreme Court to be a category of unprotected speech.

Argument and Authorities

1. The time to review *Scott v. State* is now.

The time has come for this Court to confront squarely the problem posed by *Scott v. State*. In considering a facial challenge to Tex. Pen. Code Ann. § 42.07(a)(4), the telephonic harassment statute, this Court found that the statute's specific intent provision limited the scope of its application, and found that any communicative conduct to which the statute might apply "is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Scott*, 322 S.W.3d at 670, citing *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating in dicta that a state may lawfully proscribe communicative

conduct that invades the substantial privacy interests of another in an essentially intolerable manner).

Appellant is the latest in a long line of petitioners before this Court who have challenged *Scott* on the grounds that subsequent rulings from the United States Supreme Court, among them *Reed v. Town of Gilbert*, *Ariz.*, 135 S.Ct. 2218 (2015); *United States v. Stevens*, 559 U.S. 450 (2010); and *United States v. Alvarez*, 567 U.S. 709 (2012), have abrogated *Cohen*'s dictum. *See*, *e.g.*, *Lebo v. State*, 474 S.W.3d 402 (Tex. App.—San Antonio 2015, pet. ref'd); *Ex parte Ogle*, No. 03-18-00207-CR, 03-18-00208-CR, 2018 WL 3637385 (Tex. App.—Austin Aug. 1, 2018), *pet. ref'd sub. nom. Ogle v. State*, 563 S.W.3d 912 (Tex. Crim. App. 2018); *Ex parte Reece*, 517 S.W.3d 108 (Tex. Crim. App. 2017).

In *Reece* and *Ogle*, Presiding Judge Keller wrote in dissent to the denial of petition for discretionary review, first cautioning that the narrowing of *Scott*'s holding by *Wilson v. State*, 448 S.W.3d 418, 420 (Tex. Crim. App. 2014) required re-evaluation of *Scott*, and then stating that section 42.07(a)(7) could be used by the government to coerce "a more refined atmosphere" on the internet. *Reece*, 517 S.W.3d at 111 (Keller, P.J, dissenting from the denial of discretionary

review). Presiding Judge's Keller's words of caution were shown accurate by *Ogle*, where she noted that "[i]f this Court believed that the prosecuting authorities would never use this statute to punish criticism of agents of the government, it ought to now recognize that such a belief was overly optimistic." *Ogle v. State*, 563 S.W.3d 912 (Keller, P.J., dissenting from the denial of discretionary review). This case once again provides the Court of Criminal Appeals with an opportunity to engage with Presiding Judge Keller's well-taken points and reevaluate whether *Scott* survives in light of *Wilson*, *Reed*, *Stevens*, and *Alvarez*.

2. SECTION 42.07(A)(7) RESTRICTS PROTECTED SPEECH.

The central question to be asked in reevaluating *Scott* is whether section 42.07(a)(7) restricts "protected speech." This question may be answered by asking whether the *Scott* Court had authority to create a new category of unprotected speech. In *Alvarez*, the high Court noted that content-based restrictions on speech, such as art. 42.07(a)(7), are permitted only when "confined to the few historic and traditional categories of expression long familiar to the bar." *Alvarez*¸ 567 U.S. at 717, *citing Stevens*. The Court held in *Stevens* that "there exists no freewheeling authority to declare new categories of

speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472. The historically-defined categories of unprotected speech are:

Category of Speech	Case Defining its Lack of Protection
Obscenity	*Miller v. California*, 413 U.S. 15 (1973)
Defamation	*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
Fraud	*Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)
Incitement to imminent lawless action	*Brandenburg v. Ohio*, 395 U.S. 444 (1969)
Speech integral to criminal conduct	*Giboney v. Empire Sotrage & Ice Co.*, 363 U.S. 490 (1949)
Fighting words	*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
Child pornography	*New York v. Ferber*, 458 U.S. 747 (1982)
True threats	*Watts v. United States*, 394 U.S. 705 (1969)

See Alvarez, 567 U.S. at 717. As "speech that invades privacy" is not one of those categories, and this Court lacks the "freewheeling authority" to define a new category of unprotected speech *sui generis*, the speech at issue under section 42.07(a)(7) must be **protected**

speech. Any unprotected speech that the statute captures (e.g., a true threat communicated through electronic means) is wholly incidental to the statute, as other criminal statutes would cover that instance. *See* Tex. Pen. Code § 22.07 (terroristic threat); Tex. Pen Code § 22.01(a)(2) (assault by threat).

3. The State's reasoning in support of section 42.07(a)(7) is in error.

One unique feature of the Seventh Court of Appeals' opinion is that court's explicit rejection of the State's oft-repeated canard that section 42.07(a)(7) only restricts conduct, but not speech, following *Ex parte Ingram*, 533 S.W.3d 887 (Tex. Crim. App. 2017). The State frequently argues that it is the **conduct** of sending repeated electronic communications that forms the basis of the offense, not the specific content of the communications. However, as the court below noted, *Ingram* applies to communicative conduct which is itself always illegal—soliciting a minor to engage in prohibited sexual activity—rather than section 42.07(a)(7), because it is not a crime to engage in communicative conduct which annoys, alarms, abuses, or harasses another person.

Despite correctly rejecting the State's attempt to draw a distinction between speech and "communicative conduct," the majority in the court below held that section 42.07(a)(7) survives a facial challenge because it invades "the substantial privacy interests of the victim in an essentially intolerable manner" (Tab A, page 11).

4. PRIVACY IS NOT AN EXCEPTION TO THE FIRST AMENDMENT.

Thus, the opinion below provides this Court with the best opportunity to correct the flawed reasoning of *Scott* which formed the basis of the decision below. Chief Justice Quinn, concurring with the majority in the result, wrote separately in a footnote to invite this Court to review *Scott* because of "the potentiality of criminal convictions arising from one's exercise of First Amendment rights" (Tab A, page 11, fn.6).

Review of *Scott* would allow this Court to square its First Amendment jurisprudence, to make good on its narrowing of *Scott*'s holding in *Wilson*, and to vindicate the essential correctness of Presiding Judge Keller's dissents in *Reece* and *Ogle*. Speech which invades privacy is not a category of unprotected speech; nor should it be. To hold otherwise would be to undermine the free flow and exchange of ideas that forms the core of the values protected by the First Amendment. A person does not have a right to avoid being

annoyed, alarmed, offended, or harassed. A person has the right to privacy, but not from the existence of communications which offend or upset them.

There are multiple applications of the statute which range far beyond its plainly legitimate sweep: a reporter could not send two strongly-worded e-mails with questions to a political candidate. A citizen could not send two annoying text messages to a police officer. A lawyer might find that two e-mails sent to opposing counsel became the basis for a criminal information against her. A commentator on a local news story online may be disturbed an early-morning police raid on his residence after someone took umbrage to two of his comments. While the court below may argue that what saves these hypothetical situations is the lack of intent to inflict emotional distress "for its own sake" (Tab A, pages 10-11), that condition from *Scott* is not a textual part of the statute. Communications that harass, annoy, alarm, abuse, torment, or embarrass another are ordinarily squarely protected; were this not so, the "Letters to the Editor" page of any newspaper in the country would become a hotbed of nefarious criminal activity. *Scott*'s time has come; its reevaluation cannot be forestalled.

5. Review is necessary to correct an overreach by the *Scott* Court.

This brings us back to the central question of this case, and the reason that this Court should grant review: **invasion of substantial privacy interests in an essentially intolerable manner** has never been held to be a sufficient basis for the criminalization of speech by the United States Supreme Court, which has otherwise stated the historical categories of unprotected speech and laid down a *geas* on all lower courts against creating new categories in a "freewheeling" manner. *Stevens*, 559 U.S. at 472 (2010).

Scott and its progeny represent a "freewheeling" creation of a new category of unprotected speech: speech which invades a substantial privacy interest in an essentially intolerable manner. The Seventh Court of Appeals begs the question against Mr. Sanders: it states that Texas may forbid speech which invades a substantial privacy interest in an essentially intolerable manner because Texas has decided it may forbid speech which invades a substantial privacy interest in an essentially intolerable manner, whatever the United States Supreme Court might suggest.

This Court should accept Chief Justice Quinn's invitation to revisit *Scott*. It is time for *Scott* to be led out to its pasture, to live its dotage peacefully, and then to pass from the annals of Texas jurisprudence.

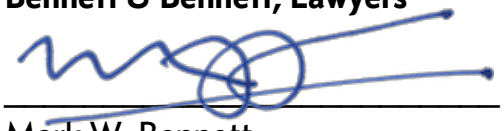
Conclusion

Scott v. State is wrongly decided; its progeny are wrongly decided; and the Seventh Court of Appeals' grudging reliance on *Scott* and its progeny is proof that the lower courts chafe under a burden they would rather not bear. The *Scott* Court could not create a new category of unprotected speech consonant with the directives of the United States Supreme Court, and decisions based upon this opinion must be overruled.

Prayer for Relief

For these reasons, Nathan Sanders prays that this Court grant discretionary review, order briefing and oral argument, and reverse the decision of the Seventh Court of Appeals, remanding the case to the trial court with orders that the information against Mr. Sanders be dismissed.

Respectfully submitted,
Bennett & Bennett, Lawyers



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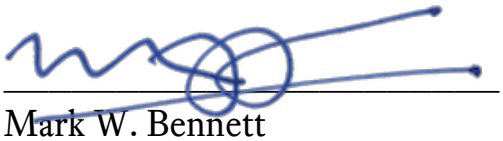
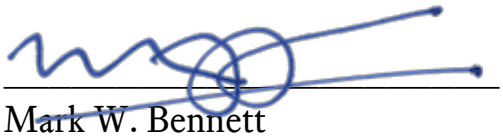
A true and correct copy of this Petition for Discretionary Review was served on counsel for the State via electronic service through the Texas e-filing manager on the same date as the original was electronically filed with the Clerk of this Court.



Mark W. Bennett

Certificate of Compliance

According to Microsoft Word's word count, this brief contains 1,616 words, not including the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.



Mark W. Bennett

Appendix

Tab A — opinion of the Seventh Court of Appeals in Cause No. 07-18-00335-CR

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00335-CR

EX PARTE NATHAN SANDERS

On Appeal from the County Court at Law No. 1
Lubbock County, Texas
Trial Court No. 2015-484,541, Honorable Mark Hocker, Presiding

April 8, 2019

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PARKER, JJ.

Appellant Nathan Sanders was charged by information with harassment, that "with intent to harass, annoy, alarm, abuse, torment, or embarrass [the complainant]" he sent "repeated electronic communications to [the complainant] in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and inperson [sic] communication."[1] Appellant subsequently filed an *application for writ of habeas corpus and motion to quash information*, arguing section 42.07(a)(7) of the Texas Penal Code is

[1] TEX. PENAL CODE ANN. § 42.07(a)(7) (West 2018). Documents in the clerk's record indicate the complainant was a woman who had dated appellant.

"facially overbroad" in "violation of the First Amendment of the United States Constitution." After consideration, the county court at law denied the application for writ of habeas corpus. Appellant now appeals the trial court's ruling. We will affirm.

In his sole issue on appeal, appellant contends Penal Code section 42.07(a)(7) contravenes the First Amendment because it is overbroad on its face.

Standard of Review and Applicable Law

Appellant challenged the constitutionality of Penal Code section 42.07(a)(7) by means of a pre-trial application for a writ of habeas corpus pursuant to Code of Criminal Procedure article 11.09.[2] A pretrial writ application may challenge the facial constitutionality of the statute under which the applicant is prosecuted, but may not be used to advance an "as applied" challenge. *Ex parte Ellis,* 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) (citing *Weise v. State*, 55 S.W.3d 617, 620-21 (Tex. Crim. App. 2001)). The determination whether a statute is facially unconstitutional is a question of law subject to *de novo* review. *Ex parte Ogle,* Nos. 03-18-00207-CR, 03-18-00208-CR, 2018 Tex. App. LEXIS 5955, at *3 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd) (mem. op., not designated for publication) (citing *Ex parte Lo,* 424 S.W.3d 10, 14 (Tex. Crim. App. 2013)).

Generally, a facial challenge to the constitutionality of a statute can succeed only when it is shown that the statute is unconstitutional in all of its applications. *Wagner v. State,* 539 S.W.3d 298, 310 (Tex. Crim. App. 2018) (citing *State v. Johnson,* 475 S.W.3d 860, 864 (Tex. Crim. App. 2015)). The First Amendment overbreadth doctrine provides an exception to this rule. *Id.* (citation omitted). That exception permits a litigant to

[2] TEX. CODE CRIM. PROC. ANN. art. 11.09 (West 2018).

succeed in challenging a law that regulates speech if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* (citations omitted). The overbreadth doctrine, therefore, proscribes the government from "'banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.'" *Id.* (citing *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002)). The overbreadth doctrine is to be "employed with hesitation and only as a last resort." *Id.* (citing *Ex parte Thompson,* 442 S.W.3d 325, 349 (Tex. Crim. App. 2014)).

Analysis

Application of *Scott v. State*

As our sister court in El Paso stated in its recent opinion addressing a facial habeas challenge to the constitutionality of section 42.07(a)(7), we do not write on a clean slate in our consideration of appellant's contention. *Ex parte Hinojos,* No. 08-17-00077-CR, 2018 Tex. App. LEXIS 10530, at *3 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (mem. op., not designated for publication). A number of Texas courts have addressed the section's constitutional validity against overbreadth challenges. *See Lebo v. State,* 474 S.W.3d 402 (Tex. App.—San Antonio 2015, pet ref'd); *Ex parte Ogle,* 2018 Tex. App. LEXIS 5955; *Ex parte Reece*, No. 11-16-00196-CR, 2016 Tex. App. LEXIS 12649 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication); *Blanchard v. State,* No. 03-16-00014-CR, 2016 Tex. App. LEXIS 5793 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication). Most often, their

analyses of the issue begin with the 2010 opinion of the Court of Criminal Appeals in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010).

In *Scott,* the court considered the question whether subsection (4) of section 42.07(a)[3] implicates the free-speech guarantee of the First Amendment. In its analysis, the court characterized the subsection's specific intent provision as requiring "that the actor have the intent to inflict harm on the victim in the form of one of the listed types of emotional distress." *Id*. at 669. It further found that the subsection, "by its plain text, is directed only at persons who, with the 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." *Id.* at 669-70. Finally, the court concluded any communicative conduct to which the subsection might apply "is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim)

[3] Texas Penal Code § 42.07 reads in pertinent part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> * * *
>
> 4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or
>
> * * *
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

in an essentially intolerable manner." *Id.* at 670.[4] All courts of appeals who have addressed the issue hold *Scott's* free-speech analysis of subsection (a)(4) applies also to subsection (a)(7). *See, e.g.*, *Lebo,* 474 S.W.3d at 407 ("We consider the free-speech analysis in *Scott* equally applicable to section 42.07(a)(7)"); *Ex parte Ogle,* 2018 Tex. App. LEXIS 5955, at *6-7; *Ex parte Reece*, 2016 Tex. App. LEXIS 12649, at *5-6; *Blanchard,* 2016 Tex. App. LEXIS 5793, at *7.

Appellant, however, contends *Scott* does not control the disposition of his appeal. In support, he first argues *Scott's* analysis has been rendered outmoded by decisions of the United States Supreme Court. He particularly relies on *Reed v. Town of Gilbert,* 2015 U.S. LEXIS 4061, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), which, as he notes, was decided five years after *Scott.* In *Reed*, the Court clarified the means of identification of content-based restrictions on speech, those requiring strict scrutiny when challenged under the First Amendment. As appellant sees it, *Reed*'s identification of "more subtle" content-based distinctions that define "regulated speech by its function or purpose," 135 S. Ct. at 2227, is applicable directly to section 42.07(a)(7). He contends the statute's specific intent requirement of intent to harass, annoy, alarm, abuse, torment, or embarrass another constitutes a distinction based on a message's purpose, and the proof requirement that the communication was reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another is a distinction based on its function. Accordingly, paraphrasing *Reed*, *id*, appellant argues "It is a distinction drawn based on

[4] Earlier in its opinion the court cited *Cohen v. California*, 403 U.S. 15, 21 (1971), for the proposition, "The State may lawfully proscribe communicative conduct (i.e., the communication of ideas, opinions, and information) that invades the substantial privacy interests of another in an essentially intolerable manner." 322 S.W.3d at 668-69.

the message the speaker conveys and wants to convey, and therefore is subject to strict scrutiny."

The Third Court of Appeals in *Ogle* addressed, and rejected, the same contention. 2018 Tex. App. LEXIS 5955 at *13-14. It noted Ogle had not cited authority applying *Reed's* analysis to government prohibition of "repeated and intentionally harassing conduct." *Id*. at *13. Appellant's briefing in this appeal similarly lacks such authority. And, like the court in *Ogle*, we are not persuaded that *Reed* requires abandonment of *Scott's* rationale based on the Court's holding in *Cohen*. *Id.* at *14 (citing *Cohen,* 403 U.S. at 21).

As others have pointed out, *e.g., Ogle*, 2018 Tex. App. LEXIS 5955, at * 7, all subsections of section 42.07(a) require the same specific intent, that "to harass, annoy, alarm, abuse, torment, or embarrass another." And while subsection (a)(4) is violated when the actor "makes" repeated telephone communications and (a)(7) is violated when the actor "sends" repeated electronic communications, both subsections require for guilt that the repeated communications occur "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

At oral argument in the case now before us, there was discussion regarding free-speech distinctions that might reasonably be drawn between prohibition of communications intended to harass or abuse versus those intended merely to annoy or embarrass. The dissenting opinion in *Scott* proposed such distinctions among the specific intent and "reasonably likely" effect provisions of subsection (a)(4). After analysis, the dissent concluded:

> Consequently, I would hold that the harassment provision at issue implicates the First Amendment with respect to the terms "annoy," "alarm," "embarrass," and "offend," but does not implicate the First Amendment with respect to the terms "harass," "abuse," and "torment." The Court contends that the entire statute is outside the purview of the First Amendment because "in the usual case, people whose conduct violates § 42.07(a)(4) will not have an intent to engage in legitimate communication of ideas, opinion, or information; they will have only the intent to inflict emotional distress for its own sake." But nothing in the statute limits its application to those occasions when the actor's sole intent is to inflict emotional distress, and if the court is implying that situations are rare in which a person has more than one intent, I disagree. The mischief this statute can create is enormous, as some of the hypotheticals given above illustrate."

Scott, 322 S.W.3d at 676 (Keller, P.J., dissenting).

Over the dissent, the Court of Criminal Appeals at least implicitly rejected such distinctions drawn among the statute's listed intents and "reasonably likely" effects, and instead grouped them all together as "listed types of emotional distress." *Id.* at 669. Given *Scott*'s interpretation of the language appearing in subsection (a)(4), as an intermediate court we are not at liberty to apply differing free-speech analyses based on differences among the "types of emotional distress" that are listed by identical language also in subsection (a)(7).

Appellant also points to the dissents to the Court of Criminal Appeals' refusal of the petitions for review in *Ogle* and *Ex parte Reece*. *See Ogle v. State*, 563 S.W.3d 912 (Tex. Crim. App. 2018); *Ex parte Reece,* 517 S.W.3d 108 (Tex. Crim. App. 2017). That fewer than a majority of members of the Court of Criminal Appeals have called for re-

examination of one of that court's opinions, however, does not provide a reason for us to question its application to the appeal before us.[5]

For those reasons we decline appellant's invitation to depart from the holdings of other Texas courts of appeals applying *Scott*'s analysis in rejection of contentions section 42.07(a)(7) is constitutionally overbroad. In so doing, however, we express our disagreement with a rationale the State offers in support of the validity of the statute.

Conduct versus Protected Speech

Citing *Ex parte Ingram,* 533 S.W.3d 887 (Tex. Crim. App. 2017) the State contends section 42.07(a)(7) does not constitute a content-based restriction on speech but, like the solicitation statute addressed in that case, merely criminalizes conduct. The State argues, "It is the *conduct* of sending repeated electronic communications in a harassing manner that is the gravamen of the offense. Because conduct and not merely speech is implicated in Section 42.07(a)(7), the statute is a conduct-based regulation that is subject to a presumption of validity."

Ingram addressed contentions subsection (c) of the pre-2015 version of Penal Code section 33.021, prohibiting online solicitation of a minor, were facially unconstitutional. 533 S.W.3d at 890. After applying a narrowing construction to language then contained in the statute, *id*. at 895-97, the court considered Ingram's argument the statute was unconstitutionally overbroad. *Id*. at 897-900. Rejecting the argument, the court began by noting that "speech or writing used as an integral part of conduct in

[5] That is particularly true here in view of the reliance on *Scott*'s analysis in the Court of Criminal Appeals' 2018 opinion in *Wagner. See Wagner*, 539 S.W.3d at 311-12 (rejecting overbreadth challenge to Penal Code section 25.07(a)(2)(A)).

violation of a valid criminal statute" is a category of speech unprotected by the First Amendment. *Id*. at 897 (citing and quoting *United States v. Stevens,* 559 U.S. 460, 471 (2010)). The court likewise cited the exemption from First Amendment protection of speech that constitutes "the commission of a 'sort[] of inchoate crime[]—[an] act looking toward the commission of another crime' that the legislature can validly punish." *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 300 (2008)). It concluded that the challenged subsection's prohibition of the conduct of soliciting a minor to meet with the intent that the minor engage in illegal sexual activity "created an inchoate offense for the object offense of sexual assault of a child." *Id.* at 898. Referring to its opinion in *Ex parte Lo,* 424 S.W.3d at 16, the court described such solicitation statutes as "routinely upheld as constitutional because offers to engage in illegal transactions such as sexual assault of a minor are categorically excluded from First Amendment protection." *Id.* (citation omitted). The court quoted another state court's summary stating, "The common thread in cases involving First Amendment challenges to luring statutes is that freedom of speech does not extend to speech used as an integral part of conduct in violation of a valid criminal statute." *Id.* (quoting *State v. Backlund,* 672 N.W.2d 431, 441 (N.D. 2003)).

The State refers also to our opinion in *Delacruz v. State,* No. 07-15-00230-CR, 2017 Tex. App. LEXIS 6018 (Tex. App.—Amarillo June 29, 2017, no pet.) (mem. op., not designated for publication), which also addressed section 33.021(c), and relied on *Ex parte Lo's* statement that "it is the *conduct* of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense." 2017 Tex. App. LEXIS 6018 at *6 (citing *Ex parte Lo,* 424 S.W.3d at 17).

The State does not cite us to authority applying *Ingram*'s "inchoate offense" analysis to section 42.07(a)(7) or describing how the communications sent with the intent and in the manner that section describes are "an integral part of conduct in violation of a valid criminal statute." *Ingram,* 533 S.W.3d at 897; *see State v. Doyal*, ___ S.W.3d ___, 2019 Tex. Crim. App. LEXIS 161, at *7 (Tex. Crim. App. Feb. 27, 2019) (form of unprotected speech involved in *Ingram* is "speech that furthers some other activity that is a crime"). Nor does the State identify the criminal statute of which it contends such communications are an integral part. *See Doyal,* 2019 Tex. Crim. App. LEXIS 161, at *7 (characterizing speech addressed in *Ingram* as "solicitation to facilitate a sex crime"); *Ingram,* 533 S.W.3d at 898 (conduct prohibited by challenged statute "created an inchoate offense for the object offense of sexual assault of a child").

Moreover, the *Scott* opinion did not characterize the forbidden telephone communications as conduct rather than speech, nor have any of the opinions finding the *Scott* analysis applicable to section 42.07(a)(7) characterized its prohibition of certain electronic communications as conduct-based regulation. *See Lebo,* 474 S.W.3d at 406-07; *Ex parte Hinojos,* 2018 Tex. App. LEXIS 10530, at *14; *Ex parte Ogle,* 2018 Tex. App. LEXIS 5955, at *13-14; *Ex parte Reece*, 2016 Tex. App. LEXIS 12649, at *6-7; *Blanchard,* 2016 Tex. App. LEXIS 5793, at *7.

Conclusion

We are not persuaded the State's proffered theory based on *Ingram* is properly applied to section 42.07(a)(7). Nonetheless, for the reasons expressed we find the repeated electronic communications the section proscribes, made with the "intent to inflict

emotional distress for its own sake," *Scott*, 322 S.W.3d at 670, are not protected speech under the First Amendment because they invade the substantial privacy interests of the victim "in an essentially intolerable manner." *Id*. Accordingly, we overrule appellant's contention section 42.07(a)(7) is facially overbroad and affirm the trial court's denial of appellant's application for writ of habeas corpus.

James T. Campbell
Justice

Quinn, C.J., concurring in the result.[6]

Do not publish.

[6] Chief Justice Quinn joins in the majority opinion for the reasons stated therein. However, the reasons expressed by Presiding Judge Keller in her dissent in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), the chipping away at *Scott* by the majority in *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014), and the concurrence of P.J. Keller and Judge Johnson in *Wilson* sways him to invite the Court of Criminal Appeals to reconsider the majority opinion in *Scott.* He too fears, as expressed by P.J. Keller and Judge Johnson, the potentiality of criminal convictions arising from one's exercise of First Amendment rights. This is not to say he welcomes the mid-supper calls from politicians to vendors but understands that such annoyances are part and parcel of residing in a country where ideas, innovation, intellect, and their urging remain invaluable.